

IN THE MATTER OF AN EXPEDITED ARBITRATION

Between

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
(SCHOOL DISTRICT NO. 39 (VANCOUVER))

(the "Employer")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION
(VANCOUVER TEACHERS' FEDERATION / VANCOUVER ELEMENTARY
SCHOOL TEACHERS' ASSOCIATION)

(the "Union")

(Referral Under Professional Autonomy Consent Award)

ARBITRATOR:	John B. Hall
APPEARANCES:	Wendy J. Harris, Q.C., for the Employer John Rogers, Q.C., for the Union
DATE AND PLACE OF HEARING:	December 31, 2008 Vancouver, British Columbia
DATE OF AWARD:	January 9, 2009

AWARD

I. INTRODUCTION

I signed a Consent Award on October 15, 2008 which granted and resolved a grievance filed by the Union over a directive issued by the Vancouver School Board to principals. The directive was dated April 19, 2007 and provided in part:

We have been informed that the BC Teachers' Federation (BCTF) is advising its locals that it is permissible for teachers to send BCTF material regarding issues such as Foundation Skills Assessment (FSA) tests home through students. That is not the position of the Vancouver School Board. Neither the Collective Agreement nor any applicable legislation gives teachers the right to use students in this manner and to do so can be harmful to public confidence in the public education system.

Paragraph 4 of the Consent Award provided that "any issue arising in the future over the distribution of FSA material by teachers in the Vancouver School District to parents through students" would be referred to me on an expedited basis. The Employer made such a referral on December 12, 2008 after a dispute arose between the parties over a pamphlet which the Union had produced regarding FSA testing. The pamphlet had been provided to teachers to send home to parents through students.

The Employer has four specific objections to the pamphlet: three relate to the content, and one relates to the manner of delivery. In the first category, the Employer says the pamphlet is misleading in two respects and fails to adequately identify the source of the pamphlet; in the second category, it says the pamphlet should be sent home in a sealed envelope or by some other method which would shield students from the message. Underlying each of the Employer's objections is its concern that distribution of the pamphlet in the present form and manner will cause harm to the administration of FSA tests and to confidence in the public education system generally.

The Union makes a number of arguments in response. First, it submits the Consent Award only contemplates expedited arbitration over issues arising from “the *distribution* of FSA material” (italics added), as distinguished from the content of such material. Alternatively, the Union submits the Employer is not entitled to challenge the accuracy of the latest pamphlet because of a statement made by a Vancouver School Board official and because the matters relating to content were effectively determined in the Union’s favour by the Consent Award. In any event, the Union says the pamphlet does not contain inaccuracies, and maintains the Employer has not met the evidentiary onus required to justify a restriction on freedom of expression. The Union also argues it is not required to submit FSA material to the School Board and/or principals before the material is sent home, and rejects the requirement for a sealed envelope based on prior practice in the Vancouver School District.

Given the expedited nature of this proceeding, I will not recite the background to the present dispute as disclosed by the “will say statements” provided through counsel and the briefs of documents. What follows will focus instead on my reasoning in relation to those issues which properly arise under the Consent Award.

II. JURISDICTION UNDER THE CONSENT AWARD

The parties have a fundamental difference regarding the scope of my jurisdiction under the Consent Award. As noted, the Union maintains there can only be a referral to expedited arbitration “over the *distribution* of FSA material” and asserts the term has a straightforward and singular meaning; i.e. “to disburse”. On the other hand, the Employer says the Consent Award captures “any issue” that arises regarding the distribution of FSA material by teachers to parents through students, and that may encompass the content of the communication, the manner of the communication, and whether the source of the communication is adequately identified.

