ARBITRATION BULLETIN

No. 02-90
August 30, 1990

SEVEN OAKS SCHOOL DIVISION #10

and

LAURA DENISE GREENAWAY

TEACHER TERMINATION

ARBITRATION BOARD:

Chairman:	Jack Chapman
Division Nominee:	Gerry Parkinson
Association Nominee	Jack London

COUNSEL:

For the Division:	R.A. Simpson
For the Grievor and Association:	M. Myers

BACKGROUND

"From the latter part of 1986 to the spring of 1988 Mr. Isler (the Superintendent) received a number of complaints that a "fair amount" of monies and other items belonging to the school, to students and to teachers were missing. In due course the Royal Canadian Mounted Police became involved and interviewed the students, the caretaking staff and the teachers.

In April 1988 the Superintendent was advised that a staff member, i.e. the Grievor, had confessed. He called her to the Division's office, at which time a meeting took place with the Grievor and another physical education teacher. The grievor admitted that she had been charged with a number of thefts and had committed the offences. As a result she was suspended pending the decision of the Division. A letter dated April 28, 1988 was sent to the Grievor, Exhibit 8, which reads as follows:

> "It is my understanding that you have recently admitted to having been involved

in the theft of money and/or other items from West St. Paul and that the matter is under police investigation. Under these circumstances I must place you on official suspension with pay until such time as the Seven Oaks School Board takes other action.

The conditions of the suspension are that you are not to report for work in the Seven Oaks School Division until further notice. Your monthly salary will continue to be posted to your bank account."

Mr. Isler reported this matter to the Division and a letter dated May 25th, 1988, Exhibit 9, was sent to the Grievor:

"This letter will constitute notice to you that I have been directed by the Board of Trustees of the Seven Oaks Division to request your attendance at a meeting of the Board to be held on Monday, May 30, 1988, at 6:00 P.M., at the School Board Offices, 375 Jefferson Avenue, Winnipeg, Manitoba, in order to have you respond to allegations that you have: 1) stolen property of the school division, 2) were in possession of school property, having taken that property without the knowledge, permission or consent of the School Division, 3) have stolen the property of teachers and/or students of West St. Paul School, and 4) have admitted to me that you have taken property of the School Division without its knowledge, permission or consent.

Please be advised that you are entitled to be represented or accompanied by your solicitor and/or a Manitoba Teachers Society representative. I recommend that you consult with your solicitor and/or a Manitoba Teachers' Society representative immediately.

In the event you do not attend at the Board Meeting at the time and place above noted, the Board will proceed in your absence."

Mr. Isler reported to the Division, and on May 5th, 1989 Exhibit 11, he wrote to the Grievor stating the concerns of the Division and invited her to attend the meeting to be held May 15th, 1989.

The meeting took place and, in addition to a number of Trustees and Administrators, the Grievor, Mr. Myers and Dr. Shane appeared. Representatives of the Manitoba Teachers' Society may have been present. In essence, Mr. Myers and Dr. Shane submitted that the Grievor had been ill but had recovered and was able to resume her teaching position. After hearing the submissions and deliberating, the Division terminated the Grievor's contract.

EVIDENCE AND ARGUMENT

The Arbitration Award in its entirety consists of 63 typewritten pages. Considerable summary and comment was written concerning the evidence as well as the argument, both on behalf of the Grievor and the Division. Numerous cases of legal precedent were cited. It should be noted the Grievor did not testify on her own behalf. Much of the Division's argument was that it was up to the Arbitration Board to determine the facts. As the evidence given to the Doctors by the Grievor was obviously subjective there was no concrete evidence for the Arbitration Board to weigh and it should, *Prima Facie,* be accepted that the action of the Division was correct.

THE DECISION

In the majority decision to reinstate the Grievor the award canvassed the question of its own jurisdiction under the Public Schools Act in dealing with "cause" for termination. Excerpts from the majority award follow:

