GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2011-01 **February 21, 2011** **By E-mail: 13 Pages**

BCTF/STA and School District No. 36 (Surrey): Duties of Teachers

Issue: Was it a violation of the Collective Agreement for the Employer to require all technology education teachers to complete weekly safety checks of machine-mounted air receivers in their shops?

Facts: A Safety Order issued by the British Columbia Safety Authority included a requirement to perform weekly tests of safety valves for freedom of operation concerning machine mounted air receivers (air compressors) used in technology education classes. This requirement was assigned by the Employer to technology education teachers. It was agreed that these safety valve tests were not beyond the knowledge or training of a shop teacher and would take around 2-3 minutes to complete. In the event that these checks reveal improper function, the teacher is to contact Corporate Services to have the compressor fixed, or removed by a certified technician, not to attempt maintenance or repair themselves.

Collective Agreement Language:

ARTICLE A.22 NO CONTRACTING OUT

A.22.1 Services of the type and kind normally and regularly provided by Surrey Teachers' Association members shall continue to be provided only by members of the bargaining unit and will not be contracted out.

A.22.2 Contracted services will be limited to services of a specialized nature other than the type and kind regularly provided to students by members of the bargaining unit or services members of the bargaining unit lack the necessary expertise to provide.

ARTICLE A.25 MANAGEMENT RIGHTS

A.25.1 BOARD AUTHORITY

The Surrey Teachers' Association recognizes the right and responsibility of the Board to manage and operate the school district, and agrees that the employment, assignment, direction and determination of employment status of the work force is vested exclusively in the Board, except as otherwise provided in this agreement or applicable legislation.

Employer Argument: The weekly safety valve check would form part of the implied duties of teachers and such duties are not confined to the instructional day. Teachers are professionals, whose duties include a variety of activities outside of the act of teaching during the school day, including responsibility for the safety of students under their supervision by ensuring that equipment in use is safe to operate.

Union Argument: There is no particular connection to educational programs or the other work of teachers in instruction invoked by this task. The assignment is neither fair nor reasonable because the

technology education teachers have no time in their work day to assume additional duties, and the assignment was undertaken without Union consultation or Employer consideration of the valve testing, which should be considered maintenance work, being undertaken by another group.

Decision: The relevant considerations concerning the basis for authority to assign duties to teachers is found in *Winnipeg School Division No. 1 v. Winnipeg Teachers' Association No. 1, [1976] 2 S.C.R 695* where the Court considered the following:

a. Express provisions in the collective agreement or relevant statute;

b. Voluntary assumption of the duties through conduct over a period of time; or

c. Connection to the employer's enterprise such that it is reasonable and fair, in the circumstances, for teachers to assume the duties.

While Arbitrator Vincent Ready agreed with the Union that parts a. and b. were not met, he disagreed with the Union's submission regarding part c., "…that in the instant case the gulf between the professional duties of teachers and the enterprise of the school is too wide to bear the assignment of this new duty." Arbitrator Ready notes:

> "It is common ground that teachers are professionals, with responsibilities extending beyond the specifics of classroom teaching and the parameters of the instructional day. The arguments that implied duties exist even absent express provision are equally well founded."

Arbitrator Ready concludes by citing a decision of Arbitrator Watters in *St. Clair Catholic District School Board v. O.E.C.T.A. (2001), 98 L.A.C. (4th) 191 (Watters)* where a grievance was dismissed over attendance at asbestos training outside of the instructional day:

> "Firstly, that health and safety is an extremely important consideration in the operation of a school. It is undoubtedly related to the educational enterprise. Secondly, that the responsibility to provide for students' health and safety is one (1) of the principal duties of a teacher."

Arbitrator Ready agreed with this principle and in considering the small amount of time required to perform the task, the length the Employer went to address potential employee concerns, and the common sense assignment to teachers who rely upon this equipment for their classes, accordingly dismissed the grievance.

Significance: The duties of teachers are not limitted to express provisions or voluntary assumption of duties.

