GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2008-06 **October 7, 2008** **By E-mail: 5 Pages**

BCTF/ SD No. 34 (Abbotsford): Preparation Time Grievance

Issue: Is the employer required to make up preparation time in elementary schools during a week when the preparation periods are scheduled on days there are statutory holidays, NIDs, emergency school closures or school activities?

Collective Agreement Language:

4:4 HOURS OF WORK

4:4.1 No elementary teacher shall be required to offer instruction for more than four (4) hours and forty-five (45) minutes per day, and may not exceed twenty-three (23) hours and forty-five (45) minutes per five (5) day week, including preparation time and excluding a daily recess of not less than fifteen (15) minutes. No secondary teacher shall be required to offer instruction for more than five (5) hours and nine (9) minutes per day, and may not exceed twenty-five (25) hours and forty-five (45) minutes per five (5) day week, including homeroom and preparation time.

4:4.2 Full time secondary teachers shall be entitled to twelve and one-half per cent (12.5%) of total instructional time for purposes of preparation.

4:4.3 Full-time elementary teachers **shall be entitled to** ninety (90) minutes per week for purposes of preparation, this preparation time will be in a minimum of twenty-five (25) minute blocks with no more than one (1) block of less than twenty-five (25) minutes.

4:4.4 Preparation time of part-time teachers of three-eighths (0.375) FTE or more shall be pro-rated.

Facts: This is the fifth case in the province concerning the question of whether missed preparation time must be made up for elementary teachers. A brief background of the previous decisions may be useful in understanding the history of this issue:

- *SD No. 75 Mission,* April 26, 2005. Mission had the following preparation time language:

  > The maximum weekly instructional assignment for a full-time elementary teacher shall be 1425 minutes per week, less 90 minutes which **shall be provided** for the purpose of preparation.

  In the *Mission* case, arbitrator Burke concluded that when a statutory holiday or a non-instructional day occurred during that week, given the specific language of their collective agreement and inconsistent practice in this area, the Mission school district was required to provide elementary teachers with 90 minutes of preparation time per calendar week.

- *SD No. 68 Nanaimo-Ladysmith*, January 29, 2007. Nanaimo-Ladysmith had the following preparation time language:

  > One hundred and ten (110) minutes preparation time per week, exclusive of recess, **shall be scheduled** for full-time regular elementary classroom teachers effective July 1, 1994.

  Arbitrator Lanyon concluded that the clear past practice was not to make up preparation time lost as a result of non-instructional days and statutory holidays. The language throughout the collective agreement provided a direct link between the amount of preparation time and instructional time; i.e., a reduction of instructional time in a week also reduced the required amount of preparation time. The arbitrator concluded that as long as the appropriate amount of preparation time was "scheduled" in a week, the Nanaimo-Ladysmith school district was not required to make up preparation time that was missed by a teacher due to a non-instructional day or statutory holiday falling in that week.

- *SD No. 73 Kamloops/Thompson*, April 2, 2007. Kamloops/Thompson had the following preparation time language:

  > Effective September 1, 1991 full-time elementary teachers assigned full-time to classroom instruction and learning assistance teachers **shall be provided** with a minimum of eighty (80) minutes preparation time per week.

  Arbitrator Kinzie stated, "Having considered all of the evidence and arguments in light of the principles I have related above in this award, I have concluded that the use of the term "week" in Article IX, Section 4.1.1 as opposed to the phrases "calendar week" or "instructional week" gives the Employer some flexibility in its ability to schedule preparation time. In my view, it can use either the calendar week or an instructional week of five days so long as over that five day period every elementary school teacher is provided with a minimum of 80 minutes of preparation time.

  Arbitrator Kinzie concluded that unlike the preparation time article in the Nanaimo-Ladysmith collective agreement, in Kamloops/Thompson the obligation was not only to "schedule" 80 minutes of preparation time per week but also to actually "provide" 80 minutes of preparation time per week. As a result, he was unable to reach the same conclusion as Arbitrator Lanyon and ruled that, based on the language of the collective agreement, the Kamloops/Thompson school district was still required to provide 80 minutes of preparation time per week.

