

IN THE MATTER OF AN ARBITRATION

BETWEEN

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/
BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 83
(NORTH OKANAGAN-SHUSWAP)

(the "Employer")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION/
NORTH OKANAGAN-SHUSWAP TEACHERS' ASSOCIATION

(the "Union")

ARBITRATOR: Robert Pekeles

COUNSEL: Judith Anderson, for the Employer
Randy Noonan, for the Union

DATE OF DECISION: September 24, 2009

INTRODUCTION

The Union seeks a declaration that the Employer has violated the parties' Collective Agreement by calculating the full time equivalent ("FTE") status of vacant positions in secondary schools in the North Okanagan-Shuswap School District (the "School District") in relation to a full school year, as opposed to the actual period of time available and covered by the term of the vacancy. The Union also advances a claim on behalf of 5 specific teachers. A central element of its position is that teachers who teach at least 2 blocks out of 4 in a semester should be entitled to a pro-rated portion of the money set out in Article D17.3 of the Collective Agreement for preparation time. Article D17.3 provides as follows:

The Employer shall continue the practice of providing preparation time equivalent to 12.5 percent or one (1) block in eight (8) for full-time teachers in secondary schools or pro rata for part-time teachers at .5 or above.

The Employer's position by contrast is that the .5 referred to in Article D17.3 must be calculated in relation to the school year and not in relation to a single semester.

FACTS

By the 2004-05 school year, all secondary schools in the School District had switched to a semester system. In a semester system, there are 2 semesters each school year. A 1.0 FTE teacher teaches 7 blocks and has 1 block of preparation time as set out in Article D17.3.

In a linear system, the teacher gets preparation time throughout the school year. The semester system takes away the ability to use preparation time throughout the school year. A 1.0 FTE teacher teaches 4 blocks with no preparation time in one of the semesters and teaches 3 blocks with 1 block for preparation time in the other semester.

Dave Witt has been employed by the School District since August 1999. He became the Assistant Superintendent in 2006. Witt testified in cross-examination that a part-time teacher who teaches 3 blocks in each of 2 semesters does not get actual preparation time. Instead, he/she gets money because that is the best that can be done in a semester system.

A teacher who teaches 4 out of the 7 teaching blocks over the full school year gets paid at 0.571 FTE. The origin of this calculation lies in an earlier arbitration award namely, *Howe Sound School District No. 48*, unreported award dated May 31, 1995 (Williams). That decision addressed the formula for calculating preparation time for part-time teachers. Arbitrator Williams wrote that: “it was agreed that the teaching blocks for full-time teachers in secondary schools are divided into 8 of which 7 are instructional and one is preparation.” (at para. 13). That is the same as in the secondary schools in the School District in the present case. Arbitrator Williams concluded as follows: “I have concluded that in making that calculation for the part-time teacher and ensuring that it is pro-rated in proportion to the teaching assignment in accordance with the Collective Agreement, one must take one-seventh, not one-eighth of the instructional time.” (at para. 32). 0.071 FTE is one half of one seventh.

A central issue that has arisen between the parties in the present case is: What happens in temporary assignments for one semester in which the teacher teaches only 2 or 3 blocks? Does the teacher get a pro-rated amount of the money for preparation time set out in Article D17.3, as claimed by the Union?

I pause to note that the Employer originally took the position that a teacher who taught 4 blocks in one semester is not entitled to the preparation time money. In closing argument, however, the Employer revised its position such that a teacher who taught 4 blocks in one semester is entitled to that money, so long as the Employer could recover any overpayment of preparation time to a teacher who had been replaced by the teacher who taught the 4 blocks.

I turn to the facts related to 5 teachers on whose behalf the Union has advanced a specific claim. Those 5 teachers are 1) Kristen Elvin, 2) Jennifer Harris, 3) Lisa Hunter, 4) Ian MacDonald and 5) Wolfram Ostermann.

Elvin received a 4 block temporary assignment in the second semester of the 2006-07 school year. The Employer's position was set out in a letter dated December 3, 2007 to the Union:

Kristen's posting (T2006:194) was for the leave of Mike Nahachewski whose assignment was 4 blocks in semester 2. The prep time associated with Mike's assignment has been used in semester 1.

Harris received a 4 block temporary assignment in the second semester of the 2005-06 school year. The Employer's explanation was as follows:

The circumstances leading to this posting (Posting T2005:193) are as follows. Joan Mitchell was assigned to be Teacher-Librarian for 4 out of 4 blocks in semester 2. Jan McDonnell was moved into Library when Joan retired at the end of January 2006. Jennifer Harris took the 3 blocks that Jan was scheduled to teach in semester 2. A fourth block was assigned by the school staffing formula. The resulting assignment was 4 out of 4 blocks. It is not the school district's practice to pay more than 1.0 FTE.

