GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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BCTF/BCPSEA: Class Size

In 2002, the BCTF grieved a number of violations of the *School Act* and *Class Size Regulation.* After it was determined that an arbitrator does have jurisdiction to determine whether there has been a violation of s.76.1 of the *School Act* or the *Class Size Regulation,* the BCTF and BCPSEA agreed to put four threshold questions to Arbitrator Don Munroe. While the award dealt specifically with the *Class Size Regulation* as it stood in the 2002/03 school year, the reasoning will also apply to subsequent years.

1. When must school districts be in compliance with statutory class size numbers?

   Boards are required to ensure compliance by September 30 and to maintain compliance thereafter. In other words, there is a grace period during September but on September 30 and throughout the remainder of the year classes must comply with the maximums in the *School Act.*

2. What is the proper method for reporting district-wide class size averages? Should the number reported reflect normal mathematical rounding?

   Averages fixed by section 76.1(1) cannot be exceeded, even fractionally. In other words, normal mathematical rounding is not to be applied.

3. What are the individual class size limits for split classes?

   The maximum permissible class size for a K/1 split is 22; and for a grade 3/4 split, 24.

4. In light of the Court of Appeal's decision of February 18, 2005, must the BCTF identify a provision of the collective agreement that is violated by a school board's alleged non-compliance with the statutory class size limits?

   The collective agreement, including its implicit terms must be interpreted in the light of the statutory breach.

   The BCTF put a fifth question to the arbitrator:

5. Can a teacher or the union agree to exceed the mandatory class size provisions? In other words, can a teacher or the union waive the right to grieve a violation?

   Arbitrator Munroe declined to deal with the question at this stage.

BCPSEA Reference No. A-02-2006

BCTF/School District No. 75 (Mission): Work Beyond 1.0 FTE

The grievor was a full-time (1.0 fte) teacher who taught in an alternate program four days per week from 8:00 to 3:00 plus five Saturdays per year. He applied for and was denied a part-time (0.5 fte) posting in an alternate program for a position from 3:30 to 6:00 Monday to Friday, which he wanted to hold in addition to his full-time position. The grievor testified that he could handle both positions without prejudice to either. While recognizing that the grievor was qualified for the vacancy and was the candidate with the most seniority, the employer did not award him the position because if it did so, the grievor's teaching assignments in the regular K-12 program would cumulatively be greater than a full-time teaching assignment. The union argued that a teacher is entitled to take on as many positions within the regular school-based K-12 program as the teacher's seniority and qualifications permit, so long as no scheduling conflict arises.

Arbitrator Donald Munroe denied the grievance. He said the true substance of the dispute was not one of a narrow interpretation of the "necessary qualifications" language in the post and fill clause, but rather a larger structural dispute requiring a review of the collective agreement as a whole. Arbitrator Munroe acknowledged the employer's pedagogical concerns about a full-time teacher taking on an extra 2.5 hour daily instructional assignment. Acknowledging the work expected of teachers outside of instructional hours, he stated, "it is too narrow a view of a teacher's employment to think only in terms of whether there is a conflict in scheduled instructional hours." Arbitrator Munroe agreed with the employer in drawing a valid distinction between that, "the exercise of its management rights must be appraised in the context of the professional nature and full scope of a teacher's duties."

Arbitrator Munroe acknowledged that teachers are sometimes assigned work in addition to a full-time appointment. He said, "It is not uncommon in all manner of employment settings for full time employees to have opportunities from time to time to work additional hours for extra pay. But that is not generally taken to mean that the full time employees are entitled to take on another regular assignment, on an ongoing basis, in addition to their already-full time assignment." He noted as valid the distinction the employer drew between additional assignments on an ad hoc basis outside the regular program of instruction, e.g. summer school, night school, Saturday school and home learner programs and positions in the regular school system.

BCPSEA Reference No. A-01-2006

CUPE, Local 1851/School District No. 35 (Langley): "Upward Bump"

The bumping language in the collective agreement includes, "The employee shall also be given the opportunity to apply for any higher classifications which are occupied by an employee with lesser accumulated seniority. Once an application has been received, the employer shall interview the employee to evaluate the employee's ability and qualifications for the position as compared to the incumbents. The required knowledge, ability and skills for the position shall be the primary consideration and where both employees are qualified to fill the position, seniority with the employer shall be the determining factor." The grievor, a Warehouseperson who was also Local President, sought to bump into a higher classification held by Mr. T, a Head Custodian who had less seniority than the grievor.

