

# Article E.2: Harassment/Sexual Harassment

## ❖ Overview

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This article sets out the commitment of school districts to provide a working environment free from harassment or sexual harassment.

It defines harassment and sexual harassment, identifies the process for investigating complaints, and sets out potential remedies. It also provides that a training program will be made available to every employee before the end of the school year.

BCPSEA has also prepared a book, *A Guide to Teacher Harassment Complaints in the Workplace*, which provides more thorough advice on the handling of harassment complaints and related issues. You may obtain a copy of this manual by contacting your BCPSEA liaison.

### **This article is divided into the following functional sections:**

#### **General**

States the employers' commitment to provide employees with an environment free from harassment, and with a fair and safe process for dealing with a complaint.

#### **Definitions**

Defines actions considered to be harassment or sexual harassment.

#### **Resolution Procedure**

Outlines the process by which an employee may raise, and the employer will investigate, a complaint.

#### **Remedies**

Describes the types of remedies to which an employee who has been harassed may be entitled and the potential consequences for the harasser.

#### **Informal Resolution Outcomes**

Provides an alternate process for resolving concerns and recording outcomes.

#### **Training**

Details the employers' responsibility to provide a training program for employees and what that program should include.

**Note:** In January 2007, this article was amended to incorporate the provisions of previous Letter of Understanding No. 2. There were no substantive changes arising from the consolidation of Article E.2 and LOU 2.

## ❖ Article E.2: Harassment/Sexual Harassment

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### **1. General**

- a. *The employer recognizes the right of all employees to work, to conduct business and otherwise associate free from harassment or sexual harassment.*
- b. *The employer considers harassment in any form to be totally unacceptable and will not tolerate its occurrence. Proven harassers shall be subject to discipline and/or corrective actions. Such actions may include counselling, courses that develop an awareness of harassment, verbal warning, written warning, transfer, suspension or dismissal.*
- c. *No employee shall be subject to reprisal, threat of reprisal or discipline as the result of filing a complaint of harassment or sexual harassment which the complainant reasonably believes to be valid.*
- d. *All parties involved in a complaint agree to deal with the complaint expeditiously and to respect confidentiality.*
- e. *The complainant and/or the alleged offender, if a member(s) of the Local, may at the choice of the employee be accompanied by a representative(s) of the Local at all meetings in this procedure.*

### **2. Definitions**

- a. *For the purpose of this article harassment shall be defined as including:*
  - i. *sexual harassment; or*
  - ii. *any improper behaviour that is directed at or offensive to any person, is unwelcome, and which the person knows or ought reasonably to know would be unwelcome; or*
  - iii. *objectionable conduct, comment, materials or display made on either a one-time or continuous basis that demeans, belittles, intimidates, or humiliates another person; or*
  - iv. *the exercise of power or authority in a manner which serves no legitimate work purpose and which a person ought reasonably to know is inappropriate; or*
  - v. *such misuses of power or authority as intimidation, threats, coercion and blackmail.*
- b. *The definition of "sexual harassment" shall include:*
  - i. *any comment, look, suggestion, physical contact, or real or implied action of a sexual nature which creates an uncomfortable working*

*environment for the recipient, made by a person who knows or ought reasonably to know such behaviour is unwelcome; or*

- ii. any circulation or display of visual material of a sexual nature that has the effect of creating an uncomfortable working environment; or*
- iii. an implied promise of reward for complying with a request of a sexual nature; or*
- iv. a sexual advance made by a person in authority over the recipient that includes or implies a threat or an expressed or implied denial of an opportunity which would otherwise be granted or available and may include a reprisal or a threat of reprisal made after a sexual advance is rejected.*

### **3. Resolution Procedure**

#### **a. Step 1**

- i. The complainant, if comfortable with that approach, may choose to speak to or correspond directly with the alleged harasser to express his/her feelings about the situation.*
- ii. Before proceeding to Step 2, the complainant may approach his/her administrative officer, staff rep or other contact person to discuss potential means of resolving the complaint and to request assistance in resolving the matter. If the matter is resolved to the complainant's satisfaction the matter is deemed to be resolved. Refer to E.2.5 Informal Resolution Outcomes*

#### **b. Step 2**

- i. If a complainant chooses not to meet with the alleged harasser, or no agreement for resolution of the complaint has been reached, or an agreement for resolution has been breached by the alleged harasser, a complaint may be filed with the superintendent or designate.*
- ii. The complaint should include specific behaviours which form the basis of the complaint and the definitions of sexual harassment/harassment which may apply; however, the form of the complaint will in no way restrict the investigation or its conclusions.*
- iii. The employer shall notify in writing the alleged harasser of the complaint and provide notice of investigation.*
- iv. In the event the superintendent is involved either as the complainant or alleged harasser, the complaint shall, at the complainant's discretion, be immediately referred to either BCPSEA or a third party who shall have been named by prior*

*agreement of the employer and the local who shall proceed to investigate the complaint in accordance with Step 3 and report to the board.*

**c. Step 3**

- i. The employer shall investigate the complaint. The investigation shall be conducted by a person who shall have training and/or experience in investigating complaints of harassment. The complainant may request that the investigator shall be of the same gender as the complainant and where practicable the request will not be denied.*
- ii. The investigation shall be conducted as soon as is reasonably possible and shall be completed in ten (10) working days unless otherwise agreed to by the parties, such agreement not to be unreasonably withheld.*