BCPSEA Reference No: A-72-2010

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

Issue: Did the Employer have just and reasonable cause for discipline to be imposed? Was the discipline excessive?

Facts: The grievor, who had previous discipline of a similar nature on file from 1997, received a five-day suspension and a forced transfer in response to allegations of inappropriate physical contact with students. A number of students complained to their parents that the teacher touched them, and the parents brought the issues forward to the school. Administration investigated, finding that several of the incidents had indeed occurrred and recommended discipline. At the board hearing, the Union raised

several issues and the board ordered a second investigation by an external investigator. The findings were the same. The board passed a motion and suspended the teacher for five days without pay, required the teacher to attend a workshop/course on maintaining professional boundaries with students, and required that the teacher be transferred to a similar teaching assignment at another school for the following school year. An option to return to the former school would be given after that year.

Employer Argument: Two separate investigations were conducted (internal and external) that yielded the same conclusion that the grievor was culpable, hence there was just and reasonable cause for the discipline imposed. The five day suspension, the requirement to complete an appropriate course and the forced transfer for one year was not an excessive disciplinary response.

Union Argument: Students conspired against the teacher. Their allegations were exaggerated or untrue. Any touching that may have occurred may well have been unconscious or easily forgettable in some instances — a "moment in school" as he described shoulder taps — and supportive or encouraging in others. The discipline was excessive.

Decision: The Arbitrator made findings based on sworn testimony only. She was satisfied that the following allegations were proven:

- Students A and C were patted on the bum by the grievor
- While they were standing, Students A, B, D, F and G were grabbed on the hips or waist from behind by the grievor either to look over their shoulder at their work or to move them somewhere
- Students B, C, D and G had their shoulders or backs massaged or rubbed by the grievor
- Students B, C, and G were hugged by the grievor
- While they were seated at their desks, Students C, D, F, G and H were touched by the grievor when he placed his hand on their shoulders, leaned over to look at their work and his hand slipped onto their chest areas; Student H was also touched on the chest when the grievor grabbed a paper from her desk
- Student G was touched in the area of her buttocks and her thigh or hip when she took her work to the front of the class to be checked.

The grievor was in a position of authority and it was evident from the testimony of several of the girls that they were too intimidated by, or too respectful of, the grievor and his position of authority to speak to him about the touching. Student C called him an elder who you don't challenge. Student H said she felt awkward and a little frightened. Student D said she didn't think it would help to say anything.

The Arbitrator recognized that the grievor is a teacher of long-standing and is well-respected by his peers and many students and their parents. However, the grievor thoughtlessly invaded the personal space of a number of vulnerable girls and caused them to be uncomfortable in a setting in which they should have felt safe. He occupied a position of trust and authority towards these girls and was responsible for their well being; see, among others, *BCPSEA and BCTF (Samson Grievance)*, supra. His denials showed a failure to acknowledge he overstepped the boundaries between student and teacher.

While the previous disciplinary incidents were over a decade ago, they remain relevant since they establish that the grievor had been warned in the past in no uncertain terms to keep out of the personal space of female students.

The grievor gave the Employer just and reasonable cause for discipline to be imposed. The five day suspension, the requirement to complete an appropriate course and the forced transfer for one year was not an excessive disciplinary response. Accordingly, the discipline as a whole was upheld and the grievance dismissed.

Significance: A teacher occupies a position of trust and authority towards students. As such, a violation of this trust by invading the personal space of students oversteps the boundaries between teacher and student.

BCPSEA Reference No: A-43-2010

BCTF/STA and School District No. 36 (Surrey): Arbitral Jurisdiction

Issue:

a. Was Ms. Spruyt's grievance inarbitrable on the basis of timeliness?

b. Does an arbitrator appointed under a Collective Agreement have jurisdiction to order a remedy for breach of previous collective agreements?