- *SD No. 8 Kootenay Lake*, February 15, 2008. Kootenay Lake had the following preparation time language:

  > Teachers shall be **assigned** preparation time in their schools as part of their **normal daily/weekly teaching schedules**, as follows:
  >
  > a) Preparation time in elementary schools shall be one hundred (100) minutes per week.

  Arbitrator Pekeles concluded that under the collective agreement language, there is no requirement to make up lost preparation time when an event such as a statutory holiday, non-instructional day or other school closure occurs. The requirement is to "assign" the required amount of preparation time "as part of their normal daily/weekly teaching schedules." Under this language, the employer is not required to provide the specified amount of preparation time, as was the case in both the *Mission* and *Kamloops/Thompson* arbitration decisions.

- *SD 34 Abbotsford*, September 12, 2008. Abbotsford had the following preparation time language:

  > Full-time elementary teachers **shall be entitled to** ninety (90) minutes per week for purposes of preparation, this preparation time will be in a minimum of twenty-five (25) minute blocks with no more than one (1) block of less than twenty-five (25) minutes.

  Prior to June 2005, the union never raised the issue of rescheduling preparation time missed due to statutory holidays and non-instructional days. Subsequent to the *Mission* decision, however, the union believed the district was negligent in making up this preparation time and filed a grievance on July 14, 2005.

  The bargaining history of clause 4:4.3 relates back to the first agreement between the parties in 1988 and the subsequent contract in 1990, which largely contains the relevant preparation time language still in place today. In the first round of bargaining, neither party discussed making up lost preparation time; however, in the 1990 round of bargaining the employer tabled a proposal which included specific instances in which preparation time would not be made up. The employer-proposed provision was not included in the collective agreement and for the next 15 years the employer continued its practice of not making up preparation time lost without receiving any grievance on that issue from the Union. The only evidence was that, on occasion, teachers informally traded preparation blocks with the knowledge of administrators.

Decision: Grievance dismissed. Arbitrator Korbin noted that when interpreting a collective agreement provision, the authorities are clear that "extrinsic evidence may only be admitted for the purpose of interpreting, as opposed to varying the collective agreement," and the primary source for interpretation is the collective agreement itself. The collective agreement is silent on the issue at hand. Arbitrator Korbin stated:

> Clause 4:4.1…clearly provides a link between instructional time and preparation time as preparation time is included in the maximum hours of instruction for both the day and the week…thus I am satisfied clause 4:4.3 cannot be read in isolation, but must be considered within the context of the Hours of Work clause which links weekly instruction and preparation time…the fact the parties have pro-rated preparation time entitlement for part-time teachers is another clear reflection of the link between preparation time and instructional time.

Arbitrator Korbin stated that the meaning of "week" for this purpose is very important. Clause 3, which covers Seniority-Layoff-Recall-Severance provides a definition of "week" for that clause equates to five teaching days. To the contrary, clause 4:4.1 links instruction to the five day week. Thus clause 4:4.3 is capable of two interpretations, it is ambiguous, and therefore extrinsic evidence can be considered.

With respect to the proposals tabled in the 1990 round of bargaining, Arbitrator Korbin noted the following:

> Why then, when the employer's practice contradicted the union's stated expectations, did it take 15 years for the union to file a grievance or bring the matter to the employer's attention? This inconsistency provides some support for the employer's position that the bargaining history and the practice reflect the mutual intention of the parties...While not registering a grievance does not automatically construe an acceptance of a practice, I am satisfied it does lend some weight as to the mutual intentions.

Arbitrator Korbin declared that it is clear from the facts that the formal district practice has been to not make up for preparation time that is missed due to statutory holidays and non instructional days. The informal practices of some teachers trading preparation time does not indicate a mixed past practice.

As arbitrator Lanyon put it in *Nanaimo-Ladysmith*, *supra* at paragraph 98, it is rather an expression of professional collegiality and goodwill.

Arbitrator Korbin concluded that the facts, extrinsic evidence in relation to past practice and the collective bargaining history, as well as consideration of the language in clause 4:4.3, lend support to the employer's interpretation. In each of the previous four awards the language, facts and evidence are distinguishable from the particular case at hand.