**4. Remedies**

- a. Where the investigation determines harassment has taken place, the complainant shall, when appropriate, be entitled to but not limited to:
  - i. reinstatement of sick leave used as a result of the harassment;*
  - ii. any necessary counselling where EFAP services are fully utilised or where EFAP cannot provide the necessary services to deal with the negative effects of the harassment;*
  - iii. redress of any career advancement or success denied due to the negative effects of the harassment;*
  - iv. recovery of other losses and/or remedies which are directly related to the harassment.**
- b. Where the investigator has concluded that harassment or sexual harassment has occurred, and the harasser is a member of the bargaining unit, any disciplinary sanctions that are taken against the harasser shall be done in accordance with provisions in the agreement regarding discipline for misconduct.*
- c. The local and the complainant shall be informed in writing that disciplinary action was or was not taken.*
- d. If the harassment results in the transfer of an employee it shall be the harasser who is transferred, except where the complainant requests to be transferred.*
- e. If the employer fails to follow the provisions of the collective agreement, or the complainant is not satisfied with the remedy, the complainant may initiate a grievance at Step 3 of Article A.6 (Grievance Procedure). In the event the alleged harasser is the*

*superintendent, the parties agree to refer the complaint directly to expedited arbitration.*

### **5. Informal Resolution Outcomes**

- a. *When a complainant approaches an administrative officer and alleges harassment by another BCTF member, the following shall apply:*
  - i. *All discussions shall be solely an attempt to mediate the complaint;*
  - ii. *Any and all discussions shall be completely off the record and will not form part of any record;*
  - iii. *Only the complainant, respondent, and administrative officer shall be present at such meetings*
  - iv. *No discipline of any kind would be imposed on the respondent; and*
  - v. *The BCTF and its locals, based on the foregoing, will not invoke the notice of investigation and other discipline provisions of the collective agreement at meetings pursuant to E.2.5.a.*
- b. *Should a resolution be reached between the complainant and the respondent at Step One under the circumstances of E.2.5.a, it shall be written up and signed by both. Only the complainant and the respondent shall have copies of the resolution and they shall be used only for the purpose of establishing that a resolution was reached. No other copies of the resolution shall be made.*
- c. *In the circumstances where a respondent has acknowledged responsibility pursuant to E.2.5.a, the employer may advise a respondent of the expectations of behaviour pursuant to Article E.2 in a neutral, circumspect memo. Such a memo shall be non-disciplinary in nature and shall not form part of any record. Only the respondent shall retain a copy of the memo. That the memo was sent can be referred to as proof that the respondent had been advised about the standard of conduct.*

### **6. Training**

- a. *The employer, in consultation with the local, shall be responsible for developing and implementing an ongoing harassment and sexual harassment awareness program for all employees.*

*Where a program currently exists and meets the criteria listed in this agreement, such a program shall be deemed to satisfy the provisions of this article. This awareness program shall initially be for all employees and shall be scheduled at least once annually for all new employees to attend.*

- b. *The awareness program shall include but not be limited to:*
- i. *the definitions of harassment and sexual harassment as outlined in this Agreement;*
  - ii. *understanding situations that are not harassment or sexual harassment, including the exercise of an employer's managerial and/or supervisory rights and responsibilities;*
  - iii. *developing an awareness of behaviour that is illegal and/or inappropriate;*
  - iv. *outlining strategies to prevent harassment and sexual harassment;*
  - v. *a review of the resolution of harassment and sexual harassment as outlined in this Agreement;*
  - vi. *understanding malicious complaints and the consequences of such;*
  - vii. *outlining any Board policy for dealing with harassment and sexual harassment;*
  - viii. *outlining laws dealing with harassment and sexual harassment which apply to employees in B.C.*

## ❖ Explanation

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As employers, school districts have a legal, moral, and contractual responsibility to ensure they provide a working environment that is free from harassment or sexual harassment. This article reflects the commitment BCPSEA members have made to providing such an environment and to treating employees with dignity and respect. It defines harassment and sexual harassment and characterizes actions that fall within these definitions and are therefore prohibited. It also provides a process for dealing with complaints that is safe and confidential for the victim while protecting the rights of the alleged harasser.

Boards and administrators are responsible under the law and by this article for ensuring that incidents of harassment are resolved fairly, quickly, and with sensitivity. The employer has committed to providing trained or experienced persons to investigate claims of harassment. It is important that administrators take action when a complaint is brought to their attention. Once a concern has been raised, the employer must take appropriate steps to ensure any harassment ceases, even if the complainant does not want an investigation to proceed.

It is equally important that administrators recognize the types of behaviour and attitudes that contribute to harassment. They should be aware of the dynamics in their workplaces and take steps to prevent problems as well as resolving any incidents that they observe or that are brought to their attention.

The article commits the employer, in consultation with the union, to providing an awareness program to every employee in the district so that they know and understand:

- what constitutes harassment
- the process for dealing with incidents of harassment
- what remedies may be available to them if it is determined that they have been harassed or sexually harassed.

Harassment and sexual harassment incidents occur at all levels of an organization. The alleged harasser may be another teacher, an administrator, a union officer, an employee in another bargaining unit, a parent, or a student. Similarly, any one of these individuals may be the victim. This article is designed to deal with complaints by a teacher about another employee.

Complaints by a teacher about a non-employee such as a student or a parent must be addressed, but may be handled in a different way than that outlined in this article. Please contact your BCPSEA liaison for guidance.

The appropriate way for a teacher to pursue a complaint about an individual who is not an employee, such as a parent, student or outside contractor, etc., is the grievance procedure, not the resolution procedure outlined in this article (Don Munroe arbitration decision, January 1999).

Complaints about a teacher by a non-teacher should be raised and processed under school board policy or the collective agreement applicable to the complainant. The provisions of this article do not apply.

### ***E.2.1: General***

- E.2.1.a***      *a. The employer recognizes the right of all employees to work, to conduct business and otherwise associate free from harassment or sexual harassment.*

This clause states that the employer recognizes an employee's right to work in an environment free from any form of harassment. Note that beyond recognizing this right, the employer has an obligation to attain and maintain an environment that is free from harassment.

- E.2.1.b***      *b. The employer considers harassment in any form to be totally unacceptable and will not tolerate its occurrence. Proven harassers shall be subject to discipline and/or corrective actions. Such actions may include counselling, courses that develop an awareness of harassment, verbal warning, written warning, transfer, suspension or dismissal.*

This clause acknowledges that harassment of any kind is unacceptable and commits the employer to taking corrective and/or disciplinary action if such an incident occurs. This article is not intended to be punitive, but to be corrective.

