GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2016-01 **April 19, 2016** **By E-mail: Seven Pages**

BCPSEA/School District No. 42 and School District No. 61 (the "Districts") v. BCTF/MRTA and VTA, BCLRB No. B45/2016: Teachers as Temporary Vice Principals

Issue

Was Arbitrator Kinzie's August 25, 2015 decision that the school districts are precluded from granting a teacher a leave of absence to take a temporary, acting Vice Principal position and returning him/her to his/her former teaching position after the appointment consistent with the *Labour Relations Code and School Act?*

Facts and Argument

On August 25, 2015, Arbitrator Kinzie issued his decision that the districts could not appoint teachers from within the bargaining unit to temporary, acting Vice-Principal positions and unilaterally place those teachers on leaves of absence which allowed them to return to their former teaching positions after the temporary appointments ended. We previously summarized the decision in *Grievance & Arbitration Update 2015-03 (available on the BCPSEA members only website)*. BCPSEA and the districts applied to the Labour Relations Board (LRB) to review Arbitrator Kinzie's decision, alleging that Arbitrator Kinzie erred in interpreting the *School Act* to automatically exclude temporary school administrators from retaining rights to a temporary leave of absence under the collective agreement.

Relevant Statutory and Collective Agreement Language

Principals and vice-principals are expressly excluded from the definitions of "teacher" under the *School Act* and "employee" under the *Labour Relations Code* by Section 20 of the *School Act*.

The collective agreement provisions applicable in the two districts provide for leaves of absence without pay for personal reasons. Neither district has language expressly stating that personal leave cannot be taken for a temporary vice principal appointment, and neither has language which expressly addresses the status or rights of a teacher taking a temporary vice principal position.

Decision

Arbitrator Kinzie decided that the districts were not entitled to place a teacher taking a vice principal position on a personal leave of absence under the collective agreement since the *School Act* did not permit a teacher to be temporarily assigned to a school administration position while still retaining rights under the collective agreement. Once a teacher has taken an administrative position — even if it is temporary — that person is no longer a teacher and the collective agreement no longer applies to him/her. Arbitrator Kinzie found that it would require "clear and express" language in the collective agreement to provide non-bargaining unit personnel, such as temporary school administrators, with leaves of absence and seniority rights that give them priority over bargaining unit members.

The LRB upheld Arbitrator Kinzie's decision. The LRB determined that Arbitrator Kinzie did not find that the *School Act* automatically extinguished a teacher's right to a leave of absence to take a temporary Vice Principal position and the collective agreement could provide such a right through clear and express language. The LRB stated (at paras. 45-47):

> While it was perhaps unnecessary [for Arbitrator Kinzie] to use the word "automatically," I do not read the Arbitrator's application of what Section 20(2) means as far as the Unions take it in the sense that his application of Section 20(2) necessarily required the result that the teachers' pre-existing right to leave of absence is extinguished.
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> That is because virtually all of the parties agreed that the collective agreements with express wording could protect the Employers' practice of granting leave and holding the teachers' former position as a temporary vacancy. What is clear from the Award is that he did not conclude that such language had been negotiated by the parties. Throughout the Award (in particular at pages 14-18), the Arbitrator considers the collective agreements' language before reaching his conclusion that the language was only generally worded and not sufficiently express to protect the Employers' practice.
>
> Since in my opinion the Arbitrator's application of Section 20(2) cannot be said to automatically require that any purported leave of absence be extinguished upon that person's appointment as an AO, his conclusion is thus based on the collective agreements and is entitled to deference…

The Board gave deference to Arbitrator Kinzie's conclusion that the collective agreement language in each of the districts did not expressly grant rights under the collective agreement to teachers on temporary school administrator appointments, and upheld his award. Accordingly, unless a collective agreement or other agreement with the union expressly allows a district to provide a temporary leave of absence to a teacher taking a temporary administrative appointment and retain rights to return to his/her former position afterward, such rights will not be provided by existing general leave of absence language under the collective agreement.