It is helpful at this juncture to set out the terms of the Consent Award:

1. WHEREAS the VTF filed a grievance on April 20, 2007 alleging a violation of the *Charter of Rights and Freedoms* owing to a restriction placed on teachers sending information home to parents about FSA via students;
2. AND WHEREAS the matter was referred to Arbitrator J. Hall for final and conclusive adjudication pursuant to the terms of the collective agreement and the *Labour Relations Code of British Columbia*;
3. AND WHEREAS the Employer has subsequently received and considered the decision of Arbitrator Kinzie in the *BCPSEA/Southeast Kootenay School Board and BCTF/Cronbrook/Fernie District Teachers' Associations* dated May 2, 2008;
4. AND WHEREAS the parties have consented to the conclusion of the grievance according to the terms of this Award;
5. NOW THEREFORE, pursuant to the collective agreement and Part 8 of the *Labour Relations Code*, the Arbitrator makes the following Award by consent;

Consent Award

1. The Union accepts the concession by the Employer that the April 19, 2007 directive prohibiting teachers from sending material opposing the FSA test home to parents through students was contrary to Section 2(b) of the *Charter* and was not saved in this case by Section 1;
2. The school district will withdraw the letter of expectation given to the teacher at Trafalgar Elementary;
3. The school district will withdraw its April 19, 2007 directive to principals;
4. If there is any issue arising in the future over the distribution of FSA material by teachers in the Vancouver School District to parents through students, this issue will be referred to Arbitrator Hall on an expedited basis. The expedited basis will consist of a hearing which will not exceed two hours in length and will be heard within one week of the referral. Any disputed material will not be sent home prior to the ruling of Arbitrator Hall.
5. This Consent Award grants and resolves the grievance filed by the Union on April 20, 2007. It is not intended to restrict any rights that the

parties otherwise have regarding the distribution of other material in the Vancouver School District.

The present interpretative task is not unlike the familiar arbitral exercise encountered where an employer and a trade union differ over language they have negotiated in a collective agreement. In that regard, the plain language of the Consent Award lends some support to the respective positions of both parties. For instance, the last sentence of paragraph 4 in the body of the document provides that “disputed material” will not be sent home prior to a ruling. This could be taken to mean, as the Employer submits, that the content of FSA material may be referred to arbitration. Conversely, the Consent Award refers variously to “sending material” (paragraph 1), “the distribution of FSA material” (paragraph 4), and “the distribution of other material” (paragraph 5). Those passages suggest the narrower scope of jurisdiction propounded by the Union.

The context of the Consent Award must be considered. As recorded in paragraph 5, the Consent Award granted and resolved the grievance filed by the Union on April 20, 2007. The grievance asserted the Vancouver School Board had “interfered with the distribution of information related to the Foundation Skills Assessment by members of the bargaining unit to parents”. As noted already, the grievance was prompted by the directive issued by the School Board on April 19, 2007 taking issue with BCTF advice to its locals that “it is permissible for teachers to send BCTF material regarding issues such as [FSA] tests home through students”. The first paragraph of the Consent Award is also significant. The Employer conceded that the directive “prohibiting teachers from sending material opposing the FSA test home to parents through students” contravened Section 2(b) of the *Charter* and was not saved by Section 1 “in this case”. The Employer made no concession regarding the content of the material. Thus, the original directive, the ensuing grievance, and the resolution of the grievance all reference the sending home or distribution of FSA material.

If any doubt remains regarding the scope of arbitral jurisdiction under the Consent Award, it is dispelled by the parties’ exchanges leading up to the October 15 arbitration

hearing. I was not directed to their without prejudice communications at the time of the initial hearing, but they were tendered and relied upon by both sides during the expedited arbitration.

The Employer initiated the without prejudice exchange through a proposal to the Union on September 19:

The Employer proposes that this grievance be resolved on the following basis:

1. The Union will withdraw its Grievance No. 39-005-2007 concerning the use of students as couriers to deliver BCTF FSA information to their parents.
2. The Employer agrees that the reasoning and decision of Arbitrator Kinzie in School District No. 5 (Southeast Kootenay) dated May 2, 2008 will apply in the future to the use of students as couriers for the distribution of union materials.
3. The Employer will rescind all letters of direction/expectation sent to teachers concerning the use of students to distribute the BCTF information on FSA.

Please advise if the Union agrees to our proposed terms of settlement.

