

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR TEACHERS' ASSOCIATION
(hereinafter called the "Association")

AND:

EASTERN SCHOOL DISTRICT
(hereinafter called the "Employer" or the "District")

GRIEVOR: Dr. Gerald White

COUNSEL: For the Association
Thomas E. Williams, Q.C.

For the Employer
Stephen F. Penney

ARBITRATION BOARD: James C. Oakley, Chairperson
Ray Goulding
William Lee

The arbitration hearing was held at St. John's on November 29, 30 and December 2, 2010. The parties agreed as follows:

1. The Arbitration Board was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Board would remain seized of the matter for sixty (60) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing by consent:

Consent 1 - Grievor's Book of Exhibits

Consent 2 - Respondent's Book of Exhibits

Consent 3 - Emails between Wayne Rogers and Allister Dyke, dated July and August, 2009

Nature of the Grievance

The Association claims that the Employer discriminated against the Grievor, Dr. Gerald White based on age and proximity to retirement when it did not select him for the position of Assistant Principal at Queen Elizabeth Regional High School and other administrative positions for the 2009-2010 school year. The Employer denies any discrimination against the Grievor and submits that it selected the candidates it believed were best suited for the positions.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 6 Employment of Teachers

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

6.04 Where competence, suitability and qualifications are comparable, preference in appointment of teachers to positions of administrative responsibility within the bargaining unit shall be given to those who have entered into continuing contract with any School Board in the Province.

...

6.11 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 6.11(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 36 Positions of Administrative Responsibility

36.01 (a) A tenured teacher appointed to the position of Principal, Vice-Principal, Program Specialist or Department Head, may be required by the School Board to serve a probationary period of two (2) years.

- (b) A teacher who has been previously tenured in an administrative position as listed in (a) above, who is appointed to a comparable administrative position may be required by the School Board to serve a probationary period of one (1) year. Where in the opinion of the School Board, the new position is not comparable then the provisions of Clause 36.01 (a) shall apply.

36.02 A teacher who successfully completes the probationary period prescribed by Clause 36.01 and continues in that position shall be deemed to have tenure in that position.

...

Article 57 Discrimination and Intimidation

57.01 The School Boards agree that there will be no discrimination or coercion exercised or practised by it with respect to any employee by reason of age, sex, race, colour, marital status, political or religious affiliation, physical or mental disability, sexual orientation or by reason of their membership in the Association.

Evidence

The witnesses called by the Association were Dr. Gerald White, the Grievor, and Wayne Rodgers, Principal of Queen Elizabeth Regional High School. The witnesses called by the Employer were Allister Dyke, Assistant Director of Education - Human Resources and School Leadership, Ford Rice, Director of Education, Dr. Albert Trask, Assistant Director of Education - Rural Education and Corporate Services, and Janet Vivian-Walsh, Assistant Director of Education - Programs.

Eastern School District has 122 schools with about 41,000 students and 3,200 teachers. The school administrative positions are Principal and Assistant Principal. The CEO and Director of Education is Ford Rice. There are four Assistant Directors of Education reporting to the Director. The Director and three of the Assistant Directors, Allister Dyke, Dr. Albert Trask and Janet Vivian-Walsh, comprised the selection committee to select school administrators for the 2009-2010 school year. Allister Dyke, Assistant Director of Education-Human Resources and School Leadership, coordinated the selection process. Mr. Dyke's duties also include administration of the Newfoundland and Labrador Teachers' Association Collective Agreement, administration of various support staff collective agreements, school leadership, staffing allocations, management of teacher leave, and teacher hiring.

Mr. Dyke described the selection process. Administrative positions are posted and teachers may apply for any positions of interest. The applicants are interviewed in one pool for all positions. Each applicant is interviewed once, regardless of the number of positions for which the applicant has applied. Mr. Dyke and at least one other Assistant Director attend all interviews. Mr. Dyke attended 170 interviews in 2009. The School District prepares a document listing the school administrative positions available, the names of the applicants, the short list of applicants and the name of the person appointed (the "summary document"). The selection is based on several factors, including the interviews. The selection for a position is made by consensus at a meeting usually attended by the Director and three Assistant Directors. According to the summary document, there were 75 positions filled for the 2009-2010 school year. The jobs for which the Grievor applied, and which are the subject of the grievance, were Assistant Principal positions at Queen Elizabeth Regional High School, Gonzaga High School, St. Paul's Junior High, Brother Rice Junior High, and St. John Bosco.

Allister Dyke testified about the interview process. Applicants were asked to give a presentation not exceeding 15 minutes on the topic of creating successful change in complex organizations and specific strategies to translate theory into practice in the school setting. Following the presentation, the applicants were asked four standard questions, which were related to leadership, teacher performance, involving teachers/students in the decision making process and the relationship between instructional improvement, teacher evaluation and staff development. The applicants were allowed time at the end of the interview to make additional comments.

Dr. Gerald White, the Grievor, testified about his qualifications. He received a Bachelor of Education and Bachelor of Arts (History) Degrees from Memorial University of Newfoundland in 1981. He received a Bachelor of Arts (Sociology) Degree from Memorial University in 1986, and a Master of Education (Honours) Degree in Teaching and Learning from Memorial University in 1992. He received a Doctor of Education Degree from the University of California (Coast Campus) in 2004. Dr. White testified that his Ph.D. dissertation was on program evaluation and design, and his Ph.D. course work included curriculum development and school administration. The Grievor's work history included teaching and administrative positions with the School District or its predecessor School Boards. From 1981 to 1990 he was a teacher at Stella Maris High School in Trepassey. Commencing in 1990 he has held teaching positions at Holy Spirit High School in Manuels, Conception Bay South, where he has taught technology, social studies and English. In the 1994-1995 school year he was seconded to the Faculty of Education at Memorial University as an Intern Supervisor where he observed, supported and evaluated intern teachers. From September, 1998 to February, 1999, he was Assistant Principal in a replacement position at Holy Spirit High School. From February, 1999 to June, 1999 he was on paid educational leave to complete course work for his PhD Degree. From 1999 to 2000 he was Assistant Principal for a one year replacement at Holy Spirit High School. From 2001 to 2002 he was on leave for the full school year to finish the dissertation for his Ph.D. Degree. He served as Department Head of Social Studies at Holy Spirit High School from 2005 to 2008, and from September, 2009 to the present.