A second hearing to deal with the districts' claims that the Unions are estopped from challenging the longstanding past practice of such appointments is set for September 19 and 30, 2016 before Arbitrator Kinzie.

Significance

Consistent with our previous advice, the impact of this decision will depend on each district's leave language and past practice in relation to this issue. School districts cannot place teachers who accept temporary school administration positions on leaves of absence or promise them a right to return to their former teaching positions without the union's express agreement. This agreement may be provided either through clear and express language in the collective agreement or by another form of agreement. Districts wishing to claim estoppel due to a longstanding practice in relation to temporary school administration appointments under the collective agreement may wish to use the attached template estoppel notice. If you have any questions, please contact your BCPSEA liaison.

Attachment: Template estoppel notice

BCPSEA Reference No. LB-02-2016

School District No. 42 (Maple-Ridge/Pitt Meadows) and CUPE, Local 703: Employees' obligation to attend interviews

Issue

Are employees required to attend an investigation interview with a district's legal counsel? If so, are they entitled to their own representation or counsel at the meeting?

Facts

The district terminated the employment of a bargaining unit employee based on an investigation into a harassment complaint by another employee. A number of bargaining unit witnesses were interviewed as part of the original investigation and were provided with the option of union representation at the interviews. The Union grieved the termination. In the course of preparing for the arbitration hearing, the district's legal counsel sought to interview potential witnesses who were members of the bargaining unit. Some of these employees did not want to meet with the district's counsel or requested that a Union representative attend the interviews.

Union Argument

The Union argued that bargaining unit members should not be required to meet with the district's legal counsel or, in the alternative, that conditions should be set on the interviews, such as requiring counsel to provide witnesses with copies of their previous statements, providing the employee with the right to representation at the interview, and that nothing in the interview could be used as a basis for subsequent discipline.

Employer Argument

The district argued that the employees scheduled for interviews were not subject to discipline, must attend the meetings scheduled on paid time, and were not entitled to representation. The district relied on a previous decision by *City of Vancouver and Vancouver Firefighters' Union, Local 18,* [2004] B.C.C.A.A.A. No. 187 (Larson).

Decision

Arbitrator Brown agreed with the district that the *City of Vancouver* decision was "on all fours" with the case. Employees who have witnessed a workplace event but are not themselves under investigation or subject to discipline, may be required by the employer to answer questions about the event. Further, absent an express provision in the collective agreement, employees do not have the right to counsel during an investigative interview. Arbitrator Brown ordered that the bargaining unit employees were required to attend interviews as scheduled by the district with its counsel on paid time and were not entitled to Union representation during the interviews.

Further, Arbitrator Brown refused to impose any conditions on the interviews as requested by the Union. Unlike in the *City of Vancouver* decision, there were no allegations that the interviews with bargaining unit members had been or would be conducted in an inappropriate or intimidating manner. Similarly, there was no obligation to provide employees with copies of their previous statements or materials in order to assist their recollection of events. Finally, Arbitrator Brown refused to set as a condition of the interviews that employees could not be disciplined for their comments in the interviews, stating that "it goes without saying."

Significance

Employees must attend investigative interviews scheduled by districts on paid time and are only entitled to representation as expressly provided by the collective agreement.

BCPSEA Reference No. A-06-2016

Lewis v. Arrow Lakes School District No. 10, WCAT-2016-00857: Workers' compensation for mental stress from school incident

Issue

Was a teacher entitled to workers' compensation benefits for a mental disorder arising out of an incident involving a student?

Facts

A physical education teacher was involved in a physical altercation with a male Grade 7 student during class. After the student acted up during class, the teacher asked the student to go to the principal's office. Instead, the student returned shortly afterward and was visibly upset. The teacher refused to allow the student to enter the change room while other students were inside and physically blocked the student from entering. The student swore at and threatened the teacher, and pushed her. The teacher's conduct in the incident was investigated and she was given a letter of discipline for escalating the situation and her role in the physical altercation with the student.