The union argued that this clause constitutes a threshold ability provision, and as the employer acknowledges that the grievor possesses the minimum qualifications, he should be awarded the Head Custodian position. The employer argued that the clause provides for a competition between employees and that the incumbent possessed much more relevant and recent experience than the grievor.

Arbitrator Christopher Sullivan dismissed the grievance. He determined that the language "constitutes a "hybrid" provision that lies between a purely competitive and a threshold ability clause…. While it is apparent the grievor meets the minimal qualifications for the position, it is also apparent that a substantial and demonstrable difference exists between his skills and abilities to perform the job as compared to Mr. T's. The grievor has an extensive supervisory experience, but not in the capacity of a "hands on" working supervisor. Further, the grievor has not held a supervisory position since 1992. He has never supervised custodial staff."

BCPSEA Reference No. A-33-2005

Coast Mountain Bus Co. Ltd.: Access to Information

In *Grievance and Arbitration Update* No. 2005-08 dated September 1, 2005, a decision by Arbitrator Judi Korbin regarding access to information was reported. BCPSEA indicated that it thought the matter was wrongly decided and would be revisited. The B.C. Court of Appeal recently issued a judgment which analyzes the intersection of collective agreement language and the *Freedom of Information and Protection of Privacy Act (FOIPPA).* Rather than review that judgment, the following is a set of general guidelines based on the judgment developed by BCPSEA and Harris & Company.

Guidelines for Responses to Union Requests for Information

The union's access to information is guided by the specific language in the collective agreement. This access may be further limited by FOIPPA Part 3 – Protection of Privacy.

The December 8, 2005 Court of Appeal judgment regarding the Coast Mountain Bus Co. Ltd. provides an analysis of the intersection of collective agreement language and FOIPPA. Essentially, the judgment states that where the collective agreement provides access to certain information and the union's purpose in accessing that information is for a purpose consistent with the employer's initial purpose in obtaining the information, disclosure is permitted, even if disclosure may include the personal information of a third party. An example would be where the employer initially requires information to select a suitable candidate for employment and the union subsequently seeks information to ensure the selection was made in compliance with the collective agreement. However, disclosure is not unlimited. The employer must ensure that it discloses only the minimum amount of third party personal information necessary for the union to perform its task — personal identifiers and information not related to the initial purpose must be blocked out and the union is obliged to ensure that security arrangements are made to properly protect the information.

Access to information language varies between districts. Of particular concern are clauses which provide for access to information that may be used in processing grievances and/or information that the union requires to fulfill its role as representative of employees in the bargaining unit. General access to information clauses may be impacted by specific language in other sections of the collective agreement; e.g., discipline and harassment. Clauses differ between districts in that some provide a right to access documents, others a right to access information, and some a right to access both documents and information. Depending on the specific language, provision of information may be mandatory or discretionary.

The recommended process to follow in determining whether or not to provide information requested by the union prior to a grievance being filed or during the pre-arbitration stages of a grievance is:

1. Review the specific collective agreement language to determine if the parties agreed that the information requested is to be shared. It is important to note that FOIPPA Part 2 – Freedom of Information only covers FOIPPA requests and does not extend or enhance the access to information clause in a collective agreement. A district may have to review bargaining history and/or past practice in determining mutual intent if the language is not clear.

2. Assess whether the union's purpose in accessing the information is consistent with the employer's initial purpose in obtaining the information.

3. If provision of the information is discretionary and the district wishes to deny access, the district should be prepared to share the criteria upon which the decision was made.

4. If the district provides the information, and the information contains personal information of third parties, three conditions must be met:

    a. Ensure that only the information necessary to the union's purpose is provided; e.g., in a post and fill grievance, the union only has access to the information of the successful applicant (whether an internal or external candidate) and other applicants who are members of the bargaining unit. The union does not have access to the information of unsuccessful applicants who are not members of the bargaining unit.

    b. Personal identifiers; e.g., name and contact information, and personal information not related to the initial purpose, must be blocked out.

    c. The union must make an undertaking that it will ensure security arrangements have been made to protect the information.

BCPSEA Reference No. CD-06-2005
Court of Appeal Reference: *http://www.courts.gov.bc.ca/jdb-txt/ca/05/06/2005bcca0604.htm*

Questions

If you have any questions concerning these decisions, please contact your BCPSEA liaison. If you want a copy of the complete award, please contact **Nancy Hill at nancyhi@bcpsea.bc.ca** and identify the reference number found at the end of the summary.