BRITISH COLUMBIA
PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION

Reply Submission to Irene Holden: Collective Agreement Implementation

This constitutes the reply submission of the British Columbia Public School Employers' Association (BCPSEA). This reply is based on the submission on the outstanding implementation issues provided by the British Columbia Teachers' Federation (BCTF) on October 18, 2006. In addition, BCPSEA would be pleased to provide any supplementary documents that may be of assistance in this matter.

1. Signing Incentive

- **Ratification by BCTF Executive**

The BCTF states in their submission that:

> "We were first promised that upon recommendation of the BCTF Executive Committee to ratify the framework agreement, teachers would be paid the incentive in July."

In actual fact, there was no such promise made by either BCPSEA or Lee Doney, special advisor to the Premier. It is important to note that the BCTF had actually raised the issue of settling as early as possible prior to June 30, 2006 in order to ensure that there would be sufficient time for the membership to ratify the agreement and therefore receive the incentive payment in July.

Further, the language in the framework agreement clearly states:

> "Should the parties reach a tentative collective agreement by June 30, 2006 which is subsequently ratified by the parties, each bargaining unit member who is an employee of the school district on June 30, 2006 shall be eligible to receive a one-time lump sum incentive payment..." and

> "The incentive payment shall be paid to employees upon receipt of funding from the government and as soon as practicable for the school district to calculate the individual payment amounts and distribute the funds."

Once the agreement was ratified by the BCTF members, and the employers received the funds from government, the incentives were paid. The executive ratification approach put forward by the BCTF is contrary to the clear language in the framework agreement. It would also represent a complete departure from the approach taken with every other public sector agreement where the incentive was provided only after ratification by the general membership.

- **Incentive Details**

The BCTF states:

> "Ms. Sims has a specific and very clear memory of an agreement and understanding between Mr. Doney and herself with the mediator present that the list was going to be "worked out later", that this was not the actual list of who would receive the incentive."

Mr. Doney maintains that he did not have such a conversation nor was there any such agreement or understanding. There was, however, a discussion on the evening of June 30, 2006 in the presence of Jinny Sims, Brian Porter, Lee Doney, Jacquie Griffiths and Irene Holden during which Ms. Sims raised some anomalous issues as the agreement was being signed off. At the time, Ms. Griffiths assured the BCTF that, once the agreement had been reached, the "details (of such anomalies) could be worked out later." This is quite different from an agreement to work out details in a way that would be contrary to the clear language in the agreement itself.

The BCTF has indicated that although they signed the incentive agreement that excluded employees commencing SIP prior to July 1, 2005, they also had a commitment from the employer that "the list was going to be

worked out later, that it was not the actual list of who would receive the incentive."

Discussion did take place during the signing of this Letter of Understanding (LOU) to the effect that the employer would be willing to discuss with the union areas of implementation and eligibility where the language of the LOU was unclear and not defined by the LOU. With respect to employees commencing SIP prior to July 1, 2005, the language is clear and not subject to further discussions.

- **Other Public Sectors**

The BCTF states in their submission that, "other public sector union employees on disability did receive the incentive."

There were no set criteria or templates set by the government as to which groups would receive the incentive. The government left this up to each individual party to determine. With respect to the incentive applying to employees on LTD, some parties chose to include this group as eligible without any caveats (i.e., health sector), while other groups placed a one year limit for eligibility (i.e., K–12, Colleges) or the requirement to return from LTD by March 31, 2006 (government workers).

- **Discrimination**

The BCTF has made a statement in their submission that it would be discriminatory and contrary to human rights to deny the incentive on the basis of health and/or disability to employees who commenced SIP prior to July 1, 2005.

Section 13(1)(b) of the BC *Human Rights Code* prohibits discrimination against a person "regarding employment or any term or condition of employment based on . . . physical or mental disability…."

Providing different levels of compensation to different groups of employees is not in itself discriminatory (*Ontario Nurses' Association v Orillia Soldiers Memorial Hospital,* [1999] OJ No. 44 (Ont. CA)). In other words, discrimination is not established simply by showing that

employees who work receive better or different compensation from employees who do not work. Prohibited discrimination only occurs when the distinction is based on disability or another ground prohibited under Section 13(1)(b).

