IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS CODE*, 1996, c. 244

BETWEEN:

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 39
(VANCOUVER)

AND:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 963

(Attendance Support Program "Mystery Man" Grievance)

ARBITRATOR:	Christopher Sullivan
COUNSEL:	Peter A. Csiszar for Employer Richard L. Edgar for Union
DATES AND PLACE OF HEARING:	February 14 and 19, 2017 Vancouver, BC
PUBLISHED:	April 16, 2018

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The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves a policy grievance filed by the Union alleging the Employer is improperly withholding from the Union the names of its members who are called to meetings in accordance with the Employer's recently-introduced Attendance Support Program ("ASP").

The Union's grievance, dated May 18, 2016, alleges:

> The Employer is depriving the Union of its statutory obligation to represent workers in the bargaining unit by not providing it with the names of its members prior to attendance management meetings.

The Employer basically takes the position that the Union's representation rights do not extend to the present case and it is obligated to protect the private information of its employees. The Employer adds it encourages employees to obtain representation from their Union for the meetings in question, but it is up to the employee as to whether they wish to engage the Union in the process.

The Employer is a large school district. Its employees are divided into multiple bargaining units represented by fourteen different unions. It also has an excluded professionals group represented by an association. The Union in the present case represents approximately nine hundred school largely in the capacity of custodians, cafeteria workers, building engineers and supervision aides.

The salient facts in this case are not seriously disputed. The ASP was developed following a recommendation in the Employer's 2012 budget report that it implement an attendance management program to save costs attributable to employee sick time. Following this recommendation, the Employer hired a Wellness Advisor to review its existing practices and to develop a wellness and attendance management program. Part

of the development of the ASP included the creation of a system for analyzing absence information, and a refinement to the Employer's collection of such information. The ASP is focussed on non-culpable absences where one cannot attend work due to no fault of their own, such as an injury, illness or disability. Situations involving culpable absences, such as absence without leave and fraudulent use of sick time are referred to the Labour Relations department.

In or around January 2014, the ASP was finalized and presented to stakeholders. Several of the unions, including the Union in the present case, submitted written responses following the Employer's release of the ASP text. In its written response, the Union raised a number of concerns regarding the ASP, including a concern that unions were "excluded from the 'Informal Conversation' that were to take place between employees and excluded staff supervisors" under the program. The Union published a brochure on this point, informing members of their right to union representation, and recommending to its members that they not to meet with any supervisor without union representation. A brochure was also issued by the Vancouver Secondary Teachers' Association, in which the Association similarly advised its members to ask for a staff representative to be present at any meeting held under the ASP.

Despite concerns raised by the various union groups, the Employer continued with its implementation of the ASP following its unveiling. In October 2014, the Employer provided mandatory training on the program to Principals, Vice-Principals, and Supervisors. Some unions were also provided the opportunity to send representatives to the training. According to the Employer's documents, this training was designed to ensure the goals of the ASP were clearly understood, and to provide Supervisors – who lead the informal meetings held with employees under the ASP – with training to develop skills in sensitive conversations. Both phases of the training were completed by early December 2014, following which the Employer held staff meetings with its employees

informing them of the new ASP, including the various resources available to employees under the new program.

The purpose of the newly developed Attendance Support Program is described in the Employer's documentation as follows:

To manage attendance proactively and consistently by:

1. Recognizing good attendance and helping those who are having difficulty achieving an acceptable attendance level.

2. Ensuring supervisors adopt a sensitive, conversation-based and supportive approach to those employees who face attendance challenges.

3. Encouraging open dialogue around available supports and wellness initiatives.

4. Identifying the legitimate accommodation needs of our employees.

5. Working with individual employees who are having difficulty maintaining regular attendance. This may include, but is not limited to:

    - informal or formal support from principles, managers, union representatives and Human Resource staff, and

    - access to support programs that promote overall wellness such as employee assistance programs and District wellness initiatives.

The ASP consists of three distinct stages: issue identification; informal conversations (identified as phase 1 in the text); and, if necessary, formal support sessions (phase 2). At the initial stage, the Employer identifies employees with significant absences for sick days and medical appointments by comparing them to their peers doing similar work in similar working conditions over a twelve-month period.

