Volume 1, Issue 2

October 2003

Human Resources Digest

Edu-Law Education H.R. Digest

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SCHOOL BOARDS: TEACHERS

Discipline

Teacher Disciplined for off-duty conduct

The issue of discipline for off duty conduct was recently reviewed in a British Columbia arbitration decision involving the Board of School Trustees of School District #20 (Kootenay-Columbia) and Kootenay Columbia Teachers Union.

The grievor, a teacher with twelve years' experience, received a three-day suspension without pay for off-duty conduct. The grievor, while at a local bar with friends, saw and spoke with two minor students who she knew and who attended the high school where she taught.

Although the grievor knew that at least one of the students was a minor, she did not approach management to inform them. But, at the end of the evening, just before closing, the bartender approached one of the students and asked for her identification. The grievor, rather than confirming that the student was underage, made a scene.

The school board and the union presented different theories regarding why the grievor interceded when the bartender was asking for identification. Nevertheless, the arbitrator found that the students could have considered the grievor's actions to be approval of their presence at the bar.

In determining whether discipline should be imposed, the arbitrator reviewed a speech by Justice La Forest presented in 1997 at a conference of the Canadian Association for the Practical Study of

Law in Education, and particularly the following passage:

Teachers occupy positions of trust and confidence and exert considerable influence over their students. They are in a very real sense "role models" for their students. As a result, it is not enough for teachers to merely "teach" these values. We also expect them to uphold them, and this may involve their activities both inside and outside the classroom. Needless to say, however, teachers, like other citizens, enjoy rights of privacy, and to a considerable extent their off-duty activities should not be subject to external scrutiny. However, where teachers, by their extra-curricular conduct, displace the trust and confidence reposed in them by the community and thereby disrupt the educational experience of their students, society has an interest in intervening.

The arbitrator also referred to a decision of the Supreme Court of Canada in *Ross v. New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1, which is consistent with the above-noted quote. Further, the arbitrator referred to the decision of the British Columbia Court of Appeal in *Shewan et al. and Board of School Trustees of School District No. 32* (Abbotsford) (1987), 47 D.L.R. (4th) 106, also consistent with the above-noted quote.

The arbitrator, in determining the appropriate discipline, also considered the fact that the community in which the teacher taught was a small one.

The arbitrator held that, in the circumstances, the school board had reason to discipline the grievor:

... without discipline, there was a risk that the administration of the school system could be brought into disrepute and the confidence of the community in the public system undermined.

However, the three-day suspension originally imposed was reduced to a one-day suspension because the arbitrator did not believe that the school board had considered the teacher's long employment history. Moreover, the arbitrator also believed that the school board acted on an exaggerated view of what took place at the bar.

This case once again illustrates that the private lives of teachers may be scrutinized when conduct impacts on the public's perception of the teaching profession and school system.

Board of School Trustees of School District #20 (Kootenay-Columbia) v. Kootenay Columbia Teachers' Union (February, 2003) (B.C. Arb.)

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Personal relationship between teacher and student found to be appropriate

The grievance arbitration in **Bryant v. New Brunswick School District 17** was the result of an anonymous letter of complaint received by the school board concerning an alleged "unhealthy" relationship between a grade 9 teacher and a grade 9 student in the school. Both the teacher and the student were female and had a relationship that was not confined to the school, but included activities outside the school.

As a result of the complaint, the school board conducted an investigation, which was undertaken by a third party and included interviews with 15 witnesses. As a result of the investigation, the school board determined that two of the four allegations raised in the letter were "founded" or "founded in part". The discipline imposed was a transfer to another school and a requirement to take part in counselling. The teacher, Bryant, filed a grievance alleging that the findings by the school board were without merit. The grievor also challenged the process that resulted in her discipline.

The third party investigator provided the school board with a written report containing a summary of findings, an analysis of the issues and copies of the interview transcripts. The report formed the basis for school board's decision to discipline the grievor.

