GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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BCTF/ SD No. 73 (Kamloops/Thompson): Post and Fill

Issue: Did the employer act in a timely manner when posting the positions in question? Is the employer required to post the original position that was vacated or can the employer first re-assign within the school and then post the resulting vacancy?

Facts: The union filed four separate grievances alleging the employer violated Article IV.2.2 of the collective agreement. In January 2006, a teacher notified the employer that she would be taking maternity leave starting January 9, 2006. From January 9 to the end of the semester, the employer employed a teacher on call (TOC). For the second semester, starting Feb 6, 2006, the employer re-assigned a teacher within the school to cover the assignment and posted the resulting vacancy on January 25, 2006.

The second teacher indicated on January 3, 2006 that she would be on medical leave until February 10, 2006 and then on maternity leave from February 11, 2006 to February 2, 2007. The employer filled the position with a TOC until the conclusion of the first semester, then posted the position on January 25 and filled it commencing at the start of the second semester on February 13, 2006.

In November 2005, the third teacher submitted documentation for a medical leave from December 1, 2005 to February 3, 2006, which was then extended (on February 9, 2006) to June 30, 2006. The position was filled by a TOC, then posted on February 15, and filled February 24, 2006.

The fourth teacher advised the employer on January 4, 2006 that she would be on maternity leave from February 1, 2006 to June 30, 2006. The position was posted January 16 and filled January 23.

Collective Agreement Language:

ARTICLE IV: DEFINITION AND CATEGORIZATION OF EMPLOYEES

2.2 When it is known that a teacher on continuing appointment will be absent for two (2) months or more, that position shall be posted and advertised and filled as described in Article XI 4.2. A Teacher on Call who serves in the position shall be granted an interview and consideration for the position.

ARTICLE XI: TRANSFER ASSIGNMENTS

4. POSTING AND FILLING VACANT POSITIONS

4.2 Positions which become vacant, or new vacancies greater than two (2) months which arise after September 1st, shall be posted and advertised and shall be filled firstly with teachers identified in September as surplus to their school needs, and then with teachers from the recall list, and appointed as per Article IV. Remaining vacancies will then be filled as per Article XI.4.1 (above).

Employer Argument: The employer may consider school assignment changes prior to a position being declared available for transfer or vacant. The agreement is silent on the timing of postings arising from teacher absences of two months or more and the employer is entitled to take business and educational

considerations into account when deciding when to post a position. Past practice supports the employers' position and reveals an intention by the parties to support the employers' interpretation.

Union Argument: The employer must post a position once it is known that the duration of an absence is two months or longer and the posted position must be for the same duration as that performed by the continuing appointment teacher. The employer does not possess discretion as to when and what to post in Article IV.2.2. The Association was never informed about the employers' intentions nor were they aware of this practice.

Decision: Grievance allowed, in part.

With respect to the timing of the posting, Arbitrator Sullivan decided that:

> "I am unable to conclude that the employer has violated the collective agreement in relation to the timing of the postings at issue. Upon learning of a leave application the employer is entitled to look into the situation and make certain determinations."

Arbitrator Sullivan relied on the time frame from a decision from School District No. 23 (Central Okanagan) and Central Okanagan Teachers Association, supra, in which the arbitrator commented that a position to be posted "as soon as reasonably possible" would have to go up "no more than a week or two after the vacancy has been identified.

On the issue of in school re-assignments prior to posting the resulting vacancy, Arbitrator Sullivan noted that:

> "The collective agreement language...discloses a mutual intention to treat Article IV.2.2 situations differently than situations covered by the post and fill provision contained in Article XI. [Article IV.2.2] uses the mandatory "shall" to express the requirement to post."

He went on to say:

> "The language...does not contain an indication that the extended absence of a continuing appointment teacher may not be posted, or that something other than what was held by the continuing appointment teacher can now be posted...To conclude in favour of the employer would essentially require turning a blind eye to the express words."

Although Arbitrator Sullivan interpreted the language in the union's favour, the union was estopped from enforcing that language because of the consistent past practice. Arbitrator Sullivan concluded that:

> "The Association has, by its words and conduct, clearly led the employer to believe it did not seek to pursue the rights of members affected by the consistent practice of the [school board]. By all accounts the Association was aware of the practice that had been taking place for many years, and it knowingly allowed it….Having been led to accept that the Association was not relying on strict legal rights contained in Article IV.2.2, the Employer has relied to its detriment in not seeking to negotiate a change to the language. In the circumstances, all of the requirements of an estoppel are met."

Significance: As previously reported, the issue of re-assignment within the school prior to posting has been arbitrated in many districts with differing results. These results have depended on the specific language of the collective agreement, past practice, and bargaining history. Should you have a similar issue in your district, please contact your BCPSEA labour relations liaison.

BCPSEA Reference No. A-68-2008

BCTF/ BCPSEA: Elimination of Salary Category 3

Issue: What salary should teachers on call, who were previously paid at salary category three, now be paid in light of Vince Ready's decision of June 1, 2006?

