

LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

BRITISH COLUMBIA TEACHERS' FEDERATION

UNION

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

EMPLOYER

(Remedy Clarification – Three Paid Release Time Questions - Grades 4 - 12 Class Size
and Composition: 2006-07 and 2007-08 School Years)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Carmela Allevato and George Popp
Representing the Employer:	Judith C. Anderson and Brian Chutter
Date of Hearing:	February 11, 2010
Date of Decision:	February 22, 2010

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1. Agreed Resolution Process and Clarification of Three Remedy Issues

[1] The union and employer have agreed to a dispute resolution process for the classes covered by the 2006-07 and 2007-08 school years grievances that were not chosen for hearing in the representative school hearing process and decision (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 81 (Dorsey) (QL)). The agreement allocates some categories of alleged class size and composition violations for two-party resolution by the local union and district board of education employer and other categories for four-party resolution by the two local parties together with the BCTF and BCPSEA. The list of available remedies is drawn from the recent remedial decision (*British Columbia Public School Employers' Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL)).

[2] Impasses in the local two-party process can be referred to the provincial four-party process. Impasses in the provincial four-party process may be referred under an agreed expedited arbitration process to one of four agreed arbitrators. In the expedited arbitration process, efforts may be made to achieve an agreed statement of facts before the hearing; lawyers will not be used to represent parties; testimony from witnesses will only be heard at the arbitrator's request; presentations are time limited; and final and binding without prejudice and precedent decisions must be issued within three working days. Unless otherwise agreed, certain impasse issues will be referred to me for formal arbitration in accordance with my jurisdiction over the two school year grievances.

[3] To complete this dispute resolution agreement, the union and employer have requested clarification and final and binding decisions on three issues relating to the implementation of paid release time compensation remedies. The three issues are: (1) calculation and allocation of paid release time when a partial month is taught by a temporary contract teacher; (2) the fraction (1/7 or 1/8) or percentage (12.5% or 14.285%) to be used to calculate paid release time for secondary grade classes; and (3)

scheduling remedial paid release time.

2. Calculation When Partial Month Taught by Temporary Teacher

[4] To help achieve the shared goal of fashioning a “structured approach that provides predictability and efficiency in resolving many, if not most, differences over classes that exceed the legislated class size and composition standard”, I ordered a formulistic remedial approach that has an element of inexactitude, but is intended to provide the foundation for “practical and expeditious” dispute resolution (*British Columbia Public School Employers’ Association* [2009] B.C.C.A.A.A. No. 81 (Dorsey) (QL), ¶ 12).

Review and analysis of the particulars of all classes in dispute in both school years has drawn me to a four tier formula with a limit on the total number of paid release days as a reasonable balance among the interests of equitable compensation, an efficacious formula and potential for settlements that minimize disruption for students. (*British Columbia Public School Employers’ Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL), ¶ 169)

The enrolling classroom teacher will be awarded the full tier remedy for the FTE teaching assignment for the applicable duration, which can be less than the full nine months if the class did not exceed the standard for the full nine months or the teacher was on leave for a portion of the year. If there is a leave of absence, as was the case for Ms. Lambright at Thornhill Elementary School, then a substitute teacher with the replacing temporary assignment, not teachers-on-call, will be entitled to the applicable tier remedy for the period of substitution.

The applicable tier remedy will not be limited to the instructional time in the classroom with the students, which might be less than 100% of the FTE assignment because a portion is preparation time or time spent with school or teacher organized reading groups or other activities. In addition, the preparation relief teacher, who teaches the same class music, library, computer skills or another subject, might also be entitled to pro-rated paid release time for the instructional time with the class, but not including a pro-rating of that teacher's preparation time. As a consequence, because of preparation time entitlements under the collective agreement, in some grades and school circumstances, a class will attract a total remedy among affected teachers of the class that is higher than 100% of the applicable tier.

There is an element of inexactitude in this formulistic approach borne from a need for practical and expeditious class size and composition dispute resolution. It is not predicated upon and seeks to avoid highly individualized inquiries into all facets of each class that characterized the representative class hearings. ...