The teacher claimed that she had suffered a mental disorder and physical injury as a result of the assault and claimed workers' compensation benefits. The Workers' Compensation Board case manager and Review Division both denied her claim, finding that the incident involving the student was not a traumatic event or a significant work-related stressor which would entitle her to workers' compensation benefits. The Board also found that there was no objective evidence of a physical injury related to the incident.

Relevant Statutory Language

Section 5.1 of the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492, sets out workers' entitlement to compensation for work-related mental disorders. It provides:

> 5.1 (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> (ii) is predominantly caused by a significant work-related stressor, including bullying and harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

Employer Argument

The district was represented by School District No. 23 (Central Okanagan) at the hearing. The district made a number of arguments in support of its position that the teacher was not entitled to compensation:

- the incident was not a traumatic event or significant work-related stressor because the teacher had worked with the student in the past and it was not unusual for a teacher to have to work with a range of student behaviours in the course of her work;
- the mental disorder was caused by the district's decision to investigate and discipline the teacher for her conduct in the incident, not the incident itself;
- the incident was not the predominant cause of the teacher's mental disorder, because she had taken a medical leave due to stress related to her husband's health condition less than a year before the incident; and
- the teacher's actions in the physical altercation with the student disentitled her to compensation since they were outside the scope of her employment.

Worker Argument

The teacher was represented by the BCTF at the WCAT hearing. The teacher argued that there was no history of physical or verbal assaults against her by the student in the past. The teacher provided a medico-legal report from her psychologist who opined that it was "extremely likely" that the physical and verbal assaults by the student were the predominant cause of the worker's diagnosed mental disorder.

In providing the opinion, the teacher's psychologist was expressly aware of the district's investigation and subsequent discipline related to the teacher's conduct in the incident and the stress arising from her husband's health condition. The teacher further argued that her husband's health prognosis was positive and she had long since returned to full time work at the time of the incident, and therefore his health condition was not the predominant cause of her mental disorder.

Analysis and Decision

There was no question that the teacher had been diagnosed with a recognized mental disorder by a psychologist, as required by Section 5.1(b) of the *Workers' Compensation Act*. WCAT's decision turned on whether the incident involving the student was a "significant work-related stressor" which had predominantly caused her disorder. WorkSafeBC's non-binding Policy Item #C3-13.00 provides that a "traumatic event" is an "emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment" and a work-related stressor is "significant" when it is excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment. Interpersonal conflicts are not generally considered significant unless the behaviour is threatening or abusive.

WCAT accepted that teachers must handle behavioural issues with students who are sometimes angry when being disciplined or directed. However, WCAT found that the incident was a "significant work-related stressor" because the worker was physically assaulted and threatened by a student who was relatively close to her in size and who had not behaved in that manner in the past.

WCAT stated (at para. 55): "In other words, this is not a situation of a small child flailing against an adult with little chance of hurting him or her." WCAT also noted that the district had not provided evidence that it was part of the normal pressures and tensions of employment in an elementary school to be physically assaulted by students.

WCAT also accepted the uncontested evidence of the teacher's psychologist that the incident with the student was the predominant cause of her mental disorder. There were no contrary opinions or

evidence provided by the district, and the psychologist recognized the employer's investigation and discipline of the teacher and her husband's health condition in providing her opinion.

Finally, WCAT considered a number of factors, including that the incident occurred on school premises while the teacher was performing her duties as a teacher, to determine that the incident arose out of and in the course of her employment.

WCAT did not agree with the employer that the teacher was not entitled to compensation because of her misconduct in connection with the incident. WCAT stated that the mere fact that a worker's action is unauthorized, or demonstrates carelessness or poor judgment, does not automatically disentitle the worker to compensation. Instead, the teacher's employment involved the exercise of discretion, and her actions were a good faith attempt to protect the safety of students. As such, even though her actions were contrary to the district's standards of conduct, they were not sufficiently outside the scope of her employment to disentitle to her workers' compensation benefits.

WCAT accepted the teacher's claim for compensation for her mental disorder, and ordered the district to pay the costs of the teacher's medico-legal opinion incurred in support of the WCAT proceeding.

Significance

While each case is fact-specific, we recommend that districts obtain legal advice when a worker files a workers' compensation claim for mental stress that may not meet the required definitions of a "traumatic event" or "significant work-related stressor" which is unrelated to a decision related to employment (such as discipline).

BCPSEA Reference No. WCB-01-2016

Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval, 2016 SCC 8: Examination of Trustees Regarding Dismissal or Discipline Decisions

Issue

Can school trustees be examined in an arbitration hearing about their *in camera* deliberations in a decision to dismiss or discipline an employee?

Facts

A teacher employed by the Commission scolaire de Laval (the "Board") had past criminal convictions for weapons and drug offences that had occurred 14-29 years ago. The Board could not employ him as a teacher under Quebec's *Education Act* if it determined his convictions were relevant to his employment and he had not obtained a pardon. The Board had the authority to make the decision on whether the teacher's conviction was relevant and he should be dismissed.

The teacher attended a partial *in camera* meeting of the Board with his Union representative. The Board then deliberated for approximately one half-hour *in camera* before deciding to dismiss this teacher.

The Union filed a grievance of the dismissal alleging, in part, that the dismissal was not in accordance with the collective agreement's requirement for a "thorough deliberation" for a dismissal decision. The Union requested to examine several Board members about their deliberations at the *in camera* meeting.
The Board objected to the examination, arguing that its deliberations *in camera* are protected by the doctrines of "unknowable motives" and "deliberative secrecy." The "unknowable motives" doctrine

holds that the motives of a public body comprised of multiple persons are “unknowable” and therefore irrelevant to the validity of its decisions. Similarly, the “deliberative secrecy” doctrine protects adjudicative decision-makers from having to share the substance of their deliberations in making decisions.

The arbitrator disagreed and found that, in order to determine if the Board’s deliberations were “thorough” as required by the collective agreement, it was necessary to hear evidence about the substance of the Board’s decision-making, including information considered and exchanged at the *in camera* meeting.

Decision

The arbitrator’s decision was appealed through all levels of court in Québec to the Supreme Court of Canada (SCC). The SCC, by a majority of 4 to 3, affirmed the arbitrator’s decision to allow examination of school board trustees about the content of their *in camera* decisions.

While the Board is a public body with immunity from questioning about its adjudicative, legislative, regulatory, policy, and purely discretionary decisions, the Court stated that not every formal decision of the Board is protected by that immunity. In this case, the Board’s decision to dismiss the employee was not made as a public body or adjudicator in a public law context, but as an employer.

In deciding the compliance of an employer’s private employment decision with the collective agreement, the arbitrator had exclusive jurisdiction over the relevance of evidence at the hearing. While normally the Board members’ individual motives are not relevant to a dismissal, in this case, the Board was required to undertake “thorough deliberation” by the collective agreement. The SCC found the arbitrator’s decision to allow the examination of the Board was reasonable, given the collective agreement requirement for “thorough deliberation.” The SCC also declined to issue any guidance or limitations on the scope of examinations of the Board, leaving that issue to the arbitrator’s exclusive jurisdiction as well.

Significance

Since the issue in any arbitration of a dismissal or discipline grievance is whether there was just and reasonable cause, it is unlikely that a school board’s deliberation of dismissal or discipline issues will normally be relevant. However, the SCC’s decision leaves open the possibility for school board trustees to be required to give evidence about *in camera* deliberations if it is relevant to whether the board compiled with procedural requirements in a collective agreement. However, a board’s *in camera* meetings, in which it obtains legal advice in respect of dismissal or discipline of an employee, will continue to be protected by privilege.

BCPSEA Reference No.CD-01-2016

Questions

Please contact your BCPSEA liaison if you have any questions.