

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

TURTLE MOUNTAIN SCHOOL DIVISION ("Division")

Employer

-and-

MANITOBA TEACHERS' SOCIETY

Union

RE: GRIEVANCE OF SHAUNA NICHOL-GEER

AWARD

BEFORE:

MICHAEL D. WERIER

E. WILLIAM OLSON, Q.C., Nominee for the Employer

WILLIAM SUMERLUS, Nominee for the Union

APPEARANCES:

ROBERT A. SIMPSON for the Employer

DONALD A. PRIMEAU for the Union

DATE OF ARBITRATION:

SEPTEMBER 25 and 26, 2006

LOCATION OF ARBITRATION: KILLARNEY, MANITOBA

INTRODUCTION

The Grievor is married, with two school age children, and is employed by the Division as an early grades instructor at Killarney School, in Killarney, a town in rural Manitoba. She was notified by the Division that she was to be transferred to Ninette School which is approximately 20 kilometres from Killarney. Ninette School at the time had approximately 23 students, with two full-time instructors. At the time of her transfer, the Grievor was off work on sick leave.

The Grievor challenged the transfer to Ninette School. A grievance was filed on November 4, 2004 which stated:

SHAUNA NICHOL-GEER submits that there is a dispute between her and the Turtle Mountain School Division (hereinafter referred to as "the Division") about the meaning, and/or application and/or violation of the collective agreement between the Turtle Mountain Teachers' Association of The Manitoba Teachers' Society (hereinafter referred to as "the Association") and the Division and in particular Articles 4.05, 9, 10 and 14 thereof, *The Public Schools Act*, *The Education Administration Act*, sections 9, 14 and 56 of *The Human Rights Code*, section 80 of *The Labour Relations Act*, and *The Workplace Health and Safety Act*.

SHAUNA NICHOL-GEER suffered from job related stress which required her to take sick leave. On April 12, 2004, while Ms. Nichol-Geer was still on sick leave her spouse wrote a letter to Shirley Highfield, of the Turtle Mountain School Board, raising concerns about the management and administration of Killarney School which his eight year old daughter attended. He also attended at the school in April 2004 to raise concerns about the inappropriate behaviour of a male student towards his daughter. Ms. Nichol-Geer received a letter dated April 29, 2004 from the Superintendent transferring her from Killarney School to Ninette School, even though he was advised on April 14, 2004 that Ms. Nichol-Geer was not well enough to attend such a meeting about assignments for the next school year.

On or about May 7, 2004, Ms. Nichol-Geer received a "poison pen" letter. The Division has refused to take the necessary action to determine who on the staff at Killarney School sent this letter, which action has exacerbated Ms. Nichol-Geer's job related stress and her safety.

Ms. Nichol-Geer grieves that this action is in violation of the collective agreement and the relevant legislation. that the transfer is disciplinary and punitive in nature, and is arbitrary, unfair, unreasonable and/or was made in bad faith, and constituted discrimination on the basis of family status.

Ms. Nichol-Geer requests:

1. A Declaration that the Division has misapplied, misinterpreted and/or violated the collective agreement, and in particular Articles 4.05, 9, 10 and 14 thereof *The Public Schools Act*, *The Education Administration Act*, sections 9, 14 and 56 of *The Human Rights Code*, section 80 of *The Labour Relations Act*, and *The Workplace Health and Safety Act*.
2. An Order that the Division rescind the transfer of Shauna Nichol-Geer to Ninette School and re-assign her to teach a primary grade in Killarney School.
3. An Order that the Division pay the necessary laboratory and other reasonable expenses to determine the author of the "poison pen" letter and to take action accordingly to ensure the health and safety of Ms. Nichol-Geer.
4. Such other remedies as may be fair and reasonable in the circumstances.

At the hearing, counsel for the Union confirmed that they were not proceeding with the allegation regarding the "poison pen" letter.

The Division's formal written response to the grievance was as follows:

"The Board of Trustees of Turtle Mountain School Division reviewed your grievance last night at its regular Board meeting. The Board has decided to deny your grievance on the basis that notification of the grievance was

received well outside the 30 days time for filing a grievance and the transfer did not violate the collective agreement in any way.”

The parties confirmed that we had jurisdiction to hear the matter and that there were no preliminary objections as to timeliness.

RELEVANT PROVISIONS OF THE AGREEMENT

The Article dealing with the Division's rights to transfer is Article 9 which states:

ARTICLE 9:00 - TRANSFER AND REASSIGNMENT

- 9:01 Teachers will be advised prior to May 1 of a transfer to become effective for the following September 1 except in cases where a vacancy arises after May 1 that cannot be filled by a suitable applicant hired by the normal procedure, the Board has the right to transfer such teachers.
- 9:02 Teachers required to transfer shall receive from the division eligible expenses incurred in the transfer to a maximum of \$750.00. Eligible expenses shall be limited to:
- a) Moving of household effects including packing and loading from the former residence, cartage and transportation, delivery to and unloading at the new residence. If a public carrier is used it must be a fully licensed Manitoba-based carrier. Estimates of cost must be obtained from two (2) carriers and submitted to the Board. Selection of the carrier must be approved in writing to the teacher by the Board before final arrangements are made.
 - b) In respect of the accommodation being vacated, claims for expenses supported by receipts, will be accepted for:
 - i) Legal fees in an amount consistent with the Manitoba Law Society Tariff, plus related itemized disbursements.

- ii) Realty agent's commission not to exceed the local tariff as filed with the Manitoba Real Estate Association.
 - iii) Cost of advertising or related expenses, where the teacher undertakes the sale of his own residence and provided there is no claim under ii)
- c) In respect to the new accommodation, claims for expenses, supported by receipts, will be accepted for:
- i) Legal fees in an amount consistent with the Manitoba Law Society Tariff, plus related itemized disbursements.

9:03 Teachers will be subject to reassignment with prior consultation. Notice will be given by June 15 except in emergency situations such as a sudden loss of a staff member. In the event notice of reassignment is provided after May 31 and such reassignment is unacceptable to the teacher, the teacher shall have up to 10 calendar days from receipt of notification to advise the Board that he/she will be terminating his/her Form 2 contract as of June 30. The Board will mutually agree with the teacher's decision to terminate his/her contract.

The Settlement of Differences clause is Article 10:07 which states:

The Board of Arbitration shall not have any power to alter or change any provisions of this agreement or to substitute any new provisions for existing provisions, not to give any decision inconsistent with the terms and provisions of this agreement.

