



Education Law eBulletin

A newsletter for educators

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Conflicted Interests: Ontario Court Removes Trustee From School Board

Earlier this month, the Ontario Superior Court of Justice released a decision which provides a comprehensive discussion of conflict of interest issues as they relate to school boards and trustees.

In 2006 an Ontario school board had accumulated a substantial deficit in contravention of the Education Act; a Deficit Management Plan was subsequently implemented requiring the Board to balance its budget within a three-year period. In order to meet cost cutting requirements, in 2008 a report was put before the Board proposing the elimination of a number of elementary teaching positions.

One of the trustees who would otherwise participate in budgetary discussions, O.C., had a daughter who was a low-seniority teacher. In addition, O.C.'s son had also just graduated teacher's college and had applied for, and been approved, to be on the list of supply teachers for the Board commencing on September 1, 2008. Given O.C.'s daughter's level of seniority, it was possible that any proposed reductions would have impacted her employment. Accordingly, when issues regarding the budget and staffing reductions was first raised, the issue regarding O.C.'s potential conflict of interest was raised. O.C. did not participate in budgetary discussions at that time.

The Board subsequently obtained two legal opinions regarding the conflict of interest issue. In short, it was confirmed that if the budget was brought before the Board as a whole, and a trustee was conflicted with respect to an element of the budget, he or she could not discuss or vote on the budget. However, if the budget was brought before the board in pieces, or in a "stepped" process, then a trustee could discuss and vote on those issues where there was no pecuniary interest. The second opinion also cautioned that trustees should be wary of participating in matters that were linked to issues in which a conflict exists.

Following the board meetings in which the opinions were discussed, O.C. participated in a series of discussions related to the school board's budget and made several motions related to staffing. The issues directly related to staffing had been presented in pieces, presumably to comply with the legal opinions that had been previously provided to the Board. However, there was little question that the pieces in which O.C. participated were linked to staffing issues.

An Application was subsequently brought by a ratepayer requesting a declaration that, by discussing and voting on issues related to staffing, O.C. had acted in conflict of interest contrary to the Municipal Conflict of Interest Act.

In finding that O.C. had committed a number of acts of conflict of interest contrary to the Act, the Court held that an individual must make objective inquiries to determine whether a conflict of interest exists in any given situation. That is, although O.C. subjectively believed that the material had been separated and he could discuss and vote on certain budgetary matters, those issues remained objectively linked to staffing, and thus O.C.'s participation was clearly in conflict of interest. Further, the Court held that the defences of inadvertence and error in judgment were not available to O.C. given that the trustee had participated in the conflict of interest information sessions and was aware of the existence of his pecuniary interest. O.C.'s participation could not be categorized as a "good faith error in judgment" as the trustee's voting and discussion of the budget were all done when O.C. was aware of the conflict of interest.

Having found O.C. to have violated the Act and that the statutory defences were not available to the trustee, the Court stated that under the Act it was mandatory to declare the trustee's seat vacant and that the trustee be removed from the Board.

This decision by the Ontario Superior Court provides timely comment on school board trustees' involvement and participation in budgetary or other school board matters where there exists a conflict of interest. It calls into question the theory that a trustee otherwise in conflict can participate in budget discussions and vote on portions of the budget as long as she or she declares his or her conflict on the specific part of the budget dealing with that trustee's direct or indirect pecuniary interest. The case also emphasizes that the Act is a public interest statute which will be strictly applied and enforced by the Court.

For more information regarding this decision and its impact on school boards and trustees, please contact Brian Nolan, a partner at Shibley Righton LLP at 519-969-9844, who has acted for school boards for over 30 years and has performed an in-depth review and analysis of the *Baillargeon v. Carroll* decision.

Grievor Reinstated Without Back Pay for Serious Misconduct

In *Simcoe County District School Board v. Ontario Secondary School Teachers' Federation*, another Ontario Superior Court decision, the Court upheld an arbitrator's decision to reinstate a teacher notwithstanding that the school board had proved three allegations of serious misconduct.

The Simcoe County District School Board (the "Board") terminated the employment of a teacher who had been hired to develop and teach a life skills program for mentally and physically challenged students between the ages of 14 and 21. However, during the 2003-2004 school year, the grievor's employment was terminated following allegations that she had acted unprofessionally by treating students in a physically and verbally abusive manner. The grievor was subsequently charged, but not convicted, of criminal offences as a result of her actions.

The subsequent 30-day arbitration took place between 2006 and 2008. Although the arbitrator concluded that the Board had proven three allegations of serious misconduct involving physical altercations with students, the arbitrator reviewed additional factors including the grievor's excellent teaching record, her professional stress, and a proven lack of intent to cause harm. After considering all the factors, including that there had been numerous unproven allegations made against the grievor, the arbitrator held that termination was too severe and that the teacher ought to be reinstated. However, given the severity of the misconduct, the arbitrator reinstated the teacher without back pay, resulting in a 4.5 year unpaid suspension.

The Board subsequently brought an application for Judicial Review of the arbitrator's decision on the grounds that reinstatement was unwarranted, especially as there was no acceptance of misconduct and the grievor had failed to express any remorse. Ultimately, the Court upheld the arbitrator's decision, stating that it was reasonable given the circumstances and, more specifically, that remorse is simply a factor to be considered, and not a prerequisite to an individual being granted a second chance.

There are several interesting issues at play in this case, including the length of time required to hear this matter. It is questionable whether, given the severity of the misconduct, reinstatement would have been awarded if the hearing had been concluded earlier, without having the effect of a 4.5 year unpaid suspension.

Additionally, it appears that the serious misconduct that was established by the Board was offset, to some extent, by unproven allegations against the grievor. The arbitrator further found that the grievor had an "excellent teaching record," which also was considered by the Arbitrator in reinstating the grievor. Arguably, the Board may have been able to better manage those considerations by only focussing on the misconduct that it could establish and/or by properly documenting incidents as they occurred. Arguably, doing so would have both helped to establish that incidents occurred and that the grievor's teaching record was not unblemished.

CASES

The Saskatchewan Court of Appeal found that an arbitrator did not have any jurisdiction to hear a grievance with respect to a symposium in which the University was not involved. *First Nations University of Canada v. University of Regina Faculty Assn*, [2008] S.J. No. 801.

The Northwest Territories Court of Appeal found that denominational school rights are not constitutionally entrenched. *Yellowknife Public Denominational District Education Authority v. Euchner*, [2008] N.W.T.J. No. 95.

The Ontario Superior Court denied an application for the production of School Board and Children's Aid Society records to an individual accused of touching a child for a sexual purpose on the basis that the accused had not established the records would be relevant to the alleged charges. *R. v. Browne*, [2008] O.J. No. 4932.

The Ontario Superior Court of Justice allowed the partial production of a record from a student's Ontario Student Record on the basis that it was of some relevance, even if marginal, to the individual accused of a number of sexual offences who was attempting to re-open his trial. *R. v. H.P.S.*, [2008] O.J. No. 4993.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com.

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