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Capsle Canadian Association for the Practical Study of Law in Education

COMMENTS

MINISTRY RELEASES NEW BOMB THREAT PROCEDURES

Violent school threats, including bomb threats, have escalated in recent years. A study from the United States-based National School Safety and Security Services found that there had been 812 occurrences in the United States in the first half of 2014, a 153% increase since the previous year.[1] The vast majority of these threats were hoaxes[2] that must be carefully assessed on a case-by-case basis.

Comparative Canadian data is not available.[3] Statistics Canada does not have a separate category for bomb threats.[4] Nonetheless, bomb threats are becoming a regular feature of the Canadian school experience due in part to the anonymity and the broad platform that social media delivers. The majority of bomb threats are now received over social media[5], and this presents a unique challenge to educators who must decide whether or not to evacuate a school.

In response to the changing landscape of school security the Ontario Ministry of Education has released a new Bomb Threat Protocol.[6] As of September 2016, Ontario school boards and local police are expected to have revised their own local protocols to include best practices for bomb threats in the schools' Emergency and Crisis Response Plan.[7]

While most of what the policy provides is termed "Effective Practices" arising from the recommendation of the Ontario Association of Chiefs of Police, there are two mandatory requirements.

1. All publicly-funded elementary and secondary school boards establish a bomb threat response policy to ensure the development and implementation of individual school plans.
2. Each board must ensure that its staff, students and other partners are aware of their obligations/responsibilities within the individual school plans.

Common questions about the new requirements include the following.

What is the role of the principal in the new policy?

The principal is responsible for:

- The overall development and content of the individual school plan;
- Inviting police, fire and emergency medical services to participate in the plan development and for making them aware of planning and drills;
- Training of staff and students;
- Being completely familiar with the school's bomb threat plan and with the scope of his/her authority vested in and the responsibilities associated with the principal's position as defined in the plan.

During Initial Stages of Bomb Threat:

- The principal will be responsible for initial assessment and related decisions including those regarding visual scans and evacuations.

For Ongoing incidents:

- Police are responsible for management of the threat and any subsequent criminal investigation.
- The principal will co-operate fully with police and strive to ensure that all staff and students do the same.
- Once the principal has been relocated to place of safety, he/she should continue to exercise his/her duties to the extent possible, in support of the emergency responders' management of the situation.

What should the school's bomb threat plan address?

A non-exhaustive list of factors the plan should include is as follows:

- Determine likely locations in and around school for placement of suspicious packages/devices.
- Provide for controlled access to critical areas of all facilities.
- Consider the use of electronic surveillance or closed-circuit television (CCTV).
- Address ways to ensure that emergency exits are kept clear from obstructions.
- Assess whether interior/exterior and auxiliary lighting is adequate.
- Provide for the regular review of document-safeguarding procedures and inspection of first aid and firefighting equipment.
- Develop an inspection procedure for all incoming packages.

What are effective practices if the school receives a bomb threat?

According to the RCMP, anonymous callers make most bomb threats over the telephone. Some are received in the mail or by other means, but these methods are rare. In each case, the communication should be taken seriously. School staff in positions that make them most likely to receive bomb threats should be identified in school plans and should receive training in proper procedures.

The person receiving a bomb threat by telephone should try to keep the caller on the line as long as possible and should record precise details of the call, especially the exact wording of the threat. However, the person should end the call if staying on the line puts them in harm's way or prevents them from initiating response procedures.

What information should be recorded?

Staff should be trained to record precise information during a bomb threat call, including the following:

- the exact wording of the threat;
- the time and date of the call;
- the phone number or line on which the call was received;
- the caller's number, if shown on call display;
- whether the caller is male or female and the caller's approximate age;
- the exact location of the explosive device and the time of detonations, if that information is revealed by the caller;
- the type of explosive device and what it looks like (e.g., pipe bomb), if that information is revealed by the caller;
- any unique speech characteristics of the caller;
- any background noises (e.g., traffic, music laughter);
- the condition or emotional state of the caller (e.g., whether the caller seems to be intoxicated, excited, angry);

- the caller's name, if that information is revealed by the caller;
- whether the call taker recognizes the voice of the caller; and
- the time when the caller hangs up.

Following the call, the call taker should immediately "lock-in" the phone number of the received call, if this feature is available through the local telephone provider. It is suggested that the "lock-in" process be posted at all phones that can receive incoming calls.

Who should be notified of a bomb threat?

- Once the initial assessment has taken place and decisions have been made regarding a visual scan and/or evacuation, the police must be notified. Initial contact with the police may be made while the principal is conducting the assessment and making decisions.
- Although it is important to provide police with information beyond simply that a bomb threat has been received, initial contact should not be delayed.
- The fire department should also be notified of the bomb threat. A predesignated phone number should be used, rather than 911, which is restricted to emergency calls to the police.
- When notifying the fire department, it is important to clarify that no explosion has occurred and that the police have been informed.

What information should be given to the police?

- The information recorded by the person who has received the threat, whether by phone, email, text, social media, or online bulletin board.
- Activities taking place in the school at the time of the threat (e.g., examinations).
- The status of any evacuation that may be underway.
- The status of any safe, visual scan that may be underway.
- The in-school contact person for the police, once they are on the scene.

When should the school be evacuated as opposed to conducting a visual scan?

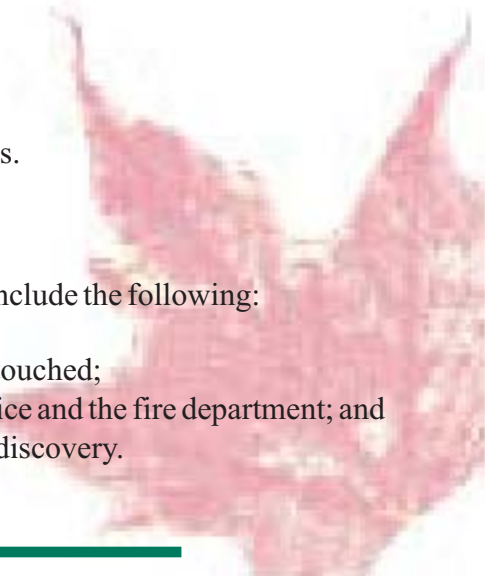
Given that bomb threats are often designed to disrupt school exams or daily classes, the guidelines do not prescribe when to conduct a safe visual scan and/or when to evacuate during a bomb threat. However a non-exhaustive list of criteria to consider when making this decision includes:

- the information received from the source of the threat;
- ongoing activities at the school;
- the location and time of threat; and
- recent comments made or incidents involving school staff or students.

What steps do you take if a suspicious package is located?

When a suspicious package/device is located, appropriate procedures include the following:

- isolation/containment of the device/package, ensuring that it is not touched;
- immediate communication of the discovery to the principal, the police and the fire department; and
- immediate re-evaluation of any evacuation decisions in light of the discovery.



What is a command post?

A command post is an area within the school that provides a central location from which officials and emergency services can evaluate incidents and control the emergency response.

Normally, the main office will be the primary command post location, with another area within the school identified as an alternate (secondary) command post location. The individual school plan should identify a third off-site command post location, to be used in the event that neither on-site command post location is available.

What communication strategies are recommended?

