GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2017-02 **August 23, 2017** **By E-mail: Five Pages**

BCPSEA/School District No. 54 (Bulkley Valley) (the "School District") v. BCTF/Bulkley Valley Teachers' Union (the "Union")

Issue

Are TTOCs entitled to bank and carry forward sick leave accrued during a temporary contract?

Relevant Collective Agreement Language

Like many school districts, School District No.54 (Bulkley Valley) provides sick leave to continuing and temporary contract teachers. Continuing contract teachers may carry over accrued sick leave from year to year. Temporary contract teachers accrue sick leave pro-rated to their FTE and length of assignment. The relevant collective agreement provisions state:

> Article G.22.1
>
> Teachers under contract with the Board will be credited on September first of every year with the number of sick days they would be entitled to for the whole of that year plus any accumulated sick days from previous years. All of these days are available for use by the teacher at any time during the current school year, after which time absence for illness becomes leave without pay.
>
> Article B.2.8.a
>
> Sick leave provisions, in accordance with Article G.22 of this Agreement, shall become an entitlement from the twenty-first and subsequent consecutive teaching days on any one assignment. The qualifying period shall be calculated from the first day of the assignment.

The District also engages TTOCs for assignments ranging from a single day to multiple days. Under the collective agreement, the district must post or retroactively convert any TTOC assignments of more than 20 days to a temporary contract position:

> Article C.27.1.a
>
> Twenty (20) days continuous teaching in the same assignment shall entitle a Teacher-On-Call to a temporary appointment made retroactive to the start of the assignment.

There was no clear past practice or local bargaining history relevant to the issue of accrued, unused sick leave for TTOCs.

Union and Employer Argument

The Union argued that the collective agreement should be interpreted liberally to carry forward the unused sick days accrued by a TTOC in a temporary assignment until his/her next temporary or

continuing contract assignment. The Union argued that there was no express language in the collective agreement that sick leave "expired" at the end of a temporary contract assignment, and the words "Teachers under contract with the Board" in Article G.22.1 were meant to include TTOCs, since there is no break in the employment relationship between TTOC assignments.

The School District disagreed. It argued that "under contract" in Article G.22.1 means only "under a continuing or temporary contract", and, at the end of a temporary contract, a TTOC's unused sick days expire and are no longer available, even if the TTOC subsequently receives another temporary contract assignment. The School District argued that TTOCs were not intended by the parties to accrue or take sick days, and clear or unambiguous language in the collective agreement would be required to provide them with such a significant monetary benefit.

Decision

Arbitrator Sullivan agreed with the School District. He found that the collective agreement did not allow TTOCs to carry forward unused, accrued sick days beyond the temporary assignment in which they are granted. Arbitrator Sullivan was persuaded by the fact that the collective agreement did not provide sick leave as an "earned benefit" generally, but contingent on the teacher gaining a contract assignment over 20 consecutive days. Since a TTOC's entitlement to sick days was directly tied to the attainment of a temporary contract, there was no reason to interpret that entitlement as extending beyond the conclusion of the temporary contract assignment.

Similarly, like most districts, the collective agreement clearly distinguished between the rights and benefits provided to continuing contract teachers and those provided to a TTOC. Given the different contexts of employment of a continuing contract teacher and a TTOC reflected in the agreement, Arbitrator Sullivan found there was no evidence that the parties intended the sick leave provisions to be interpreted broadly to allow a TTOC to carry forward accrued sick days. The words "teacher under contract with the Board" in Article G.22.1 was most appropriately interpreted, in context, to mean teachers "under a continuing or temporary contract with the Board", not any teacher "in the employment of the Board", such as a TTOC.

In short, the language and context of the collective agreement supported the District's position that a TTOC's sick leave days were not intended to carry forward from one temporary contract assignment to the next.

Significance

While the decision rests on the interpretation of local collective agreement language, many districts may have similar language about TTOCs' entitlement to sick leave during and after a temporary contract assignment. The decision supports that the context of TTOCs' employment is important when interpreting collective agreement provisions which provides them with rights to sick leave and other benefits. This decision may help guide the interpretation of your district's collective agreement, depending on local collective agreement language, past practice and bargaining history.

Questions

Any questions about this decision and its impact for your district should be directed to your BCPSEA liaison.

If you would like a copy of this decision, please contact Nancy Hill at 604 730-4517and quote
BCPSEA Reference No.A-06-2017

BCPSEA/School District No. 85 (Vancouver Island North) (the "School District") v. Canadian Union of Public Employees, Local 401 (the "Union")

Issue

Did the School District prove there was just and reasonable cause for discipline of a long-term employee?

Facts and Argument

A support worker at an elementary school was dismissed for just cause after 19 years of service for an alleged inappropriate phone call to a parent's home and dishonesty in the subsequent investigation. The grievor had no prior disciplinary history.

A parent alleged that the grievor called her at home one evening and disclosed that the parent's family had been discussed in a dismissive manner at a staff meeting earlier that day. In support of her allegation, the parent provided the school with an email which she allegedly received from TELUS, showing a call from the grievor's phone number to the parent's home at the relevant time.

