GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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BCTF/BCPSEA/ SD No. 39 (Vancouver): Arbitrability of Board Conduct

Issue: Does an arbitrator have jurisdiction to determine a grievance which challenges the legality of a Board of Education's motion and internal administrative procedures? What avenues are available if a member of the public is concerned that a Board of Education's bylaws may have been breached?

Facts: On October 15, 2007, a report pursuant to section 76.3 of the *School Act* was presented to the trustees for their consideration by the Superintendent. Following deliberation there was a 4-4 vote with one abstention on a motion to accept the Superintendent's report, also known as the Report.

After deliberation, the Chair of the Board followed his review of the Board's Bylaw No.1, Section III - Rule of Order 6 and interpreted the vote to mean that the motion had carried. Bylaw No.1, Section III - Rules of Order 6 states "...any trustee who fails to vote or abstains from voting shall be considered to have voted on the prevailing side of the question (*School Act*, Section 58)." However, one trustee disagreed with this interpretation of the bylaw and held the view that that there was no prevailing side in a tie vote.

Employer Argument: The grievance is inarbitrable. The BC Court of Appeal award in *BCTF v. BCPSEA* [2005] B.C.J, No.289 (B.C.C.A.) established that class size provisions removed from the collective agreement and transferred to the *School Act* were arbitrable because the formation and size of classes directly affect the significant terms, conditions and aspects of the employment relationship. In the same way, *Parry Sound* [2003] S.C.J. No. 42 (S.C.C.) extended arbitral jurisdiction to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were implicitly part of the collective agreement. This grievance does not relate in any way to the substance of the Report. The provisions of the *School Act* that have allegedly been breached are unrelated to the interpretation, application, operation or violation of the collective agreement and unrelated to any substantive term or condition of employment.

Union Argument: The bylaw requires the Chair to deem the motion failed as opposed to carried and the prevailing side on this case is that of the four trustees that voted against the motion. The Board has breached its bylaws and is in violation of the *School Act*. All of the provisions of the statutory scheme, as established by *BCTF v. BCSPEA* must be open to arbitral enforcement, including the Report. The Union must be able to challenge the illegal conduct of the Board through the grievance and arbitration procedure under the collective agreement.

Relevant Legislative Provisions:

The *School Act* states:

76.3 (1) In this section:

"class size provisions" means *section 76.1 and any regulation* made under that section;

"report" means

(a) a report prepared under subsection (2) by the superintendent of schools…

> (2) In each school year, the superintendent of schools for a school district must review and prepare a report on, the organization of classes in the school district.
>
> (3) The superintendent of schools must include in his report a rationale for the organization of any class in the school district that has more than 30 students.…
>
> (7) *On or before October 15 of the school year to which the report related, the board must at a public meeting of the board*,
> (a) *accept the report*, or
> (b) instruct the superintendent to revise the report.
>
> (10) The board must submit the report to the minister immediately after accepting the report under section (7)(a) or after reviewing the revised report under subsection (8)(c).…

Decision: Arbitrator Gordon declined to hear and determine this grievance and stated:

> "The substance of the Union's claim is that in the course of accepting the Report, the Chair rendered an incorrect interpretation of the language in the provisions of the Board's meeting procedures. Hence, the allegation of non-compliance related to the exercise of power under the provision of the Board's procedural bylaw, not section 76.3(7) of the *School Act*."

Arbitrator Gordon also noted:

> "I find that when viewed in its factual context, there is no real connection between the statute, the collective agreement and the dispute between the parties."

Arbitrator Gordon stated she is unable to consider the proceeding before her and added:

> "It has not been shown that the matter of the Board's meeting procedures has ever been the subject of collective bargaining, included in the parties' collective agreement provisions, or viewed as a term or condition of employment or an aspect of management's rights under the collective agreement. The only connection to the *School Act* is that fact that the Board was exercising its meeting procedure powers, which had been established in compliance with section 67(5) of the *School Act*...It appears happenstance that the alleged mis-interpretation of the bylaws occurred in the context of a vote on the Report relating to the organization of classes, and I find this association with the subject of class size cannot be relied on to essentially bootstrap arbitral jurisdiction."

Arbitrator Gordon concluded:

> "A determination regarding a court's jurisdiction to provide a remedy if an error in the Board's voting process is substantiated must be undertaken by the court."

Significance: A Board of Education's administrative procedures are not arbitrable.

BCPSEA Reference No. A-14-2009

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: As stated in BCPSEA's *Grievance and Arbitration Update* No.2008-06, the grievance was upheld.

Arbitrator Holden agreed that the employer had a number of concerns regarding the legitimacy of the claim and, as such, was entitled to make inquiries 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.

Section 99 of the *Labour Relations Code* allows for the review of an arbitration awarded by the Labour Relations Board (LRB) on the grounds that a party to the arbitration has been or is likely to be denied a fair hearing.

The employer appealed the decision to the LRB on this ground.

The employer argued there was a failure to provide a reasoned analysis in the award, the arbitrator imposed a reverse onus on the employer when the onus is on the union to prove that the benefit in question was something the grievor was entitled to and the award does not explain why the employer would be required to repeat requests which it had already made.