Facts: This decision, which deals solely on preliminary matters, involved two separate grievances concerning pay issues. The first grievor, Ms. Spruyt was hired on November 18, 1997 as a Teacher-On-Call (TOC). She obtained a contract on February 28, 2002 and signed it on May 28, 2002. With her application for employment Ms. Spruyt provided information detailing her experience in South Africa from 1970 to 1989. The Employer inadvertently determined Ms. Spruyt received experience from a private school, and she was not given credit for her public school experience. In accordance with the grievor's request, the Joint Salary Review committee reviewed her case and determined that her placement on the grid should go back to January 1, 2005. On December 17, 2008 the Union grieved the matter seeking lost wages from 1998 to 2005.

The second grievor, Ms. Fraser, was hired on July 1, 1999 as an Adult Education TOC. She submitted documentation that proved she has nine years of teaching experience in Manitoba. As the Employer failed to process this information, Ms. Fraser was never given credit for this experience. Consequently, Ms. Fraser's placement on the salary scale was inaccurate. In December 2008 Ms. Fraser requested a review of her placement on the salary scale which resulted in her placement being adjusted effective September 1, 2008. On December 17, 2008 the Union filed a grievance seeking retroactive payments dating back to Ms. Fraser's first date of hire, which was beyond the current collective agreement.

Collective Agreement Language:

ARTICLE A.6 GRIEVANCE PROCEDURE

Steps in Grievance Procedure

A.6.2 Step One

a. The local [Surrey Teachers' Association] or an employee alleging a grievance ("the grievor") shall request a meeting with the employer official directly responsible, and at such meeting they shall attempt to resolve the grievance summarily. Where the grievor is not the local [Surrey Teachers' Association], the grievor shall be accompanied at this meeting by a representative appointed by the local [Surrey Teachers' Association].

b. The grievance must be raised within thirty (30) working days of the alleged violation, or within thirty (30) working days of the party becoming reasonably aware of the alleged violation.

ARTICLE B.20 JOINT SALARY REVIEW COMMITTEE

B.20.2 Inquiries

Questions relating to salary, allowances, benefits or indemnities shall be referred through the Surrey Teachers' Association's Economic Welfare Committee to the Joint Salary Review Committee.

ARTICLE B.21 SALARY CATEGORIES

B.21.1 Salary Scales

b. No Surrey Teachers' Association member on staff at the signing date of this agreement shall have their salary reduced by the coming into effect of the Salary Schedules in Appendix H.

ARTICLE B.22 TEACHING EXPERIENCE

B.22.1 Conditions

Providing the teacher held a valid teaching certificate, or its equivalent, at the time the experience was gained, teaching experience gained outside the district of Surrey shall be recognized as set out below:

a. Normally, only that experience claimed on a teacher's application form will be eligible for credit as previous experience.

b. For full-time teaching experience, a minimum of ten (10) months full-time service in any one (1) year is required to constitute a year's service, except for one of the years, when eight (8) months full-time service will be sufficient to constitute a full year's service.

c. Fractions of years taught outside the district will be accumulated and recognized where:

i. Interrupted full-time teaching experience was of at least four (4) months' duration in a single continuous assignment, and/or

ii. Part-time or relieving teaching experience was at a rate of 20% or more.

d. For increment purposes, fractions of years not applied at time of hire will be carried to accumulate with Surrey Teachers' Association experience.

Employer Argument:

a. Ms. Spruyt's grievance was filed well beyond the timelines of the Collective Agreement and should be dismissed on the basis of timeliness.

b. The arbitrator appointed under the current Collective Agreement does not have jurisdiction to order a remedy for a breach of previous agreements.

Union Argument:

a. The timeliness issue can only be determined on the basis of factual findings, which can be agreed upon by the parties, or otherwise established by oral evidence.

b. The grievor is entitled to retroactive pay dating back to Ms. Fraser's date of hire, as she was not given credit for her previous experience.