Dr. White testified that upon completing his PhD Degree, he was asked by the Faculty of Education at Memorial University to teach Graduate level courses. He taught courses in school leadership, school improvement and teaching and learning. In 2007, he was a full time visiting Professor at Memorial University. He testified that his father was diagnosed with cancer in August, 2008 and started to receive treatment in 2009. He curtailed his extracurricular activities at the school and did not teach University courses after his father's cancer treatment started. He had to spend some

additional time, about two hours per week, working with the family business. The Grievor testified that, during school breaks and holidays he does civilian communication work for the Royal Canadian Mounted Police, where he has a top secret level of security clearance. The Grievor said he was the teacher representative from Newfoundland and Labrador on a national curriculum committee preparing materials for school visits to the Library of Parliament in Ottawa. He has attended the Teachers Institute of Canada. He was awarded the Canada Volunteer Award Medal and Certificate of Honour for his volunteer work, which included paramedical support for an ambulance service in Trepassey and work with Newfoundland Crime Stoppers.

In the 2008-2009 school year, Dr. White was Assistant Principal in a one year term contract position at Queen Elizabeth Regional High School, located in Foxtrap, Conception Bay South. Dr. White testified that in August, 2008, Allister Dyke called him and asked if he was interested in the position. He accepted immediately. He had been interviewed as part of the pool for school administrator positions for the 2008-2009 year. The Grievor described Queen Elizabeth Regional High School as having issues with student achievement and student attendance. Most of the students arrived by school bus. At the start of the school year, Dr. White asked the Principal, Wayne Rodgers, for direction on priorities for the school year. Mr. Rodgers asked him to organize the school finances and to address student attendance. Dr. White prepared a professional growth plan for the school year and updated it periodically. In the professional growth plan dated April 30, 2009, the Grievor's stated goals were (1) complete three minute classroom visits on a regular basis; (2) gain a higher level of competency in Winschool, the school management computer program; (3) implement a checks and balances system for cash handled through the school general account; and (4) improve his visibility/interaction with the student body. The plan was signed by the Principal. At that time the Principal's Evaluation Report stated that the Grievor was making satisfactory or better progress, and that he was "making a wonderful administrator".

Wayne Rodgers, Principal at Queen Elizabeth Regional High School, testified that Dr. White "did a fine job" as Assistant Principal in the 2008-2009 school year. He said the Grievor had a good relationship with the staff and students and a good work ethic. He recalled that the Grievor did walk throughs, was active in supervision outside the school building, developed the school accounting system with the auditor, worked on the Winschool program, handled discipline, prepared reports for student Court cases, and addressed student lateness. Mr. Rodgers sent an email to Allister Dyke to support the Grievor's application for the Assistant Principal position for the 2009-2010 school year. Mr. Rodgers said that no issue was raised with him at any time regarding the Grievor's eligibility

for retirement or succession planning. Mr. Rodgers said he had expressed an interest in moving to another school, but he did not recall if that occurred prior to August, 2009. He had assumed that the Grievor would continue in his role as Assistant Principal until he was told otherwise. In the Summer of 2009, the Grievor assisted Mr. Rodgers to hire teachers for the following school year.

The School District advertised the position of Assistant Principal at Queen Elizabeth Regional High School for a term contract from September, 2009 to June, 2010. Mr. Dyke testified that the selection committee considered the administrative needs of the school, based on the school report, the school improvement process and the student achievement and retention reports compared to the School District. Ford Rice testified that student academic achievement was identified as a need for Queen Elizabeth Regional High School. Janet Vivian-Walsh testified that the senior management team looks at the culture and challenges of the school and looks for the “best fit” of a candidate for the school, having regard to student achievement data and the school development plan. She said that student achievement was identified as a need for the school.

Allister Dyke testified about the evaluation of the Grievor by Wayne Rodgers in the 2008-2009 school year. The professional growth plan was orientated to management issues and not instructional leadership. The references to the Winschool program and managing the school finances were not significant issues in relation to instructional leadership. He acknowledged that the Grievor’s effort to improve visibility within the school was important.

The Grievor attended an interview on July 14, 2009, conducted by Allister Dyke and Dr. Albert Trask. The Grievor testified that he gave a PowerPoint presentation and then responded to questions. He believed the questions were fair. He expected that there would have been more questions about his personal background and his experience as Assistant Principal in the 2008-2009 school year.

Allister Dyke testified that the Employer concluded that TB was the best candidate for the Assistant Principal position at Queen Elizabeth Regional High School. TB had one year’s experience as Program Specialist in Language Arts, 12 years experience as Department Head, and six years experience as the Chief Marker for the Department of Education for the English 3201 examination. His experience showed strong instructional leadership, which was the need identified for the school. Mr. Dyke said that the Employer often considered Program Specialists for school administrative positions. TB had demonstrated in his presentation at the interview that he could effectively translate theory into practice. His answers to the interview questions, demonstrated his experience with team

building and professional development of teachers. Mr. Dyke said Dr. White's presentation at the interview did not include reference to personal experiences in the school. He acknowledged that the Grievor had impressive academic qualifications.

Ford Rice testified that TB was the best candidate for the position, having regard to the needs of the school. TB was involved with curriculum development with the Department of Education, and had worked with teachers and Principals as a Program Specialist. He said Dr. White was not the best candidate for the position. He said the evaluation of the Grievor's performance during the 2008-2009 term contract did not indicate any issues or strengths, and indicated a heavy slant towards school management and not instructional leadership.