The report found that the relationship between the grievor and the student was unprofessional and presented concerns because of the significant amount of time spent with the student, which appeared to other students to place the student in a position of privilege. The school board concluded:

As a teacher, you are in a special position of trust and responsibility with students. That trust relationship comes into question when both students and teachers begin to remark about the unusual amount of time spent by a teacher with one student. Teachers are there for all students. By spending so much time with M you are in fact isolating her socially from her peers and in the eyes of other teachers this creates an unhealthy situation.

The school board also found that the teacher had permitted the student to be in the presence of a convicted sex offender during a social event not related to the school.

The arbitrator considered it very significant that the grievor and the student's mother were close friends and that the student's mother knew of the extent of the contact between the grievor and the student and approved of their relationship.

With respect to the allegations regarding the board's process, the arbitrator indicated that the grievor should have been provided with an opportunity to review the report and the appended statements before meeting with the superintendent, as she "*might have been able to demonstrate its apparent inadequacies*". The arbitrator found that the employer breached its duty of fairness in the manner in which it conducted its interview with the grievor prior to imposing the discipline. The arbitrator found that this breach by the employer was sufficient to overturn the discipline imposed.

Further, the arbitrator found that the evidence gathered by the school board did not support the conclusion that the grievor's conduct toward the student would suggest favouritism, and there was no evidence to support the conclusion reached by the school board that the time spent by the grievor with the student isolated the student from her peers.

The arbitrator held that, contrary to the Board's findings, the relationship between the grievor and the student was a positive one. The grievance was allowed, the discipline imposed by the school board was quashed, and the grievor was ordered to be compensated for lost wages and benefits in

accordance with the collective agreement.

It was apparent that the arbitrator was greatly influenced by the fact that the relationship between the teacher and the student was condoned by the student's mother. It should also be noted that there was no suggestion that the relationship between the teacher and the student was sexual. In addition, there was no evidence of "sexual grooming". Query whether the arbitrator would so easily accept these circumstances had either the student or the teacher been male?

Bryant v. New Brunswick School District 17, [2003] N.B.L.A.A. No. 14 (N.B. Lab. Arb.)

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Video surveillance contrary to federal privacy Act

The issue referred for grievance arbitration in **Ross and Rosedale Transport Ltd.** was the termination of a long-standing employee with a good employment record using video surveillance information, which disclosed that the employee, while assigned to clerical and administrative responsibilities as a result of a back injury sustained on the job, was lifting articles of furniture during his family's move to a new home.

The grievor requested a one-week vacation in order to assist with his family's relocation. His manager, who suspected that he was malingering and deliberately not resuming his duties as a driver/associate, engaged the services of a private detective to conduct surreptitious video surveillance while the grievor was assisting with the move.

The video surveillance demonstrated, in the employer's opinion, a case of fraud on the part of the grievor which justified his dismissal. The grievor had been video-taped lifting and carrying furniture from his home to the moving truck. During a meeting with the grievor the employer told him about the video surveillance in which he was observed lifting and carrying heavy objects, and the employer indicated that, unless the grievor resigned his employment, he would be terminated.

Counsel for the grievor objected to the admissibility of the video surveillance on the grounds that it constituted a collection of "personal information" without the grievor's consent, contrary to the federal *Personal Information Protection and Electronic Documents Act*. The arbitrator agreed, finding that the video was not a reasonable collection of personal information "*for purposes related to investigating a breach of an agreement*" within the terms of section 7(1)(b) the Act, which permits the collection of personal information without consent in limited circumstances. The arbitrator, in determining how section 7 should be applied, relied on the case law regarding video surveillance generally, and specifically on the decision in **Re Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees** where the adjudicator stated that:

Surveillance is an extraordinary step which can only be resorted to where there is, beforehand, reasonable and probable cause to justify it. What constitutes such cause is a matter to be determined on the facts of each case.

The arbitrator did not find the actions of the employer reasonable because there was no evidence that the grievor had been anything but a reliable and honest employee. There was no history of fraudulent claims for insurance benefits, and the employer did not exercise its discretion to ask for an independent medical examination to refute the findings of the grievor's family physician. The arbitrator held that the video was not admissible, as:

… the collection of this personal information in the form of the video surveillance tape was not reasonable for any purpose related to the investigation of a breach of the employment agreement. Its collection without the knowledge and consent of Ross violated section 7(1)(b) of the Act.

