

## **PRELIMINARY**

The arbitration hearings were conducted in Gander and St. John's, NL commencing on June 6, 2006, continuing on June 7, 2005 and concluding on August 1, 2006.

The following witnesses were called and gave evidence under solemn affirmation:

1. Geraldine Devereaux, the Grievor.
2. Stephanie Tuff, Administrative officer with Association.
3. Derrick Dalley, Principal, J. M. Olds Collegiate.
4. Lloyd Burt, Principal, Lewisporte Collegiate.
5. Max Rice, retired Principal with Nova Central School District.
6. Claudine Wells, Assistant Director of Personnel, Nova Central School Board.

The following documents were placed into evidence with the consent of the parties or through introduction by a witness:

Consent 1 Provincial Collective Agreement – NLTA September 2, 2001 to August 31, 2004

Consent 2(a) to (f) – grievance and other letters in grievance process

Exhibit GD 1 - Resume, Geraldine Devereaux

Exhibit GD 2 – Grade Report MSVU Course: Students with learning difficulties

Exhibit GD 3 – Extract Athabasca University Course: Biological Psychology

Exhibit GD 4 – Transcript Athabasca University

Exhibit GD 5 – Transcript MSVU courses towards M.Ed. degree

Exhibit GD 6 – Grade Report Acadia University Course: Topics in Counselling

Exhibit GD7 – Transcript Memorial University Courses

Exhibit GD 8 – 1994 Assessment of Geraldine Devereaux by M. Guy

Exhibit GD 9 – 1994 Assessment of Geraldine Devereaux by Carl Boyd

Exhibit GD10 – 1994 Assessment of Geraldine Devereaux by Roland Hamlyn  
Exhibit GD11 – 1994 Assessment of Geraldine Devereaux by Max Rice  
Exhibit GD12 – 1994 Assessment of Geraldine Devereaux by Diana Yates  
Exhibit GD13 – Letter from Lloyd Drover to G. Devereaux – June 5, 1996  
Exhibit GD14 – Letter from Randell Mercer to G. Devereaux – April 30, 1998  
Exhibit GD15 – Letter from Richard Harvey to G. Devereaux – March 30, 2005  
Exhibit GD16 – Reference for G. Devereaux by Ann Cody – September 29, 2005  
Exhibit GD17 – Letter from G. Devereaux to Claudine Wells – August 19, 2004  
Exhibit ST 1 – Stephanie Tuff’s notes from meeting of October 8, 2004  
Exhibit ST 2 – Stephanie Tuff’s notes in preparation for October 8 meeting  
Exhibit CW 1 – Guidelines for Employment of Retired Teachers  
Exhibit CW 2 – Board Report on Employment of Retired Teacher (for form only)  
Exhibit CW 3 – Board Report on Employment of retired teachers 2004/2005  
Exhibit CW 4 - School Board Guidelines re teacher assessment - 2001

## THE ISSUE

The issue for resolution is whether the Employer violated Article 6.03 of the Collective Agreement by failing to make a proper assessment of the Grievor’s competence, suitability and qualifications in relation to the vacant position of guidance counsellor at Riverwood Academy and thus abused its management rights in violation of Article 39 of the Collective Agreement.

## THE COLLECTIVE AGREEMENT

The following Articles of the Collective Agreement (Consent 1) are believed to have some impact on the outcome of this dispute.

*Article 6: EMPLOYMENT OF TEACHERS*

...

6.03 *The basic criteria for the selection of teachers shall be competence, suitability and qualifications as assessed by the School Board.*

...

6.12 *In filling vacant positions in accordance with Clause 6.03, the Board shall*

*(a) make reasonable effort to accommodate requests from teachers already employed with the Board in a continuing contract.*

*(b) subject to Clause 6.12 (a), give consideration to applications from teachers who have served in replacement and/or substitute positions with the Board before applications from teachers with no previous experience with the Board.*

...

Article 14: *EVALUATION*

14.01 *The prime purpose of evaluation shall be the increased effectiveness of personnel in improving instruction and educational environment.*

14.02 (a) *Subject to Clause 14.02(b), all evaluations, both formative and summative, shall be conducted openly and with the knowledge of the teacher(s) and the teacher(s) shall be informed as to which type of evaluation is being conducted.*

*(b) For the purposes of the Article:*

*i) formative evaluation is a process of evaluation which occurs to improve the professional performance of the teacher(s);*

*ii) summative evaluation is the process of evaluation which uses its results to make decisions in areas of employment;*

*iii) the evaluation of a probationary teacher shall be comprised of both formative and summative processes;*

*iv) any summative evaluation made on a tenured teacher must be preceded by a formative evaluation.*

*(c) the School Board shall consult with the teachers in determining the nature of the support which may be required to address suggestions for change and improvements.*

*(d) Probationary teachers will be given an opportunity to address concerns which may be identified in the evaluation process.*

...