Dr. Albert Trask testified that TB was the best candidate. He considered Program Specialist experience to be equivalent to school administrative experience. He referred to TB's experience working with teachers and the Department of Education. He felt that TB gave stronger answers to the interview questions than the Grievor. TB's answers demonstrated the application of concepts such as interconnectedness starting with the classroom and working outward, and the process of engaging people in the decision making process. He said that the Grievor's answers were lacking in references to personal experience.

Janet Vivian-Walsh testified that TB was the strongest candidate based on his experience as an instructional leader. She said it was not uncommon to place a Program Specialist in a school administrative role. She said the performance evaluation by Wayne Rodgers of the Grievor in his role as Assistant Principal was positive, but did not show detail of the work done by the Grievor as an instructional leader. She agreed that the Grievor was qualified for the position, but maintained that he was not the most qualified candidate.

The School District has a Leadership Program for first year school administrators. The program is organized by Janet Vivian-Walsh and others. During the 2008-2009 school year, there were five sessions scheduled for the 32 first year Principals and Assistant Principals. There were two sessions in late Summer and single sessions in December, March and May. Ms. Vivian-Walsh testified that the Grievor was the only administrator not to attend any of these sessions. Some administrators missed one session. She had expected the Grievor to attend, although attendance was not mandatory. The sessions provide an opportunity for dialogue among professionals and she believed it was a valuable program. She sent the Grievor an email about the March session to encourage him to

attend. The Grievor emailed her on the day of the March session advising that he could not attend because of events in the school.

The Grievor testified about the reasons he did not attend the Leadership Program sessions. He did not attend the Summer sessions because he had made a prior commitment. When he was offered the position by Allister Dyke he informed him of this commitment and he was excused from attending. He did not attend the December session because the Principal was out of the school and the Grievor did not wish both of them to be out of the school on the same day. For the March session, there had been an event at the school the night before at which a student was arrested for a drug offence. The Grievor said he was told by the police that he might have to attend at the student's bail hearing in Court on the same day as the session.

The Grievor testified that he felt devastated when he received an email on August 10, 2009 from Allister Dyke informing him that his application for Assistant Principal was unsuccessful. He accepted Mr. Dyke's offer to meet with him. He testified that he met with Mr. Dyke on August 12, 2009 to discuss the reason he was not selected for the position. He said that when he arrived at the meeting he was limping from a jetski accident. They first chatted about his injury and the location where it happened, as Dr. White's summer home is located in the same area as Mr. Dyke's residence. Mr. Dyke talked about his own possible retirement. The Grievor said Mr. Dyke asked him how much service he had and he replied that he had almost 30 years. Mr. Dyke said that the Grievor could "go" at any time, which the Grievor understood was a reference to retirement. The Grievor said he told Mr. Dyke that he had no intent to "go" any time soon. Mr. Dyke asked him if he knew that the Principal, Wayne Rodgers was looking for a transfer. Dr. White said that he knew the school to which Mr. Rodgers was interested in moving. Mr. Dyke told him that in filling the position, the Board had to look at "the bigger picture and the stability of the school" and that it would be a concern if both Wayne Rodgers and the Grievor left the school at the same time. Mr. Dyke told him that the District was putting a lot of energy and resources into succession planning. Mr. Dyke told him that his evaluation was "glowing" for the year he was Assistant Principal and he had the qualities the District was looking for in candidates for administrative positions. Mr. Dyke told him that the District wanted someone for Queen Elizabeth Regional High School with a strong curriculum background and they had appointed a person with the best credentials for the position. The Grievor testified that he felt insulted about the comment on his credentials, given that he had a Ph.D. in Curriculum, he was teaching Graduate students at Memorial University and he had other qualifications in the curriculum area. Mr. Dyke told him that he should have given more information

in his responses at the interview about the instructional leadership component. Mr. Dyke also referred to his absence from attendance at the Leadership Development sessions for new administrators. The Grievor testified that he told Mr. Dyke that he had been excused from attending the first session and events arose that prevented his attendance at the other sessions. Mr. Dyke told him that he wished he had known the reasons that he did not attend. Mr. Dyke told him that the District was moving away from promoting from within the school and wanted to bring in “fresh blood”. Mr. Dyke told him that his office would be posting at least one or two administrative positions later that day and he encouraged the Grievor to apply. The Grievor testified that he could not accept that he was unsuccessful for any reason other than succession planning and the District did not want the Principal and Assistant Principal to leave the school at the same time for the stability of the school.

Allister Dyke testified about his meeting with the Grievor on August 12, 2009. He said the meeting lasted for about 45 minutes. They first had a conversation about the fact the Grievor was limping and about the location where both had residences. Mr. Dyke said he considered it to be a meeting of colleagues. Mr. Dyke said he told the Grievor that another candidate “beat you out” for the job. Mr. Dyke said that he discussed how long he was teaching and his own possible plans for retirement. The Grievor told him that he was eligible to retire. Mr. Dyke did not recall saying to the Grievor that he must be “ready to go”. He had not known that the Grievor was eligible to retire. He had access to the seniority list, but service on the seniority list did not equal service in the teacher’s pension plan. They had a discussion about school stability and succession planning. Mr. Dyke said that succession planning meant there would be a team in the school. Mr. Dyke did not believe he discussed this topic as a reason for the selection decision. He talked to the Grievor about his qualifications in instructional leadership and told him that his achievement in this area at the school in 2008-2009 was lacking. He said he could not imagine making any comment about wanting “fresh blood” for the school, or making any comment about the Grievor’s age. Mr. Dyke acknowledged that he had a discussion with Wayne Rodgers about transferring out of the school. He said that Mr. Rodgers had not applied for any positions for the 2009-2010 school year, and it could be 2 or 3 years before he moved to another school.

The Grievor testified that his claim of age discrimination was based on his conversation with Allister Dyke. He said the conversation about retirement was not simply part of a casual conversation, but was the first part of the response as to why he did not get the job. He said that he would have been

eligible to retire in the 2009-2010 year, as he would have the necessary 30 years pensionable service.