This four tier formulistic remedial approach does not account for a burden teachers must bear in September; precise student numbers; variations in student personalities and abilities; differences in students with different special needs category designations; the mix of designations in a class; school supports for individual students in a class or the entire class; or teacher experience, expertise

and coping abilities. Allowing compensation greater than 100% of the applicable tier in some circumstances and including preparation time for the enrolling classroom teacher and not for the preparation relief teacher are inexactitude consequences of having a more easily administered approach. (*British Columbia Public School Employers' Association* [2010] B.C.C.A.A. No. 1 (Dorsey) (QL), ¶ 174 - 177)

[5] One aspect of the remedy, not enlarged upon in the decision, has attracted differing interpretations by the union and employer. For each of the four tiers, the compensatory remedy is paid release time “for each month, or part thereof, that an employer has contravened sections 76.1(2.2) and (2.3) of the *School Act*” (*British Columbia Public School Employers' Association* [2010] B.C.C.A.A. No. 1 (Dorsey) (QL), ¶ 170 – 173).

[6] The employer submits the phrase “or part thereof” expresses an intention that entitlement to the applicable tier release time remedy is to cease when the class comes into compliance with the grade level class size and composition standard and the applicable tier release time remedial entitlement is to be apportioned on the basis of the portion of the month the class was not in compliance. Otherwise, at the extreme, a teacher will receive the applicable tier monthly paid release time for a class that is in contravention for only one school day in the month. That would be overcompensation.

[7] The union correctly interprets that it was, and is, my intention that in calculating remedial entitlement the full monthly paid release time for the applicable tier applies for each month and for each “part thereof.” A partial month contravention generates the same remedial entitlement as a contravention for a full month. The applicable tier monthly paid release time applies whenever there is a contravention in a month for as short a duration as one day in the month.

[8] It was not intended to pro-rate the applicable tier paid release time for a month in which the class was in contravention for a part or fraction of the month. It was not intended, in a month when the size or composition of a class changes with the result that the class comes into compliance with the grade level class size and composition standard or reduces to the sum of the number of students in the class and the number of students in the class with an individual education plan for a lower tier remedy, that the remedial paid release time tier applicable at the first day of the month is to be pro-rated

on the basis of the number of calendar, school or instructional days in the thirty-one, thirty, twenty-eight day or twenty-nine day month in which the class was in contravention.

[9] This approach is open to being characterized as providing a remedy for a time during a month in which there was no contravention or providing a higher tier remedy for a portion of a month when a lower tier remedy could be applicable. Without taking a broader perspective, this could be characterized as inequitable overcompensation or a form of unjust enrichment. The same could be said of other aspects of the remedial formula while ignoring those aspects that could be characterized as an inequitable under compensation.

[10] This inexactitude is a consequence of having a remedial formula that lends itself to easier and, hopefully, less contentious and costly administration. It is intended to provide predictable, meaningful and easily administered remedies, not engender debates about the precise calculation and administration of paid release time for situations when a class size or composition change occurs on the fifth or twenty-fifth day of a month. It is one part of a broader approach to fashioning a practical and efficacious remedial formula.

[11] The union and employer accept that in circumstances when a teacher entitled to a paid release time remedy is absent for one or more days in a month and is replaced by a teacher-on-call, the absence does not diminish the teacher's paid release time entitlement. The union and employer disagree on what is to occur when a teacher is replaced by a temporary contract teacher for a portion of a month. Is the paid release time pro-rated or are both teachers entitled to the full paid release time for the month?

[12] The union acknowledges the applicable tier remedial paid release time should be pro-rated when teachers job share or team teach or in the situation of leave for union business, as in the case of Cathy Lambright at Thornhill Elementary School in School District No. 82 (Coast Mountains), because these situations of concurrent assignments for the class are analogous to having one teacher assigned to the class. However, the union advocates the full applicable tier paid release time remedy for both the classroom teacher and the temporary contract teacher who assumes the teacher's assignment for

the month in which they have consecutive, rather than concurrent, assignments for the class. The rationale is that one teacher stops responsibility and the other teacher begins responsibility for teaching the class in the month and each teaches the class for a part of the month.

[13] The employer submits pro-rating of paid remedial release time applies in a month in which a temporary contract teacher replaces a teacher entitled to a paid release time remedy.