Two companion cases of the Saskatchewan Court of Queens Bench which dealt with similar issues are particularly helpful: *Real Canadian Superstore, Local 1400,* [1999] SJ No. 777 (Sask. Q.B.) ("*Real Canadian Superstore*"); and *United Food and Commercial Workers, Local 319W v Coca Cola Bottling Limited,* [1999] SJ No. 777 (QB), aff'd (2000) 187 DLR (4th) 759 (CA) ("*Coca Cola*"). In these cases the court was asked to reconcile the decisions of two arbitrators who had come to opposite conclusions in cases involving employees who were deemed ineligible for bonuses on the basis of disability leaves.

In *Coca Cola,* the employer paid a lump sum payment to all full time employees on active payroll as of a certain date. This excluded any employees not actively on payroll because they were on leave for some reason, including disability. Five employees who did not receive the payment because they were on disability leave alleged they had been discriminated against on the basis of their disability. The court held that it was reasonable to presume that, in general, payment of a signing bonus in the collective agreement is intended to provide additional compensation to employees for work performed without affecting the wage scales in the agreement. The court determined that the appropriate comparator group was other employees who had not performed work during the qualifying period and concluded there was no disparate treatment of the grievors on the basis of disability in relation to compensation received for work performed.

In *Real Canadian Superstore,* the employer paid bonus payments to full time employees and prorated on hours worked for part time employees. Prorating was calculated over a ten month period as a percentage of full time hours. A part time employee who had been injured in a car accident received a reduced bonus reflecting his absence from work. He alleged this constituted discrimination on the basis of his disability. The court rejected the claim. Like the court in *Coca Cola, supra,* it accepted that the bonus was to provide additional compensation, or wages, in a way that did not affect wage scales in future years. It determined that the appropriate comparator group was other part time employees. In relation

to the treatment of hours he had not worked as a result of his disability, the grievor was treated the same as all other part time workers who had been absent or on leave from their usual hours of work. The court concluded that, where the underlying purpose of the benefit is compensation for work performed, it is not discriminatory to distinguish among employees based on whether and to what extent work has been performed.

In the present case, the appropriate comparator group is those employees who were on unpaid leave. They were treated precisely the same, in that their unpaid hours do not count for the purpose of calculating the bonus amount. Thus, the denial of the benefit to disabled employees on long term disability is not based on their disability, but rather is based on their absence from work on unpaid leave.

Furthermore, it is not discriminatory for the parties to negotiate some exceptions to this general rule and include some groups of employees on unpaid leave under certain circumstances. Examples of these exceptions were the parties' agreement to extend eligibility to employees who were on unpaid leave due to SIP that commenced July 1, 2005 onward as well as to employees who were on unpaid maternity and parental leave during the July 1, 2005 to June 30, 2006 year.

This is not unlike the situation where the parties have seen fit to extend certain types of provisions of the collective agreement to selected groups (i.e., the sick, injured, pregnant) that they consider merit such additional protections. However, the parties also have the right to attach certain conditions to these benefits. For example, under the collective agreement it is not uncommon in this sector to have a provision for employees on LTD to continue to be eligible for extended health and dental for a defined period of time; i.e., up to two years. The fact that disabled employees receive differential treatment within their own group under the terms of these negotiated provisions is not discriminatory. Rather, the parties have simply negotiated different levels of benefits which apply to these protected groups at different times depending on the circumstances.

The incentive payment is a benefit closely tied to wages or "actual time worked." For the majority of the bargaining unit, the amount of actual time worked will determine the amount of the signing bonus they receive. The parties have negotiated an exception to the general principle that the bonus is based on actual time worked and have agreed to extend the

signing bonus to identified categories of employees on leave who are not providing services under certain circumstances.

