

IN THE MATTER OF: Two grievances filed on behalf of Ms Kim Burgess against an involuntary transfer to another school pursuant to Article 9 of the Collective Agreement.

BETWEEN:

ROLLING RIVER SCHOOL DIVISION,

Employer,

- and -

**THE ROLLING RIVER TEACHERS' ASSOCIATION
OF THE MANITOBA TEACHERS' SOCIETY,**

Union.

AWARD

Appearances

Robert A. Simpson, counsel for the Division.

Garth Smorang, Q.C., counsel for the Association.

Nature of the proceedings

This case presents a difficult and sensitive issue concerning the intersection between a teacher's personal and professional life. The grievor Kimberley Burgess lives in Minnedosa, Manitoba and is employed by the Division as a teacher at Tanner's Crossing Elementary School (K-8) ("Tanner's") located in Minnedosa. During the 2008/09 school year, the grievor was assigned 75% as a Guidance Counsellor and 25% to teaching Grade 5 science

in the classroom. Around March 2009, the grievor became involved in an intimate relationship with the Principal of Tanner's, Glen McNabb ("McNabb"). McNabb had separated from his wife early in January 2009. The grievor has been separated for about two years. On April 14, 2009, Division Superintendent Reg Klassen ("Klassen"), responding to rumours in the community, asked McNabb to confirm the existence of the relationship. McNabb readily did so. Klassen then immediately indicated that he had serious concerns about the advisability of a personal relationship between supervisor/subordinate working in the same school and suggested that a transfer may be required.

After a series of meetings involving the grievor and McNabb, Klassen directed on May 11, 2009 that the grievor be transferred to Elton High School in Forrest, Manitoba ("Elton") effective the start of the new school year. Based at Elton, the grievor will be assigned 75% High School Guidance at Elton and 25% Elementary Guidance; the latter duties are split between Rapid City Elementary School and Douglas Elementary School. These are the current assignments of Elton teacher Cory Stocks, who will be switched from her duties at Elton/Rapid City/Douglas to assume the grievor's position at Tanner's in Minnedosa.

No grievance was filed by Stocks although she testified at the hearing and voiced her opposition to the move. Stocks has never taught elementary students, has no science background and has been focusing her career on Guidance for senior students. She criticized the change as harmful to the interests of her students and burdensome to herself. Similarly, the grievor objected to leaving her ongoing relationships with needy elementary students at Tanner's and being forced to deal with unfamiliar high school issues. The two teachers will be crossing paths as they each face additional driving distances to work. Stocks lives in Brandon but will commute about 50 km north to Minnedosa. The grievor lives in Minnedosa and will drive south to Rapid City, Forrest and Douglas.

The Division's policy on administration/teacher transfer states as follows (Ex. 11):

The Board believes that professional staff transfers are necessary from time to time in order to support the following principles. Transfers will not be made capriciously. The following guiding principles will be carefully considered in all professional staff transfers.

1. The professional staff complement should reflect a reasonable balance of experience and special competencies.
2. Transfers can form an integral part of professional growth and development. New challenges and a new environment can offer new incentives for growth.
3. Student welfare is of primary importance when transferring teachers. Teaching background and expertise must match the assignment.
4. Transfers are seen as a positive step in professional growth and will not be used as a punitive measure.
5. A teacher's place of residence is not a primary consideration but will be a factor in determining transfers.
6. Teachers/administrators will be encouraged to initiate transfers.
7. Transfers may be permanent or of a temporary "exchange" nature.
8. Professional staff are eligible for a transfer at any time.
9. Generally speaking, and in such situations that are not covered by changes in student populations, professional staff will be eligible for transfer after five years in a particular assignment or school but with consideration given to the proceeding (*sic*) principles. Eligibility for transfer does not necessarily mean that the transfer will take place in that school year.

The Division currently has no written policy relating to personal relationships between employees in the same school or workplace.

Article 9 of the collective agreement (Ex. 1) acknowledges the Division's right to transfer teachers between schools but sets out certain requirements, as follows:

ARTICLE 9: TRANSFERS

The Association recognizes the right of the Division to transfer teachers employed by the Division to schools under the jurisdiction of the Division.

The Division shall exercise its discretion to transfer in a manner which is fair and reasonable.

The Division shall consult with teachers who are being involuntarily transferred prior to making a final decision.

In making transfer decisions the Division shall consider the educational needs of the students, the administrative needs of the Division and those concerns raised by the teacher prior to making a decision. However, the Division shall be guided by the educational needs of the students and the administrative needs of the Division.

...

The Association challenged the grievor's transfer on multiple grounds. The decision failed to consider the educational needs of students. The concerns of both affected teachers were ignored. There was no meaningful consultation before the effective decision was made. Key requirements of the Division's policy on transfer were violated - student welfare is of primary importance, teaching background and expertise must match the assignment, the teacher's place of residence will be a factor in determining transfers. The real cause of the transfer was intolerant community reaction to the grievor's relationship with her married (but separated) Principal.

The Association submitted that in response to the new personal relationship between the grievor and her Principal, alternate administrative arrangements should have been made in the school to address any real or perceived problems which might arise. In particular, the Vice-Principal at Tanner's, Matt Rapsky ("Rapsky"), could have been assigned responsibility for evaluating the grievor. The Association said that Superintendent Klassen failed to make a thorough inquiry into the available accommodations. Based on all the foregoing, the transfer decision was not made in a fair and reasonable manner, contrary to Article 9 of the collective agreement. The Association asked that the transfer decision be rescinded, recognizing that in substance this would be a one-year order. Based on actual experience over the course of the upcoming school year, the Division could make another decision to transfer the grievor for 2010/11 if real and significant problems did develop as a result of her personal relationship with the Principal. The Association noted that in smaller rural divisions like Rolling River, teachers frequently have personal relationships of various kinds with students, staff and colleagues, but these realities are well understood and easily managed.

In response, the Division submitted that the transfer was fully compliant with the requirements of the collective agreement. Teacher transfers are commonplace in school divisions and the complaints by the grievor and Stocks in this case were overstated. Every teacher transfer requires some degree of transition but both teachers here were fully capable of performing their new assignments. There was no basis for finding that student educational interests would be adversely affected.

In making his decision, Klassen carefully considered extensive representations by both the grievor and McNabb. He met the consultation obligation under Article 9, said the Division. In the end, the Superintendent reasonably concluded based on his years of experience that it was unworkable to have an intimate relationship between supervisor and subordinate in the same school building. He determined that there would inevitably be staff problems which

in turn would negatively affect the student educational experience at Tanner's. This was a decision the Superintendent was entitled to make. Transfer was not an undue hardship to the grievor. Her personal and career interests were fully respected. The Division therefore denied any violation of the collective agreement.

Parallel grievances were filed by the Association and the grievor on May 29, 2009 (Ex. 2, 3). By resolution of the Board of Trustees dated June 10, 2009, the grievances were denied. I was appointed as sole arbitrator by consent of the parties on June 26, 2009 and the hearing took place on July 27-28, 2009. Both parties requested an expedited decision in light of the need to carry out preparations for the upcoming school year commencing in September 2009.