Article 14:00 deals with the Division's right to discipline. It states:

The imposition of discipline without just cause by the Division or any agent thereof in the form of written warning(s) and/or suspension(s) with or without pay shall be subject to the following provisions:

1. Where the Division or person(s) acting on behalf of the Division so disciplines any person covered by this Collective Agreement and where the affected person is not satisfied that the discipline is for just cause, the Division's action shall be deemed to be a difference between the parties to or persons bound by this Collective Agreement under Article 10:00 Settlement of Differences.
2. When such a difference is referred to a Board of Arbitration under Article 10:00, the Board of Arbitration shall have the power to:
 - a) uphold the discipline
 - b) rescind the discipline
 - c) vary or modify the discipline
 - d) order the Board to pay all or part of any loss of pay and/or benefits in respect of the discipline
 - e) do one (1) or more things set out in subclause (a), (b), (c) and (d) above.
3. The written warning(s) shall not include Performance Assessment and Development done pursuant to Policy K-2 and any amendments thereto, except where the implementation of said policy against a person covered by this Collective Agreement is for the purpose of disciplining said person.
4. The Association agrees that the Division has the right to suspend an employee with or without pay for just cause.

The individual contract between the Division and the Grievor contained a number of provisions, including the following term:

The teacher agrees with the school board to teach diligently and faithfully and to conduct the work assigned by and under the authority of the said school board during the period of this employment, according to the law and regulations in that behalf in effect in the Province of Manitoba, and to perform such duties and to teach such subjects as may from time to time be assigned in accordance with the statutes and the regulations of the Department of Education of the said Province.

Section 80 of *The Labour Relations Act* states:

OBLIGATION TO ACT FAIRLY AND CONSULT

Obligation to act fairly, etc.

80(1) Every collective agreement shall contain a provision obliging the employer, in administering the collective agreement, to act reasonably, fairly, in good faith, and in a manner consistent with the collective agreement as a whole.

Deemed fairness provision

80(2) Where a collective agreement does not contain a provision as required under subsection (1), it shall be deemed to contain the following provision:

In administering this agreement, the employer shall act reasonably, fairly, in good faith, and in a manner consistent with the agreement as a whole.

EVIDENCE OF THE UNION

The Union called five witnesses, including the Grievor.

The Division called one witness, Jerry Storie, the former superintendent of the Division.

The Grievor testified at length and the salient points of her evidence will be highlighted. The Grievor resides on a farm four kilometres outside of Killarney. She is married and has a 10 year old daughter and a 6 year old son, both whom attend Killarney School. The Grievor attended Killarney School as a student and graduated in 1988. She has a Bachelor of Arts degree from the University of

Manitoba and a Bachelor of Education from Brandon University. She started teaching at Killarney School for the 1994/95 term. For eight years she has taught Grade 2, and has been regarded as a early years' specialist.

She indicated that prior to the Spring of 2004, she had not had any discussion with the principal, vice-principal, or superintendent with respect to a transfer, and was definitely not looking for a transfer. She had had certain discussions in 2003 with respect to a reassignment within the school to a Grade 5 position, but after discussions between her Union and the school, no action was taken.

In February 2004, there were further discussions about a reassignment. The discussions took place at a K-4 staff meeting and there were discussions about splitting Grade 1 and 2. She agreed to this split and also noted that at this meeting one of the teachers, Christine Richards, made comments about Grade 6 students being engaged in abnormal unusual behaviour with Grade 1 and 2 girls. Ms. Richards noted there was need for supervision and counseling. The Grievor agreed with this suggestion and gave her support for this idea at the meeting.

It was stated that a Grade 6 boy seemed to have an unusual interest in playing with Grade 1 and 2 girls. The Grievor stated she did not think it was a healthy situation as something bad could happen. Following the meeting, the Grievor's expectation for the next year was that she would be teaching a Grade 1 and 2 split. Not long after this staff meeting the Grievor spoke to Carla Neufeld ("Neufeld"), who is a

parent teaching in Grade 2. She was called at home. The Grievor stated that she had been having problems with Neufeld's daughter in class and had been treating it as a disciplinary matter. It became clear to her that more was going on as Neufeld's daughter had been taken to the police about possibly being the victim of a sexual assault. The mother felt that this was why problems in the classroom had been developing.

The Grievor had not heard anything about this allegation and it came as a shock to her. She was concerned because she had been dealing with Neufeld's daughter as a disciplinary problem and this was obviously not the case. She spoke to the Student Services Coordinator and also to Acting Vice-Principal, Con Erickson ("Erickson"). Erickson apologized to her and the Grievor replied that she did not need an apology, but just wanted to deal with her student effectively.

The Grievor stated that certain issues had arisen with respect to her own daughter as a boy in Grade 3 was bothering her daughter, holding her against her will, and saying obscene things to her. The Grievor's husband was concerned that it would not be acted upon and taken seriously by the school.

Immediately before spring break Darlene Shaw ("Shaw"), the Vice-Principal, came to her and said that the school would be taking action and assured her that it would be taken care of. The Grievor went on leave the first day after spring break on April 5th and took in a sick certificate to the school. She gave it to the Assistant

Superintendent. She did not believe that Jerry Storie ("Storie") was there at the time. The Grievor testified that at the time of the arbitration hearing, she was still on sick leave. Subsequent to turning in the sick leave certificate, she received a letter from the Division requesting that she come in to see Storie on April 12th. She did not see him, but spoke to her Union representative who wrote a reply on April 14th.

Her husband had also written a letter on April 12th which was delivered to the Chair of the School Board outlining concerns about what had been going on with their daughter who was being intimidated and threatened and what was going on at the school with respect to older boys harming younger girls.

The Grievor said that as far as she knew nothing was put into place to deal with the problem. She was concerned that a child could be put at risk because of the school's inaction. The Grievor believed that her husband's letter was quite critical of the school. She said that she and her husband had gone to a meeting with other parents to speak to the Chair of the School Board. The parents wanted to express their concerns about safety. The Grievor said that she was silent at the meeting, but expressed concerns about her job situation. Her husband asked the School Board Chair as to what action should be taken and they were advised to write a letter to the School Board. The School Board Chair also said the Board would protect the teachers from any repercussions. As far as she was aware, other parents also wrote to the School Board. She denied drafting the letter, but did read it prior to it being sent out. The Grievor said she was very concerned about her

husband writing the letter, but she was assured that the Board would protect her.

Subsequently, there was further correspondence between Storie and her Union representatives. In particular, they indicated to the Division that she did not wish to be transferred on April 23rd. On April 29th Storie replied and indicated that she would be transferred. The letter read as follows:

This letter is further to previous correspondence to you and to your MTS representative regarding your assignment for the 2004/2005 school year.

This letter is to confirm your transfer, as per Article 9:01 of the Turtle Mountain School Division Collective Agreement, to Ninette School for the 2004/2005 school year. Your assignment will be early years with the details of your classes and duties to be confirmed through discussions with the principal of the school.