Not all forms of harassment are of the same severity or committed with the same awareness. Accordingly, the employer's response must be appropriate to the circumstances and the harasser's individual record. For example, low level harassment resulting from ignorance, lack of judgment, confused perceptions, etc. may prompt counseling, training, or a written warning. On the other hand, overt, deliberate behaviour – especially if it continues after the harasser is advised that it is unwanted – will result in a more severe response that may include suspension without pay, transfer to another work location or, in very serious cases, dismissal.

- E.2.1.c**      *c. No employee shall be subject to reprisal, threat of reprisal or discipline as the result of filing a complaint of harassment or sexual harassment which the complainant reasonably believes to be valid.*

Employees must be able to make a complaint knowing that they will not suffer retaliatory action as a result of raising what they believe to be a valid concern. This clause ensures that employees who raise complaints in good faith are protected from unwarranted reprisals or discipline.

When providing advice, administrators must be careful not to make comments that may be construed to violate this clause.

This clause does not preclude the employer from taking action if the complaint has been motivated by malice or vexatious intent. Administrators must be careful to distinguish between a complaint that is found not to be harassment but that the employee believed was harassment, from a complaint that the employee raised knowing it was false. Making a false complaint is a misuse of this article and subject to a disciplinary response.

- E.2.1.d**      *d. All parties involved in a complaint agree to deal with the complaint expeditiously and to respect confidentiality.*

Both the complainant and the alleged harasser are entitled to have a complaint dealt with as quickly and confidentially as possible. Individuals to whom the complaint is made and those investigating or participating in an investigation are obliged to interview all parties involved in the investigation privately, and to ensure that only those who "need to know" are aware of and advised of the results of an investigation. This commitment to confidentiality protects the privacy of the complainant and accused harasser. It binds the employer representatives and the investigator, as well as any union officer involved in raising or investigating the complaint.

- E.2.1.e**      *e. The complainant and/or the alleged offender, if a member(s) of the Local, may at the choice of the employee be accompanied by a representative(s) of the Local at all meetings in this procedure.*

Employees who experience what they believe is harassing behaviour – especially if it is sexual harassment – may for reasons of privacy prefer to proceed without a union representative. This is their option.

Administrators should generally respect this request. If the complaint concerns another member of the bargaining unit, however, or a member of another

bargaining unit, administrators should suggest that the complainant include their union representative in the process, since it is likely that the alleged harasser will do so.

In the early stages of an investigation, and if the complainant so requests, the alleged harasser may prefer to meet with the complainant alone or with the complainant and the individual to whom the complaint was made. However, except for very minor allegations, the administrator should encourage the employee accused of harassment to seek union advice and representation. In cases of serious harassment, the disciplinary provisions of most collective agreements provide union involvement for the alleged harasser, who may face significant disciplinary sanctions. In many agreements this representation is mandatory.

If the respondent is a member of the BCTF bargaining unit and elects to proceed without union representation, please also refer to the explanation addressing clauses E.2.5.a through c for more advice.

Mandatory representation is contrary to the optional language of this article, but is necessary as soon as it becomes apparent that a complaint is both serious and substantial. Administrators who are involved in the initial stages of a complaint should seek advice early in the process in cases where significant discipline may result.

### ***E.2.2: Definitions***

#### ***E.2. 2. Definitions***

- a. For the purpose of this article harassment shall be defined as including:*
  - i. sexual harassment; or*
  - ii. any improper behaviour that is directed at or offensive to any person, is unwelcome, and which the person knows or ought reasonably to know would be unwelcome; or*
  - iii. objectionable conduct, comment, materials or display made on either a one-time or continuous basis that demeans, belittles, intimidates, or humiliates another person; or*
  - iv. the exercise of power or authority in a manner which serves no legitimate work purpose and which a person ought reasonably to know is inappropriate; or*
  - v. such misuses of power or authority as intimidation, threats, coercion and blackmail.*
- b. The definition of "sexual harassment" shall include:*
  - i. any comment, look, suggestion, physical contact, or real or implied action of a sexual nature which creates an uncomfortable working environment for the recipient, made by a person who knows or ought reasonably to know such behaviour is unwelcome; or*

- ii. *any circulation or display of visual material of a sexual nature that has the effect of creating an uncomfortable working environment; or*
- iii. *an implied promise of reward for complying with a request of a sexual nature; or*
- iv. *a sexual advance made by a person in authority over the recipient that includes or implies a threat or an expressed or implied denial of an opportunity which would otherwise be granted or available and may include a reprisal or a threat of reprisal made after a sexual advance is rejected.*

The two categories of harassment are sexual and personal. E.2.2.b characterizes the behaviors that fall under the former; E.2.2.a indicate the kinds of behaviors that constitute the latter.

In British Columbia, the *Human Rights Code* provides the legal foundation on which harassment related to prohibited categories and sexual harassment complaints may be raised. Section 13(1) of this code prohibits discrimination in the workplace, as follows:

*No person shall*

- (a) refuse to employ or refuse to continue to employ a person, or*
- (b) discriminate against a person with respect to employment or any term or condition of employment,*

*because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.*

It should be noted that in the delineation of provincial and local matters, the parties determined that discrimination is a local issue, and harassment and sexual harassment are provincial issues. Therefore, our harassment language is not expressed on the basis of discrimination, and the language in this article exceeds BCPSEA's legal obligations under the *Human Rights Code*.