Employees whose absences are above the 95th percentile ranking according to this analysis are then reviewed, and advanced to phase one of the ASP.

Phase one commences with the employee being "invited" to what is described as the first of two "informal conversation" sessions with the employee's supervisor. During the first meeting, the supervisor makes the employee aware that their sick day usage is significantly higher than their peers, makes inquiries about their wellbeing ,and offers support to improve attendance.

A second follow-up "informal" meeting with employees is to be held under the ASP in approximately eight to twelve working weeks to discuss whether the employee's attendance has improved. If the employee has exhibited "sufficient improvement", no further action is to be taken. If, however, the employee has "continued to struggle" with attendance, the supervisor is required to contact the Human Resources Department, which decides whether to refer the employee to the second phase of the ASP.

The second phase of the ASP comprises of up to four "formal support" meetings. The written notification of these meetings encourages the employee to invite their Union representative and union contact information is provided. Employees are informed in these letters that their union will not be notified of the meeting due to "confidentiality reasons."

The "formal support" sessions are described in the text of the program as a "structured conversation consisting of a series of discussion points and follow-up actions." Two possible outcomes are identified under this second phase. If, over the course of the "Formal Support Sessions", employees demonstrate they are able to more regularly attend work, Human Resources staff may decide that the employee does not need to complete all four sessions. In cases where "improvement has not been made" Human Resources staff will determine the next steps, such as maintaining the employee

in the program or referring him or her to other programs and departments, depending on the employee's individual case.

The Employer began holding its first informal conversations with employees at the 100th percentile for absences in February and March 2015. Subsequently, the unions at the School District expressed objection to the ASP.

On May 3, 2016 the Employer met with the Union and during this meeting, the Employer informed it had received legal advice to the effect the unions claims were not supportable, and on May 18 the Union filed its present grievance, which is quoted at the outset of this award. The Board's response to the Union's grievance is articulated in the Employer's June 3, 2016 Step Three response:

> The Board is obligated to protect the private information of its employees, which includes disclosure to a third party. While the Board agrees that the union is the sole bargaining agent for their members, we believe that when we are having a meeting with an employee as part of the Attendance Support Program, union representation is not mandated.
>
> When employees are contacted to arrange the Attendance Support meeting, they are strongly encouraged to contact their union representative and arrange for them to accompany them. We believe that the union has a role to play in supporting employees in attending work regularly. The Board feels that without the direct consent from the employee, we cannot discussion particulars, or arrange meetings, with union representatives.

In an email dated June 30, 2016, the Employer advised the Union of the following change in practice:

> …Although not legally required, in order to alleviate this concern and to maintain the privacy of employees we will ensure the following practice. From this point forward when an employee is contacted regarding a formal conversation meeting we will ask the employee if we may inform their union of their name. If the employee agrees, we will send the name of that

> employee to the union so that you are aware of the formal conversation meeting prior to it being held. We hope that this is a first step toward collaborating on many of the items that stand in the way of continued positive relationships.

At these arbitration proceedings, the Union called Union President Tim Chester and Business Agent Tim De Vivo as witnesses, and both testified that, prior to the Employer's introduction of the ASP, the Union had always been invited to attend meetings the Employer held with employees whose absenteeism was a concern. Specifically, these witnesses testified the Union has previously been present at all meetings at which a members' employment may ultimately be in jeopardy. This included meetings for employees with absenteeism issues, those with accommodation issues, and other non-culpable performance issues. The Union was given advance notice of these meetings, and these meetings were set by the parties at a mutually-agreeable time. The Union's right to participate in these meetings was not previously contingent on an employee's request as it now is under the ASP.

Mr. Chester also gave evidence regarding a situation that occurred in November of 2015 where he attended an "informal" meeting with an employee in relation to poor absenteeism, and during that meeting the employee responded to questioning about her absences by providing the Principal with information about her current diagnosis. In response, the Principal proposed an accommodation that reduced the employee's five-day-a-week schedule to three days a week, with a request that the employee to consult with her doctor regarding this arrangement.