I know that you will enjoy the assignment. With 2 full time staff and a full time instructional assistant, in a school of 23 students, you will have a great opportunity to use your talents and creativity in a small school setting.

On a personal note, I know that as a result of your experience you will do an exceptional job. The Ninette staff and students will be glad to have you as part of Ninette School.

The Grievor confirmed that Ninette School has 23 students. She had no idea why Storie would say that she would enjoy this assignment as she believed that she was receiving the transfer as punishment. She viewed Ninette as a demotion. She indicated there was no history of such transfers, and this transfer would not be helpful for her stress. It would add 60 minutes of travel time to her day and she would no longer be able to be with her children to ensure they were safe. She further stated that she had never been in a multi-grade school and this would add to

her stress as well. Just knowing it was punishment was not good for her. She viewed the school's actions as totally unreasonable and unfair and it was being done simply because she was trying to look after her students and her daughter. She confirmed that her position was filled by a teacher from Ninette.

On cross-examination, she confirmed that there was no issue that she was employed by the Division as opposed to an individual school and that teachers are assigned as required by the Division. She confirmed that she had heard that in the Division there had been a declining enrollment and that there was movement and reductions as required to fill the needs. She also confirmed that she was qualified to teach all grades, although she was specialized in the early levels. She agreed that Ninette School covers Kindergarten to Grade 8, and that if she was teaching there some of the students would be early and middle years. She also agreed that she was aware that Ninette School had a full time Principal who served as a teacher and a full time instructional assistant.

The Grievor acknowledged that the Principal was a colleague and a friend and that she had no concerns about working with her. She also admitted that Kim Riley ("Riley"), the teacher at Ninette School, was approximately her age and she was aware that Riley was seeking to transfer out of Ninette School.

The Grievor agreed that staff changes were made if possible prior to the end of April of each school year, and confirmed that staffing discussions took place in February

2004 at Killarney School. She acknowledged that Storie was responsible for staffing, and acknowledged that in the Spring of 2003 she had opposed a potential transfer and that it was resolved in her favour. She also agreed that at the time she met with Storie and Shaw, it was the only time she had a meeting with Storie regarding reassignment or transfer.

She was referred to Storie's letter confirming her transfer. She stated she had no idea why Storie would indicate that she would enjoy the transfer. She also acknowledged that she had no direct knowledge or idea as to why Storie decided to transfer her. She also confirmed that she decided to deal with the issue of transfer through the intermediary of her Union. Her Union representatives were Nancy Kerr and Diane Beresford. She also confirmed that from April 6th onwards, after she brought in her sick leave certificate, that Storie communicated with her through the offices of the Manitoba Teachers' Society. She stated that there seemed to be a great urgency about a decision having to be made about the transfer, and she confirmed that she felt the transfer had to do with her daughter's situation and her husband writing a letter. She said that she was relying on the information that was being provided to her by the Union, and that there was a lot of communication between the Union and Storie at the time, and that other than the information that was given to her by her Union representatives, she had no direct information from Storie as to the basis for his decision to transfer her. She also confirmed that she was aware that her Union was reluctant to initiate a grievance on her behalf. She stated that on June 3rd she made a submission in writing to the School Board

requesting that they reconsider the decision to transfer her. She was advised by the School Board that they were not prepared to change their position.

With respect to safety concerns at the school, the Grievor maintained that she felt nothing was done to her satisfaction and reiterated that she was not told about the sexual perpetrator in a timely way.

She confirmed she did not know whether Storie knew about her meeting with the Board Chair. She also confirmed that she had no knowledge whether Storie consulted with the Principal or the Vice-Principal about her transfer. She was questioned as to whether it would be fair to say that her relationship with administration was strained at that time. She maintained that she tried to stay positive and denied in that the Spring of 2003 she made disparaging remarks about the administration to Storie. She denied that she was ever aware that Storie was concerned about her and the situation at Killarney School.

Kevin McKnight ("McKnight") testified for the Union. He is presently the Secretary-Treasurer of the School Division and was called in part to talk about in-camera discussions which took place at the Board of Trustees level. An objection was raised by the Division that these discussions are confidential in nature and that privilege attaches to discussions. The Division agreed to allow this evidence to be heard subject to a ruling at the completion of the hearing as to its admissibility.

McKnight confirmed that he had been employed for approximately 9 years in his position. He reports to the Board of Trustees. He confirmed that Storie retired as Superintendent in July 2004, and that he had worked with him for approximately 6 years.

He confirmed that the Board of Trustees delegated the authority to transfer to the Superintendent. The Board finalizes its budget in March, and during April any transfers, if any, are discussed and set up. At the first meeting of the Board in April, the Superintendent gives the Trustees an idea of what might happen, and at the last meeting in April the Superintendent advises as to who is being transferred. The discussions with respect to transfer take place in-camera.

McKnight said that during his years in the Division he had a recollection of perhaps two teachers who were not entirely pleased about their transfer, and recalled one transfer that took place from Killarney School to Ninette School. McKnight indicated that the issues of transfer were brought up at the Board meeting and Storie indicated that he had been considering a few transfers. The only comment that McKnight remembered was that there was a requirement to move someone out of the elementary school at Killarney due to staffing reductions. It was only a preliminary indication on April 14th. It did not come to pass that there was a need to reduce staff.

McKnight indicated that he had personal experience with the Grievor. She taught

both his children in Grade 2. She was an excellent teacher and he always felt she was one of the best teachers in the school.

In March or April of 2004, he confirmed that there had been 9 letters received from parents with regards to safety issues on the playground. These letters were presented to the Board by its Chair. One of the letters was the one from the Grievor's husband.

The Grievor's transfer came up at the April 28th meeting. McKnight was not present.

McKnight had one discussion with Storie regarding his decision to transfer and he expressed it at the Board level. He felt it was inappropriate to target the Grievor as she was one of the best teachers in the school. There was an indication that she had done something wrong professionally. He said he got that impression from a statement that Storie or Beazley had an issue with her. The discussion with Storie took place in his office. McKnight indicated that he thought the Grievor was very professional and Storie's reply was that McKnight had not seen what he had seen. Storie felt that she had made unprofessional comments. This was the only specific conversation that he recalled. He did not have any discussions with Storie about Storie's discussions with the Grievor.

McKnight confirmed that when transfers are being considered, it is the practice of

the Superintendent to involve the Principal, although the final decision is the Superintendent's.

On cross-examination, McKnight confirmed that the Division operates under a dual track system and the Superintendent is responsible for education and the Secretary-Treasurer for monetary matters. He acknowledged that he was not involved in teacher transfer and that at the Board meeting Storie was making a report and that he was not involved in the report. He also confirmed that what Storie did or did not do or how he arrived at his decision was within his sphere of authority. He also confirmed that in this Division the Board delegates responsibilities to the Superintendent, and the Board would anticipate that some time in April of each year the Superintendent would advise as to some of the changes.

