

IN THE MATTER OF AN ARBITRATION

BETWEEN: UNIVERSITY OF BRITISH COLUMBIA
(the "Employer" or "University")

AND: CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 116
(the "Union")

(Article 10 Policy Grievance – Promotions)

ARBITRATOR: David C. McPhillips

COUNSEL FOR THE EMPLOYER: Michael H. Korbin

COUNSEL FOR THE UNION: Anthony Glavin

DATES AND PLACE OF HEARING: April 28, 2005
Vancouver, B.C.

DATE OF AWARD: May 27, 2005

The parties agree this Board has jurisdiction to determine this matter. This is a Union policy grievance which seeks a declaration from this Arbitration Board that in the future the Employer must provide the Union, if it so requests, with certain documents following the completion of a job selection process pursuant to Article 10 of the Collective Agreement.

BACKGROUND

This dispute involves a policy grievance related to Article 10 – Promotions and Staff Changes in the Collective Agreement between these parties. There were originally two issues in this dispute and they were referred to a binding mediation-arbitration process.

The first of those involved the actual interpretation of Article 10.02 – Role of Seniority in Promotions and Transfer which states:

10.02 Role of Seniority in Promotions and Transfers

The parties agree with the following principles:

1. promotion within the service of the University;
2. job opportunity increasing in proportion to the length of service; and
3. recognition of efficiency and qualification.

Therefore in making staff changes, transfers or promotions the University shall consider these principles and make appointments based on the work history, efficiency, required qualifications and seniority of the applicants from within the application department or unit. Seniority shall be the determining factor only where the other factors are relatively equal.

Where there is no applicant who meets those factors from within the applicable department or unit, preference shall be given to applicants from elsewhere within the bargaining unit who meet those factors. Where there are two (2) or more such applicants, length of unbroken service with the University in the bargaining unit shall be the determining factor only where the other factors are relatively equal.

That matter has been resolved under an agreement reached by the parties on April 21, 2005 during the mediation process.

The second issue, which could not be resolved, relates to the Union's assertion in its grievance that the Employer is obligated to provide the Union with certain documents, if the Union so requests, after the Union has been notified following the completion of a competition pursuant to Article 10.09:

10.09 Union Notification

Each department shall notify the Union in writing when employees covered by this Agreement are hired, promoted, demoted, transferred, laid off, recalled, resign, are suspended or are terminated.

The Union submits that it has the right to review certain documents prior to deciding whether to file a grievance. It is submitted the following documents should be made available as a matter of course once they are requested by the Union:

- (1) Resumés of all applicants for a vacant position
- (2) Application forms of all applicants
- (3) Names of all interviewers
- (4) Questions asked of each applicant in the interview
- (5) Notes of the Answers provided by each applicant to those questions
- (6) "Answer key" or correct answers for each question
- (7) The system of weighting the factors
- (8) Individual and total scoring by each panel member

The University has been refusing to provide such information to the Union on the grounds that to do so would violate the Freedom of Information and Protection of Privacy Act [RSBC 1996] Chapter 165. The University has informed the Union that the Union must procure signed consents from each applicant before his/her information can be divulged or, in the absence of such consent, obtain an order from an arbitration board requiring the University to provide such information. It is agreed by the parties that it is the Freedom of Information and Protection of Privacy Act ("FOIPPA" or the "Act") which applies to the University of British Columbia rather than the Personal Information Protection Act SBC 2003, Chapter 63 ("PIPA") which applies in the private sector.

The parties referred this Board to a number of provisions of FOIPPA. The provisions in Part 2 deal with Freedom of Information and include the following Sections:

Purposes of this Act

2 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records,
- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
- (c) specifying limited exceptions to the rights of access,
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
- (e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;
- (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity; • • •
- (d) a record of a question that is to be used on an examination or test;
- (e) a record containing teaching materials or research information of employees of a post-secondary educational body; • • •

(2) This Act does not limit the information available by law to a party to a proceeding.

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Part 3 – Division 2 of FOIPPA sets out the exceptions to the obligation of disclosure. It includes the following:

Disclosure harmful to personal privacy

22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
- (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
- (c) the personal information is relevant to a fair determination of the applicant's rights,
- • •
- (f) the personal information has been supplied in confidence,
- • •

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if • • •

- (d) the personal information relates to employment, occupational or educational history,
- • •
- (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
- (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,
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(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

- (a) the third party has, in writing, consented to or requested the disclosure,
- (b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,
- (c) an enactment of British Columbia or Canada authorizes the disclosure,
- (d) the disclosure is for a research or statistical purpose and is in accordance with section 35, • • •

Part 2 – Division 3 sets out the requirements with respect to notification of the third party and time limits for doing so.

23 (1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).

(2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).

(3) The notice must

- (a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,
- (b) describe the contents of the record, and
- (c) state that, within 20 days after the notice is given, the third party may, in writing consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

(4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that

- (a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,
- (b) the third party is being given an opportunity to make representations concerning disclosure, and
- (c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

Time limit and notice of decision

24(1) Within 30 days after notice is given under section 23 (1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of

- (a) 21 days after the day notice is given, or
- (b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to

- (a) the applicant, and
- (b) the third party.

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Part 3 of FOIPPA address Protection of Privacy and Division 2 in that Part deals with the use and disclosure of personal information by public bodies. The Act states:

Use of personal information

32 A public body must ensure that personal information in its custody or under its control is used only

- (a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34),
- (b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or
- (c) for a purpose for which that information may be disclosed to that public body under sections 33 to 36.