*Article 39: MANAGEMENT RIGHTS*

*39.01 Except as specifically abridged, delegated or modified by the Agreement, management functions, rights and powers now existing are recognized by the Association as being retained by the School Boards and the Government as the case may be.*

FACTS

The facts giving rise to this issue are subject to some dispute as between the witnesses. Thus, a review of the conflicting evidence of some of the witnesses will be necessary in order to understand the dispute.

The Grievor has significant training and educational background in the field of guidance counselling, but has only held term appointments as a teacher since commencing her employment in 1999. Her teaching career began in Conception Bay Central School in 1965-66, she moved to Roncalli School in Avondale for the next two years, then to Hamilton Elementary in Happy Valley-Goose Bay, Labrador for one year. At these locations, however, the Grievor taught various academic subjects, but was not working as a guidance counsellor. She moved to Gander in 1972, but did not teach except for limited substitute positions for a number of years while she raised her family. She then moved to St. John's in 1993 with her family and did some additional substitute teaching. In 1994, she attended Mount St. Vincent University in Halifax, Nova Scotia.

In the fall of 1994, she obtained her first term employment as an "itinerant" guidance counsellor with the Lewisporte Integrated School Board, working 2 days a week in Twillingate Elementary, 1 day at Newville Elementary, 1 day at Summerford Primary and 1 day at Morton's Harbour School. At these locations, her duties included personal counselling of students, intake, assessments, play

therapy and some classroom sessions. It is not common practice to evaluate the performance of term employees in the Newfoundland and Labrador school system, but while in this position, the Grievor initiated and obtained evaluations of her work performance from the various supervisors under whom she worked (Exhibits GD 8, 9, 10, 11 and 12). In none of these assessments were there any negative observations regarding her work performance, except perhaps for the observation in one that she should continue “university courses in counselling theory and practice”. She subsequently engaged in such additional areas of training. In her view, her performance as a guidance counsellor was at least adequate. At the end of her 2 year term, she applied for but was unsuccessful in obtaining the position of Educational Psychologist with that Board.

The Grievor then went to Bonavista for a term, working as a guidance counsellor at Matthew Elementary and at Catalina Elementary. In September 1997, she worked as an Assessment Specialist with Riverwood Academy, but had wide responsibility for many schools in the Gander Bay area including schools in Twillingate, Fogo Island, Musgravetown, Carmenville and Stoneville. During this period, however, she performed assessments only and did not work as a full guidance counsellor.

Her employment as a guidance counsellor involved in all aspects of that career commenced once again in 1999 in the community of New World Island, Notre Dame Bay where she again worked in multiple schools, dividing her weekly time between Newville Elementary (1/2 day), Summerford Primary (2 one-half days), Inter Island Academy (2 one-half days) and Coaker Academy (1/2 time each day). In this position she worked under various supervising principals including Derrick Dalley at Newville Elementary, Lloyd Burt at Coaker Academy and Max Rice at Summerford Primary, each of whom also gave evidence in this arbitration hearing.

After three years working once again on term contracts, the Grievor and her husband, who had retired, decided to travel for a period. In June 2004, she applied for a job as a guidance counsellor in Musgrave Harbour, but she ultimately withdrew that application before the position was awarded. That position was also with the Nova Central School Board.

In August 2004, the Grievor applied in writing for the position which gives rise to this grievance (Exhibit GD 17). While that application referenced 3 different positions, it is agreed between the parties to this dispute that only the position of guidance counsellor at Riverwood Academy is under contention. That position was not filled by any candidate for the 2004-05 school year, but some of the duties were assumed by an itinerant Educational Psychologist employed at the Board office. The person working in that position was a retired teacher, a fact which troubled the Grievor since retired teachers are only to be re-employed by a school board under exceptional circumstances. Believing that she should have been offered that position, the Grievor decided to investigate.