He confirmed that the Board would be notified and if they had any concerns they could express those to the Superintendent. He also acknowledged that there was a short period of time between the finalization of the budget in mid-April to the decisions with respect to staff related changes.

He confirmed that when Storie was staffing in early April, Storie was of the view that there had to be a reduction in the staffing. He also confirmed that Riley had been at Ninette School for at least 5 years.

Conrad Erickson testified for the Union. He has been employed as a teacher and administrator for approximately 43 years and has an extensive background at a number of schools in the Province of Manitoba. He was a Vice-Principal at Killarney School from 1995 - 2002.

He knows the Grievor very well and described her as an exemplary Grade 2 teacher. He never had any cause to discipline her. He was called back to the Division in 2003/2004 because of an illness. With respect to any decision to transfer a teacher, the protocol was that there would be discussion between the Principals and the Superintendent with the hope that an amicable solution can be achieved.

He was not consulted by Storie in 2004 with respect to the transfer of the Grievor to Ninette School. He did say that transferring her would have been a detriment to the quality of education at Killarney School. He said that to his knowledge no one teaching at Killarney School had requested a transfer to Ninette School.

In February/March 2004, he had discussions with Beazley and was aware of certain issues regarding student safety on the playground. He and Beazley did not agree on whether information with respect to what was happening should be shared with the entire staff. According to Erickson, Beazley's major concern was to protect the privacy of the perpetrator and that only those on staff who needed to know should be informed. Erickson testified that in his opinion all staff needed to know

everything. He was asked as to whether or not he was aware in February or March 2004 about the Grievor's concerns about safety on the playground. He stated that on the very last day at the school, a young student allegedly accosted the Grievor's daughter and was apparently lying on her and asked her whether she liked it. Erickson testified that this was not the first time apparently something like that had happened. Erickson spoke to Beazley about it and then left town the next day. He stated that Beazley listened very carefully, but that he had no indication as to what he was going to do. Erickson testified that he was not aware of a teacher ever being transferred while on sick leave. He said that a transfer would enhance the sickness or stress of the teacher.

On cross-examination, Erickson confirmed that he was not a medical doctor. He confirmed that he had never transferred a teacher during his service in administration. He did acknowledge that strong teachers may have to be transferred and acknowledged that Riley was a strong teacher. He confirmed that he knew Storie and that he knows what he is doing. He has admiration for his ability as a School Superintendent.

Lorne Whitelock ("Whitelock") testified for the Union. He taught at Killarney School from 1989 to June 2005, and in later years was responsible for student services in the high school. He was aware the Grievor had been transferred. He had no involvement in the transfer. He became aware some time in mid-May that she was away on sick leave. He spoke to Darlene Shaw ("Shaw") some time in May about a

number of matters and asked her how the Grievor was doing. He was quite surprised at her response as she stated that the Grievor will not talk to us and we are going to be sending her a letter. Whitelock stated he was surprised by the words and the tone of the words and the body language of Shaw. Her demeanor was uncaring and hostile.

Gary Maxwell ("Maxwell") testified for the Union. He has been employed in the education field for approximately 36 years and was Superintendent of the Turtle Mountain School Division from 1988 to 1998. He is presently employed as Principal for Sioux Valley School near Brandon. He has a lot of experience in small schools. He indicated that one of the difficulties teaching at small schools or remote locations is that you do not have colleagues with whom to discuss things. It is more difficult to teach a multi-grade school as the preparation is difficult. He described that when he had to consider a transfer he would go through the seniority list, speak to Principals and meet with the teachers to arrive at a plan. He could not recall if he transferred anyone in the 10 years that he was Superintendent for the Division.

He worked with the Grievor and stated he had no concerns with her ability as a teacher. He never did a formal evaluation, but she was always highly rated. He indicated that he would never contact a teacher while they were out on sick leave, nor would he transfer anyone who was out on sick leave.

On cross-examination, he confirmed that the Division operates eight schools, six of

which are small schools. He agreed that students attending a small school are entitled to a good education and a good teacher. He also acknowledged that it would require a strong teacher to succeed in a small school. He agreed it was not unusual for someone living outside the community to commute to their teaching assignment.

He stated that as a Superintendent if a teacher was absent and he wanted to know whether something was adversely affecting them, he would communicate with the staff officer at the Manitoba Teachers' Society. He further acknowledged that the Grievor was a friend and that he had been an advocate for her in certain situations.

EVIDENCE OF THE DIVISION

Jerry Storie testified for the Division. He is presently the acting Dean at the Faculty of Education at Brandon University and has been so employed since July, 2005. He was employed as a Superintendent for 10 years. He also was an MLA from 1981 to 1994 and during that time held a number of Ministerial portfolios, including Minister of Education.

Storie described the series of events which took place with regards to preparation of a school division's budget and the process behind a transfer. He indicated that by the end of January, principals at the schools identify prospective enrollment figures and budgets have to provide for staff allocation by the end of March of the year.

Transfers are decided upon in April and reports have to be made to the Board at that time.

Storie indicated that there are three reasons why a teacher is transferred. One is due to necessity as there is no other choice. The second reason is that there is a need for change in that the existing staff are not experiencing success. Thirdly, there is a requirement to accommodate the needs of small schools. Storie indicated that when he became Superintendent, teachers taught in small schools for periods of time greater than 10 years. It is necessary to have a strong teacher in a small school because of the isolation. Most teachers employed in small schools look to return to a large school. A teacher who served a division faithfully and responsibly in a small school should have the opportunity to transfer.

Regarding the Killarney School situation, Storie indicated that he thought there was going to be a reduction of one teacher and he started thinking what would necessarily meet the needs of the Division and the small schools. By the end of March and the first week of April, he was reminded that someone in the smaller school "wanted out". Storie spoke to the early year teachers and had letters from them expressing their views. By the end of March or early April he concluded that the Grievor would fit most nicely into Ninette School because of her early years' experience. Riley had been teaching at Ninette School for at least 6 or 7 years. She had approached the Division in writing the year before and requested a transfer and approached him in person just after spring break. He believed that it was not

fair for her to be there for over 5 years. He had transferred others from small schools. Storie testified that small schools are a tremendous opportunity and indicated that he was a product of a small school system.

On April 5, 2005 Storie received a medical certificate delivered by the Grievor and her husband. The following day he left them a message requesting a meeting. He received a message on the morning of April 6th that he speak to the Manitoba Teachers' Society as the Grievor did not wish to speak with him directly. On April 7th he sent a letter to the Grievor which stated he subsequently had discussions with representatives from the Manitoba Teachers' Society.