The Grievor testified that he informed the Principal, Wayne Rodgers about the decision. Mr. Rodgers told him that he was “floored” by the decision. The Grievor sent an email to the staff to inform them of the decision. Staff members replied to him by email expressing disappointment and thanking him for his work at the school.

The Grievor testified that he did not list SC, Principal at Holy Spirit High School as a reference, because SC had not evaluated him. He listed CK, Assistant Principal at Holy Spirit High School as a reference, because she was the administrator most familiar with his work at that school. Allister Dyke testified that he contacted SC to ask his opinion as a reference. SC told him there were some concerns about the amount of time Dr. White spent at the school.

The Grievor applied for four other administrative positions for 2009-2010 and was unsuccessful. The Employer’s witnesses testified about the reasons for the selection of other candidates. Allister Dyke testified that TH was selected for the Gonzaga Assistant Principal position. He had a one year term as Principal at another school and a one year term at Gongaza as Assistant Principal. He had good attributes for the position, a favourable interview, and was a tenured administrator. Dr. Albert Trask testified that TH was familiar with the culture and climate of the school. Janet Vivian-Walsh testified that TH had considerable experience and had served as Principal at another school.

Allister Dyke testified that DL was selected for the Assistant Principal position at St. Paul’s Junior High School. He was a tenured administrator and had three years experience as a school administrator at another school. In his interview, he could relate personal experiences where he had involved parents in decisions. He had a strong vision for technology. Dr. Albert Trask referred to DL’s experience as an administrator. Janet Vivian-Walsh referred to DL’s successful experience as Assistant Principal.

Allister Dyke testified that SE was selected for the Assistant Principal position at Brother Rice Junior High School. She had extensive experience with the kindergarten to grade nine schools and had demonstrated important characteristics sought for that school. Dr. Albert Trask testified that SE was a tenured administrator with significant experience. Janet Vivian-Walsh testified that SE had significant experience as an administrator at another school.

Allister Dyke testified that BB was the successful candidate for the Assistant Principal position at St. John Bosco School. BB had demonstrated capable instructional leadership and he fit with the community. Dr. Albert Trask and Janet Vivian-Walsh also referred to the role of BB in building trust in the community.

Allister Dyke testified that age plays no role in the selection process. He said that at the time of the selection process he did not know the age, seniority or proximity to retirement of Dr. White or TB. He said that even if he knew the seniority, the amount of pensionable service could be different than seniority. He said he was shocked to hear an allegation of age discrimination. Mr. Dyke said that eight school administrators were hired for the 2009-2010 school year who were the same age or older than the Grievor. Ford Rice testified that age and proximity to retirement play no role in the selection process. He said he did not know when the Grievor would be eligible to retire. Many administrators stay on beyond retirement eligibility. He was not aware that Wayne Rodgers was contemplating a transfer out of the school. Dr. Albert Trask testified that age plays no role in the selection process. He said that it was offensive to consider that proximity to retirement might be a factor. He testified that he personally has been eligible to retire for two years and has not retired. At the time of the selection process he did not know when Dr. White or TB would be eligible to retire. Janet Vivian-Walsh testified that age and proximity to retirement play no role in the selection process. She said that age was never discussed in any conversation in relation to the selection of TB. She did not know the ages of the Grievor or TB. She said that she personally would be eligible to retire after the current year, but she may decide not to retire. She knew of school administrators who were five years past retirement eligibility. She was familiar with the expression “30 and out” as a reference to the fact a teacher with 30 years pensionable service is eligible to retire.

The Employer’s witnesses referred to the purpose of succession planning. Allister Dyke said that succession planning was an attempt to have candidates available for positions and to have a system where both Principal and Assistant Principal are capable of running the school. He said the School District operates a Leadership Development Program for school administrators which is part of the succession plan. Teachers are encouraged to attend the program and to apply for administrative positions. Ford Rice testified that succession planning is directed to developing potential leaders. Dr. Albert Trask described succession planning as the School District being proactive with recruitment of administrators. Janet Vivian-Walsh described succession planning as leadership development for aspiring administrators.

The School District witnesses testified that it was the norm to award a position to an incumbent, however, there were exceptions. Janet Vivian-Walsh testified that she was aware of three cases where a position was not awarded to an incumbent in the position.

The Grievor's date of birth was August 4, 1959. TB's date of birth was July 28, 1960. As of June 30, 2009, the seniority of the Grievor was 26.38 years and the seniority of TB was 25.89 years. There was no evidence of the pensionable service of TB. Dr. White testified that he had 30 years pensionable service in 2010.

Association Submission

The Association submitted that Articles 6.03 and 6.11 applied to the selection for Assistant Principal positions. It was a position of administrative responsibility under Article 36. The Association acknowledged that pursuant to Article 6, there was a degree of deference to be shown by the Arbitration Board to the decision of the Employer. However, the Employer's decision was subject to Article 57.01. The Employer was not permitted to discriminate against the Grievor on the grounds of age or proximity to retirement. Discrimination may be found by inference from all the evidence. Proof of intent to discriminate is not required (*Ayangma v. Eastern School Board* (2005) Carswell P.E.I. 111, 56 C.H.R.R. D/297 (P.E.I. H.R.C.) (“*Ayangma*”). Discrimination could be proven under Article 57 by the Association raising a *prima facie* case, at which time the Employer is required to prove that it has a credible nondiscriminatory reason for its failure to hire the Grievor. The Association had met the three requirements to show a *prima facie* case (*Ayangma*). The first requirement was that the Grievor was qualified for the position of Assistant Principal at Queen Elizabeth Regional High School. He had a strong curriculum background, high academic qualifications, and had served in the position for one year, with an excellent performance review. The Employer's witnesses agreed that it was common to select an incumbent in a hiring procedure. The Principal at Queen Elizabeth Regional High School recommended the Grievor for the position. The Grievor also applied for other positions for which he was qualified. It was only necessary to show discrimination by the Employer in the hiring for any one of the positions. The second requirement of a *prima facie* case was that the Grievor was not hired for the position. The third requirement was that the person hired was no better qualified than the Grievor and did not share the personal characteristic that was the subject of the discrimination complaint. The Grievor was closer to retirement than the successful applicant, TB, by four years. It was acknowledged by the Employer that the expression “30 and out” referred to eligibility for retirement upon completing 30 years