Decision:

a. With regard to the first grievance, Arbitrator Sullivan determined that the length of delay in filing the grievance was substantial. The grievor became aware that the correction to her pay was being backdated to December 2005 but did not file a grievance for further back pay until December 17, 2008.

b. As for the second grievance, Arbitrator Sullivan determined that he did not have jurisdiction to order the monetary remedy sought by the Union in the present case for damages arising out of a violation of previous collective agreements. He noted that notwithstanding the Collective Agreement violation at issue in the present case may be described as a "continuing" one, the right to retroactive pay increases sought does not constitute a "vested" right, which accrued under previous agreements.

Arbitrator Davie in the *York University v. York University Faculty Association (Briskin Grievance), [2002] O.L.A.A. No. 65* observed:

> *63 The right to be paid in a manner which does not violate the collective agreement or the equal pay for equal work provisions of a statute is not a "vested" right in the sense that the term is used in Dayco, supra. If it were, a grievor could go back many years and grieve for example that on a particular occasion the employer failed to pay him/her the hourly rate specified in the collective agreement, or the minimum wage set out in applicable legislation. The payment of salary in a manner which does not violate the collective agreement to the equal pay for equal work provisions of a statute does not give rise to a vested right. Rather it is a discrete, separate transaction or incident which occurs every pay day …*

Arbitrator Sullivan concluded that these comments have application to the present set of circumstances and support the conclusion that he is without jurisdiction to make the remedial order sought by the Union in its grievances.

Significance:

a. Grievances must be filed in a timely manner in accordance with the collective agreement, and the right to retroactive pay increases does not constitute a "vested" right.

b. An arbitrator has no jurisdiction to award a remedy that goes beyond the start date of the collective agreement under which the grievance was filed.

BCPSEA Reference No: A-62-2010

British Columbia (Ministry of Education) v. Moore, 2010 BCCA 478

Issue: Did School District No. 44 (North Vancouver) and/or the Ministry of Education deny a disabled student, Jeffrey Moore and/or others, any accommodation, service or facility customarily available to the public on the basis of that disability?

Facts: This BC Court of Appeal case originated from the BC Human Rights Tribunal decision that found the Board of Trustees of School District No. 44 and the Ministry of Education had discriminated against Jeffrey Moore and other severely learning disabled students by failing to accommodate their learning disabilities contrary to the *Human Rights Code*. The district and the ministry sought judicial review, which resulted in the quashing of the Tribunal's decision on the grounds that the Tribunal had erred in finding discrimination in the absence of evidence of disparate treatment. The appeals were brought by Frederick Moore on behalf of his son, Jeffrey, from the order quashing the Tribunal's decision.

Language (*Human Rights Code)*:

Discrimination in accommodation, service and facility

8 (1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

Employer and Union Arguments: None outlined in BCCA decision.

Decision: The Honourable Mr. Justice Low found that the board of education did not deny Mr. Moore accommodation, service or facility or discriminate against any other person in that regard. He noted that:

> *"...the essence of the complaint in this case concerns allegedly ineffective remediation that is identified as differential treatment to fit it within the s. 8 legal analysis. The evidence, however, permits only one conclusion: by applying its policies in place at the time, the School Board, through its employees, identified Jeffrey Moore's learning disability and took reasonable steps toward remediation in accordance with treatment theory than prevalent. This was done by one-on-one instruction, monitoring, and reporting. As has been noted, Jeffrey Moore received more special education services than any other student in his school."*

Justice Low emphasized that the recipient of the service in question is not entitled to a perfect result. He is entitled to no more than a conscientious and reasonable attempt to identify his condition and address his needs. In this case, there was no denial of service or discrimination with respect to its delivery.

With regard to the comparator group, Justice Low agreed wit the reviewing judge, that:

> *"the appropriate comparator group in relation to the benefit in question, namely special education services, is special needs students other than those with severe learning disabilities."*

This coincides with the principle given by Binnie J. in *Hodge v. Canada (Minister of Human Resources Development), [2004] 3 S.C.R. 357* noted at para. 18 that, "(t)he appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought…"

Justice Low explained that to compare Jeffrey Moore and other severely disabled students with the general student population is to invite an inquiry into general education policy and its application, which cannot be the purpose of a hearing of a human rights complaint.