The Union did not accept this proposal, but made a counterproposal on September 29 which included these provisions:

1. BCPSEA grants Grievance No. 39-005-2007 and acknowledges that the directives of School District No. 39 prohibiting teachers from sending material opposing the FSA tests home with students was a breach of the *Charter of Rights and Freedoms* which was not justified in a free and democratic society.
2. A consent order will be issued to that effect and will include the following terms:
 - (a) Teachers in the Vancouver School District will continue to be able to utilize students to provide material to parents consistent with the practice prior to the Employer's illegal directive;

- (b) If the School Board has any concerns about the accuracy of materials sent home by teachers through students, it will raise those concerns with the teacher and the Union;
- (c) If the Union and the Employer are unable to agree, Arbitrator John Hall will deal with the issue of accuracy on an expedited basis. The expedited basis will consist of a hearing which would not exceed 2 hours in length, and would be heard within one week of the referral; ...

The Union's counterproposal was considered and rejected. However, on October 7, the Employer sent a comprehensive document incorporating provisions of the Union's proposed consent award with some revisions; it also provided explanations for the revisions. Two elements of the document are relevant to the immediate issue:

3. Teachers and/or the Union will advise their Principal and/or the Employer of any material on the FSA which teachers intend to send home to parents through students before doing so. The Employer will have three (3) working days to advise the Union of any concerns about the material being inaccurate or misleading. Should the Union and the Employer not be able to resolve the issue with respect to the materials within that time frame, the disputed material will be referred to Arbitrator Hall as provided in paragraph 3 herein.

This provision recognizes the right of a Board of Education, as confirmed by Arbitrator Kinzie, to control what is sent home to parents through the medium of students. It is also intended to recognize Arbitrator Kinzie's conclusion that there is an obligation to ensure that information sent to parents is not inaccurate or misleading.

With respect to material produced by the local Union or BCTF, it may be more expeditious to address any concerns regarding accuracy at the district level. With respect to material which individual teachers may produce with respect to FSA, any concerns could be raised at the school level with the involvement of the Union.

3. If there is any dispute regarding the information which is intended to be sent home to parents on FSA (i.e. whether it is accurate or misleading) or the means of sending it home (i.e. if it is not in a sealed envelope), Arbitrator Hall will deal with the issue on an expedited basis, unless otherwise agreed by the parties. The expedited basis will

consist of a hearing which would not exceed 2 hours in length and would be heard within one (1) week of the referral. Any disputed material will not be sent home to parents prior to Arbitrator Hall's decision.

This provision is based on the Union's proposal to have a mechanism for resolving disputes about the material on the FSA and any disputes related to the means of sending the material home (other than through the use of a sealed envelope).

The Employer sent another letter on October 8, and the Union responded to both letters on the day following. It confirmed a willingness to settle the matter but "... want[ed] to be very clear that the grievance [would] not be resolved on the basis that the award of Arbitrator Kinzie in the May 2, 2008 Southeast Kootenay School District case governs the disposition of this grievance". The Union instead stated that the grievance would be resolved solely on the basis of the terms found in a revised consent award attached to its latest correspondence. Then, before the Employer had replied, the Union sent a one-sentence letter stating: "The purpose of this letter is to advise that our offer of October 9, 2008 is withdrawn".

At least four points emerge from this exchange. First, the Union clearly rejected a resolution of its grievance based on what I will describe as the *Cranbrook* award by Arbitrator Kinzie (that being said, the Union's position does not dictate the potential relevance of the *Cranbrook* award in light of *Board of School Trustees, School District 57 (Prince George)*, [1977] 1 Can LRBR 45 (BCLRB No. 79/76) -- a point made by Arbitrator Kinzie in his preliminary ruling of January 2, 2008 in the *Cranbrook* proceeding).

Second, and more critically, the parties unmistakably made a distinction in their exchanges between the information being sent home ("i.e. whether it is accurate or misleading"), and the means of sending it home ("i.e. if it is not in a sealed envelope"). That is, they distinguished the content of FSA material from the distribution of FSA material.

Third, the Union rejected the Employer's proposal for "three (3) working days to advise the Union of any concerns about the material being inaccurate or misleading", which would have allowed the Employer to pre-screen the content of FSA pamphlets.

And finally, while the Union initially proposed an expedited mechanism for addressing "concerns about the accuracy of material sent home by teachers through students", it had unequivocally retracted that proposal by the end of the exchange. (The Union's change of position appears to have been prompted by the September 30, 2008 edition of BCPSEA's "@ issue" which came to the attention of Union counsel on the eve of the initial hearing and is said to contain "wild misrepresentations" concerning the *Cranbrook* award which amount to improper "censorship".)