The evidence

The grievor and her role as Guidance Counsellor

The grievor is married with two children aged 17 and 13 years. She was separated two years ago and now maintains an equal shared-custody arrangement with her husband. She has known McNabb most of her life, given that they grew up in the same small town and ended up on staff together at Tanner's, but it was only around the end of March 2009 that they began an intimate relationship. Their first public appearance together did not occur until June 29, 2009. The grievor was emphatic that the new personal relationship did not exist prior to January 4, 2009, the date McNabb separated from his wife. The grievor said that she and McNabb are not cohabiting and presently intend to maintain separate residences. It is very common at Tanner's, she said, for staff to have relatives, friends, neighbours or intimates in the same school. Her own children all went to the school and her sister teaches there. Every teacher has had their children attend Tanner's, often in their own classroom. It is the norm. Spouses on staff are common as are dating relationships among staff. The wife of the

previous Superintendent, Neil Whitley, was a teacher at Tanner's Crossing.

Professionally, the grievor received her Bachelor of Education from Brandon University in 1994 and since that time has taught at various schools in the Division, always at the elementary level. In 2006, she undertook half-time duties as a Guidance Counselor at Tanner's while continuing to teach Grade 8 Math and Language Arts for the other 50% of her assignment. At this time, she began studies towards her Guidance and Counseling Graduate Diploma which she successfully completed in 2009 at Brandon University. Her guidance duties were increased to 75% in the 2008/09 school year and she was assigned Grade 5 science for the other 25% of her duties. She had taught elementary science several times previously during her career. The grievor is presently enrolled in a Masters program in Guidance and Counseling, also at Brandon University.

According to the grievor, her counseling activities include playground issues, bullying, social skills development, emotional needs and fears, difficult home situations (abuse, separation, death in the family) and classroom behavior modification. Referrals come from the students themselves, parents and staff. She collaborates as required with outside agencies, school staff and parents. Only about 10% of her caseload involves an outside agency contact. The grievor emphasized that while some cases are one-off, many involve a multi-year involvement with the student and the family. It is vital to build and nurture relationships in order to achieve positive results. She estimated that of her 75 open files in June 2009, about 50 would involve a least one additional meeting with the student in the new school year.

The grievor was very concerned about being transferred to a high school position in a different community. "I can do it but it's starting over." In her view, it takes three years to get to the point where you can really do well a new position. "I just got into a groove in my current job." She observed that all the students she leaves behind and their parents will also

be facing a significant transition. She estimated that across the four schools affected by the two transfers, 800 students plus their parents would be affected. The grievor recognized that transfers are common for various reasons such as retirement and maternity leave, but she questioned the wisdom of forcing people to undergo so much change in the present case, solely because of her relationship with McNabb.

The grievor acknowledged in her testimony that as a Guidance Counsellor, she has a close working relationship with other staff in the school, including the Principal and Vice-Principal. She agreed that the Guidance Counsellors's working relationship with the Principal might be considered to be closer than his relationship with classroom teachers. Once per six day cycle, there is a Student Support Team meeting with the administrators, Guidance and Resource staff to review concerns about students and discuss their needs. Monthly there is a meeting with the Division's Behavior Specialist, Rebecca Grey ("Grey"). The grievor stated that much of her work is self directed and requires prioritizing and flexibility. However, she conceded that there may be close involvement with other staff such as the Principal, depending on the particulars of the case.

The grievor did not dispute that the Principal is in effect the manager of the school and her immediate supervisor. There is no hierarchy as between herself and other teachers in the school. She admitted that there may sometimes be disagreements among the teachers and in that case, it is the Principal's responsibility to resolve the problem. Asked in cross-examination whether there might be a perception on the part of other teachers that they should not bother to argue with her, given her closeness to McNabb, she replied, "Yes, you could say that." She agreed that there is a distinction between two staff members in the school dating and the present contested situation - dating between the supervisor and a subordinate. Nevertheless, while recognizing the Division's concern, the grievor insisted that all the employees involved are capable of conducting themselves in a professional manner

so that these fears do not materialize.

Formal evaluation of teachers takes place every three years in the Division. The grievor's last evaluation was conducted during the 2006/07 school year by McNabb (Ex. 6, 7). Teachers first prepare a self-reflective evaluation, followed by the Principal's first-term formative evaluation and second term summative evaluation. The process includes periodic meetings with the Principal, classroom observation, a review of short and long term personal goals, formulation of an action plan to meet these goals and discussion with the Principal about how the administration can support and assist the teacher. The grievor said that to assess her performance as a Guidance Counsellor, the Principal would probably rely on his general sense of how she was doing, based on interaction in the school, referrals, meetings, and likely also input from other teachers and Grey, the Behavior Specialist.

The teacher receives a copy of the Principal's evaluation and has an opportunity to add comments, following which it is sent to the Division office. One copy is retained by the Principal in the school. At Tanner's, there are about 20 teachers and therefore each year approximately seven evaluations are conducted. The Vice-Principal handles some evaluations to reduce the Principal's load.

The grievor is scheduled for another formal evaluation in the upcoming school year. She proposed that Rapsky should take over doing her evaluation next year in place of McNabb, given the personal relationship she now has with McNabb. In cross examination, it was suggested that this too was unacceptable as Rapsky would have to evaluate "his boss's girlfriend". The grievor answered that in her opinion, this was not a problem.

Glen McNabb and his role as Principal

McNabb was born and raised in Minnedosa and has lived in the area all his life. He is married with three children aged 17, 15 and 12 years. On January 4, 2009, he and his wife separated. Since then he has lived with his sister but he also owns a half section of land which he farms with his brother. He plans to move a modular home onto the farm site and eventually built himself a house at that location. McNabb has known the grievor all her life and got to know her better as a professional colleague in the past 10 years at Tanner's. In March or April 2009, they began an intimate relationship.

Professionally, McNabb has been employed by the Division since 1999 as an administrator at Tanner's Crossing School. For his first three years, he was a part-time Vice-Principal and part-time classroom teacher. In his fourth year, he was promoted to full-time Principal and has continued in that position ever since. Rapsky replaced McNabb as part-time Vice-Principal and he continues in that capacity at the present time. Before joining the Division, McNabb had 10 years of teaching experience in two different rural schools.

McNabb and Rapsky both participate in the Student Support Team meetings once per cycle with the grievor and the Resource Teacher. There are Divisional Principals' meetings once per month which both McNabb and Rapsky attend, as well as Parent Advisory Council meetings. By law, McNabb is in charge of the school. All the staff including Rapsky report to him. Rapsky's evaluation is done by McNabb. The Principal has no autonomous authority to hire, discipline and fire staff, but does provide reports and recommendations to the Superintendent on these matters. In describing his relationship with the Vice-Principal, McNabb said they collaborate on many things and have a good working relationship. Assignment and evaluation of teachers are key functions which they try to work on together. At times they may agree to disagree. In that case, McNabb was clear that the decision rests with him.