Accordingly, the ruling of the BC Supreme Court is upheld. The complainants had failed to prove a *prima facie* case of discrimination against the board of education. Both appeals were dismissed.

Significance: The recipient of a service such as special education is not entitled to a perfect result. He is entitled to no more than a conscientious and reasonable attempt to identify his condition and address his needs.

BCPSEA Reference No: CD-01-2010

School District No. 40 (New Westminster) and CUPE Local 409

Issues: Did the Employer violate the collective agreement when transferring custodial staff to different schools in the school district for summer team cleaning?

Facts: On June 30, 2010, the Employer presented the 2010 custodial schedule to district custodians. The schedule implemented "team cleaning," which involves a temporary transfer of custodial staff into teams that move between schools to address the heavier summer clean rather than leaving individual custodians at their regular work sites. In meetings between the Union and Employer prior to June 30, the Union indicated its disagreement with summer team cleaning. On July 5, 2010, the Union filed a policy grievance alleging that the Employer breached the collective agreement in unilaterally implementing team cleaning.

Collective Agreement Language — Articles 4.02, 4.06, 4.08, and 5:

4.02 Posting of Positions

(a) Job Postings

(i) When a new position is created, when a vacancy of a temporary or permanent nature occurs, which shall include the resignation of an incumbent, when there is an increase in hours of work of more than one (1) hour more per shift in a school year, or when a school term position becomes a regular position, the employer shall immediately notify the Union in writing and post notice of the position on all bulletin boards for a minimum of ten (10) days, effective April 1, 1996. (For the purpose of clarification, it is understood that if a position has an increase of one (1) hour or less, the position does not need to be posted if the incumbent accepts the increase in hours; however, such increase cannot occur more than once in a twelve (12) month time period without a posting. If the increase in hours makes the position full time, the position must be posted).

(ii) Positions shall be posted not later than one (1) week after the vacancy has occurred.

(iii) Vacancies arising from normal retirement shall be posted sixty (60) days prior to the employee's date of retirement provided the Board has received adequate notice.

(iv) The Board shall maintain a voice mail information system to be used by employees who are absent from work during the posting period. The voice mail system shall allow employees to apply for positions.

(e) Filling of Vacancies

The Board agrees to fill every vacancy without undue delay but shall name the successful applicant and provide the Secretary of the Union, in writing, with the name of the successful applicant for the posted position, within fifteen (15) working days of the closing date of the posting. Such period may be extended by mutual agreement in writing.

(f) All vacancies created by promotions or transfers shall be filled on a temporary basis, until such promotions or transfers have been confirmed upon completion of the trial period or upon the return of an employee to their former position.

(g) The Board shall ensure that all jobs are posted in the various work locations of the employer for at least ten (10) consecutive days. In the case of positions posted during Spring, Summer, or Winter breaks the employer shall ensure those position(s) are posted on the job posting voice mail system for a period of at least fourteen (14) days to ensure that employees on vacation and or absent for other reasons have an opportunity to apply for the posted positions.

4.06 Board Initiated Transfers

(a) The Board has the right to transfer an employee. If the Board initiates the transfer, it shall be deemed to be involuntary. Normally an employee shall not be involuntarily transferred by the Board more than once in a calendar year.

(b) The Board shall follow the following guidelines when considering a Board initiated transfer:

(i) Such transfer may occur where it is a swap of positions where the employee not being transferred agrees to the swap. Such swap must be within the same classification.

(ii) Such transfer may occur where there is a vacancy in the same classification. In such cases the employer may transfer the employee and shall then post the new vacancy.

(iii) Where the Board initiated transfer involves a swap of positions of different classifications, both employees must agree to the swap; and the positions must have similar responsibilities and duties and the same pay.

(c) The Board shall notify the Union of any Board initiated transfers prior to the transfer. The notice shall include the reasons for the transfer.