Also on April 14th he attended a Board meeting. He provided an updated report on transfers. He could not recall if he had mentioned Riley, but believes he did. He did not know whether the Board had asked him any specific questions.

The second item of business at the Board meeting had to do with parental concerns as brought forward by the Board Chair. The Board Chair had met with parents at the end of February or early March and had suggested the parents write letters. Storie did not have prior knowledge of this meeting.

One of the letters was Mr. Geer's letter of April 12th. He had not seen the letter prior to its presentation at the Board meeting. He was to investigate the matter at the Board's direction, and subsequently reviewed the letters and met with the parents

after the 14th.

In response to a question as to whether this was the first time he had been aware of the parents' concerns, he indicated "no, that every school division had concerns regarding safety and these issues existed at Killarney School". He did indicate there was serious misinformation in the parents' letters. He investigated the matter and determined that the administration at the school had responded in a multitude of ways. He put information together and decided to have a public meeting later in June and that meeting did in fact take place. In response to a concern as to whether or not the administration had done anything, Storie confirmed that a memo dated December 12th had been sent to staff advising them of the situation, and in addition there was a student services meeting. In one case Storie worked through the sequence of steps taken by the administration and shared them with the Deputy Minister of Education before he reported to the Board. He also met with the local director of Child and Family Services and was satisfied that things had been done properly.

He also met with Mr. Geer and went through everything that had been done. Storie stated that safety issues had absolutely no part to play in his decision to transfer the Grievor. The process was started in February and it was obvious that there was going to be staff changes. The decision to transfer the Grievor was a "win win" situation as Ninette School needed an excellent teacher and the Grievor was an excellent teacher.

Storie related that an incident had taken place after a concert at the school where the Grievor had indicated to him that that was just a show. He had met with her afterwards and had indicated to her it was an opportunity for students and that if she had concerns that she should meet with the Principal. It appeared to him that there was some friction between her and the administration of the school.

The Grievor's job at Ninette School would involve working with an administrator who was her friend and, in addition, the transfer would support a long-serving staff member who wanted to be part of a bigger school. Storie indicated that he felt the Grievor would enjoy her new posting and that it would be a challenge.

Storie stressed that it was his decision to transfer and it was based on his analysis of the best needs of the Division. The Principal at Ninette School was receptive to having the Grievor teach at Ninette and Beazley, the Principal at Killarney School, was receptive to having Riley teach at the school.

The decision to transfer the Grievor was confirmed at the Board meeting on April 29th. Prior to that time he had had further discussions with the representatives of the Manitoba Teachers' Society, but was not satisfied with the information he was getting from them. After the transfer it was clear to him that Ms. Beresford from the Manitoba Teachers' Society knew exactly where the Division was coming from.

Storie described the resources that would be available to a teacher at Ninette

School. He believed that if the Grievor assumed the assignment she would have been successful and would have enjoyed it. Storie confirmed that no consideration whatsoever to punish the Grievor was involved in his decision. He wanted to create a situation where the Division could be successful and where the Grievor could support administration. It was not a disciplinary move. Nothing was placed on her file. Nothing was considered or discussed of a disciplinary nature.

With regards to the suggestion that her assignment to Ninette School was being sent to the "boonies", he indicated that small schools are very important to the Division. Leadership is important in small schools as that is how the students themselves develop leadership skills. Small schools require great teachers and enthusiastic individuals. In the past they have been used as a dumping ground.

Storie testified that it was his goal to strengthen the school. He indicated that he has transferred people in the past who did not want the transfer, but that he has never transferred anyone who could not do the job.

On cross-examination, Storie could not recollect whether a student at Killarney School had been charged for assault. He reiterated that he believed that the administration at the school had responded appropriately to the incidents at the school. He indicated that he had no recollection of a male student being on top of a younger girl, and stated that stories get embellished.

He admitted that he and Erickson were of the same view and that Beazley's approach to privacy was different than his approach. He acknowledged that the Grievor had a responsibility to know all the facts.

Storie confirmed that a memo had gone out to all staff in December 2003 alerting them to the problem. Storie stated he took his responsibility seriously regarding teacher transfers. He maintained that he acted in the best interests of both the Division and the students. He confirmed that he transferred teachers regularly.

Storie stated that he wanted to have more information from the Grievor and that he did not think an employer loses all rights to know what is going on with a teacher when she is on leave. He knew that the Grievor was having trouble with the administration.

He confirmed that the Grievor was a highly regarded teacher and had a right to be unhappy as an individual parent. She never expressed that unhappiness to him. He confirmed that when he reported to the Board as to the reasons for the transfer, he mentioned staff reductions and the need to resolve a situation at the school. The Grievor was not talking to the administration at the school. The transfer would relieve that situation. Storie said he was never given an opportunity to address any concerns that the Grievor had with the administration at Killarney School.

Storie denied that he regarded the Grievor as a "whistleblower". He again

maintained that he felt it was in the best interests of the school and the Grievor and that he believed it would be a successful transfer even after learning that there was a retirement at Killarney School. He stated that he felt this was an opportunity to give her a collegial working environment.

Storie denied that Beazley encouraged him to "move" the Grievor. He explained his plans to Beazley and Shaw and they had no objections. He did not consider that the Grievor had two or three years seniority over Riley because they had the same skills and training. He stated that the Grievor would be well organized and that it would help her stress because happiness with administration outweighed any stress resulting teaching a number of grades.

When asked if he had considered whether Beazley was the "problem", Storie stated that Beazley was not faultless, but Beazley was willing to try and make changes. On the other hand, the Grievor did not come to him and discuss her problems. He felt the transfer was the best course of action.

It was suggested again to Storie that Beazley encouraged him to get the Grievor out of the school; that he did not take kindly to the Geer's letter expressing concerns about student safety, and that he was offended. Storie stated categorically that the transfer was initiated by himself and that Beazley had no impact one way or the other. Any suggestion to the contrary would be inaccurate. He informed Beazley about the transfer as he had done in the past.

SUBMISSION OF THE UNION

On behalf of the Union, Mr. Primeau submitted that this grievance was a classic case for the application of s. 80 of *The Labour Relations Act*. The Division has clearly breached its obligation to act reasonably, fairly, and in good faith. It was noted that while there is no one admitting wrongdoing, and there is not a “smoking gun”, the totality of the other evidence is overwhelming and should bring this Board to the conclusion that there has been a breach of the *Act*.