[14] The remedy decision explained: “because of preparation time entitlements under the collective agreement, in some grades and school circumstances, a class will attract a total remedy among affected teachers of the class that is higher than 100% of the applicable tier” (*British Columbia Public School Employers’ Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL), ¶ 176). It was not intended that an absence by a classroom teacher would be a circumstance that would increase the total remedy among affected teachers higher than 100% of the applicable tier paid release time remedy. I specifically decided: “If there is a leave of absence, as was the case for Ms. Lambright at Thornhill Elementary School, then a substitute teacher with the replacing temporary assignment, not teachers-on-call, will be entitled to the applicable tier remedy for the period of substitution” (*British Columbia Public School Employers’ Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL), ¶ 174).

[15] The “period of substitution” for a temporary contract teacher does not pre-date the commencement of the temporary assignment. And the intention is that, except for circumstances of preparation relief entitlement, which is not applicable in secondary grade classes, the total remedial paid release time is not to exceed the maximum for the tier. The reconciliation of these propositions is to pro-rate the applicable tier paid release time for the month between the enrolling and temporary contract teacher.

[16] In the circumstances when the class size and composition has changed to achieve compliance with the grade level class size and composition standard before the temporary contract teacher’s assignment commences, the temporary contract teacher will have no entitlement and the classroom teacher will have entitlement to all the applicable tier paid release time for the month.

[17] The clarification is that applicable tier remedial paid release time is to be pro-rated between the full time teacher(s) of the class and a temporary contract teacher of the class. The total amount of the paid release time is not to exceed the applicable tier paid release time for the month.

3. Basis for Calculating Paid Release Time for Secondary Grade Classes

[18] A full-time secondary school teacher with a 1.0 FTE assignment will typically teach in two semesters, which have four blocks of classes in each semester. The teacher will teach in four blocks in one semester and three in the other. The eighth block will be a preparation block used to prepare lessons and activities, plan, mark assignments and exams, consult other teachers and specialists, communicate with parents and attend to administrative and other matters.

[19] Elementary school teachers have scheduled preparation time during which their classes are taught by preparation relief teachers who teach the class “music, library, computer skills or another subject” (*British Columbia Public School Employers’ Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL), ¶ 175). In those situations, both the enrolling and preparation relief teachers teach the same class attracting a remedy and each receives a paid release time remedy that might total more than 100% of the applicable tier paid release time remedy.

[20] The union submits an application of this approach in the secondary school semester system requires attributing one-seventh (14.285% or 0.143) not one-eighth (12.5% or 0.125) of a full-time teacher’s workload to the class in contravention of the applicable grade level class size and composition standard. This is a change from the union’s position in the original remedial hearing when it used 12.5% to calculate secondary school teacher paid release time (*British Columbia Public School Employers’ Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL), ¶ 106). The union submits:

The Remedy Award applies the remedy to elementary school teachers at 100% of their workload, not their teaching load, so that they are receiving compensation based on their total working hours, not total hours teaching the class.

The same logic must apply to secondary teachers; they must have the ability to be compensated for 100% of their workload if all of their classes are in violation of Bill 33.

If a secondary teacher has all 7 classes in violation of Bill 33, the teacher needs to be compensated at 1/7 of a FTE for each class in order to be compensated for 100% of their workload, teaching hours plus paid preparation hours.

To compensate a secondary teacher at 1/8 of her workload for each class in violation of Bill 33 would be to provide no compensation for the period of time in which a teacher is performing preparation for the class.

While the BCTF's initial submission on remedy was rejected, Arbitrator Dorsey clearly recognized that teachers are entitled to be compensated for the workload of the class, teaching plus prep time, not just the teaching hours of the class. Arbitrator Dorsey's decision, and BCTF's revised position, is consistent with the nature of preparation time and with arbitral jurisprudence. (*Outline of Union's Submission on Remedy Issues*, p. 2)

[21] The union supports its position with reliance on decisions in which paid preparation time for less than full-time teachers was calculated at one-seventh of instructional time (*Howe Sound School District No. 48* [1995] B.C.C.A.A.A. No. 165 (Williams) (QL); *Nanaimo-Ladysmith School District No. 68* [2004] B.C.C.A.A.A. No. 328 (Glass) (QL); *British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 113 (Pekeles) (QL)). The employer submits prior decisions concerned with calculation of pay have no relevance to this issue of remedy for contravention of class size and composition standards.