The employer did not have any further evidence to offer, thus the grievance was upheld.

It should be noted that there are significant distinctions between the federal *Personal Information Protection and Electronic Documents Act* and the *Municipal Freedom of Information and Protection of Privacy Act* ("MFOIPOP"), which applies to school boards. Arguably, MFOIPOP would not apply to similar circumstances involving school board personnel in view of the specific exceptions relating to labour relations. Consequently, this decision may not be of particular consequence or concern for school board labour relations matters at this time. However, it is anticipated that provincial legislation similar to the federal Act will be tabled by the new provincial government. The legislation is expected to have similar provisions and could likely have a similar effect on labour relations matters, in which case, decisions such as *Ross* need to be kept in mind.

Ross v. Rosedale Transport Ltd., [2003] C.L.A.D. No 237, (Can. Lab. Arb.)

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SCHOOL BOARDS: SUPPORT STAFF

Discipline

Assault against student justifies termination of groundskeeper

In **Canadian Union of Public Employees, Local 723 and. Campbell River School District No. 72,** a grievance was filed relating to the termination of a groundskeeper/janitor for the use of threats and violence against fellow employees and a student. The grievor claimed that the termination was unjust.

The first issue before the arbitrator was whether the grievor engaged in conduct deserving of discipline.

The grievor worked with the school board's maintenance and grounds crew along with a 17-year-old student. The student was gaining work experience as part of the Co-operative Education Program at Carihi Secondary School, where he was a student.

The first incident took place on June 8th, 2001. The grounds crew were waiting to leave at the end of their shift, and the student made a comment about the grievor's belt buckle,

which he had won three or four years earlier in Team Roping competitions. The grievor responded by hitting the student in the stomach with the back of his fist. The arbitrator found that there was "*a history of good-natured physical contact of the horseplay variety between the grievor and the student*" and therefore, there was no reason to impose more than a reprimand for this incident.

The second incident involved alleged threats made by the grievor to other employees. It was alleged that on a number of occasions the grievor had told employees: "*Let's go out back and sort this out*". The arbitrator was satisfied that such threats did in fact occur on more than one occasion, and that such conduct merited discipline.

The third and final incident occurred on June 13, 2001. Though there were four different versions of the events that took place that day, the arbitrator found that the grievor and the student were working together when the student again made a comment about the grievor's belt buckle, stating that it looked like a buckle for midget wrestling from the World Wrestling Federation. The grievor reacted with anger and grabbed the student by either the neck or shirt collar before a third party intervened.

The arbitrator found that these actions constituted serious misconduct, and were deserving of discipline:

The use of physical force against another employee has no place in the school environment. No employee has the right to grab another employee by the throat. In my view the act is more egregious when the victim is a student who is not only more vulnerable than an adult co-worker but is supposed to be learning how to conduct himself in the workplace. There was nothing for the student to learn from the grievor's aggressive act that day and the student's work experience should not have included a period, however brief, when he was afraid of a co-worker.

The arbitrator then looked at whether the grievor's termination was an excessive form of discipline under the circumstances. The arbitrator refused to consider the student's taunts as a mitigating factor:

The student's comments were made in jest, not out of meanness. In my opinion it was not sufficient provocation, if provocation at all, to justify the grievor's reaction which constituted a physical assault by a man who should have known better against an immature boy.

The escalation from threatening behaviour to assault proved to be an important factor in the arbitrator's findings. Also, the absence of any recognition by the grievor that what he had done was inappropriate meant that any future employment relationship would be tainted. In light of this, the arbitrator found that termination was an appropriate response to the misconduct and the grievance was dismissed.

In most cases employers will choose to terminate a violent employee who has assaulted another employee rather than risk a repeat of the behaviour. This is particularly true where there is inappropriate conduct against a student.

