

**BRITISH COLUMBIA  
LABOUR RELATIONS BOARD**

**FAX TRANSMITTAL SHEET**

Re: British Columbia Public School Employers' Association (on behalf of  
all Boards, as defined in the School Act) -and- British Columbia  
Teachers' Federation  
(Section 72(1) - REPORT - Case No. 62037/11)  
(Section 72(2) - ORDER - Case No. 62039/11)  
(Section 72(2) - Case No. 63069/12 - Marking of Provincial Exams)

**DATE:** January 25, 2012

**SENDER:** LABOUR RELATIONS BOARD

**OPERATOR SENDING:** Susan Noble Senior Executive Assistant to  
Michael Fleming, Associate Chair, Adjudication

**TELEPHONE NO:** (604) 660-1329

**INTENDED RECEIVER:**

**FAX NUMBER:**

To: Roper Greyell LLP  
Attention: Delayne Sartison, Q.C.

(604) 806-0933

To: BCTF  
Attention: Carmela Allevato

(604) 871-2288

**NUMBER OF PAGES:** 10 (including this page)

**SPECIAL INSTRUCTIONS:**

Decision BCLRB No. B21/2012 dated January 25, 2012, is attached.

Hard copies will follow by mail.

**\*\*NOTE: FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED  
RECEIVER AS SOON AS POSSIBLE. THANK-YOU**

BRITISH COLUMBIA  
**LABOUR RELATIONS BOARD**

**BY FAX**

January 25, 2012

To Interested Parties

Dear Sirs/Mesdames:

Re: British Columbia Public School Employers' Association (on behalf of  
all Boards, as defined in the School Act) -and- British Columbia  
Teachers' Federation  
(Section 72(1) - REPORT - Case No. 62037/11)  
(Section 72(2) - ORDER - Case No. 62039/11)  
(Section 72(2) - Case No. 63069/12 - Marking of Provincial Exams)

Enclosed is a copy of the Board's decision (BCLRB No. B21/2012) rendered in connection  
with the above-noted matter.

Yours truly,

LABOUR RELATIONS BOARD



Susan Noble, Senior Executive Assistant to  
Michael Fleming, Associate Chair, Adjudication

Enclosure(s)

Interested Parties:

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ATTENTION: Carmela Allevato  
**(Fax: (604) 871-2288)**

BCLRB No. B21/2012

**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, Q.C., for BCPSEA  
Carmela Allevato, for BCTF

CASE NO.: 63069

DATE OF HEARING: January 24, 2012

DATE OF DECISION: January 25, 2012

## **DECISION OF THE BOARD**

### **I. NATURE OF APPLICATION**

1 BCTF applies pursuant to paragraph 18 of BCLRB No. B132/2011 (the "Essential  
Services Order") seeking a clarification that teachers are only required to mark Grade  
10 Language Arts and Grade 11 Social Studies provincial exams if there are not enough  
administrators in the school district who are members in good standing in the B.C.  
College of Teachers (the "College").

2 BCPSEA opposes that application and seeks to have the Board issue a final  
decision declaring that, under the Essential Services Order, teachers are not permitted  
to withdraw from marking provincial exams.

3 In the alternative, BCPSEA seeks confirmation that, under a previous interim  
decision in BCLRB No. B221/2011 between these parties ("B221/2011"), the usual  
expectation that the open content of provincial exams will be marked by educators with  
current or recent experience teaching the courses examined, is to remain in place.

4 The process for the marking of the exams in issue will begin on January 26, 2012  
and the marks must be returned by January 31, 2012. Accordingly, I am satisfied this is  
a matter of urgency which requires an expedited decision.

5 The parties provided written submissions and attended at the Board to engage in  
a mediation/adjudication process to deal with the issues between them. While progress  
was made in exploring a viable solution, the parties were unable to reach an agreement  
and accordingly, an expeditious answer is required.

### **II. BACKGROUND**

6 The collective agreement between the parties expired on June 30, 2011 and the  
Essential Services Order was issued on July 26, 2011.

7 The Essential Services Order sets out a list of activities that BCTF members  
need not perform during Phase 1 of the BCTF job action which has now been under  
way since September 2011.

8 The portions of the Essential Services Order relevant to the 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)

9 The exams in issue involve written essay answers, the marking of which is often referred to as "local marking". But for Phase 1 of the BCTF job action, that marking would be done by BCTF members.

10 In B221/2011, I provided an interim order directing that teachers were to continue marking provincial exams subject to administrators being used to the best extent possible.

### 11 III. POSITIONS OF THE PARTIES

11 BCTF submits that in giving effect to the term "to the best extent possible", recent teaching experience in the subject matter examined is not necessary in order for an educator to mark the exams in issue. The BCTF says that any administrator who is a member in good standing of the College is competent to mark the exams.