pensionable service. TB was younger than the Grievor. The Association referred to the case of *Toronto Star Newspapers Limited v. I.A.M., Local 235* (1995) 47 L.A.C. (4th) 142 (H.D. Brown) ("*Toronto Star*") where the employer was found to have discriminated against the grievor when it hired employees who were less qualified and who were younger than the grievor. The Employer had not provided a credible explanation for not hiring the Grievor. The Employer's witnesses all acknowledged that succession planning was important. The Employer's desire for stability for another three to four years in the school was a factor in the hiring. The inference could be drawn that the Grievor's proximity to retirement and age were factors in the decision. Wayne Rodgers was considering a transfer to another school. With its concern about the Principal leaving the school, the Employer would want the successful candidate for Assistant Principal to have a longer term at the school. There was no clear and convincing evidence of any difference in qualifications between TB and the Grievor. The reason the Employer did not hire the Grievor was disclosed at the meeting between the Grievor and Allister Dyke. The purpose of the meeting was to discuss why the Grievor did not get the position. Mr. Dyke referred to stability and succession planning, which meant the Board must have taken into account age and proximity to retirement. Mr. Dyke's reference to bringing in "fresh blood" indicated discrimination. The Board was asked to accept the Grievor's account of the meeting as credible. The Association requested as redress that the Grievor have an opportunity to fill an administrative position in the next academic year and that the Grievor be paid compensation.

Employer Submission

The Employer submitted that Article 6.03 did not apply to the appointment of an Assistant Principal, but applied only to the appointments of teachers. The Employer's decision was made in the proper exercise of its management rights. A strong deference was owed by the Arbitration Board to the Employer's judgment on qualifications. The Employer referred to the award in *Newfoundland Teachers' Association and Port Au Port Roman Catholic School Board (Flynn)*, January 17, 1986 (Faour) where the arbitration board held that the decision of a school board selection committee must not be lightly interfered with, that the suitability of an employee is an attribute upon which his immediate supervisors are the most competent persons to pass judgment, and that there is a heavy burden on a grievor to substantiate a claim that the selection committee made an improper assessment. The Employer distinguished the *Toronto Star* case on its facts, as a case where six positions were filled by persons significantly younger than the grievor. In this case the Employer hired school administrators who were older than the Grievor. The person hired for the position at

Queen Elizabeth Regional High School was only 11 months younger than the Grievor. The evidence had not established that the Grievor had four years more pensionable service than TB. There was no evidence of TB's pensionable service. TB had 25.89 years of seniority and the Grievor had 26.38 years of seniority as of June 30, 2009. The selection committee did not know when TB or the Grievor would be eligible to retire, or whether they would retire when eligible. There was no evidence of a *prima facie* case of discrimination. The Employer acknowledged that the Grievor was an impressive candidate, however, TB was properly selected as having better qualifications for the position. Age and proximity to retirement were not factors. The Employer gave a reasonable explanation for the decision. TB had a better interview, and had relevant experience as a Department Head, Chief Marker and Program Specialist. TB demonstrated instructional leadership in his answers to interview questions by giving examples from his experience. The Grievor was the only one of 32 new school administrators who did not attend any of the Leadership Development sessions in the 2008-2009 school year. The Grievor's professional growth plan did not demonstrate instructional leadership. The Grievor did not have a strong reference from the Principal in his previous school. The selection committee reviewed the information about the school and the candidates. The interview process was fair. At the time of the selection process, the committee did not know that Wayne Rodgers was interested in moving to another school. Mr. Dyke knew that Mr. Rodgers had not applied for any positions that year. The discussion about retirement between Allister Dyke and the Grievor was a casual friendly discussion. The Grievor admitted that he had no other evidence to support his allegations of discrimination other than his evidence of the comments made by Mr. Dyke at the meeting. The Employer provided a sufficient rationale for its hiring decisions for other positions for which the Grievor applied. There was no evidence of discrimination and no reason to interfere with the decision. The Employer requested that the grievance be denied.

Considerations

The Association submitted that the Employer discriminated against Dr. Gerald White and violated the Collective Agreement, when it did not select him for the position of Assistant Principal at Queen Elizabeth Regional High School or for other administrative positions for the 2009-2010 school year. The redress requested was that the Grievor have an opportunity to fill an administrative position in the next academic year, and that the Grievor be paid compensation. The position advertised for Queen Elizabeth Regional High School was a term contract for the school year 2009-1010. The parties did not dispute the facts relevant to the qualifications of the Grievor and other candidates, or

the process followed by the School District to select candidates for administrative positions. There was some conflicting testimony with respect to statements made by the Grievor and Allister Dyke, Assistant Director of Education, at a meeting held to discuss the reasons why the Grievor was not the successful candidate for the Queen Elizabeth Regional High School position. The Arbitration Board will address the testimony with respect to this meeting in the Award.

The issues before the Arbitration Board are: (1) What Collective Agreement Articles apply to the hiring of school administrators, and was there any violation of those Articles? and (2) Did the Employer discriminate against the Grievor in violation of Article 57 or other Articles when it did not select him for a school administrator position for the 2009-2010 school year?

Although the primary focus of submissions to the Arbitration Board addressed the issue of discrimination, contrary to Article 57, the parties also addressed the issue of what Articles of the Collective Agreement applied to the selection of school administrators. In that regard, the parties also addressed the general principles that apply to review by an arbitration board of such School District decisions.

Article 6.03 states “The basic criteria for the selection of teachers shall be competence, suitability and qualifications as assessed by the School Board.” The parties disputed whether Article 6.03 applies to the selection of candidates for a position of Assistant Principal or Principal. The Arbitration Board has examined Article 6.03 within the context of Article 6 and the Collective Agreement as a whole, and has applied accepted principles of collective agreement interpretation when considering this issue (see Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraphs 4:2100 and 4:2150). Article 6 is headed “Employment of Teachers”. Article 6.04 refers to the appointment of teachers to positions of administrative responsibility, and states that preference will be given “to those who have entered into continuing contract with any School Board in the Province” provided that “competence, suitability and qualifications are comparable”. Article 36 is headed “Positions of Administrative Responsibility”. Article 36.01 (a) states that “A tenured teacher appointed to the position of Principal, Vice Principal, Program Specialist or Department Head, may be required to serve a probationary period of two (2) years.” According to Article 36.01 (a), a Principal or Vice Principal is a position of administrative responsibility. Therefore, Article 6.04 applies to the appointment of a Principal or Vice Principal. Persons in those positions are teachers within the meaning of the Collective Agreement. Within the context of the Collective Agreement,

it follows that the reference to selection of teachers in Article 6.03 includes the selection of teachers to positions of administrative responsibility, such as Principals and Vice Principals.

When reviewing a School District decision for selection of a teacher to a position of Principal or Vice Principal under Article 6.03, the Arbitration Board will have regard to the language of the Article, the general principles applied by arbitrators, and prior decisions that have considered Article 6.03 or similar Articles.

In *Brown & Beatty, Canadian Labour Arbitration*, 4th edition, at paragraph 6:3100, the scope of arbitral review of a decision by management that involves an assessment of ability is described as follows:

In the first place, there is a consensus that regardless of the language of the agreement, the standard of arbitral review of managerial decisions that involve an assessment of the abilities of employees is less demanding than that used in discipline cases. As a general rule, arbitrators have been reluctant to interfere with managerial decisions of this kind unless there is evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer's judgment was unreasonable in some basic and significant respect.

In *Terra Nova Integrated School Board and Newfoundland Teachers' Association (Sceviour)*, April 30, 1987 (Roil), the arbitration board considered Article 6.04 of the collective agreement in effect at that time, which referred to preference in hiring for teachers domiciled in the Province "provided that they are qualified and suitable in the opinion of the School Board". The arbitration board in that case, decided that the language of Article 6.04 gave the School Board a subjective right to determine qualifications and suitability. It was also decided that the jurisdiction of an arbitration board to review the School Board's subjective decision was based on whether the decision was made in good faith, fairly and reasonably based on legitimate considerations of qualifications and suitability. In *Newfoundland Teachers' Association and Port au Port Roman Catholic School Board (Flynn)*, January 17, 1986 (Faour), the arbitration board reviewed a selection decision for a department head position. The arbitration board in that case considered Article 6.05, which is not at issue in this grievance, where arbitral review was based on an objective test and not a subjective test. Even where an objective test applied, the arbitration board was of the view that the decision of a selection committee must not be lightly interfered with, and there is a heavy burden on the grievor to substantiate a claim that the selection committee made an improper assessment. In that case, the

arbitration board was satisfied that the selection committee made the proper decision when it assessed suitability.

Article 6.03 sets out a subjective standard, as it states that the criteria for selection shall be competence, suitability and qualifications “as assessed by the School Board”. The Arbitration Board will review the decision based on the criteria discussed in the Brown & Beatty text. The Arbitration Board has reviewed the decision made by the Employer with respect to the selection of the successful candidate for the Assistant Principal position at Queen Elizabeth Regional High School, and the other positions that are the subject of the grievance. The Board has considered whether the Employer acted in good faith and did not act in an arbitrary or unreasonable manner in the process followed by the Employer when it made the decision and whether the decision itself was in good faith and not arbitrary or unreasonable. With respect to the process that was followed by the District in this case, the selection decisions were made by a selection committee comprised of the Director of Education and three Assistant Directors. The candidates for all positions had the opportunity to attend an interview, give a presentation on a topic selected by the School District and respond to a standard set of questions prepared for the interview. With respect to each school administrator position, the selection committee determined the criteria appropriate for the position, having regard to the needs of the school. For example, the selection committee determined that the most important need for Queen Elizabeth Regional High School was instructional leadership and the improvement of student academic achievement. The selection committee then compared the qualifications of the candidates with the needs of the school. The selection committee followed the same process for the other positions for which the Grievor applied. The Arbitration Board finds that the process followed by the School District was conducted in good faith and was not arbitrary or unreasonable.

The Grievor claims that he was qualified for the positions for which he applied, in particular, the Assistant Principal position at Queen Elizabeth Regional High School, and that the candidates selected for the positions did not have any greater qualifications. The School District does not dispute that the Grievor has the competence, suitability and qualifications to be appointed to a position of administrative responsibility. The Grievor served as Assistant Principal at Queen Elizabeth Regional High School in the 2008-2009 school year. The Principal gave the Grievor a positive evaluation and recommended that he be selected for the position for the 2009-2010 school year. The School District gave consideration to the Grievor’s qualifications and to the qualifications of the successful candidate, TB, in particular, with respect to instructional leadership. The selection committee members testified as to the reasons why TB was the best candidate for the position.

Those reasons included the needs of the school, having regard to TB's experience as Program Specialist, Chief Marker for the Department of Education, and Department Head. The selection committee members also referred to TB's stronger answers to the interview questions when compared to the Grievor's answers. The selection committee also considered that the performance evaluation of the Grievor in the position of Assistant Principal did not indicate instructional leadership. It is not the function of the Arbitration Board to substitute its opinion as to the competence, suitability and qualifications of the candidates for the opinion of the selection committee of the School District. When the decision is reviewed based on the test of whether it was made in good faith and not arbitrary or unreasonable, the Board finds that the decision meets the test. The evidence does not establish that the selection committee considered irrelevant factors or did not consider relevant factors when making the decision. The Arbitration Board has also reviewed the rationale presented by the District's witnesses for the selection of candidates for other positions, and finds that those decisions also meet the test of being made in good faith, and not being arbitrary or unreasonable. Therefore the decisions do not violate Article 6.03 of the Collective Agreement.