Teacher evaluations are split between McNabb and Rapsky. Although the number varies, on average there are seven or eight evaluations to be done annually and of these, Rapsky typically would do two. McNabb did the grievor's 2006/07 performance review.

McNabb testified that his role as the grievor's supervisor varies day-to-day but in general terms, it is a close working relationship. The students referred to him as Principal are often the same ones referred to the Guidance Counsellor for assistance. Behavior problems are often a signal that the student is in need of support. These issues are reviewed at the team meeting every cycle and additionally in conferences with the Guidance Counsellor as required. McNabb described this as a collaborative relationship. Decisions are made as a team. "I don't call the shots." McNabb said that he and Rapsky handle the discipline issues but when it comes to the management of student supports, everyone on the team is involved. "I am not an authoritarian leader."

McNabb stated that he has given considerable thought to how his new personal relationship with the grievor would affect the performance of his job function. In his view, the personal and professional sides can be separated. He believes that he and the grievor are very professional in their approach to this matter and would not let the relationship interfere with serving the interests of students. He saw no real impact on collegial relationships within the school. "As team members, we all want the same thing, what's best for the kids." Regarding the grievor's performance review, McNabb suggested that Rapsky could do it. If a complaint arose against the grievor from a parent or another teacher, McNabb said that he would remove himself and turn the issue over to Rapsky as Vice-Principal. He himself would remain responsible for evaluating Rapsky but did not see this as a difficulty.

During cross-examination, McNabb was asked whether other staff in the school might sense favoritism as a result of his relationship with the grievor. He replied, "I don't see that, in our

school environment we use a team approach. I am a professional.” What about the fact that he is “sleeping with one of the team members”? McNabb answered, “I am very professional.” He denied that by having an intimate relationship with a subordinate, he was compromising his employer’s position. “We felt we could make it work.” McNabb testified that he had considered disclosing the relationship to his Superintendent and talked it over with the grievor. They felt it was still too early to make the disclosure. Nevertheless, McNabb readily acknowledged that it was appropriate for Klassen to raise the subject and ask for clarification of the relationship.

Cory Stocks and her objection to the transfer

The Association called Stocks as a witness and adduced detailed evidence concerning her involvement in the chain of events and her perspective on the transfers. The Division objected to much of this evidence on the basis that Stocks herself did not grieve and therefore her complaints were irrelevant. During the hearing, I ruled that the contested evidence may be relevant insofar as the grievor and Stocks were switching jobs and the transfers were factually interconnected. I have taken Stocks’ evidence into account but mainly as background to the primary issue - the grievor’s involuntary transfer to Elton. Personal and professional concerns raised by Stocks during the transfer process were not strictly speaking germane in the present proceeding as she did not invoke Article 9. Alleged negative impacts on student education due to Stocks’ half of the transition process *were* relevant because the Division must be guided by student educational needs and the two transfers were linked. I recognize that how a teacher handles the challenges of a transfer, especially when the new job represents a marked departure from past assignments, can itself have an impact on the quality of student education, at least in the short term.

Stocks joined the Division as a teacher five years ago based at Elton High School. In her first

year, she did guidance halftime and classroom teaching halftime (Grade 9 English, Grade 9-10 Health, Grade 10 Independent Living Skills.) The next year she was assigned 75% at Elton and 25% at Forrest Elementary School, all of which was guidance work. The next year she took maternity leave. During the 2007/08 and 2008/09 school years, Stocks was again assigned 75% guidance at Elton but the remaining 25% of her duties were split between two elementary schools - Douglas and Rapid City. She lives in the City of Brandon and drives to the foregoing schools; driving times are in the 10- 20 minute range. Elton High School in Forrest is her home base.

Stocks received her Bachelor of Education degree in 1995 in the elementary education stream. Prior to joining the Division, she taught English overseas, coordinated a literacy program for adults and did counseling in a women's shelter. She started as an Education Assistant with the Division before her first assignment as a teacher at Elton. Although her university degree was in the elementary stream, she has since realized that her main interest is in counseling at the high school level. She has never held an elementary class teaching position although she once filled in for two weeks in an elementary classroom. Regarding her transfer to Tanner's and the 25% role teaching elementary science, she testified that there is no assignment she would be less comfortable doing.

About 50% of Stocks' current high school guidance duties involve individual and group counseling. She also does career counseling with students and parents, academic counseling to assist with course selection and post-secondary requirements, and scholarship and funding advice for Grade 11 and 12 students. The most common personal counseling issue she deals with is depression. Other common issues are abuse, home issues, sexuality, sexual decision-making and self harm. As a Guidance Counselor, Stocks does not conduct therapy sessions herself but plays a supportive role and arranges access to appropriate resources. She stated that it takes considerable time to learn what is available and build relationships with outside

agencies. The ability to make a successful referral depends on knowing the agency's mandate and the people involved. "It takes years to establish these relationships."

Stocks has worked hard at professional development both inside and beyond the Division. All of her P.D. activities have focused on guidance at the high school level. Recent subjects in which she has been involved include grief and loss training, suicide intervention, addictions and crystal meth. While she acknowledged that some P.D. is generic in scope, she has not done any training specific to guidance at the elementary level. Nonetheless, 25% of her assigned duties involve the delivery of guidance counseling services at elementary schools.

On the personal side, Stocks explained that she recently went through a separation and is now single parenting her two-year-old daughter. Due to the separation, she was planning a move out of the family home. She presently lives in Brandon but expressed interest in a move to Minnedosa when she heard that there might be an opening in a full-time guidance position at Minnedosa Collegiate Institute ("MCI"). She indicated to Klassen that the MCI position would be attractive to her because it would involve less driving and a more manageable childcare situation. Stocks acknowledged that changing jobs would mean building new relationships but the duties at MCI would be very similar to her high school activities at Elton. When she learned that the MCI position had been filled and that instead she was facing a transfer to Tanner's Crossing Elementary, first she thought it was a joke and then she was shocked.

Klassen met with Stocks to discuss the transfer and listen to her concerns. She told Klassen that high school guidance was her passion and that she hoped any assignment to an elementary school would only be temporary. She did not believe that refusal of the transfer was an option and therefore told Klassen that she would reluctantly accept the position if

necessary. Stocks assumed that the job at Tanner's was full-time guidance although she conceded that Klassen never made any statement to this effect. She did not learn about the 25% classroom component until she spoke with McNabb after the official announcement of the transfers on May 11, 2009. McNabb indicated that for the upcoming year, she would be given a split Grade 5/6 science class. Stocks testified that she has never taught science, knows very little about it and is extremely uncomfortable with the prospect of this new assignment. The split class approach was new to the school and new to her. Adding to her discomfort, McNabb said that the guidance component of her new position might be reduced to 50% from 75% depending on overall assignments at the school. In the end, Klassen intervened with McNabb to ensure that the guidance duties did not drop below 75%.

Both Klassen and McNabb urged Stocks to appreciate the positive aspects of her transfer and view it as they move forward. She remained unconvinced. Moreover, because of her dissatisfaction and the uncertainty of the pending grievance, Stocks decided not to move to Minnedosa as originally planned and relocated within Brandon. As result, Stocks is now facing a 40 minute daily drive to work on a busy two-lane highway. This will interfere with her ability to undertake extracurricular student activities, something she has been actively involved in to date. She will also experience a financial impact as she will not receive mileage payments for the commute to work.

