GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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Third Party/BCTF/BCPSEA/SD No. 69 (Qualicum): FIPPA and Access to Personal Information

Issue: To what extent are labour relations information and records and notes collected, prepared or maintained for grievance procedures accessible to a third party?

Facts: Parents requested access to personal information about themselves and their child from the school district. The school district disclosed most of the requested records but withheld certain grievance records under ss. 21 and ss. 22 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The parents applied to the Office of the Information and Privacy Commission for BC for a review of the school district's decision to deny access. The parents stated they were entitled to these grievance records as they contained statements that other individuals had made related to them, their child and their child's school program.

Adjudicator Celia Francis held that the submissions supplied by the school district did not meet any part of ss. 21 and directed the school district to disclose these portions of the grievance records to the parents.

Both the BCTF and BCPSEA/SD No. 69 (Qualicum) filed judicial review applications petitioning the errors of law made by the adjudicator in the interpretation of ss. 21.

Relevant Legislative Provisions:

> *Freedom of Information and Protection of Privacy Act*
>
> **Disclosure harmful to business interests of a third party**
>
> **21** (1) The head of a public body must refuse to disclose an application information
>
> (a) that would reveal…
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
> (c) the disclosure of which could reasonable be expected to…
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,…

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations office or other person or body appointed to resolve or inquire into a labour relations dispute.

Decision: The Supreme Court of British Columbia upheld the FIPPA and maintained that the Board of Education of School District 69 (Qualicum) was required to refuse access to grievance records.

Significance: Grievance correspondence and notes of grievance meetings are protected under s. 21(1) of FIPPA.

BCPSEA Reference No. FOI-01-2009

BCTF/BCPSEA/SD No. 36 (Surrey): Discipline and Discharge

Issue: When there is a causal connection between workplace misconduct and a disability, which part of the misconduct is due to the disability (non-culpable) and which part of the misconduct is within the control of the employee (culpable)?

Facts: The grievor was widely regarded as an outstanding elementary school teacher and had an unblemished disciplinary record. The grievor was appointed the Information Technology (IT) contact for the school in 2004. The grievor was suspended and then dismissed for misconduct following an investigation and a board hearing.

The alleged misconduct and main grounds for termination consisted of the grievor inappropriately accessing and misusing the e-mail accounts of others in the district. Without authority, the grievor secretly sent two e-mails that were extremely offensive in nature to a retired principal using the e-mail account of another teacher. The grievor also secretly uploaded, deleted and copied private personal information and caused harm to district staff without their knowledge and ability to respond. The grievor accessed the e-mails of others over a period of two years.

During the investigation, the grievor admitted to having made somewhere between 45 to 50 false statements. The grievor also provided misleading information, shifted blame to his wife and failed to cite and provide particulars.

Following an assessment by the union's psychologist and psychiatrist, the medical report suggested the grievor had demonstrated symptoms of Bipolar II Disorder. The employer retained its own psychiatrist who provided a medical report with divergent views from those expressed by the union's two medical professionals.

Employer Argument: The employer held that the grievor's actions gave the employer just cause for discharge. In addition, the employer contended the grievor's misuse of instructional time, dishonesty and avoidance of accountability and responsibility for conduct during the investigations clearly demonstrated discharge was not excessive and no alternative measure should be substituted for the dismissal.

Union Argument: The union's position was that the suspension and dismissal were without just and reasonable cause. Based on the medical evidence, the union invoked the hybrid approach analysis from *Fraser Lake Sawmills Ltd.,* BCLRB No.B390/2002, and held that the grievor was suffering from a mental disorder (Bipolar II Disorder) which explains or mitigates his alleged misconduct.

In dismissing him, the union contended the board failed to fulfill its duty to accommodate the grievor and discriminated against him on the basis of a mental disability.

Decision: Grievance dismissed. Arbitrator Hall cited the findings of the Labour Relations Board in *Fraser Lake Sawmills Ltd.* and reiterated that "the hybrid approach is not automatically engaged by the presence of a disability." He also added:

> "I have accordingly concluded that the medical evidence does not provide the necessary causal link between the disability of Bipolar II Disorder and the misconduct which the Employer relied upon to justify the Grievor's dismissal. Therefore, the hybrid approach does not apply, and the traditional *Wm Scott* analysis governs in the context of solely culpable conduct."

Arbitrator Hall examined the employer's Information & Communication Technology (ICT) Access and Use" policy and found the grievor's misuse of e-mail and "unethical actions cannot in any way be described as "spur of the moment" because he was required each time to type in the user name and password for the account he was accessing. The two e-mails, as well as the "Concerned Teacher" e-mail, unquestionably violated several terms of the Policy and Regulation — although one would expect employees to recognize such conduct is entirely inappropriate even without a written standard."