- **Discrimination and TOCs Not Available Due to Pregnancy**

The BCTF states:

> "These teachers are in receipt of benefits or on pregnancy leave under the *Employment Standards Act.* It would be discriminatory to deny them this leave on the basis of pregnancy. "

Section 13(1)(b) of the BC *Human Rights Code* prohibits discrimination against a person "regarding employment or any term or condition of employment based on . . . sex, physical or mental disability. . . ."

The employer's position is that TOCs are not on leave. They may be unavailable to accept an offer of a TOC assignment due to a pregnancy and may be able to apply for and receive maternity EI benefits, but they are not on leave from the employer.

Discrimination can be established by comparing the treatment of one group of employees to another (*Real Canadian Superstore*). Therefore, the first step in determining whether discrimination has occurred in a particular case is to compare the treatment of the employee or employee group alleging discrimination to the treatment given to other employees in an appropriate "comparator group."

The appropriate comparator group would be other TOCs who were also unavailable to accept TOC assignments from July 1, 2005 until June 30, 2006 for a variety of reasons. The rule for the comparison group was consistent – TOCs were paid the incentive based on hours worked from July 1, 2005 to June 30, 2006. No TOCs in the comparison group received the incentive for hours not worked nor did they receive the incentive for hours/days that they were unavailable to accept a TOC assignment due to a variety of reasons.

- **Discrimination and TOCs on Union Leave**

With respect to the issue of TOCs and the work they do for the union, the BCTF submits that, "denial of the incentive to those who have participated in their union would be discriminatory on the basis of union activity under the *Labour Code.*"

Although not stated in the BCTF submission, it would appear that they are claiming a breach of Section 6(3)(a) of the *Labour Relations Code,* which provides as follows:

> (3) An employer or a person acting on behalf of an employer must not
>
> (a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person
>
> (i) is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
>
> (ii) participates in the promotion, formation or administration of a trade union,

The same analysis that is applied in discrimination points raised above would apply to a claim of discrimination under the *Labour Relations Code.* A TOC who does not require a leave of absence to do union work but who reports in as not available is not on a paid leave. As such, the appropriate comparator group is other TOC employees who are unavailable. As such, the TOC is not being discriminated against because of his or her participation in the administration of the union.

- **Union Leave — Amalgamated School Districts**

The BCTF's submission indicates that employees in amalgamated districts who were granted additional leave (without pay) above the number of union officials prescribed in the collective agreement should also receive the incentive on the basis of being non arbitrary, fair and consistent.

These employees are not on union leave. In order to assess the union's allegation of inconsistency, a review of the nine districts in question has revealed the following:

SD 5 – A provision in the collective agreement allows for the release of two people on FT union leave (president and VP). Thus, two individuals in this district received the incentive per our provincial agreement to do so. This is therefore not an issue in this district.

SD 6 – Have three employees on leave. Collective agreement provides for leave for one employee. The district has indicated to the local that they will provide the incentive to the other two individuals provided the district is reimbursed by the union.

SD 8 (Kootenay Lake) – Have 2.3 employees on leave. Collective agreement provides for one employee. The district has indicated to the local that they will provide the incentive to the other 1.3 individuals provided the district is reimbursed by the union.

SD 53 (Okanagan Similkameen) – Collective agreement provides leave for one employee. Internally, the union now operates as one local. They only have one person on leave, so this is not an issue in this district.

SD 58 (Nicola-Similkameen) – Have two employees on leave. Collective agreement provides for one employee. The district has indicated to the local that they will provide the incentive to the second individual provided the district is reimbursed by the union and subject to the Holden award on the issue.

SD 79 (Cowichan Valley) – Have 2.5 employees on leave. Collective agreement provides for one employee. The district has indicated to the local that they will provide the incentive to the 1.5 individuals provided

the district is reimbursed by the union and subject to the Holden award on the issue.

SD 82 (Coast Mountains) – Have two employees on leave. Collective agreement provides for one employee. Both individuals received the incentive. The district has had no discussions with the local union on this topic and was unaware of the issue when they made payment.

SD 83 (North Okanagan-Shuswap) – Collective agreement provides leave for one employee. Internally, the union now operates as one local. They only have one person on leave, so this is not an issue in this district.