The Union reviewed the relevant evidence. The Grievor attended grade school in Killarney and lives outside Killarney with her husband and son and daughter. She has taught at the Killarney School for 9 years, and all witnesses agreed that she is an excellent teacher and a specialist in early years' education. It was noted that the Board was fortunate to hear from witnesses who have known her for many years and who are experienced in the education field. Con Erickson testified that he would never have agreed to a transfer and what a loss it would be to the Killarney School.

It was pointed out that there was an abundance of evidence about the Grievor's issues with the administration of the school. It was submitted that the issues were very troubling and they would have caused anybody to have a high level of anxiety, stress and fear. The Grievor's daughter was victimized twice, and in discussions with the acting Vice-Principal she was assured that things would be taken care of

after the first incident, but they were not taken care of and her daughter was victimized a second time.

A notice to the teaching staff did not go out until April 12th, after the second assault, and the Geers were not the only parents concerned. The Grievor was dismayed when parents called her at home regarding issues with her daughter. She had been dealing with it as a discipline problem and, in fact, the child had been traumatized. Her overwhelming fear and angst caused her stress and concern. The administration at the school was not dealing with these matters. Principal Beazley had a notion of protecting the perpetrator's privacy.

It was submitted that Beazley was clearly misguided. Nothing precluded him from sharing the information with staff, and a memo should have gone out long before April 4th.

It was pointed out that parents met with the School Board Chair. The Grievor was apprehensive about attending because she was worried about the repercussions. She had every right to have that concern. She talked about the meeting where two groups of parents were encouraged to write to the School Board and were assured that they would be protected. It was submitted that obviously that protection was not there because as a consequence of the complaints, the Grievor was removed from the school. It was argued that no one wanted to be transferred out of this school to Ninette School as it was not a desirable posting.

Quite apart from the Grievor's personal reasons against the transfer, other teachers did not want to teach there because there are proper supports in place there. By transferring the Grievor, this would only increase her stress rather than resolve it.

It was also argued that there was no need to remove a staff person in order to reduce a staff position. Mr. McKnight said that Storie acknowledged this. It should be noted that Storie said the transfer would resolve a situation at Killarney School.

The Grievor was transferred while on sick leave, which is a highly irregular action according to the witnesses called by the Union. McKnight testified that it was his understanding or perception that she had done something wrong.

What might that have been? The Union submitted that all she did was stick up for her child, and being a whistleblower and going right to the Board because the administration had not done their job.

Storie testified on behalf of the Division that it was important to have good teachers at all schools. No one would argue with that. It was submitted that where Storie's position breaks down is that it is important to have someone go into a small school with enthusiasm and the Grievor would be not be enthusiastic as she did not want to go, was on sick leave, and wanted to be in the same school as her children. She drove them to school every day and a transfer would add 45 minutes to 1 hour to her work day.

It was submitted that no right thinking person might think she would want to be separated from her children in those circumstances. Her concerns were very real.

It was argued that it does not matter how the administration described their actions, in a grievance like this arbitrators must look beyond self-serving descriptions to determine motive and to find that employers' actions are disciplinary.

The Union referred to the following legal authorities:

1. *Re Vancouver School District No. 39 and Vancouver Teachers Federation (Jukich Grievance)* (1998) 54 C.L.A.S. (3d) 398 (Korbin) where the grievance was not allowed and a transfer was not seen as a punitive measure. It was important to note that the transfer did not involve a loss of status as is alleged in the case at hand.
2. *Re Etobicoke (City) Board of Education and C.U.P.E. (Biscevan Grievance)* (1994) 37 C.L.A.S. 79 (Low) in which the grievance was dismissed as there was no evidence of disciplinary motivation or bad faith on the part of the employer. Again it was pointed out that the transfer did not involve a change in pay or status. The only change was a change in location. In the case at hand, there is a demonstrated negative impact and loss of status.
3. *Re Campbellford Memorial Hospital and C.U.P.E., Local 2246 or 2247(?)*

(1990) 14 L.A.C. (4th) 129 (Joyce) where a transfer to an undesirable shift involving weekend work was held to be disciplinary.

4. *The Lakeshore Teachers' Association of The Manitoba Teachers' Society and The Lakeshore School Division (Macneil Grievance)* [2004] M.G.A.D. No. 14 (Graham) where the Arbitration Board was dealing with a clause that was very different than in the case at hand. The clause stated in part that "the right to transfer shall be exercised fairly and reasonably, having due regard for the educational needs of the Division, and the interests of the teacher involved". The lack of such wording in this case is why s. 80 of *The Labour Relations Act* becomes so important. What does it mean to act fairly and reasonably? The Union submitted that the School Board has to take into account the relevant circumstances, including the needs of the teacher. If the teacher's interests are disregarded, the actions cannot be fair and reasonable.
5. *The Western School Division No. 47 and The Western Teachers' Association No. 47 (Payne Grievance)* [2002] M.G.A.D. No. 50 (Teskey) in which the conclusion appears to be based on a breach of s. 80 of the Act.
6. *Re Seven Oaks School Division No. 10 and Seven Oaks Teachers' Association No. 10 and The Manitoba Teachers' Society (Treller Grievance)* [2000] M.G.A.D. No. 18 (Graham) where the case again turned on the

specific facts and language of the agreement. A transfer was set aside on the basis that the Division failed to properly consider the educational needs of the students, and the particular skills and experience of the grievor.

7. *Re St. Clair Catholic District School Board and Ontario English Catholic Teachers Association (Odrich Grievance)* (1999), 86 L.A.C. (4th) 251 (Picher) where the Board determined that a transfer of a teacher was disciplinary because there were complaints, concerns and corrective action.
8. *The Transcona-Springfield School Division No. 12 and The Transcona-Springfield Teachers' Association No. 12 of The Manitoba Teachers' Society (Hughes and Honey Grievances)* June 25, 1996 (Wood) where the Board was dealing with very different language, but the case provides guidance as to the factors a Division ought to consider in transferring a teacher.
9. *Re Re Transcona-Springfield School Division No. 12 and The Transcona-Springfield Teachers' Association No. 12* [1995] M.G.A.D. No. 72 (Chapman).

The Board heard evidence from Storie that the Grievor was unsuccessful because she failed to communicate with Beazley, and one was asked to conclude that there was some disharmony with Beazley. The only way to alleviate it is to remove one of the parties, and the Grievor was chosen. It was noted that there was no direct

evidence of disharmony, and if that was the reason and the rationale to move the Grievor to Ninette, surely there should have been more evidence tendered about this disharmony. One would have expected that Beazley would have testified, but for whatever reason he did not. The Board can draw an adverse inference over the failure to call Beazley.

It was pointed out that the Board heard from other witnesses that principals are always consulted about transfers. All that was heard in this case was that the principal did not object. It was submitted that that is simply not credible, and that all the circumstances indicate something else was going on.