Decision: Grievance dismissed. Vice-Chair Wilkins stated:

> "The Trilogy has provided guidance to the parties to the collective agreement concerning the obligations of the parties with respect to medical information where sick leave is requested. In the third award, Arbitrator Taylor rules that employers may particularize their concerns to the employee and request that his or her physician respond, or they may ask the physician to complete a supplementary report. The Arbitrator found that the Employer did not take these steps in the July 15 Letter, the August Meeting, or at any time thereafter…the Employer had the right to make enquiries beyond the form, the Employer did not follow through and make the enquiries incumbent on it to make."

Vice-Chair Wilkins further noted:

> "I do not find a palpable and overriding error in the findings of the Award. There is a factual basis for the ultimate finding made by the Arbitrator that the Employer did not have enough information to deny the extended medical leave request of the Grievor in 2005. I find that the Arbitrator stated the issue before her in reasonable terms and did not do so in a contradictory fashion. I further find there is a reasoned analysis in the Award. I do not find the Award to be incongruous in terms of the positions of the parties and I find that the Arbitrator has discharged her statutory mandate."

Vice-Chair Wilkins declined to substitute his own findings for those of the arbitrator and concluded there was a reasoned analysis in the award.

Significance: This award confirms the employer's right (based on the individual circumstances surrounding the request for sick leave) to require medical information beyond that of the extended medical form. In this case, although the employer believed that they had made this request already, the arbitrator determined that this request should have been made again during the meeting with the employee on August 24, 2005.

BCPSEA Reference No. A-41-2008

BCTF/BCPSEA/ SD No. 42 (Maple Ridge-Pitt Meadows): Discipline and Discharge

Issue: Given the grievor was a recipient of a physical attack, did the grievor act appropriately in this circumstance? Was the employer's decision to terminate the grievor's employment with the district an excessive response in all the circumstances of the case?

Facts: The grievor had been an employee of the district for over 30 years. The grievor was disciplined for a variety of offences over that period including physically dealing with students, providing false information to the Insurance Corporation of British Columbia and making inappropriate comments to students.

On March 28, 2007, a verbal and physical altercation ensued between the grievor and a male grade 9 student, also known as "B.P." B.P. first threw the punches at the grievor.

Evidence submitted by the grievor concerning what happened during the incident differed significantly from the evidence submitted by the witnesses who testified. The grievor testified he hit B.P. with a jab, not a forceful punch, to the side of his head after B.P. had hit him. Witnesses stated the grievor hit the male student multiple times and that some of the hits were to his head. Following this incident B.P. had an abrasion on the side of his head, two bumps above his ear and a scratch on his back.

The employer put the grievor on leave of absence until the investigation had been completed. The grievor stated he felt he did the best he could with the situation. The grievor was dismissed for his conduct in the March 28, 2007 incident.

Relevant Legislative Provisions:

> *School Act*
> 76 (3) The discipline of a student while attending an educational program made available by a board or a Provincial school must be similar to that of a kind, firm and judicious parent, but must not include corporal punishment.

Decision: Grievance dismissed.

Arbitrator Kinzie found the grievor gave the employer just and reasonable cause to discipline him. On a balance of probabilities, Arbitrator Kinzie assessed the credibility of witnesses and the scope of the male student's injuries to conclude that the grievor was not justified in using physical force during the March 28, 2007 incident. Arbitrator Kinzie did not accept the grievor's contention that he was under attack and was of the view that "the grievor hit B.P. a number of times with his punches and that the grievor punched B.P. more than once while B.P.'s hoodie and his shirt were over his head."

Arbitrator Kinzie also stated:

> "I am satisfied that the grievor was not under threat of physical harm to such a degree as to justify his actions by way of self defence. In my view, a "kind, firm and judicious parent" would not have done what he did. Further, those punches, in my view constituted corporal punishment contrary to Section 76 (3) of the *School Act*."

Arbitrator Kinzie also stated the employer's decision to terminate the grievor's employment was not an excessive response in all the circumstances of the case. He noted:

> "The fact that the grievor punched B.P. and caused him injury does not in and of itself mean that dismissal was not an excessive response in all the circumstances of the case. However, when such a serious offence is coupled with a failure to acknowledge any wrongdoing, a failure to express any remorse for having punched and injured B.P. and a lack of candour about the extent of his involvement in this incident, I am of the view that the termination of the grievor's employment cannot be called an excessive response in all the circumstances of the case. In such circumstances, I do not see how a viable employer-employee relationship could be re-established between the employer and the grievor.

Arbitrator Kinzie concluded "I am not convinced that if the grievor was reinstated he would not engage in similar misconduct if in the future he was faced with behaviour such as exhibited by B.P. in this case.

Significance: Teachers are not entitled to respond to students physically unless that response is necessitated by justified self defence. In addition, the nature and scope of discipline that teachers and administrators may carry out is limited by Section 76 (3) of the School Act and must be similar to that of a kind, firm and judicious parent, but not include corporal punishment.

BCPSEA Reference No. A-16-2009

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.