GRIEVANCE & ARBITRATION UPDATE

British Columbia Public School Employers' Association

07 August 1, 2005 By E-mail: 3 Pages

BCTF/School District No. 6 (Rocky Mountain): Effect of Temporary Employment on Recall Rights

Under this collective agreement a teacher's right to recall was lost if 27 months had elapsed from the date of layoff and the teacher had not been recalled. In April 2003, the district wrote to teachers who had been laid off effective June 30, 2002 and advised them that if they were not recalled into a continuing teaching appointment by September 30, 2004 their recall rights would be lost. The letter stated, "It is important to know that the acceptance of a temporary teaching assignment does not constitute being recalled."

The union grieved, taking the position that when a teacher on the recall list accepts a temporary assignment, they have been "recalled." Furthermore, even though there is no new "layoff," at the completion of the temporary assignment the teacher's 27 month period for recall and severance is reset to zero. Thus, in order for a teacher to lose their recall and severance rights, there would have to be a clear 27 month period of no temporary employment with the school district.

Arbitrator Nicholas Glass concluded that even though the teacher's acceptance of a temporary assignment may be considered a "recall," this recall to a temporary assignment has no effect on the duration of a teacher's recall and severance rights. He indicated that a teacher who works temporary assignments while on recall may acquire other rights (that of a temporary employee), however, these rights are not related to recall and severance rights.

> "I am well aware that this decision is adverse to the interests of teachers on the recall list, but they are not without some protection if or when their recall rights expire. If they have done no temporary assignments at all nothing will help regardless of this ruling. However, if they have completed ten months of cumulative service on temporary appointments within the past four years they receive consideration under Article 66.6. Having said that, obviously this is not as advantageous as continuing to have recall rights. Any further security or protection will have to be achieved in bargaining."

Arbitrator Glass's award contains an *Interpretation and Discussion* section which reviews collective agreement interpretation principles:

- A primary rule of construction is that the plain meaning rule may be departed from where it would involve an absurdity or inconsistency with other parts of the collective agreement
- All words in the agreement are to be given meaning
- It is wrong to assume that a word or term which appears in different parts of the collective agreement necessarily bears an identical meaning throughout
- The provisions of a collective agreement are to be read as a whole with the presumption that they are not intended to conflict
- However, when faced with a choice between two linguistically permissible interpretations, arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility, and which interpretation would give rise to anomalies.

In reaching his decision, Arbitrator Glass reviewed three previous arbitration awards on the issue of layoff/recall and severance rendered in School District No. 5 (Southeast Kootenay), summarized below.

1. Arbitrator Laing, 2001: Confirmed that there is only one layoff date; i.e., working temporary assignments does not alter or create a new layoff date. The arbitrator further commented in obiter that the working of temporary assignments while on recall had no effect on the duration of recall rights.

2. Arbitrator Jackson, 2002: Although Arbitrator Jackson agreed with Laing that there is only one layoff date and a new layoff date is not created at the expiry of the temporary assignment, Jackson agreed with the union that a teacher is "recalled" when a temporary assignment is worked, resulting in the resetting of the recall clock to zero. Jackson based this conclusion on the contract language which indicated that in order to lose one's recall rights, three years must elapse from the date of layoff and the teacher has not been re-engaged; the rationale being that as the teacher has been re-engaged (to a temporary assignment), the teacher's rights to recall cannot be lost.

3. Arbitrator Taylor, 2004: Arbitrator Taylor declined the employer's request to depart from the Jackson award. Although Taylor agreed that the language could be read differently and that another arbitrator could reach different conclusions than Jackson, when dealing with the same parties and same language he was unable to conclude that the Jackson award was clearly wrong when applying the "clear conviction" standard test.

As you are aware, BCPSEA has long been concerned with the Jackson award because of the inherent inconsistency and administrative feasibility. The Glass award addresses these concerns.

BCPSEA Reference No. A-18-2005

Note: Related Arbitrations	*SD No. 5 (Laing)*	*A-25-2001*
	SD No. 5 (Jackson)	*A-19-2002*
	SD No. 5 (Taylor)	*A-11-2004*

Christopher Kempling/BC College of Teachers: Court of Appeal/Freedom of Speech

In April, the BC Court of Appeal heard two matters regarding teachers' freedom of speech as outlined below. The matters were heard by the same panel of judges on consecutive days.

- BCPSEA's appeal of Arbitrator Munroe's decision in which he decided that by directing teachers not to distribute political information during parent-teacher interviews and posting political information on public bulletin boards within schools, school boards had violated teachers' freedom of expression as guaranteed by section 2(b) of the *Charter of Rights and Freedoms* and that such actions were not saved by section 1 of the *Charter.*

- The appeal of Christopher Kempling, a teacher in SD No. 28 (Quesnel) of a decision by the Supreme Court of BC which upheld a decision by the BC College of Teachers (BCCT) to discipline Mr. Kempling for publishing articles in a local newspaper expressing his view of homosexuality (associated with immorality, abnormality, perversion and promiscuity).

The Court of Appeal issued its decision on the Kempling matter on June 13, 2005. A decision on the Munroe arbitration has not yet been issued.

The Court of Appeal dismissed Mr. Kempling's appeal, concluding that the Supreme Court judge "made no error in his assessment that the disciplinary action of the BCCT in this case was demonstrably justified under s.1 of the *Charter."* The Court found that Mr. Kempling's rights of freedom of expression protected by the *Charter* (section 2.b) had been violated but this infringement could be demonstrably justified in a free and democratic society (section 1). The Court determined that Mr. Kempling's statements were "inherently harmful, not only because they deny access, but because in doing so they have damaged the integrity of the school system as a whole." The Court said:

> "Mr. Kempling can remain a BCCT member and continue while off duty to express his views on homosexuality by way of reasoned discourse befitting a teacher and counsellor. What he cannot do is to advance such views in a discriminatory manner that will be seen publicly to be those of a teacher and counsellor in the public school system. While I recognize that Mr. Kempling's prominence as a teacher in what is a relatively small community may of itself confine his ability to express his views on homosexuality regardless of whether he makes mention of the fact that he is a teacher, the deleterious effects of the infringement are, nonetheless, relatively limited when compared to the salutary effects; namely, restoring the integrity of the school system and removing any obstacles preventing access for students to a tolerant school environment."

BCPSEA Reference No. CD-04-2005

Questions

If you have any questions concerning these decisions, please contact your BCPSEA liaison. If you want a copy of the complete award, please contact Lynda Kuit at lyndak@bcpsea.bc.ca and identify the reference number found at the end of the summary.