Because all parties were waiting for the outcome of the arbitration process, Stocks indicated that neither she nor the grievor have begun working on the transition process for their job switch. Once they begin, it would probably take about two weeks. Each of them would orient the other in terms of job duties and ongoing files would be transferred. Stocks emphasized the challenge for both teachers and estimated that it would take a couple of years to become comfortable in the new positions. She has been doing her present job for four years and only recently became fully comfortable.

Under cross examination, Stocks confirmed that in her discussions with Klassen, there was no concern raised over her competency and ability to assume the new job at Tanner's. Stocks acknowledged that she is entering her fifth year of teaching in the public school system and has already managed several transitions. Her level of experience today is greater than when she began five years ago. Any transfer within the Division involves a certain degree of transition and orientation to the new position.

McNabb testified that he assigned the 25% science duties to Stocks because "there wasn't much wiggle room" given the overall available resources. Admittedly he didn't know her science background. In his view, she should be able to handle the course but she will have some preparatory work to do.

Superintendent Reg Klassen's perspective

Klassen was appointed Superintendent of the Division effective August 18, 2008. It was intended that there would be a period of overlap with the outgoing Superintendent, Neil Whitley, but as it turned out, Whitley was only available for a half day of new teacher orientation. Assistant Superintendent Jim Hardy also retired in the summer of 2008 and was replaced by Marg Janssen ("Janssen"). Klassen has nearly 25 years of experience in the field of education. He began teaching in 1985 and spent 15 years at Westgate Mennonite Collegiate Institute including 10 years as Principal. He served as Principal for five years at W. C. Miller Collegiate in Altona (Garden Valley School Division) and also had one year of prior experience as a Superintendent in that Division.

Rolling River Division operates 16 schools with about 1850 students in 300 staff, including 139 FTE teachers for the upcoming year.

Notwithstanding the apprehensions expressed by both Stocks and the grievor about their new assignments, Klassen was definitive in stating that he had no concerns about the competency or qualifications of either teacher. Under cross examination, he defended his decision as been necessary to meet the administrative needs of the Division and the educational needs of students. He would not concede that moving a Guidance Counselor has a greater effect than moving a regular classroom teacher. The Guidance Counselor builds relationships that deal with deeper, more sensitive issues but at the same time, similar relationships may be built by some classroom teachers with their students.

Klassen was challenged on whether he considered and applied the Division's policy on teacher transfer. He maintained that he did. Paragraph 3 of the policy provides that "Teaching background and expertise must match the assignment." While he did not have a specific discussion with Stocks about her teachables, he was generally aware of her background and left the details to be reviewed with McNabb. Klassen stated that once a teacher has been transferred, it is the Principal's responsibility to discuss preferences and align the teacher's skill set with the assignment. In Stocks' case, she had taken the elementary stream and was more than qualified to take the assignment at Tanner's Crossing. As for the differences between high school and elementary level guidance, Klassen did not review this specifically with Stocks but he did encourage her to look positively at the new features of her work. He did not inquire about the nature and extent of her professional development activities.

According to Klassen, it was simply unworkable for the grievor to continue as a Guidance Counselor in Tanner's Crossing while involved in an intimate relationship with McNabb. The role and expectations of the two positions could not be properly carried out, in his view. The Principal's role is to provide leadership in every aspect of the school's operation. The Principal must be aware of what's happening at all times and whether the school is meeting

its goals. All teachers and staff report to the Principal and he is ultimately in charge of the building. He has a significant role in hiring, firing, supervision and discipline, working with the Superintendent's office. He is responsible for working with the school's FTE allotment and determining which teachers will be assigned which courses. This determines how much of the educational program can be offered at the school. Along with the Vice-Principal, he is actively involved in helping students who are struggling and dealing with behavior problems.

The Guidance Counselor takes referrals from the administrators, teachers, students, parents and other sources, responding with counseling and referral services. Often the Guidance Counselor is an advocate for a troubled student, especially in situations where the classroom teacher is pushing to remove the student from the class. The position calls for a collaborative approach with all the other players in the school. In particular, the relationship with the Principal is different than the relationship between classroom teachers and the Principal. The Principal works more often and more intensively with Guidance and Resource teachers because these are the staff who deal with the students needing the most attention.

Under cross examination, Klassen agreed that the Principal does not have final authority on hiring, firing and discipline matters. Hiring is the responsibility of the Assistant Superintendent subject to formal approval of the trustees. With respect to hiring and removing administrators, he and Janssen generally work on it together. The Superintendent is authorized to impose discipline, on recommendation to and subject to ratification by the trustees. In general, Klassen agreed that he functions like a Chief Executive Officer, reporting to the trustees, who in essence are the Board of Directors. In this chain of command, the Principal reports to the Superintendent's office. It was suggested to Klassen that Principals and Vice-Principals have no security of tenure in their role as administrators. He demurred, observing that administrators are seldom moved back to the classroom unless

they have requested it. He conceded that nothing in the collective agreement gives a Principal the right to object, other than the general provisions of Article 9.

The grievor's transfer: chronology of events

Rumours in the street. Klassen testified that it was around the end of January or early February when he began hearing talk in the community which made him wonder about the relationship between the grievor and McNabb. He lives in Winkler and goes home every weekend. Around mid-February, he returned to work on Monday morning and noticed there was “a buzz about a coming-out party” for the grievor and McNabb during the weekend. Klassen said that he heard similar rumours for the next two months. Believing that he had a good working relationship with McNabb, by mid-April Klassen decided to approach McNabb with a direct question.

Initial discussion and disclosure between Klassen and McNabb. The evidence conflicted on whether Klassen and McNabb had one or two initial meetings. McNabb recalled that he was approached by Klassen on April 14, 2009 and disclosed the relationship upon being asked. Klassen's recollection was that this meeting occurred and was followed by a second meeting during the week of April 20, 2009. In my view, nothing turns on this particular difference of recollection. The substance of their discussion was as follows.

Klassen and Janssen were finishing an ordinary staffing meeting with McNabb at the Division offices on April 14th, 2009 when Klassen decided that this would be an appropriate opportunity to ask about the relationship. As pre-arranged, Janssen excused herself and Klassen closed the office door for privacy. He thought that the situation would best be handled by a one-on-one conversation. He asked McNabb whether there was a personal relationship with the grievor. McNabb said yes.

According to Klassen, he and McNabb had a straightforward conversation about the issues. For his part, he talked about four things: the integrity of the Principal's role; perceptions of the community; the supervisor/subordinate relationship in the school; and potential problems if the relationship goes bad, leaving McNabb in a position of power over his ex-girlfriend. Klassen said that he asked McNabb to think it over and indicated that they would continue the conversation at a later date.