**E.2.2.a E.2.2.a: Definitions**

- a. *For the purpose of this article harassment shall be defined as including:*
  - i. *sexual harassment; or*
  - ii. *any improper behaviour that is directed at or offensive to any person, is unwelcome, and which the person knows or ought reasonably to know would be unwelcome; or*

- iii. objectionable conduct, comment, materials or display made on either a one-time or continuous basis that demeans, belittles, intimidates, or humiliates another person; or*
- iv. the exercise of power or authority in a manner which serves no legitimate work purpose and which a person ought reasonably to know is inappropriate; or*
- v. such misuses of power or authority as intimidation, threats, coercion and blackmail.*

Sexual harassment is referenced in E.2.2.a, but defined in E.2.2.b.

Harassment is aberrant behaviour and does not include actions that are part of the employer's normal managerial or supervisory rights and responsibilities, or part of normal social contact. The following actions do not constitute harassment:

- routine supervision
- performance evaluations
- imposition of appropriate discipline
- a request or directive to do something that a reasonable person would consider reasonable as part of a job function
- lack of friendliness
- an apparent grumpy response
- denial of a request for time off
- other routine day-to-day interaction between an employer and an employee
- interpersonal conflict arising from personality differences and/or professional disagreements

Some of these actions might be considered harassment if the employee is singled out for unique and substandard treatment that a reasonable person would consider unwelcome and undeserved, or that would detrimentally affect the employee's working environment and have adverse job consequences.

For example, if an administrator directs a subordinate to perform a menial and perhaps humiliating task that is not appropriate for the subordinate's job category, this may be considered harassment, as well as a violation of E.2.2.a.iv and possibly iii. It is not considered harassment if someone is simply asked to "help out" under particular circumstances, but would be harassment if the individual is ordered to "do it" when there is no valid reason for it to be done at that time by that person.

An administrator's behaviour is also considered harassment if, for example, the administrator excessively supervises and admonishes a single teacher when there are no distinguishing work performance issues and when comparable work habits of other teachers at the same school are not addressed.

Just as routine managerial or supervisory behaviour is not considered harassment, neither is normal social interaction nor the standard give-and-take inherent in such interaction between employees.

Remarks, questions, jokes, or innuendo based on age, gender, religious belief, or other grounds prohibited under the *Human Rights Code* may be considered harassment under the Code and/or E.2.2.a.ii and iii. Such a conclusion is even more likely if the recipient has made it clear that such comments are unwelcome. Depending on the substance of the offending statement, a comment, joke, or other suggestion may be considered harassment even without recipients advising that they find such remarks offensive. The following examples illustrate this ambiguity:

- A joke that mocks an ethnic, religious, or racial group is in bad taste and inappropriate in a work setting. It may also be considered harassment if the listener is a member of the impugned group. It would definitely be considered harassment if the listener has made it known that such jokes are offensive or hurtful.
- A discussion in the workplace that becomes heated is not considered harassment, even if one of the participants is embarrassed by the outcome. It may be considered harassment if one party refuses to drop the issue and repeatedly raises the same matter. It is considered harassment if, during the discussion, one of the parties demeans or belittles the other's position based on religious belief, racial heritage, sexual orientation, or other prohibited ground, or uses a position of authority improperly.
- The posting of pictures or cartoons and the use of graffiti may also be considered harassment if the message in the material is offensive and targets an individual or group of individuals based on age, gender, race, or any other prohibited ground. What may be amusing to some may be hurtful to others. The circumstances will determine whether or not the posting is found to be harassment.

It is important to note that one individual may find certain behaviour harassing, while others in the workplace find the same behaviour acceptable. If the offensive statement, behaviour, etc., falls under one of the prohibited grounds in the *Human Rights Code*, it will be considered harassment under the Code. Other behaviours might not meet the criteria cited in the Code but would be considered harassment under this article. Workplace cultures evolve, and as new employees join, changes in social interaction may be required. When a concern comes up, administration is responsible for correcting the situation.

Personal harassment is a serious issue and should be treated as such by managers and employees. This clause should not be used to deal with minor issues or general unhappiness in the workplace, as this could trivialize cases of substantial workplace abuse.

- E.2.2.b**      *b. The definition of "sexual harassment" shall include:*
- i. any comment, look, suggestion, physical contact, or real or implied action of a sexual nature which creates an uncomfortable working*

- environment for the recipient, made by a person who knows or ought reasonably to know such behaviour is unwelcome; or*
- ii. any circulation or display of visual material of a sexual nature that has the effect of creating an uncomfortable working environment; or*
- iii. an implied promise of reward for complying with a request of a sexual nature; or*
- iv. a sexual advance made by a person in authority over the recipient that includes or implies a threat or an expressed or implied denial of an opportunity which would otherwise be granted or available and may include a reprisal or a threat of reprisal made after a sexual advance is rejected.*

Just as routine managerial and social behaviour should not be considered personal harassment, nor should the definition of sexual harassment inhibit interactions or relationships based on mutual consent or normal social contact between employees. This is especially important considering that protection against harassment extends to incidents occurring at or away from the workplace, during or outside working hours, provided the acts arise out of or are connected to the employment relationship. There may be a fine line between acceptable and unacceptable behaviour, and that line may change when a relationship changes.

Examples of sexual harassment include, but are not limited to, the following:

- a person in authority asks an employee for sexual favours in return for being hired or receiving a promotion or other employment benefit
- sexual advances with actual or implied work-related consequences—for example, a teacher is assigned the most undesirable portable classroom when she refuses to date the principal or staff representative
- unwelcome remarks, questions, jokes, or innuendo of a sexual nature, including sexist comments or sexual invitations—for example, comments about sexual prowess, physical attributes, etc.
- leering, staring, or making sexual gestures
- display of pornographic or other sexual materials, such as Playboy or Playgirl foldouts (recognized works of art such as a Raphael or Rubens painting would not be included)
- offensive pictures, graffiti, cartoons, or sayings
- unwanted physical contact, such as touching, patting, pinching, or hugging (Note the caveat "unwanted" – if the actions are otherwise accepted in the workplace as non-sexual, it is important that individuals make clear that they do not wish to participate in such contact)
- physical assault of a sexual nature (Note that this is also criminal behaviour and may be dealt with in the court system, although this should not influence or delay investigation or employer response to a complaint raised under this article)