Facts: This grievance arises out of the Vince Ready Interim Award of June 1, 2006 (Implementation of the October 20, 2005 Industrial Inquiry Commission Recommendation to Resolve A Collective Bargaining Dispute — Interim Award). In his award, Mr. Ready eliminated salary category 3. The BCTF alleged that the employer violated the collective agreement by compensating teachers on call using the previously existing category 3, a category which was eliminated in Ready's decision (June 1, 2006). The union's position was that the employer should have eliminated all references to category 3 and replaced them with category 4. In November 2007, the BCTF filed a policy grievance. In order to address this issue, the parties sought the assistance of mediator Judi Korbin, who issued a Consent Award dated November 17, 2008.

Decision: The Consent Award decision amended previous local agreements to delete references to category 3 and replace them with category 4. These changes are effective September 1, 2007. For information on how this impacts your district, please contact your BCPSEA labour relations liaison.

BCPSEA Reference No. A-66-2008.

BCTF/ BCPSEA: Ferry Travel Costs

Issue: Are employees in specific districts entitled to receive reimbursement for costs associated with traveling by ferry/water taxi to and from work?

Facts: This grievance arises out of an interpretation disagreement between BCPSEA and the BCTF regarding the Provincial Collective Agreement (PCA) article B.10.5. The PCA Article B.10.4 sets out a number of specific districts and circumstances upon which employees in those circumstances would receive additional travel reimbursements as set out in that Article.

Article B.10.5 states:

> *"the parties agree that there may be other situations analogous to those set out in Article B.10.4 a through Article B.10.4 d above, in which non-resident employees are assigned to schools which require them to use ferries or water taxis to travel to work. By no later than September 30, 2006, the parties will identify any additional Districts and locations where employees may require reimbursement for ferry/water taxi charges. These additional areas will be recorded in a Letter of Understanding.*"

The parties were unable to reach agreement on the intent of this provision. In November 2007, the BCTF filed a policy grievance. In order to address this issue, the parties sought the assistance of mediator Judi Korbin who issued a Consent Award dated November 17, 2008.

Decision: The Consent Award decision provided for six additional school districts and employees to receive specific ferry/water taxi reimbursements. The award amended Article B.10.4 to include subsections (e), (f) and (g) which apply to School Districts 46 (Sunshine Coast), 69 (Qualicum), 50 (Haida Gwaii/Queen Charlotte), 72 (Campbell River), 79 (Cowichan Valley) and 85 (Vancouver Island North). Additional provisions were also agreed to for the term of this agreement only for School Districts 50 (Haida Gwaii/Queen Charlotte), 70 (Alberni), and 84 (Vancouver Island West).

BCPSEA Reference No. A-67-2008.

BCTF/ SD No. 22 (Vernon): *Labour Relations Code* Section 17 Religious Exemption

Issue: Is an employee with a Section 17 religious exemption entitled to receive the SIP allowance?

Facts: Under Section 17 of the *Labour Relations Code*, on the basis of religious beliefs, an employee applied for a religious exemption from the requirement in the collective agreement that all employees be members of the trade union.

Decision: Exemption granted. The Board ordered that the employee is not entitled to receive the SIP allowance and that the dues, and any other assessments which would have been required to be paid to the trade union if the grievor remained a member (including an amount equivalent to the SIP premium), is to be paid to charity. In addition, the board is not liable for SIP indemnity payments.

Significance: Even though the exempted employee is still required to pay the SIP premium to a charity, that employee is not entitled to receive the SIP allowance nor are they entitled to the SIP benefit.

BCPSEA Reference No. LB-02-2008

BCTF/ SD No. 39 (Vancouver): Foundation Skills Assessment

Issue: If teachers are sending home FSA materials to parents through students, in what manner can the materials be sent home? Is the employer entitled to advance notice that the FSA materials are being sent home to parents through students?

Facts: Arbitrator John Hall released an expedited arbitration award on January 9, 2009 regarding the distribution of FSA materials to parents through students in School District No. 39 (Vancouver). Arbitrator Hall had remained seized of the issue after he issued a Consent Award regarding FSA on October 15, 2008. This expedited arbitration arose after a dispute between the district and local "over a pamphlet which the union had produced regarding FSA testing. The pamphlet had been provided to teachers to send home to parents through students."

Decision: Although the expedited arbitration award is limited to the specific issue of the distribution and does not address the content of the FSA material, Arbitrator Hall's award makes two important findings for school districts to consider.

First, with regard to teachers sending home material about FSA through students, Arbitrator Hall relied on Arbitrator Kinzie's statement in the School District No. 5 (Southeast Kootenay) FSA arbitration, that placing the FSA pamphlet in a sealed envelope addressed to the parents or guardians of students "constitutes a reasonable attempt" to address the concern that inserting students into the policy discussion causes them to feel "uncertain about two very important sets of people in their lives."