> "At the time of the termination the Division was faced with the undisputed fact that the Grievor had pleaded guilty to the offences, had not raised any defence in the Courts that she wasn't accountable for the offences nor was she pleading insanity or diminished responsibility.
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> There is no question however that the division knew that the Grievor was undergoing treatment with a Psychiatrist and allegations had been made to it in April of 1988 that she was not "able to assume responsibility for her actions" (Exhibit 13, Page 5, supra). The Grievor pleaded guilty to the offences in the fall of 1988. In March of 1989 Dr. Shane met with the Division, at which time the Grievor was applying for reinstatement, and he noted in Exhibit 15 (supra), that the Grievor had been undergoing treatment for a lengthy period of time. When the Grievor was charged with the offences and was placed on sick leave the question of conclusion whatsoever from the sick leave being granted as it was done on a "Without Prejudice" basis and as an act of kindness to the Grievor.
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> Several months after the Grievor pleaded guilty she applied for reinstatement. At that time the Division considered the matter based on the representations of counsel, the submissions of Dr. Shane and reviewed the transcript of the sentencing Judge which included the comments of her counsel at the criminal hearing. The comments to the Criminal Court, in summary, were that the Grievor accepted responsibility for her acts and that she had not pleaded diminished responsibility or a lack of intent to commit the crimes i.e. *Mens rea*, and accordingly had not pleaded insanity. On the other hand, Dr. Shane's reports and verbal representations clearly were that the Grievor "was experiencing a dissociative state, in which her behavior was accomplished in a state of mind over which she had no control". There is obviously a contradiction which should have been addressed. It would appear that the explanation offered by Dr. Shane was rejected. We note that Dr. Ross did not concur in that conclusion of Dr. Shane, in that he opined that her "illness" simply allowed her to cope. However, he did not waiver in his testimony that she was suffering from a mental illness or disorder.
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> The simple fact remains that the Grievor committed theft in the environment of the school, not only from fellow staff members but of school and student property. If we examine the four criteria set forth by Arbitrator Mitchell in the Priske case (supra) we note that only one factor may be applicable. That factor is that the Grievor had an unblemished record over 13 years of service which is more than the 7 1/2 years of service referred by Arbitrator Mitchell. Other mitigating factors were the value of the material stolen, which in that case was "garbage", whereas in this case it was quite substantial. In that case the Grievor had admitted his misconduct within a very short period of time and in this case the incidents continued for slightly less than 2 years. Of some considerable significance is that in the Priske case the misconduct was an isolated incident,

whereas in this case there were a number of incidents. In that case it was an aberration from his normal behavior. In this case the large number of incidents, although constituting a departure from her normal behavior, nevertheless revealed a course of conduct which raises the issue as to whether the concept of aberrant behavior applies to a number of incidents over an extended period of time. The psychiatric evidence is that it may, however Dr. Ross did not know of her confession to the police."

"This case involves clear evidence on the one hand that the Grievor, on a number of occasions over a period of time, stole from her employer and her associates and admitted her culpability in the criminal court. On the other hand the Grievor had an unblemished record as a exemplary teacher for some 13 years. During the court proceedings she admitted her guilt and did not claim mental disability of lack of the ability to form mens rea. The standard of proof in a criminal case is, of course, substantially higher than in a civil matter such as arbitration. In an arbitration one must consider the evidence on a standard of the "balance of probabilities". Even though there are certain inconsistencies in the conclusions of Dr. Shane and Dr. Ross we cannot, without valid reasons, disregard their evidence even though we may, as did Arbitrator Hope, question some of it or view portions skeptically and cynically. Dr. Shane has given an opinion that the Grievor, at the very least had a diminished sense of responsibility. Dr. Ross opines that the Grievor's amnesia, although not constituting a defence in the legal sense, had to be a considered as a factor."

"Much has been said about the failure of the Grievor to give evidence and to be available for cross-examination. It is true that her plea of guilty and the Exhibits filed give us clear evidence as to the facts of the case and that the requirements of criminal justice were met. Although her evidence may have allayed some of the skepticism we had about the medical evidence, the fact remains that such evidence discloses some form of mental illness. We, as was the sentencing judge, are satisfied that her behavior in committing the offences was so abhorrent and unusual that it could only be explained by some mental illness or some other aberration.

However, her not being available for questioning does leave unanswered some serious questions as to her ability to resume her teaching responsibilities."

"As laymen we, even more than the psychiatrists, agree that the diagnosis of mental disorder cannot be established in a finite manner such as a diagnosis which results from an X-ray or blood test. Although we may question some of the statements and opinions of the doctors, and may approach some of their conclusions with skepticism, it would be improper for us to disregard their evidence out of hand. In this case the Grievor's condition must be established on a balance of probabilities. She was obviously guilty of the thefts. We are satisfied from the psychiatrists' opinion that she did have some form of mental disorder which impaired her ability to act rationally. In general terms, (and we are aware of the exceptions) illness, whether physical or mental, does not usually constitute cause for termination. We conclude that the Grievor, on the basis of the evidence, was suffering some form of mental illness and are of the view that the Division should not have terminated the Grievor as that illness, at least according to Dr. Shane, was primarily the cause of her committing the

offences. We hasten to add that we do not attribute any bad faith in any way whatsoever to the Division or the staff and, in fact, compliment them on their concern for the Grievor. They acted in what they perceived to be a proper manner and considered, in their opinion, the best interests of the students, parents, the Division and its other employees. Unfortunately they did not consider or give any weight to the aspect of the mental illness which was stated to them. The Division apparently relied on the fact of the conviction in the criminal court and the representations made by her counsel. The criminal court accepted a plea of guilty and, in any event, such a court considers the evidence on the basis of a different standard of proof than is applicable in an arbitration."

"In view of all of the above, and in particular as there was no expert challenge to the psychiatric evidence we conclude that it would be improper to reject same. We appreciate the hearsay component of their evidence but we must give weight to the expert opinions and we conclude that she suffered some mental dysfunction which caused her to act in an abhorrent fashion. it is difficult to accept that the Grievor who had an exemplary record for some 13 years, would act in the fashion she did without some untoward mental factors."