- Communication with parents, guardians, and the community in general is important so as to ensure a good understanding of bomb threats and explosive incident procedures, without instilling fear.
- Consider sending a newsletter to each home at the beginning of the school year to inform parents of bomb threat procedures and to encourage parents to reinforce with their children the importance of understanding the procedures and following staff direction.
- Parents need to be informed of where they should proceed in the event of an actual incident. Given the dynamic, complex, and fluid nature of these incidents, communication with parents around the importance of procedures is vital.
- In all incidents resulting in an evacuation that is not a drill, it is recommended that a communication to parents be sent home with each student at the conclusion of the school day or as soon as possible thereafter.
- Parents should be encouraged to ensure that their contact information is kept up-to-date so they can easily be reached by staff in the event of an emergency.

Ada Chidichimo Keon
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1. National School Safety and Security Services, "Study finds rapid escalation of violent school threats" (9 February 2015). Online: <http://www.schoolsecurity.org/2015/02/study-finds-rapid-escalation-violent-school-threats/>.
2. Richard Woodbury, "Canadian bomb threats are almost always hoaxes, but still take police time" CBC News (25 September 2016). Online: <http://www.cbc.ca/news/canada/nova-scotia/bomb-threats-canada-nova-scotia-p-e-i-who-makes-them-1.3777501>.
3. Evan Dyer, "Closure of RCMP bomb data centre lamented by police", CBC News (13 August 2016) online: <http://www.cbc.ca/news/politics/rcmp-bomb-centre-closure-1.3718556>.
4. *Supra* note 2.
5. *Supra* note 1.
6. Ministry of Education, "Provincial Model for Local Police/School Board Protocol" (2015) at <http://www.edu.gov.on.ca/eng/document/brochure/protocol/locprote.pdf>
7. George Zegarac, Deputy Minister of Education, Memorandum to Directors of Education and District School Boards, "Revised Provincial Model for a Local Police School Board Protocol" (9 September 2015), online: <http://www.edu.gov.on.ca/eng/policyfunding/memos/sept2015/revised_provincial_model.pdf.>

PRESIDENT'S MESSAGE

I wish to use this President's Message (which will be my last) to highlight two key issues:

1. **Saskatoon Conference** – if you haven't already done so, I would strongly encourage you to register for this year's CAPSLE Conference which will be at the Sheraton Cavalier Saskatoon Hotel from April 30 to May 2, 2017. More information concerning registering for this Conference can be found elsewhere in this newsletter. The theme of the Conference is "In the Land of Living Skies: Expanding Horizons in Education and the Law". There are engaging and informative plenary sessions and keynote speakers already confirmed. Some of the highlights will be Judge David Arnett, Chief Commissioner, Saskatchewan Human Rights Commission speaking about diversity. A panel topic on Diversity: Success and Challenges, including medical marijuana in Canadian schools and student refugees at crossroads. Chief Darcy Bear, White Cap Dakota First Nation will also be a keynote speaker. Chief Darcy Bear is a much sought after speaker. There will also be a panel on the Violence, Threat, Risk Assessment in Saskatoon which will touch on the Violence, Threat, Risk Assessment in educational organizations, freedom and expression in the internet age and collaborative risk driven intervention.

2. **CAPSLE Bursary** – following the Annual General Meeting in 2016, CAPSLE established a bursary to provide financial assistance to students entering post secondary education and/or law programs. The CAPSLE Board of Directors is extremely pleased to announce that one $1,000 bursary is available for the 2017/2018 academic year. The eligibility criteria and the application process will very shortly be added to the CAPSLE website and this bursary will be discussed more in Saskatoon. The eligibility criteria for the bursary are as follows:

a. The applicant must have been accepted to a Canadian university program at a recognized Faculty of Education and/or Faculty of Law in the 2017/2018 academic year.

b. Priority will be given to applicants who identify as a member of a group that is under-represented in education and/or the law.

c. The full application process will be available on the website but applicants will be required to provide a short essay up to 500 words describing how the applicant meets the eligibility criteria and why the applicant is studying education and/or law, including thoughtful commentary of the nexus between education and the law.

In order to create this bursary, CAPSLE has eliminated its Fellowship Program. The CAPSLE Fellowship Program has been in place for 16 years and the Board thought it would change its focus away from the Fellowship and instead provide a bursary to students requiring financial assistance entering post secondary education and/or law programs. The Board is very excited about this initiative and we expect numerous applications.

The Board is also looking forward to the essay providing commentary on the nexus between education and law.

As this will be my final newsletter as President, I wish to thank the CAPSLE Board of Directors, the CAPSLE Secretariat and all CAPSLE members for what has been a very enjoyable experience. As always, I encourage anyone reading this to acquire a CAPSLE membership if you don't already have one and attend a CAPSLE conference as it is the best (by far) professional development for anyone who has to deal with the intersection between education and the law with any type of frequency.

See you in Saskatoon!

Ian Pickard
CAPSLE President

TEACHERS AND OFF-DUTY CONDUCT

A recent Ontario arbitration decision, addressed the relationship between off-duty conduct and the importance of the role of a teacher in society. In *Grand Erie District School Board v Ontario Secondary School Teachers' Federations, District 23*[1], sole Arbitrator Christopher White was tasked with balancing the seriousness of off-duty conduct, its impact on the employer and the high standards to which teachers are held given the importance of their role in society, with the fundamental nature of employment.

Facts

Alex Zurby (the "Grievor") was employed as a teacher by the Grand Erie District School Board (the "Board") and was a member of the Ontario Secondary School Teachers' Federation, District 23 (the "Federation"). The Grievor was employed by the Board on an occasional basis as an elementary school teacher as well as a teacher at the Brantford Jail prior to 2008 when he was hired to teach on a permanent full-time basis at the Brantford Jail in 2008 until 2011. At that time, the Grievor was hired to teach full-time at Sprucedale, a youth correctional facility.

In the fall of 2015, a staff member at Sprucedale advised the Board that the Grievor was involved as a witness in a criminal trial. The accused in the trial was a police officer who was facing charges with respect to his involvement with a cheese smuggling ring. Board conducted an investigation into this matter, reviewing media reports as well as transcripts of the proceeding. The Board suspended the Grievor with pay on November 18, 2015 pending the outcome of the investigation. The Board held a meeting with the Grievor and the Federation on November 30, 2015. The Board asked the Grievor a number of questions in relation to the matter but the Grievor, on the advice of the Federation, did not respond. The Board terminated the Grievor for cause at that time. The Federation filed a grievance on December 7, 2015 which was denied by the Board on December 17, 2015 and the matter was referred to arbitration.

Following referral to arbitration, the Board received a copy of the transcript of the Reasons for Judgment in the above-noted matter, as well as the transcript of the Grievor's interview with police. The transcripts revealed that the Grievor had become involved with two (2) other individuals, both police officers, in a cheese purchasing scheme whereby cheese was purchased in the United States (where the cost was much less) smuggled across the border, and sold to local restaurants in Ontario with the Grievor keeping a portion of the proceeds from the sale. The entire scheme began to unravel when one of the officers involved, who was also smuggling steroids, was caught by U.S. customs. A police investigation was launched and the Grievor sought legal counsel. In exchange for his cooperation regarding prosecution of one of the police officers for his role in the cheese smuggling arrangement, the Grievor did not face any criminal or Canada Border Services Agency charges. As evidenced by the transcripts, the Grievor was involved mainly in the sale of the smuggled cheese in Ontario. The Grievor had only himself smuggled cheese across the border once, and had asked his parents to do the same on his behalf once as well. Furthermore, the Grievor was remorseful and acknowledged that his actions were errors in judgment.

At arbitration, the Board introduced email correspondence between the Griveor and a co-worker (sent during working hours) containing references to cheese and to restaurants. The Board also introduced a number of media reports on this matter, some of which made reference to the Grievor and the Board, as well as the Ethical Standards for the Teaching Profession.

The Federation made a production request at the hearing for all relevant documents relating to the discipline of teachers whose police record checks revealed a finding of guilt regarding criminal or regulatory matters. The Board objected on the basis of relevance and privacy interests. Arbitrator White allowed the request, subject to conditions designed to protect the privacy interest of the individuals and evidence was led at arbitration of information regarding the offence, hire date of the employee, offence date and notes regarding discipline imposed.

Board's Position

The Board took the position that the Grievor's conduct was sufficiently serious and warranted termination for cause in the circumstances given the seriousness of the conduct relative to his role as a teacher, the manner in which his conduct impacted the trust relationship and the lack of mitigating factors weighing in favour of a lesser penalty.

With respect to the seriousness of the conduct, the Board argued that the following factors made the Grievor's conduct sufficiently serious warranting discharge:

- length of time the cheese smuggling ring continued (2009 until 2015);
- the fact that the Grievor engaged in the cheese smuggling ring for personal gain;
- the misconduct involved conspiracy with police officers;
- the Grievor himself had smuggled cheese and had his parents smuggle cheese on his behalf; and
- the conduct in question was criminal in nature and but for his cooperation, the Grievor would have been guilty of the same charges as one of his fellow smugglers.

With respect to the impact on the trust relationship, the Board relied on the following factors in support of its argument that the trust relationship was no longer viable:

- the Grievor's position as a teacher supporting young offenders and his inability to continue to be a role model;
- the Grievor's failure to express his remorse via testimony at the hearing and any evidence of remorse in the transcript can't be tested by cross-examination; and
- the Grievor failed to account for his conduct to the Board and did not come forward to the Board at any time after he was aware that the conduct was discovered by police.

Lastly, with respect to the lack of mitigating factors, the Board argues that the mitigating factors do not outweigh the misconduct and relied upon the following:

- the Grievor's relatively low seniority;
- the harm to the Board's interests due to the media reports;
- the Grievor's purely pecuniary motivation; and
- the Grievor's failure to testify and explain himself or show remorse.

The Board's arguments centred on the special role that teachers play in the lives of students. The Board relied on cases that focused on the nexus between the off-duty conduct and the viability of the employment relationship involving teachers and their status in society given the high professional standards to which they are held.

Federation's Position

The Federation took the position that the Board failed to establish that discharge was sustainable on the basis of the Grievor's off-duty conduct at law, and at most, the Grievor's conduct was an error in judgment, not warranting dismissal. The Federation argued that the proper test for determining whether or not off-duty conduct warranted discharge was outlined in *Millhaven Fibres Ltd. v Oil, Chemical & Atomic Workers Int'l Union, Local 9-670 (Mattis Grievance)*, [1967] OLAA No. 4 (Anderson) ("*Millhaven*"). The *Millhaven* test requires the employer to prove that:

- the conduct of the Girevor harms the employer's reputation;
- the Grievor's behaviour renders the employee unable to perform his duties satisfactorily
- the Grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him; and
- the Grievor has been guilty of a serious breach of the *Criminal Code* and thus rendering his conduct injurious to the general reputation of the employer and its employees.

With respect to the *Millhaven* factors, the Federation argued that:

- there was no harm to the Board's reputation as the Grievor was only identified as a witness in media reports and no concerns have been voiced;
- there was no evidence of reluctance by any co-workers or administration at Sprucedale to working with the Girevor in the future and no impact on the Board's operations;
- the Grievor's conduct did not constitute a serious breach of the Criminal Code; and
- the Grievor's conduct was less morally or ethically culpable than that of others who were not discharged and continued to be seen as role models.

The Federation relied on cases involving employees who engaged in illegal conduct but were not charged or convicted. Furthermore, the Federation took the position that the Board's handling of the Grievor's conduct was not consistent with its handling of misconduct by other employees. The Federation argued that the Board's practice regarding off-duty misconduct, which did not involve discharge or severe discipline, is consistent with case law and the Board's decision to terminate is inconsistent with both its practice and the jurisprudence and is discriminatory. Lastly, the Federation argued that the Grievor was remorseful and cooperative despite potential negative consequences.

Decision

Arbitrator White determined that the issue was whether the Grievor's off-duty conduct impacted the legitimate interest of the Board assessing the nature and extent of the impact considering a number of factors including:

- the nature of the workplace;
- the nature of the off-duty conduct;
- the duties and responsibilities of the Grievor;
- the impact of the conduct on the relationships within the workplace;
- the impact of the conduct on the operations within the workplace;
- the impact of the conduct on the Board's external business or institutional interests e.g. reputation, status, market interests etc.;
- the third-party or public interests; and
- any applicable statutory or contractual rights, duties, obligations or standards.

Additional consideration may be given to the following factors when determining the appropriate response to the conduct in question:

- the length of service of the Grievor;
- the Grievor's record of work performance during that service;
- the Grievor's disciplinary record;
- any evidence relevant to an assessment of future conduct;
- any evidence of special personal circumstances of the Grievor;
- any evidence as to how the Board has dealt with prior, similar instances of off-duty conduct by its employees;
- any expressions of remorse;
- any evidence of steps taken by the employee to mitigate past and future harm to the Board; and
- any other factor relevant to an assessment of the employer's ability to mitigate negative consequences of the off-duty conduct.

Where discipline is warranted, an additional assessment must be made having regard to factors that mitigate the extent of the discipline imposed.

Arbitrator White reflected on the higher standard to which teachers are held in society, which is evident throughout the jurisprudence and the legislation. Arbitrator White concluded that although the Grievor had not been charged with a criminal offence, his conduct nonetheless breached the high standards expected of teachers. The nature of the Grievor's conduct, namely his participation in a long running, organized cheese smuggling scheme, considered in light of the high standard expected of teachers, formed the necessary nexus to engage the Board's interest.

Upon concluding that there was a nexus between the Greivor's involvement in the smuggling scheme and the Grievor's role as a teacher, Arbitrator White assessed the appropriateness of the response by the Board to the Grievor's conduct. Arbitrator White concluded that a disciplinary response was reasonable and justified. Next, Arbitrator White assessed whether or not the discharge, was reasonable in the circumstances. In undertaking this assessment, Arbitrator White considered the following:

- the Grievor as neither a long nor short service employee;
- the Grievor had been competent and professional throughout his teaching career;
- the absence of evidence of any issues caused by the Grievor's off-duty conduct that directly and negatively impacted his ability to work with others or perform his duties;
- the remorse expressed by the Grievor in his interview with the police;
- the fact that the Grievor's failure to come forward to the Board regarding the smuggling scheme was understandable and does not constitute evidence that he cannot be an effective teacher in the future.

With respect to the Federation's argument that the Board's response to the Grievor's conduct was inconsistent with its practices and was discriminatory, Arbitrator White distinguished the Grievor's conduct from that of other employees and concluded that the Board's response did not constitute discriminatory discipline. Turning to the public interest, Arbitrator White considered the following:

- whether the Grievor's off-duty conduct creates a risk of harm to the Board's reputation;
- the nature of the potential harm created by that risk;
- evidence of any actual harm;
- the potential for future harm; and
- the potential (and cost) of any steps that might ameliorate harm.

Arbitrator White determined that the harm to the Board's reputation was minimal or non-existent but that there was potential for harm created by the Grievor's conduct and therefore, the public interest is factor to be considered.

Conclusion

Ultimately, Arbitrator White concluded that the Grievor's off-duty conduct did not render the Grievor unable to be a role model at the Board, inside or outside the classroom, and the Grievor's remorse was genuine. Arbitrator White ordered reinstatement without loss of seniority and ordered that termination be substituted with a nine (9) month, unpaid suspension, commencing November 30, 2015. In coming to this conclusion, Arbitrator White noted that the Grievor's reinstatement represents an opportunity to demonstrate that the Grievor can conduct himself in accordance with the high expectations reflected in the legislation and the ethical standards.

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1. 2016 CanLII 72391 (ONLA) ("*Grand Erie*")

ARBITRATOR CONSIDERS IMPACT OF OFF-DUTY CONDUCT OF TEACHER

On Tuesday, February 14th, 2017 (Valentine's Day and Teacher Appreciation Week in Nova Scotia), the Nova Scotia Government introduced Bill 75, the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*: http://nslegislature.ca/index.php/proceedings/bills/bill_75_teachers_professional_agreement_and_classroom_improvements_201.

Bill 75 was introduced after the Province's teachers rejected a third tentative agreement reached between the Nova Scotia Teachers Union and the Government. On February 9, 2017, more than 100% of teachers voted 78.5% against the tentative deal (substitute teachers working were eligible to vote, bringing the total vote count over 100 per cent).

Bill 75, if passed, will impose a four-year collective agreement (with terms less favourable than the tentative agreement the teachers just rejected). The Bill will end teachers' right to strike for this round of bargaining. Teachers have been engaged in a work-to-rule since November, 2016. It will also forever restrict the form of strike to a full withdrawal of services: the Bill states that the duties of teachers in the Education Act apply while teachers are at work, despite their right to strike in the Teachers Collective Bargaining Act.

As of the date of writing, February 15, the Bill is in 2nd Reading and the NSTU has announced a province-wide one-day strike for Friday, February 17th, the first strike in NSTU's 122-year history.

Gail Gatchalian
Pink Larkin
Halifax, Nova Scotia

DOES MY ATTENDANCE MANAGEMENT PROGRAM VIOLATE THE COLLECTIVE AGREEMENT AND/OR HUMAN RIGHTS LEGISLATION?

In his (2013) decision, *London (City)*[1] Arbitrator Sheehan reviewed the City of London's attendance management plan. Subject to two issues (characterization of disability and lack of an exit from Level 4 of the Plan) Arbitrator Sheehan concluded that the Plan was not in contravention of the collective agreement and not in conflict with the Ontario *Human Rights Code,* the Ontario *Employment Standards Act, 2000* and the *Personal Health Information Protection Act, 2004*.

The following is a summary of the components of the attendance management program approved by Arbitrator Sheehan. (The Plan Principles were taken from an earlier (2012) arbitration decision, *London (City)* and *London City Firefighters' Association*.[2])

1. Plan Objectives:

To promote and maintain standards of attendance for all employees and to provide support to employees in order to achieve regular and improved attendance. (para. 9)

2. Plan Principles (para. 13):

- Employees recognize that regular attendance is a condition of employment and will act in good faith to ensure prompt and regular attendance at work.
- Employees, when absent, will conduct themselves in a manner to encourage a timely return to work.
- Management will provide a strong, visible commitment and support for responsible attendance at work.
- Management will provide and/or arrange for guidance and advice to support employees in the improvement of their attendance.

- Management will ensure effective early intervention practices are established to facilitate a timely return to work.
- Management will promote regular attendance by communicating with employees about their attendance and, where appropriate, will involve medical resources to assist and support employees.
- Management will ensure absenteeism is managed using a consistent, corporate-wide approach while allowing for consideration and flexibility to deal with individual circumstances.
- Management will implement an effective information system to record, track and measure absenteeism.
- Management will assess accommodation needs and accommodate disabilities in accordance with the Ontario Human Rights Code, the applicable collective agreements and/or policies and procedures.

3. Plan Application to Non-Culpable Absences:

The Plan applies to "non-culpable" (non-blameworthy) absences. … "sick leave absences" which are defined as absences due to illness or injuries that do not result from a "disability" as defined in the Code. Additionally, absences where the employee is on an emergency leave pursuant to the Employment Standards Act, 2000 (ESA), or on Long-Term Disability, or in receipt of WSIB, are not considered as sick leave absences for the purposes of the [Program]. … The Program was primarily designed to deal with casual intermittent absences of employees. (paras. 9 and 12)

4. Threshold for Entry to the Plan / Continuation in the Plan (paras. 10-12):

- An employee potentially enters, and progresses through the [four] Levels of the Plan, if he/she exceeds the monitoring threshold of 96 hours of sick leave absences in a rolling 12-month review period.
- All employees will have their attendance reviewed and compared to the threshold on a regular basis.
- [The Plan Administrator] would review as to whether any of the absences in question were related to a disability, or whether extenuating circumstances existed (e.g. single event or one time sickness), suggesting, notwithstanding the threshold has been triggered, that it would not be appropriate for the employee to enter the Plan, or progress to the next level of the Plan.

5. Level 1 Review Meeting:

- The employee would meet with his or her supervisor.
- The employee had the right to request union representation at the meeting.
- [At the Level 1 Meeting and at subsequent Level Meetings] the specific sick leave absences of the employee would be reviewed and if it appeared that some of those absences were a result of a disability, or that extenuating circumstances existed, the supervisor was to contact [the Plan Administrator] to review whether it was appropriate for the employee to enter the Plan [or continue in the Plan].
- Otherwise, the supervisor was to review with the employee the Plan and its objectives. The supervisor was required to identify the concerns of the Employer with the employee's absenteeism and outline the impact of the absences on the Employer's operations. The employee was also to be advised as to the expectations for improving his/her attendance and there would also be the identification, by the supervisor, of the resources available including, where appropriate, the Employee Assistance Program (EAP) that may be of an aid to the employee in improving his/her absenteeism.

6. Level 2 and Level 3 Review Meetings:

If the employee progressed to Level 2, the only difference between a Level 2 review meeting and a Level 1 review meeting would be that the employee would be advised "that progression to Level 4 of the Plan may result in non-disciplinary termination of employment". If, subsequently, the employee progressed to Level 3, then a representative of the Union would be expressly invited to attend the Level 3 review meeting by the Employer. Otherwise the meeting would mirror a Level 2 meeting.

7. Level 4 Review Meeting:

If the employee ultimately progresses to Level 4 of the Plan, the Employer would determine whether it would be appropriate, at that time, to terminate the employment of the employee on the basis of the doctrine of innocent absenteeism. The Plan suggests, as part of that review, the Employer would determine whether it had fulfilled its obligations under the collective agreement, the Ontario *Workplace Safety and Insurance Act, 1997* and the Code.

8. Exit from the Plan

At Levels 1, 2 and 3 of the Plan, if the employee does not exceed the threshold of 96 hours during the subsequent 12-month monitoring period, the employee will exit the Plan. [NOTE: Arbitrator Sheehan identified the lack of an exit from Level 4 of the Plan for a non terminated employee as a Plan defect which had to be corrected.]

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Hugh ConnellyLAW
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1. London (City), 2013 OLAA 338 (Sheehan)
2. London (City), 2012 CanLII18862 (Surdykowski)

In the Land of Living Skies: Expanding Horizons in Education & the Law

CAPSLE CONFERENCE 2017

Sheraton Cavalier Saskatoon Hotel
Saskatoon, Saskatchewan
April 30 – May 2, 2017

At this national conference, lawyers, educators and experts in their fields will speak to topics of human rights, immigration, accommodation, First Nations education, partnerships and more. Information is cutting edge, practical and from multiple perspectives.

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TEACHING IN A "POST-TRUTH" WORLD: DO TEACHERS AND STUDENTS NEED MORE TRAINING IN MEDIA LITERACY?

Post-truth: Relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.

2016 proved to be a year where popular public opinions confounded traditional news media, pollsters and many others. The presidential election in the United States and the United Kingdom's "Brexit" vote serve as prime examples. One of the galvanizing forces underlying this increasing disconnect between public sentiment and traditional media has been the growing prevalence of online sources that report "news" meant to appeal to its audience without being bound by facts or evidence or research – news that simply must be true (to some) because it *feels right*. This shift in the importance of verifiable truth as a basis for popular opinion led Oxford Dictionaries to select *Post-truth* as 2016's Word of the Year.

So what does it mean to be living in the era of post-truth? For starters, it means more responsibility on the shoulders of people who make use of media (i.e., everyone). First, as consumers of media content, individuals have a new responsibility to sort reliable information and credible sources from the questionable, the unreliable and the downright false information that may be masked as news for their consumption. Second, as producers of media in online spaces – whether through posting of tweets, blogs, photos or Facebook entries – individuals have a new responsibility to consider the impact of the content that they create or sponsor.

There is an important relationship between consuming and producing online media. Individuals don't tend to simply consume information; they pass it on – through retweets, likes and blog posts. Modern apps and technologies make this quick and simple.

For better or worse, when posting online, one effectively attaches one's name and reputation to the information being posted – regardless of whether the decision is made carefully and critically, or casually while ordering a double-double. This is where hazards arise for the young and inexperienced, or for any individual with limited media literacy.

When it comes to online media – no matter how small a circle one may intend to communicate with – one's potential audience is always the entire world. Take the infamous case of Justine Sacco, for example. While she was the head of communications at a major media conglomerate, Ms. Sacco boarded a plane and posted a tweet that others considered racist and insensitive. Ms. Sacco likely expected that her post would only be seen by her small group of followers. When her plane landed, the post had been retweeted thousands of times, #HasJustineLandedYet was trending worldwide on Twitter, and Ms. Sacco was no longer head of communications. She had been fired.

For educators, the implications of new responsibilities arising from the online media landscape are significant.

According to the researchers behind a recent study conducted by Stanford University, the young people who populate modern classrooms may have significant difficulty assessing the truth of online content.[2] These researchers found that most elementary school students had trouble distinguishing articles from advertisements, and most university students had trouble identifying reasons why relying on information from fringe media or activist groups could be problematic. Discussing these findings in a recent interview, the researchers noted that "the kinds of duties that used to be the responsibility of editors, of librarians now fall on the shoulders of anyone who uses a screen to become informed about the world."[3] If left unaddressed, the researchers warn that the lack of basic media literacy uncovered by their study may become a "threat to democracy."

On the flip side of the coin – when it comes to *producing* online media – recent examples illustrate that educators may also have important lessons to learn about modern media literacy. A teacher was terminated from his employment in 2015 after posting tweets with comments expressing views on various identifiable groups.[4] Numerous community members found these postings highly offensive, racist, and exclusionary. These community members filed complaints to the school board, and the resulting investigation led to the teacher's termination.

More recently, an Ontario principal has come under investigation following complaints that anti-Muslim content was posted to her Facebook account.[5]

One significant concern that is evident in both educators' online postings is their apparent lack of awareness or concern that (i) members of the communities they serve would see their postings; and (ii) some members of these communities could reasonably find these postings offensive and threatening. Being responsible for the education of children in increasingly diverse modern communities, the duties of educators – and principals in particular –include facilitating inclusiveness in classrooms and in schools.

In an age of online media that makes it all too easy to "broadcast ourselves," educators' duties will increasingly entail using such media responsibly and literately. Moreover, as Stanford University's study bears out, students have a growing *need* to receive quality education in media literacy. If the media literacy of teachers is left in doubt, then the ability to fill this need will effectively be left to chance. As suggested by the public fallout from recent cases, the consequences to school boards of taking on such risks can be significant.

Professional bodies, such as the Ontario College of Teachers, have taken steps toward ensuring media literacy among their members by adopting a professional advisory on the *Use of Electronic Communication and Social Media*. This advisory, which was released on February 23, 2011, provides direction and guidance to ensure that educators in Ontario are informed of their responsibilities in online spaces. As set out in the advisory, these responsibilities are rooted in an awareness of what it means to engage in online commination in the first place:

> Electronic messages are not anonymous. They can be tracked, misdirected, manipulated and live forever on the Internet. Social media sites create and archive copies of every piece of content posted, even when deleted from online profiles. Once information is digitized, the author relinquishes all control.
>
> The use of the Internet and social media, despite best intentions, may cause members to forget their professional responsibilities and the unique position of trust and authority given to them by society. The dynamic between a member and a student is forever changed when the two become "friends" in an online environment.
>
> Members should never share information with students in any environment that they would not willingly and appropriately share in a school or school-related setting or in the community.

The advisory states that there is a distinction between professional and private life of teachers. Practioners are individuals with private lives. However, off-duty conduct matters. The advisory asserts "sound judgment and due are should be exercised."

It confirms that teaching is a public profession. The Supreme Court of Canada has ruled that teachers' off-duty conduct, even when not directly related to students, is relevant to their suitability to teach. The advisory states, "Members should maintain a sense of professionalism at all times – in their personal and professional lives."

As one of its key recommendations for educators, the advisory advises acting as a "digital citizen" to model appropriate online behaviour for students. This begins with classroom instruction but, as the examples above indicate, it does not necessarily end there. Ontario's elementary curriculum and its secondary English curriculum each require teachers to provide extensive lessons in media studies to their students. At the same time, online media renders teachers' own media literacy subject to public display and public scrutiny. This introduces a new and significant responsibility into the teacher's role as a media literacy instructor and as a "digital citizen" who uses their online acts to *educate*.

As a best practice, schools and school boards can help put these principles into action by adopting written *acceptable use policies* setting out guidelines for the use of online and other media. Such policies provide clarity, and ensure that educators are on the same page when it comes to translating the role of "digital citizen" into everyday actions and decisions. These policies may include information and instruction on:

- Means for ensuring privacy online;
- The limits of online privacy;
- Demonstrating empathy online;

- Netiquette and cyber-kindness; and
- Appropriate ways to integrate classroom materials and online materials (ie., putting lessons online *or* bringing existing online content into lessons).

Moreover, an acceptable use policy may provide a forum for educators to share their concerns over online media use, and to address issues collaboratively with administrators as they arise.

If we are indeed entering an era of *post-truth* news reporting, then teachers may be among the forefront of individuals responsible for providing tools to challenge the propagation of false information and assumptions – ensuring, in particular, that such information is not laundered through oblivious or uninformed acts of "reposting". For teachers who choose to participate in social media and broadcast themselves to the world, this responsibility weighs more heavily and necessarily extends beyond the classroom.

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1. See Tom Blackwell (4 Nov 2016) "The scourge of the U.S. election: Fake news, exploding on social media, is seeping into the mainstream" available online < http://news.nationalpost.com/news/world/growing-fake-news-phenomenon-fuels-polarized-u-s-election>
2. Stanford History Education Group, *Evaluating Information: The Cornerstone of Civic Online Reasoning*, Executive Summary, available online <https://sheg.stanford.edu/upload/V3LessonPlans/Executive%20Summary%2011.21.16.pdf>
3. Camila Domonoske, "Students have 'dismaying' inability to tell fake news from real, study finds" available online < http://www.npr.org/sections/thetwo-way/2016/11/23/503129818/study-finds-students-have-dismaying-inability-to-tell-fake-news-from-real>
4. See David Bateman (9 Sept 2015), "High school teacher fired after investigation into 'racist' tweets" Available online: <https://www.thestar.com/yourtoronto/education/2015/09/09/high-school-teacher-fired-after-investigation-into-racist-tweets.html >
5. Noor Javed and Kristin Rushowy (28 Nov 2016), "Markham principal who apologized for anti-Muslim posts now on leave" Available online: <https://www.thestar.com/news/gta/2016/11/28/markham-principal-who-apologized-for-anti-muslim-posts-now-on-leave.html>

EMPLOYER SOCIAL MEDIA ACCOUNTS - WHAT ARE THEIR RESPONSIBILITIES?

For several years, we have seen instances of discipline involving teachers who have posted inappropriate contents/comments on their own social media accounts. In many cases, those posts occurred by teachers using their own computers, on their own time, often at home, and using their own accounts. In such cases, discipline can be upheld on the basis of the potential harm to the reputation of the school, the school division and sometimes the potential harm to the reputation of fellow teachers (and perhaps of students).

The conclusion of these cases dealing with the constant rise in the use of social media is that teachers must be cautious of their comments online, given the legal reality that their obligations as employees extend beyond the strict working hours from Monday to Friday, and indeed beyond the physical location of the school itself.

Recently a similar extension of legal obligations was imposed on an employer who maintained social media accounts and invited comments from the general public. I am referring to an arbitral award by Arbitrator Howe dated July 5, 2016 in the matter of *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (2016) O.L.A.A. 267.*

This case dealt with employees being harassed online by an employer's customers, and an employer's legal obligation to protect its employees from such harassment. The Toronto Transit Commission (TTC) maintained several social media accounts, including two Twitter accounts, a Facebook page and a YouTube channel.

The main problems occurred with the employer's Twitter accounts, and in particular one by the name @TTChelps. While some of the Tweets were complimentary, many were critical of the TTC's service and/or the performance of individual TTC employees. Many of the Tweets contained derogatory language, threats of violence, and profanity.

A member of the Executive of the Union began monitoring the Twitter comments after receiving complaints from his members. The Union then formally complained to management. When the Union did not receive a satisfactory response, they filed a policy grievance. The grievance was based on language in the collective agreement that referred to maintaining an environment that protected the dignity of the employees, and that was free of harassment and discrimination. The grievance was also based on legislation, namely the *Ontario Human Rights Code* and the *Ontario Occupational Health and Safety Act*. In addition, the Union relied on the TTC's own policy, namely the Respect and Dignity Policy.

The Arbitrator allowed the grievance, but stopped short of ordering TTC to shut down the Twitter site. Rather, he ordered the TTC to develop guidelines and a social media policy.

Arbitrator Howe ruled that an employer can be held liable for the acts of third parties given the extent of the employer's control of the workplace. He further ruled that the employer's social media sites formed part of the employer's workplace, which brought those sites within the employer's legal obligations to maintain a workplace free of harassment and discrimination.

In an education setting, this case would have application to any school or school division that would consider maintaining social media accounts and inviting comments from the public, including students and the parents of students.

In such situations, if some of the comments are abusive or disrespectful, and the employer takes no corrective action, the TTC Award could be relied upon to assert a failure on the part of the employer to maintain a respectful workplace on the basis that the "workplace" includes the social media sites maintained by the Employer. In the course of advancing such an argument, the Union ought to include reference to the applicable legislation (Workplace Safety and Health, and Human Rights) any collective agreement provisions dealing with respectful workplace, and any applicable employer policies. In the event that there is a failure to discipline the student, this may be considered as an additional ground for advancing a grievance, keeping in mind that this was not an option in the TTC case.

As a final point, any Union faced with such a situation would be well-advised to:

· first, monitor and maintain copies of the violations/abusive comments
· report the comments/posts in writing to the employer, and
· engage in open dialogue with the employer with a view to giving the employer a chance to correct the problem before filing a grievance.

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NOVA SCOTIA SUPREME COURT REVIEWS DUTY OF FAIR REPRESENTATION DECISION

The Supreme Court of Nova Scotia recently set aside the decision of a Labour Board Review Officer that "screened out" a duty of fair representation complaint before it was heard by the Board: *Nickerson v. Nova Scotia (Labour Board)*. [1]

Under the *Nova Scotia Trade Union Act*[2], when a person makes a complaint that a union has breached its duty of fair representation, the complaint is initially referred to a Review Officer who must decide if there is sufficient evidence to allow the complaint to go forward. If the Review Officer is not satisfied such evidence exists, the complaint is dismissed without notice of the matter every having been given to the Union. The decision in *Nickerson, supra*, suggests the Labour Board should consider changing the process it follows before a Review Officer stops a complaint from going forward.

Sharon Nickerson had been employed as a part-time psychology professor at Saint Mary's University in Halifax for 11 years when the University decided not to reappoint her. She filed two grievances, one over a letter of discipline she had received before she was terminated; and one challenging the decision not to reappoint her.

At the time of her dismissal, and in the months leading up to the dismissal, Ms. Nickerson had suffered from depression.

Ms. Nickerson was a member of Local 3912 of the Canadian Union of Public Employees. The Union sought to obtain medical information from Ms. Nickerson to support her grievances.

After a lengthy delay, the grievances were scheduled for a hearing on December 9, 2014. In the meantime, Ms. Nickerson had retained her own lawyer.