At the risk of belabouring what should by now be readily apparent, it is telling to juxtapose the third paragraph of the Employer's October 7 settlement proposal with the fourth paragraph of the Consent Award:

3. *If there is any dispute regarding the information which is intended to be sent home to parents on FSA (i.e. whether it is accurate or misleading) or the means of sending it home (i.e. if it is not in a sealed envelope), Arbitrator Hall will deal with the issue on an expedited basis, unless otherwise agreed by the parties. The expedited basis will consist of a hearing which would not exceed 2 hours in length and would be heard within one (1) week of the referral. Any disputed material will not be sent home to parents prior to Arbitrator Hall's decision. (Employer's October 7 settlement proposal; emphasis added)*

4. *If there is any issue arising in the future over the distribution of FSA material by teachers in the Vancouver School District to parents through students, this issue will be referred to Arbitrator Hall on an expedited basis. The expedited basis will consist of a hearing which will not exceed two hours in length and will be heard within one week of the referral. Any disputed material will not be sent home prior to the ruling of Arbitrator Hall. (Consent Award; emphasis added)*

Thus, while the Employer's proposed consent award identified two categories of dispute which might be referred to expedited arbitration, the final document only allows for one category; namely, "any issue ... over the distribution of FSA material". Nor does the Consent Award use language such as "... any issue arising over FSA material distributed by teachers..."; as the Union argues, it is issues over distribution *simpliciter*. I accept the Union's further submission that interpreting the Consent Award to include jurisdiction over disputes about the content of an FSA pamphlet, or about other issues unrelated to distribution, would go beyond the negotiated terms of settlement and be inappropriate: see *Norske Canada Ltd. -and- Communications, Energy and Paperworkers' Union, Local 1123*, [2001] B.C.C.A.A.A. No. 322 (Munroe), especially at para. 46. Finally, and contrary to the Employer's submission, restricting paragraph 4 to disputes over the distribution of FSA material does not result in a "hollow" process (that will become evident by what follows in the remaining parts of this award).

Having made the above determination, I expressly refrain from commenting on the parties' submissions regarding the accuracy of the pamphlet now in dispute, as well as the Union's argument that the Consent Award bars the Employer's challenges in accordance with *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621.

III. DISTRIBUTION OF THE FSA PAMPHLET

The Union accepts I have jurisdiction under the Consent Award to determine whether FSA material must be sent home to parents in a sealed envelope, but opposes any such requirement. The Union does not allege that sealing the pamphlet would infringe its *Charter* rights; rather, it relies on what is said to be a practice of FSA and other material being sent home in the Vancouver School District without being placed in envelopes. The Union additionally says there is no evidence of students having been inappropriately involved in the debate over FSA testing as a consequence of this practice.

The Employer steadfastly maintains that a “pamphlet espousing [teachers’] political views should not be provided to young students in a manner that enables children to read the pamphlet”. It relies on what was said by Arbitrator Kinzie in the *Cranbrook* award, as well as the “professional judgment” expressed by Associate Superintendent Paul Wlodarczak in his will say statement that:

... students may believe that they may be harmed by writing the test; they may be confused by the fact that the pamphlet suggests that their teacher does not want them to write the test even though the same teacher administers them the test; they may be confused by having their parents tell them that the test is important when their teacher is telling them that the tests negatively affect them; they may be misled by the statement that they can be excused from writing the test if their parent writes a letter to the principal; they may be upset by the principal's refusal to excuse them when their parent has written a letter requesting their exclusion; and they may not take the FSA test conscientiously as a means of showing support for their teacher, thus invalidating the data. (para. 18)

In my view, the evidence found in the parties’ will say statements and their books of documents does not establish a “past practice” as that concept is generally understood in labour relations. Among other necessary elements, I am not persuaded that officials responsible for interpretation of the collective agreement in the Vancouver School District have sanctioned the distribution of FSA material in the manner and to the extent asserted by the Union. I also accept the Employer’s submission that there is a qualitative difference between the pamphlet being sent home by teachers through their students, and the information about FSA testing which has emanated from other sources. I accordingly reject the Union’s submission that sealing would not be appropriate because of the prior distribution of pamphlets and other information about FSA testing.