While there is no "smoking gun" in this case, the Union submitted that one has to put the pieces together. It was argued that the Grievor was transferred for improper reasons, and simply because Beazley wanted to get her out of the school. It is important to look at her state of mind. She is a mother with concerns about her daughter in the spring of 2004. Why would the Board insist on removing her from the school? She is transferred to a school where there are only 9 students. There was another vacancy in June 2004, and McKnight voiced his opposition. He knew what was going on and he said he felt that Storie was personally offended. It was also submitted that Storie had no business phoning and writing the Grievor while she was on sick leave. Clearly the Grievor was victimized and it is shameful what happened in this case.

In conclusion, the Union requested a rescission of the transfer and an order that the

Grievor be placed back in a similar position at Killarney School as soon as she is medically able to so attend.

SUBMISSION OF THE DIVISION

The Division pointed out that an Arbitration Board cannot alter the terms of the Agreement or make decisions inconsistent with its terms. It noted that while the Union alleged that the transfer was disciplinary, Article 14 refers to discipline in the context of written warnings or suspensions. The Division has the right to transfer under Article 9 of the Agreement.

The Division reviewed the overall nature of the evidence. It contrasted the Union's argument and its invitation to draw inferences without factual support to the uncontradicted evidence of Storie.

It was noted that McKnight is clearly a supporter of the Grievor, which is his right. He testified that in early April, transfer decisions had to be made and this pre-dated Mr. Geer's letter of complaint. At the time, the transfer was being considered and budget restrictions were necessitating staff reductions. McKnight testified about "in-camera" discussions held by the Division.

The Board heard this evidence, but the Division reserved its right to argue that these discussions should not be admitted into evidence. The Division submitted

that evidence was inadmissible under the "Wigmore" rules and relied on the following cases:

1. *Re Government of Province of British Columbia (Ministry of Transportation & Highways) and British Columbia Government Employees Union, Local 1103* (1990), 13 L.A.C. (4th) 190 (Larson);
2. *Canadian Broadcasting Corp. and Canadian Union of Public Employees (Broadcast Council)* (1991), 23 L.A.C. (4th) 63 (Thorne);

To establish a privilege where confidentiality is not presumed, the four conditions are:

1. The communication must originate in a confidence that it will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered, and
4. The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.

The Division asserted these conditions exist in this case, and while McKnight's evidence was of little moment, the Division expressed concern about a precedent being established which would allow in-camera board meetings to become public in a subsequent hearing.

The Division stated the Erickson's evidence was of little assistance. He was at the

High School and was not consulted about the transfer. He provided a hearsay description of what transpired on the playground.

Maxwell was a superintendent ten years ago. He is the Grievor's supporter and advocate. He was not involved in the transfer, and the best one could say is that he was called to testify as to how he might have handled things. Maxwell talked about the perception of teaching in a small school. The Division however noted Storie's view of small school. Six out of eight of the Division's schools are small. They have to be staffed appropriately. Storie's view is a more enlightened one than Maxwell's.

Overall, the Division submitted that none of the Union's witnesses shed any light on the transfer. None were involved even peripherally. While the Union argued that an adverse inference should be drawn as a result of the Division's failure to call Principal Beazley to testify, the Division countered by saying that Storie's uncontradicted evidence was that while he conferred with Beazley, the decision to transfer was his alone. The Union could have called their member Beazley to testify if they so desired. No one came forward, including the Grievor, to testify that Beazley was the person behind the transfer.

The Division then turned to the Grievor's situation. As an early years' specialist, the Grievor was assigned to a school with 23 students, 2 teachers, and one assistant. The Principal was known to her and respected by her. She has access to other resources. She was given every opportunity to consult with Storie about the

transfer and did so through the Union. It is abundantly clear that Storie was attempting to elicit information from the Grievor, that he tried to do it personally, and at the Grievor's request, did it through an intermediary. He gave her an opportunity to confer with the new principal regarding her assignment at Ninette School.

While the Grievor believes there was an ulterior motive for the transfer, the Division argued that it was abundantly clear that there is no factual basis for that assumption. Storie gave direct evidence as to his rationale, the process followed, and what he hoped to accomplish in the transfer.

Suggestions to him of ill or inappropriate motive were rejected and he remained steadfast. He testified that the transfer was not at the request of Beazley or anyone else. It was not a result of the parents' letter of complaint. The transfer was not intended to be punitive or disciplinary. Storie was transferring the Grievor to a good situation and at the same time was fulfilling a request from a teacher for a transfer. It was a "win win" situation.

The Division referred to the legal principles regarding a transfer. The starting point is that management has the right to assign or transfer teachers. The Division referred to Article 4 of Exhibit 12, the statutory form contract which gives the Division the authority to assign work according to the laws of the Province of Manitoba.

The Division also submitted that it had complied with the terms of Article 9 of the Agreement. In response to cases referred to by the Union, it was pointed out that it is necessary to look at the exact wording in the specific agreements. While the Union relies on s. 80 of *The Labour Relations Act* in support of the grievance, the Division pointed out that the intention of s. 80 was not to allow arbitrators to manage, second guess discretionary decisions, to ignore bargaining made by the parties, or the specific provisions of the Agreement. The Division has to administer the negotiated agreement fairly.

The Union referred to certain authorities where a Grievor had suffered a reduction in status and alleged that this was unfair discipline. In the case at hand there was not any discipline and nothing was placed on the Grievor's personnel file.

In summary, the Division argued that it had the right to transfer in accordance with the legislation as modified by the Agreement. It had complied with its obligations and there was not a breach or violation of the Agreement. The parties should be held to the terms of the bargain they struck.

The Division also referred to the following cases:

3. *Re Sudbury Board of Education and Ontario Secondary School Teachers' Federation et al* (1986), 2 C.L.A.S. 19 (Marcotte) where the arbitrator held that the onus of proof is on the grievor to establish an intent to discipline on

the part of the Division. In that case the onus was not met. A requirement for a teacher to travel a further distance was not considered a loss.

4. *Re City of Thunder Bay and Canadian Union of Public Employees, Local 87* (1986), 3 C.L.A.S. 77 (Springate) where the Arbitration Board dismissed the grievance and the allegation of a disciplinary transfer. In that case the teacher alleged that a transfer to a less desirable location was disciplinary. The Board found that the relocation was a valid exercise of a management right and the subjective view of the grievor was not sufficient to establish discipline.
5. *Re Pacific Press (a Division of Southam Inc.) and Communications, Energy and Paperworkers Union, Local 2000* (2000), 90 L.A.C. (4th) 218 (Germaine) where even though the circumstances surrounding the reassignment of a reporter with the Vancouver Sun was deemed suspicious, it was not considered disciplinary because the employer provided a reasonable and plausible explanation for its actions.
6. *Re Canada Safeway Ltd. and United Food and Commercial Workers Union, Local 1518* (2001), 101 L.A.C. (4th) 144 (Burke) where a transfer to a different store to defuse conflict at a worksite was held not to be disciplinary. The grievor's view that the new location was less attractive was not sufficient to categorize the transfer as disciplinary.

