

## **BCTF/School District No. 42 (Maple Ridge-Pitt Meadows): P. Dunning Leave**

The grievor had received a 3 week suspension for off-duty conduct. The disciplinary action was reported to the BC College of Teachers (BCCT) in accordance with Section 16 of the *School Act*. The grievor applied for and received a long service leave for the 2004/05 school year. Long service leave is a partially paid leave. On November 3, 2004, the BCCT informed the district that the grievor's membership and teaching certificate were suspended from October 25, 2004 to January 25, 2005. The district cancelled the leave and the remuneration for the same period.

Arbitrator Christopher Sullivan upheld the grievance and ordered the employer to make the grievor whole. He determined that the grievor was not providing an educational program at the time of his suspension from the BCCT, "he continued to be an employee covered by the Collective Agreement, and was entitled to receive the benefit of the negotiated long service leave provision. ... The grievor was suspended from being able to perform work as a teacher, not from being an employee." Arbitrator Sullivan commented that the grievor's 1976 appointment "was clearly understood to be contingent upon him receiving a valid teaching certificate. ... The letter of appointment issued at that time notably does not express the notion that continued employment under the terms of the Collective Agreement is contingent upon him maintaining this certification."

*BCPSEA Reference No. A-33-2006*

## **BCTF/School District No. 49 (Central Coast): Posting**

In 2004/05, the school in Shearwater was ultimately staffed with 1.72 FTE teachers. The .72 FTE teacher had posted in at .5 and was increased to .63 and then .72 as the year progressed. In September 2005, the 1.0 FTE teacher transferred to another school. The .72 teacher was offered and accepted a 1.0 FTE. As the student population had declined, a .5 vacancy was posted and filled. The union argued that when the 1.0 FTE teacher left the school, the employer had the right to determine whether to fill the position. In this case, the union did not take issue with the employer's right to determine how much of the position to fill but, once it determined to fill .78 of the position (1.5 - .72), the employer had to post a .78 position.

The language in the collective agreement states:

"A vacancy exists when it is decided to fill a position to which no teacher is assigned."

Arbitrator Robert Pেকেles dismissed the grievance. He said, "The longstanding practice points to a mutual intention of the parties that an increase of an FTE to an existing position to which a teacher is already assigned, is not a decision "to fill a position to which no teacher is assigned". As such, it is not a "vacancy". He emphasized that he reached this conclusion in light of the language and the past practice. "Without the past practice evidence, my conclusion on this point may have been different."

*BCPSEA Reference No. A-28-2006*

**BCTF/School District No. 70 (Alberni): Alex Herdy Discipline**

In late Spring 2004, the Grievor, a TOC, slapped a Grade 8 female student on her buttocks during the lunch hour while walking past the student off the school property. The incident did not come to the district's attention until January 2005 when two teachers overheard the student saying that the grievor had "slapped her ass" and reported the comment to the Vice-Principal. After an investigation and Board hearing, the grievor was suspended from the TOC list for 20 working days. Upon reporting the discipline to the BC College of Teachers (BCCT), the district became aware that the grievor had not applied for membership and certification with either the BCCT or the Teacher Qualification Service.

Arbitrator Joan Gordon upheld the discipline but substituted a 10 working day suspension which represented the grievor's average month. The arbitrator noted, "Thus, a 10 working day suspension still constitutes a significant penalty for his first incident, albeit serious, of misconduct."

Arbitrator Gordon noted that "teachers are vulnerable to students' allegations, sometimes erroneous, of serious misconduct. As grave consequences for teachers' reputations flow from arbitral findings that serious allegations have occurred, arbitrators have reposed on employers the onus of proving their cases on a balance of probabilities with clear, cogent and convincing evidence of misconduct." In this grievance, the arbitrator found she accepted the student's version over the teacher's because:

- the location described in the evidence of the witnesses was the same place.
- while the employer did not establish the date and time to the higher degree noted above, the flaw was not fatal.
- the student testified in a forthright, straightforward manner while the grievor did not (answers were unnecessarily rambling, evidence in cross-examination was evasive, numerous inconsistencies).
- the student's mother's and sister's testimony regarding the impact on the student was consistent.
- the grievor's story changed over time while the student's version was consistent.
- the student did not have any motive to make a false allegation against the grievor.
- there was nothing in the student's history that would place less reliability on her evidence while there were at least 3 considerations diminishing the grievor's evidence (knowingly failing to obtain BCCT membership, TQS certification and accepting a higher rate of pay than he was entitled to receive; misrepresenting his BCCT status to his union; and misrepresenting advice received from the union).

With regard to the disciplinary penalty, the arbitrator found that the grievor's conduct "was impulsive and not intended to embarrass or harm the student," and "it nonetheless constitutes a failure to meet the high standards of conduct teachers must maintain...professional teachers must maintain a standard of behaviour which most other citizens do not need to observe because others do not have positions of trust and do not have such public responsibilities to fulfill. Professional teachers are expected to contemplate and appreciate the likely impact of any physical contact with students. Teachers are reasonably expected to think before they act in order to ensure they avoid serious acts of poor judgment such as occurred here."

## 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](mailto:nancyhi@bcpsea.bc.ca)** and identify the reference number found at the end of the summary.