The vacancy should have been posted at .50 FTE to be worked/paid at 1.0 FTE and was incorrectly posted at .571 FTE to be worked/paid at 1.0 FTE.

Hunter received a 4 block temporary assignment in the second semester of the 2005-06 school year. The Employer's explanation was as follows:

Lisa's posting (T2005:191) was for the leave of Tony Say whose assignment was 4 blocks in semester 2. Tony had used the prep time associated with that assignment in semester 1.

The vacancy should have been posted at .50 FTE to be worked/paid at 1.0 FTE and was incorrectly posted at .571 FTE to be worked/paid at 1.0 FTE.

Ian MacDonald received a 4 block temporary assignment in the second semester of the 2005-06 school year. The Employer's explanation was as follows:

Ian's posting (T2005:186) was 3 blocks for Paul Britton and 1 block for Brian Heitman. Paul Britton had used up his prep block in the first semester and was to work four blocks in the second. The fourth block of his assignment was for Career Co-ordination. This fourth block was assumed by another staff member. The resulting timetable shuffling had Ian teaching one block of Brian Heitman's assignment.

Ostermann received a 4 block temporary assignment in the second semester of the 2005-06 school year. The Employer's explanation was as follows:

Wolf's posting (T2005:190) was for the leave of Hilary Wahlstrom whose assignment was 4 blocks in semester 2. Hilary had used the prep time associated with that assignment in semester 1.

The vacancy should have been posted at .50 FTE to be worked/paid at 1.0 FTE and was incorrectly posted at .571 FTE to be worked/paid at 1.0 FTE.

Witt testified that the 0.571 FTE postings for each of Harris, Hunter and Ostermann were incorrect and should have been posted at 0.5 FTE because the teachers who previously filled those assignments had used up the preparation time along with their first semester assignment of 3 blocks.

Article D6.3 (the predecessor to the present Article D17.3) of the predecessor 1990-92 collective agreement provided as follows:

The Employer shall continue the practice of providing preparation time equivalent to one (1) block in eight (8) for full-time teachers in secondary schools or pro rata for part-time teachers at .5 or above.

Article D7.3 (again the predecessor provision to the present Article D17.3) of the predecessor 1992-94 collective agreement provided as follows:

The Employer shall continue the practice of providing preparation time equivalent to 12.5 percent or one (1) block in eight (8) for full-time teachers in secondary schools or pro rata for part-time teachers at .5 or above.

I have underlined the words that were added to the article in that collective agreement. Article D17.3 of the Collective Agreement contains the same language as that article.

The Employer adduced substantial past practice evidence about postings and assignments for 2, 3 or 4 blocks in a single semester. In argument, the Employer referred to it only briefly and relied on it in only a minor way. In view of my conclusion in this matter, I need not review the lengthy evidence with respect to the past practice on which the Employer relied. I pause to note that the Union submitted that the practice was not totally consistent.

Witt testified about meetings held between the parties between April 2006 and October 2007. In the April 27, 2006 meeting, the Employer indicated that it did not want to pay more than 1.0 for a 1.0 FTE assignment. For example, with respect to Harris, the Employer indicated that there would be a possible claw back of preparation time money if the assignment was part of a full year assignment in which the teacher in the full time position worked 3 blocks in the first semester and then went on leave in the second semester. The Union's position in that meeting was that if a teacher worked 2 blocks in a semester system, he/she must be paid preparation time because they taught 0.5 FTE during that time period (i.e. 2 out of 4 blocks). The Employer indicated that was not how it read Article D17.3.

In a January 18, 2007 meeting, the purpose was not to address the issue as a grievance, but rather to have a discussion to find common ground regarding secondary school preparation time issues. The Union took the position that Article D17.3 should be interpreted by semester and not by year. The Union took the position that teachers teaching 4 out of 4 blocks in one semester and no blocks in the other semester, should be

paid preparation time for the one semester. For teachers who worked 3 out of 4 blocks in one semester and then left or retired, pay back of one half of the block's preparation time would be in order.

Witt described the meetings as problem solving sessions. The Employer thought the parties were close with respect to teaching 4 blocks in one semester. Witt testified that in that meeting, the Union acknowledged understanding of the Employer's position, namely that for 7 teaching blocks a teacher should not be paid more than 1.0 FTE. A stumbling block, he stated, was the Employer's interpretation of 0.5 in D17.3 as being over a year and not over a semester.

