

Class Size Arbitration — Superintendent's Class Size Report to the Board

We have today received the award of arbitrator Robert Diebolt, QC..

Issue

This award concerns a grievance (attached) that was filed on October 20, 2009 in School District No. 68 (Nanaimo-Ladysmith) alleging that the superintendent's class size report to the board of education was not in accordance with section 76.3 of the *School Act* and the Dorsey arbitration award of August 24, 2009.

More specifically, with respect to the report, the union alleged that:

- the rationale for each class of over 30 students was inadequate
- the report did not include the opinion of the teacher
- the principals did not clearly communicate the results of the consultations with the superintendent.

This grievance was referred to arbitration by the BC Teachers' Federation (BCTF) on an expedited basis under section 104 of the *Labour Relations Code*.

Preliminary Matter

BCPSEA raised a preliminary objection that the matter at issue was inarbitrable and, as a result, the arbitrator did not have the jurisdiction to proceed.

It was the position of BCPSEA that these process sections of the legislation do not contain substantive terms and conditions of employment for teachers and therefore are not grievable. The sections of the class size and composition legislation that can be grieved are those sections that directly affect substantive employment rights of teachers. Examples of these would be whether the proper class size or class size aggregate exist; whether there has been "consultation," or whether the opinions of the superintendent and principal on the appropriateness of the class organization for student learning are to be accepted.

Decision

Arbitrator Diebolt concludes on page 27 of the award,

"In summary, I am unable to conclude that the statutory provisions in issue create substantive rights and obligations or that they are a significant part of the employment

relationship. Nor am I able to conclude that there is a real and contextual connection between the statutory provision in issue and the collective agreement such that a violation of them gives rise, in the context, to a violation of the provisions of the collective agreement. I find myself in agreement with the Employer's position that the superintendent's report and the Board's acceptance of it are internal processes designed to further accountability respecting class size and composition. As stated earlier herein, in my view, the substantive rights and obligations are enshrined in s. 76.1, 76.2 and 76.4. Those provisions, as noted, are being arbitrated on a province wide basis in respect of the 2009-10 school year. Because I have concluded that the provisions in issue in s. 76.3 are inarbitrable, I must conclude and declare that I lack jurisdiction to hear and determine the merits of the grievance. Accordingly, the grievance is dismissed."

With respect to paragraphs 381, 441, 442 and 450 of the August 24, 2009 Dorsey award, Arbitrator Diebolt concluded on page 26:

"I have endeavored to read the Dorsey award with care. While I admire and respect the work he performed, and though he considered the wisdom of supplying boards of education with teachers' positions, the fact is that the arbitrability of the statutory positions in dispute in this grievance were not in issue, not argued and not explicitly commented upon in his award. In these circumstances, his remarks are at best non-binding obiter and of limited utility."

The award can be accessed on the BCPSEA website at <http://www.bcpsea.bc.ca/access/publications/aissue/2010/ai2010-02-award.pdf>.

Significance

Only the portions of the class size legislation in the *School Act* that directly affect substantive employment rights of teachers are grievable.

Questions

Should you require assistance or wish to discuss this issue further, please contact your BCPSEA labour relations liaison.

Attachment:
NDTA Grievance