The Grievor maintains that she contacted the School Board on two occasions, in the fall of 2004, once speaking to Florence Pike, a administrative employee, and once to Claudine Wells, the Assistant Director of Personnel. When speaking with Ms. Wells, the issue of why the guidance counsellor position was not awarded to the Grievor was raised. It is the Grievor's evidence that, in this meeting, Ms. Wells advised her that, according to the principals with whom the Grievor worked in New World Island, there were problems with her work there and that she should "never be allowed to darken a school door in Newfoundland again!" The Grievor explains she was understandably "taken aback" by this comment, given that she had received no negative comments about her performance, so she decided to contact the Association and ultimately to file the grievance.

Following this rejection in the fall of 2004, however, the Grievor was later able to successfully obtain another term position as guidance counsellor at St. Peter's Junior High in Mount Pearl from mid February to the end of June 2005. Following this employment, she was able to obtain positive evaluation of her performance from the school principal (Exhibit GD 16).

Stephanie Tuff was the Association representative who assisted the Grievor in investigating her concerns. She first met privately with the Grievor on October 7 and then on October 8 attended a meeting at the School Board office involving the Ms. Tuff, the Grievor, Claudine Wells and John Head, Director of Personnel. Once again, the issue of the Grievor's performance at New World Island was the subject of discussion. The position of the school board representatives was that, while they would not get into details, the Grievor's work performance there was "not positive". But at that meeting there was no discussion of the "darken a school door" comment allegedly made by Ms. Wells in her earlier private meeting with the Grievor.

Derrick Dalley, who gave evidence for the Employer, has more recently been employed as a principal, also has training in and has worked as a guidance counsellor. He detailed his observations about the Grievor's performance while he worked as principal at Newville Elementary for the three school years from 1999 to 2002. Although he confirmed that she was a good, kind and well liked employee, the Grievor's performance as a guidance counsellor was less than satisfactory during that time. He felt she did not display the level of energy need for his "difficult" school, her assessments were not performed on a timely basis, and that the Grievor did not have a "presence" in his school after three years, even acknowledging that her working time there was only part-time. He felt this was a real deficit for which the Grievor was responsible. When challenged that he did not discuss his concerns with her at the time of her employment there, Mr. Dalley felt that his comments to her at the time should have been taken by her as observations requiring attention. When asked why

her one-year term position was renewed two additional times, he commented that, even with her deficits, having the Grievor working in his school was better than having no guidance counsellor.

Lloyd Burt was the principal at Coaker Academy while the Grievor worked there on a half-time basis from 1999 to 2002. He related his experience working with her and indicated that he had to have a “corrective” interview with the Grievor. He felt that she “overacted” in some counselling sessions with students, which was not a proper response to the child’s issues. But his greatest concern was that at the end of her three-year work period, there were some students who did not even know who she was in terms of the school environment or personnel. He concluded that he simply did not have confidence in her ability to get the job done. He recalls later conversations with John Head of the Nova Central District where his concerns over the Grievor’s performance were discussed.

Max Rice, who is now retired, was principal of Summerford Primary during the period when the Grievor worked there. He summarized her performance issues as displayed by a lack of initiative; she was reactive as opposed to proactive and did not make good use of her time. He also had concerns about her assessments being done on a timely basis. He also recalled discussing these concerns with John Head in a telephone conversation in 2004. When asked why his verbal assessment of the Grievor’s performance in 1999-2002 was different from his written assessment of her performance in 1994 (Exhibit GD 11), Mr. Rice explained that the Grievor’s role in the prior period was different from her role during the later period.

Claudine Wells was the Assistant Director of personnel for the Nova Central School Board during the time when the Grievor made application for the position at Riverwood Academy for the position of guidance counsellor in the fall of 2004, the issue which gave birth to this arbitration. She explained that

John Head would have taken care of the process of reviewing applicants for the vacant position in Musgrave Harbour earlier in the year, but that she was involved in the 2004 competition at Riverwood.

The position being offered at Riverwood Academy was a permanent position as guidance counsellor, not a term position. In her application for that position (Exhibit GD 17), three references were given on the Grievor's application, one of whom was Derrick Dalley. It was Ms. Wells who reviewed and assessed that application. Even though she was aware of concerns that Mr. Head had noted arising from his prior review of Ms. Devereaux's performance in relation to the Musgrave Harbour position, she decided to contact all three prior supervisors of whom she simply asked the question: "Would you recommend Ms Devereaux for a permanent position?" In each case the answer was "No" and there were a lot of concerns expressed over her performance as a guidance counsellor in those schools.

Since Ms. Wells was responsible to fill an important staff position at Riverwood Academy, she was concerned that the Grievor was not suitable for that position, and so it was not offered to her. To use Ms. Wells' words, the comments by the Grievor's prior supervisors were "scathing".