Board initiated transfers are subject to the grievance procedure. Except in emergency situations such involuntary transfers shall not take place until the grievance procedure is completed (if a grievance is filed).

4.08 Day Engineer of Custodian

The Day Custodian or Custodian C shall accept the care of the school buildings and the comfort of the occupants as his/her responsibility and shall be prepared to do the necessary emergency work if and when it is required. The Custodian shall not be responsible for the mechanical or power failure of automatic heating units, but it shall be incumbent upon him/her to make periodic inspections when conditions warrant the same, and advise the Administrative Officer/Director of Operations when he/she is not available for this duty.

Custodians in-charge on day shift shall use their own discretion for starting time, as they are responsible for the care of the school buildings and the comfort of the occupants. The thirty (30) minute lunch period shall not be included in their hours of work.

The Day Custodian or Custodian in-charge is responsible to ensure that there is an overlap between the day and afternoon shifts so that no school is left unattended without the permission of the Administrative Officer/Director of Operations, provided that this shall in no way be deemed to affect any of the working conditions otherwise granted to Day Custodians or Custodians in-charge under this Agreement.

It shall be the duty of the Day Custodian or Custodian C to ensure that the cleaning and maintenance schedules as laid out by the Administrative Officer/Director of Operations are satisfactorily performed.

ARTICLE 5 – TECHNOLOGICAL CHANGE

5.02 Notice

The Board will give to the Union, in writing, at least one hundred and twenty (120) calendar days of notice of any intended technological change that:

(a) Affects the terms and conditions, or security of employment of any employee to whom this Agreement applies; and/or,

(b) Alters the basis upon which this Agreement was negotiated.

Employer Argument: Article 4.02 post and fill language does not apply to the adaptation of team cleaning in elementary and middle schools in the summer. Team cleaning improves workplace safety and reduces workers' compensation claims. Further, team cleaning improves efficiency and effectiveness, as well as employee morale. It is within the Employer's management rights to re-organize its workforce.

Union Argument: Article 4.02 post and fill language applies to the adaptation of team cleaning in elementary and middle schools in the summer. The implementation of team cleaning could lead to an erosion of full time positions and the elimination of 12-month custodial positions. Employees who travel to the worksite by public transit will be greatly inconvenienced by the implementation of team cleaning. Also, subsequent to 2000, all job postings have been location specific and reflect the location as the work area. Bargaining history and past practice indicate that this was the intention of the parties.

Decision: Arbitrator Burke found that Article 4.02 does not provide the limitation sought to be established by the Union. It ultimately does not necessarily apply, as the circumstances do not involve a posting or a vacancy. The utilization of team cleaning did not create a new position or vacancy but rather is a temporary deployment.

In recognizing the Employer's right to manage a workforce, Arbitrator Burke cited the following from *Brown and Beatty:*

> *"It is an almost perpetual condition of the industrial environment that work requirements are in a state of flux…*
>
> *… prior to the establishment of a collective bargaining relationship, it could be said that management's initiative to respond to changing needs of this nature was limited only by its resources and other pragmatic considerations."*

Further, Arbitrator Burke noted:

> *"…the Employer retains the organization and duration of the workforce unless a clear limitation of that right is expressed in the collective agreement."*

In this case, the Union was unable to establish a clear limitation on management's right to temporarily transfer employees. The collective agreement does not restrict management's rights to temporarily redeploy and organize workforce for the summer team cleaning. Accordingly, Arbitrator Burke dismissed the grievance.

Significance: This decision clearly reinforces management's right to re-organize a workforce in the absence of a clear limitation expressed in the collective agreement.

BCPSEA Reference No: A-90-2010

Health Employers Association of BC and Health Services & Support Facilities Subsector Bargaining Association: Criminal Record Check Fee Grievance

Issue: Is the employer required to pay the fee required for employees to undergo a criminal record check?