The School District gave notice to the grievor of its investigation, but did not provide the name of the parent who had complained or the specific staff meeting about which the confidential information was allegedly disclosed. The School District interviewed the grievor, who denied that she had made the phone call.

During its investigation, the School District received conflicting information from TELUS as to whether the alleged email was fake or not. The School District's lawyers investigated further, but could not confirm the veracity of the email since the original had been deleted automatically from the parent's email account. Despite the uncertainty about the validity of the TELUS email, the School District determined that the grievor was dishonest about the call. The School District terminated her employment for breach of confidentiality and misrepresenting internal staff discussions, hurtful behavior toward a school family, and dishonesty during the investigation.

The case turned on the credibility of the parent and the grievor. The School District argued that, based on numerous inconsistencies in the grievor's evidence, the parent should be believed. The Union argued that the School District had failed to complete a proper investigation before terminating the grievor's employment and had discharged her employment based on a forged document. At the arbitration hearing, the Union called a Senior Security Investigator from TELUS as an opinion witness, who testified that the email provided by the parent in the investigation was fake.

Decision

Arbitrator Peltz concluded, based on all the evidence, that the email from Telus was fake. While both the grievor and the parent were sincere in their testimony, the email provided by the parent could not be verified by TELUS's records of customer service calls and would have been created and sent contrary to TELUS's internal processes and policies.

Further, Arbitrator Peltz found many of the inconsistencies in the grievor's evidence during the investigation and at the hearing demonstrated confusion rather than deceit. For example, when the grievor was first asked by the School District about making the phone call, she did not unequivocally deny it, but stated that she did not recall making the phone call. Arbitrator Peltz found that this equivocation was more likely caused by the School District's failure to provide sufficient detail to the grievor to allow her to respond during its initial interview, rather than the grievor's dishonesty or lack of candour. Arbitrator Peltz noted that the notice of investigation informed the grievor of the date, time and

essence of the allegation against her, but did not name the parent who had complained or describe the staff meeting about which she was alleged to have disclosed confidential and inaccurate information.

The School District therefore was not able to prove that the grievor had made the phone call to the parent, on a balance of probabilities. Arbitrator Peltz allowed the grievance and ordered the grievor to be reinstated.

Significance

The decision is a good reminder about the challenges of comprehensive investigations into employee misconduct. Investigations are, of course, conducted without the luxury of unlimited time and money. Choices will necessarily be made by employers about how far and wide to pursue evidence in an investigation. That said, an investigation which does not gather key evidence to conclusively prove or disprove the factual issues in dispute creates the risk that discipline arising out of the investigation may be later overturned at arbitration. To ensure that a district is in the best position to prove just and reasonable cause for any discipline:

- Ensure that the district provides sufficient detail in a notice of an investigation and any interviews to allow the respondent employee to respond to the allegations and to comply with applicable collective agreement requirements.
- When an investigation turns on a key piece of evidence, such as a document or testimony, employers should be especially careful to pursue leads raised by the respondent and “tie up loose ends”.
- Even if a complainant or witness is sympathetic and sincere, and/or the context of an investigation is emotional, witness evidence must be evaluated neutrally in light of contradictory facts.

If you would like a copy of this decision, please contact Nancy Hill at 604 730-4517and quote ***BCPSEA Reference A-05-2017***

Office of the Information and Privacy Commissioner for British Columbia Guidance – Conducting Social Media Background Checks (May 2017)

The Information and Privacy Commissioner for British Columbia recently published a guidance document, which advises public bodies such as school districts on the risks of performing social media background checks of prospective or current employees. The Commissioner also provides a series of recommended steps to avoid such risks. Some of the main points from the Commissioner are:

- The collection, use, and disclosure of personal information from social media about an applicant for employment (paid or unpaid) or a volunteer position is subject to the BC’s *Freedom of Information and Protection of Privacy Act* (FIPPA)
- School districts may collect personal information under section 26 of FIPPA only if the information relates directly to and is necessary for an operating program or activity of the school district, or is otherwise authorized by FIPPA. The restrictions on collection apply even if the person consents to it.
- School districts are also required by section 28 of FIPPA to ensure the information they collect is accurate, regardless of whether the district views or saves copies of the information.
- Given the nature of social media and breadth of information which may be posted, social media is a source of potentially inaccurate or irrelevant information about a person, and the employer

has little control over the quantity or quality of information collected during a social media search.

- Similarly, districts may inadvertently collect the personal information of third parties during a social media search, which is unlikely to be permitted under FIPPA.

The Commissioner recommends, among other steps, that public bodies contemplating the use of social media as a part of background checks first conduct a privacy impact assessment, including identifying the proper legal authority for the collection and considering whether less privacy intrusive measures would meet the district's goals. While the guidance document does not have binding legal force, we recommend that school districts contemplating a social media background check review the guidance in full to ensure they are complying with the *Freedom of Information and Protection of Privacy Act.*

Attachment: OIPC Guidance Document (May 2017)