In his testimony, McNabb said that Klassen referred to community perceptions that McNabb had left his wife to be with the grievor. "He said I would need to rebuild my integrity with the community." McNabb responded by telling Klassen that the perception was untrue. In fact, he had not left his wife for the grievor. Klassen then told McNabb that he had consulted with a number of Superintendents about the situation and was thinking about transferring the grievor to another school in the Division. It was not feasible to move McNabb because he would lose his large administrative allowance as Principal. Klassen asked McNabb not to share the discussion with the grievor. In his evidence, Klassen explained this request. As Superintendent, he felt that he should be the first one to approach the grievor about the relationship issue.

Under cross examination, it was suggested to McNabb that the "integrity" comment was directed to McNabb's role as Principal of the school. In response, McNabb testified that Klassen was referring to a perception on the street that he left his wife for the Guidance Counselor. It was not just about his function as Principal. It was about him allegedly leaving his wife. McNabb acknowledged that they also discussed potential problems arising from the supervisor/subordinate relationship and perhaps the prospect of the relationship going sour. He was insistent that during their discussion, there was never any suggestion that he would be the one to be moved.

Klassen testified that during the second meeting with McNabb, they discussed the whole issue again and Klassen emphasized that the Division would have to act on the supervisor/subordinate issue. He explained to McNabb that this was something which could affect the whole school. Transfer was one of the options but Klassen said he explained to McNabb that he did not want to cause him a loss of salary or position. It might be simpler to transfer the grievor. According to Klassen, the meeting ended on the understanding that he would initiate the subject with the grievor and then he would meet again with McNabb to continue the discussion.

Both Klassen and McNabb agreed in their evidence that McNabb called back and asked for permission to reveal the conversation to the grievor. Klassen said yes. McNabb then told the grievor what had happened.

April 28 meeting between Klassen and the grievor. The grievor recalled that as soon as she learned about the disclosure to Klassen (probably on April 15), she called him and they agreed to meet before any final decision was made on a transfer. Towards the end of April, before the meeting with Klassen could be held, Stocks called the grievor to say she had not gotten the MCI position but had been asked by the Division if she was interested in the grievor's job at Tanner's Crossing. Stocks asked where the grievor was going. The grievor testified that she was shocked by this question as she had received no notification from Klassen. The next day Klassen e-mailed her to arrange a meeting at his office.

On April 28, 2009, according to the grievor, Klassen began the meeting by reporting to her that he had spoken to a person on the street who said that the grievor was in a relationship with her Principal. It was not a division employee. However, Klassen was hearing about the relationship in the community. As a result, he did not want her working with McNabb. He did not believe that two people in an intimate relationship can work effectively together in

the same workplace. In response, the grievor told Klassen that she believed it could work. She and McNabb shared the same passion and vision for education. Klassen made the point that they all lived in a small community. "You can't do this to your staff." The grievor responded that the staff are used to this kind of thing. It is commonplace that relatives are working in the same staff complement. She suggested to Klassen that this was only a minor variation. She predicted that by the fall, this would be old news and it would be a non-issue.

The grievor testified that discussion turned to the culture, dynamics and current issues at Tanner's Crossing. She made the point that there was an overload of changes taking place - two new Superintendents, four staff changes due to leaves, a transition to split grades. In her view, the relationship between herself and McNabb required less of an adjustment than any of these other issues. Students, parents and agencies should not have to adjust to a change in Guidance Counselor at this time. The grievor said she emphasized her belief that it would be easy to separate the personal and professional sides of her relationship. According to the grievor, Klassen said that he had mainly focused on the relationship itself and had not thought about the other points made by the grievor. But he felt that "it just didn't look good in the coffee shops." The grievor testified that she was particularly shocked, hurt and offended by the following two remarks made by Klassen. "It wouldn't look good that the Principal left his wife to sleep with the Guidance Counselor." "I don't want you getting in the way of Glen's good work."

When Klassen suggested the idea of moving the grievor to a high school position, she replied that this was not her aspiration. She said she assumed that the position he had in mind was at MCI. Klassen replied that MCI was not an option. The grievor then concluded that he must be thinking of Elton High School.

In cross-examination, it was suggested to the grievor that she opened the meeting by asking

for a transfer to MCI. The grievor denied it. It was also suggested to her that during this and subsequent meetings held by Klassen, she had an opportunity to make her case against a transfer. She agreed. "He listened, yes, and at the end he felt there had to be a change."

Klassen's account of the April 28 meeting was not substantially at variance with the grievor's testimony. He was caught off guard by the call from Stocks who was assuming prematurely that she would be transferred to MCI. The meeting with the grievor was lengthy and detailed. Klassen recalled that the grievor came into the meeting saying that she was ready to go to MCI, viewing it as a move up and an opportunity to do full-time guidance. Klassen had to inform the grievor that the MCI position was been filled and therefore she could not be transferred there. He mentioned a possible opening at Erickson Elementary with 50% guidance but the grievor was not interested. She viewed Erickson as a smaller position. To her, it felt like a punishment.

Klassen testified that he explained his concerns about a supervisor and subordinate being involved in an intimate relationship. In his view, it would inevitably lead to problems over time. They each expressed their opinions. Klassen told the grievor that this would put McNabb in a very difficult situation. Any time he accepted her point of view in a dispute with other staff, it could be perceived as unfair favoritism. There could be a reluctance by staff to bring issues to the Principal. Given the close working relationships at the school, especially for the guidance program, Klassen could foresee real problems. He conceded in cross-examination that the only feedback he had received was from people on the street. No employee of the Division had raised any concern. Pressed to admit that he had already made a decision on the transfer before the meeting, Klassen denied the suggestion.

The meeting ended with Klassen and the grievor agreeing to think things over and talk again soon.

Follow-up meeting between Klassen and the grievor on April 29. The grievor testified that after her first meeting with Klassen, she did some soul-searching overnight and called him the next day to request another meeting. He agreed to meet. The grievor expressed dismay that her professional growth plan was now being driven by coffee shop gossip. She could see nothing positive in a high school placement. If the transfer was essential, she asked Klassen to allow her to choose MCI. In her view, moving to Elton would mean starting from scratch and would carry a negative connotation for her career. She repeated her concern over the impact on her students at Tanner's Crossing. She asked about taking over Grey's position as Behavioral Specialist. According to the grievor, Klassen responded that he had not considered all her points. He had consulted with other Superintendents and the consensus was that "relationships don't work".

The grievor testified that although Klassen seemed pretty firm in his opposition to two employees in the same building having a relationship, she also thought that he was considering her arguments.

Again, Klassen's version of the April 29 meeting was similar. He testified that the grievor made an extensive presentation to him, outlining the programs she had initiated at Tanner's Crossing and her plans for future professional growth. She mentioned the fact that she was working on her Master's degree and might not be staying in the Division forever. Given that the grievor expressed some willingness to take a high school position at MCI, Klassen raised the option of Elton Collegiate. At this point, the grievor asked for a few minutes to consider the idea and left the room. When she returned, she suggested a switch with Grey. Klassen testified that he was uncomfortable with that idea because Grey would perceive the move as a demotion. At the end of the meeting, Klassen undertook to consider everything the grievor had said about retaining her position at Tanner's Crossing. There were some points he had not considered, at least in the way that the grievor presented them. Klassen acknowledged

that he had primarily been thinking about the supervisor/subordinate aspect of the problem.

