

# **ARBITRATION**

# **BULLETIN**

No. 03-89

December 8, 1989

## **ABANDONMENT OF POSITION**

### **AN ARBITRATION BETWEEN:**

**THE ST. JAMES-ASSINIBOIA SCHOOL DIVISION NO. 2**

**AND**

**AND THE ST. JAMES-ASSINIBOIA TEACHERS' ASSOCIATION NO. 2**

### **MICHAEL BAXTER**

Chairperson	Mr. Jack Chapman, Q.C.
Board's Nominee	Mr. Rob Simpson
Association's Nominee	Mr. Richard Daley
Counsel for the School Board	Mr. G.D. Parkinson
Counsel for the Association and Grievor	Mr. M. Myers, Q.C.

### **THE EVIDENCE**

On May 4, 1988 Mr. Wieler, the principal of the school, received a telephone call from the Grievor. Initially he was advised by the Grievor that the Grievor wouldn't be in as he was not feeling well. The Grievor then asked if "he was in trouble as he had heard something was going on". Mr. Wieler did not deny this. The Grievor then said, "my conscience is clear" and advised Mr. Wieler that he was going "to get it cleared up and wouldn't be in today". Mr. Wieler suggested to him that it would be a good idea. He expected him to be at work the next day. May 3<sup>rd</sup> was the last day the Grievor taught. He subsequently tried to reach the Grievor but was unsuccessful in doing so. The next time he heard from the Grievor was on Tuesday, May 10<sup>th</sup>, at which time he received a call at school from the Grievor. The Grievor informed that he was in Fort Pearce, Florida, and that "was a town where the bus took him". The Grievor indicated that he was coming back to clear up matters. Mr. Wieler told him that this plan of

action was fine and he should do that. He did not give the Grievor any approval for his absence. The Grievor did not get in touch with him again, and didn't teach any further.

The call Mr. Wieler received on May 4<sup>th</sup> was at his home, which was very unusual. If a teacher was going to be absent they usually called at approximately 8:30 a.m. at the school. If they cannot reach the school they have a card which lists a number that they are to call to either cancel a substitute or to arrange for one, and also to advise if they will be in the following day in the event that they were absent on a specific day. Mr. Wieler did not receive any advice that the Grievor had called again on May 4<sup>th</sup>, or on any subsequent day up to the time of the telephone call on May 10<sup>th</sup>.

Mr. Stefanson, the Superintendent of Personnel gave evidence that "he tried to contact the Grievor on May 13<sup>th</sup>. He had received information that Mr. Wieler had previously tried to contact the Grievor but was unsuccessful. There was no request for leave nor did anyone make any approaches to the Division on the Grievor's behalf. The Division had no idea if or when the Grievor would ever return to work. Accordingly a notice was prepared on May 13<sup>th</sup>, which advised the Grievor that a recommendation would be made to the Board of Trustees of the Division to terminate his contract. The Division retained a Process-server in order to deliver the letter to the Grievor's home. Filed as Exhibit 8 was a report of the Process-server, which stated, inter alia, that he was unable to serve the letter on the Grievor as the Grievor's wife advised him that the Grievor had gone to England. She further advised him that she did not know when the Grievor would return.

On or about May 24<sup>th</sup> Mr. Stefanson received a telephone call from a representative of The Manitoba Teachers' Society advising that she had spoken to the Grievor and told him to obtain medical advice. She did not advise at that time that the Grievor was under doctor's care. She called subsequently and advised that she would attend at the Trustee's meeting. She advised, on behalf of the Grievor, that he had been distressed and she requested the matter be adjourned to receive the doctor's report. In the second conversation she advised that the Grievor was under doctor's care and the certificate would be forthcoming. None was ever received and no indication or evidence of any medical problem was filed. No leave of absence was ever formally requested on behalf of the Grievor.

