

BCLRB No. B221/2011

BRITISH COLUMBIA LABOUR RELATIONS BOARD**BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION**

(the "BCPSEA")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION

(the "BCTF")

PANEL: Michael Fleming, Associate Chair,
Adjudication

APPEARANCES: Delayne M. Sartison, for BCPSEA
Carmela Allevato, for BCTF

CASE NO.: 62911

DATE OF HEARING: November 30, 2011

DATE OF DECISION: December 2, 2011

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 BCPSEA applies pursuant to paragraph 18 of an essential services order set out
in BCLRB No. B132/2011 (the "Order") seeking to have the Board direct that BCTF
members continue all activities with respect to the examination of the oral component of
the Français langue première 12 and Français langue seconde immersion 12e
(together, the "French Oral Exams") at the times currently scheduled or to be
scheduled. Those exams are currently scheduled to commence on Monday, December
5, 2011.

2 BCPSEA also applies seeking to have the Board direct BCTF members to
continue to mark nine identified provincial examinations in the same manner as they
have done in the past.

3 BCTF has advised BCPSEA that its members will withdraw from performing
those activities as part of Phase 1 of the BCTF job action.

4 Given the urgency of the application, the parties appeared at the Board on short
notice and provided only brief submissions setting out their respective positions as well
as a brief summary of the factual background as counsel understood the facts to be at
that time.

5 I am satisfied these issues require an immediate answer and, accordingly, the
decision will be brief.

6 The portions of the Order relevant to this matter read in part as follows:

During Phase 1 job action BCTF members need not:

- Provide any student assessment data to Administrative Officers or the school office, except Grade 12 marks required for graduation, post-secondary applications and scholarship purposes.
- Administer or supervise FSA or any District or Ministry test (consistent with principle in B418/2001).

(para. 6)

The services/activities performed by teachers outside of the regularly scheduled day which will continue to be performed are:

(c) assessment, evaluation and marking.

(para. 13)

II. BACKGROUND

7 The collective agreement between the parties expired on June 30, 2011 and the Order was issued on July 26, 2011. The Order reflects the agreement of the parties and replicates terms in two previous orders between the parties in 2001 and 2005.

8 The Order sets out a list of activities that BCTF members need not perform during Phase 1 of the BCTF job action. Activities not expressly listed must be continued in the normal fashion.

9 BCTF commenced Phase 1 of the job action at the beginning of this current school year.

10 The Employer typically develops a schedule for the French Oral Exams by which students are slotted in each day during the exam period. There are schedules now in place for most, but not all schools.

11 Typically, the activities directly related to the French Oral Exams are performed by BCTF members. In that regard, typically the French Oral Exams begin with a discussion between the teacher and a student regarding the subject matter of the exam. The teacher provides some parameters and the student is then expected to prepare to discuss the subject matter with the teacher, in French.

12 The teacher prepares questions and engages in a discussion and interaction with the student, eliciting responses where appropriate. That process is used to assess and evaluate the student's progress in French. There is also a written component which occurs once all the French Oral Exams have been completed. Together, those tools provide a substantial portion of the student's grade in French.

13 In terms of the marking of provincial exams, BCTF members typically mark the provincial exams listed in the BCPSEA application. Teachers do not generally mark the exams of their own students.

14 Other provincial exams are marked centrally or by a teacher retained specifically for the purpose of marking provincial exams.

III. POSITIONS OF THE PARTIES

15 BCPSEA submits the imminently anticipated withdrawal of services relating to the French Oral Exams and listed provincial exams by BCTF members, is contrary to the Order. In that regard, BCPSEA says that paragraph 6 of the Order, which lists the activities BCTF members need not perform during Phase 1, does not contemplate the withdrawal of services now planned by BCTF.

16 BCPSEA argues that paragraph 13 of the Order contemplates that marking by
teachers is to be distinguished from the administrative duties set out in paragraph 6 of
the Order.

17 BCPSEA submits that paragraph 13 of the Order contemplates that teachers will
continue assessment, evaluation and marking of students, including outside of
instructional hours. That paragraph cannot be reasonably interpreted, it is asserted, as
providing that BCTF members can withdraw those services during the instructional day
but be required to provide them outside of instructional hours.

18 BCPSEA says the teacher's role in the French Oral Exams is an integral part of
teaching.

19 BCPSEA argues that while the Order contemplates that BCTF members are
permitted to withdraw services relating to the transfer of marks to the Administrative
Officer, they are not permitted to refuse to continue marking.

20 BCPSEA submits that in BCLRB No. B418/2001 ("B418/2001"), which is
expressly referenced in paragraph 6 of the Order, the Board confirmed that teachers'
ability to withdraw from administrative duties and supervision, does not encompass
withdrawing from those same duties related to provincial exams.

21 BCPSEA says the marking of the provincial exams in issue relates to courses
that are mandatory for a student to graduate.

22 BCPSEA says there would be unacceptable uncertainty and disruption to the
established schedule, particularly the French Oral Exams, which would be detrimental
to students if the BCTF position in this matter were to be adopted. BCPSEA says that,
in any event as a practical matter, there are very few Administrative Officers who
possess the necessary knowledge and background (i.e., fluent in French and
conversant with the oral exam process) to be in a position to carry out these exams.