Klassen and McNabb meet again on May 4. McNabb contacted Klassen and requested another meeting to consider possible solutions to the problem. The meeting took place on May 4, 2009. McNabb made the point that the school was undergoing so many changes that it would be unwise to move the Guidance Counselor. In particular, this was the grievor's third year doing guidance and it does take a significant period of time to develop a good rapport with all the players. McNabb had just succeeded in raising the guidance assignment to 75% from the 50% level which had prevailed for many years. The grievor had a large caseload of students and her contribution to the school was very important, especially since the school had recently adopted a restitution model. The schools was also moving to multi-level learning, a prospect which was exciting but also was raising concerns among the teaching staff. In short, McNabb made the argument that the grievor should not be transferred when there were so many other changes happening at the school.

As for solutions, McNabb offered to step down as Principal for a year and assume the role of Vice-Principal. Klassen responded that this was impractical because the Board of Trustees must be involved in all administrator hiring decisions. McNabb proposed that the grievor's evaluation be conducted by Rapsky and that Rapsky could report directly to Klassen. McNabb reiterated that he and the grievor could keep their personal and professional relationships separate. According to McNabb, Klassen did not respond to the proposal for an alternative evaluation arrangement and did not seem open to changing his mind.

In his evidence, Klassen said that the meeting was short and that McNabb presented some options for dealing with the relationship short of a transfer. Klassen did not favor the idea of a job swap with the Vice-Principal. A Board hiring process would be required and in his opinion, it would be inappropriate for a personal relationship to drive an administrator

appointment decision. He conceded that he never checked with Rapsky to ask how the Vice-Principal felt about the concept of taking over evaluations of the grievor. Klassen testified that this was really a non-starter because Rapsky would be evaluating his boss's girlfriend. "It would be really difficult to carry that out. Teachers will see that it is still the Principal that makes the decisions. They would be unsure of when to go to McNabb and when to go to Rapsky." These kinds of issues can become very intense in a school building, said Klassen, and McNabb's proposal would complicate the issue even more.

Meeting on May 6 with Klassen, Janssen, McNabb and the grievor. One final, short meeting was held on May 6, 2009 involving the Superintendent, the Assistant Superintendent, the grievor and McNabb. According to the grievor, she reiterated her belief that two employees involved in a relationship could still work effectively together. She asked Klassen whether he had considered all the options under discussion. Klassen replied that he couldn't remember them so she and McNabb reiterated their proposal that Rapsky act as her supervisor and take over her performance evaluations. Klassen responded by quoting from remarks he was hearing on the street - that their relationship was strong, intimate and undeniable. The grievor pleaded to the left in the school for the sake of the students, parents and the school as a whole. Klassen said no, the transfer would proceed. Then he said he was "taking off his Superintendent hat" and speaking to them as a friend. He suggested that he was doing them a favor by ordering the transfer. It was in their best interests and would avoid future problems for them. The meeting ended without a mutually acceptable solution.

Klassen described the meeting as a reiteration by each side of their respective concerns. For his part, he emphasized that the relationship could affect the ability of other staff in the school to speak freely. Taking off his Superintendent hat, he tried to speak to the grievor and McNabb as a colleague. He asked them, "Why do you want this." It would only take one teacher to raise a complaint based on their relationship, which would turn into "a hornets

nest”. Klassen said the meeting ended without any decision but he stated that he would now have to determine a way to move forward. Following the meeting, he spoke to several other Superintendents outside the division and gathered some research on policies put in place by other divisions to deal with this type of problem (Ex. 10).

Formal announcement of the transfers on May 11. On May 11, 2009, the grievor was officially informed by Klassen of the decision to transfer her to Elton. Stocks was transferred to Tanner’s Crossing. Klassen circulated an e-mail to the various affected personnel but before doing so, he went to Tanner’s Crossing to meet with the grievor and convey the decision in person. Klassen testified that he made the final decision to transfer the grievor after the May 6 meeting. He met with Janssen to review all of the information and mulled it over during the weekend. Then he returned to work on Monday morning and reached a decision.

For her part, however, the grievor believed that the real decision was likely made on April 14. In retrospect, she felt that she wasted a lot of time attending meetings with Klassen to discuss the issues around the transfer. The grievor acknowledged that Klassen was respectful throughout the process but in her view, he had no intention of changing his mind from the start. He listened but he did not waver in his decision.

The Division’s rationale for the transfer. Klassen testified that he considered all the factors set forth in Article 9 of the collective agreement before reaching a decision to transfer the grievor. With respect to the administrative needs of the Division, it was his view that the personal relationship placed McNabb in an untenable position as Principal. On any disputed issue in the school involving the grievor, a ruling in her favor could be seen by other teachers as preferential treatment based on the intimate relationship. Over time, Klassen foresaw that morale could be affected and teachers may lose their sense of voice in the school. This

would be contrary to the administrative needs of the Division in that teachers in the school must be able to work together effectively as colleagues. Klassen testified that Guidance and Resource teachers deal with tough issues and there may be differing staff opinions on how to resolve such issues. By ordering a transfer, Klassen believed that he was also looking after the best interests of McNabb and the grievor.

Secondly, Klassen testified that in his opinion, the transfer was supportive of the educational needs of students in the school. He rejected the Association's criticism of the new assignments handed to the grievor and Stocks. There was no question in his mind that both teachers had the ability to learn new jobs and perform satisfactorily. Stocks is trained as an elementary teacher and has proven to be a gifted guidance counselor. By applying herself in the new school, she can learn the files and connect with students and parents. While she will face a learning curve in teaching elementary science, that is a challenge which faces numerous teachers every year in the Division. Similarly, the grievor is a very capable teacher and counselor. She will not have great difficulty adapting to high school issues and a new setting.

On the other hand, if the grievor remains at Tanner's Crossing and administrative problems develop due to the intimate relationship in the building, this could translate into a negative impact on the student educational experience. Teachers may be less willing or able to do their jobs; fewer referrals may be made to the guidance program; McNabb may be less effective as the school leader. Klassen testified that the proposal to have Rapsky evaluate the grievor instead of McNabb was not an acceptable solution. The Principal and Vice-Principal are part of the same team. Klassen questioned how Rapsky could fairly be seen to evaluate the grievor given that he himself is answerable to McNabb.

Finally, with regard to concerns raised by the grievor, Klassen testified that he participated

in six meetings, received lengthy representations from the grievor, made additional inquiries into the policy implications of the issue, held repeated discussions with his Assistant Superintendent and fully considered everything presented to him. On balance, he decided that more credibility should be given to his concern that a supervisor/subordinate relationship between intimates was not workable.

