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Human Resources Newsletter

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IN THIS ISSUE —

Third party racial harassment results in award against employer.....2

Human Rights Panel finds discrimination by Board in hiring.....3

Complainant successful in Human Rights Complaint against OCT.....5

Human Rights & Arbitrator have concurrent jurisdiction.....6

Off-Duty Conduct to be reconsidered by College.....7

Illness may constitute frustration of employment contract.....8

When does supervision begin.....10

Third party racial harassment results in award against employer

In June 2007, the Chair of the Public Service Grievance Board heard submissions in the matter of *Cassandra Charlton v. Ontario (Ministry of Community Safety and Correctional Services)* (unreported, PSGB, June 27, 2007), and awarded the grievor significant damages for the mental distress she suffered as a result of a breach of the contractual guarantee of freedom from racial harassment in the workplace.

The grievor commenced her employment with the Ministry of Community Safety and Correctional Services (the "Ministry") in 1999 and worked in various capacities at several Toronto-area correctional facilities. In June 2005, Ms. Charlton was promoted to the position of Operation Manager and commenced a labour relations course for managers in the fall of that year. While on the course, the grievor received a threatening, anonymous letter at her home address containing racist comments. The letter was one of a series of such letters that were sent to racial minority correctional officers in Toronto starting in January, 2005. The Ministry responded to these incidents of hate mail by consulting the police, who conducted a full investigation. The police investigation included the letter that was sent to the grievor; however, as of the date of the PSGB hearing, the sender of the letters remained unknown. As a result of the traumatic effect that the letter had on her psyche, the grievor was unable to work and began to receive Workplace Safety and Insurance Board ("WSIB") compensation, commencing at her full salary and eventually being reduced to the WSIB guideline amount of approximately $800 per week. Throughout this period, the grievor continued discussions with the Ministry about her eventual re-entry into the workplace.

The grievor brought a complaint to the PSGB seeking several remedies to repair the violation to her human rights at her place of employment. In order to expedite the hearing, the parties agreed to a Statement of Facts that outlined the facts discussed above and the Ministry took the position that it would pay the grievor the appropriate amount of damages as determined by the Chair of the PSGB.

The first remedy sought by the grievor was reintegration back into a workplace environment free of racial harassment. The Chair confirmed his jurisdiction to order the employer to reintegrate the grievor back into a harassment-free workplace; however, as this process was already being negotiated between the parties, the Chair simply issued an order confirming that the employer should "*…make all reasonable efforts to find a position comparable in responsibility and remuneration to the position held by the grievor but in a work environment free of any threat of racial harassment*."

The Chair began the discussion of an appropriate award of damages by confirming the jurisdiction of the PSGB. The PSGB's mandate is to provide dispute resolution services on employment issues involving employees of the Ontario Public Service who are not covered by a collective agreement. It is an implied contractual term of every employment relationship in Ontario, including those with the Crown, that an employee has the right to a workplace free of racial harassment and, therefore, the Chair concluded that PSGB had the jurisdiction to hear and remedy an agreed-upon breach of that right.

The next issue was whether the PSGB's remedial mandate was limited by the terms of the *Workplace Safety and Insurance Act*. The Act, pursuant to which WSIB benefits are paid, provides that entitlement to insurance benefits under that regime is "*in lieu of all rights of action (statutory or otherwise) that a worker…has…against the worker's employer…*" The Chair referred to another

PSGB decision where the panel concluded that the grievor's claim was barred because WSIB benefits had already been paid to compensate him for injuries to his health; however, the Chair distinguished that decision from the grievor's case. The grievor's situation was *"…much more than an 'accident' as defined by the Workplace Safety and Insurance Act"* and involved a breach of the contractual guarantee of freedom from racial harassment in the workplace. As this breach affected the grievor's dignity interest, the Chair concluded that the remedies available should not be limited to those designed to compensate her for damage to her health under the WSIA. In order to fully compensate the grievor, the damage to her dignity interest needed to be addressed.

In determining what amount of damages was appropriate, the Chair ordered the employer to compensate the employee for her loss of income during her absence, being the difference between her salary and the WSIB amounts, as well as the value of dental work that should have been covered by her employer's benefit plan. The Chair refused to order compensation for the alleged loss she incurred as a result of selling her house, because the agreed Statement of Facts did not address this issue.

