

School Board Update

Arbitrator's Remedy Includes Waiver of Sunset Provision

Date: March 6, 2014

In *Canadian Office & Professional Employees Union, Local 529 v Nipissing-Parry Sound Catholic District School Board*, Arbitrator Jesin provided an interesting alternative to a simple "reinstatement without compensation" order, one that reflected the concerns of both the school board and the union.

In this case, an educational assistant ("EA") was dealing with a kindergarten student in distress who was boarding a school bus to go home. The situation escalated, causing the EA to physically restrain the student. The student began to try to kick and bite the EA while being restrained.

The grievor, another EA, came upon the scene. Even though she was not asked to intervene, and without inquiring as to whether intervention was necessary, the grievor grabbed the student by the wrist and dragged him along the pavement and into the school. While there was some dispute as to what exactly occurred, it was clear that the grievor's actions went against Board policy.

In an investigatory meeting after the incident, the grievor did not apologize for her conduct.

In a further meeting to discuss the investigation report prepared by the Board, the grievor did apologize for her conduct, but also attempted to minimize its gravity by taking the position that she did not drag the student on the pavement and questioning why no other EAs assisted or told her that her assistance was not needed. The EA also showed no concern for the effect of her actions on the student.

While the Board agreed with the grievor that "2 minutes ought not to ruin a 22 year career," the decision was made to terminate the grievor due to the severity of the misconduct and her lack of insight. This lack of insight continued during the arbitration hearing, where the grievor continued to minimize her conduct. The Collective Agreement contained a sunset clause that prevented any arbitrator from looking at any discipline that had been imposed prior to any discipline-free period of 24 months.

On balance, Arbitrator Jesin found that reinstatement without compensation was the appropriate course of action in the circumstances. While he accepted that the grievor's actions were "totally inappropriate and contrary to the Employer's policy," he also could not ignore the fact that the grievor had 22 years of seniority with a clean service record.

However, rather than simply ordering reinstatement without compensation, Arbitrator Jesin indicated that he would make such an order only if the union agreed to waive the operation of the sunset clause. This would give the Board some assurance that the grievor would not engage in similar behaviour again without facing significant discipline or discharge. The matter was subsequently remitted to the parties in order to allow the union to consider its position.

School boards are entitled to demand a commitment to exemplary service from those who are trusted to support its most vulnerable students. This award recognizes that although a long, clean service record will generally support reinstatement, it is appropriate to take steps to ensure that school board employees who have engaged in inappropriate physical restraint of a student learn their lesson and commit to never doing so again.

If you have any questions regarding the *Nipissing-Parry Sound* case, please feel free to contact your [regular Hicks Morley lawyer](#).

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