GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2006-03 **March 1, 2006** **By E-mail: 4 Pages**

BCTF/BCPSEA: Freedom of Speech

As reported in the February 23, 2006 @ issue, the Supreme Court of Canada (SCC) dismissed the BCPSEA application for leave to appeal the judgment of the BC Court of Appeal (BCCOA) regarding the issue of teacher freedom of speech rights in the context of parent-teacher interviews and the use of bulletin boards.

The SCC does not provide reasons in dismissing applications for leave to appeal. A rejection of a leave application does not amount to an endorsement of the lower court's reasoning, but rather reflects the SCC's view that the case is not of national importance. Our application may have been affected by a SCC judgment in another case (*Montreal (City of)* v. 2952-1366 *Quebec Inc.,* 2005 SCC 62) which was issued after BCPSEA's leave application was filed but before it was considered. In the *Montreal* case the SCC held that whether there is a right to use public property for free expression will depend on the particular context and historical function of the public space. It may be necessary to revisit the issue in the public education sector in the further should further disputes arise.

It should be noted that the BCCOA did not deal with the issue of the use of students as conduits or couriers for the transmission of political materials to parents. This issue is currently in the grievance process.

For your reference, the BCCOA established the following principles governing teacher freedom of expression. You may want to share these principles with your school administrators.

General Principles

1. School boards and teachers have an obligation to ensure public schools are and are seen to be places open and receptive to a wide spectrum of views, particularly in political discourse. A teacher's right to political expression must be valued, but must also be balanced with society's interest in effective parent-teacher interviews and public confidence in the school system.

2. Political expression by employees must not interfere with the effective and efficient operation of a school.

3. Political expression by employees must not result in a loss of instructional time for students or any other educational disturbance, or impair the performance of the duties of the employee in question.

Parent-Teacher Interviews

In addition to the above, the following specific guidelines apply to parent/teacher interviews:

1. Parent-teacher interviews fulfill the informal reporting requirements mandated by subsections 5(8) and (9) of the School Regulation. School boards have a pressing interest in ensuring that these reporting requirements are met during parent-teacher interviews.

2. Boards are permitted to remind teachers of the purpose of parent-teacher interviews (i.e., to report on the progress of a child to a child's parent), and their obligation to ensure that the goals of the interview are reached.

3. Parent-teacher interviews must not be dominated by discussion of class sizes, class composition, or school resources for the purposes of advancing what can be characterized as a particular position or political agenda. Any such discussion must be reasoned and connected to the specific needs of the child being discussed.

BCPSEA Reference Materials: *http://www.bcpsea.bc.ca/public/publications/aissue/ai2006-01.pdf*
http://www.bcpsea.bc.ca/public/publications/aissue/ai2005-03.pdf

BCTF/School District No. 33 (Chilliwack): Sick Leave/Duty to Accommodate (Fifth Disease)

Fifth Disease, so named because it is the fifth common childhood disease, creates a slightly increased risk of miscarriage or fetal death, generally during the first months of pregnancy. The grievors, all pregnant teachers, were advised by their doctors to cease attending school because of potential exposure to Fifth Disease. The grievors, without the antibody providing immunity to Fifth Disease, were granted sick leave benefits. The Union argued that the Employer had discriminated against the grievors based on prohibited factors and failed to provide a safe workplace. The resolution sought was twofold: the Employer is obligated to pay the grievors for the time they were unable to attend work and to make whole their sick leave banks; and the Employer is obligated to find alternative work.

Arbitrator Colin Taylor dismissed the grievances. He found that the Workers' Compensation Board (WCB, now Worksafe BC) has exclusive jurisdiction to determine the safety of the workplace and the WCB had investigated the matter of Fifth Disease and determined it did not pose an undue hazard. In considering the collective agreement language, the arbitrator said, "The parties are also free to negotiate their own collective agreement protections against workplace hazards. In this case, the negotiated protection applies only to the "physical conditions" in "facilities". I have found this does not include the risk of catching contagious disease from schoolchildren."

Arbitrator Taylor also found that the Employer has a duty to accommodate those pregnant teachers who did not have the antibody and that pregnant teachers facing the risk of Fifth Disease have a duty to determine if they have the antibody for Fifth Disease. He further found that the Employer had met its duty in considering other teaching work. While alternate education sites were likely to present a significantly reduced risk, there was no vacancy available and the work there did no seem to be suitable for the grievors. "In the result, the Grievors have made an entirely defensible choice, based on medical advice, to remove themselves from the schools. The Employer has accepted that choice. The issue is whether the Grievors are entitled to regular pay for their absence. I have determined that, given the findings outlined above, they are not. It is not necessary for me to decide whether the Grievors are entitled to paid sick leave for their absence, but I find that in providing paid sick leave, the Employer has acted reasonably in the circumstances."

BCPSEA Reference No. A-03-2006

BCTF/School District No. 41(Burnaby): Adult Education: Experience Recognition

The grievor, a certified teacher started teaching in Adult Education (AE) in Burnaby in September 1997 on a part-time basis while teaching in the AE program in School District No. 39 (Vancouver) on a full-time basis as defined by the collective agreement in that district. In March, 2000 the Labour Relations Board varied the certification to include Burnaby AE teachers. The terms and conditions of the collective agreement applicable to AE teachers in Burnaby took effect July 1, 2003. The grievor was placed at Step 0 of the salary scale based on the language of the collective agreement in Burnaby. The grievor thought he should be paid at the highest step as he was on the highest step in Vancouver.

The principal issue considered was whether a year of teaching full-time in Vancouver as determined by the Vancouver agreement (950 hours inclusive of preparation time) met the requirements in the Burnaby agreement (a minimum of eight months of full-time employment during one school year). The Employer argued that the requirement in the Burnaby agreement requiring AE teachers to teach 1000 hours before earning an increment should form the basis for calculating full-time work for experience recognition for AE teachers in Burnaby.

Arbitrator John Kinzie upheld the grievance. He noted that the parties have established two distinct regimes for measuring teaching experience for salary purposes – experience recognition and increment accrual. He said, "the question of whether an adult education teacher has been engaged full-time … in another school district is, in my view, to be determined under the terms of the collective agreement governing employment in that school district. In this case, the grievor has been engaged in "full-time employment" with the Vancouver School Board since September 1, 1992. In my view, he is entitled to credit for those years of teaching experience under Article B.4." Arbitrator Kinzie further determined that the appropriate date to determine salary "on appointment" should be July 1, 2003, the date that all AE teachers in Burnaby were placed on the salary scale.

Arbitrator Kinzie noted that the inclusion of the words 'on appointment' in the experience recognition clause "make it expressly clear that Article B.4 only applies to teachers on initial scale placement and not to their accrual of increments thereafter while in the employ of the Employer." This finding provides an answer to the question of whether or not teachers on leave should earn an increment if they teach in another district. Under this award, external experience is to be recognized only at time of appointment and teachers would not accrue increments for teaching elsewhere after their initial appointment.

BCPSEA Reference No. A-04-2006

BCTF/School District No. 75 (Mission): LRB - In-Dispute Declaration (Gallup Teacher Insight)

In Update 09, October 1, 2005, we reported on a LRB decision that voided the in-dispute declaration placed by the BCTF on the Employer because the Employer required all external applicants to complete the Gallup Teacher Insight screening questionnaire. The BCTF appealed that decision.

The LRB dismissed the BCTF's application.

BCPSEA Reference No. LB-02-2005

BCTF/School District No. 75 (Mission): Recall to Part-Time Position

Also in Update 09, October 1, 2005, we reported on Arbitrator Brian Foley's decision that once a teacher accepts a re-engagement offer, at any FTE, the teacher has been re-engaged, is now actively working, and is no longer to be retained on the re-engagement list. The BCTF appealed that decision.

The LRB dismissed the BCTF's application.

BCPSEA Reference No. A-24-2005

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.