To determine the amount of damages to award for mental distress, the Chair cited the 2006 Supreme Court decision in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] SCJ No. 30, where the Supreme Court concluded that *"mental distress damages are not dependent on some form of egregious conduct on the part of the person in breach of the contract, but flow directly from the breach of certain types of contractual terms"* that create the expectation of a "*psychological benefit*". In the Chair's view, the breach of the contractual term of a harassment-free workplace did create a psychological benefit and that, given the substantial disruption to the grievor's health, well-being and employment as a result of the breach, the grievor should be compensated by an award of $20,000.00.

In respect of the last remedy sought by the grievor, compensation for legal fees, the Chair saw no reason to depart from the PSGB's established policy of not awarding legal costs.

This case reinforces the requirement to provide a work environment "*free of any threat of racial [or other] harassment*". The onus on employers in this respect is significant.

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Human Rights Panel finds discrimination by Board in hiring

Ayangma v. Prince Edward Island Eastern School Board, [2007] P.E.I.J. No. 25 (S.C), involved an application for judicial review of a Human Rights Panel's decision finding that the Board had discriminated against Mr. Ayangma on the basis of race, colour, ethnic and national origin, and age by not interviewing him for a teaching position over a one year period. The Panel awarded Mr. Ayangma $55,000.00 for lost wages and $6,000.00 for hurt feelings and humiliation. The Board sought to have the Panel's decision quashed. Mr. Ayangma, in his response to the Board's application for judicial review, requested that the Court vary the Panel's order to increase his award of damages to $376,096.00.

Mr. Ayangma filed a human rights complaint against the Board in 1998. There were subsequently several applications for judicial review and appeals. Ultimately, in 2004, the Court ordered that a Human Rights Panel be appointed to hear Mr. Ayangma's complaint. The Court restricted the Panel's deliberations to the issue of whether the Board had discriminated against Mr. Ayangma on the basis of race, colour, ethnic and national origin, or age by denying him the opportunity to interview for French language teaching positions in the period between August 17, 1997, and August 17, 1998.

The Panel conducted a hearing over nine days. The Panel heard evidence about the Board's hiring processes and the factors the Board considered when filling a teaching position. The evidence disclosed that applications for teaching positions were kept on file at the Board office and reactivated annually by the individual applicants. In addition, when a school needed to hire a new teacher, the applications on file containing the specific expertise sought by the principal would be retrieved from the Board office. The principal and a group of staff selected by the principal to participate in the hiring process then evaluated the applications and granted interviews to qualified applicants. Principals and the Director of Human Resources testified to the importance of an applicant's teaching experience when determining which applicants to interview for a position.

Mr. Ayangma is a black person from Cameroon. He received his first degree in Cameroon. His application had been on file for ten years with the Board and demonstrated many years of teaching experience in Prince Edward Island. Despite Mr. Ayangma's extensive teaching experience, he was never interviewed for any teaching positions in the time period in question. The Panel examined the applications of the interviewees who were interviewed and hired for teaching positions during that same time period and found that each of the applicants interviewed were Caucasian and had little or no teaching experience. The Board argued that Mr. Ayangma had never been interviewed because his application was incomplete; however, the evidence before the Panel showed that Caucasian applicants with no prior teaching experience and similarly incomplete applications had been offered the positions that Mr. Ayangma had not been interviewed for.

The Panel held that the Board had discriminated against Mr. Ayangma. In reviewing the Panel's decision, the Court held that the Panel had correctly set out the three elements necessary to make out a *prima facie* case of discrimination in employment: namely, that it must be shown (1) that the complainant was qualified for the particular employment; (2) that the complainant was not hired; (3) and someone no better qualified but lacking the distinguishing feature that is the ground cited in the human rights complaint obtained the position. The Panel determined that Mr. Ayangma had satisfied these three elements thereby establishing a *prima facie* case of discrimination.

The Court also found that the Panel had correctly articulated the applicable law when, having found a *prima facie* case of discrimination, it shifted the burden of proof to the Board to show credible, non-discriminatory reasons for the failure to hire the Complainant. On the basis of the evidence before it, the Panel had concluded that the Board had not met its burden.

The Court applied the standard of "reasonableness *simpliciter*" to the Panel's decision, meaning that it would review the evidence and determine whether or not the reasons given by the Panel supported the Panel's decision. The Court found that the reasons given by the Panel were well supported by the evidence and dismissed the Board's application for judicial review.