Ms. Wells acknowledged meeting with the Grievor privately to discuss why the Riverwood position had not been offered, but denied adamantly that she used any language which would have lead to the inflammatory comment attributed to her by the Grievor's version of that meeting. She explained that in personnel matters she would never use language that would demean or embarrass an unsuccessful employee.

Finally, a number of employment policies were put into evidence through this witness including the Government's "Guidelines for Employment of Retired teachers" (Exhibit CW 1), and School Board guidelines surrounding personnel

issues, including one on “Guiding Principles for Personnel Assessment – Policy 409”, another entitled “Teacher Assessment – Policy 410” and one entitled “Staff Selection Process – Policy 402” (each of which is contained in Exhibit CW 4).

## THE PARTIES’ POSITIONS

### The Association

The Association submits that the Employer erred in its assessment of the Grievor’s application for the position since she held the criteria essential for the job, and the real problem was in the adequacy of the Board’s assessment of her competence, suitability and qualifications, the test provided under Article 6.03 of the Collective Agreement.

The Association contends that the technical qualifications of the Grievor as a guidance counsellor are well established by the evidence of her training and employment experience. It also argues that in determining competence, the test for exclusion is that she must be found not competent rather than losing on a measurement of relative competence compared to other candidates. On the question of suitability, the Employer must satisfy the arbitration board that its decision was not (1) arbitrary, (2) discriminatory, (3) based on bias or bad faith, and (4) that it must stand the test of reasonableness. Arbitral authorities were submitted in support of that conclusion.

As to the good faith of the Employer, the Association submits that this must be questioned in light of the “never darken the door” comment made by Ms. Wells. (There were no submissions made by counsel on alleged discrimination or bias concerns.)

Regarding reasonableness, the Association submits that the dichotomy between the written performance assessments and the subsequent verbal references given by the Grievor's prior supervisors could not be reconciled and the Employer, faced with that difficulty, should have used the interview process to make an assessment of her suitability. It also argues that the decision not to interview the Grievor was an unreasonable decision. The Grievor should have been presented with the fact that her prior supervisors were negative about her performance and she should have been given the opportunity to confront those suggestions of poor performance. The Association asks: If the concerns over her work performance were so bad, why was the Grievor able to obtain and hold a guidance counsellor position at St. Peter's Junior High just 6 months later and receive a positive work evaluation afterwards? (Exhibit GD 16)

The Association also argued that, under the school's guidelines, particularly Policy 402, the Grievor should have received an evaluation of her application by a duly appointed selection committee, not just a review by the Assistant Director of Personnel. In failing to comply with its own policies, the Employer once again failed the test of reasonableness. And on the facts of this case where a retired teacher was hired to perform the duties which the Grievor would have performed if she had been hired, there is a heavier obligation on the Employer to clearly show that the Grievor should not have been hired. Given her ability to perform in a similar job just a few months later, the Employer has not met its own policy objectives.

As a remedy for the grievance, the Association seeks compensation for the Grievor from the time that she ought to have been awarded the position at Riverwood Academy up to the date that she accepted employment at St. Peter's Junior High.

### The Employer

The Employer acknowledges that there is no question of the Grievor having adequate technical qualifications for the position of guidance counsellor at Riverwood Academy; rather, the issue in contention is the Grievor's competency and suitability for that vacant position. It submits that an interview would not have answered the troubling questions surrounding the performance concerns held by her prior supervisors, namely, her lack of initiative, her inability to complete her work in a timely fashion, her lack of "visibility" in the schools in which she worked and her lack of rapport with students for whom she was responsible as guidance counsellor. These are not personality issues, but professional competency ones which the Employer is entitled to consider.

The Employer also cautions that this is not a grievance alleging a breach of Article 6.12 of the Collective Agreement; it alleges only a breach of Article 6.03. The competence and suitability as assessed by the Employer are the only issues. In this case, all three reference checks provided similar concerns and would not recommend the Grievor for a permanent position as guidance counsellor. The fact that she was able to obtain term employment on a continuing basis for three years as a guidance counsellor in rural Newfoundland is more likely a commentary on the lack of availability of such resources in those areas.

The Employer rejects the Association's argument that it is entitled to rely on an internal policy of the School Board to create an argument that such a policy creates a collective bargaining entitlement for the Grievor.

The real issue is the right of the Employer to rely upon the comments of referees in its determination of suitability and competency. All three referees raised legitimate concerns about performance and at least two of them gave

similar comments to the School Board on two separate occasions. An employer is entitled, acting in good faith, to rely upon those references in its quest to determine the suitability of a candidate. In the face of such detailed concerns, general letters of “commendation” given earlier by supervisors at the end of particular terms of employment are not a significant positive factor.