Mr. Chester also raised another situation that occurred prior to the implementation of the ASP where an employee and the Union were called in to a meeting due to the employee's excessive absenteeism and the employee informed the Employer he was rarely sick, and he received a letter of discipline instead. Mr. Chester noted there was no

suggestion this was a private meeting that did not properly involve the Union's participation.

Mr. De Vivo and Mr. Chester both expressed concerns about employees attending "informal" ASP meetings, without Union representation, and divulging confidential medical information that could give rise to an accommodation or have other impact on their employment. Mr. De Vivo disputed the Employer's allegation that the ASP meetings went no further than providing support for an employee, 'because the next steps could lead to discharge."

The following additional evidence was stipulated: The Employer's supervisor training meetings for the ASP conveyed that if an employee wanted union representation at any meeting it would be obtained; the ASP applies to all unionized groups; and there have been no grievances filed by any of the other unions regarding the issue in the present case.

During the course of these proceedings, the parties cited the following provisions of the Collective Agreement:

> 4. GRIEVANCE PROCEDURE
>
> (G) Right to Representation
>
> At any step in the grievance procedure or for any meeting for which disciplinary action is contemplated, every member of the bargaining unit has the right to be represented by a Union representative and the Board shall inform the employee of this right. The Board shall provide advance notice to the Union in a timely manner so that a Union representative can be present.

10. GENERAL PROVISIONS

(B) Changes – (Con't)

(2) Present Conditions and Benefits

Any working conditions and welfare benefits or other conditions of employment at present force which are not specifically mentioned in this Agreement and are not contrary to its intention, shall continue in full force and effect for the duration of this Agreement.

The parties also cited the following provisions on the *Freedom of Information and Protection of Privacy Act,* S.B.C. 2003, c. 63:

Part 2 – Freedom of Information

Disclosure harmful to personal privacy

22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy….

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…

(d) the personal information relates to employment, occupational or educational history….

Part 3 – Protection of Privacy

Division 2 – Use and Disclosure of Personal Information by Public Bodies

Disclosure inside Canada only

33.2 A public body may disclose personal information referred to in section 33 inside Canada as follows:

(a) for the purpose for which it was obtained or compiled or for a use consistent with that purpose (see section 34);

Definition of consistent purpose

34 For the purposes of section 32 (a), 33.1 (1) (r) (iii) or 33.2 (a), or paragraph (b) of the definition of "data linking" in Schedule 1, a use of personal information is consistent with the purpose for which the information was obtained or compiled if the use

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a program or activity of, the public body that uses or discloses the information.

SUMMARY OF ARGUMENTS

On behalf of the Union, Mr. Edgar argues the Union is entitled to be provided with the names of its members engaged in the AMP as these are necessary for it to meet its statutory duty to represent its members and ensure compliance with the Collective Agreement. In relation to absenteeism matters the Union has a representational role for its members in accordance with the *Labour Relations Code* and the *Human Rights Code*.

Mr. Edgar asserts Section 33.2 of the *FOIPPA* authorizes the Employer to disclose to the Union the names of its members in the ASP, as such disclosure is for a use consistent with the purpose for which it was obtained or compiled. The Employer seeks to manage attendance in accordance with the terms of the Collective Agreement and the Union seeks to ensure compliance in its role. Counsel recalled the ASP initiative commenced with a budget proposal to reduce sick leave costs.

Any assessment of privacy with respect to disclosure must take into account the labour relations context and the tripartite nature of the employment relationship under a collective agreement. There is no legitimate basis for the Employer to refuse to tell the Union the name of its members being called into meetings to discuss excessive

absenteeism. There is no assurance that negative job consequences will not result from the "informal" meetings. Counsel states the Union would not become aware of a member's personal/private information by merely being given their name; the member could decline the Union's offer of representation and no private information will have been disclosed.

The Union points out that the meetings in question involve the Employer making inquiries into accommodation issues if their inquiries in the ASP lead them in that direction, and that any consideration of an accommodation is necessarily a change in the terms and conditions of employment that requires the Union's involvement.