Under cross-examination, Klassen was challenged on all of the foregoing conclusions. He admitted that his wife is a teacher employed by the Division at Erickson Elementary School. Kathleen Slashinsky, the Principal of Erickson School, reports to Klassen. The Principal will therefore be evaluating her boss's wife. Why is this arrangement satisfactory, given Klassen's criticism of the proposals to have Rapsky evaluate the grievor? Klassen responded that it would be Slashinsky's duty to perform evaluations on her teaching staff. Moreover, in his personal case, he is not directly supervising his wife and is not working in the same building. To avoid any perception of conflict, the Assistant Superintendent and not Klassen will evaluate Slashinsky.

Klassen acknowledged that at the time this issue arose, he had been working in the Division for less than one year. He conceded that he is still learning about the Division. Nevertheless, he rejected the idea of waiting to see whether any actual problems begin to develop at Tanner's Crossing. He asserted that he knows the feelings of the staff and is confident that issues will arise if he delays taking action. He did not explain the basis for this insight. There is also a risk that the problems may go underground. "If we wait, we will be in deep." Klassen testified that he had thought about the wait-and-see option. However, he was concerned that if he took steps to initiate a transfer later, it might appear to be punitive. In the end, he concluded that it was essential to be forthright and proactive in this situation. Moreover, it is administratively more difficult to carry out a transfer during the middle of the school year.

Argument, analysis and conclusions

Did the Division meet its duty to consult?

The Association argued that consultation under Article 9 must be meaningful, citing *Re Seven Oaks School Division No. 10 and Seven Oaks Teachers' Association No. 10 of the Manitoba Teachers' Society (Grievance of Jim Treller)*, [2000] M.G.A.D. No. 18 (Graham) at para. 184-185 and *Re Lakeshore School Division and The Lakeshore Teachers' Association (Neil MacNeil Grievance)* (June 30, 2004; Graham) at p. 16:

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

While there were a number of meetings held in the present case, the Association submitted that Klassen failed to meet the standard of meaningful consultation. From the time that McNabb disclosed the personal relationship, the Superintendent held a firm and fixed view that one of the two involved employees must be transferred out of Tanner's Crossing School. Klassen quickly identified the grievor as the employee who should be moved, apparently because McNabb would lose his administrative allowance if he should be the one transferred. The Association said that Klassen failed to maintain an open mind during the course of the meetings held in April and May. His decision had been made before the consultation really began.

In my view, the Association's submission is not supported by the evidence in this case. I accept the argument of the Division that Klassen remained open to persuasion even though he identified the core of the problem early on - whether it was workable for a supervisor and subordinate in the same school to carry on an intimate personal relationship. He had a firm tentative view but not a closed mind. In my assessment, it was significant that Klassen was forthright in conveying his central concern to the grievor and to McNabb. He also referred repeatedly to negative community perceptions of the relationship, clearly another concern in his mind. Thus, both the grievor and McNabb were well aware of the basis for the proposed transfer.

Klassen attended six meetings and listened to lengthy representations from the grievor and McNabb. To the extent that it may be relevant, he also heard from Stocks. Numerous pertinent topics were canvassed - disruption to students and families, impact on the educational interests of students, real or potential conflict of interest in decision-making by the McNabb, career aspirations of the two teachers, learning curves created by the new assignments, personal considerations of the teachers. Klassen heard and considered potential solutions put forward for his review, even if he was never more than lukewarm to having Rapsky assume some of McNabb's duties. He understood the concept. In sum, there was "meaningful dialogue and an opportunity for the exchange of information": *Lakeshore, supra*, at p. 16. As noted by Arbitrator Graham in *Lakeshore*, consultation need not necessarily result in a decision satisfactory to the teacher. In the present case, the grievor's representations were heard but not accepted, as in *Seven Oaks, supra*, at para. 202.

The grievor herself was ambivalent in her testimony on the question of whether or not Klassen remained open to persuasion. She acknowledged that she had an ample opportunity to make all her arguments and that Klassen listened respectfully. At times she felt that she may be making headway with the Superintendent. At other times, she despaired that he was

still committed to proceeding with the transfer. The grievor testified that by the end of the process, she felt that she had wasted her time. This was not necessarily a surprising conclusion given the intensity of the issues and the high stakes involved for the participants. The unsuccessful party often feels frustrated with the process. However, it is apparent to me that the grievor is articulate and intelligent. I have no doubt that she was a capable advocate in her own cause. Klassen testified that he maintained an open mind and took away from each of the meetings new points to consider. At the end, he took the issue home for the weekend and made a decision upon returning to work.

The onus of proving a violation of the collective agreement rests with the Association. On balance, the evidence does not establish a failure to conduct a meaningful consultation prior to the final decision on the grievor's transfer.

Did the Division exercise its discretion in a fair and reasonable manner?

The Association argued that arbitral review of a teacher transfer under this heading has extended beyond mere fair process and has included an objective assessment of the factors considered by the Division: *Seven Oaks, supra*, at para. 220-227. In *Seven Oaks*, it was held that the division failed to give proper consideration to the needs of students and the interests of the teacher (leaving aside his personal preferences). In particular, the arbitrator held as follows (at para. 226):

I do not believe the transfer of [the grievor] to Garden City Collegiate was a decision that can be objectively viewed as one that was likely to contribute positively to the educational experience of the students to be taught by [the grievor]. The Garden City teaching assignment certainly did not properly utilize the abilities and experience which [the grievor] had developed as a senior level mathematics teacher.

In the present case, the Division pointed to differences between the collective agreement language in *Seven Oaks* and the provisions of Article 9 herein. In *Seven Oaks*, the relevant clause within the transfer article stated as follows:

The right to transfer shall be exercised fairly and reasonably, having due regard to the educational needs of the division, and the interests of the teacher involved.

In *Seven Oaks*, the obligation to act fairly and reasonably was specifically linked to two stated criteria. For this reason, the arbitrator conducted a searching analysis of whether due regard had been paid to educational needs and the interests of the teacher. The arbitrator evidently included the educational experience of students as one facet of the division's educational needs. Because the division did not properly consider student needs (combined with a second deficiency in the process), the transfer decision did not comply with the requirements of the collective agreement.

In the present case, the duty to act fairly and reasonably (para. 2) is not textually linked with the list of factors. The obligation to consider educational and administrative needs is set out later in Article 9 (at para. 3). However, in my understanding, a duty to act fairly and reasonably includes an obligation to consider relevant matters and ignore irrelevant matters. Thus, there is an inevitable linkage between the fairness obligation (para. 2) and the duty to consider educational, student and teacher needs or concerns (para. 3). The end result is not substantively different than the *Seven Oaks* language. I therefore accept the Association's general point that arbitral review under Article 9 of the present collective agreement ought to extend beyond mere fair process and must include some substantive review of the transfer decision. However, I remain mindful of the admonition that arbitrators are not mandated to manage the employer's business and should not intrude into that domain. It is my role to ensure compliance with the negotiated terms of the collective agreement.

Did the Division exercise its discretion in a manner which was fair and reasonable? The Association argued that the real impetus for the transfer was a perception in the community (or more likely some elements of the community) that the grievor and McNabb were engaged in sexually immoral behaviour. According to statements made several times by Klassen during the consultation process, people on the street and in the coffee shops perceived that the Principal had left his wife for the Guidance Counsellor. On the available evidence, this perception was incorrect, but in any event, the Association said that public indignation and moral judgement over marital infidelity by teachers cannot be accepted as an underlying basis for a transfer under Article 9. I agree. This was an irrelevant consideration and it should not have been allowed to influence the Division's exercise of discretion.