SD 91 (Nechako Lakes) – Have two employees on leave. Collective agreement provides for one employee. Both individuals received the incentive. The district has had no discussions with the local union on this topic and was unaware of the issue when they made payment.

The employer maintains its position that employees on union leave are not eligible for the incentive under the language of the signed Letter of Understanding. A without precedent and prejudice offer was made to the union to provide the incentive to full time union officials who received union leave under their collective agreements. This without prejudice offer did not apply to, nor include, employees who were granted leave without pay in addition to the union leave provision. It is clear from the provincial collective agreement language (A.2 Recognition), two provincial Letters of Understanding and a provincial Memorandum of Agreement settlement that only one local union per school district is recognized.

The employer has not been arbitrary nor inconsistent in the payment of the incentive to union officials in accordance to the without prejudice offer from the employer to do so. The only locations where the incentive was paid to additional employees on leave was in two locations (SD 82 and 91) where they were unaware of the issue.

Once a decision is rendered, it will be implemented consistently throughout the province.

2. Seniority

- **Broken Service**

The BCTF's question implies that the employer is seeking to cancel a right that teachers had when, in fact, no such right existed. Until C.2.2 was negotiated, there was no right to port seniority between school districts and, with rare exceptions, no right to reactivate seniority credits which had been extinguished by resignation, dismissal, or layoff/severance. Clause C.3.2 gave teachers a limited right to port seniority but the bridge to this right was to secure employment in another school district. C.2.2 did not provide rights to seniority credits which had already been extinguished or which would be extinguished in the future should a teacher terminate employment with a school district without being re-employed in a new school district.

In their submission, the BCTF state that BCPSEA never disclosed to them our position with respect to broken service. However, the onus was not on BCPSEA to disclose something which was not discussed as part of the language proposed by the BCTF. BCPSEA accepted the union's proposition that teachers who were otherwise reluctant to move between districts because of their vulnerability in the event of declining enrollment, might be attracted to employment with rural and remote districts if they were able to port seniority (and sick leave) to their new employer. The rationale presented by the union in bargaining on this issue never brought into question any past seniority that a teacher would already have lost by virtue of having left an employer and severing the employment relationship.

The union further argues that because C.2.1 defines seniority as the aggregate of service, the provisions of C.2.1 provide the entitlement to both current and extinguished seniority rights. There is no grounding in the collective agreement for this argument.

First, C.2.1 reads, "Except as provided in this article…" and C.2.2 reads, "Effective September 1, 2006 and despite paragraph 1 above…." Therefore,

C.2.2 acts as a limited over-ride on C.2.1 and it is not helped by the words of C.2.1.

Moreover, and more importantly, "aggregate" does not carry the meaning that the union purports it to have. In C.2.1 the meaning of the word "aggregate" is clearly relegated to the definition of seniority in each of the 60 districts as defined in the previous collective agreement; and, as we have already noted, it is the exception — not the rule — for past service to be recognized upon re-employment with the district. As recently as December 2005, Arbitrator Korbin rejected the union's arguments on this very point with respect to School District No. 68 (Nanaimo-Ladysmith). Article 13 in the Nanaimo-Ladysmith agreement defines "seniority":

> 13.3 "In this article, "seniority" for teachers on continuing appointments means a teacher's **aggregate length of service** in the employment of the board for actual time worked, inclusive of service under temporary appointment and part-time teaching...."

On page 18 of her award, Arbitrator Korbin stated:

> "Nonetheless, I am satisfied on looking at the whole of the language relating to seniority in this Collective Agreement, it is clear that the aggregation of seniority under Article 13.3, while not requiring continuous service per se, contemplates an unbroken period of employment with the Board, put another way, while service due to leave, part-time work and such are to be aggregated for seniority purposes, this does not include periods of time prior to termination for cause, severance, resignation or retirement."