23 BCTF submits that BCPSEA is essentially seeking to have the Order varied. To
do so, BCPSEA must establish changed circumstances or that the Order is operating in
an unforeseen way. BCTF says there are no changed circumstances since the date of
the issuing of the Order and it is operating in a manner that was reasonably
foreseeable.

24 BCTF says the Order contemplates that BCTF members are not required to
provide student assessment data to Administrative Officers except Grade 12 marks.
That also applies to the provincial examinations at issue here.

25 BCTF says further that the Order provides that teachers are not required to
administer or supervise FSA, District or Ministry tests.

26 BCTF submits paragraph 6 of the Order distinguishes between administration
and supervision. In that regard, BCTF asserts that the concept of administration is

broader than supervision, encompassing a range of activities such as ensuring students are arranged and physically prepared, providing test booklets, etc.

27 BCTF argues that the provincial exams are a Ministry test and are therefore captured by paragraph 6 of the Order and BCTF members are not, as a result, required to administer, supervise them or mark them.

28 BCTF argues that paragraph 13 of the Order is not intended to apply to District or Ministry tests but rather to manage and evaluate regular student tests and assignments.

29 BCTF says BCPSEA has not met its onus to establish there is no other way for the French Oral Exams or the marking of provincial exams to be done except through BCTF members.

30 BCTF says the issues raised by BCPSEA in this application are properly matters to be discussed and resolved locally by the parties. Any unresolved issues could be referred to the Board for an expedited resolution.

IV. ANALYSIS AND DECISION

31 I find that BCPSEA is not seeking to vary the Order. Rather, the BCPSEA application and the issues between the parties arising from it, require an interpretation of the Order.

32 Given the urgency surrounding this matter, the parties were only in a position to provide brief submissions and a bare outline of the facts. I am therefore reluctant to provide any definitive interpretation of the Order in all the circumstances. However, the parties clearly have a disagreement that requires an expedited answer. Under the circumstances, I am prepared to provide an interim decision reflecting those limitations and my initial views regarding the issues between the parties relating to the interpretation of the Order.

33 The portions of paragraph 6 of the Order relevant to the issues arising here relates to the provision of student assessment data (i.e., marks) to Administrative Officers and the administration and supervision of FSA, District or Ministry tests.

34 In my view, the activities relating to the provision of the French Oral Exams appear to be integral to teaching and are not simply administrative or supervisory in nature.

35 In my initial view, paragraph 13 of the Order is not limited to the assessment, evaluation and marking by teachers outside of instructional hours. A reasonable view would be that it is at least implicit that those activities would also apply to instructional hours. It does not seem to me, on the basis of the information before me, to be a reasonable interpretation of the Order to find that those activities apply only outside of instructional hours.

36 It is my initial view, that the activities relating to the French Oral Exams would fall within the activities contemplated by paragraph 13. Accordingly, in my view BCTF members should be required to continue their activities with respect to the French Oral Exams at the times currently scheduled or to be scheduled unless or until this decision may be varied.

37 Turning to the marking of the identified provincial exams, the relevant portion of paragraph 6 of the Order provides first that BCTF members are permitted to not provide assessment data to Administrative Officers (except Grade 12 marks). My initial view is that paragraph 6 relates to the transmission of information, including marks, by teachers to the Administrative Officer. It would not appear to capture or encompass the actual marking of the provincial exams in issue here.

38 In addition as noted, paragraph 6 of the Order provides that BCTF members are permitted to withdraw from the administration and supervision of FSA, District and Ministry tests. Paragraph 13 requires teachers to continue to provide assessment, evaluation and marks. The Order contemplates, at least implicitly, that those activities including marking would also be performed during instructional hours.

39 I note that it is apparent that teachers are providing marks on assignments and tests. In fact, in BCLRB No. B214/2011, I found BCTF members were providing a range of feedback to students and parents including providing marks on assignments and tests.

40 It is my initial view that the concepts of administration and supervision in paragraph 6 of the Order, do not encompass the marking of the provincial exams in issue here.

41 I note that while in B418/2001, the Board directed BCTF members to continue to perform administration and supervision with respect to provincial examinations, which were at that time limited to Grade 12, it did so without providing reasons.

42 Given my reluctance to provide a definitive interpretation of the relevant portions of the Order at this juncture, as reflected in B418/2001, I find it to be important to try to fashion a practical labour relations outcome, based on my initial view of the interpretation of the Order, on an interim basis. To that end, in keeping with the Section 2 duty to ensure the expeditious resolution of disputes, I am satisfied BCTF members should continue to mark the provincial exams at issue in this case as they have in the past, subject to Administrative Officers being utilized to the best extent possible. The parties should discuss how to implement that direction at the local level.

43 In my view, the parties should ensure that marking is done in a timely manner to ensure a student's progress is not impeded. Any disputes that arise should be dealt with by the parties first using their informal process. If no solution is found, an application can be made to the Board seeking an expedited hearing and resolution either by mediation or adjudication.

44 As noted, this is an interim decision which may be revisited if I am persuaded it would be appropriate to do so.

V. CONCLUSION

45 On an interim basis, BCTF members will continue their activities with respect to the French Oral Exams in the usual manner at the times currently scheduled or to be scheduled.

46 As well, on an interim basis, BCTF members will continue to mark the identified provincial exams as they have in the past, subject to Administrative Officers being used to the best extent possible.

LABOUR RELATIONS BOARD



MICHAEL FLEMING
ASSOCIATE CHAIR, ADJUDICATION