GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

**2007-04** **June 1, 2007** **By E-mail: 2 Pages**

## BCTF/ SD No. 72 (Campbell River): Discipline — Inappropriate Touching

**Issue:** Did the Employer have just cause to discipline the Grievor?

**Facts:** The Grievor, a TOC, was assigned to a Grade 7 PE class and two blocks of Social Studies/English 7. The Grievor is alleged to have touched a female student by twice brushing her right breast while telling her to go and get changed at the end of the PE class. The Grievor was suspended from the TOC list pending the investigation. The investigation resulted in a continuing suspension from the TOC list to the end of the school year, approximately six weeks. The Grievor was also prohibited from teaching in any school where the student is enrolled. At the hearing, the Grievor denied that the incident occurred.

**Decision:** Grievance dismissed, discipline upheld. On balance, the arbitrator found that the evidence of the student and the witness was more in harmony with the preponderance of the probabilities than the Grievor's story. The finding of intentional inappropriate touching was a serious misuse of the Grievor's physical authority as a teacher. His ongoing denial at the hearing exacerbated the seriousness of his misconduct. The Grievor failed to apologize and settle the matter after being given ample opportunity to do so. The Grievor's attempt to develop a theory that the student and the witness fabricated the incident was troubling, indicating that the Grievor did not accept responsibility for the misconduct, did not recognize the seriousness and improper nature of his misconduct, and felt no remorse for the significant and ongoing impact of his misconduct on the student's emotional well-being.

*BCPSEA Reference No. A-17-2007*

## Human Rights Complaint: SD No. 38 (Richmond) — Early Retirement Incentive Plan; Discrimination Based on Age

**Issue:** Does the Early Retirement Incentive Plan (ERIP) contravene the *Human Rights Code* by discriminating based on age?

**Facts:** The collective agreement provided an ERIP to teachers aged 55-64. The ERIP was paid as an allowance to teachers based on a percentage of salary. That percentage varied according to the teacher's age at retirement. For example, a teacher retiring at age 55 was entitled to an allowance of 22% of salary, while a teacher retiring at age 64 was entitled to an allowance of 14% of salary.

The amount of funds available for the ERIP each school year is a maximum of $120,600. The funds were allocated on the basis of age, beginning with those teachers retiring at 55 years of age.

The Union and the Employer submitted that allocating the funds in this manner was part of the legitimate business objective of the ERIP, to help offset the early retirement penalties of the pension

plan. A teacher retiring at the ages of 55 through 59 receives a reduced pension of between 15 to 25 percent, while a teacher retiring at age 65 receives no such reduction.

**Decision:** Complaint dismissed. The ERIP is exempt from the Code's prohibitions as a *bona fide* retirement or pension plan. The Tribunal accepted the conclusions set out in an actuarial report filed by the employer that "the ERIP is based on sound and accepted retirement/pension practice…. The fact that, under the ERIP, larger allowances are paid to younger teachers reflects the reality that negative monetary outcomes under [the pension plan] tend to be largest for younger teachers who chose early retirement and is consistent with sound ERIP design princip[les]."

*BCPSEA Reference No. HR-01-2007*

## BCTF/ SD No. 36 (Surrey): Summer Pro D Activities — Application of Consent Award

**Issue:** The Consent Award addressed professional development during the summer months, and provided that teaching staff would be entitled to vote whether such scheduling should occur. Paragraph 2 allowed that if 50% + 1 of the teaching staff did not vote in favour, the professional development would not take place in the summer. Paragraph 3 allowed that if 75% voted in favour, the professional development may take place in the summer. Paragraph 11 allowed that if between 50% and 75% voted in favour, the issue may be referred to Arbitrator Colin Taylor for resolution.

Votes at two schools resulted in between 50% and 75% approval for summer professional development activities. The employer referred those two issues to the arbitrator for a declaration that the summer professional development was permissible.

The union argued the employer was estopped from relying on the strict language of Paragraph 11 approval.

**Decision:** The Employer application was granted. The union's estoppel argument failed. The arbitrator found that it appeared as if the Union, notwithstanding the clear language of the Consent Award which it signed, assumed that summer professional development activities required a 75% vote. It also appeared as if the Employer had never asserted its right to challenge a vote pursuant to Paragraph 11. Neither party said anything about this to the other. In these circumstances, the arbitrator determined it cannot be said that silence was evidence of an unequivocal representation by the Employer that summer professional development required a 75% vote and that it would not rely on its rights under the Consent Award. There must be evidence of a plain and unmistakable promise, by words or conduct, from which it would be unfair or unjust to resile. There was no such evidence in this case.

The arbitrator found that n the merits of the referral, the votes of 73.3% and 67% must be said to represent support for summer professional development, and the Employer made its case. As such, summer professional development activities may take place at those schools.

*BCPSEA Reference No. EX-01-2007*

## 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.