12 In support of its argument, the BCTF points to the Ministry of Education 2011-2012 Handbook of Procedures for the Graduation Program (the "Ministry Handbook") which indicates that markers of provincial exams must be in good standing in the College and should have current or recent experience in teaching the subject examined or be competent to assess students' responses with appropriate prior training.

13 BCTF argues the Ministry provides a one day training session for provincial exam markers. As well, exams come with rubrics for marking which contain a list of possible answers for the exam questions.

14 BCTF says that generally, administrators are required to hold a Bachelor of Education degree and most hold a Masters degree in some education related subject. In addition, the BCTF argues that administrators generally evaluate teachers who

normally mark the exams. Those considerations, together with the rubric and the one day training means administrators are competent to mark the exams in issue.

15 BCTF underscores its argument by noting that the BCTF and its members are involved in a lawful job action which by its nature means that it is not "business as usual".

16 BCPSEA submits that, but for the Phase 1 job action, the marking of the exams in issue would be done by teachers who currently or recently taught the subject matter examined.

17 BCPSEA argues that typically, markers already possess the knowledge of the subject matter and that knowledge is supplemented by the one day training session and the rubric.

18 BCPSEA says that, while the Ministry Handbook does not state a marker must have current or recent experience teaching the subject matter examined, that quality is clearly contemplated in the Ministry Handbook. BCPSEA says further there are no courses or training available (other than the one day session) for educators involved in local marking. The one day session only deals with how to apply the rubric and does not provide any training relating to the subject matter examined.

19 BCPSEA essentially submits that marking the exams in issue requires a degree of judgment and recent experience in teaching the subject matter examined allows the marker to be able to properly assess the validity or acceptability of answers other than those provided as examples in the rubric.

20 BCPSEA says that students whose exams are marked by administrators with no recent experience in the subject matter examined and with only one day training, will be put at a distinct disadvantage as compared to those students whose exams are marked by teachers or an administrator with current or recent subject matter experience. BCPSEA says that disadvantage is in the context of the exams making up about 20% of the student's final mark.

21 BCPSEA argues that while B221/2011 was an interim order, it did not permit teachers to withdraw from marking provincial exams. BCPSEA goes on to say the Board should now provide a final determination that teachers cannot withdraw from marking the exams at issue under the Essential Services Order.

22 In the alternative, BCPSEA asserts that the Board should confirm that the reference to the use of administrators to the best extent possible in B221/2011 should be interpreted to mean that local marking will be performed by educators with current or recent experience teaching the course examined.

#### IV. ANALYSIS AND DECISION

23 During Phase 1, excluded staff are to perform their own work which is essential,  
as well as bargaining unit work which the Essential Services Order contemplates BCTF  
members can withdraw from, to the best extent possible: *British Columbia Public School  
Employers' Association*, BCLRB No. B193/2011, para. 32.

24 In B221/2011, I expressed my reluctance to provide a definitive interpretation of  
the Essential Services Order at that time given the time constraints and resulting brevity  
of submissions, facts and arguments advanced by the parties. I did, however provide  
the interim decision "reflecting those limitations and my initial views regarding the issues  
between the parties relating to the interpretation of the Order": para. 32.

25 In this matter, while the right of BCTF members to withdraw from marking  
provincial exams under the Essential Services Order has been put in issue by BCPSEA,  
given the limited nature of the submissions the parties were able to provide under the  
circumstances and the time considerations surrounding this decision, I am not prepared  
to provide a definitive answer to the interpretative issue sought by BCPSEA at this time.  
If such a definitive answer were to be provided, it should be in the context of more  
fulsome submissions, arguments, evidence and reflection.

26 Having said that, the parties require some immediate direction regarding how  
the exams are to be marked. Accordingly, I am prepared to provide an interim decision  
designed to give some guidance and direction to the parties reflecting what is, in my  
view, a practical labour relations outcome under the circumstances.

27 In B221/2011, I concluded that BCTF members should continue to mark the  
provincial exams in issue in that case, subject to administrators being used to the best  
extent possible. In this matter, the parties essentially disagree about the meaning to be  
given to that phrase in the circumstances of this case.

28 In providing an answer to resolve that disagreement, it is necessary to bear in  
mind the context of this issue. In that regard, as noted in *British Columbia Public  
School Employers' Association*, BCLRB No. B214/2011, in a controlled strike such as  
this one, the Board attempts to preserve the ability of the parties to apply economic  
pressure to the extent possible, while protecting the public interest, through the  
designation of essential services.

29 While the Board has recognized that under Section 72 there is a public interest in  
the ability of a union to retain a limited right to strike in order to advance its bargaining  
objectives, that right is exercised through the vehicle of the controlled strike: *Fraser  
Health Authority and Burnaby Hospital*, BCLRB No. B334/2002 (Leave for  
Reconsideration of BCLRB No. B228/2002).