Canadian Union of Public Employees, Local 723 v. Campbell River School District No. 72 (April 7, 2003) (Lab. Arb.)

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PUBLIC SERVICE CASES

Discipline

Release of confidential information not sufficient for termination

The release by an employee of confidential information gave rise to that employee's termination in **British Columbia and British Columbia Government and Service Employee's Union.**

The grievor, formerly the supervisor of financial services, had been employed by the B.C. government for approximately 11 years and had an unblemished employment record prior to the incident that led to her dismissal. One of the requirements of her position was strict adherence to the Standards of Conduct for Public Service Employees, which included an obligation with respect to confidentiality.

The grievor released a confidential document to a personal friend, who then released the document to the media. When confronted by her employer, the grievor admitted that she was the source of the leaked document. The grievor was immediately suspended without pay while the employer conducted a further investigation with respect to the surrounding circumstances of the leak.

As part of its investigation, the employer retrieved many emails between the grievor and the recipient of the confidential document and, in some of those emails, the grievor had made derogatory comments about her manager and her immediate supervisor. The employer then conducted an interview with the grievor with respect to the issues of the leaked document and the derogatory emails. Subsequent to the interview, the grievor received a letter of dismissal, which cited both her violation of the Standards of Conduct by disclosing confidential and sensitive information and her derogatory emails about management.

The grievor's position during arbitration was that, while her conduct should attract discipline, her termination was excessive in the circumstances, which the grievor argued should have included consideration of her unblemished employment record, years of service, excellent employment appraisals, admission of wrongdoing, and expression of regret.

The arbitrator found that the disclosure of confidential information by the grievor was a violation of the Standards of Conduct, which should attract discipline by the employer. The arbitrator's analysis of the appropriateness of the discipline imposed included a review of the following factors:

1. how serious was the immediate offence of the employee that precipitated the discharge?

2. was the employee's conduct premeditated or repetitive or, instead, was it a momentary and emotional aberration, perhaps provoked by someone else?

3. did the employee have a record of long service with the employer in which she/he proved an able worker and enjoyed a relatively free disciplinary history?

4. did the employer attempt earlier and more moderate forms

of corrective discipline of this employee that did not prove successful in solving the problem?

With respect to the first factor, the arbitrator found that there must be a "*core element of trust*" in order for the department to deal with confidential information. As well, the arbitrator found that the release of the document caused disruption, considerable additional work, and delay of the government's plans.

Regarding the second factor, the arbitrator found that, while the actions of the grievor were not premeditated and did not have a malicious intent, the grievor was aware of the confidential nature of the document.

Regarding the third and fourth factors, the arbitrator noted the grievor's history and employment record.

The derogatory emails sent by the grievor were considered by the arbitrator to have been intended to remain private and had occurred during a very difficult period in the employee's history. The arbitrator did not consider the emails to be the "*final straw*" as alleged by the employer.

With respect to the appropriate discipline to be applied, the arbitrator found that the grievor's rehabilitative potential was very high and that it was unlikely that such an incident would occur again. Her actions were not premeditated or carried out over a long period of time. Rather, the arbitrator found that the disclosure was an isolated act and out of character for the grievor. Given these factors, the arbitrator held that the discipline was excessive, that the employment relationship could be restored, and that a six-month suspension and one-year probationary period should be substituted for the dismissal.

In the education sector the potential for release of confidential student or employee information is very great. However, in most such circumstances, the release of information is either unintended, unknown or the employee does not realize that the information should be treated confidentially. These circumstances would likely be treated very differently than in the above noted case. Deliberate breaches of confidentiality that would attract similar discipline to this case, such as release of a school board's position in bargaining or a price that they are willing to spend for land, are fortunately rare.

More interesting than the discipline imposed in the immediate case was the arbitrator's analysis of the factors militating the discipline imposed by the employer, particularly the grievor's rehabilitative capacity and the arbitrator's opinion that the employment relationship could be salvaged. It would be interesting to hear from the employer whether they in fact considered the relationship to be one that could be salvaged. One would suspect that the employer would feel uncomfortable in providing the grievor with sensitive confidential information for quite some time into the future.