Mr. Edgar argues the representation rights contained in Article 4(G) of the Collective Agreement must be read in the context of Article 10(B)(2), which expressly preserves pre-existing practices, including the longstanding practice of informing the Union of all meetings its members had with the Employer regarding their attendance. Counsel asserts the term "disciplinary action" as used in Article 4(G) is broad enough to capture the potential outcome of the ASP, particularly in light of the past practice that included the Union being expressly advised of meetings with its members regarding their attendance. Whether or not a discharge is "disciplinary", for culpable as opposed to non-culpable reasons, does not matter given the outcome to the employee is essentially the same, and the Supreme Court of Canada has recognized that the term "discipline" can be interpreted broader than relating to "punishment per se".

Counsel states adjudicators generally interpret representation rights broadly and such approach is particularly appropriate in relation to the present grievance, which involves employees who may be vulnerable and most in need of Union representation being required to participate in the ASP. Answers given by employees in these meetings may prove prejudicial to their interests. The ASP is a unilateral Employer policy under which there is the potential for negative employment consequences for the Union's

members. The use of the word "support" in place of "management" in the title of the program does not convert the ASP into something less than what is generally understood to be the essential features of an attendance management program. It is during the initial "informal" meetings when an employee is at most risk to divulge information they are not necessarily required to.

Mr. Edgar adds Article 10(B)(2) in itself preserves the representation rights the Union has long-enjoyed of attending all meetings held by the Employer with its members regarding absenteeism concerns.

In support of its arguments the Union cites the following authorities: *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company*, 2005 BCCA 604; *Bernard v. Canada (Attorney General)*, [2014] 1 S.C.R. 227; *British Columbia (Public Service Employee Relations Commission)*, [1995] B.C.L.R.B.D. No. 223; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 SCR 727; *Noël v. Société d'énergie de la Baie James*, [2001] S.C.J. No. 41; *National Association of Broadcast Employees and Technicians v. New Brunswick Broadcasting Co. Limited*, (1988) C.L.R.B.D. No. 711; *Canada Post Corp. v. Canadian Union of Postal Workers*, [1988] C.L.A.D. No. 29 (Weatherill); *Bell Canada,* [2003] C.I.R.B. No. 212; *Chapdelaine v. Emballage Domtar Limitée*, 84 C.L.L.C. 14,013; *Mordowanec v. Ontario Nurses Association*, [1984] O.L.R.D. No. 18; *Public Service Alliance of Canada v. Canada Post Corporation*, (1985) 63 di 136; *CHBC TV Kelowna v. Communications, Energy and Paperworkers Union of Canada, Local 823-M (Hagglund Grievance)*, [2005] C.L.A.D. No. 23 (Burke); *Lakeside Feeders Ltd.*, [2005] A.L.R.B.D. No. 6; *Brink's Canada Ltd. v. Independent Canadian Transit Union, Local 1*, [1997] C.L.A.D. No. 756 (Jamieson); *Westar Timber Ltd.*, [1986] B.C.L.R.B.D. No. 58; *Hawkesbury General Hospital v. U.S.W., District 6*, [1992] O.L.A.A. No. 29 (Weatherill); *Commercial Bakeries Corp. v. Retail Wholesale Canada/CAW, Local 462,* [2003] O.L.A.A. No. 728 (Shime); *Board of School Trustees of School District No. 39 (Vancouver) v. I.U.O.E.,*

Local 963, [2000] B.C.C.A.A.A. No. 440 (Jackson); and *Canadian National Railway Co. v. B.L.E.,* [1993] C.L.A.D. No. 1220 (Picher).

On behalf of the Employer, Mr. Csiszar argues the Union's representation rights are expressly contained in Article 4(G) of the Collective Agreement, and these comprise the totality of such rights between the parties. In Article 4(G) the parties have carefully chosen the words to reflect their respective rights and obligations in relation to the matter of Union representation for its members at the workplace, and the language chosen in that provision clearly does not cover the factual situations surrounding present grievance. Counsel notes Article 4(G) provides for a right of representation in two specific situations – "at any step in the grievance procedure" and "any meeting for which disciplinary action is contemplated" – and that neither of these terms is applicable to the ASP meetings in question.

