

Class Size: Arbitration Update — SD No. 70 (Alberni) — Mandatory Replacement of Absent Education Assistant

On February 3, 2010 an arbitration award was issued by Arbitrator Dorsey concerning the issue of whether, in the context of the class size provisions of the *School Act*, the employer has the right to change resources assigned to a class after September 30.

Arbitrator Dorsey's ruling in this case helps to solidify a board of education's right, subject to the collective agreement, to assign staff and make resource allocation changes during the school year.

Facts

- The grievor was a grade 5 teacher who, on September 30, 2008, had 29 students and four students with a ministry designated IEP.
- Under section 76 of the *School Act*, consultation was held with the teacher, and the principal/superintendent were of the opinion that the class was appropriate for student learning.
- During the consultation process, the grievor was informed that a support staff education assistant (Integration Support/Behaviour Assistant) was assigned to assist with her class and one other grade 5 class.
- District policy on replacement of education assistants when absent was to replace on the fourth day of absence.
- The education assistant was absent for five consecutive days in April, and due to a replacement not being available, the absence was not replaced on the fifth day.

Union Position

The union alleged that in the context of the class size provisions of the *School Act*, the employer had made a commitment in the consultation meeting to provide an education assistant. As a result, the employer was required to fulfil this commitment by backfilling the education assistant when she was absent.

Employer Position

1. Evidence pertaining to matters occurring after September 30 is inadmissible with respect to whether a class is appropriate for student learning under section 76.1 of the *School Act*.
2. The grievance is not arbitrable because there is no provision of the collective agreement at issue nor is there contextual connection between the collective agreement and a statutory

provision that creates a substantive right and obligation concerning a term or condition of employment.

3. In the alternative, if it is found that the matter is arbitrable, there was no commitment to replace the education assistant and no breach of the *School Act* or the implied management rights provision under the contract.

Arbitrator's Decision

In a preliminary ruling, Arbitrator Dorsey held that the class was presumed to be appropriate for student learning on September 30, 2008 and that no evidence of events after September 30, 2008 was admissible to challenge the opinions of the principal and superintendent. Only if there was a change in the number of students after September 30 (which triggered section 76.4 of the *School Act* requiring a consultation and a further opinion from the principal and superintendent) would evidence be admissible after September 30.

After hearing the evidence on the merits of the case, Arbitrator Dorsey held that the matter was not arbitrable and, as a result, he did not have jurisdiction to make a determination of the issue.

At pages 48-50, Arbitrator Dorsey states,

I have concluded the issues relating to any individual terms and conditions of employment that result from the consultation process do not have "an express or implicit connection to the collective agreement" whose scope and content is circumscribed by section 27(3) of the *School Act*.

Nor do any teacher's individual terms and conditions of employment have any connection to the *School Act* class size and composition provisions. They may arise in the required legislated consultation process, but they are not enforceable under any subsection of sections 76.1, 76.2, or 76.4. As quoted above, the circumstance in September is that consultations are based on current circumstances, limited current knowledge and assumptions about the future. Principals form opinions that can turn out to be incorrect. Circumstances with all classes, whether organized within the class size and composition standards or permissibly in excess of the standards, and within a school can change. As time passes, as more is known and as needs within classes and a school change and are reassessed, principals and teachers respond. Class organization at September 30th is not intended to freeze the allocation of some resource supports or to limit the flexibility of principals and school teams to respond to changed circumstances.

The consultation process is not intended to either expressly or implicitly provide individual teachers with guarantees that are enforceable as a necessary derivative appendage to the process of being assigned a class that exceeds legislated grade level class size and composition standards. Under the legislation scheme, consequences only flow if there is a failure to fulfil the obligation to consult and form dual principal and superintendent opinions the class exceeding the grade level size and composition standard is a class appropriate for student learning.

In part, this is because the class size and composition standards of 30 students and 3 students entitled to an individual education plan are unrefined parameters that encompass a wide range of grade level, age related student behaviour, parental engagement and demands and individual students needs and challenges that can be variously affected, as all

classes can, by changes, including support and resources changes, throughout the school year. The standards do not encompass refinements to account for curriculum. Any refinements are left to the discretion of boards of education, superintendents and principals.

To echo Arbitrator Gordon: "in the circumstances at hand, I cannot find this dispute ... falls within the ambit of the collective agreement as that concept has been extended by the courts." Therefore, I find the grievance is not arbitrable.

Finally Arbitrator Dorsey ruled that even if he had found the grievance arbitrable, he would have dismissed the grievance on its merits.

On page 50, Arbitrator Dorsey states,

If the grievance were arbitrable, I would dismiss the grievance. I would find Ms Battand did not agree to the organization of her class. I would find there is insufficient mutuality of understanding and agreement between her and the employer to have created an enforceable commitment to always replace a non critical Education Assistant on the fourth day of absence, namely April 17, 2009.

Significance

1. Unless section 76.4 is triggered by an increase in number of students during the school year, evidence after September 30 is inadmissible in challenging the opinion of the principal and/or superintendent that a class is appropriate for student learning on September 30.
2. Subject to the collective agreement, the employer has the management right to make staffing decisions and decisions of resource allocations during the school year.
3. In order for a matter to be arbitrable, there must either be a collective agreement provision at issue or a contextual connection between the collective agreement and a statutory provision that creates a substantive right and obligation concerning a term or condition of employment.

Questions

If you have any questions regarding this award please contact your district's BCPSEA labour relations liaison.