Facts: Under the *Criminal Records Review Act* (CRRA), a criminal record check is required for employees who work with children. Effective December 21, 2010, a criminal record check is now required every five years for all employees who work with children, pursuant to BC Reg. 386/2007. Offers of employment by the health authorities in BC, for positions that require a criminal record check, are conditional upon successful completion of a CRRA Criminal Record Check, as evidenced by Interior Health Authority (p.19). The health authorities, with the exception of Northern Health Authority, used to pay the fees (inconsistently) for individuals for their criminal record checks. This started in 2002 and will end in December 2010.

Collective Agreement Language:

> **COLLECTIVE AGREEMENT: 6.01 MANAGEMENT RIGHTS**
>
> The management of the Employer's business, and the direction of the working forces including the hiring, firing, promotion and demotion of employees, is vested exclusively in the Employer, except as may be otherwise specifically provided in this Agreement.
>
> ***EMPLOYMENT STANDARDS ACT*: DEDUCTIONS**
>
> 21 (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by regulations.

Employer Argument: The fees for criminal record checks are not "business costs" under the *Employment Standards Act* (ESA). Estoppel does not apply, as the practice to pay a one-time fee for the criminal record checks was inconsistent.

Union Argument: The health authorities are required to pay this fee for two reasons. First, section 21(2) of the *Employment Standards Act* states that an employer must not require an employee to "pay any of the employer's business costs." A criminal record check is such a business cost. Second, the health authorities paid the fees for employees in the past and they are estopped from ending that practice.

Decision: With regard to the Union's first argument that the health authorities must not require an employee to "pay any of the employer's business costs" under section 21(2) of the *Employment Standards Act*, Arbitrator Steeves concluded that since the privacy of the employee or applicant for employment is at stake when such criminal record checks are done, it is they who have the responsibility to initiate the record check, by means of providing authorization. The fee for the check is a cost borne by an employee who is required to authorize the check under the CRRA, and not a business cost of the employer. Accordingly, section 21(2) of the ESA does not apply.

With regard to the Union's second argument, that the health authorities are estopped from ending the past practice of paying the fees for employees, Arbitrator Steeves considered whether the practice by the employer of paying for criminal record checks was consistent. He noted that neither an indulgence nor a practice over many years will necessarily constitute an estoppel *(Eurocon Pulp & Paper Co. (1991), 14 L.A.C. (4th) 103 (Hickling), at pages 114-115).* Arbitrator Steeves noted further,

> 38 *Among other things, what is required to establish estoppel is a clear and consistent intention, by word or conduct, to change an existing legal relationship."*

Arbitrator Steeves concluded that declaring estoppel is problematic with the inconsistency in one health authority because the Union seeks a remedy against all health authorities. Further, there is no right in the collective agreement to pay for criminal record check fees. Thus, there is difficulty finding the right that is alleged to have been altered by the words or conduct of the health authorities. The health authorities are entitled to make an operational change in accordance with the amendment of CRRA to require five-year checks, and estoppel does not apply.

Finally, Arbitrator Steeves concluded that in any case, external applicants being offered a position is conditional upon successful completion of a criminal record check; they are not employees until that condition is fulfilled. Therefore, they are not covered by the collective agreement and are accordingly not subject to the grievance process.

Significance: In situations where the employee's privacy is at stake, the obligation to obtain material for authorization, such as a criminal record check or a medical certificate, is on the employee and not the employer. Thus the fees associated with obtaining these materials cannot be considered "business costs" under the ESA. Further, employers are entitled to make operational changes in accordance with new regulations. This award is consistant with the advice BCPSEA provided to districts in *Legislative Update* No. 2008-01 dated April 9, 2008, on our public website at http://www.bcpsea.bc.ca/documents/20101228_011344931_lupdate2008-01.pdf

BCPSEA Reference No: A-92-2010

Questions

If you have any questions concerning these decisions, please contact your BCPSEA labour relations liaison. If you want a copy of a complete award, please contact **Nancy Hill at nancyh@bcpsea.bc.ca** and quote the BCPSEA reference number.