The Grievor, Mr. M. Baxter, gave evidence. "He confirmed that he had called Mr. Wieler on the morning of May 4<sup>th</sup> and asked him to confirm if he was in trouble. The Grievor claims that he said that "in view of the investigation – under no circumstances could I come to work". He submitted that Mr. Wieler said "ok". He said that when he had the conversation with Mr. Wieler, it was simply a question of going through the motions. He had a bad year and was subject to stress because of Police investigation. He felt that he was having an emotional breakdown. His mother had died although he was unable to tell us when. He then packed a suitcase, went to his bank, withdrew one-half of his bank account and went to Winnipeg. He went to the airport and bought a one-way ticket to England. He claims that he wanted to see his mother's grave. He checked his baggage to England and placed his money in it. When he arrived in Toronto he noted a Greyhound bus at the airport and bought a ticket on it.

He felt that he was running from his problems and was in a daze. He stated that he couldn't attend at school because he needed help. His understanding was he was taking time off as he had accumulated sick leave. In any event he took that bus to Montreal, then went by bus to New York, and then to the South-eastern United States.

He spent four or five days on the bus. He then called home from Fort Pearce and spoke to his wife who told him that the Police had contacted his home and also that the Principal had contacted his home. The Grievor stated that he felt "shaky" and then called the school. Mr. Wieler seemed sympathetic to him after he told him that his life was falling apart. He did not dispute that he told Mr. Wieler he was coming home. Instead he went to England, allegedly to obtain his suitcase. When he got there he found that his

luggage had not been sent to England, as he was not a passenger on the plane. It had been held at the airport security office. He ultimately came back to Winnipeg and, in due course, contacted the Manitoba Teachers' Society. He did not contact the Division or Mr. Wieler. He denied that he ever restricted his conversation with Mr. Wieler on May 4<sup>th</sup> to being absent for only that day.

He claimed he never intended to resign his position nor did he abandon it. He submitted that he was sick and that he was an employed teacher who needed help."

Dr. Fred Shane, a qualified Medical Practitioner & Psychiatrist gave evidence, as he had seen the Grievor on May 30, 1988. "Dr. Shane reviewed his report and said that when he saw the Grievor he was concerned about the Grievor's state of mind. In his view the Grievor, at the time i.e. in 1988, had told him that his reaction to the allegations was one of "panic, fear and complete psychological disorientation". He was of the view that the Grievor only had a "fragile" ability to form an opinion and that one doesn't usually impulsively resign from one's livelihood. Usually actions of that type are given a lot of thought. He stated that the Grievor's way of dealing with the crisis was "he had to be away – he was in a frenzy" and needed time to think. By the end of May, after his return, he appeared more coherent although the anxiety was still present.

During cross--examination he agreed that, in May of 1988, at the time of the interview that the Grievor was sufficiently coherent and that what he said was reliable. It was suggested to him that he was satisfied that the Grievor was competent. He stated that competence was not the issue. He confirmed that he had not instructed the Grievor to stop teaching. He also agreed that the Grievor was not "committable" and accordingly he took no steps to have him committed. He acknowledged that the man he saw was competent. He also agreed that when he was asked to consult with the Grievor in May of 1988 he was not asked to form any opinion as to whether or not the Grievor had or had not resigned and whether he could reasonably make such a decision.

## **THE DECISION**

After carefully considering all of the relevant evidence and the authorities, we are of the opinion that the Grievor did abandon or quit his position. There is an obligation, both under the statutes and under the Collective Agreement, on the Grievor to attend at school for the purpose of teaching on designated teaching days. The evidence establishes, to our satisfaction, that on May 4<sup>th</sup> the Grievor contacted the Principal and advised that he wanted one day off to investigate and clear up matters. In addition to Mr. Wieler's testimony we note the comments of Dr. Shane respecting that conversation (supra).

The Grievor, instead of investigating the matter, very shortly thereafter purchased a one-way ticket for England. He did not go there but left for parts unknown in the United States. Some 6 days later he contacted the Employer and said he would be returning. He then proceeded to leave for England, allegedly to take possession of his suitcase. He then came back to Winnipeg on May 19<sup>th</sup> or 20<sup>th</sup> and still did not consult on his behalf until his representative appeared before the Division. At that time no medical evidence was filed. At the Arbitration hearing the only medical evidence was Dr. Shane's report prepared a year earlier, which did not specify any illness or disability. It may well be that the Grievor was preoccupied with marshalling evidence to defend himself against any charges relating to the alleged sexual harassment, but we find it hard to accept that during the period of the suspension, no evidence was filed by or on behalf of the Grievor to show that he was "sick". We have received evidence that the Division, on occasion, retroactively approves a leave of absence. Whether or not it would have been granted in this case is, of course not known, but it is clear that the Grievor did not even try. The evidence is clear that the Grievor had been advised that the Division was trying to contact him. He returned to Winnipeg on May 19<sup>th</sup> or 20<sup>th</sup> which was before the Trustees made any final decision to act on the recommendation of the Division's professional staff and did not, even then, attempt to establish that he had been sick. He may have been preoccupied with other considerations, however he had told Mr.