As to the alleged “never darken the doors” comment attributed to Ms. Wells in her subsequent meeting with the Grievor, the Employer argues that it did not happen. Alternatively, even if it was made, then it was said after the assessment of her candidature for the vacant position and had no impact on the Employer’s earlier decision-making process. It also notes that there was no mention of such comment in the meeting between the Grievor, Ms. Tuff and the Employer’s representatives immediately following the decision not to hire; had it been said, posits the Employer, it would surely have been mentioned at that meeting.

Based on the existing arbitral jurisprudence, the Employer has the right, acting reasonably, to make a determination of suitability and in doing so is entitled to rely on honest comments from prior employers. The grievance should be dismissed.

## CONSIDERATIONS

The parties are agreed that the duty and obligation of the Employer is set out in Article 6.03 of the Collective Agreement where it says:

*6.04 The basic criteria for the selection of teachers shall be competence, suitability and qualifications as assessed by the School Board.*

An arbitration board must first determine its proper role in reviewing the actions of an employer. The employer has a duty to assess three criteria and

the process of assessment would appear to be subjective, to a degree at least. The words “as assessed by the School Board” allow of no other probable meaning. But this does not mean that the assessment process cannot be subject to scrutiny by a board of arbitration. In Terra Nova Integrated School Board – Sceviour, unreported, Roil, 1987, at page 11 the following uncontroversial standard was stated, that time in relation to Article 6.04, but it would equally apply to a subjective assessment made under Article 6.03:

*“This Board accepts the position, substantially adopted by both legal counsel, that the (arbitration) Board must have the jurisdiction to review this subjective decision to assess whether that (employer’s) decision was made in good faith, fairly and reasonably based on the information available, and on considerations legitimately determined as being attributable to qualifications and suitability.”*

To that test for a review of decisions made under Article 6.04, this current Board in reviewing this Employer’s actions under Article 6.03 needs only to add that the assessment of the Grievor’s competence and suitability should be subject to the same review standard.

A similar hands-off test was enunciated by arbitrator Alcock in Eastern School District – Dooley, unreported, Alcock, 2006 at page 100 where he stated:

*“Since Article 6.03 makes it clear that the criteria for the selection of teachers is competence, suitability and qualifications” as assessed by the School Board’, this arbitration board should take care to ensure that the result of any comparative assessment it determines is not based on a higher standard than would be the case if the Employer were determining this issue under Article 6.03”*

A set of additional priorities for the Employer is also set forth in Article 6.12 which provides:

*6.13 In filling vacant positions in accordance with Clause 6.03, the Board shall*

- (e) make reasonable effort to accommodate requests from teachers already employed with the Board in a continuing contract.*
- (f) subject to Clause 6.12 (a), give consideration to applications from teachers who have served in replacement and/or substitute positions with the Board before applications from teachers with no previous experience with the Board.*

The Grievor was not a teacher already employed under a “continuing contract” with the Employer, but she is a teacher who served in “replacement and/or substitute positions” previously with this Employer or one of its predecessor organizations. While Article 6.12 would give the Grievor precedence in consideration over “outside” candidates, she would still have to fit and satisfy the three primary criteria of Article 6.03 before she can expect to be offered a permanent position with that Employer.

It is also a common point of agreement that the Grievor held at the time of her application all of the qualifications necessary to hold the position of guidance counsellor, the position for which the Employer posted a vacancy in August 2004.

Where the parties diverge is on whether the Employer properly assessed the Grievor in light of the two additional criteria of “competence” and “suitability”. The Association questions the adequacy or good faith of the Employer’s assessment of these criteria in light of her employment history and the process used by the Employer to make its determination.

Is there any real difference between “competence” and “suitability”? And what do they add to the determination of the Grievor’s ability that is a necessary ingredient in addition to her qualifications. While the parties have submitted much arbitral jurisprudence on the question of how aspects of Article 6.12 should be applied (Lewisporte/Gander School District – Sparkes, unreported Alcock, 2004; Roman Catholic School Board, Humber St. George – Burridge,

unreported, Cook, 1995, only the case of Port au Port Roman Catholic School Board – Flynn, unreported Faour, 1986 reflects on the basic criteria of Article 6.03.