### ***E.2.3: Resolution Procedure***

#### ***E.2.3.a E.2.3.a: Step 1***

#### ***3. Resolution Procedure***

##### ***a. Step 1***

- i. The complainant, if comfortable with that approach, may choose to speak to or correspond directly with the alleged harasser to express his/her feelings about the situation.*
- ii. Before proceeding to Step 2, the complainant may approach his/her administrative officer, staff rep or other contact person to discuss potential means of resolving the complaint and to request assistance in resolving the matter. If the matter is resolved to the complainant's satisfaction the matter is deemed to be resolved. Refer to E.2.5 Informal Resolution Outcomes*

Step 1 of the Resolution Procedure is intended to provide an early warning or resolution mechanism that makes the harasser aware of the problem and allows a quiet and private solution. It gives employees who believe they are being harassed two options for addressing the concern before filing a complaint that will launch a full investigation.

If the complainant is confident and comfortable enough to do so, the complainant may convey the concerns directly to the offender and request that the problematic behaviour cease. The complainant is not obliged to do this – it is strictly the complainant's choice.

Alternatively, an individual who believes he or she is being harassed may approach an administrator, staff representative, or any other individual to discuss the perceived problem and request assistance in resolving it. If such a request is made, the administrator may use discretion to decide how to deal with the issue, but must act immediately. One likely step is to meet privately with the alleged harasser and hear the other side of the story. The administrator's role is concluded once the administrator is satisfied that the alleged harasser understands that the behaviour is unacceptable and commits to correcting it, and the complainant is satisfied with the outcome.

At this stage, neither the complainant nor the alleged harasser needs union representation, but representation is permitted if desired by either party.

If the administrator or complainant is not satisfied with the outcome of the discussion with the alleged harasser, then the administrator is obliged to take further action to ensure that the harassing behaviour ceases – even if the complainant does not proceed with a formal complaint at Step 2. The action the administrator takes will depend on the circumstances. The administrator may simply monitor the situation to ensure that there are no further incidents, or may proceed to discipline if warranted by the behaviour of the alleged harasser.

Although the collective agreement provides for this informal step, there are some behaviours that are so serious it is inappropriate for the employer to leave the matter to an informal process. An administrator who becomes aware of such a situation is advised to bring the matter to the attention of the human resources department in the district and a formal investigation should follow.

If the alleged harasser is a member of the BCTF, there are further directives with respect to Step 1. Please refer to the explanation for E.2.5 Informal Resolution Outcomes for advice.

### **E.2.3.b E.2.3.b: Step 2**

#### **b. Step 2**

- i. If a complainant chooses not to meet with the alleged harasser, or no agreement for resolution of the complaint has been reached, or an agreement for resolution has been breached by the alleged harasser, a complaint may be filed with the superintendent or designate.*
- ii. The complaint should include specific behaviours which form the basis of the complaint and the definitions of sexual harassment/harassment which may apply; however, the form of the complaint will in no way restrict the investigation or its conclusions.*

A complaint may be filed with the superintendent or individual designated by the district to receive Step 2 harassment/sexual harassment complaints if the options in Step 1 are not accessed or have not resulted in resolution of the complaint, or if a previous resolution agreement has been breached.

Clause E.2.3.b.ii sets out the required components of all formal complaints. Complaints must be received in writing and:

- include the specific actions or comments that are alleged to be harassment;
- identify the specific part of Article E.2.2 (Definitions) which is thought to have been breached.

This provision was negotiated with the caveat that the employer will not restrict the investigation or the conclusions of the investigator if, in the course of the investigation, it becomes apparent that the respondent has exhibited other prohibited behaviours that had not been identified in the written complaint.

Should a complaint be received that does not include the specific details described above, the superintendent or designate should request that the information be provided. The investigation should not proceed until such information has been received. If you are in doubt as to whether you have sufficient information, please contact your BCPSEA liaison for assistance.

**E.2.3.b E.2.3.b: Step 2**

**b. Step 2**

- iii. *The employer shall notify in writing the alleged harasser of the complaint and provide notice of investigation.*

When a formal complaint is received by the superintendent or designate, the alleged harasser must be notified in writing that a complaint has been filed and that the district is investigating the complaint. If the respondent is a member of a bargaining unit, the notice should reference the appropriate local discipline article as well as Article E.2.3.b.iii, and a copy of the written complaint(s) should be enclosed. If further information has been requested from the complainant, that should be noted as well. This correspondence must be copied to the local to ensure that the employee's rights under the disciplinary provisions of the collective agreement are not violated. This correspondence should not be copied to the complainant or to the board of school trustees.

**E.2.3.b E.2.3.b: Step 2**

**b. Step 2**

- iv. *In the event the superintendent is involved either as the complainant or alleged harasser, the complaint shall, at the complainant's discretion, be immediately referred to either BCPSEA or a third party who shall have been named by prior agreement of the employer and the local who shall proceed to investigate the complaint in accordance with Step 3 and report to the board.*

When the superintendent is a party to the complaint – either as the person being harassed or as the alleged harasser – the complainant has the option of referring the complaint directly to BCPSEA or to a third party who has previously been named by agreement between the local and employer. The party selected will investigate the matter and report to the board.

Any action subsequently taken with a bargaining unit member – that is, any remedy or disciplinary response – must be consistent with the provisions of this article.

**E.2.3.c E.2.3.c: Step 3**

**c. Step 3**

- i. *The employer shall investigate the complaint. The investigation shall be conducted by a person who shall have training and/or experience in investigating complaints of harassment. The complainant may request that the investigator shall be of the same gender as the complainant and where practicable the request will not be denied.*

- ii. The investigation shall be conducted as soon as is reasonably possible and shall be completed in ten (10) working days unless otherwise agreed to by the parties, such agreement not to be unreasonably withheld.*

The employer is required to investigate a complaint raised at Step 2, however the extent of the investigation will depend upon the specifics of the complaint. Each investigator will establish the process necessary to determine whether or not harassment has occurred.