The Court also dismissed Mr. Ayangma's application for a variation of the Panel's award.

The Ontario Human Rights Commission has identified that the teaching profession does not adequately represent the students being taught with respect to ethnicity and race. Boards should be mindful and encourage diversity and practices that assist in eliminating discrimination at the point of hiring.

Complainant successful in Human Rights Complaint against OCT

Siadat v. Ontario College of Teachers, [2007] O.J. No. 65 (Ont. Sup. Ct.), was an appeal of a decision of the Ontario College of Teachers, Registration Appeals Committee, denying Ms. Siadat's request that OCT waive the requirement of producing official documentation and devise an individualized method of determining her qualifications as a teacher.

Ms. Siadat was an Iranian national. She had been educated as a teacher in Iran and worked as a teacher for approximately 16 years. Ms. Siadat indicated she had been persecuted by the Iranian government for comments she had made about the right of authors to freedom of expression during the course of teaching literature classes. Ms. Siadat fled Iran and was accepted as a Convention refugee in Canada.

A person must have a Certificate of Qualification from the OCT in order to teach in Ontario's publicly funded education system. Ontario Regulation 184/97 sets out the requirements that applicants trained outside of Ontario must meet in order to obtain a Certificate of Qualification, including that the applicant must produce evidence of his or her academic qualifications. In addition, the OCT has a policy of only accepting original, official documents sent directly from the granting institution.

The original copies of Ms. Siadat's university degree, transcript, and the equivalent of her teacher's certificate were all held by the Iranian government and she was, therefore, unable to include them in her application to the OCT for a Certificate of Qualification. Instead, Ms. Siadat provided photocopies of the documents, an original Iranian photo identification card indicating that Ms. Siadat was a teacher, and affidavits attesting to her professional training and suitability to teach.

The OCT Registrar denied Ms. Siadat's application. Ms. Siadat appealed the Registrar's decision to the College's Registration Appeals Committee, requesting that the Committee "*re-evaluate her application and devise an individualised method of determining her qualifications, so that their equivalency could be evaluated*".

The Committee denied the requested accommodation and upheld the decision of the Registrar to refuse certification. The written reasons provided by the Committee noted that all the other applicants had successfully met the requirements of providing original documentation and determined that the alternative documents provided by Ms. Siadat did not constitute acceptable evidence.

Ms. Siadat appealed the Committee's decision to the Superior Court, arguing that the Committee's failure to accommodate her inability to provide the College with original documents constituted a breach of section 6 of the *Human Rights Code*. Section 6 explicitly confirms the right of every person to equal treatment with respect to membership in any self-governing profession without discrimination because of place of origin.

The Court reviewed the Committee's decision on a standard of correctness and noted that two issues were determinative of the appeal: first, whether or not the Committee had properly interpreted and applied the provision of the Ontario *Human Rights Code* and public policy relating to Convention refugees; and, second, whether or not the Committee gave sufficient and proper reasons to support its decision on that issue.

In considering the first issue, the Court noted that the Committee's insistence that Ms. Siadat provide original or government certified documents from her place of origin was *prima facie* discriminatory in light of the uncontradicted evidence that she was a Convention refugee who had been persecuted by her government. The onus then shifted to the Committee to establish that

accommodation was impossible without imposing undue hardship on the Committee. The Court reviewed the Committee's written reasons and found that the Committee failed to demonstrate that accommodating Ms. Siadat would cause the OCT undue hardship. This failure led the Court to conclude that the Committee had failed to interpret and apply the *Human Rights Code* in any meaningful way.

On the second issue, the Court found that the reasons provided by the Committee did not meet the criteria required by procedural fairness. As a result, the Court held that Ms. Siadat's appeal should be granted and referred Ms. Siadat's application back to the Committee for re-hearing.

The Ontario Human Rights Commission and many school boards have identified that the teaching profession needs to become more representative of its students. Teachers coming to Canada can face many barriers to certification and hiring; all of which need to be considered by the education community.