Arbitrator Korbin's decision is consistent with that of Arbitrator Dorsey regarding the same argument in School District No. 54 (Bulkley Valley). On page 27 of his award, he stated:

> "This is a detailed code of seniority. The "aggregate length of service" consists of a combination of all of the identified service in the bargaining union, including on temporary appointment or part-

> time teaching; time on specified leaves, but not others or while on layoff; and the time employed outside the bargaining unit as an administrative officer. The agreement is careful to specify that approved leaves and layoffs do not break a teacher's continuity of service. Some of these may be lengthy leaves — long term sick leave, compassionate leave, holding elected office, secondment to the Ministry of Education, attending to union duties, etc. The collective agreement is specific that service prior to receipt of severance pay following notice of layoff is not to be counted if a teacher is subsequently rehired.

And Arbitrator Dorsey went on to say on page 28:

> "The seniority definition provision does not presume aggregate length of service includes all, and any, service with the employer...."

Arbitrator Dorsey's award is attached for your review (Attachment 1).

A quick review of the seniority language at Tab 6 of our initial submission will show that the definitions in both Nanaimo-Ladysmith and Bulkley Valley are very similar to most school districts in the province.

In summary, the language on which the union relies excepts the provisions of C.2.2 and, more importantly, has been determined by arbitrators to mean something entirely different than that purported by the union.

- **Multiple Districts**

For the first time the BCTF has suggested that C.2.2 should be read to include the right of TOCs to port seniority and to port it from multiple districts. This is entirely inconsistent with the purpose C.2.2 was purported to address, inconsistent with existing provisions for TOCs, and inconsistent with Vince Ready's award which gave rise to TOC seniority (Attachment 2, Vince Ready's award, page 15).

As noted above and in the original submission, the context in which the union presented their rationale was to provide a measure of security for teachers who would be leaving secure employment where they had been protected by a number of years of seniority. It is BCPSEA's recollection that the discussion centered around how much security was enough. Ultimately, the parties agreed that a teacher would be able to port up to ten years of such recognized seniority to the new employer, thus maintaining a degree of job security in the face of possible future job redundancies. This purpose and this discussion did not and would not ever bring the issue of TOCs into question — TOCs have no job security in the face of layoffs. In fact, the layoff provisions of most if not all agreements in the province expressly apply only to continuing contract teachers. Accordingly, the union's argument that C.2.2 was intended to permit TOCs to "port" seniority from a number of school districts simply cannot be supported by the existing seniority scheme in the province. In the majority of school districts, the definition of seniority is linked to having a continuous appointment and TOCs do not have a continuous appointment.

Accordingly, BCPSEA maintains that except for the successive, accumulative seniority circumstances described in our initial submission, C.2.2 does not permit the porting of seniority from more than one district.

3. Optional 12-Month Pay Plan

In their submission on this matter, the union argues that this article was intended to provide a minimum standard and that teachers should not be denied the benefits of the new article if their previously negotiated provisions provide an inferior benefit. They further state that every mid-contract modification in this regard since the inception of provincial bargaining has included payment of interest to teachers.

BCPSEA disagrees with this line of argument on two grounds: first, your jurisdiction as an arbitrator is to determine the meaning of the language already negotiated — this is a "rights" arbitration not an "interest" arbitration. The motivation of the union on this point is only relevant if there is any ambiguity to

the language. As BCPSEA noted in our initial submission, the agreed language is clear on its face: clause 1 sets out that the new provisions only apply *"where the Previous Collective Agreement does not contain a provision that allows an employee the option of receiving partial payment of annual salary in July and August."*

The parties clearly had no intention to modify 12 month pay provisions which were already in place and which met the specified criterion – partial payment of annual salary in July and August. The issue of interest was not part of this criterion.

As this is a "rights" arbitration and not an "interest" arbitration, in the face of clear language, the track record of the parties in the past 12 years has no relevance.

Not withstanding that the BCTF's statement is irrelevant for the purpose of this arbitration, it is also not accurate. The Mid-Contract Modification signed in School District No. 6 (Rocky Mountain) dated November 28, 2003 does not include any provision for interest (see Attachment 3).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2006.

Jacquie Griffiths
Managing Consultant, Collective Bargaining Services