It should be recalled that the Union is seeking to express its views about FSA testing to the parents of students in the school system, particularly those whose children are in grades 4 and 7 at elementary schools. It is difficult to see how that objective is properly advanced by having the students themselves receive the message directly from their teachers. To varying degrees, the concerns of Mr. Wlodarczak readily accord with

common sense, and I ascribe on this point to what was said by Arbitrator Kinzie in the *Cranbrook* award:

I am also of the view that the method of communication utilized in this case, i.e., sending the pamphlet expressing teacher concerns with the FSA tests home with students in a sealed envelope, is not repugnant to the functions of a public school or the values Section 2(b) is designed to serve. This method of communication is the one commonly used by teachers to communicate with parents about their children's education. The communication in this case does concern parents' children's education through the impact FSA tests will have on it. *The students/children are not inappropriately involved in this discourse because the pamphlet is sent home in a sealed envelope to the parents.* Parents are free to read it or not and if they do, to be persuaded by it or not. There is no wrongful intimidation or coercion. But for one exception which I will deal with later, there is no evidence that its distribution would impede the functions of the school or undermine the values underlying the free expression guarantee. (p. 47; emphasis added)

Arbitrator Kinzie later commented that placing the FSA pamphlet in a sealed envelope addressed to the parents or guardians of students “constitutes a reasonable attempt” to address the concern that inserting students into the policy discussion causes them to feel “uncertain about two very important sets of people in their lives” (p. 49).

Therefore, if the Union wishes to distribute FSA material to parents via students, it must do so in a sealed envelope or in some other manner designed to prevent students from reading the contents of the material. This precautionary measure avoids the potential for harm to the students, and does not infringe the right of teachers to express their views about FSA testing to the students’ parents.

IV. THE TIMING OF DISTRIBUTION

The remaining issue is whether the Employer is entitled to notice that FSA material will be sent home to parents through students. More specifically, given my determinations to this stage, the question is whether the Employer must be told in

advance how the material will be distributed (i.e. in a sealed envelope or in some other manner).

This issue was argued more broadly during the expedited arbitration, with the question being whether the Employer is entitled to review FSA material before it is distributed. The Employer argued this must be the case given the “consultation process mandated by Arbitrator Kinzie [in the *Cranbrook* award]”; moreover, a contrary conclusion would be illogical given the passage in the Consent Award that “[a]ny disputed material will not be sent home prior to the ruling of Arbitrator Hall”.

The Union argued for a different interpretation of the Consent Award. It said the fourth paragraph does not contain a vetting process”; further, it is only required to “halt distribution of materials” once an issue has been referred to the expedited arbitration process and “until Arbitrator Hall has made a determination in the matter”.

I have found that the Union ultimately eschewed settlement proposals which would have given the Employer an opportunity to assess the accuracy of FSA material before it is sent home to parents. But that is different than finding the Union is not obliged to advise the Employer and/or principals about how the material will be distributed. I find it can be reasonably implied from the expedited arbitration process in the fourth paragraph of the Consent Award that any issue over the manner of distribution will be resolved before the material is sent home. If the material is not distributed in a manner which shields students from the message, it will simply be impossible to “unring the bell” at a later date (in that respect, it is not the referral to arbitration, but the existence of any issue or dispute, which puts distribution in abeyance). Finally, and regardless of what is found in the Consent Award, the Employer “... has the right to control what is sent home to parents through the medium of their children/students at its schools” (*Cranbrook* award, at page 35) -- subject, of course, to *Charter* considerations.

V. CONCLUSION

I will summarize the three main conclusions in this award: first, my jurisdiction under the Consent Award is confined to issues arising over the distribution of FSA material, and does not extend to other issues such as the content of material; second, the Union must ensure any FSA material sent home to parents through students is placed in a sealed envelope or sent by another method designed to prevent students from reading the content; and finally, the Union must give the Employer and/or principals advance notice of the method selected for distribution in case there is any dispute.

Dated at Vancouver, British Columbia on January 9, 2009.

A handwritten signature in black ink, appearing to read "John B. Hall". The signature is stylized with a large, circular flourish on the left side and a series of connected loops on the right side.

JOHN B. HALL
Arbitrator