Human Rights & Arbitrator have concurrent jurisdiction

In *Nova Scotia Human Rights Commission v. Halifax (Regional Municipality)*, [2007] N.S.J. No. 231, the Nova Scotia Human Rights Commission appealed to the Court for an order compelling the production of documents by the Regional Municipality of Halifax. The complainant was an employee of the Municipality who self identified as an African-Nova Scotian. He filed a human rights complaint alleging discrimination on the ground of race, claiming that racially discriminatory jokes were told in his presence and that he was denied certain promotions that went to Caucasian employees, despite being the most senior candidate. He also claimed that he was refused bereavement leave granted to others in similar circumstances.

The Human Rights Commission requested that the employer disclose certain documents relevant to the complaint, such as information regarding job descriptions, the qualification of applicants, and letters of reprimand for the complainant and successful applicants. The employer refused to disclose these documents, arguing that the matter fell within the exclusive jurisdiction of a grievance arbitrator and thus was not within the Commission's jurisdiction. The employer argued that the *Trade Union Act* provided for final and binding arbitration of employment disputes, and the collective agreement permitted the grievance of human rights complaints.

The Commission applied to the Court for an order compelling the employer to disclose the relevant documents. The Court first had to determine whether the Commission had jurisdiction to deal with the complaint or whether the arbitration procedure in the collective agreement gave an arbitrator exclusive jurisdiction.

The Court examined the legislation and concluded that the arbitration provisions in the *Trade Union Act* did not provide an arbitrator with exclusive jurisdiction over matters that otherwise fell under the *Human Rights Act*. The Court then examined the particular allegation of racial discrimination in the workplace and found that the dispute did not arise from technical matters related to the collective agreement. Rather, the essential character of the dispute related equally to workplace issues and human rights issues and therefore, a labour arbitrator would not have any greater expertise to offer than a human rights tribunal with regards to resolving the dispute.

In light of these findings, the Court held that the Commission and a grievance arbitrator had concurrent jurisdiction over the matter and ordered the employer to produce the information requested by the Commission.

Concurrent jurisdiction between arbitrators and the Ontario Human Rights Commission and Human Rights Tribunal has meant that employees may choose their forum. While the Human Rights Complaint route might not be as expedient, it can result in damages being awarded to complainants.

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Off-Duty Conduct to be reconsidered by College

In *Fountain v. British Columbia College of Teachers*, [2007] B.C.J. No. 1260 (B.C.S.C.), a teacher, Michael Fountain, appealed a decision of the B.C. College of Teachers (the "College") in which he had been found guilty of conduct unbecoming a member of the profession. While off-duty, Mr. Fountain had, following a domestic dispute involving his seventeen and twenty year old sons, fired a shot from a firearm over their heads. His sons had had a verbal altercation with Mr. Fountain's wife, which escalated into a physical fight with Mr. Fountain. Mr. Fountain was convicted of careless use of a firearm, an offence pursuant to the *Criminal Code* of Canada. The conviction was overturned on appeal.

A Hearing Panel of the College conducted a hearing following the appeal of the conviction. The Panel determined that Mr. Fountain had provoked the situation, that the shot was not fired in self defence and that a reasonable teacher would not have communicated with a gun shot in the circumstances. As a result, Mr. Fountain was found guilty of conduct unbecoming a member of the College.

On appeal, Mr Fountain alleged that the College's Hearing Panel had erred by (1) failing to ensure that he knew the case he had to meet; (2) failing to consider relevant circumstances; and (3) failing to apply the appropriate standard of proof.

The Superior Court applied the standard of review of reasonableness to the decision of the Hearing Panel, except with respect to questions of law, which were subject to the standard of correctness.

With respect to the first ground of appeal, failing to ensure that Mr. Fountain knew the case to be met, Mr. Fountain alleged that the College's Citation and the finding of the Hearing Panel were not identical. The Court held that the conduct giving rise to the allegation of misconduct was clear and there was no evidence to suggest that Mr. Fountain's ability to defend himself was prejudiced.

With respect to the second ground of appeal, failing to consider relevant circumstances, the Court found that, while the Hearing Panel had mistakenly interpreted Mr. Fountain's acquittal, this error was not material to the final decision. The Court also found that the Hearing Panel had taken sufficient notice of the totality of circumstances, including Mr. Fountain's subjective belief, and that its findings in that regard were reasonable.

With respect to the final ground of appeal, failing to apply the appropriate standard of proof, the Court noted that the Hearing Panel had applied the appropriate standard of proof for a disciplinary hearing of a professional person, specifically, "*a fair and reasonable preponderance of credible evidence*."