"We wish to emphasize that we do not in any way condone or approve of the Grievor's acts not do we accept the principle that theft from an employer or one's associates is a trivial matter or is one that is not deserving of the most serious industrial discipline. However in this case, as we have stated, there is no question that the psychiatrists have given their professional expert opinion that the Grievor committed offences under some abnormal mental condition and we cannot disregard that evidence. If there was no evidence of mental illness or disorder, we would have had absolutely not difficulty in holding that the reasons given for the termination constituted cause for termination.

In considering this entire matter we have also examined the concept of the Grievor acting as a role model. We do not accept the comments of Dr. Shane and Dr. Ross that the Grievor would serve as a good role model simply because she is one who has had problems, paid her penalty and overcome those problems. Although there might be some merit in what they say, that aspect of being a role model is not a proper consideration for us. The role model concept we must consider is that defined in the Policy Manual (supra). Under ordinary circumstances a teacher who commits theft, especially in the school environment, would not be a suitable role model in any school. Similarly, there are circumstances where a teacher, because of physical illness might not be able to serve as a role model. If a teacher circumstances where a teacher, because of physical illness might not be able to serve as a role model. If a teacher loses that ability i.e. to act as a role model as a result of a bona fide physical or mental illness, the "cause" for termination would ordinarily not exist unless the "viability" of the employment relationship had been destroyed. We need not define viability. In this particular case, we are not prepared to conclude, on the basis of the evidence before us, that the relationship cannot be viable. That determination can only really be made after the Grievor returns to teaching responsibilities. We have concluded that the Grievor was ill and the psychiatric evidence is that she has recovered although she is still undergoing treatment with Dr. Shane. The recommendations that we have made would permit the Division to ascertain if the employment relationship is viable. However, the

final determination of viability may be a question for the parties or some other tribunal to determine in the future."

ARBITRATION BULLETIN

04-90
December 14, 1990

SEVEN OAKS SCHOOL DIVISION #10

AND

LAURA DENISE GREENAWAY

TEACHER TERMINATION

The following is the decision of the Court of Appeal of Manitoba wherein they quash an Arbitration Board's decision to reinstate the above captioned teacher.

Please refer to Arbitration Bulletin No. 02-90 for details of the termination and resultant arbitration hearing.

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott, C.J.M., Huband and Twaddle JJ A

B E T W E E N:

LAURA DENISE GREENAWAY (Applicant) Respondent	**)**	**R.A. Simpson for the appellant**
- and -	**)**	**Mr. Myers, Q.C. for the respondent**
SEVEN OAKS SCHOOL NO. 10 (Respondent) Appellant	**)**	**Appeal heard and decision pronounced: December 10, 1990**

TWADDLE, J.A. (orally for the Court):

The question on this appeal is the extent to which this Court can interfere with an award made by an arbitration board constituted pursuant to s. 92 of The Public Schools Act, R.S.M. 1987, c. P.250.

The applicant had been employed by the respondent for some 13 years as a school teacher. She was charged and later convicted of several thefts, some from the School Board, some from students and some from colleagues. There was a School Board hearing at one point when the applicant was suspended from her duties pending the disposition of the charges against her. Later (still before the charges were disposed of) the School Board agreed, on a without prejudice basis, to the applicant being placed on sick leave pending a resolution of the criminal proceedings.

Once the criminal proceedings were concluded, the applicant asked that she may be permitted to resume her teaching duties. A further School Board hearing was convened. At this hearing the applicant appeared with counsel. A psychiatrist was called to testify that she had been suffering from a mental illness at the time of the offences, but that the prognosis was good. Notwithstanding the psychiatric evidence, the School Board was of the view that the applicant's criminal conduct and its effect on her status as a role model gave the Board cause to terminate her services, and it did so.

The applicant asked that the question of the existence of cause be referred to arbitration pursuant to s. 92 of The Public Schools Act. On such an arbitration, the issue is "whether or not the reason coven by the school board for terminating the agreement constitutes cause for terminating the agreement." (Section 92 (4L d)).

After a full hearing, a majority of the Board of Arbitrators concluded that "the grievance be allowed", wording their award to conform to the issue statutorily before them by saying, "the reasons submitted by the Division do not constitute cause."

In our view, the majority went beyond the question of whether cause existed for termination and decided instead what they thought the School Board should have done They found facts which, on any view of the matter, constituted cause for dismissal and then went on to say that, in their view, in the particular circumstances the applicant should not have had her employment terminated. In our view, it is **NOT** the function of an Arbitration Board under The Public Schools Act to decide the consequence: the Arbitration Board should have confined itself to the factual question of whether cause existed.

Mr. Myers submits that we should not interfere with an award made by an Arbitration Board in the exercise of its discretion unless it is palpably wrong. We do not accept that as the proper test in a case under The Public Schools Act but, even if it were, we are of the view that it was palpably wrong to conclude that the crimes of the applicant, even if committed whilst ill, did not constitute a cause for dismissal.

The question as to whether, there being cause dismissal should follow is one for the School Board to make: not the Arbitration Board. In all the circumstances, we would allow the appeal, set aside the award and substitute an order that the School Board had cause for terminating the applicant's employment.

PLEASE NOTE: Underlining is ours.