GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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Class Size Violations for the 2006-2007 and 2007-2008 School Years — Preliminary Objections

On April 13, 2007 the BC Teachers' Federation (BCTF) filed a grievance of general application for all class size violations for the 2006-2007 school year. This grievance was to collect and replace all class size grievances that had been filed that year in local school districts. Attached to this grievance was a list of those districts as well as a statement that the union reserved its right to add to the list at a later date.

On November 5, 2007 the BCTF filed a placeholder grievance of general application for all class size violations for the 2007-2008 school year. The grievance indicated that "particulars in support of the grievance will be provided to you in the course of the grievance procedure or as soon as the Federation becomes aware of any violations." On June 13, 2008, (less than three weeks prior to the end of the school year which the BCTF was grieving), the union sent the employer a "schedule of particulars."

As a result, the employer raised the following preliminary objections:

1. The union is attempting to improperly pursue what are individual grievances as a grievance of general application. For example, if the union is alleging that the consultation was not appropriate, the facts and circumstances surrounding each consultation for each class would have to be examined. Similarly, if the union was challenging the opinion of the Superintendent and the Principal that the organization of the class was appropriate for student learning, each class and circumstances would have to be examined on its own merits.

2. The union has failed to comply with the time limits under the collective agreement.

3. The union cannot unilaterally collect and replace individual grievances with an omnibus grievance.

4. The union cannot file a placeholder grievance and then add additional or different factual circumstances at a later date.

5. The employer is prejudiced by the fact that the union has not provided any particulars of the alleged violations and as a result has not afforded the employer the opportunity to investigate and, if appropriate, remedy the alleged violation.

In a 79 page award dated September 24, 2008, Arbitrator James E. Dorsey, QC, dismissed all of the employer's preliminary objections and ordered that the grievances proceed on their merits on November 24, 2008.

Merits: What Will Now be Arbitrated

1. Grades 8 to 12 — in classes that exceeded 30 students, did consultation occur and, if so, was it meaningful?

2. Grades 8 to 12 — in a number of instances where classes exceeded 30 students, the union will be challenging the opinion of the Superintendent and the Principal that the organization of the class was appropriate for student learning.

3. In classes that exceeded three students with individual educational plans, did consultation occur and, if so, was it meaningful?

4. In a number of instances where classes exceeded three students with individual educational plans, the union will be challenging the opinion of the Superintendent and the Principal that the organization of the class was appropriate for student learning.

5. Does section 76.1(2.3) apply to all classes, including dedicated special needs classes, modified classes, and elective classes?

School Districts Affected

2006-2007 school year:
School Districts 5, 8, 20, 28, 33, 36, 39, 53, 61, 62, 63, 67, 68, 70, 79, 82, 87, 91

2007-2008 school year:
School Districts 5, 8, 20, 28, 36, 37, 39, 44, 53, 57, 58, 61, 62, 63, 68, 69, 70, 73, 82

Next Steps

Counsel for the BCTF and BCPSEA will be meeting shortly for case management to discuss particulars and which/how these cases will proceed. There are currently 10 days of arbitration scheduled (November 24-28 and December 15-19, 2008). Following the clarification meeting, BCPSEA will immediately be in contact with the districts that will be involved in these hearings. These will be very tight time lines.

Summary of Arbitrator's Reasoning for Dismissing the Employer's Preliminary Objections

1. Grievances of General Application v. Individual Grievances

Arbitrator Dorsey indicated that there was no definition of "grievances of general application" in the collective agreement. Further, he found that a grievance of general application is not dependent on whether it seeks remedies for individuals or whether the requested remedy is confined to a declaratory interpretation. At pages 56 and 57 of his award he concludes:

> "Similarly, while there is some weight to the proposition, heavily relied on by the employer, that a dispute over "application" of the class size provisions is school-based and class or fact specific and not of general application, these new disputes over legislated class size provisions do not arise, and cannot be neatly compartmentalized, as disputes of "interpretation," "application," "operation," or "alleged violation."

