GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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BCTF/ SD No. 5 (Southeast Kootenay): Foundation Skills Assessment — Students as Couriers

Arbitrator John Kinzie released an arbitration award on May 2, 2008, concerning what has become known as the *Students as Couriers* case. The matter at issue was the BC Teachers' Federation (BCTF) grievance over the decision of a school district not to permit teachers to send home with students a BCTF pamphlet opposing the use of the FSA tests in schools. The teachers proposed to send that pamphlet home in a sealed envelope addressed to parents.

In his reasons, the arbitrator concluded that schools have the right to control what information is sent home to parents from the school. He agreed that the BCTF pamphlet, titled "FSA testing can be harmful to students!" was "confusing and does not provide parents the whole story."

However, the arbitrator determined that rather than instituting "an absolute ban" on teachers from sending home information with students, the Board of Education should have instead addressed concerns with the union about the accuracy and confusing nature of the pamphlet. If the union refused to correct the inaccuracies, then the Board would have been justified in restricting its teachers from sending the pamphlet home with students. As this process did not occur, the arbitrator ruled that the absolute ban on sending this pamphlet out to parents through students was not a reasonable limit demonstrably justified in a free and democratic society under section 1 of the *Charter of Rights and Freedoms*.

It is important to recognize that this award does not provide a teacher the right to send any information home through students to parents. The award places a restriction on the subject matter of the material that can be sent, requires it to be accurate, and retains a process for employer control of what information is sent home.

Although implementation of this award is limited to School District No. 5 (Southeast Kooteany), there may be issues of general application. BCPSEA will be drafting policies and procedures consistent with this award for districts to consider.

BCPSEA Reference No. A-09-2008

SD No. 39 (Vancouver): Workers' Compensation Appeal Tribunal Decision — Should Wage-loss Benefits Payable in July and August be Paid to the Teacher or to the Employer?

In SD No. 39 (Vancouver), employees who are on an approved WorkSafeBC claim continue to receive their regular salary from the school district. As a result, WorkSafeBC reimburses the school district for the amount of workers' compensation benefits that the employee would have normally received directly from WorkSafeBC.

In 2006, a teacher in SD No. 39 (Vancouver) was eligible for wage loss for the period July 1 – August 31. Although the employee had already received his full annual salary for the year he believed that he, rather than the employer, should receive the WorkSafeBC benefits for the summer months. There was no disagreement with respect to the employer receiving the reimbursement during the school year (September – June), the disagreement arose only for the summer months when the employee was not physically in receipt of pay from the employer.

Having been unsuccessful with the initial decision of the case manager and its subsequent concurrence by the Review Division, the employee referred the matter to the Workers' Compensation Appeal Tribunal (WCAT), the final level of appeal.

Prior to the overhaul and amendment of the *Workers Compensation Act*, Regulations and Policies in 2002, there was specific policy that addressed this issue. However, since 2002 there have been WCAT decisions that have gone both ways. As a result, a three-person panel (as opposed to the usual one-person panel) was appointed to hear this appeal.

This three person WCAT panel decided in favour of the employer. The panel based their decision on the following:

- They accepted that the worker, as a regular teacher, was paid an annual salary over ten months and thus was on prepaid vacation leave during the months of July and August.

- They found it relevant that the majority of teachers are not eligible for EI benefits in July and August on the basis that they have already collected a salary for this period of time.

- They accepted that if a teacher was to directly receive wage loss benefits in the summer, the employer would be in a double liability situation and the employee would receive a windfall.

- To accept the employee's position would result in teachers receiving significantly different levels of compensation for the same injury (depending on whether they were on a 10 or 12 month pay period).

- They found the payment of vacation time to be an allowance or benefit as described by section 34(1), whether it is paid in advance, or arranged through a deferred payment scheme or over 12 months.

On page 17 of the award they concluded as follows:

> We do not consider this consistent with the spirit and intention of workers' compensation law and policy, which is designed to reimburse lost income or earning potential. The objective of this Act is not to result in a situation where it is profitable to have an injury late in the school year. The goal of section 34 of the Act is to prevent double compensation to the worker and double liability to the employer, and this is not the end result if the Board were to exercise the discretion afforded under this section in favour of the worker.

As a result, WCAT denied the worker's appeal and found that the wage loss payments for July and August were properly paid directly to the employer.

BCPSEA Reference No. WCB-01/2008

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.