Arbitrator Hall also noted the grievor's dishonest and deceptive conduct during the investigation and hearing and stated:

> "During the course of his cross-examination, the Grievor admitted to having made somewhere between 45 and 50 false statements in response to questions posed by the Employer during the February 17 interview. He acknowledged reviewing the e-mail accounts of other teachers, but did not admit the full extent, and said it was only to ensure his wife had not sent them inappropriate e-mails from his account. Through an elaborate series of fabrications, he attempted to shift blame to his wife."

He also went on to say:

> “It is trite law that honesty is the cornerstone of a viable employment relationship, particularly where the employee holds a position of trust. Arbitrators have consistently held that dishonesty is grounds for discipline, and may in some circumstances justify dismissal.”

Further, Arbitrator Hall upheld that dismissal was not an excessive response and stated:

> "I am not persuaded by these and other mitigating factors, including the apologies first proffered by the Grievor near the beginning of his direct examination. Teachers are deservedly held to a higher standard of conduct than many employees given their role in our society...Short of inappropriate interaction with a student or actual physical harm to another person, one is pressed to envisage a more egregious breach of a teacher's obligations to his Employer and professional colleagues. Dismissal was not an excessive response given all the circumstances."

Arbitrator Hall concluded,

> "Despite these and other mitigating considerations, the magnitude of the Grievor's reprehensible conduct, combined with a widespread litany of falsehoods, eliminates any sanction short of dismissal."

BCPSEA Reference No. A-22-2009

BCTF/BCPSEA/SD No. 61 (Greater Victoria): Discipline

Issue: Was a five-month suspension without pay an excessive disciplinary action for a teacher who used physical force to achieve compliance from students?

Facts: The grievor was a 0.16 FTE for a Grade 1/2 French Immersion class. The grievor had been an employee of the district for less than two months when the incident occurred. Two six-year-old students were on the carpet at the back of the class. The grievor called their names and directed them to return to their seats but could not get their attention. The grievor walked behind the boys and grabbed each student by the neck directing them to their seats. One of the students, Boy B, then left the class and went to the school office. He met the principal, crying and holding his neck complaining that he was scared and had been "strangulated." The employer completed an investigation and imposed a five-month disciplinary suspension for serious misconduct. The union and employer characterizations of the grievor's actions differed as the union contended the grievor "guided" the child while the employer maintained the grievor "grabbed" the child. The union grieved the suspension.

Decision: Grievance dismissed.

Arbitrator Dorsey held that the employer had a just and reasonable cause to discipline the grievor. He stated the grievor's "use of physical force, not just benign physical contact, in this situation was misconduct. This is not a situation where the behaviour relied on by the employer is so close to the boundary of commonly accepted touching of a child by a teacher that it has to be clearly enunciated and communicated to teachers in a published policy... This handling of the boys was physically invasive touching of a child to the extent and in circumstances that teachers are expected to clearly recognize is not appropriate or permissible."

Arbitrator Dorsey added,

> "Student behaviour can be unpredictable, but a teacher's response should not be. [The grievor] had choices. She could have offered the boys a tally for prompt return to their seats. The other educators who testified identified other strategies she could have used. Instead, she deliberately chose to use physical force to correct and control behaviour and to have the boys comply with her direction."

The arbitrator concluded,

> "In the context of [the grievor's] short length of employment, her full opportunity and failure to explain to the Board of Education what she had done and her failure to accept responsibility for her actions and their consequences, while denying she grabbed the boys and blaming Boy B for the hurt she caused him, the Board's decision to impose a five-month suspension without pay for her misconduct was not excessive in all of the circumstances."

BCPSEA Reference No. A-24-2009

CUPE/SD No. 68 (Nanaimo-Ladysmith): Management Rights

Issue: Did the employer act in bad faith by changing the qualifications in the three Education Assistant II job descriptions and/or that those changed qualifications bore "no reasonable relation to the work to be done."

Facts: In 1988, the employer and the union agreed to a Gender Neutral Job Evaluation Plan, known as the "Plan." Two representatives from each party were selected to create a Joint Job Evaluation Committee, or JJEC, to review each job description presented and to ensure it accurately describes the work expected to be performed by the incumbents in the position.

In the 2006-2007 school year, the employer changed the qualifications specified in the Education Assistant II, Education Assistant II (ASD-LOVAAS) and Education Assistant II (ASD-POPARD) job descriptions. The employer deleted the requirement for "a minimum of two years related experience" and inserted the following education requirement in all three job descriptions:

> "Successful completion of a program equivalent to the Malaspina University Special Education certification, including two 105 hour practicums, or an equivalent combination of training and experience."

The Malaspina program has been in existence for approximately 10 years. Of the 34 new education assistants hired during the 2006-2007 school year, 17 of them had no related experience.

The union grieved the removal of the first requirement for "a minimum of two years related experience."