Mr. Csiszar states it has been generally recognized by adjudicators that meetings held in accordance with attendance management programs are not disciplinary. The potential for negative outcomes does not necessarily trigger the Union's representation rights. At any time during such a meeting it becomes evident that discipline may be an outcome, the proper way to deal with this is to stop the meeting to allow for the employee to obtain Union representation. The same would apply where an accommodation agreement, such as the one described in the evidence involving a reduction in the days of work from five to three, was required.

Mr. Csiszar states that even if the meetings in question could be characterized as disciplinary, Article 4(G) only obliges the Employer to inform the employee that they have the right to be represented by a Union representative, and it does not oblige the Employer itself contacting or otherwise informing the Union of the situation. Counsel points out the Employer's step 3 grievance response, which states: "(w)hen employees are contacted to arrange the Attendance Support meeting, they are strongly encouraged to

contact their union representative and arrange for them to accompany them." Additionally, in a subsequent email the Employer informed the Union that "when an employee is contacted regarding a formal conversation meeting we will ask the employee if we may inform their union of their name. If the employee agrees, we will send the name of that employee to the union so that you are aware of the formal conversation meeting prior to it being held."

The Employer argues the ASP is truly a non-disciplinary wellness support program as opposed to a traditional attendance management program, and it is up to the choice of each employee as to whether they wish to be represented at this initial support stage. An employee may not feel comfortable with the Union in attendance at these support meetings. The Union's position effectively takes this element of choice away from employees.

Mr. Csiszar states the Employer is not relying on the *FOIPPA* as a basis for not disclosing the information sought by the Union in the present case. He adds, however, that Section 22 of *FOIPPA* bars the disclosure of the information sought, and the Union has not otherwise brought itself within the scope of Sections 33 and 34. The fact that none of the other unions whose members are subject to the ASP have filed and pursued grievances supports the Employer's notion that the Union's present grievance is without merit.

Mr. Csiszar refutes the Union's assertion that Article 10(B)(2) enshrines the Union's right to participate in meetings the Employer has with employees with excessive absenteeism. The matter of union representation is not a "working condition" or "other condition of employment" as those terms are intended in Article 10(B)(2). Significantly, that provision expressly only applies to conditions of employment "which are not specifically mentioned" in the Collective Agreement, and the matter of union

representation is so mentioned and defined in Article 4(G), a provision that clearly does not apply to the present circumstances.

The Employer cites the following authorities in support of its arguments: *British Columbia (Public Service Employee Relations Commission)*, [1995] B.C.L.R.B.D. No. 223; *Health Employers Association. of British Columbia v. Hospital Employees' Union,* [2001] B.C.C.A.A.A. No. 264 (McEwen); *Imperial Parking Canada Corp. v. Construction & Specialized Workers' Union, Local 1611,* [2001] B.C.C.A.A.A. No. 127 (McDonald); *Toronto Hydro v. Canadian Union of Public Employees, Local 1*, [2003] O.L.A.A. No. 573 (Saltman); *Canada Safeway Ltd. v. United Food and Commercial Workers' Union, Local 1518,* [2011] B.C.C.A.A.A. No. 10; *Canadian Labour Arbitration* (Brown & Beatty, Canada Law Book) para: 7:2130; *Fording Coal Ltd. v. United Steelworkers of America, Local 7884,* [2000] B.C.C.A.A.A. No. 242 (Sanderson); *Santic,* [2001] B.C.L.R.B.D. No. 266; *Cold Springs Food Products Ltd. v. U.F.C.W., Loc. 633*, [1993] O.L.A.A. No. 68 (Williamson); *H.E.A.B.C. (Royal Jubilee Hospital)*, B.C.L.R.B. No. B112/2002; *Purolator Courier Ltd. v. Teamsters, Local 31*, [2000] C.L.A.D. No. 238 (Greyell); *Richmond School District No. 38 v. C.U.P.E., Local 716,* [2002] B.C.C.A.A.A. No. 19 (Sullivan); *Langara College and Langara Faculty Association,* [1998] B.C.C.A.A.A. No. 527 (Kelleher); *Vancouver (City) v. Vancouver Fire Fighters' Union, Local 18,* [1995] B.C.C.A.A.A. No. 418 (Munroe); *British Columbia Public School Employers Association. v. B.C.T.F.*, [2012] B.C.C.A.A.A. No. 70 (Lanyon); *Guildford Regency Care Home and H.E.U.*, [1997] B.C.C.A.A.A. No. 761 (Devine); *Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378*, September 3, 2014 (Korbin); *Canada Post Corp. v. C.U.P.W.,* [2016] C.L.A.D. No. 92; and *NAV Canada and Canadian Air Traffic Control Association*, [1998] C.L.A.D. No. 401 (Swan).

