SHIBLEY RIGHTON LLP
Barristers and Solicitors

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A newsletter for educators

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Two recent decisions of arbitrators are of significance to all school boards in Ontario

Pregnancy Leave: Entitlement to "Top Up" Pay

Schools boards that have agreed to top-up provisions in their collective agreements with teacher or other employee bargaining units should be aware of their obligations considering the latest case on the subject. School Boards without Top-Up provisions should be alert to the problems of including such provisions in the future.

In *Greater Essex County District School Board* v. *OSSTF, District 9*, the Supreme Court of Canada refused to grant leave to hear the school board's application to overturn the decision of the Ontario Court of Appeal, which reversed a decision of the Ontario Divisional Court and restored the decision of Arbitrator M. Levinson.

The issue was whether the school board had to make top-up payments during the months of July and August to educational support staff who were on pregnancy leave when such employees were 10 month employees. Such employees did not work during July and August, were not paid by the school board during that time, and were instead in receipt of Employment Insurance.

The school board argued that the top-up provision in the collective agreement was inoperative for the months of July and August because the employees in question were not entitled to any wage, hence there was no wage to top up.

The arbitrator found that the language of the collective agreement required the board to top up the amount of EI moneys paid to the employees to the level of the wage they would be receiving had they been working and not on pregnancy leave.

The Court of Appeal agreed with the arbitrator and the dissenting judge in the Divisional Court decision that, for the school board to succeed, there would have to be language explicitly excluding July and August from the top-up provision of the collective agreement for 10 month employees.

Special Assignment Principals (Vice-Principals): In the Bargaining Unit or Not?

In the first arbitration decision released since the "Keller Award" (*Wellington Catholic District School Board* ats. *OECTA*), Arbitrator Stephen Raymond, in a brief decision ruled that the position of "School Effectiveness Lead/Assistant to Superintendents," assigned to a principal with the title "Assistant to a Superintendent," was a bargaining unit position regardless of whether it involved managerial or confidential duties.

In this respect Arbitrator Raymond agreed with Arbitrator Keller, without further analysis. The declaration sought by the union was issued in spite of the fact that the school board discontinued the position prior to the arbitration hearing and the arbitrator disapproved of both parties' approach to labour relations.

Of further significance is that OECTA attempted to have the arbitrator rule that teaching duties could not be assigned to a principal or performance of duties that would otherwise be in the bargaining unit. The arbitrator refused to deal with that issue "at this time."

This case, *Sudbury Catholic District School Board* and *Ontario English Catholic Teachers' Association*, [2009] O.L.A.A. No. 627, indicates that OECTA, at least, is not prepared to concede the scope of teaching duties that may be performed by a principal or vice-principal in a school, despite the ruling of the Divisional Court in *ETFO* v. *Superior Greenstone District School Board*, [2009] O.J. No. 3713.

School Board Employees' Moral Conduct Held to a High Standard

It is trite to say that, because they are required to assume the role of a reasonable and prudent parent, teachers are often held to a higher standard when addressing conduct – both in and out of the classroom. A recent decision by Arbitrator Burke serves as a useful reminder that this standard does not apply to teachers only but may also apply to all school board employees.

In *Board of Education of School District No. 91 v. C.U.P.E., Local 4177* (Bowerbank Grievance), the grievor had been employed with School District No. 91 in British Columbia as a school bus driver for approximately 18 years. Although not all school bus drivers forbid eating on the bus, the grievor maintained a strict "no eating" policy, which was well known by all students. The grievor enforced this rule for safety reasons, as she would not be able to help a choking student while the bus was in motion. The grievor handled infractions of her policy in various manners, including requiring an offending student to sit at the front of the bus, using verbal and/or written warnings, and suspending an offending student from school bus service for a limited period of time. The grievor claimed that, in addition to these measures, she would use humour to enforce her policies.

On May 7, 2007, the grievor observed two students eating at the back of the bus. After failing to comply with the grievor's instructions to put the food away, the students were told that they would be required to sit at the front of the bus for the rest of the week. When the grievor was cleaning her bus at the end of her shift, she found food and mints on the floor of the bus where the students were sitting. Noticing that the mints resembled mothballs, the grievor decided to give the students "treat bags" containing mothballs, believing that it would be an amusing way of enforcing her no eating policy. Subsequently, one of the students put the mothball in his mouth, at which time he spit it out. A Grade 5 girl was given one of the mothballs as candy; this student subsequently threw it out after being told it was not candy. The parents of the students became aware of the events later that evening and, discovering that mothballs contain poison, complained to the school principal about the incident.

The grievor was suspended without pay during the ensuing investigation; the grievor was later terminated for her conduct. In the grievance hearing, although the union agreed that discipline was warranted, it argued that summary dismissal after 18 years of service was overly punitive given that the grievor was playing a practical joke and there was no malice intent to cause harm.

In her conclusions, the arbitrator recognized that school bus drivers occupy positions of trust and must adhere to "extremely high standards of safety and prudence." The arbitrator further found that the practical joke must be taken within the context of the school setting, where the grievor, as a bus driver, was placed in a position of trust and where her actions had the potential to harm children. Although the grievor had apologized and there had been no evidence that the grievor's actions were malicious, the arbitrator found that the misconduct showed a serious lack of judgment concerning children to the point that the employment relationship could not be repaired. Accordingly, the arbitrator upheld the termination, finding that it was not excessive in the circumstances.

In our opinion, although the arbitrator specifically referred to the conduct of school bus drivers, and that bus drivers are held to a higher standard due to their responsibility for the safe transport of students, this decision should be borne in mind when considering all school board employees. The grievor here was terminated for her "serious lack of judgment" and engaging in a potentially harmful practical joke. Therefore, this decision serves as a reminder that school boards should be entitled to require a high standard of conduct from all of their employees, and especially those who come in contact with students.

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