[22] The employer submits this approach is an attempt by the union to relitigate an issue that was not in dispute and not a request to clarify an issue. The union seeks to allocate 0.125 FTE to seven blocks and 0.143 FTE to one block for a total of 1.018 FTE. The union does this for all situations although entitlement to paid preparation time for secondary teachers often depends of their contractual status (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 113 (Pekeles) (QL); *Nanaimo-Ladysmith School District No. 68* [2004] B.C.C.A.A.A. No. 328 (Glass) (QL)).

If the Union's position is accepted, a teacher ... could receive 0.125 or 0.143 depending on her contractual status. There is no support in legislation, in prior class size/composition awards, or in other authorities to support a different remedy for a teacher that is tied to her/his contractual status.

It is not a reasonable outcome for a teacher ... to receive more remedy or less remedy on a factor totally unrelated to the class for which the remedy is awarded. (*Outline of Argument of the Employer*, ¶ 16 – 17)

[23] On this question, the union, after the fact, seeks a departure from the shared assumption in the original remedial hearing that one-eighth or 12.5% is the appropriate and applicable basis for calculation of a remedy for a secondary grade class. It also

seeks an added exactitude in the remedial formula that is a harbinger for further disputes depending on a teacher's contractual status and its preparation time consequences under the collective agreement provision applicable in the school district.

[24] I confirm and clarify that the calculation of a teacher's remedial paid release time for a secondary grade class is based on a semester class being one-eighth or 12.5% of the workload of a full-time teacher.

4. Scheduling Remedial Paid Release Time

[25] The difference between the union and employer on the character of remedial paid release time is reflected in the language they choose to describe the paid time away from work. The union speaks of remedial paid release time in the same manner as bereavement, jury duty, sickness or other time away from work over which neither the teacher nor the employer has control. There is an entitlement to these absences from work. The leave is taken and the employer must accommodate it. The employer speaks of remedial paid release time as time to be scheduled that does not disrupt operational requirements. It is subject to administrative review similar to personal or discretionary leave under the collective agreement. It may be requested with lengthy advance notice, but must be approved close to the time it is to be taken to ensure teachers-on-call are available.

[26] Some differences in scheduling remedial paid release time were anticipated in the remedial decision.

Paid release time is to be taken at a time chosen by the teacher for whatever use the teacher decides after giving notice in accordance with the collective agreement provisions or employer's policy or practice for teacher absences.

Normally, the paid release time must be taken within the current school year. Because it is now the middle of the 2009-10 school year, the paid release time ordered in this decision for teachers at Thornhill Elementary School may be taken in the 2010 calendar year. That board of education will know at the end of June any residual liability it has for the 2010-11 school year arising from this decision.

If any teacher is no longer employed by a board of education or on leave during 2010, the teacher will be paid an equivalent amount in salary without an additional percentage for benefits. (*British Columbia Public School Employers' Association* [2010] B.C.C.A.A.A. No. 1 (Dorsey) (QL), ¶ 178 – 182)

[27] The remedy is for a contravention of the *School Act* for which the burden was

primarily borne by the teacher. The balance of control over implementation of the remedy was deliberately assigned to the teacher who may chose the time and use for the paid release time. Routinely, board of education employers must manage unplanned absences of one or more teachers for a variety of reasons, such as individual illness or flu epidemics, and for planned absences of several teachers on the same day, as happened in the hearings on representative schools.

[28] Relying on teachers' professional commitment to the educational program and welfare of their students, their collegial workplace culture and the ability of employers to manage in a complex and routinely changing environment, the only requirement placed on teachers taking remedial paid release time was administrative notice to the employer in accordance the collective agreement or local policy or practice.

[29] The approach is that the paid release time is a remedy over which the employer, whose contravention caused the remedy, may exercise no control. If notice is given, the date selected by the teacher is not subject to prior approval by the employer. This paid release time is not "leave." It is not similar to negotiated discretionary or personal leave over which the employer might have authority through review and approval processes.

[30] To specifically answer a question posed by the employer, the teacher has "an unfettered right to take a paid release day on any day requested regardless of the timing and activities scheduled for that day, for example, professional development days, in-service, end of term, parent-teacher interview days, students assessment/evaluation days, etc., or the availability of a qualified teacher-on-call for the class on the day requested?" I add that it was stated teachers in one school have selected days in April and May that might present a challenge for the employer, but not dates that will surely disrupt an educational program, adversely impact students, disrupt planned school activities or seriously inconvenience colleagues.

FEBRUARY 22, 2010, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey