GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2009-08 **October 7 , 2009** **By E-mail: 5 Pages**

BCTF/ SD No. 39 (Vancouver): Removal from the Employee On Call List

Issue: Does the removal of an employee from a teacher on call/ employee on call list constitute the end of the employment and extinguish the rights of the employee under the agreement?

Facts: The grievor was hired to the district in 2006 and was placed on the employee on call (EOC) list. He immediately began a temporary contract teaching position for the balance of the 2005-2006 school year and received another temporary contract position from October 2006 – June 2007.

Following the expiry of the temporary contract in June 2007, the employee received a less than satisfactory performance evaluation and was removed from the EOC list for just and reasonable cause.

The union filed a grievance challenging the grievor's removal from the EOC list but shortly before the hearing was due to commence, the union withdrew this challenge and advised the employer that it was no longer seeking to have the grievor's name restored to the list. The union reduced the grievance to a dispute about the grievor's status and rights as a temporary contract teacher once the temporary contract had expired.

The grievor has not applied for any vacant position with SD No. 39 (Vancouver) since the removal of his name from the EOC list.

Collective Agreement Language:

Article C.20 (2)
(g) "Employees who currently hold, or within the previous three (3) year period held, a temporary contract with the Board shall be entitled to apply for vacant positions according to the provisions of Article E.21.3 and E.21.4. The Board shall give prior consideration to these applicants over applicants who have not been on contract."

Article C.22 (5)
(a) "The Board shall not dismiss an employee except where the Board has received three (3) consecutive reports written by not fewer than two (2) evaluators indicating less than satisfactory performance."

Employer Argument: The employer submitted that the union's grievance was now moot since the union and the grievor were no longer contending that the district did not have just and reasonable cause for removing his name from the EOC list and were not seeking reinstatement to that list. The employer also maintained that the grievor's claim to rights under Article C.20(2)(g) of the agreement was premature, in that the grievor had not applied for any vacant position in the district since the removal of his name from the EOC list. The employer further took the position that Article C.22 (5) was never intended to apply to teachers on temporary contracts. The employer maintained the grievor's

employment relationship with the employer had been brought to an end with the expiry of his temporary contract.

Union Argument: The union's position was that the evaluation was tainted by an apprehension of bias and reached an incorrect conclusion. The union took the position that the employer was not entitled to remove the grievor from the EOC list unless three less than satisfactory evaluations were completed as set out in the agreement. The union also argued that the removal from the EOC list did not end the employment and extinguish the rights related to the employment of a teacher who had acquired rights under the agreement as a result of one or more temporary contracts.

Decision: Grievance dismissed**.**

Arbitrator Kinzie declined to inquire into the issue around Article C.22 (5) and concluded that rendering a decision would have no practical effect. He stated:

> "In light of the fact that the grievor is no longer challenging the removal of his name from the EOC list and does not seek to have it restored to that list as well as the fact that his temporary contract with the employer has expired, I agree with the employer that this issue is now moot."

On the issue of whether or not a teacher must be an employee of the employer to claim the priority provided for in Article C.20 (2)(g), Kinzie held that teachers who only hold a temporary contract are not employees of the employer. He stated:

> "An employment relationship exists while the temporary contract is in place, but once that contract ends, the employment relationship also ends."
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> "I am of the further view that the rights accorded to teachers on temporary contract by Article C.20 (2) (g) are not sufficient to create a reasonable expectation of continued employment so as to maintain the employment relationship when a temporary contract comes to an end. Nor, in my view, do those rights constitute a right to recall...thus the only way a temporary contract teacher can maintain an ongoing employment relationship on her way to a continuing contract is by having her name placed and maintained on the EOC list. This is in fact how the Employer administers its hiring, hiring new teachers as employees on call from which position they can then apply for future temporary and continuing contracts as they become available based on their qualifications and seniority."

In summary, arbitrator Kinzie held that:

> "…the grievor no longer had any ongoing employment relationship with the employer. In the result, he no longer was an "employee" of the employer within the meaning of Article C.20 (2)(g) or Article E.21(3) and (4) of the collective agreement."

Significance: Once a teacher's temporary contract comes to an end, his/her employment with the employer ceases and he/she is not afforded the rights under the collective agreement unless he/she is on the EOC list.

BCPSEA Reference No. A-31-2009

BCTF/BCPSEA/ SD No. 62 (Sooke): Professional Autonomy and Discipline

Issue: Does the employer have the power to discipline an employee who relied on her individual professional autonomy to decline to follow a principal's direction to administer a standardized test to her primary students?

Facts: The Sooke school district adopted the DART assessment (District Assessment of Reading Team) in May 2004 to evaluate the effectiveness of literacy interventions throughout the district.

The grievor had taught in the district since 1990 and, in the 2006/-7 school year, the grievor taught Grades 2/3. The grievor refused to administer the DART assessment when she was verbally directed by her principal to do so.

In September 2007 the Board of Education found there was a deliberate and overt refusal to follow the principal's direction and issued a disciplinary letter to the grievor for insubordination.

Collective Agreement Language:

> **ARTICLE F3 - PROFESSIONAL AUTONOMY**
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> The Board recognizes and respects the professionalism of teachers covered under this collective agreement. Teachers shall, within the bounds of the prescribed curriculum and consistent with recognized effective educational practice, have individual professional autonomy.

Employer Argument: The employer submitted it acted in a reasonable manner in directing the grievor to participate in DART activities and was well within its rights under the collective agreement and the duties of teachers under the *School Act*.