On consideration of the criteria of suitability, the Flynn decision makes the following observation at page 11:

*“First, the question of suitability is an ephemeral concept, not easily given to definition or qualification. It is the intangible attribute of an employee, upon which his (sic) immediate supervisors are most competent to pass judgment.”*

While not the most helpful of explanations, the above passage does at least give guidance in terms of who is in the best position to pass upon this “ephemeral” quality of an employee. With that passage, this Board agrees. If one is to test suitability, one should look first and foremost to the applicant’s prior supervisors, if they exist. The Employer did that in this case.

Based on the cases submitted by the parties, the meaning of competence, in the context of Article 6.03, has not yet been the subject of arbitral comment. But that word has found interpretation in other places. In Re Walter Volten Nurseries Ltd. 1990 15 L.A.C. (4d) 437, Arbitrator Ready from British Columbia cited with approval the following explanation of competence, albeit in the somewhat gender-specific language of that time period, from Arbitrator Carrothers in I.W.A., Loc 1-424 (unreported -1954) that:

*“In respect of any given function in the company’s mill, whether skilled or unskilled, there is only one standard of competency; either the employee performs a normal or average day’s work, in terms of quality or quantity or both, or he does not:.....”*

At the end of the day, this Board is satisfied that what competence really encompasses is the ability to use one's knowledge, understanding, practical and intellectual skills to perform effectively in one's employment. It is akin to, but not the same as, suitability. Once again, the best place to seek a fair assessment of this quality within a candidate for employment would be from the employee's prior or existing supervisors.

In this case, the Employer sought information about the Grievor's prior performance as a guidance counsellor from three of her prior supervisors. In fact, two of the three supervisors consulted, namely Lloyd Burt and Derrick Dalley, were named persons the Grievor submitted in her application for employment (Exhibit GD 17) who should be consulted for a reference. The other person consulted, Max Rice, was the principal of a school in which the Grievor had worked as guidance counsellor in her previous employment experience both in 1994 and in 1999.

In each case, the evidence from the supervisor was clear, unequivocal and negative towards the Grievor's performance as a guidance counsellor. Derrick Dalley said that the Grievor did not display the level of energy needed, that her student assessments were not performed on a timely basis, and that she did not have a presence in his school that a guidance counsellor should have to perform adequately. Lloyd Burt found that at the end of her three years of part time work, there were still some students who did not know what function she performed in the context of the school and accordingly he did not have confidence in her ability to perform. Max Rice concluded that she displayed a lack of initiative, was reactive as opposed to proactive in her duties, did not make good use of her time and her assessments were not completed in a timely fashion. In each case, the witness held to his position despite challenging cross examination. At the same time, it was clear that there was no malice, since each supervisor stated that the Grievor was a fine person and appeared to be well motivated towards students and a cordial member of staff. The bottom line

in each case was that they felt there were shortcomings in her performance as a guidance counsellor and, while they each worked with her in their respective schools only on a term or temporary basis, neither was prepared to recommend her for a full time position.

It is acknowledged by all that the work assignments for the Grievor during the years 1999-2000 were somewhat challenging because she covered a number of schools in the Notre Dame Bay area, each with divergent problems and so she had limited opportunity for contact with students in each school during the terms. It is clear that each of them was fully aware that the Grievor had other schools for which she was responsible, all on a divided time basis. And so her supervisors were aware of her time allocations between schools and yet felt that, notwithstanding her multiple assignments, performance was still not to an acceptable standard. They are the persons best able to judge that issue.

The Association on behalf of the Grievor has made much of the fact that there was an apparent conflict "on the record" between the statements of the supervisors who were questioned during the 2003 and 2004 screening processes and the written assessments of the Grievor's performance made in 1994. But those written assessments were done very early in the Grievor's working career and were prepared as the result of an initiative of hers, since term teachers are not normally assessed as a part of normal staff supervision. The verbal comments from her supervisors came at a later time and spoke to her more recent performance at work. In the case of Max Rice, for example, his written assessment (Exhibit GD 11) of the Grievor's work was completed in 1994, but his verbal assessment given in 2004 was of the Grievor's work performance in 1999-2000. Thus, it is not fair to characterize this dichotomy as a conflict. Albeit there is a difference, but time could, and seemingly has, made a difference in their assessment of her work performance.

This Board is satisfied that their response to inquiries made by the Employer was an accurate and honest view of their assessment of the Grievor's more current work ability. We are further impressed with the fact that such testimony was difficult for these supervisors who were, at the time of doing their supervisory work, also members of the same bargaining unit with the Grievor. One understands that it is not easy to criticize a fellow professional and a fellow member of the Association. It was clear that they were uncomfortable with the role of being critic of a co-worker, but they were obliged to be honest in both their comments and their assessments. That is the challenge that the role of supervisor offers within this bargaining unit.