The Division reiterated that the transfer letter was not disciplinary. The Union did not meet its onus to establish that the transfer was disciplinary. Cogent evidence is required to make such a determination and it cannot be founded on inferences. There is no evidence that the parents who complained in the letter of April 12th were subject to adverse criticism.

In reference to the sick leave, the Division urged that one should not read anymore into the circumstances than is necessary. The Grievor had no prior history of illness. She went off on sick leave after Spring Break. The Division argued that a message should not be sent to teachers that they can avoid time sensitive employment conditions merely because they are ill.

Further, the Division argued that the transfer has nothing to do with an intention to separate the Grievor from her children. The Grievor is employed by the Division, not the school. She is subject to assignment by the Division. In any event, she resides outside Killarney and commutes to work. Ninette is only 20 kilometres away.

In conclusion, the Division submitted that to suggest the transfer is shameful and was prompted by ill-will is unacceptable. The Division asked that the grievance be dismissed.

REPLY SUBMISSION OF THE UNION

The Union pointed out that the early jurisprudence does not deal with the deemed fairness clause from *The Labour Relations Act*. The Union is not seeking a rewrite of the Agreement, but is asking for “flesh” to be put on the “bones” of the Agreement. It is necessary to read into the Agreement that the Division act reasonably and fairly.

The Union also noted that a number of the cases relied upon by the Division dealt with personality conflicts. In this case, there was no direct evidence of conflict in the workplace or disharmony with the principal.

Further, the Division was informed initially that the Grievor would be away until May. It is well known that when you are ill, the duration of the illness is uncertain.

DECISION

In this case, the Grievor alleges her transfer was in breach of s. 80 of *The Labour Relations Act* and the transfer was tantamount to a disciplinary action. In so arguing, the Union acknowledges that it bears the onus of proof to prove its case on balance by convincing and cogent evidence. It also acknowledges that Article 9 (Transfer) of the Agreement gives the Division a discretion to transfer, all of which is subject to the s. 80 duty of fairness.

Therefore, there is not any dispute in this case about the meaning of the transfer article. The real issue is whether the Grievor has met the onus to prove that the Division's actions were arbitrary, capricious, ill-motivated, and in breach of s. 80 of *The Labour Relations Act*.

The Union, in its closing arguments, allowed that there was no "smoking gun" in this case. The Union argued that the Grievor's transfer was a direct result of her complaints about her school administrator's handling of the incidents at the school. The Union invited the Board to infer an improper motive on the Division's part as they had no direct evidence.

After carefully considering all of the evidence and the submissions of the parties, I find that the Grievor has not met the onus on it. While one could argue that there may be "suspicious" circumstances present in this case, the evidence falls short of that required to prove a breach of s. 80 of the *Act* and that the transfer was disciplinary in nature.

If the Grievor had been able to introduce some direct evidence of the Division's intentions, or alternately been able to impact on Storie's credibility, there may have been a different result.

However, as the Division argued, Storie gave direct evidence as to his decision to

transfer the Grievor. Storie was steadfast in his explanation and was not shaken despite vigorous cross-examination. There is nothing to suggest that Storie was not being candid or truthful.

I agree with the Division's counsel that Storie gave direct evidence as to his rationale for the transfer, the process he followed, and what he hoped to accomplish in the transfer.

He explained in some detail that there is a need to supply small schools with excellent teachers. He also explained that teachers at small schools also deserve an opportunity for transfer after a period of time. None of this evidence was really challenged, and I accept Storie's evidence as to his intentions and his motivation.

Much like the facts in the *Pacific Press* case (cited above), Storie gave a plausible explanation as to the circumstances behind the transfer. As Arbitrator R. Germaine stated in *Pacific Press*:

The Union's case raises a suspicion that the grievor's reassignment was disciplinary. The facts proven by the Union are sufficient to call for an explanation by the employer. Mr. Enchin provided that explanation in the course of his sworn evidence at this hearing. His was the only direct evidence before me in relation to the actual reasons for the grievor's reassignment. It does not eliminate doubt about the real motivation for the reassignment. But it was plausible and I am not persuaded the surrounding circumstances are sufficient to permit me to ignore or reject his evidence. I conclude the Union has not proven the reassignment was a disciplinary measure.

I also agree with the Division's submission that none of the Union's evidence was helpful in gaining an insight into the reasons for the transfer. Most of the witnesses had no knowledge at all. They were all of the view that the Grievor is an excellent teacher. This is not disputed by the Division, but it is not determinative of the issue in this case.

The Grievor herself was not able to give direct factual evidence as to the reason for the transfer. There is no doubt she felt she was being punished, but she was not able to provide any factual underpinning to buttress her feelings.

In the final analysis, and after considering the totality of the evidence, I am not persuaded on balance that the Grievor has proven on balance that the transfer was a disciplinary measure and was in breach of s. 80 of the *Act*. The grievance is therefore dismissed.

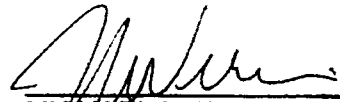
I wish to add a few words regarding the Grievor's personal situation. I can understand why the Grievor would have been concerned about the timing of the transfer. It is extremely regrettable that she has not fully recovered from her illness. By all accounts, she is an excellent teacher. It is hoped that in spite of this ruling, the Division might see fit to working towards a resolution that might allow the Grievor to return to a classroom.

Lastly, I wish to comment on the Division's objection to the introduction of the in-

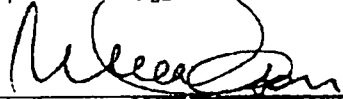
camera proceedings of the School Board. This evidence was not a factor in the ultimate decision in this case and therefore it is not necessary to make a decision in that regard. It is better left to another occasion where further detailed argument can be advanced. I can state however that I have serious concerns about such evidence being introduced at arbitration hearings as this would likely have a serious impact on the ability of Divisions to have frank, thorough, and meaningful discussions on personnel issues.

I wish to thank the parties for their presentation of the case.


DATED at the City of Winnipeg, in Manitoba, this 24 day of December, 2006.


MICHAEL D. WERIER,
Arbitrator

I, concur/^{id}~~dissent~~ to the above Award.


E. WILLIAM OLSON, Q.C.,
Nominee for the Division

I ~~concur~~/dissent to the above Award.


WILLIAM SUMERLUS,
Nominee for the Union

DISSENT TO FOLLOW