Wieler that he would be coming back to Winnipeg. He knew from information that his wife had received that the Division was trying to contact him. We find it difficult to accept that, if the Grievor did want to maintain his position with the Division, he would not at the very least have contacted the Principal and/or other Division officials. The fact situation is considerably different than that which was considered by Arbitrator Outhouse in the Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union (supra). In that case, as mentioned, the Grievor revoked his resignation the very next day.

In our view the evidence is overwhelmingly convincing that the Grievor, initially at least, did not intend to continue as a teacher with the Division. It would appear that on his return to Winnipeg he was concerned about possible criminal charges and not about the status of his employment. He told the Principal that he would be absent for one day, he then cleaned out one-half of the bank account which he held with his wife, he had purchased a one-way ticket to England, he went to Toronto and then took a bus. He did not go to England but went to the United States. Some six days later he contacted Winnipeg and said that he would be returning. Instead of returning to Winnipeg he went to England, allegedly to pick up his suitcase. He then returned to Winnipeg and did not contact the Division for some 4 or 5 days, at which time a representative of the Association made contact. There is no evidence that he attended any doctor to confirm his illness other than his attendance on Dr. Shane with respect to potential criminal proceedings. None of these acts are consistent with the actions of someone who intends to return to his position. Argument has been submitted that the Grievor was sick and under considerable stress. Although he was undoubtedly under stress, there is no indication from Dr. Shane that the Grievor was so sick as to require treatment.

We acknowledge that Dr. Shane pointed out that the Grievor had indicated that his reaction to all of the allegations was one of "panic, fear and complete psychological disorganization". If such was the case his actions on May 4<sup>th</sup> might have been understandable. However his subsequent actions after he telephoned the principal did not show any positive steps to reinforce his claim that he wished to return to the Division. The evidence we have is that he did not appear in person at the Board meeting and was represented by the Association who "read a statement on his behalf".

After reviewing all of the evidence and the authorities we are satisfied that the Grievor must be deemed to have abandoned his position. If however we are incorrect in our decision that he abandoned same, we nevertheless are of the view that the Division was entitled to terminate the Grievor for being absent from his teaching duties without approval. The Grievor, as any teacher, is under a contractual and statutory obligation to carry out his or her duties as a teacher. His failure to do so, without approval, constitutes a fundamental breach of contract. The Collective Agreement, as noted earlier provides a leave of absence to be granted in a number of circumstances. Article 5.08(a) states, inter alia, that teachers must receive permission from the Board for all forms of leave which are not defined in the statutes or in this Agreement. The same Article 5.08(a) provides:

"Teachers must receive permission from the Board for all forms of leave which are not defined in statutes or in this Agreement. Deductions will be made at the per diem rate. If under emergency or extenuating circumstances a teacher does absent himself or herself from his or her duties, he or she may request special consideration in writing and, on Board approval obtain remission of the per diem deductions. The teacher shall submit the written request through the principal who will forward said written request along with his/her written recommendation to the Board" (emphasis added).

It is abundantly clear that the Grievor has breached not only the statute and his statutory contract but also the Collective Agreement. There is no question that the Grievor, even if he did not abandon his position,

was absent without approval. In our view this was inexcusable. We find no extenuating or mitigating circumstances which in this case would have justified a penalty less than termination. We note, ex gratia, that the actions of the Grievor so detrimentally affected his employment that any ongoing relationship would not be viable.

Having concluded that the Grievor abandoned his position, neither the suspension nor the termination are arbitrable. However, even if the Grievor had not abandoned his position we are satisfied that actions of the Grievor are not justified. Therefore, we would dismiss the grievances filed under the Collective Agreement and further we would find that the Division had cause to terminate the Grievor's employment. Both grievances are disallowed.