Significance: The language was deemed to be ambiguous and, as such, extrinsic evidence (bargaining history and past practice) was permitted as an aid to interpretation.

BCPSEA Reference No. A-42-2008

BCTF/ SD No. 28 (Quesnel): Sick Leave Denial

Issue: Does the employer have the right to deny an extended sick leave request to a teacher who has produced a note from a doctor? Can the employer require information beyond that of the district's medical form if the individual facts and circumstances warrant it?

Facts: On August 20, 2004, the grievor applied for an unpaid leave of absence for the first semester of the 2004-2005 school year to care for his father in England. At the beginning of the leave the grievor requested that the leave be changed to a paid medical leave and enclosed a doctor's note. This paid medical leave was granted on compassionate grounds. The grievor returned to teach for the second semester of 2004-2005.

On June 21, 2005, the grievor applied for a further extended medical leave for the following school year and provided a doctor's note stating that the grievor needed a leave of 6-10 months due to stress. The district requested that the grievor have his/her doctor complete the district medical form, which mirrored that which was a result of the "trilogy," a series of four provincial arbitration awards between 2000 and 2006. The doctor stated that the grievor was prevented from working because he was experiencing significant disability to focus and plan daily teaching sessions. The form also went on to say that close follow up and counseling would be occurring. The recommended course of treatment determined by the doctor was for the grievor to return to England to care for his father and deal with the source of anxiety. The grievor returned to England without waiting to see if the request was granted.

On July 15, 2005, the district wrote the grievor a letter, which questioned the legitimacy of the claim, denied the request for an extended medical leave unless further information was provided, and instead granted a leave without pay. The grievor met with the district on August 24, 2005 but nothing was resolved. Following the leave the grievor returned to teaching in 2006 and did not provide any further medical information in support of his 2005 sick leave request until 2007. This 2007 medical note stated that the grievor in 2005 had been suffering from an anxiety disorder and depression.

Decision: Grievance upheld. Arbitrator Holden stated:

> It is not my role to determine whether or not the grievor was ill in 2005. It is my task to determine if the employer's concerns about the legitimacy of the sick leave request were reasonable under the circumstances and if the employer had the right to make further enquiries.

Arbitrator Holden agreed that the employer had a number of concerns regarding the legitimacy of the claim and, as such, was entitled to make enquiries beyond the medical form to review the grievor's leave request. Arbitrator Holden stated:

> The concerns listed in July of 2005 merely raise suspicions about the claim. Enough suspicion, in my view, that it was reasonable to want to discuss the issues with the grievor.

Arbitrator Holden concluded that the employer did make this request in its July letter; however, at the August 24th, 2005 meeting, the district did not pursue the concerns and neither party addressed the issues. Arbitrator Holden stated:

> The district did not pursue the School District's concerns...at no time, throughout this timeframe, did the School Board request that the grievor's physician provide further information related to the bona fides of the grievor's illness.

Arbitrator Holden further noted:

> It bears repeating that the real crux of a sick leave request is, as the Union stated, whether the employee is "sick or not." If the School Board needed further proof of the grievor's illness, then this issue should have been pursued in clear and unequivocal terms. It was not pursued in such a manner…it was incumbent on the employer in that meeting not only to address the concerns it had raised in the July 15th letter but, if not satisfied with the grievor's response, to progress to the next step and require additional information.

Arbitrator Holden noted that the medical information provided in 2007 was two years too late. Should the correct information have been pursued in an appropriate manner and the grievor refused to comply, then the employer would have had every right to deny the claim. The employer, however, did not have enough information to deny the medical leave request of the grievor in 2005. The grievor is to be made whole for the time he was on unpaid leave in the first semester of 2005/2006.

The employer is appealing the decision to the Labour Relations Board.

Significance:

Under these particular facts and circumstances, arbitrator Holden confirmed that the employer may request additional information from the grievor or physician beyond what is noted on the district medical form.

BCPSEA Reference No. A-41-2008

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.