With respect to the application of the standard of conduct unbecoming a member of the College, the Court confirmed that off-duty conduct can give rise to discipline in cases where the conduct negatively impacted the teacher's ability to carry out his professional obligations as a teacher, or where the conduct has negatively impacted on the school system, including where the conduct is contrary to the core values of the school system. The Court provided a detailed examination of relevant case law and determined that the jurisprudence provided the following framework for analyzing off-duty conduct: *"(a) some, but not all, off-duty conduct can give rise to discipline for professional misconduct or conduct*

unbecoming; (b) in considering whether the particular conduct at issue is such as to give rise to discipline, the Panel should consider whether the conduct evidences direct impairment of the ability to function in the professional capacity or impairment in the wider sense as described in the case law; and (c) direct evidence of impairment is not always required. In an appropriate case, impairment can be inferred. In the absence of direct evidence of impairment, the Panel will need to consider whether it is appropriate to draw an inference of impairment in the circumstances."

The Court held that the Hearing Panel had not completed the analysis in that, having found the conduct unnecessary and unjustified, it had failed to consider whether the conduct fell below the standard such as to constitute impairment of Mr. Fountain's ability to fulfill his responsibilities as a teacher or whether, alternately, it would harm the school system. The Court noted that not all off-duty conduct that is below the standard of the reasonable teacher will provide grounds for discipline. The Hearing Panel's decision, therefore, was found to be unreasonable and the Court referred the matter back to the College for reconsideration.

One would hope that on reconsideration the panel discusses the impact that the teacher's conflict resolution skills (or lack thereof) will have on the confidence parents and students in his care have in his ability to settle disputes in the classroom and on the playground.

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Illness may constitute frustration of employment contract

In *Wightman Estate v. 2774046 Canada Inc*., [2006] BCJ No. 2164, the B.C. Court of Appeal dismissed an appeal by the estate of a deceased employee relating to damages allegedly owed for dismissal without cause. The Court examined when the doctrine of frustration should be applied to employment contracts and concluded that the trial judge was correct in concluding that the doctrine should apply to the facts of this case.

Mr. Wightman began employment with the defendant numbered company in 1975 under an oral contract of employment. He was employed as a senior project manager and was a valued employee of the company, but, unfortunately, he began to experience serious health problems in the late 1990's. He took a short-term leave from work and eventually went on long-term sick leave in February 2002. He died of a heart attack in 2004 and his estate brought an action seeking damages for wrongful dismissal.

Mr. Wightman was a beneficiary under the employer's group benefits plan, which was paid for by the employer. Under this plan, he was entitled to receive long-term disability benefits in the amount of two-thirds of his salary until the earlier of the date on which he ceased to be disabled, he turned 65, or he died. Mr. Wightman continued to receive disability payments until the date of his death. While he was on disability leave, the assets of the employer were bought by another company, which only agreed to hire some of the existing employees. As part of this transaction, Mr. Wightman's employment was terminated without notice.

At trial, the trial judge concluded that the terms of the group insurance plan were incorporated into the contract of employment, but this contractual obligation had been discharged by the insurance company payment of disability benefits until Mr. Wightman's death. The employer admitted that its dismissal of Mr. Wightman was without cause and without notice, but argued that the contract of employment had been frustrated by the seriousness and length

of his illness. The trial judge agreed with this argument.

The first ground of appeal advanced by Mr. Wightman's estate was that the employment contract continued to be in effect at the time of his dismissal because he had continued to receive disability benefits pursuant to the contract and, therefore, he was entitled to notice upon dismissal without cause. The Court reviewed the doctrine of frustration and concluded that it can apply to employment contracts and in such cases "*…the question is whether the disability prevents the performance of the essential functions of the employee's job for a period of time sufficient to say that, in practical or business sense, the object of the employment has been frustrated*." In the circumstances of this case, the issue was whether Mr. Wightman and the employer had agreed that "*the contract would remain on foot despite the sickness if it should occur*" and an examination "*of the contract in order to determine whether its terms are wide enough to accommodate Mr. Wightman's permanent disability without termination*" was necessary in order to resolve that issue.