Employer Argument: The employer argued the changes made to the qualifications required for the three positions were consistent with its management rights under the collective agreement. The employer maintained that the changes to the job descriptions reflect the employer's hiring practices for education assistants and are reasonably related to the work that has to be performed.

Union Argument: The union argued the employer removed the requirement for a "minimum of two years related experience" solely for the purpose of maintaining the education assistant positions at their current evaluations and pay rates under the collective agreement. The union contended the employer was not entitled to take this step unilaterally, requiring the agreement of the union.

Decision: Grievance dismissed.

Arbitrator Kinzie held the employer has the authority to set the qualifications for a position unilaterally. He stated, "there is nothing in the collective agreement or the Plan that required that changes to a job description can only be implemented if the union agreed."

Arbitrator Kinzie commented that:

> "…the critical evidence in this case is that the employer has hired education assistants straight out of the Malaspina University College Special Education Assistant certificate program with no related experience beyond having completed that program, and they have performed well in their jobs."

He went on to say,

> "…one example of an employee who has not performed well, is in my view, outweighed by the fact that 17 out of 34 education assistants were hired during the first half of the 2006-2007

> school year without any related experience and they all performed well in their jobs without the need for additional training or adjustments on the job."

Arbitrator Kinzie also noted:

> "Having considered all of the evidence and argument, I am satisfied that a requirement of a minimum of two years related experience in addition to completion of the Vancouver Island University Special Education certificate program would be setting the qualifications for the three Education Assistant II positions too high. If anything, the continuance of such a requirement in the job descriptions could result in a grievance, for example in a vacancy posting case, that the Employer was manipulating 'the purported job qualifications in order to subvert the just claims of employees for job advancement under the terms of the collective agreement.'"

The arbitrator concluded "each position and job of work must be considered on its own facts against the test of whether such a requirement bears a reasonable relation to the work to be done."

Significance: In addition to being consistent with the employer's hiring practices, job qualifications must also be reasonable in relation to the work to be done for that specific position.

BCPSEA Reference No. A-25-2009

CUPE/SD No. 91 (Nechako Lakes): Discipline/Discharge

Issue: Was the termination of an employee, who gave students mothballs disguised as candy, an excessive response to the misconduct?

Facts: The grievor was a school bus driver and longstanding employee of the district. She had over twenty years of service and a discipline free record.

The grievor gave two secondary students each a plastic ziploc bag containing four mothballs and indicated to the students that they were "treats."

One of the students put a mothball in his mouth. He later spat it out after his father told him they were not candy but were mothballs. Another mothball was given to a Grade 5 girl as candy. She threw it out after someone told her it was not candy.

The parents of the students reported the incident to the school principal. Following an investigation, the grievor was terminated. She was also charged criminally but was ultimately granted an absolute discharge. The union grieved the termination.

Employer argument: The employer argued that the grievor's termination was an appropriate response to the grievor's misconduct.

The employer also maintained the grievor's conduct was premeditated and not a spur of the moment reaction to the students. By continuing to claim her actions were an attempt at humour or a practical joke, the employer asserted the grievor was essentially blaming the students for not getting the joke and that there was no real apology or acknowledgement of wrongdoing.

The employer asserted that the grievor was in a position of trust as a school bus driver and she must live up to a high standard of conduct. Ultimately, the employer argued that the fundamental concern in

this matter was student safety, and under the circumstances, the employer was not reassured the grievor would not repeat her conduct in the future.

Union argument: The union did not dispute that there was cause for discipline.

The union argued that the discharge was an excessive response to the grievor's misconduct based on a number of mitigating factors

The union maintained the view that the grievor was deeply remorseful for her mistake and recognized her actions were inappropriate. The union also took the position that the grievor's actions constituted a practical joke gone awry and did not amount to anything more than a mistake.

Decision: Grievance dismissed**.**

Arbitrator Burke concluded that discharge was an appropriate response in this case. The arbitrator reviewed case law stressing the high standard of conduct to which school bus drivers are held and concluded that school bus drivers are in a position of trust and are expected to adhere to extremely high standards of safety and prudence in carrying out their work.

Arbitrator Burke held the view the grievor also failed to see the gravity of her misconduct by continuing to insist that it was a joke. The arbitrator maintained that "the misconduct in this case is very serious. It has damaged the school board's reputation and the trust that is essential to be maintained in those responsible for the safety of the school bus children."

While the arbitrator did not consider the grievor's actions to be malicious or show intent to harm, her actions showed a serious lack of judgment concerning children in these circumstances. The arbitrator upheld the grievor's termination and concluded the entire circumstance is such that it does not indicate a sufficient likelihood of the employment relationship being repaired.

Significance: School district employees are in a position of trust and must live up to a high standard of conduct. Public employers such as school districts are entitled to expect their employees to live up to a high standard of conduct to maintain the public confidence in the school system.

BCPSEA Reference No. A-29-2009

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.