Ms. Nickerson's relationship with her union representatives was a difficult one. The Union was concerned Ms. Nickerson was not providing full access to her medical records. Ms. Nickerson apparently did not trust the Union to deal fairly with her medical information.

Shortly before the scheduled hearing date, the Union decided to seek a mediated resolution of the grievances. Ms. Nickerson strongly opposed the decision not to have a formal arbitration. Through her lawyer, she insisted that she had the right to a hearing that would provide "*vindication, extract an apology from the university and allow for general, aggravated and punitive damages": Nickerson, supra*, para. 5.

Ms. Nickerson's lawyer filed a lengthy complaint with the Nova Scotia Labour Board, claiming the Union's representation of his client breached its duty of fair representation and was arbitrary, discriminatory and in bad faith. At the same time, he asked the Union to adjourn the mediation. When it refused, Ms. Nickerson's lawyer wrote the arbitrator/mediator directly and the hearing was adjourned.

The Union and the Employer used the scheduled hearing date to meet and try to settle the grievances. They came to an agreement under which Ms. Nickerson would:

· be reinstated with full seniority;
· receive a cash payment of approximately $17,000; and
· return to work when she could provide medical documentation showing she was well enough to do so.

Ms. Nickerson had not participated in the settlement discussions and she refused to sign the settlement agreement. As a result, she was not reinstated to her position.

The Labour Board Review Officer dismissed her complaint on a number of grounds, including a finding that Ms. Nickerson had been partially responsible for the delay in bringing her grievances to arbitration by refusing to provide relevant medical information to the Union.

Ms. Nickerson applied for judicial review of that decision and the case was heard by Justice Joshua Arnold of the Nova Scotia Supreme Court. Justice Arnold distilled the many issues raised by Ms. Nickerson to one question:

> Did the Union delay in pursuing Ms. Nickerson's grievance amount to a breach of the duty of fair representation?

The Court stated it was applying the reasonableness standard in answering that question. Despite acknowledging that the record before him was incomplete because the Union had not been asked to respond to the complaint, Justice Arnold engaged in a detailed examination of the factual allegations behind the complaint. He found that the conclusion that Ms. Nickerson had been partially responsible for the delay in the case was an unreasonable finding of fact that was essential to the decision of the Review Officer.

He cited a number of cases where delay by a union in the handling of a grievance had been found to be a breach of the duty of fair representation. He found as well that there was evidence on the record that Ms. Nickerson had suffered prejudice because of the delay in bringing her grievances to arbitration.

The Court set aside the decision of the Review Officer and directed that Ms. Nickerson's complaint be referred to a different Review Officer for reconsideration.

This was only the second time that a decision of the Nova Scotia Labour Board Review Officer was challenged on judicial review and it was the first time a decision has been overturned.

While finding that the Review Officer was entitled to deference in the exercise of his statutory authority, the Court was willing to enter into a close review of the facts alleged by the Complainant and disagreed with the Review Officer about the conclusions to be derived from those facts.

The quality of the record that was before the Court was clearly a factor in the outcome of the application. Because the Union had never been asked to respond to the complaint, the record lacked evidence that might have shown why the Union acted as it did toward Ms. Nickerson.

Given the likelihood that complainants will continue to seek judicial review of decisions of the Review Officer, the Nova Scotia Labour Board should consider whether complainants and unions would be better served if unions were given an opportunity to respond to a duty of fair representation complaint before a final decision is made by the Review Officer.

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1. 2016 NSCC 348 ("Nickerson").
2. Chapter 475, R.S.N.S 1989 (as amended)

SUPREME COURT RULING CONTINUES TO IMPACT B.C. SCHOOLS

The November 10th, from the bench ruling by the Supreme Court of Canada in *British Columbia Teachers' Federation v. British Columbia* continues to reverberate, both in the political world and in the day to day running of schools.

And late in the day at the end of Friday, March 3rd, the two parties reached an agreement to implement the collective agreement provisions which the Supreme Court of Canada had ordered restored.

To refresh your memory, the *British Columbia Teachers' Federation (BCTF)* took the BC government to court, challenging the legality of the stripping of certain contract provisions from the teachers' collective agreement, dating back to actions taken in 2002. In essence, though other issues were also in contention, the government unilaterally removed provisions in the collective agreement that established maximum class sizes and maximum numbers of designated or special education students in each class (generally referred to as *composition* clauses).

The BC Supreme Court twice ruled in favour of the BCTF, initially providing the provincial government with one year to correct the *Charter*-offending portions of its legislation, then ruling against the government a second time when the government introduced replacement legislation the court deemed was, in effect, essentially the same as the original offending legislation it had been directed to replace. In April 2015, the B.C. Court of Appeal overturned the B.C. Supreme Court Justice Susan Griffin's previous two rulings. That 4-1 decision was appealed by the BCTF to the Supreme Court of Canada.

The Supreme Court of Canada decision restored the stripped collective agreement provisions that had been originally stripped, in effect placing the 2002 limits to class size and composition to the current collective agreement, not due to expire until 2019. However, during the last round of collective bargaining – that included one of the longest teacher work stoppages in British Columbia history – the collective agreement, while not re-instating the class size and composition provisions the teachers' union sought, did include a memorandum of understanding that would have those provisions of the collective agreement pertaining to class size and composition re-open to bargaining even before the expiration of the collective agreement in the event the Supreme Court of Canada ruled in the BCTF's favour.

The ruling had, however, already begun to have immediate and concrete effects on schools. On January 5th, the BC Public School Employers' Association (the bargaining agent for the employer) and the BCTF reached an agreement on an interim measure that would "immediately create 1,000 new teaching positions while discussions continue on full restoration of teachers' unconstitutionally stripped collective agreement language."[1] This interim measure had the Provincial Government injecting an immediate $50 million into the current year school budgets that would have school districts able to hire additional teachers to be placed in schools as soon as possible until at least the end of the 2016-2017 school year. Each district was allotted its proportionate share of the $50 million based on its percentage of overall student enrollment.

And the hiring frenzy began.

With the injection of funds for increased teacher positions coming in the middle of the year, schools and school districts were faced with a *practical* dilemma: what to do with this newfound windfall in teacher FTE. Creating new classes, moving students, reorganizing classes, etc, midway through the school year, while potentially providing some smaller classes or helping to address some classes' composition issues, was also entirely problematic. By this point of the year, classroom cultures and relationships are long established (with the exception of second semester classes for those secondary schools on the semester system) and breaking up those classes would have the potential to defeat the improvement in learning conditions the additional staffing was intended to provide.

Thus, many schools and districts used the short-term increase in available staffing funding to add additional support teachers to existing class organizations and structures, at least for the current school year.

As of March 3rd, however, that *interim* funding measure has become temporary, meaning it will be in place only until the end of the current, 2016-2017 school year. Pending ratification (scheduled to occur the week of March 6th to 10th), the *new* collective agreement language puts in place the *restored* collective agreement provisions that were deleted by the *Public Education Flexibility Act and Choice Act* in 2002 and the *Education Improvement Act* of 2012.

The agreement sets out some specific staffing levels. For example, ratios will now apply province-wide for certain specialist positions like counsellors, teacher-librarians and learning assistance. It further sets firm class size limits for students in kindergarten through grade three.