British Columbia v. British Columbia Government and Service Employee's Union, [2003], B.C.C.A.A.A. No. 152 (Lab. Arb.)

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SCHOOL BOARDS

Human Rights - Benefits

Not discriminatory for benefit plan to treat married and single teachers differently

In **British Columbia Public School Employers' Assn. and British Columbia Teachers' Federation**, the British Columbia Court of Appeal allowed an appeal from an arbitrator's decision that a policy within a collective agreement drew a discriminatory distinction between employees on the basis of marital status by distinguishing between those employees who had a spouse employed by the school board and those who did not.

The benefits provision within the collective agreement prevented "*dual or coordinated coverage*".

First, it prevented simultaneous enrolment of a teacher as both a primary member of a benefit plan and a dependant under his or her spouse's coverage.

Secondly, only one teacher in a couple could claim their children as dependants.

The arbitrator had determined that the collective agreement was not consistent with section 15(1) of the *Charter* and section 13 of the *Human Rights Code*, and that individual teachers were entitled to any resulting benefits that would follow.

The Court of Appeal in a split decision allowed the appeal. The majority of the court held that there was no discrimination, as there had been no denial of a benefit:

The Union bargained for and received a medical package which consisted of the same coverage for all teachers, equally, regardless of marital or family status. On this basis there is no loss of benefits and thus no discrimination. Teachers who are married to each other and qualify under the Plan simply never became entitled to coordinated benefits. If they were entitled to such a right, it would allow them greater coverage than other teachers. Accordingly, no benefit was ever lost.

The majority of the court also considered the Supreme Court of Canada decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, where the court explained that the equality analysis under the *Charter* is concerned with the infringement of "*human dignity*", and found that the policy did not prevent a married teacher from enrolling in the plan. The plan simply gave teachers a choice of how they wished to structure their benefits. This could not create the:

... marginalizing, ignoring or devaluing of persons or groups... This could not, to any reasonable person or standard, be a devolution of self-respect or self-worth. The couple, if being reasonable and dispassionate, could not allege their human dignity was demeaned by this requirement.

Although the majority of the court did not find that the school board had discriminated against married teachers, ideally, benefit plans and other forms of remuneration should treat married teachers as positively as teachers who are not

married to other teachers.

British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation [2003] BCJ No. 1272 (B.C.C.A.)

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PROFESSIONAL ACCREDITATION

Professional Complaints

Teacher awarded costs for defending professional complaint

In **Eggertson and Alberta Teachers' Assn.**, a teacher who was also a parent made an application for special costs resulting from her defence against allegations made by the Alberta Teachers' Association ("ATA").

The teacher was charged with violating section 13 of the Code of Professional Conduct established by the ATA when she criticized her child's teacher's professional competence and reputation.

The matter proceeded from the College of Teachers up to the Court of Appeal.

The Alberta Court of Appeal found that they had no jurisdiction to award costs for the first two levels of decisions made by the Hearing Committee and the Professional Conduct Appeal Committee. However, the court did find that they were entitled to take into account the history of the proceedings in considering costs for the decisions made by the Queen's Bench and before their own court.

The court rejected the appellants argument that she was entitled to full indemnity, finding that:

… neither party (could) be criticized for the manner in which the proceedings were conducted.

and that,

… this was not a case where justice can only be done by indemnifying the appellant for her out of pocket expenses.

Instead, the court found that the appellant was entitled to party-and-party costs in excess of the default scale. They awarded a lump sum of $15,000.00 plus disbursements based on three main factors: the costs she had incurred for legal counsel were significant; she was required to defend her professional reputation in lengthy internal discipline proceedings; and resolution of this issue was:

important to the Alberta Teachers' Association and to all parent-teachers as it reconciles their rights as parents with their professional obligations as teachers.

The lump sum awarded was clearly less than the costs this teacher incurred, but the court did not want to penalize either party given the nature of the complaint.

Eggertson v. Alberta Teachers' Assn.
[2003] A.J. No. 384 (Alta. C.A.)

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