GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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HEU & BCTF et al v. HEABC & BCPSEA: Definition of Strike — Constitutional Challenge

Issue: In January 2002, the BC Teachers' Federation (BCTF) and the Hospital Employees' Union (HEU) engaged in a withdrawal of services in response to Bills 27, 28 and 29. The legislation imposed collective agreements and amended and/or removed collective agreement provisions.

Both the BCTF and the HEU applied to the Labour Relations Board for a declaration that the definition of "strike" in the *Labour Relations Code* was unconstitutional, infringing upon their members' right to freedom of expression under section 2(b) of the *Charter of Rights and Freedoms*. The original panel's ruling on those applications reached two different conclusions. The applications were subsequently joined, and a reconsideration panel ruled that the definition did infringe upon the union members' right to freedom of expression, but was saved by section 1. That decision was appealed to the BC Supreme Court.

Decision: On March 20, 2007, the Supreme Court ruled that the definition of "strike" does not infringe upon union members' right to freedom of expression.

> "The petitioners submit the definition of strike creates an absolute prohibition on the petitioners' ability to exercise their right to political expression. However, at most, the definition inhibits the petitioners' ability to exercise their right to political expression in the form of mid-contract work stoppages. Their ability to engage in political expression and to attend political protest rallies to deliver their message is not affected by the expanded definition. All that is circumscribed is the time (not during a collective agreement) and the manner or form (a work stoppage) of their expression. It is the physical consequences (the mid-contract work stoppage) of their political expression (protest rallies against government policy) that is restricted by the definition, not their ability to engage in or the content of their political expression.
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> The effect of the definition on both petitioners is that their members remain free to attend political protest rallies provided they are not required by the terms of their collective agreement to be at work when the protest rally is scheduled. The petitioners argue that such a limitation reduces the effectiveness of their political message, but the s. 2(b) right to freedom of expression has never guaranteed the right to the most effective form of expression….
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> With respect, I have determined that the definition of strike does not infringe s. 2(b) as it does not prohibit the content of political expression and its purpose and effect does not prevent individuals from exercising their right to political expression by attending protest rallies. The restriction merely requires that such political expression not involve a mid-contract withdrawal of services. It is a restriction of time and form rather than a ban on the content of expressive activity and is consistent with restrictions on the expressive activity of all individuals in an employment relationship.

The Court also analyzed whether, if the definition of "strike" did infringe upon the right to freedom of expression, was the definition saved by section 1. The Court decided that the definition is saved by section 1, as the overall objective of certainty, stability and the preservation of industrial peace justify the imposition of time and form restrictions on mid-contract work stoppages in a free and democratic society.

BCPSEA Reference No. CD-01-2007

BCTF/ SD No. 39 (Vancouver): Experience Recognition

Issue: The collective agreement provided for a variety of scenarios under which a teacher would have previous teaching experience recognized:

1) 1 year of experience recognition for a minimum of 8 months of full-time employment during 1 school year
2) 1 year of experience recognition for 2 periods of full-time employment each of 5 months or more, in 2 different school years
3) 1 year of experience recognition for a minimum of 60% of full-time employment during one school year.

The union argued that under point 3) above, teachers are entitled to teaching credit when their experience accumulated over *a number of years* adds up to the equivalent of a 60% assignment for one year. The reference to "one school year" combined with 60% defines what amount of experience must be accumulated, but it does not restrict the time for completing that experience.

Decision: Arbitrator Judi Korbin dismissed the grievance. As the accrual of credit and thus salary is an important benefit, it would be expected that the language would be clear and unequivocal. There is no such language here that would allow for accumulation of outside credit at less than 0.60 FTE per year. Use of the word "equivalent" allows for combinations of experience that accumulate to 0.60 FTE in one school year only.

Korbin also noted that consideration must be given to the word "accumulate," used elsewhere in the agreement to allow adding years together — the word is not used in this clause. Given the specific language elsewhere in the collective agreement outlining the ability to accumulate experience over a number of years, and the absence of such language in the clause in question, the arbitrator concluded that the parties did not intend to furnish the benefit of accumulation of part time experience gained outside the school district.

BCPSEA Reference No. A-11-2007

BCTF/ SD No. 68 (Nanaimo-Ladysmith): Rec 'N Reading — Work of the Bargaining Unit

Issue: The Rec 'N Reading program is a summertime literacy program for students with below grade level literacy skills. The program was initiated and developed by a school district employee who garnered community support, financial and otherwise, to run the program.

For the summer of 2005, the employee was unable to run the program herself, and the employer received a provincial government grant to continue the program. The union argued that as the employer was now funding the program, it must be staffed with members of the teacher bargaining unit and in accordance with the collective agreement.

Decision: Arbitrator Colin Taylor dismissed the grievance. Although teachers teach reading, that, in and of itself, does not mean the Rec 'N Reading program is work normally performed by teachers as

part of their regular duties and responsibilities. The program does not constitute an educational program under the *School Act* — it was not under the supervision of a principal, it took place outside the school year, there was no entitlement to enroll, the program was by invitation only, class size provisions were not applied, it did not involve learning outcomes or assessment requirements, no student data were collected and sent to the Ministry of Education, there were no student progress reports, and the program did not lead to a credit or graduation within the context of the school system.

BCPSEA Reference No. A-05-2007

BCTF/ SD No. 62 (Sooke): Qualifications on Layoff / Recall

Issue: While on layoff, the grievor was denied placement into three Learning Assistance/Integration Support (LAIS) positions, one at the middle school level, and two at the elementary school level. The grievor had previously worked in a LAIS position for two years at the middle school level.

The employer argued that the grievor was not qualified for the positions, as she did not possess university level courses in the diagnosis and remediation of learning disabilities in math and language arts, and in assessment and testing theory and practice up to and including Level A and B tests.

Decision: Arbitrator John Kinzie allowed the grievance. The grievor was entitled to be offered re-engagement to the LAIS position at the middle school level.

The employer considered the grievor for the positions under the necessary qualifications requirement in the post and fill provision, as opposed to the appropriate test of reasonable expectation under the layoff provision. With respect to the grievor's previous experience in a LAIS position at the middle school level, the arbitrator stated that on the evidence, the only reasonable conclusion that can be drawn is that the grievor performed the duties in a satisfactory manner. The union therefore established that there was a reasonable expectation that the grievor would be able to perform the duties at the middle school level in a satisfactory manner.

The arbitrator noted that because the provision of LAIS services seems to be different for elementary students than those provided to middle schools students, and because the grievor did not have the university level courses in testing and the diagnosis and remediation of learning disabilities, it cannot be said that the same reasonable expectation would have existed insofar as the grievor filling a LAIS position in an elementary school.

BCPSEA Reference No. A-04-2007

Questions

If you have any questions concerning these decisions, please contact your BCPSEA labour relations 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.