The Grievor submitted two additional letters (Exhibits GD 13 and 14) from two district directors, each of which were in the tone of a "thank you for your service" relating to her work in schools under their control in which she provided part time or term duties as guidance counsellor. These letters cannot be reasonably construed as "letters of recommendation". They are not from supervisors and they are clearly not intended to supplant comments from her immediate supervisors. That being said, the issuing of such letters is something which should be done in a guarded fashion as it can possibly be construed as being more positive than its intention was.

The Association suggests that an interview would have resolved the differences or at least given the Grievor a chance to challenge her critics. In the employment process generally, if the references are checked before the interview and those references indicate major concerns, the candidate will not normally receive an interview because he or she will have been screened out as the result of the reference check. If, on the other hand, the interview is given first, then the employer will not have the information from the reference checks to present during the interview process. Either way, it is apparent to this Board that the interview of a candidate is not a place suited to challenge three negative and consistent assessments of a candidate's prior performance. The

circumstances might be different had the verbal comments been inconsistent with one another. But here they were not. Faced with hiring a new permanent employee, a school board is entitled, absent exceptional circumstances, to rely on reference checks with consistent results from credible supervisors.

Thus, in seeking information from the Grievor's prior supervisors about her prior on-the-job performance as a guidance counsellor, the Employer was seeking information relevant to their determination of her "competence" and "suitability" for the position which was being offered. They were seeking the information they were entitled to consider in the hiring process under Article 6.03.

This Board must now consider whether any of the legitimate criteria for arbitral review exists which might suggest that intervention by a board of arbitration is appropriate, the standard set in the Sceviour decision.

The Association has raised the issue of lack of good faith or perhaps more properly put, the question of bad faith. There is no evidence before this Board which would bring into question the good faith of the Employer in these facts. The only aspect of the evidence which brought that topic into play at all was the assertion by the Grievor that Ms Wells said to her, after the rejection of the Grievor's application, that she should never "darken the door" of a school in Newfoundland again, an apparent reference to the Grievor's lack of positive references. With respect, this Board does not conclude, based on the evidence before it, that those words were ever said by Ms. Wells to the Grievor. Ms Wells as a witness appeared as a sensitive and caring person, sophisticated in human resource practices, and it is difficult to imagine that she would choose to use such inflammatory words to another professional. It may be that the Grievor took her words to have that import, but that is only the impression formed by the Grievor, who was upset at the time. We are not prepared to attribute those words to the Employer's representative.

Has the Employer acted fairly and reasonably toward the Grievor? One of the issues raised by the Association is that the interview process undertaken by the Employer was not in accordance with the internal policy of the Employer which called for the interview team/staffing committee to be made up of a school principal, a district administrator and one other person( Exhibit CW 4). In this case, the process of conducting checks of references, a duty which was to be assigned to the staffing committee, was undertaken by a staff member at the district office of the Employer, not by a committee. The Employer argues that the Grievor is not entitled to rely upon this internal mechanism of the Employer to assert a collective bargaining right. The Association argues that this failure to follow its own protocol is evidence of a lack of fairness and due process by the Employer. While the fact that the policy was not followed does raise a concern for this arbitration board, having considered all of the evidence, including the fact that this selection process was undertaken during a period of transition for the Employer and the fact that the indications of lack of suitability and competency were so compelling from all three sources, we are not convinced that any lack of internal process has caused any lack of fairness to the Grievor. Any selection committee faced with the information acquired by the Employer's staff would only have come to the same conclusion, that is, that there were serious concerns about the Grievor's ability to perform adequately in the available vacant position. The lack of compliance with internal policy here is not evidence of a lack of fairness.

Finally, we must examine whether the matters looked at by the Employer are legitimately connected to the position which was being offered or whether extraneous matters were considered. Clearly, seeking from prior supervisors information about how the Grievor performed on earlier occasions when she worked as a guidance counsellor are matters which are properly connected to the assessment of her abilities to perform as a guidance counsellor, the position for which she was being considered. They are not irrelevant or

extraneous matters which were considered by the Employer. These issues are core to the employability of the Grievor.

In the same vein, the Grievor adduced evidence that, following the rejection of her application, she was able to secure a similar position, albeit once again on a term basis, in another school (St. Peter's Junior High in Mount Pearl) and following that employment received a very positive letter (Exhibit GD 16) on her ability as a guidance counsellor from the principal of that school. Evidence acquired after the grievance has arisen is evidence which the Employer could not have had access to, and it is unfair to use such evidence in judging the propriety of the Employers action taken before that information was available.