DECISION

The narrow issue in dispute in this case is whether the Employer is obligated to provide the Union with the names of its members who are scheduled to meet with the Employer regarding their attendance.

Having considered the parties respective submissions, I determine the Union does not possess the right it asserts. Union representational rights are contractual and statutory, and neither of these are triggered in the circumstances surrounding the present case.

Article 4(G) contains the parties' express agreement regarding the matter of union representation rights, and it is clear that the words used by the parties in this provision do not extend to the present circumstances. Suffice it to observe the plain and unequivocal meaning of the words chosen by the parties to deliniate their consensus indicate an employee's right to representation is for "any step in the grievance procedure" or "for any meeting for which disciplinary action is contemplated". Notwithstanding the potential outcome of ultimately being discharged for one's absenteeism, there is no basis upon which to conclude the ASP is disciplinary as this term is generally used.

The potential disciplinary repercussions that may ultimately result are not enough to characterize the process as discipline. The longstanding practice of the Union being invited to meetings regarding the attendance of its members and the existence of the "Present Conditions and Benefits" provision in Article 10(B)(2) are not sufficient to, in effect, alter the clear meaning of the bargained representation rights as made evident by the language used in Article 4(G). The fact there was a longstanding practice of inviting the Union to excessive absenteeism meetings does not necessarily mean the parties previously viewed these meetings as disciplinary and covered by Article 4(G).

In *Fording Coal Ltd. v. United Steelworkers of America, Local 7884, supra*, arbitrator John Sanderson had opportunity to comment on the matter of union representation rights for a meeting that has the potential of involving discipline, with a collective agreement provision similar to Article 4(G) in the present case. The language in the *Fording* case stated: "The employee will have the option of having a Union Shop Steward present at any meeting or hearing involving discipline." Noting that, in theory, any meeting between a supervisor and an employee may ultimately lead to discipline, even in cases where the meeting began as a discussion regarding a routine work assignment, arbitrator Sanderson emphasized that the purpose of the meeting is critical is assessing whether the Union's representation rights are triggered:

> It is the purpose of the meeting that is critical. If the meeting is intended to lead to a disciplinary decision by the employer, either in the result or in securing vital information such as an admission of fault by an employee, the employee must be given the option of having a steward present. If the meeting in question begins with a different purpose, such as to engage in a normal workplace dialogue between a supervisor and an employee, there is, as arbitrator Hope noted, no "inherent right to union representation". More importantly for our purposes, there is no contractual right because discipline was not "a reasonable anticipation." If, however, that same meeting turns confrontational and the supervisor decides that discipline is going to result from what is happening, it is my view and the thrust of what arbitrators Hope and Ready have said, that the supervisor is required at that point in time under article 7.03 to give the employee the option of having a union representative present and, if necessary, adjourning the meeting to make the necessary arrangements. The reason for this seems clear; because there is a looming expectation of discipline, there is a concomitant need for representation by the union to protect the interests of the employee, if he in fact wishes to have such help. In any event, no precise interpretive line can be drawn in the abstract and each case will depend on its individual facts and circumstances.

In *Health Employers Association of British Columbia on behalf of the Greater Victoria Hospital Society (Royal Jubilee Hospital), supra*, a reconsideration panel of the Labour Relations Board had opportunity to consider whether an employer's attendance

management program was disciplinary in nature, and it determined it was not. In that case the Board observed, "Employers have the right, and arguably the obligation, to take active steps to manage absenteeism", and that absences due to illness or disability may be amenable to correction or improvement through the application of renewed effort or a change in lifestyle. While noting an employee's enrollment in the program may ultimately lead to dismissal for excessive non-culpable absenteeism, the Board concluded that "neither the result nor the progressive steps leading up to the process are punitive in character".

