GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2018-02 **May 28, 2018** **By E-mail: Seven Pages**

Attendance Support Meetings do not Require Notice to Union

School District No. 39 (Vancouver) v. International Union of Operating Engineers, Local 963

Issue

Does the union have the right to be notified when the school district meets with its members under an attendance support program?

Significance

The answer is no. The union did not have a right to be informed or represent its members in attendance support meetings because there were no disciplinary consequences that flowed from the meetings. The attendance support program focused on offering support to employees who were frequently absent from work for reasons outside their control (such as injury, illness or disability).

The decision bolsters districts' rights to develop and implement well-designed and executed attendance support programs and follows on other recent decisions, including the *Telecommunications Workers' Union v. Telus Communications Inc.,* 2017 BCCA 100 decision (previously summarized in Grievance and Arbitration Update No. 2017-03), which affirm an employer's right (absent a clear collective agreement restriction) to meet with employees about a workplace accommodation without having to notify or involve the union.

Facts

The district's Attendance Support Program (ASP) was developed as a comprehensive wellness and attendance support program, aimed at supporting employees who experienced excessive non-culpable absenteeism. The ASP was exclusively focused on non-culpable absenteeism due to illness or injury; situations involving culpable absenteeism, such as absences without leave or fraudulent sick leave, were referred to the district's human resources department.

The ASP consists of three distinct stages: issue identification; informal conversations; and, if necessary, formal support sessions. After the district identified employees with significant non-culpable absenteeism (issue identification), the employee was invited to an informal conversation with his/her supervisor. At the informal conversations, the supervisor made the employee aware of his/her absenteeism compared to his/her peers and offered support to assist the employee in improving his/her attendance. If the employee continued to struggle with regular and consistent attendance, the district's human resources department and the supervisor would consider whether to have more formal support meetings with the employee. In the written notifications to employees about the formal support sessions, employees were encouraged to invite their union representative to attend, but were informed that the district would not notify the union about the meeting to protect the employee's confidentiality. The formal support sessions involved more structured conversations aimed at referring the employee to programs or services, depending on his/her individual circumstances, to assist in improving attendance. There were no disciplinary consequences that flowed from an employee's participation in the ASP.

Relevant Collective Agreement and Statutory Provisions
The Collective Agreement between the parties included a union representation clause, which stated:

> 4(G) 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.

Decision
Arbitrator Sullivan agreed with the district that the union did not have the right to be notified and/or to represent its member in an ASP meeting. Union representational rights are provided either under the collective agreement or by legislation, and neither of these was triggered by the ASP meetings. The union's contractual right to represent its members was only triggered for any step in the grievance procedure or for any meeting for which disciplinary action is contemplated. Although the ASP did not specifically provide for discharge for non-culpable absenteeism, Arbitrator Sullivan concluded that, even if negative consequences such as termination for non-culpable absenteeism were possible, the purpose of the meetings could not be characterized as meetings at which "disciplinary action is contemplated."

Arbitator Sullivan also dismissed the Union's argument that its right to represent its members under the *Labour Relations Code* required it to be notified and/or involved in the ASP meetings. Union's representational rights under the Code generally involve the fundamental right to contact its members. In this case, the Union already had its members' personal contact information and was able to communicate information about the ASP and their representational rights to them. In short, the District's refusal to provide the names of employees involved in the ASP to the Union did not affect the Union's fundamental right to represent its members.

BCPSEA Reference No. A-07-2018

Union Obliged to Pay Pension Costs for Employees on Union Leave

School District No. 44 (North Vancouver)/BCPSEA v. North Vancouver Teachers' Association/BCTF

Issue
Was the union obligated to pay for 100% of a member's pension costs while the employee was on union or union officer leave?

Significance
Yes. The most appropriate interpretation of a local union leave provision where "pension" is not specifically stated as a "benefit" to be paid by the union is an expansive one, reflecting a reasonable intention that the union is to pay for costs incurred while an employee is working for the union and not the employer.

Relevant Collective Agreement Language and Argument
The Collective Agreement provided for Association Officers' Leave as follows:

> A.28.3 The Board shall continue to pay these officers their salary and to provide benefits as specified elsewhere in this Agreement, provided the Association reimburses the Board for such salary and benefit costs upon receipt of monthly statement.

Article A.28.3 does not include a specific reference to pension cost reimbursement in contrast to other provisions of the collective agreement, including Article G.6 Leave for Union Business, which did expressly include “pension” as a benefit cost that had to be reimbursed by the union. Among other arguments, the union relied on the lack of explicit reference to pension in Article A.28.3 to take the position that pension costs were excluded from the union’s obligation to reimburse benefit costs during a union leave.

The district argued that Article G.6 (specifically, G.6.2, which specifies pension must be reimbursed) applied. In the alternative, the district relied on its long standing practice of billing the union for pension costs under Article A.28, for which it was reimbursed by the union dating back to 2004.