The employer also submitted that the decision to implement a district-wide DART assessment was to fulfill the requirements of the accountability framework and the decision to have teachers administer it was fair and reasonable with no elements of discrimination, arbitrariness or bad faith.

Union Argument: The union submitted that the grievor determined the DART assessment was not appropriate for her students. The union argued the grievor was ordered to breach her duties and responsibilities by being directed to perform what she did not consider a useful tool for her class.

The union argued that the Board did not have just and reasonable cause to discipline the grievor. It relied on the professional autonomy clause in the collective agreement, which provides for "individual professional autonomy," exercised "within the bounds of the prescribed curriculum and consistent with recognized effective educational practice." The union also relied on the collective agreement requirement that the board's management rights be "exercised in a fair and reasonable manner."

Decision: Grievance dismissed.

Arbitrator Dorsey held the employer had the right, through the principal, to direct the grievor to administer the DART assessment. He stated:

> "The direction to administer a DART assessment, in the context of the statutory scheme regulating public education and the Board of Education's responsibilities and obligations under the accountability framework, is an assignment of duties the employer has the exclusive authority to make. It is not an infringement of the individual professional autonomy guaranteed in Article F3 of the collective agreement."

Arbitrator Dorsey also held that the grievor did not have the right to refuse the lawful direction to perform an administrative task as an exercise of her individual professional autonomy. He stated:

> "…Teachers do not have unfettered discretion to comply with or refuse to comply with employer policies or directions on all matters that relate to teachers' duties and responsibilities. Teachers work and are employed in a bureaucratic professional educational enterprise. The nature and extent of their contractually guaranteed right of individual professional autonomy must be interpreted in this context."

He went on to say:

> "Whether or how the teacher chooses to use the DART assessment activity and its results in discharging the teacher's responsibility is a matter within the teacher's individual professional autonomy. The teacher can choose to embrace and integrate DART assessment into the planning, instructing, assessing and evaluating cycle or can choose to simply treat it as an additional administrative and bureaucratic burden."

Arbitrator Dorsey concluded that the employer had just and reasonable cause for discipline and stated the discipline imposed was not excessive in all of the circumstances.

Significance: This decision upholds the rights of a Board of Education and its administrators to determine the overarching framework of assessment, materials, and processes to be used by teachers in meeting the specified mandate.

BCPSEA Reference No: A-35-2009

BCTF/BCPSEA/ SD No. 83 (North Okanagan-Shuswap): Preparation Time

Issue: When there are temporary assignments for one semester in which a secondary employee teaches only two or three blocks, is the employee entitled to a pro-rated amount of preparation time set out in Article D 17.3?

Facts: By the 2004-05 school year, all secondary schools in the district had switched from a linear system to a semester system.

The semester system took away the ability to use preparation time throughout the school year. A 1.0 FTE teacher taught four blocks with no preparation time in one of the semesters and taught three blocks with one block for preparation time in the other semester.

Collective Agreement Language:

> **Article D 17.0 Preparation Time**
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> 3. The Employer shall continue the practice of providing preparation time equivalent to 12.5 percent or one (1) block in eight (8) for full-time teachers in secondary schools or pro rata for part-time teachers at .5 or above.

Employer Argument: The employer's position was that the 0.5 referred to in Article D 17.3 must be calculated in relation to the school year and not in relation to a single semester. The employer also submitted that a teacher in a 1.0 FTE assignment should not receive more than 1.0 for the assignment.

Union Argument: The union submitted that under Article D 17.3, the 12.5% related to the teachers and not to the assignments. The union also submitted that if a teacher taught two blocks in one semester, then the teacher taught 0.5 FTE (two blocks out of four) over that period of time (semester) and should be entitled to preparation time pay.

The union argued that the payment of preparation time cannot depend on what another teacher was paid and submitted that the employer cannot manipulate a job posting so that it relates to a period of time outside of the period for which the job is posted.

Decision: Grievance allowed, in part.

Arbitrator Pekeles stated that at the heart of the dispute between the parties is the meaning of: "at .5 or above" in Article D17.3. The arbitrator concluded FTE is based on the school year and not the semester. He stated:

> "…in the context of the parties' Collective Agreement, "at .5 or above" means over the school year. First, preparation time is "equivalent to 12.5 percent." 12.5% is equal to 1.0 divided by 8. A 1.0 FTE teacher is assigned 8 blocks through the full school year. Part-time teachers at 0.5 or above receive pro rated preparation time money. Looking at Article D 17.3 in isolation indicates that the .5 is 0.5 of 8 blocks, i.e. 4 blocks."

With respect to the point conceded by the employer during its closing argument, arbitrator Pekeles wrote:

> "I agree with the Union, however, that the payment of preparation time is for teachers, and not for assignments. The payment of preparation time does not depend on what, if any, preparation time was paid to some other teacher who taught only part of their assignment. Paying the preparation time to a teacher does not depend on whether or not the teacher who that teacher is replacing did or did not get paid preparation time.
>
> Having said that, however, if for example a teacher is assigned to teach 7 blocks in a school year and leaves after the first semester, then the Employer can seek to recover any overpayment of preparation time money from that teacher through the grievance/arbitration procedure...."

Significance: First, the entitlement to preparation time is based on the time worked by each employee, not the amount of preparation time already paid to the assignment. Also, the FTE calculation is based on the amount of work for each employee over the year, not the semester. Finally, the employer has the right to recover overpayments of preparation time.

BCPSEA Reference No: A-36-2009

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.