The Board differentiated attendance management programs from the disciplinary process as follows:

> **75** The process may resemble the more traditional models of progressive discipline in that the expressions of concern escalate in seriousness of tone. The objective is the same, namely to bring about a significant improvement in workplace performance and ensure that the employer gets the benefit of the employment contract. The ultimate result may be the same, in that the employee loses his or her job. However, the process differs from traditional progressive discipline in that the employer does not resort to punitive sanctions. The employee is not subjected, as in the typical progressive discipline system, to warnings of punitive actions to come or to a series of suspensions of increasing severity, culminating in dismissal.

These comments have application to the present case and support a conclusion that, although potentially adverse employment consequences may eventually flow from an employee's placement in the ASP, the purpose of the meetings under this program cannot be characterized as meetings at which "disciplinary action is contemplated" so as to trigger the Union's representational rights. The mere possibility that a matter discussed in an ASP meeting may later lead to discipline is insufficient to bring it within the Union's bargained representational rights.

Of further significance, the negotiated representation right contained in Article 4(G) does not entail the Employer notifying the Union of a particular situation, but rather is limited to the Employer informing employees of their right to Union representation and seeking to ensure this occurs if the employee chooses such representation.

Article 10(B)(2) on its own has no application to the present situation insofar as that provision expressly applies to conditions of employment "which are not specifically mentioned in this Agreement", and the matter of Union representation rights are specifically addressed in Article 4(G).

I do not accept that the Union's statutory representation rights extend to the circumstances of the present grievance. The cases where these particular rights have been found to exist invariably involve a union seeking from an employer the contact information of its membership. The information sought by the Union in the present case – names of employees meeting with the Employer under the ASP – does not engage the same fundamental principle under consideration in the cases that have recognized statutory representation rights. The Union in the present case has the personal contact information of its members and has been able to communicate information to them about the ASP and advise them of their right to representation. This is not a case where the Union would be wholly reliant on the Employer to advise employees of their right to representation if it were not provided with the names of employees in the ASP. The Employer's refusal to provide these names has not impacted the Union's fundamental need to contact its members. The fact that the Union in this case does not require the information it seeks to discharge its statutory duty to represent its members is a significant distinguishing factor from the authorities that have upheld statutory union recognition rights.

In arriving at my conclusion, I find it is unnecessary to engage in an assessment as to whether the Employer is precluded under the *FOIPPA* from providing the Union with

the information it seeks. Suffice it to observe, neither the *FOIPPA* nor the Collective Agreement contains a positive obligation on the Employer to disclose the information in question to the Union and this distinguishes the present case from others where disclosure was granted.

In *Coast Mountain Bus Company, supra*, the BC Court of Appeal considered the request by a union to be provided with copies of applications for all bargaining unit job competitions in accordance with an express collective agreement provision. The Employer argued the collective agreement provision was in conflict with the provisions of the newly-enacted *FOIPPA*. The Court determined the "union's use of the information for the purpose of ensuring the employer's hiring decision complies with the collective agreement is consistent with the purpose for which the information was obtained" and was necessary for it to carry out its obligations. The Court ultimately determined, at paragraph 73, that "(d)isclosure must be limited to what is necessary to ensure the obligations in Article 7.11 are met." Article 7.11 in that case stated: "The Employer will provide the Union with copies of applications for OPEIU job bulletins upon request to the Local Human Resources Office."

Unlike the situation in *Coast Mountain Bus Company*, there is no basis upon which to establish the positive reporting obligation the Union seeks, particularly given that s. 33 of *FOIPPA*, which the Union relies on, permits disclosure but does not require it (*Coast Mountain Bus Company*, para. 56).

Of significance to the outcome in the present case there exists no positive obligation by contract or statute that supports the requirement sought by the Union, and I am otherwise unable to find that the Union's use of the information in question is "necessary for performing the statutory duties of, or for operating a program or activity of" the Employer as per s. 34(b) of the *FOIPPA*, such that would place on the Employer

the mandatory obligation to notify the Union of names of its members who are being called in to attend a meeting under the ASP.

For all of the foregoing reasons the grievance is denied.

Christopher Sullivan