However, when class size and composition provisions were eliminated in 2002, class size and composition limits for grades 4 through 12 varied throughout the sixty different school districts. Thus the language restored by the Supreme Court decision and subsequent re-opening of the collective agreement may be different depending in which school district a student attends or a teacher works.

Details of individual school districts' class size and composition provisions will soon become public, with the intention that the newly restored collective agreement provisions will form the basis for school and class organization for the 2017-2018 school year.

The direct, *practical* impact of the agreement based on the Supreme Court ruling is not yet known. Both parties acknowledge significant increases in funding are likely required to meet these new provisions. Districts may well have to consider adjusting school catchment boundaries, bringing in portable classrooms or other measures needed to meet the new requirements. The increased hiring of teachers necessitated by January's *Interim Measures* agreement already saw some districts, particularly in more rural districts, struggling to fill positions: specialist teacher positions were suddenly needed but trained specialist teachers weren't necessarily always readily available to fill them.

This will surely be the case in the coming school year's expected implementation of the new collective agreement provisions. With potentially "thousands more teachers" required to meet the requirements of the new collective agreement language, it could be very difficult indeed for districts to find sufficient numbers of teachers to meet their needs.[2]

The coming months will certainly provide challenges as schools, districts and teachers grapple with the impact of the Supreme Court ruling and subsequent agreement between the two parties. And it may well be a good time to be looking for jobs as a teacher in British Columbia.

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1. British Columbia Teachers Federation. (2017, January 5). *More than 1,000 new teaching positions to be created as a first step in the process to implement the BCTF's landmark court win* [Press release]. Retrieved February 12, 2017, from http://bctf.ca/NewsReleases.aspx?id=43834
2. British Columbia Teachers Federation. (n.d.). *BCTF reaches agreement on implementation of teachers' restored collective agreement language*[Press release]. Retrieved March 6, 2017, from https://bctf.ca/NewsReleases.aspx

FROM THE CAPSLE ARCHIVES (2012, Ottawa, ON)
You Say You Have What? - Provision of Medical Information by Teachers to Employers
(Lise LeDuc and Bobbi Éthier)

Introduction

Arbitrators attempt to balance Employer rights to information with individual privacy rights. While the law on privacy of medical information continually evolves and each situation must be assessed on its own facts, there are discernable rules. This paper will outline the rules surrounding the release of personal medical information in a variety of circumstances.

Employer Rights under the Collective Agreement

…

Rights granted under the Collective Agreement are interpreted restrictively and in favour of employee privacy. The following examples illustrate this concept:

- If the Collective Agreement grants the Employer the discretion to request employee medical information, an Employer policy requiring such information automatically violates the Collective Agreement.
- If the Collective Agreement allows the Employer to request a medical certificate (doctor's note), the Employer is not therefore also entitled to a diagnosis.
- Where a Collective Agreement requires employees to provide proof of illness, the Employer does not thereby gain the right to schedule a medical examination using a doctor of the Employer's choosing, and does not gain the right to demand access to the employee's doctor.
- If the Collective Agreement allows the Employer to require a medical certificate after a certain amount of sick days, the Employer does not automatically gain the right to request a certificate for a lesser number of days.
- Where the Collective Agreement sets out the procedure for verifying illness, it is probably improper for the Employer to implement a different method.

The extent of the information – prognosis vs. diagnosis

Arbitral authority has laid out the limits to the information that should normally be contained in a medical certificate:

- confirmation that an employee is ill;
- confirmation that he or she is under a physician's care;
- the projected or anticipated length of the absence, or confirmation as to when the employee will be fit to return to work (the prognosis); and
- in some cases, whether the return to work should be limited to modified duties, description of the limits of those duties, and an estimate of the duration of those restrictions.

Conclusion

…

This is a complex area of labour law for many reasons, including the fact that many of the relevant principles and rules depend greatly on the circumstances of each particular case. In closing, we provide you with certain key points to remember:

1. By virtue of the employer/employee relationship, the Employer has the right to seek confirmation of illness, whether or not there is any wording in the Collective Agreement concerning the provision of medical notes or certificates. The key is that the Employer is only entitled to medical information to sufficiently answer the question as to whether or not the individual should be away from work, and nothing more. This concept comes from the principle that an Employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer/employee relationship which justified the intrusion.
2. Broadly speaking, there are three circumstances under which an Employer is entitled to medical information about an employee:

    a) To verify that time away from the workplace was due to illness;
    b) To prove eligibility conditions are satisfied for disability benefits (including sickness benefits);
    c) To facilitate accommodation of a disability. The Employer is entitled to a general statement as to the nature of the illness from the doctor, but the doctor is not required to provide a specific diagnosis. For example, the doctor should say "stress related leave" and not "patient suffers from depression with suicidal ideation".

3. The Employer is entitled to know whether a treatment plan has been prescribed by the doctor and whether the patient is following it.
4. The Employer is entitled to ask and be advised as to the doctor's prognosis for assessing when the employee may return to work.
5. Where it is contemplated that the employee may have some restrictions on return to work, either temporarily or permanently, then the duty to accommodate requires the employee to disclose medical information in order to allow the Employer to assess the employee's ability to assume job duties, or to allow the Employer to modify job duties to accommodate any ongoing disability.
6. When an Employer receives medical information about an employee, there is an implied obligation that the Employer shares that information with only those on a "need to know basis".
7. The Union's role in the duty to accommodate process may require it to get involved in the provision of, and sharing of the employee's medical information to determine such questions as extent of disability, length of disability, restrictions on job duties, etc.
8. There is no duty on the employee to submit to an independent medical examination, or a medical examination with the "company doctor", unless it is in the Collective Agreement.
9. The employee should never let the Employer have direct access to their doctor/health practitioner in writing or by telephone. The Union can be of assistance to the employee in channeling the appropriate questions to the doctor, and asking for a report.
10. Whether or not the Employer is using an outside consultant to manage its sick program, the information that the employee must provide is the same.
11. If, however, the sick leave is being paid by an insurance carrier, there may be provisions in the insurance contract that require greater disclosure to the insurance carrier. Beware, however, that the insurance carrier does not obtain the employee's consent to provide all of that extra information back to the Employer.
12. As to who pays for the medical certificate, look to the Collective Agreement. If there is nothing in the Collective Agreement, then, at common law, the employee probably has to pay for the certificate. Unions should try to negotiate something into their Collective Agreements requiring the Employer to pay when it seeks a medical certificate.
13. An Employer who demands that a particular employee provide sickness notes or medical certificates "for all future absences from work" may be discriminating against the employee, and/or imposing discipline without just cause.

Where can I get the rest of this Paper?

The above extracts are part of a 17 page paper presented at the 2012 (Ottawa, ON) CAPSLE Conference. This paper and other are available to CAPSLE Members on the CAPSLE Members Only Web Page. There is also a Master Index of all the Paper and PPT's from the 2011-15 CAPSLE Conferences.

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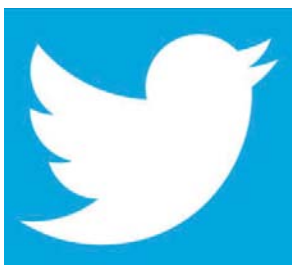

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