The investigator must be either trained or experienced in harassment investigations, and if requested and practicable, be the same gender as the complainant. If the district does not have such a trained or experienced investigator, or if gender is the issue, contact BCPSEA for assistance. BCPSEA can identify trained or experienced investigators in other public sectors who may be willing to assist on a quid pro quo basis, or can suggest alternatives.

### **Choosing an investigator**

The investigator should be selected keeping in mind the need for objectivity. While we encourage the use of internal investigators, under some circumstances a specific investigator may not be appropriate because of a perceived, if not real, apprehension of bias, either against or in favour of the respondent or the complainant. As well, for a very serious complaint that may have significant employment consequences for the respondent, a very experienced investigator with legal training is suggested. If you have questions, contact your BCPSEA liaison for advice.

Note that while training or experience is a must for investigators, the training or experience need not be specific to the language in this collective agreement. See Administration later in this article for a long term solution to this problem.

Districts with several trained investigators should have a balance of male and female investigators. However, smaller districts may only have one trained individual available, and would have to incur considerable cost to hire someone from outside to do the investigation. For this reason, an employer may not always be able to satisfy a request for an investigator of the same gender as the complainant.

E.2.3.c.ii requires that the investigation be conducted and completed as soon as possible and at least within 10 working days. When this is not possible, the timeline may be extended if the extension would not be detrimental to the integrity of the investigation. Requests for a time extension cannot be refused if a reasonable person would conclude that an extension is necessary. Extension requests may be refused if the justification is unreasonable, or if there is an equally valid reason for requiring an early conclusion.

The collective agreement is silent on the manner in which an investigator communicates his/her findings and conclusions. The practice has been to communicate these in a written report submitted to the superintendent or designate.

### ***E.2.4: Remedies***

#### ***E.2.4.a 4. Remedies***

- a. Where the investigation determines harassment has taken place, the complainant shall, when appropriate, be entitled to but not limited to:
  - i. reinstatement of sick leave used as a result of the harassment;*
  - ii. any necessary counselling where EFAP services are fully utilised or where EFAP cannot provide the necessary services to deal with the negative effects of the harassment;*
  - iii. redress of any career advancement or success denied due to the negative effects of the harassment;*
  - iv. recovery of other losses and/or remedies which are directly related to the harassment.**

If the investigator concludes that harassment has occurred, the complainant may be entitled to one or more remedies. This clause lists some of the remedies that may be considered appropriate, but does not mandate that these remedies be provided. The particular circumstances should determine whether a remedy is required. Considerations should include the following:

- If the complainant used sick leave during the complaint or investigation process, reinstatement of that sick leave may be appropriate. This will depend on whether the complainant's use of the sick leave was due to the harassment or to an unrelated illness. Also, how much (if any) of the sick leave was caused by the harassment, and is the claim reasonable or excessive?
- Did the complainant require counselling as a result of the harassment, and were additional costs incurred beyond the amount covered under an EFAP or extended health plan?
- Was the complainant prevented from or denied a career opportunity due to the harassment? If so, is monetary compensation due, or should another career opportunity be provided?
- Did the complainant suffer any other losses that are clearly identifiable as resulting from the harassment, other than those described above? If so, the complainant may be entitled to compensatory action or reimbursement.

The district should contact BCPSEA when considering potential remedies under this provision.

- E.2.4.b**      *b. Where the investigator has concluded that harassment or sexual harassment has occurred, and the harasser is a member of the bargaining unit, any disciplinary sanctions that are taken against the harasser shall be done in accordance with provisions in the agreement regarding discipline for misconduct.*

A member of the bargaining unit who is determined to have harassed another employee may be subject to a disciplinary response. Any such response must be taken in accordance with the disciplinary provisions of the district's local agreement. If the district has any questions about how the "discipline for misconduct" provisions relate to this article, BCPSEA should be contacted for clarification. These are serious matters and the employer may be exposed to grievance and/or court action if the rights of the harasser are breached.

- E.2.4.c**      *c. The local and the complainant shall be informed in writing that disciplinary action was or was not taken.*

Any disciplinary action taken against a proven harasser is confidential and should not be made public. The complainant and the local are entitled to know whether disciplinary action has been taken, but they are not entitled to know what the action was. They should be informed in writing when the complaint and investigation process is concluded.

- E.2.4.d**      *d. If the harassment results in the transfer of an employee it shall be the harasser who is transferred, except where the complainant requests to be transferred.*

If it is determined that the harasser and complainant must work in separate workplaces, the harasser will be transferred, not the complainant, except when the complainant would prefer to be transferred.

The harasser or complainant should be transferred in accordance with local posting and filling provisions. If the local agreement does not contain a specific provision for making this transfer, moving the harasser should take priority over other transfer requests.

- E.2.4.e**      *e. If the employer fails to follow the provisions of the collective agreement, or the complainant is not satisfied with the remedy, the complainant may initiate a grievance at Step 3 of Article A.6 (Grievance Procedure). In the event the alleged harasser is the superintendent, the parties agree to refer the complaint directly to expedited arbitration.*

This clause provides that the grievance procedure may be accessed if the complainant is not satisfied with the results of the investigation or the proposed remedy for the complainant, or when the employer fails to follow the provisions of the collective agreement. In these cases, a grievance may be filed at Step 3 of the grievance procedure. If the harasser is the superintendent, under these circumstances the complaint will be referred directly to expedited arbitration.

Note, however, that this is, under most circumstances, a last resort. The complainant does not have the option of using the grievance procedure instead of this article. There is an exception to this, however, where the complainant believes s/he is being harassed by a person that is not an employee. In such cases, Arbitrator Munroe determined that the resolution process does not apply, and it is appropriate to file a grievance.