While the employer submits issues of consultation must be regarded simply as individual factual disputes because of the varied class contexts in which they arise, the diversity of context did not find its way into the recent singular definition of consult under the *Class Size Regulation*. Disputes over the administration of the legislated class size provisions contain all aspects of disputes under a collective agreement — interpretation, operation, application and alleged violation. The disputes have a general nature applicable across the public school system. They are disputes that have a general interest to all members of the bargaining unit. They can fairly and reasonably be characterized as disputes of general application."

"Alternatively, if it is not a grievance of general application, I relieve against the procedural requirement to present it at Step One by exercising the remedial authority under section 89(e) of the *Labour Relations Code*."

2. Timeliness of Grievances

Arbitrator Dorsey found that the grievance was of no surprise to the employer, there was no urgency demonstrated by the employer and also no prejudice suffered by the employer. He wrote on page 65 of his award:

"Granting relief will not prejudice the employer, which will have access to particulars to be provided in this arbitration process and the legislated class organization reports with their rationale for class organization and supporting documentation.

I therefore grant relief under section 89(e) of the *Labour Relations Code* and exercise my agreed jurisdiction under Article A.6.8.d.i of the collective agreement to waive the time requirement for the referral of this general application grievance to Step Three of the grievance procedure. This is not an appropriate case to deny access to arbitration by exercise of the jurisdiction under section 89(f) of the *Labour Relations Code*."

3. Collect and Replace Individual Grievances with Omnibus Grievance

On pages 68 and 69 of the award, Arbitrator Dorsey found as follows:

"In the context of this centralized, multi-employer bargaining unit with class organization, formally in the components of the collective agreement that were originally bargained locally, replaced by a single set of provisions, it is in furtherance of all the goals of the *Labour Relations Code* and effective administration of the legislated class size provisions that the issues that give rise to recurring disputes be aggregated, as the union has done, into a single grievance of general application. This grievance procedure has been used in a similar fashion to address and resolve other issues of general application.

I find that in the circumstances, the union was entitled within this bargaining structure, under this collective agreement and on this issue to collect and replace the local class size grievances for the 2006-07 school year. The April 13, 2007 grievance, although untimely, is properly submitted to arbitration because I have relieved against the breach of time limits under the grievance procedure. It is the grievance which it is agreed I am to arbitrate. I am not asserting jurisdiction over the grievances filed by local unions that have been subsumed, replaced or abandoned by the grievance filed by BCTF. I am not consolidating any other grievance with the April 13, 2007 grievance, which it is agreed I am to arbitrate."

4. Change or Add Additional or Different Factual Circumstances at a Later Date

Arbitrator Dorsey ruled that following the initial grievance of April 13, 2007, the union was permitted to add additional allegations up to the June 2008 employer's application to adjourn the hearing. Arbitrator Dorsey wrote on pages 73 and 74 of the award:

> "I find the employer is incorrectly seeking to characterize a difference in degree, on which the union gave notice in the initial grievance and provided additional information in the subsequent settlement discussions, as a difference in kind in order to restrict the grievance to the letter of the initial grievance. Including the additional allegations of violations of class size provisions in the 2006-07 school year in all the school districts identified is not an expansion of the scope or character of the grievance. To find otherwise and restrict the union to the letter of the grievance would not be fulfilling the statutory mandate of grievance arbitration."

5. Failure to Provide Adequate Particulars

Arbitrator Dorsey indicated that while it may be considered for remedy purposes, lack of particulars during the grievance procedure does not in itself defeat the grievance. Instead, such particulars can be requested prior to arbitration by counsel in an application for an order for pre-hearing disclosure.

Questions

BCPSEA will be in contact with the districts covered by these two grievances of general application.

If you have any questions concerning this decision, please contact your BCPSEA labour relations liaison.