This is not to say that community concerns about behaviour by teachers outside the school are irrelevant. To the extent that the behaviour in question was criminal, illegal or represented a breach of professional standards, then community perceptions might well be a relevant factor upon which a Superintendent could act. It would depend on all the circumstances. In the present case, I find that community perceptions of immorality related to marital infidelity were the genesis of Klassen's decision to approach McNabb, request disclosure and ultimately order a transfer. The evidence established that this subject was raised by Klassen a number of times during his meetings with McNabb and the grievor leading up to the final May 11 decision.

I appreciate the Division's response on the morality question. The Division argued that the actual decision to transfer the grievor was ultimately made based on a series of legitimate managerial considerations as outlined in Article 9, the foremost being Klassen's considered opinion that it was unworkable to continue an intimate relationship between supervisor and subordinate in the same school. I accept that this was Klassen's primary concern and that he directed himself to the workplace implications of the relationship. In no way do I believe

that Klassen personally was attempting to impose any kind of critical value judgement on the grievor and McNabb. Nevertheless, he succumbed to the pressure of “coffee shop” considerations which remained an operative factor during the decision-making process. In my respectful view, this tainted the Division’s exercise of discretion.

Even aside from the inappropriate influence of community perceptions, I find that the Division’s exercise of discretion under Article 9 was flawed. My reasoning on this second ground is as follows.

It was entirely appropriate for the Superintendent to ask whether an intimate relationship between supervisor and subordinate in the same building would undermine the proper functioning of the school. Klassen raised a series of reasonable apprehensions about teacher morale, sense of fairness and loss of voice. I also recognize the Division’s argument that such relationships within the workplace may expose the employer to litigation risks: *Gagne v. Smooth Rock Falls Hospital* (1991), 39 C.C.E.L. 281 (Ont. Ct. Justice) at para. 31; *Gelinas v. Centre d’Analyse des Operations*, [2004] F.C. 1755 at para. 58; *Carroll v. Emco Corporation* (2006), 50 C.C.E.L. (3d) 48 (B.C.S.C.) at para. 25; although these were cases of secret personal relationships. In *Vancouver Community College v. Vancouver Community College Faculty Association* (1997), 66 L.A.C. (4th) 73 (Gordon), it was held that an anti-nepotism policy, while *prima facie* discriminatory, was a *bona fide* occupational requirement due to the inherent potential for favoritism (at para. 57). The jurisprudence has recognized that perceptions of favoritism, abuse of power and sexual harassment are legitimate concerns against which employers must be permitted to guard.

In this case, however, the Association did not contest the Division’s desire to guard against negative effects in the workplace arising from the grievor’s personal relationship. Nor was any policy of the Division at issue here. Rather, the Association criticized what the

Superintendent *did not do* in deciding on a transfer under Article 9 of the agreement, arguing that the exercise of discretion was therefore rendered unfair and unreasonable.

According to the evidence, there were no complaints originating from staff in the school arising from the grievor's relationship. Despite the apprehensions listed by Klassen, no problems had yet emerged. The Association argued that Klassen should have contacted the Vice Principal and made other inquiries to determine whether there was likely to be any real problem in the school. Klassen was new to the Division and did not have the benefit of longstanding relationships with school staff or a deep sense of the culture of the building. I agree that in the particular circumstances of this case, it was incumbent on Klassen to go beyond the realm of *potential* adverse impacts in order to meet the fairness obligation.

I was not persuaded that there was a threat to student educational needs due to the assignment of duties which were new or unfamiliar to the grievor and Stocks. Both teachers were qualified and capable of doing the new jobs, albeit each faced a learning curve and would not be performing optimally for some period of time. The two live issues were the administrative need of the Division to maintain a well functioning professional staff and, related to this, the danger that educational services would be disrupted by turmoil among the staff.

In his consultation meetings, Klassen heard from the Principal and the grievor that the leadership style in the school was cooperative rather than authoritarian, most issues were handled by a team approach and the staff were not troubled by the relationship. Both McNabb and the grievor asserted that they could effectively separate the personal from the professional while carrying out their duties. It was further suggested that Rapsky could act in place of McNabb in situations where a perception of conflict might otherwise prevail. In the face of these assertions, Klassen needed some empirical information to support his apprehension that the arrangement was unworkable. In my view, had the Superintendent

carried out a reasonable set of confidential inquiries within the school to ascertain the likely impact of the grievor's relationship, his good faith judgement on the matter would have been unassailable. However, absent any such investigative steps, I must conclude that there was a failure to consider information which was highly relevant to the decision.

The Division cited *Re Sault Ste. Marie Board of Education and Sault Ste. Marie Women Teachers' Association* (1991), 22 L.A.C. (4th) 439 (Burkett) where the board upheld the exercise of management discretion in refusing to hire a Vice-Principal whose spouse was the Principal, based on the employer's anti-nepotism policy (at p. 447). Similarly, the Division relied on *Vancouver Community College, supra*, for the proposition that "the College need not await actual incidents within a department which reveal occurrences of the consequences the policy seeks to avoid (at para. 61). Also mentioned was *Commission des droits de la personne du Quebec v. Town of Brossard*, [1988] 2 S.C.R. 279. In those cases, the employers had pre-existing policies restricting or prohibiting the hiring of relatives. None of the decisions considered the application of the duty to act fairly and reasonably where a personal relationship had developed after hiring. Those grievors knew or ought to have known that there was a policy affecting their employment prospects. In the present case, absent any standing Division policy, the grievor was entitled to assume that her job at Tanner's Crossing would continue, subject to a fair and reasonable transfer decision under Article 9.

The Division has a right to transfer teachers but the discretion is case specific and requires an individualized assessment of all relevant circumstances. I concur with thrust of the Division's submission that the transfer decision was open for the Superintendent to make, subject always to the prescriptions of Article 9. My holding is founded on a narrow basis. The individualized assessment process here was inadequate given the unique circumstances of this case.

Based on the foregoing, I find that the Division considered an irrelevant factor and failed to properly consider relevant factors in the course of deciding on the transfer pursuant to Article 9 of the agreement. As a result, the discretion was not exercised in a fair and reasonable manner.

The Association argued that rescinding the transfer would in substance be a one-year order. I confirm that should problems arise or reasonably be anticipated, the Division may again exercise its discretion to transfer. Alternatively, the Division may conclude that administrative accommodations to deal with the relationship are working well and no further action is required. The Division might also choose to adopt a written policy in light of the experience in this case.

Award and order

The grievance is allowed. The decision to transfer the grievor from Tanner’s Crossing School to Elton Collegiate is rescinded. Jurisdiction is retained as may be required to deal with any issues relating to remedy.

DATED at Winnipeg, Manitoba this 6th day of August 2009.

“A. Peltz”
ARNE PELTZ, Arbitrator