Decision

Arbitrator Korbin considered that the union’s argument depended on finding that there was an interpretive difference between Articles G.6.2 and A.28 in respect of union reimbursement to the employer for pension contributions. She definitively rejected such a difference, concluding that the lack of reference to “pension” in Article A.28 was a “distinction without difference,” and that pension reimbursement is a union obligation regardless of the collective agreement article cited. She found that a plain reading of the collective agreement language about “salary and benefit costs” is directly, and grammatically, tied to the salary and benefit payments regularly paid by the board and it is “entirely reasonable for the Union to reimburse the Employer for costs incurred when an employee is working not for the Employer, but for the Union.”

Arbitrator Korbin dismissed the union’s grievance, upheld the employer’s grievance, and ordered remedy as follows:

1) The Union must reimburse the District for pension costs that were invoiced to the Union but not paid; and
2) The Union must reimburse the District for the financial benefits that the Union derived from the application of G.6.3 to Union leaves.

With regard to the latter remedy, the arbitrator noted that it would be “incongruous and unfair for the Union to benefit by lower TTOC salary reimbursement costs, through application of an article they have specifically and repeatedly disavowed.” This is in reference to Article G.6, which the union maintained they had not elected throughout the arbitration.

A third grievance before Arbitrator Korbin regarding the return of the officer to a teaching position after union leave was not substantively decided, as the grievance was dismissed due to timeliness.

Appeal

The union has filed a section 99 application with the Labour Relations Board seeking a review of the Award by Arbitrator Korbin. BCPSEA will provide further updates as the appeal proceeds.

BCPSEA Reference No. A-08-2018

Union's Pro-D Events Violated Collective Agreement

School District No. 69 (Qualicum) v. CUPE, Local 3570

Issue
Did the union arrange seminars on professional development days that met the requirements of the collective agreement?

Significance
No, the professional development seminars arranged by the union, to which the district financially contributed, did not meet the collective agreement requirement to be related to the employees' jobs and breached the collective agreement. School districts with similar collective agreement parameters around professional development activities will find instructive the arbitration board's analysis of the terms "professional development," "directly related," "skills and qualifications," and "necessary."

This decision also serves as a reminder that, in appropriate circumstances, an employer grievance can be an effective tool for school districts to clarify and maintain their rights under the collective agreement. It is also a reminder to employers of the importance of providing clear estoppel notice to their union locals in the context of moving away from what may be viewed as an unequivocal practice. For further information on estoppel notice and how it may apply in a specific circumstance, please contact your BCPSEA labour relations liaison.

Relevant Collective Agreement Provision
The collective agreement calls for the union to arrange professional development day seminars that "promote and foster the professional development of staff" (Article 37.2) and that are "directly related to the skills and qualifications necessary to the various job descriptions, safety issues and current trends in the respective occupations" of staff members (Article 37.3).

Facts and Argument
The first disputed Professional Development Day ("Pro-D day") took place in October 2016 and included seminars on the Municipal Pension Plan. The second disputed Pro-D Day was held in February 2017 and included seminars on the district's benefit plans as well as a keynote speaker who addressed the same topic. The district filed grievances following each of the disputed days.

The district took the position that no interpretation of Articles 37.2 or 37.3 could bring the seminar topics within the scope of the collective agreement provisions. The union claimed it had acted in accordance with the collective agreement, and, in the alternative, even if the language of the agreement did not support its interpretation, the district was estopped from relying on a different interpretation until the next round of bargaining in light of what the union alleged was long standing practice.

Decision
The arbitration board, consisting of an employer and union nominee as well as Arbitrator Marguerite Jackson, upheld the district's grievances, and ruled that the topics of municipal pensions and the district's benefit plan did not fall within the requirements of Articles 37.2. or 37.3. The arbitration board also found that the union's estoppel argument could not be upheld.

The arbitration board determined that the collective agreement language was unambiguous. The plain meaning of the articles is that Pro-D day activities are intended to promote and foster the development of employees' competence, expertise, or skills on the job. The seminars arranged by the union must precisely address topics that give the employees specific education, training, or capability essential to the performance of their various jobs. Given those criteria, the municipal pension plan and benefits seminars did not meet the requirements of the collective agreement language.

On the estoppel argument, the arbitration board found that any estoppel that may have existed prior to previous rounds of bargaining was brought to an end by a letter from the district to the union in November 2010, which put the union on notice that all Pro-D day seminars going forward must be in accordance with Articles 37.2 and 37.3 and must relate directly to the skills and qualifications necessary for the jobs in the bargaining unit. The evidence from the period subsequent to the estoppel letter was insufficient to establish an essential element of estoppel; specifically, an unequivocal representation by the district that it was dispensing with its rights under Article 37.3 of the collective agreement.

BCPSEA Reference No. A-10-2018

Is a One-room School Teacher Required to Supervise Lunch Breaks?

School District No. 73 (Kamloops/Thompson)/BCPSEA v. Kamloops Thompson Teachers' Association/BCTF

Issue
Was it a breach of the collective agreement to require a one-room school teacher to supervise 30% of the lunch breaks during a school year?

Significance
The short answer is no. It was reasonable for the district to require a one-room school teacher to supervise 56 of the 180 lunch breaks during the school year, considering the parties' past practice and specific collective agreement language.

Facts
The district operated three one-room schools. The grievor was the sole teacher at one of these schools for 12 K-7 students. The principal of the school was also responsible for two other schools and therefore does not regularly attend the school. During the 2015-16 school year, the grievor supervised 56 out of the 180 instructional days. Generally in the district, lunch time supervision at one-room schools is provided by community members/parents and education assistants (EAs) and, occasionally, the principal. However, during the 2015-16 year (similar to past years), there was no EA assigned to the school and, despite efforts by the principal and grievor to recruit more assistance, there were not enough community members/parents able to provide lunch time supervision for all school days.

Relevant Collective Agreement Provisions
Articles D. 18 and D.19 set out teachers' rights in respect of instructional days and supervision.

D.18
1. Elementary
In an elementary school the duration of a teacher's instructional day shall not exceed six (6) consecutive hours and shall be inclusive of:

a. Five (5) hours of instructional time which shall include fifteen (15) minutes of recess and preparation time as outlined in Article D.4.3.;
b. A regular lunch intermission.

D. 19
1. Except in one-room schools no teacher shall be required to perform any supervisory duties during the regularly scheduled lunch breaks.
2. Other supervisory duties shall be assigned on an equitable basis by the school administration and shall not exceed the equivalent of twenty (20) minutes per week.

Article B. 27 of the collective agreement provides for allowances for posts of special responsibility. Teachers in one-room schools are paid an allowance in addition to scale placement income. While the collective agreement did not describe for what specific tasks these allowances are intended to compensate, the parties understood that the allowances are intended to compensate teachers in one room schools for the "special responsibilities" associated with their positions, including but not limited to performing administrative responsibilities in the absence of a principal regularly on site, and additional student supervision responsibilities.

Decision

Arbitrator Bell decided, based on the district's past practice and collective agreement language, that while one-room school teachers were not obliged to supervise students at every lunch break, Article D.19 did deliberately carve out an exception to the general rule that teachers do not provide lunch time supervision. Arbitrator Bell relied on the fact that, over many years, the general practice at the one-room school was to have the teacher, with the assistance and financial support of the administration, arrange for community members or parents to perform lunch time supervision for portions of the instructional year. However, not all days could be covered in this way, which was reflected in the exception for one-room school teachers in Article D.19.1.

Arbitrator Bell also found that the requirement of the grievor to work 56 of the 180 lunch breaks in a school year was reasonable, considering the past practice, express exception for lunch break supervision in one-room schools, and the provision of a special allowance to one-room school teachers to reflect unspecific additional supervisory responsibilities. Arbitrator Bell left it up to the parties to negotiate changes to the nature and extent of lunch time supervision at the bargaining table if the union had concerns about the fairness of the exception in D.19.1 for one-room school teachers.

BCPSEA Reference No. A-09-2018

BCPSEA Update: BC Teachers' Federation Provincial Grievance on Failures to Fill Teacher and Teacher Teaching on Call Positions

Issue

Following a mediation before the Labour Relations Board (LRB) of the BC Teachers' Federation (BCTF) application under section 88 about failures to fill teaching positions in the province, BCPSEA and the BCTF agreed to forward the BCTF's provincial grievance on the same issues to be resolved expeditiously by arbitration. The arbitration is primarily focused on resolving the following issues:

1. Is it a breach of the collective agreement if a district fails to assign a teacher teaching on call (TTOC) to cover a classroom where the teacher is absent?
2. Is it a breach of the collective agreement if another classroom teacher covers a classroom where the teacher is absent?
3. Is it a breach of the non-enrolling ratios provided in the Memorandum of Agreement re LoU No. 17 (MoA) to assign non-enrolling teachers to cover classrooms where the teacher is absent and there is no TTOC available?

The BCTF has put forward four districts as examples for the arbitrator to determine the above questions: School Districts No. 28 (Quesnel), No. 33 (Chilliwack), No. 39 (Vancouver) and No. 73 (Kamloops/Thompson). However, due to the available time before the arbitrator, only the union's case against School District No. 33 (Chilliwack) will be heard at this time; the parties are setting further dates in the fall to hear the case against the other three districts.

Significance

The outcome of the arbitration will affect most, if not all, districts in the province as all districts are subject to the non-enrolling ratios in the MoA and many districts have experienced difficulty in covering classes with TTOCs during this (and previous) school years. Further, a significant number of collective agreements require that classes be covered by a TTOC if the teacher is absent, most without an exception based on the availability of TTOCs.

The hearing will continue before LRB Vice-Chair Jennifer Glougie on June 5, 6 and 11. We will keep you updated as the case proceeds.

Questions

If you would like a copy of any of the decisions cited above, please contact Nancy Hill (604 730 4517; nancyh@bcpsea.bc.ca) and quote the BCPSEA Reference No. found at the end of each case summary.