One point must be perfectly clear. The result of this arbitration decision is not that we have found the Grievor to be incompetent and unsuitable to hold employment as a guidance counsellor in Newfoundland and Labrador. That clearly is not our assignment and it is not our conclusion. Our limited role is to review and comment upon the actions and decision of this Employer, faced as it was with the three negative references that were presented in 2003 and 2004 about the Grievor's prior performance as a guidance counsellor. This Board is simply satisfied that the Employer acted in such a manner that its determinations made under Article 6.03 cannot be impugned under the test set out in Sceviour and other awards.

#### DECISION & AWARD

As a result of the foregoing, the Board finds that the Employer has acted reasonably in its treatment of the Grievor during the hiring process, it was not required to offer employment to the Grievor in 2004 because in its assessment of the Grievor's application for employment, it reasonably and a fairly determined based on the available evidence that she did not have the qualities of suitability and/or competence necessary to be awarded the position of

guidance counsellor, as was required to be determined by the Employer pursuant to Article 6.03 of the Collective Agreement.

Accordingly, the grievance is hereby dismissed.

Dated at St. John's, NL this 23rd day of February 2007.

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John F. Roil, QC, Chair

(Dissenting) \_\_\_\_\_  
Aubrey Dawe, Association Nominee

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Andrew Butt, Employer Nominee

## DISSENT

Difficulties arise when a distinction is made between Ms. Deveraux's abilities to fill term positions as opposed to full time, permanent positions. On page 19 in "Considerations", in summarizing the evidence of the three Principals, the report reads, *"The bottom line in each case was that they felt there were shortcomings in her performance as a guidance counselor and, while they each worked with her in their respective schools only on a term or temporary basis, neither was prepared to recommend her for a full time position."* Further to that, on page 19, the report reads, *"Faced with hiring a new permanent employee, a school board is entitled, absent exceptional circumstances, to rely on reference checks with consistent results from credible supervisors."* Implicit in these considerations is that Ms. Deveraux's capabilities as a term employee were subject to a different level of scrutiny which did not necessarily match the scrutiny in the context of her application for a permanent position. These decisions still have to be made in accordance with the provisions of the Provincial Collective Agreement. Article 6.03 does not distinguish between criteria for term employees and permanent positions. In fact, the criteria used for assessing an individual for a permanent position is identical to that of a term employee. The report intimates that the permanent nature of the position in dispute gives rise to considerations not in existence for Ms. Deveraux's previous term positions. This is inconsistent with the interpretation of Article 6.03 and ignores the provisions of Article 7 which provide for probationary periods for new permanent employees. That article specifically provides for a period of review of the performance of new permanent employees because the criteria for selection contained in article 6.03 is to be applied for uniformly to both term and permanent positions. We cannot differentiate between Ms. Deveraux's capacities as a term employee and the criteria for selection of a permanent employee. In do so, we ignore the role of Article 7 in the

assessment of suitability for permanent positions through the mandatory probationary period as well as the fact that Article 12.01(b) allows the employer to terminate the contract of a probationary employee for reasons of incompetence or unsuitability.

Insufficient weight has been given to the School Board's lack of attention to its own policies during the selection process in this case. The Arbitration Report finds that had the School Board followed its policies, "*any selection committee faced with the information acquired by the Employer's staff would only have come to the same conclusion...*" While it may be that the Selection Committee may have come to similar conclusions, the failure to follow board policies identified in CW4 gives rise to concerns respecting the fairness and reasonableness of the Employer's assessment of the Grievor. It is incorrect to find that the Employer need not adhere to its internal policies when assessing candidates. While it may be that those policies are not part of the Provincial Collective Agreement, the reasonableness of any assessment under the Provincial Collective Agreement must be viewed in the context of whether the employer acted in accordance with its own rules when conducting that assessment. It may be that on the specific facts of a particular application, the employer may be in a position to justify its divergence from the internal policy and thus save its decision making process from arbitral review in accordance with the Sceviior decision. However, the fact that the policy was ignored or not followed must give rise to a conclusion that the decision of the Employer was unreasonable; to conclude otherwise would make irrelevant the purpose of internal policies.

Given my concerns with the differences between considerations for term and permanent employees and the internal policy considerations of the School Board, I must dissent from the decision of the Arbitration Board.

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Aubrey Dawe

NLTA Nominee