Witt testified that no agreements were reached at that meeting. The parties met again on October 2, 2007. The purpose was further discussion of secondary school preparation time.

Witt testified that in that meeting the parties carried on their discussion of 1) what to do with a teacher who teaches 4 blocks out of 4 in one semester and 2) the interpretation of ".5" in Article D17.3. The Employer was not prepared to negotiate that .5 meant .5 over a semester. The Union informed the Employer that it would be grieving. The Union filed its grievance later that day.

Witt testified that it was an important Employer objective in the matter to not pay more than 1.0 for a 7 block teaching assignment. He agreed, however, that there was never an agreement that what the parties said in those meetings would be their position throughout.

Witt agreed that if a teacher taught 4 blocks in a single semester, the teacher taught the same amount of time as a teacher who taught 4 blocks in the full school year. He further agreed that the teacher who taught 4 blocks in a full school year was being paid at 0.571 because he/she was being paid for preparation time. The teacher who taught 4 blocks in a

single semester was only being paid at 0.5, because he/she was not being paid for preparation time.

Witt testified that if one teacher taught 4 blocks in the first semester without preparation time having been taken and a 3 block posting was put up for the second semester, then preparation time was available for that 3 block posting in the second semester. He agreed that the practice had been that for a 3 block posting in the second semester, whether or not the teacher received preparation time money depended on what happened with a different teacher in the first semester. He further agreed that as a result, 2 new teachers each with 3 teaching blocks in the second semester could be paid at different rates.

Witt testified that the Employer's concern with respect to the 5 teachers named earlier in this decision was that another teacher had already used the preparation time so that there was no preparation time money left. He further agreed that if 4 blocks were assigned to a teacher in the second semester only, then the issue regarding whether preparation time was used in the first semester relates to the assignment and not to the teacher.

Bruce Hunt, the Secretary Treasurer of the School District, agreed that a person's pension is affected by their salary. Accordingly, a person who receives 0.571 of a year's salary has an advantage over someone who receives only 0.5 of a year's salary.

Lynda Nicholson was the President of the North Okanagan-Shuswap Teachers' Association from January 2006 until June 2008. She was present at the meetings referred to earlier. She testified that the Union raised the issue of 2 blocks, 3 blocks and 4 blocks in a single semester. In her view those should attract preparation time. The Union did not express agreement with the Employer regarding 2 or 3 blocks in one semester.

According to Nicholson, the Union understood that the Employer's position was that it would not pay more than 100% of a salary. With respect to the January 2007 meeting,

the Union floated the idea of the Employer not paying more than 1.0 for 7 blocks of teaching time as part of a bigger package.

Don Briard, who works for the BCTF, was present at the January 2007 meeting. The Employer expressed concern about paying too much. To break the log jam, the Union put forward a proposal that the Employer would not pay more than 1.0 FTE for 7 blocks of teaching time. With respect to the principle of D17.3 being interpreted by semester and not by year, Briard testified that if a teacher taught 4 blocks in a single semester, then the semester should be treated as an intact unit and 12.5% preparation time should be paid for that. Briard testified that the Union could agree to those two principles as part of an overall solution. With respect to the issue of overpayment, he testified that it would be on the back of the person who had left and who had been overpaid. It would not be on the back of the person who taught in the second semester. He testified that with respect to overpayment, the Union would hardly be in a position to raise an issue if the Employer attempted to recover.

Briard testified that the bulk of the time in the January 2007 meeting was spent on the issue of 4 blocks taught in one semester, because the parties could not get past that. He testified that the Union did not give up on the assignment of 2 or 3 blocks in a semester. The parties did not have time to deal with that at that meeting.

He testified that 8 blocks did not fit into one semester. However, he testified that the 12.5% could apply to any teacher who taught over 50% in a single semester.

Despite the issues and proposals discussed at these various meetings, it is clear on the evidence that no agreement was reached between the parties.

UNION'S ARGUMENT

As noted earlier in this decision, in closing argument the Employer conceded that a teacher who taught 4 blocks in a single semester was entitled to preparation time money, so long as the Employer could recover any overpayment of preparation time to a teacher who had left before the completion of their full teaching assignment. I will address those issues in my analysis below.

In view of my conclusion in this matter, I will only set out the Union's argument. The Union submits that the Employer's job postings relate to a period of time outside of the job that is being posted and that is to be performed. It argues that a teacher teaching 4 out of 4 blocks is engaged in a full-time job.

The Union submits that under Article D17.3, the 12.5% relates to the teachers, and not to the assignments. It submits that the Employer's approach leads to 2 teachers each teaching 3 blocks in the second semester but being paid different amounts for doing so. That difference is related to the teaching assignment, as opposed to the teacher.

It notes that the teacher applying for the job does not know whether the teacher whom he/she is replacing was or was not paid preparation time. All that he/she knows is that he/she will be teaching full time for the semester in question. The key factor is the preparation time.

The Union agrees that a teacher who teaches 1 block in the first semester and 1 block in the second semester should not receive preparation time because over the period of his/her assignment, he/she is a 0.25 FTE. However, the Union submits that if the teacher teaches 2 blocks in one semester, then the teacher teaches 0.5 FTE (2 blocks out of 4) over that period of time and should be entitled to preparation time pay.

The Union submits that the result of the Employer's practice is that 2 teachers may get paid different amounts of money depending on whether or not the teacher who has left did or did not get paid preparation time. The Union submits that the payment of preparation time cannot depend on what another teacher was paid. In sum, the Union submits that the Employer cannot manipulate a posting so that it relates to a period of time outside of the period for which the job is posted.

The Union further refers to Article C16.4 of the Collective Agreement and notes that a teacher employed under temporary contract for a minimum of twelve consecutive school months shall be granted a continuing contract of employment. Thus, a teacher who teaches 4 blocks over the course of a school year gets credit towards that goal, whereas a teacher who teaches the same 4 blocks in only one semester may not get that credit. The Union submits that if a teacher teaching in the first semester only is not an employee in the second semester for the purpose of conversion or benefits, then that teacher is also not an employee for the purpose of calculating preparation time. It further refers to the difference in pension secured by a teacher who is paid at 0.571, as a result of receiving preparation time pay, over a teacher who is paid at 0.5, as a result of not receiving preparation time pay.

ANALYSIS AND DECISION

I begin by setting out certain provisions of the parties' Collective Agreement:

- B13.1 A part-time teacher is one whose FTE as set out in his/her letter of appointment is less than 1.0.
- B13.2 Part-time teachers shall be paid that portion of their regular scale placement as set out in their letter of appointment.
- B17.2 An Employee shall be paid 1/10th of current annual salary in respect of each month (Sept-June) in which the teacher works all prescribed school days that month.

- C16.4 A teacher on temporary contract shall be granted a continuing contract of employment provided that the teacher has been employed under temporary contract for a minimum of twelve consecutive school months.
- D15.1.a The annual salary established for teachers covered by this Agreement shall be payable in respect of the teacher's regular work year which shall not exceed 195 days in session per school year.
- D17.3 The Employer shall continue the practice of providing preparation time equivalent to 12.5 percent or one (1) block in eight (8) for full-time teachers in secondary schools or pro rata for part-time teachers at .5 or above.

Appendix A of the Collective Agreement sets out the annual salary scale grid payable to teachers.

The parties differ over the meaning of Article D17.3. With respect to the present issue, I should refer to certain principles of interpretation. The primary resource for interpretation is the collective agreement language itself. The words used in the collective agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole. When faced with a choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered. See for example: *Health Employers Association of BC*, unreported award dated April 26, 2002 (Gordon).

At the heart of the dispute between the parties is the meaning of: "at .5 or above" in Article D17.3. Does that mean 0.5 over the period of time worked by the teacher, as asserted by the Union, or does it mean 0.5 over the school year, as asserted by the Employer? The question is .5 of what? The answer to that question depends on the contract language agreed to by the parties.

I have concluded that in the context of the parties' Collective Agreement, "at .5 or above" means over the school year. First, preparation time is "equivalent to 12.5 percent". 12.5% is equal to 1.0 divided by 8. A 1.0 FTE teacher is assigned 8 blocks through the full school year. Part-time teachers at 0.5 or above receive pro rated preparation time money. Looking at Article D17.3 in isolation indicates that the .5 is 0.5 of 8 blocks, i.e. 4 blocks.

Second, the salary scale set out in Appendix A of the Collective Agreement is an annual salary, not a semester based salary. It is the amount paid to a 1.0 FTE teacher. Article B13.2, for example, sets out that: "Part-time teachers shall be paid that portion of their regular scale placement as set out in their letter of appointment." (emphasis added). Article D15.1.a, for example, states that: "The annual salary established for teachers covered by this Agreement shall be payable in respect of the teacher's regular work year which shall not exceed 195 days in session per school year." (emphasis added).

In short, the scheme of payment under the Collective Agreement is based on the 1.0 FTE annual salary, i.e. the salary payable for the school year; not a salary payable for each semester. The school year consists of 8 blocks, not the 4 blocks in each semester.

Third, in addition to being consistent with the language of Article D17.3 and the Collective Agreement as a whole, this interpretation is also a reasonable one in that it provides consistency for teachers who teach the same number of blocks in a given school year. A teacher who teaches 4 blocks in a school year will receive preparation time money, regardless of when he/she teaches those 4 blocks. Unlike the Employer's practice, it does not matter, for example, whether the teacher teaches 2 blocks in each semester or 4 blocks in one semester during one school year. Thus, this interpretation avoids the problem of 2 teachers who each teach 4 blocks in one school year, yet get paid differently depending on when they teach those blocks. On the other hand, a teacher who only teaches 2 or 3 blocks in a school year will not receive preparation time money, again regardless of when he/she teaches those 2 or 3 blocks.

Similarly, a teacher who teaches 4 blocks in a school year, regardless of when he/she teaches those 4 blocks, will not only receive preparation time pay, but will also accrue whatever advantage in terms of pension that would result from receiving 0.571 FTE salary, as opposed to 0.5 FTE salary.

Considering the language of Article D17.3 itself and in the context of the rest of the Collective Agreement, as well as the reasonableness of the interpretation, I have concluded that the “.5 or above” in Article D17.3 is in relation to the school year. The FTE status of vacant positions should be calculated in relation to the school year and not in relation to the period of time covered by the term of the vacancy.

The 8 blocks in the school year consist of 7 teaching blocks and 1 preparation time block. Teachers who teach 1 to 3 blocks out of 7 in a school year are not entitled to preparation time pay. They work less than 0.5 FTE. Teachers who teach 4 to 6 blocks out of 7 in a school year are entitled to the pro-rated share of preparation time pay. They work “at .5 or above”. Teachers who teach 7 out of 7 teaching blocks are, of course, entitled to full preparation time pay.

As is evident from my analysis above, under the terms of the parties’ Collective Agreement, a teacher who teaches 4 out of 4 blocks in a single semester is not engaged in a full time job in terms of the parties’ Collective Agreement. A full time job or 1.0 FTE job under the terms of the Collective Agreement is one in which the teacher teaches 7 out of 7 teaching blocks in a full school year. Full time in the school sector may well be different than in other employment contexts. Certainly under these parties’ Collective Agreement, it is different than in other employment contexts. I note that the teachers teach only 10 out of 12 calendar months i.e., from September to June. That is very different than most employment contexts.

With respect to the Union’s argument regarding conversion from a temporary contract to a continuing contract under Article C16.4, the difference that flows to a teacher who

teaches 4 blocks over the course of a school year, as opposed to one who teaches 4 blocks over one semester only, is something that simply flows from the language that the parties have agreed to. The parties could have agreed, for example, that conversion would flow from performing a minimum percentage of FTE over twelve consecutive months. However, that is not what they agreed to in Article C16.4.

I agree with the Union, however, that the payment of preparation time is for teachers, and not for assignments. The payment of preparation time does not depend on what, if any, preparation time was paid to some other teacher who taught only part of their assignment. Paying the preparation time to a teacher does not depend on whether or not the teacher whom that teacher is replacing did or did not get paid preparation time.

Having said that, however, if for example a teacher is assigned to teach 7 blocks in a school year and leaves after the first semester, then the Employer can seek to recover any overpayment of preparation time money from that teacher through the grievance/arbitration procedure. I will not say more than that as there may or may not be issues with respect to the recovery of that money from any particular teacher. That may be left to separate proceeding(s) in which the Union can turn its attention to any particular issue(s) that may arise in that (those) case(s).

In conclusion, the Union's grievance is allowed in part. I declare that teachers who teach at least 4 blocks out of 7 in a school year are entitled to the pro-rated share of preparation time pay. They work "at .5 or above". With respect to any of the 5 teachers named earlier in this decision who taught 4 out of 7 teaching blocks in a school year and were not paid the pro-rated share of preparation time money, I order the Employer to pay them any preparation time money which they are owed. I say any of them because I am uncertain as to whether Harris, Hunter and Ostermann were actually paid for the preparation time. I note that their assignments were posted as 0.571 FTE. MacDonald's and Elvin's assignments were posted as 0.5 FTE, so it is probable that they were not paid for preparation time. I further order the Employer to make those 5 teachers whole to the

extent that they may have lost other entitlements under the Collective Agreement as a result of the Employer's breach.

I retain jurisdiction to address any issue relating to the interpretation or implementation of this decision.

Dated at the City of Vancouver in the Province of British Columbia, this 24th day of September 2009.

Robert Pekeles
Arbitrator