

2018-04

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By E-mail: Four Pages

Lengthy Suspension for Teacher Who Crossed Personal Boundaries with Vulnerable Student

BCPSEA/Certain School District v. BCTF/Certain Teachers' Association

Issue

What is the appropriate discipline for a teacher who significantly blurred professional and personal boundaries with a vulnerable student?

Significance

The answer will depend on the facts. In this case, Arbitrator Taylor found that although the teacher exercised very poor judgment, the teacher was well-intentioned, was honest, and was remorseful. Also, in light of his 15 years of discipline-free service, the dismissal was not justified. Instead, Arbitrator Taylor substituted a one year suspension without pay.

Facts

The grievor was a highly-regarded high school music teacher. He began meeting weekly with a 15 year old student for private music lessons. The student subsequently became enrolled in the district and in the grievor's classes. The student was experiencing anxiety and depression.

Over the course of the school year, the grievor was frequently in contact with the student's parents to discuss concerns about her attendance, punctuality, and performance at school. Soon, the student was regularly confiding in the grievor about personal matters, including difficulties with her parents. Over the course of the school year, the grievor engaged in the following conduct:

- Although he suggested that the student talk to a doctor or counsellor, he counselled the student about her mental health struggles and personal problems, including through frequent texts and emails, despite not having any training or experience in counselling
- He met with the student after curfew on a school trip for 1.5-2 hours to discuss personal issues
- He met the student in his car behind her house at 1:30 am, including giving her a hug at her request
- He met with the student in his car after a late night rehearsal to discuss her personal difficulties, including giving her a hug; when they were disturbed by a RCMP officer at approximately 1:30 am, the grievor initially told the RCMP officer that he was "spending time with his girlfriend"
- He spoke with the student about his marital discord; and
- He did not report these events or actions to the district.

The student also alleged that there was physical and sexual contact with the grievor, including holding hands, hugging and sexual touching, and that he had communicated that he "loved her in a non-student-teacher way". Arbitrator Taylor, however, did not find these allegations to be credible.

Decision

Arbitrator Taylor weighed all the facts in the case and found that the district did not have just cause to terminate the grievor. He distinguished past cases supporting dismissal as an appropriate penalty because there was no sexual impropriety or intention behind the grievor's very poor judgment. The arbitrator also took into account that the grievor had reflected on his actions, acknowledged his conduct, and had 15 years' of "unblemished service" with the employer. In short, Arbitrator Taylor found there was "no risk" that the grievor would repeat his misconduct, stating: "To paraphrase Wilde, 'every saint has a past and every sinner has a future.' I am persuaded that the Grievor has a future."¹

BCPSEA Reference No. A-19-2018**Persistent "Failures to Fill" May Breach Collective Agreement****BCPSEA v. BCTF (Chilliwack Decision)****Issue**

Does a district's difficulty in filling positions, including TTOC assignments, breach the collective agreement, including compliance with non-enrolling ratios?

Significance

As previously reported by email dated October 12 and 31, 2018 Arbitrator Jennifer Glougie has issued the first example decision arising from the BCTF's provincial grievance about so-called "failures to fill" in the province. She found that:

- there were breaches of the Chilliwack School District's local replacement and coverage language arising from persistent shortages of TTOCs in the district; and
- there was a breach of the non-enrolling ratio for teacher-librarians arising from frequent reassignments of teacher-librarians to cover unfilled enrolling vacancies.

BCPSEA has appealed the decision to the Labour Relations Board (LRB). We anticipate that the LRB will render a decision on the appeal by the end of January 2019. We will keep you updated as the appeal proceeds.

Most districts do not have the same language and facts as Chilliwack. Other districts with "example" grievances will be arbitrated as part of the provincial arbitration at further hearings; the first involves School District No. 73 (Kamloops/Thompson) and is currently scheduled for February 2019.

Facts

Chilliwack School District experienced TTOC shortages prior to the 2017-2018 school year, with enhanced difficulties after the implementation of the restored language under the LoU No. 17 Memorandum of Agreement (MoA). The district reassigned administrators, non-enrolling teachers (including teacher-librarians) and enrolling teachers during their preparation time to cover these classes. The district did not replace teacher-librarians when they were absent.

Decision

Arbitrator Glougie found that there were three violations of the collective agreement arising out of the TTOC shortages. First, given that there were not enough TTOCs available on most school days to replace absent teachers, there was a breach of the district's local mandatory replacement language Article D.27.2 which states, "When for any reason the teacher is absent from a school for one-half (1/2) day or more, the Board shall employ a Teacher Teaching On Call to replace that teacher upon being informed of such absence."

¹ Paragraph 185

Second, Arbitrator Glougie found there was a breach of the local coverage provision (D.27.3), which states, "Except in emergency situations, cover-off is voluntary." Arbitrator Glougie found the TTOC shortage did not amount to an "emergency" because that term has been defined by arbitrators in other cases as a "sudden, expected circumstance calling for immediate action" and did not agree those circumstances existed in this case.

Third, Arbitrator Glougie found that the "failures to fill" led to a breach of the non-enrolling ratio for teacher-librarians. The arbitrator found that re-assigning teacher-librarians to cover absent classes, and not replacing teacher-librarians when they were absent, brought the district below the required ratio.

Arbitrator Glougie concluded that there should be compensatory remedies for the breaches of the collective agreement, but left it up to the provincial parties to determine what those remedies would be.

Next Steps

There are some issues which may, in the future, have implications for other districts but those will not be known until the appeal has been decided and any remedy decision and/or further hearings are concluded. The extent to which your district may be impacted by this decision will also depend on several factors, including **your district's**:

- collective agreement provisions about replacement of, and coverage for, absent teachers
- practices in covering absent teachers' classes
- non-enrolling ratios
- experience with TTOC shortages.

Districts should hold any grievances related to failures to fill in abeyance pending the outcome of the appeal of the Chilliwack decision.

BCPSEA Reference No. A-20-2018

Guidance About Remedy under the MoA

BCPSEA v. BCTF: Second Semester Remedy

Issue

How should remedy be calculated for the first month of second semester?

Significance

We have previously informed you about Arbitrator Jackson's recent decision on this issue via *Teacher Collective Agreement Administration E-Update* No. 19 dated October 11, 2018. All teachers of non-compliant classes must receive a remedy for the entire month if their classes are eligible on or after the 22nd day of the first month of the semester.

Districts that have semestered schools need to re-calculate remedy for February 2018. If the class was compliant after the 21 day window, no remedy for February is owed. However, if the class was non-compliant after the 21st day, then the remedy for February is calculated as if the class was non-compliant for the entire month of February (even though the 22nd day falls part way through February).

BCPSEA Reference No. A-21-2018

BCPSEA v. BCTF Unused 2017-2018 Remedy

Issue

Can an arbitrator decide what should be an alternative remedy for the 2017-2018 school year if the local parties are not able to agree?

Significance

We have previously informed you about Arbitrator Jackson's interim decision in the provincial remedy grievance via *Teacher Collective Agreement Administration E-Update* No. 18 dated September 20, 2018.

Arbitrator Jackson decided, as a preliminary matter in the arbitration of the BCTF's provincial remedy grievance that she does not have jurisdiction to determine what alternative teachers will receive for unused remedy from the 2017-18 school year under paragraph 24 of the MoA if the local parties are unable to agree. The unused remedy that accrued during the last school year continues to be owed to teachers, and it remains up to the local parties to negotiate how unused remedy will be provided to teachers.

BCPSEA Reference No. A-22-2018

Questions

If you would like a copy of any of the decisions cited above, please contact Alex Dounce (604 730 4515; alex@bcpsea.bc.ca) or Rosalie Cress (604 730 4504; rosalie@bcpsea.bc.ca) and quote the BCPSEA Reference No. found at the end of each case summary.