The Court concluded that, while the employment contract provided that Mr. Wightman was entitled to continue to receive disability benefits until the earlier of his ceasing to be disabled, attaining the age of 65 or death, the contract did *not* provide that it would continue indefinitely despite his disability.

The insurance policy stated that "[*i*]*f your employment ends because of… sickness …you may be entitled to continued insurance under this plan…*" and the Court concluded that this provision demonstrated that the contract contemplated termination of the employment relationship as a result of a sickness.

Turning to the issue of whether Mr. Wightman's illness was sufficient to "*put an end, in the business sense*" to the employment relationship, the Court agreed with the trial judge's finding of fact that Mr. Wightman's disability at the time of his dismissal "*…was likely to continue for such a period of that performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him or agreed to be accepted by the employer under the agreed terms of his employment*."

The Court also cited a policy reason for agreeing with the employer's position that under these circumstances, the employment contract had been frustrated by Mr. Wightman's illness. Referring to the desirability of encouraging employees to purchase group insurance benefits for their employees, the Court concluded that a finding that a long-term illness will never be sufficient to terminate an employment contract so long as the employee is receiving disability benefits, may discourage employers from funding such benefit plans.

The appellant also argued that termination on the basis of a disability was a violation of human rights legislation, which protects against discrimination in employment on the basis of disability; however, the Court disagreed with this argument. The Court recognized an employer's duty to accommodate a disabled employee to the point of undue hardship, but concluded that an employer's duty to accommodate "*…will most often be fulfilled through a new contract of employment*" and "*this is not inconsistent with the frustration of the old one.*"

After concluding that Mr. Wightman's employment contract had been frustrated and therefore he was not entitled to notice of his dismissal, the Court also dismissed the appellant's second ground of appeal. The

appellant argued that the trial judge erred in considering Mr. Wightman's post-termination deterioration in health when he reached the conclusion that Mr. Wightman was totally disabled from working at the time of his dismissal, but the Court did not agree. While the trial judge did discuss Mr. Wightman's post-termination deterioration, he specifically stated in the judgment that he did not rely on this evidence in reaching the conclusion that Mr. Wightman was totally disabled for the purposes of finding frustration of the employment contract.

Decisions of this nature may make it more difficult to balance the issue of illness, long-term benefits and terminations of employment, but this decision does provide some insight and confirms the applicable principles.

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When does supervision begin

In *Hamilton-Wentworth District School Board and Elementary Teachers Federation of Ontario, Hamilton-Wentworth Elementary Teachers' Local*, (January 3, 2006) (Surdykowski), ETFO successfully grieved the Board's characterization of "entry time", the 15 minute period between the first signal (normally a bell) and the second signal in the morning, and the 5 minute entry time following a lunch or nutrition break. The issue was whether and, if so, when, entry times or parts thereof counted as teachers' supervision time within the meaning of the collective agreement, in light of the interplay between the collective agreement and s.20(d) of Regulation 298, Operation of Schools. Section 20(d) provides that:

20. In addition to the duties assigned to the teacher under the Act and by the board, a teacher shall:

(d) unless otherwise assigned by the principal, be present in the classroom or teaching area and ensure that the classroom or teaching area is ready for the reception of pupils at least fifteen minutes before the commencement of classes in the school in the morning and, where applicable, five minutes before the commencement of classes in the school in the afternoon.

After a lengthy review of the applicable legislation, the collective agreement, the evidence and submissions of the parties, and relevant jurisprudence and arbitration decisions, the Arbitrator concluded that "*teachers have a discretion with respect to how they will carry out their duties and responsibilities under Section 20(d), and … if the School Board interferes with that professional discretion by expecting or requiring a teacher to be in a classroom or other teaching area to supervise students during any part of the periods specified by Section 20(d) it is otherwise assigning that teacher within the meaning of that provision…such an expectation or requirement, whether or not in writing, is an assigned supervision duty within the meaning of …the collective agreement, and that as such it must be counted as supervision for the purposes of that provision.*" As a result, any requirements imposed by the Board for teachers during entry times would be counted as supervision time and deducted from the weekly allotment of supervision time provided for in the collective agreement. In effect, then, supervision during entry times could not be required of teachers, as it would swallow up the bulk of supervision time that had been negotiated.

This decision is consistent with the practices of other Boards, and although not currently an issue, supervision might become an issue again as we get ready for bargaining.

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Human Resources Newsletter

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