The Association also alleged that Article 6.11 was violated. Article 6.11 refers to filling vacant positions under Article 6.03. Article 6.11 also applies to selection of Principals and Vice Principals. The Board has considered Article 6.11, and finds that the Employer made the reasonable effort required under Article 6.11 (a), and that Article 6.11 (b) is not applicable on the facts of this case, as all the teachers selected for the positions in dispute had previous experience with the Employer. With respect to Article 6, the Employer did not violate Article 6.03, 6.11 or any other provision of Article 6.

The Arbitration Board will consider whether or not the Employer's actions amounted to discrimination in violation of Article 57 of the Collective Agreement. The Association submits that the selection decisions by the School District were motivated by the factors of age and proximity to retirement of the Grievor compared to the successful candidates.

The Arbitration Board finds that it is appropriate to consider whether there is a *prima facie* case of discrimination, and then, if necessary, to consider the reasons for the decision provided by the Employer. The review process is described in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* (1985) Can. LII 18 (SCC) at paragraph 28 as follows:

The complainant in proceeding before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer.

In *Shakes v. Rex Pak Ltd.* (1981) 3 C.H.R.R. D/1001, the Ontario Board of Inquiry stated that a *prima facie* case of discrimination is established by proving the following:

- a) The Complainant was qualified for the particular employment;
- b) The Complainant was not hired; and
- c) Someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

The Board has considered how the above three criteria apply to this case. The meaning of the first criteria, in the context of this case, is whether the Grievor was qualified for the positions that are the subject of the grievance. Having regard to the evidence of the Grievor's qualifications, and other evidence presented at the hearing, the first criteria is met in this case. The meaning of the second criteria, in this case, is whether the Grievor was selected for any of the disputed positions. The Grievor was not selected, and the second criteria is met.

The Board has considered the meaning of the third criteria in relation to the allegation of discrimination made in this case. The Association alleges discrimination on the grounds of age and proximity to retirement. Article 57.01 states there will be no discrimination with respect to "age", but does not list "proximity to retirement" as a ground of discrimination. The Arbitration Board has considered that proximity to retirement is related to age. There was testimony that the expression "30 and out" is commonly understood by teachers to mean that teachers with 30 years of service are eligible for retirement. There was evidence that a teacher who is eligible to retire may decide not to retire. However, there is a sufficient correlation between age and proximity to retirement to establish that discrimination on the grounds of proximity to retirement also amounts to discrimination on the grounds of age.

Therefore, the third criteria needed to establish a *prima facie* case, for the purpose of this matter, may be stated as follows: “that a considerably younger employee, or an employee considerably further from retirement eligibility, who is no better qualified than the Grievor, subsequently obtained the position”. There are two parts to this criteria. The first part is whether the person placed in the position was considerably younger or was considerably further from retirement eligibility than the Grievor. How much of an age difference is needed to establish discrimination on the basis of age? The amount of age difference required will depend on the circumstances. Relevant considerations will include the type of work and the ages concerned.

With respect to when a difference in age is discriminatory, the Arbitration Board has considered the decision in *Toronto Star Newspapers Limited v. I.A.M., Local 235* (1995) 47 L.A.C. (4th) 142 (H.D. Brown) (“*Toronto Star*”). In *Toronto Star*, a *prima facie* case was established by the fact the employer had hired persons to work as machinists who were less qualified than the grievor, but lacked the distinguishing feature of age. In that case, the grievor was 57 years old and the persons hired in place of the grievor ranged in age from 32 to 42. There was a considerable age difference. The arbitrator did not accept the employer’s explanation that enthusiasm overrode experience. The employer was found to be motivated by a desire to hire younger employees. The *Toronto Star* case is distinguishable from the present case on the basis of the age differences.

For the position at Queen Elizabeth Regional High School, TB, the successful candidate, was less than one year younger than the Grievor, and was therefore not considerably younger. With respect to the difference in eligibility to retire, the Association submits there was a difference of four years, based on the Grievor’s testimony that he had about 30 years pensionable service, and the evidence that TB had seniority of 25.89 years as of June 30, 2009. However, the pensionable service of TB was not established. Pensionable service and seniority may be different. The difference in seniority between TB and the Grievor was about one half year, not a considerable difference.

The evidence did not establish a considerable difference in age or proximity to retirement between the Grievor and TB, the candidate selected for the Queen Elizabeth Regional High School position. With respect to the positions in other schools that are the subject of the grievance, the evidence does not establish a considerable difference in age or proximity to retirement between the Grievor and the successful candidates. This part of the criteria needed to establish a *prima facie* case of discrimination has not been proven. It is therefore unnecessary to consider the final part of what is

required to prove a *prima facie* case, namely, whether the persons placed in the positions were better qualified than the Grievor.

The Arbitration Board finds that a *prima facie* case of discrimination was not proven. Alternatively, in the event the Board has erred in this finding and a *prima facie* case was proven, the Board will consider whether a reasonable explanation was provided by the Employer for the selection decisions.