Arbitrator Hall goes on to say that:

> "If the Union wishes to distribute FSA material to parents via students, it must do so in a sealed envelope or in some other manner designed to prevent students from reading the contents of the material. This precautionary measure avoids the potential for harm to the students, and does not infringe the right of teachers to express their views about FSA testing to the students' parents."

Second, with regard to the authority of the employer to control what is sent home from school, in light of the Consent Award, Arbitrator Hall stated that:

> "The Union must give the employer and/or principals advance notice of the method selected for distribution…I find it can be reasonably implied from the expedited arbitration process in the fourth paragraph of the Consent Award that any issue over the manner of distribution will be resolved before the material is sent home"

With respect to the content of the pamphlet, although Arbitrator Hall indicated that as a result of the wording of the Consent Award he was not seized with this issue, he did reconfirm Arbitrator Kinzie's finding that the employer has the right to control what is sent home to parents through students:

> "Finally, and regardless of what is found in the consent award, the employer "… has the right to control what is sent home to parents through the medium of their children/students at its schools" (Cranbrook award, at page 36) — subject , of course, to *Charter* considerations."

Significance: If teachers are to send home FSA materials to parents through students it must be done in sealed envelope or in another manner designed to prevent students from reading the contents. In addition employers have the right to advance notice of the method of selected for distribution. Although not covered by the Consent Award, Arbitrator Hall reconfirms that with respect to content, the employer has the right to control what is sent home to parents through children. For more information on this subject, please refer to BCPSEA's @*issue* No. 2008-13 dated September 30, 2008 and @*issue* No. 2008-16 dated December 18, 2008

BCPSEA Reference No. A-43-2008

BCTF/ SD No. 68 (Nanaimo-Ladysmith): Union Executive Sick Leave

Issue: When a teacher on full-time union leave becomes ill and is replaced by a second teacher on full-time union leave, is the union required to reimburse the employer for the salary and benefit costs incurred by the union executive who is ill and now on sick leave?

Facts: Two teachers (President and Vice President of the Nanaimo District Teachers' Association) were on a full time union leave from their teaching duties. During the 2006-2007 school year, the President of the association became ill and missed time due to illness from December 11 to December 22, 2006. The Vice President was then absent due to illness from February 23 to March 9, 2007 and then absent due to illness on a half time basis from March 12 to 16, 2007. During those illnesses another union executive member was brought into the union office to perform union duties and was replaced by a TOC. The school board invoiced the union for the full cost of the president and vice-president salaries and benefits on exactly the same basis as if they had not been ill and also invoiced the union for the cost of the TOC replacing the other union executive member.

Collective Agreement Language:

Article 11.13.1 Leave-Executive N.D.T.A

11.13.1 Upon the request of the Executive of the Association, following the annual election of officers, the Board shall grant to a member(s) of the Executive of the Association a leave of absence for a specified term.

The Association will reimburse the Board for such salary, benefits and sick leave costs upon receipt of a monthly statement from the Board. For leave granted under Article 11.13.1, the employer's share of the President's pension contributions shall be remitted at no cost to the Association.

11.13.2 For purposes of pension, experience, sick leave and seniority, the Executive Member(s) shall be deemed to be in the full employ of the Board. The President shall inform the Secretary-Treasurer of the number of days or partial days, if any, that the Executive Member(s) were absent from Executive duties due to illness. Such days or partial days shall be deducted from the Executive Member's accumulated sick leave credits.

Decision: Grievance allowed. Arbitrator Sanderson noted the issue and facts of this case are similar to those set out in a previous Prince Rupert decision decided by Arbitrator Sanderson. Arbitrator Sanderson commented that the difference between this case and the Prince Rupert case is that the "Nanaimo contract calls for the Association to reimburse the Board for 'salary, benefits and **sick leave costs'**" of the association executives.

In his interpretation of the executive leave provisions Arbitrator Sanderson concluded that:

> "There can be no question that had either or both of the two executives involved in this case been engaged in their normal teaching duties and become ill, they would have been entitled to access their existing sick leave credits, which in both cases were ample to cover their respective period of illness. The important question is whether the parties intended that principle to be applied when a teacher becomes a member of the Association executive and becomes ill while on leave of absence under Article 11.13. In my view, that question must be answered in the affirmative."

Arbitrator Sanderson went on to give examples of what is meant to be included in "sick leave costs":

> "If the executive has no sick leave credits left when the illness arises, the Board must be reimbursed for the salary that has been paid for that time period. An even more obvious example is the facts of this case….it became necessary for the Association to bring someone else into the office to cover their absence. When this was done the teacher brought in had to be replaced and on-call teacher expenses were incurred. Quite properly, the board itemized those costs in the monthly statement."

Significance: In this case, as in the Prince Rupert case, the union is not required to reimburse boards for the salary and benefit costs of the association executives during times when the executives are away ill. Instead, sick leave credits will be deducted for the duration of those absences.

BCPSEA Reference No. A-69-2008

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.