30 As is contemplated under Section 72, there is also a public interest in the protection against the immediate and serious disruption of the provision of educational services during a labour dispute in education.

31 As noted in BCLRB No. B193/2011, notwithstanding the fact the parties are involved in a very difficult and contentious bargaining dispute, the Board's expectation is that during Phase 1, the parties will ensure that student educational interests remain an important focus and that in advancing their respective bargaining objectives, they will also ensure that student educational outcomes are not unduly prejudiced: see para. 46.

32 The parties generally accept the utility of resolving issues of this nature at the local level. In fact, I understand that the parties have been able to resolve this issue at the local level in a number of school districts. I understand that, not surprisingly, there is a range of solutions across the school districts in which the parties have found a solution. However, there are a number in which the parties have been unable to find a solution, hence the need for this decision.

33 In my view, while it is appropriate to provide an interim decision which can be re-visited at the appropriate time, it is necessary that the outcome provided here be as simple and provide as much certainty as possible in order to give the parties enough guidance regarding how the imminent marking of exams should occur.

34 My view is that the phrase "to the best extent possible" can best be given effect in the circumstances of this case by having regard to whether or not an administrator has sufficient subject matter expertise.

35 In that regard, the parties differ regarding the importance of direct knowledge of the subject matter examined. In its direction to school districts, BCPSEA has provided its view that in the context of Phase 1, there is some flexibility in the concept of current or recent experience in the subject matter examined and to that end, administrators marking the exams should have experience teaching the subject matter examined within the past three to five years.

36 The BCTF takes the view that any administrator, who is a member in good standing of the College, is competent to mark the exams regardless of whether they have any direct experience with the subject matter examined at any time in their career.

37 While it would appear that in a number of school districts the parties have agreed to the parameters suggested by BCPSEA, in others, different arrangements have been put in place. This reflects the fact the parties have agreed to a range of local solutions but provides little real assistance for the purposes of my decision beyond the fact that range exists, because details of the local arrangements are not available at this time. It is not possible to know if they could provide any legitimate basis for guiding the determination required in this case.

38 In my view, there is some merit to the positions of both parties. I accept that administrators are highly skilled professionals who have at least a general knowledge of



curriculum, and teaching methods and who assess teachers, including those who mark the exams. I accept the point that Phase 1 means it is not "business as usual" and understand BCTF's interest in being able to advance its bargaining objectives as much as possible within the confines of the controlled strike.

39 However, I also accept that a degree of familiarity with the subject matter examined would allow the administrator to be in a much better position to assess the appropriateness of a range of answers and would be very useful in the marking of the exams.

40 Viewed from the perspective of an objective outsider to the educational system, a lack of familiarity by an administrator with the specific material examined either because an administrator has no experience teaching it, or as a result of a significant hiatus in the teaching of it, may well put those students whose exams are marked by those administrators, at a distinct disadvantage to those marked by educators with recent experience teaching the subject matter. That concern is heightened by the fact these exams represent roughly 20% of the student's final grade and are therefore important to the student's educational outcome.

41 Based on the limited information available, I understand that the current local marking system was put in place in about 2004. I also believe that the curriculum for Social Studies was changed at about the same time and the curriculum for English was likely changed at about the same time as well. Accordingly, any administrator with direct experience with the subject matter being examined within that time frame (i.e., 2004 to 2012) would have knowledge and experience that would be reasonably proximate to the current local marking system and curriculum.

42 Under all the circumstances, and based on the limited information available at this time, I am satisfied that for the purposes of determining what meaning should be given to the term "to the best extent possible" in the circumstances of the marking of the exams, an administrator would have sufficient subject matter expertise if they have direct experience (i.e., teaching) with the subject matter examined within the last eight years.

43 I am also satisfied that, under the circumstances, any administrator who has taught Grade 10, 11, or 12 English during the last eight years, would have sufficient subject matter expertise to mark the Grade 10 English exams, for the purposes of this decision.

44 I appreciate that the parties have reached a range of outcomes in their local agreements which may not entirely reflect this decision. However, those local agreements should remain in effect and unaltered by this decision. As well, the parties are free to, by mutual agreement, enter into other local agreements or arrangements reflecting local conditions and realities, which have different terms than this decision particularly where their local discussions are well advanced.

45 In summary, on an interim basis, BCTF members should continue to mark the provincial exams at issue as they have in the past, subject to the administrators being utilized "to the best extent possible" as that phrase is given effect in this decision.

46 The parties should ensure that marking is done in a timely manner, as currently scheduled, in order to ensure a student's progress is not unduly impeded.

LABOUR RELATIONS BOARD

A handwritten signature in black ink, appearing to read 'Michael Fleming', written over a horizontal line.

MICHAEL FLEMING  
ASSOCIATE CHAIR, ADJUDICATION