The Board will consider whether the reason for the selection decisions was discriminatory contrary to Article 57. It is unnecessary to find that a discriminatory reason, such as age, was the sole reason for the decision not to select the Grievor for the positions. In *Chidley v. Clowe's Ambulance Service* (2010) CHRR Doc 10-3550 (N.L.Bd. Inq), a finding of discrimination on the basis of gender was found to be an influencing factor in the decision not to hire the complainant. The Adjudicator stated as follows:

It is not incumbent on me to determine that [gender] was the sole or primary reason for that decision [see *Almeida v. Chubb Fire Security Division* (1984), 5 C.H.R.R. D/2104 at para. 17840-17841]: (“*Almeida*”)

“. . . it is sufficient for a complainant to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decisions which are the subject matter of the complaint. . . although the prohibited ground of decision making must have some causal role or influence in the decision made, it need not be the exclusive cause of or influence on the decision. Indeed, as is suggested in *Bushnell* itself, it is not necessary to establish that the prohibited ground was the main reason for the decision in question.”

The Arbitration Board accepts the above principle, and agrees that discrimination on a ground listed in Article 57 may be proven when the discriminatory factor is one factor that influenced the decision. In this case, the decisions were made by a selection committee comprised of four persons, the Director of Education and three Assistant Directors. The testimony of each of the committee members regarding the reasons for the decisions is described in the Award. The decisions were made by consensus and each of the committee members contributed to the decisions. Under these circumstances, if the discriminatory factor was one factor that influenced the decision of any one of the committee members, that would be sufficient to amount to discrimination contrary to Article 57. This result would follow from the fact that if any one of the committee members was influenced by

a discriminatory factor, then the decision made by consensus by all four committee members would be influenced, in part, by a discriminatory factor.

The Arbitration Board refers to the rationale given by the Employer for the decision to select TB for the Queen Elizabeth Regional High School position, and the rationale given for the decisions to select other candidates for the other positions. The Board notes the testimony of all selection committee members that the factors of age and proximity to retirement have no influence on the selection decisions. The committee members said they did not know the age or proximity to retirement of the Grievor or the selected candidates at the time the decisions were made. The testimony of the selection committee members supports finding a credible nondiscriminatory reason for the selection decisions.

In relation to the Employer's reason for the selection decisions, the Arbitration Board will also consider evidence with respect to the meeting between the Grievor and Allister Dyke. The meeting was held to discuss the reasons for the selection decision for Queen Elizabeth Regional High School. At that meeting, Mr. Dyke explained to the Grievor that the School District was looking for a candidate who had demonstrated instructional leadership. Mr. Dyke informed the Grievor that his answers to the interview questions, and the evaluation of his work as Assistant Principal, did not demonstrate the instructional leadership required for the position. The Association did not allege that Mr. Dyke expressly stated that the selection decision was influenced by age or proximity to retirement. However, it is alleged that Mr. Dyke's statements implied such an influence. Both Mr. Dyke and the Grievor testified that Mr. Dyke made comments about his own possible retirement, and that he asked the Grievor about his plans for retirement. The comments left the impression on the Grievor that age was a factor in the decision. However, the comments were made in the context of a friendly conversation at the start of the meeting, and prior to the discussion of the reasons for the selection decision. In that context, the statements by Mr. Dyke did not indicate discrimination on the basis of age or proximity to retirement. Mr. Dyke made statements at the meeting about succession planning. The Grievor understood those statements to mean that the School District wanted to hire someone for Queen Elizabeth Regional High School who was further away from retirement than the Grievor. The Principal in the school had expressed a desire to transfer to another school. The Grievor testified that Mr. Dyke referred to the stability of the school and he understood the comment to mean that the District would not want both administrators to leave the school at the same time. The Grievor also testified that Mr. Dyke expressed a desire to have "fresh blood" in the school. Mr. Dyke denied making such a statement. Mr. Dyke testified that he had heard that the

Principal was interested in transferring to another school. However, the Principal had not yet made any application for a transfer, and it was unknown when such a transfer might occur. Mr. Dyke said he had no knowledge as to when the Grievor would be eligible to retire. Mr. Dyke and other School District witnesses testified that succession planning was not related to age or proximity to retirement, but meant that both the Principal and Assistant Principal in a school ought to be capable of operating the school if one were absent. The District's witnesses also stated that succession planning was directed at preparing a group of teachers for leadership roles, so that teachers would be available to replace administrators who left the system. Within the context of the discussion at the meeting, it would be inconsistent with other comments made by Mr. Dyke, and therefore unlikely, that Mr. Dyke would have stated that the decision was related to a desire to have "fresh blood" in the school. In the context of the explanation of succession planning provided at the hearing, the Board finds that any statements made by Mr. Dyke to the Grievor about the stability of the school or succession planning do not indicate that age or proximity to retirement had any influence on the decision not to select the Grievor for the position.

The Employer has established a credible, nondiscriminatory reason not to select the Grievor, and to select another candidate for the position at Queen Elizabeth Regional High School and to select other candidates for the other positions that are the subject of the grievance. The Employer has established that it was not influenced by the factors of age or proximity to retirement when it made the selection decisions.


In summary, the Employer did not violate Article 6 of the Collective Agreement when it did not select the Grievor for the position at Queen Elizabeth Regional High School or other positions. The Association did not establish that persons considerably younger or further from retirement than the Grievor were selected for the positions. Further, the Employer has established a credible nondiscriminatory reason to select other candidates for the positions. The Employer has established that age or proximity to retirement did not influence the decisions. Therefore, the Employer did not discriminate against the Grievor on the basis of age or proximity to retirement, and did not violate Article 57, when it did not select the Grievor for the positions.

Decision

For the reasons stated in the Award, the grievance is denied.

DATED this day of April, 2011.

James C. Oakley, Chairperson



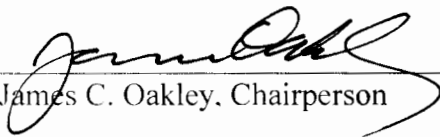
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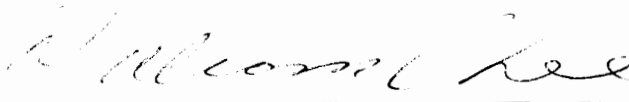
Decision

For the reasons stated in the Award, the grievance is denied.

DATED this 18th day of April, 2011.


James C. Oakley, Chairperson

Ray Goulding



William Lee