GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2007-07 **November 1, 2007** **By E-mail: 3 Pages**

BCTF/SD No. 79 (Cowichan Valley): President's Leave (Amalgamation)

Issue: Did the employer violate the collective agreement by denying the union an additional 1.0 leave for union business?

Facts: On December 2, 1996, School District No. 65 (Cowichan) and No. 66 (Lake Cowichan) were amalgamated into one school district, School District No. 79 (Cowichan Valley). Until 2002, the collective agreements in the Cowichan and Lake Cowichan school districts remained in force and continued to apply to the employees in the respective geographic areas of the former school districts.

In January 2002, the provincial government enacted the *Education Services Collective Agreement Act* which, among other provisions, addressed the continued operation of multiple collective agreements in the amalgamated school districts. In School District No. 79 (Cowichan Valley), the Cowichan collective agreement was deemed to apply to all teachers in the amalgamated School District No. 79, and the Lake Cowichan collective agreement ceased to have effect.

In June 2002, BCPSEA and the BCTF reached a Letter of Understanding addressing a number of transitional issues. With respect to union president's leave, the Letter of Understanding provided for the continuation, for one year only to June 30, 2003, of the union president's leave under the Lake Cowichan collective agreement, in addition to the leave provided for under the School District No. 79 collective agreement.

After June 30, 2003, the union continued to request the additional union president leave. Each year the district considered the request and, on a without prejudice basis, the employer continued to grant release time to the union beyond its collective agreement obligations. For the 2007-2008 school year, the employer denied the union's request to grant the additional 1.0 FTE union leave beyond its collective agreement obligations. The union grieved that decision.

Union Argument: Although the union conceded that the collective agreement did not require the employer to grant an additional president's leave under Article 480, their position at arbitration was that this full time union leave must instead be granted under Article 445, the local union business leave provision. It was their position that it is the union's decision as to how many members they require to be on leave for union business and, for the employer to deny such leave, the employer must "identify a reason that overrides the fundamental importance of facilitating participation in union affairs by elected officials."

> "The union submits the interpretive context begins with the fundamental principle that certified trade unions are democratically selected and vested with exclusive bargaining authority to create a countervailing force to the dominant position and greater power of employers. The Canadian statutory scheme is to strengthen unions so they can be on a more equal footing in collective bargaining and have ongoing relations with the employer. For this to be effective, unions must have a viable organizational structure and the right to draw on the time and resources of it s membership. Collective agreement provisions providing for leave to engage in union business must be read in this context."

> "… it is a matter exclusively for the union to determine who will be designated to speak for the union. Similarly, it is entirely an internal decision for the union to determine how many persons and which persons it may require from time to time to be released from employment to undertake work which the union concludes it wishes to have done. Whether the union has one person or 10 persons seconded for the purpose is none of the employer's business except to the extent that the leaves may affect the operation of the school district in a significant way owing to an inability to replace teachers seeking leave. The employer did not base this decision on such a claim in this case."

Decision: Grievance dismissed. The union applied for full time release from teaching duties for an entire school year with full pay, benefits and pension contributions to be reimbursed by the union under Article 445 – Association, BCTF/CTF, Teachers' College Business. Arbitrator Dorsey found that this provision was not appropriate for such a leave request.

> "The express intention is that leaves under Article 445 are to be covered by a teacher on call. There are express provisions on the duration of time a teacher on call can be engaged to cover for an absent teacher. It cannot be indefinitely or for a full school year. The clear intention from the language and structure of Article 445.1, within the context of the entire collective agreement, is that these are leaves that arise for a limited time period within the school year.
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> The language of Article 445.1, its context and interconnection to corollary provisions in the collective agreement and the implications from the limitations on leaves being reimbursed at the costs of a teacher on call direct the clear conclusion that a full time union leave with full benefits, as requested from Mr. Halme, is not encompassed by Article 445.1. The leave requested on the terms requested simply is not a leave agreed to or to which Mr. Halme was entitled under Article 445.1."

The employer is not obliged under the collective agreement to consider or grant leaves for which it has not agreed.

BCPSEA Reference No. A-27-2007

Toronto District School Board/Elementary Teachers' Federation of Ontario: Duty to Accommodate

Issue: Did the employer fail in its duty to accommodate the grievor by declining to provide her with a set of digital hearing aids?

Facts: The grievor, a special education teacher with the Toronto District School Board since 1995, suffered from bilateral moderate sensoneural hearing loss since birth, a condition which was expected to deteriorate over time. At the time of the grievance her hearing loss was 70%. She had worn hearing aids since childhood and compensated for her hearing loss by lip reading and sign language.

Previously, the grievor had used analog hearing aids. Because analog aids contain no mechanism for filtering out white noise, she would not be able to hear students unless they were immediately in front of her. This also caused difficulty when supervising the lunchroom with the excessive background noise generated by 250 students, as well as during staff meetings. Consequently, in 2002, when it was time to replace the analog hearing aids she had been using since 1997, the grievor purchased a digital set which had three modes, including one that filtered out white noise. However, after one month, the grievor felt compelled to return the digital hearing aids because she determined that she could not afford them.

The grievor was frustrated because she believed that she could be a more effective teacher with digital hearing aids, and that she was denied the opportunity to work to her full capacity. She was able to communicate adequately with analog hearing aids at home, however, and was willing to leave the digital hearing aids at school if that was required. In the view of the principal, the grievor was a very competent teacher who performed her job well.

Decision: Grievance dismissed. The board of arbitration, chaired by Pamela Picher, denied the grievance, ruling that the duty to accommodate does not extend to the provision of personal assistive devices.

The board of arbitration found that:

> The Board is satisfied, in other words, that an employer's duty to accommodate an employee in the workplace does not require it to provide modification to an employee's person, by supplying such things as personal bodily assistive or prosthetic devices when requested by the employee as his or her preferred means of accommodation. Such devices as are available in the marketplace as devices that help a person take part in life's normal functions are for that person to acquire or not, as he or she may decide. The Board accepts the position of the School Board that the responsibility of the employer in meeting its duty to accommodate to the point of undue hardship is properly focused on the workplace and, in the ordinary course, as set out above, not on the employee's person or body. Providing personal bodily assistive devices is not a job related obligation which goes to the duty to accommodate."

However, the board found that the question of whether the grievor was in need of accommodation through adjustment to the workplace and/or job had not been properly explored, and declared in that respect that "the employer has not satisfied its preliminary obligation under its duty to accommodate to consider the need for accommodation and possible means to accomplish it within the limits of undue hardship." In the result, the parties were directed to meet and discuss the matter. The arbitrator also "recommended" that the school board, although it had no obligation to provide the grievor with digital hearing aids, "facilitate" her purchase of them through "the arrangement of favourable financing and a reasonable repayment schedule."

BCPSEA Reference No. A-28-2007

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.