Accordingly, complaints regarding parents, students, contractors, etc. should be raised as a grievance.

### ***E.2.5: Informal Resolution Outcomes***

#### ***E.2.5 5. Informal Resolution Outcomes***

- a. When a complainant approaches an administrative officer and alleges harassment by another BCTF member, the following shall apply:
  - i. All discussions shall be solely an attempt to mediate the complaint;*
  - ii. Any and all discussions shall be completely off the record and will not form part of any record;*
  - iii. Only the complainant, respondent, and administrative officer shall be present at such meetings*
  - iv. No discipline of any kind would be imposed on the respondent; and*
  - v. The BCTF and its locals, based on the foregoing, will not invoke the notice of investigation and other discipline provisions of the collective agreement at meetings pursuant to E.2.5.a.**
- b. Should a resolution be reached between the complainant and the respondent at Step One under the circumstances of E.2.5.a, it shall be written up and signed by both. Only the complainant and the respondent shall have copies of the resolution and they shall be used only for the purpose of establishing that a resolution was reached. No other copies of the resolution shall be made.*
- c. In the circumstances where a respondent has acknowledged responsibility pursuant to E.2.5.a, the employer may advise a respondent of the expectations of behaviour pursuant to Article E.2 in a neutral, circumspect memo. Such a memo shall be non-disciplinary in nature and shall not form part of any record. Only the respondent shall retain a copy of the memo. That the memo was sent can be referred to as proof that the respondent had been advised about the standard of conduct.*

The provisions of E.2.5 were negotiated to address concerns regarding Step 1 of the resolution process, should a teacher respondent participate without the protection of union representation. Both union and employer representatives were concerned that individuals would not run the risk of breaching the

discipline articles in collective agreements by proceeding at Step 1 without union representation and without notice under the disciplinary article.

The effect of this concern could result in complainants being referred back to the union for informal resolution, or respondents being advised to bring in representation and being served notice under the discipline provisions prior to a Step 1 meeting. This, of course, would negate the intended function of Step 1, which was to provide an informal process to resolve less serious issues. E.2.5.a specifically addresses this concern. It provides that any meetings involving a teacher complainant and a teacher respondent under Step 1 are intended to be:

- mediation only (paragraph i)
- off the record (paragraph ii)
- without the potential for discipline (paragraph iv) and
- will be limited to the complainant, the respondent and the administrator (paragraph iii).

Clauses E.2.5.b and c address concerns regarding the lack of closure for the respondent and the need for the employer to be able to reference the fact that a respondent had been advised of the meaning of the harassment article. It also keeps the employer in the loop of informal resolutions.

The effect of these provisions is to provide a record for the complainant and the respondent that the matter has been concluded and to provide a coaching opportunity for the employer.

The informal Step 1 process is not appropriate for dealing with serious harassment allegations but can be useful in cases that may be considered minor in nature and can be easily corrected. If there is a serious matter that is raised at this level, then the more formal complaint process should be invoked. If a complainant still prefers to handle the matter without filing a formal complaint, BCPSEA recommends union representation be at all meetings with the respondent and disciplinary notice provisions be followed. Alternatively, the employer may initiate a misconduct investigation under the disciplinary provisions of the collective agreement.

### ***E.2.6: Training***

#### ***E.2.6.a 6. Training***

- a. The employer, in consultation with the local, shall be responsible for developing and implementing an ongoing harassment and sexual harassment awareness program for all employees.*

*Where a program currently exists and meets the criteria listed in this agreement, such a program shall be deemed to satisfy the provisions of this article. This awareness program shall initially be for all employees and shall be scheduled at least once annually for all new employees to attend.*

Where a program currently exists and meets the criteria listed in this agreement, such a program shall be deemed to satisfy the provisions of this article. This awareness program shall initially be for all employees and shall be scheduled at least once annually for all new employees to attend.

- E.2.6.b**      *b. The awareness program shall include but not be limited to:*
- i. the definitions of harassment and sexual harassment as outlined in this Agreement;*
  - ii. understanding situations that are not harassment or sexual harassment, including the exercise of an employer's managerial and/or supervisory rights and responsibilities;*
  - iii. developing an awareness of behaviour that is illegal and/or inappropriate;*
  - iv. outlining strategies to prevent harassment and sexual harassment;*
  - v. a review of the resolution of harassment and sexual harassment as outlined in this Agreement;*
  - vi. understanding malicious complaints and the consequences of such;*
  - vii. outlining any Board policy for dealing with harassment and sexual harassment;*
  - viii. outlining laws dealing with harassment and sexual harassment which apply to employees in B.C.*

The employer is required to have a training program in place. The employer and union may work together to develop the program, but the employer is ultimately responsible for producing, implementing, and scheduling the initial program and any required ongoing training.

BCPSEA undertook this project on behalf of its members. In consultation with the BCTF, BCPSEA has made available a training package to school districts on request. If the district already had a program in place that meets the criteria listed in E.2.6.b, then employees who have already been trained do not need to be retrained. If such a program is not in place, then either the BCPSEA program or a comparable one was to have been implemented by the district prior to June 17, 1997, and offered to new employees on annual basis.

The school district is responsible for arranging scheduling and providing the training in consultation with the local. This training program should not incur TOC costs, so training should not be scheduled during instructional hours.

Training may be scheduled:

- as part of the professional development program
- as part of a orientation program
- in conjunction with a staff meeting
- any other time that is mutually agreeable to the district and local.

The audience for this training does not just include teachers, but must include:

- principals and vice-principals
- district-based administrative staff.

Training should also be made available to:

- trustees
- support staff
- other professionals who interact with teachers in their workplace.

The program may also be made available to outside contractors or Parent Advisory Councils if these individuals interact with teachers with any regularity.

Some districts may wish to develop their own training program in consultation with their local. Subsection (b) describes the elements that must be included in the program, as follows:

- definitions of harassment and sexual harassment – see Article E.2.2.a and b
- examples of harassment and sexual harassment – examples of what is and what is not prohibited behaviour (for examples of acceptable and unacceptable behaviour, refer to the explanation of E.2.2 earlier in this section)
- case studies – used to develop an awareness of behaviour that is illegal and/or inappropriate (such studies should demonstrate the point at which borderline behaviour becomes unacceptable under this article)
- suggestions for strategies to prevent harassment and sexual harassment – these should include opportunities for teachers to ask questions about situations they have observed or been involved in
- a review of the resolution procedures – for information on dealing with harassment and sexual harassment complaints, refer to the explanations of E.2.3, and E.2.5 earlier in this section
- examples of complaints – include complaints that a reasonable person would consider malicious, vindictive, vexatious, or frivolous, and point out that individuals who raise such complaints will be subject to discipline, the level of which will depend on the extent to which the complaint meets these criteria
- board policy – policy on harassment or sexual harassment must be consistent with the new provincial language (if not, it should be updated)
- applicable law – in BC, the applicable law is the *Human Rights Code*.

## ❖ Administration

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### **Selecting the Investigators**

Districts should ensure that at least one management individual is trained as an investigator for the district.

Investigators should be chosen carefully. The investigator should be someone who:

- is well respected by both management and union members
- is sensitive to the nature of workplace harassment and its effects
- can be trusted to observe strict confidentiality
- is confident and capable of discussing a complaint at all levels in the organization
- has good judgment.

This article also provides that a complainant may request an investigator of the same gender. While it is not mandatory to meet this request, districts should train at least one male and one female investigator if reasonably practical.

Small districts may prefer to rely on outside investigators to satisfy gender requests, or may opt to trade off with a neighbouring district if travel and time costs are not excessive.

### **Training Investigators**

The district's investigator must be trained or have considerable experience in investigating harassment and sexual harassment complaints. A program is available through BCPSEA and may be requested if a district has a need for replacement or for additional investigators. The district should ensure that the individuals selected as investigators are scheduled for training.

### **Awareness Program**

BCPSEA contracted with Learning Works to develop a portable awareness program that can be produced locally and on site. This program should have been delivered to all current teachers by the end of the 1997-98 school year and should be scheduled at least once annually to train new and returning teachers. It is recommended that this training be done in consultation with the union. If you require additional or replacement trainers, please contact your BCPSEA liaison.

### **File Retention**

At the conclusion of the investigation, the investigator's report and any documentation, correspondence, etc. that was related to the complaint and subsequent investigation, should be filed in a discreet location in the superintendent's office. This file is a confidential one and should only be accessed by the superintendent/designate. Notice of investigation letters to the respondent should be retained in this location and not in the personnel file

of the respondent. No documentation related to the complaint and investigative process should be put on either the respondent's or the complainant's personnel file. If there is a disciplinary response that results from the investigation, that should be recorded on the personnel file. The investigation file should be retained for five years.

### **Report Disclosure**

In December 2000, Arbitrator Dorsey issued an award dealing with this matter. The award, "Disclosure and Distribution of Harassment Investigation Reports," commonly referred to as the Dorsey Protocol, dealt with many of the contentious issues which had been in dispute between the provincial parties. Chief amongst these was the nature and extent of a board's obligation to disclose harassment investigation reports and related materials to the union. The Protocol was developed as part of a tripartite process involving the BCTF, BCPSEA and the BC Principals' and Vice-Principals' Association (BCPVPA). The BCPVPA was invited to participate in the process as their members were the subject of harassment complaints which lead to investigation reports.

Dorsey's award dealt with issues of confidentiality and included appropriate protections to ensure privacy (a severing process), a commitment to disclose reports promptly, and an expedited resolution process should the parties disagree on the severing issue.

The confidentiality requirements limit access to the report to the complainant, the respondent, their respective counsel and representative at the provincial and local level. Those who gain access to a report must undertake not to discuss, circulate, copy or otherwise disseminate any part of the report except as permitted by Dorsey's award. In addition, provision was made to have all copies of the investigation report returned to the employer or their representative once any proceedings arising from the complaint and report have been concluded.

Criteria for severing material from harassment investigation reports include considerations for the deletion of material:

- to protect the privacy of third parties
- comments or recommendations unrelated to the complaint or outside of the mandate of the investigator
- the names or other identifying characteristics of witnesses

It is necessary to retain sufficient material in the report to allow counsel to properly advise their respective clients.

A timeline for dealing with the disclosure of the report and any disputes in regard to severing is also an integral part of the Protocol. Most important for employer representatives is to be aware of their obligation to disclose an unsevered copy of the investigation report to counsel for the complainant and respondent within five (5) school days of its receipt. The employer representative should identify any portions of the report that need to be severed and advise counsel for the complainant and respondent of this when

the unsevered report is forwarded to them. The report is not to be disclosed to anyone else until any severing disputes are resolved.

A more comprehensive review of Arbitrator Dorsey's award was circulated in *Teacher Collective Agreement Administration Bulletin* Number 32 dated February 8, 2001. The award is available upon request to your BCPSEA liaison.

Subsequent to this award the parties have continued to refine their understanding of the Protocol and have had Arbitrator Dorsey make a determination on several severing disputes. In May 2005, the BCPVPA advised the BCTF, BCPSEA and all superintendents that they would no longer participate in the disclosure protocol awarded by Arbitrator Dorsey. Notwithstanding their withdrawal, if a principal or vice-principal wishes to have access to an investigator's report as a respondent, access may only be granted pursuant to the confidentiality terms of the Protocol.

## ❖ BCPSEA Resources

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### *"A Guide to Teacher Harassment Complaints in the Workplace"*

This book provides more detailed advice with respect to the application and administration of Article E.2. It is recommended as a tool for superintendents, other district administrators and school-based principals and vice-principals. It is available upon request to your BCPSEA liaison.