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Disclosure inside or outside Canada

33.1 (1) A public body may disclose personal information referred to in section 33 inside or outside Canada as follows:

- (a) in accordance with Part 2;
- (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure inside or outside Canada, as applicable;
- (c) in accordance with an enactment of British Columbia or Canada that authorizes or requires its disclosure;
- (d) in accordance with a provision of a treaty, arrangement or agreement that
 - (i) authorizes or requires its disclosure, and
 - (ii) is made under an enactment of British Columbia or Canada;

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Disclosure inside Canada only

33.2 A public body may disclose personal information referred to in section 33 inside Canada as follows:

- (a) for the purpose for which it was obtained or compiled or for a use consistent with that purpose (see section 34);
- (b) to comply with a subpoena, warrant or order issued or made by a court, person or body in Canada with jurisdiction to compel the production of information;
- (c) to an officer or employee of the public body or to a minister, if the information is necessary for the performance of the duties of the officer, employee or minister;
- (d) to an officer or employee of the public body or to a minister, if the information is necessary for the delivery of a common or integrated

program or activity and for the performance of the duties of the officer, employee or minister to whom the information is disclosed;

. . .

- (h) to a representative of the bargaining agent, who has been authorized in writing by the employee whom the information is about, to make an inquiry;

. . .

Definition of consistent purposes

34 (1) A use of personal information is consistent under section 32 or 33.2 with the purposes for which the information was obtained or compiled if the use

- (a) has a reasonable and direct connection to that purpose, and
- (b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information or causes the information to be used or disclosed.

The Union asserts these provisions support the assertion that the documents related to a promotion case under Article 10 of the Collective Agreement should be provided by the University. The University, on the other hand, submits that the provisions of FOIPPA limit such disclosure.

POSITIONS OF THE PARTIES

A. The Union

The Union seeks a declaration that once the Union is made aware of an appointment pursuant to Article 10 of the Collective Agreement and advises the Employer that it wishes to have certain information (resumés of all candidates, applications for each, names of interviewers, questions, answers and marking guide from the interviews and the weighting and scoring for each factor for each candidate), then the Employer should as a matter of course provide that information to the Union. The Union believes that this disclosure should occur during the grievance process and, indeed, prior to the filing of a grievance if the Union so requests.

The Union asserts that this disclosure would allow it to properly administer the Collective Agreement and make informed decisions as to whether job appointments should be grieved.

The Union asserts that FOIPPA and specifically Section 3 of the Act does not restrict such disclosure and indeed requires it. The Act permits such disclosure in accordance with the provisions of a

collective agreement under Section 33.1(1)(d) as well as under the Labour Relations Code which is an “enactment” under Section 22(4)(c) and Section 33.1(1)(c). It is also submitted that this information is relevant and is necessary for a “fair determination of the Union’s rights” pursuant to Section 22(2)(c) of FOIPPA.

The Union asserts that there is no doubt it is entitled to this information pursuant to an order from an arbitration board and, thus, the issue here is merely a question of timing. The Union asserts that it is not expedient to require it to file a grievance, proceed through the grievance process and then appoint an arbitrator in order to obtain these documents to see if that grievance would be appropriate. The Union argues that the purposes of the Labour Relations Code, specifically Sections 2(d) and 2(e), require that everyone encourage cooperative participation between employees and trade unions in resolving workplace issues and promote conditions favourable to the orderly constructive and expeditious settlement of disputes. C.U.P.E. also asserts that a failure to provide this information violates other provisions of the Labour Relations Code in the following way:

- Section 6(i) which states that “...an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.”;
- Section 48 which stipulates that parties are bound by the terms of a collective agreement;
- Section 49 which requires that the terms of a collective agreement must be carried out; and
- Section 12, in that the refusal to disclose interferes with the Union’s duty of fair representation.

It is maintained that the Union is entitled to this disclosure as part of its duty to investigate grievances: Canada Post Corp. (Warrenchuk), [1977] C.L.A.D. No. 199 (Joliffe); Canada Post Corp. (Melnyk), [1999] C.L.A.D. No. 465 (Freedman).

The Union also argues such information should be disclosed as, under Section 82 and Section 89 of the Labour Relations Code, arbitrators are permitted to order that disclosure. Moreover, that can be done on a pre-hearing basis: Pacific Press Limited, B.C.L.R.B. No. 109/83.

The Union also asserts that the Collective Agreement between these parties anticipates such disclosure given the existence of the following provisions:

5.04 Technical Information

The University shall make available to the Union on request and within thirty (30) working days, information required by the Union such as job descriptions, positions in the bargaining unit, job classifications, wage rates, an explanation of the methods used in job evaluation, and financial and actuarial information pertaining to pension and welfare plans.

Where it is not possible to provide the information requested within thirty (30) working days, notice will be sent to the Union that such information will be provided as soon as reasonably possible thereafter.

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**ARTICLE 6
GRIEVANCE PROCEDURE**

6.01 Election of Stewards

In order to provide an orderly and speedy procedure for the settling of grievances, the University acknowledges the right of the Union to appoint or elect Stewards, whose duties shall be to assist any employee who the Steward represents, in preparing and presenting his/her grievance in accordance with the grievance procedure.

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6.03 Permission to Leave Work

The University agrees that Shop Stewards shall be given reasonable freedom of action in investigating disputes and presenting adjustments. It is further agreed that Shop Stewards are employed to perform work for the University and that Shop Stewards will not leave their work during working hours except to perform their duties under this agreement.

It is further agreed that no Shop Steward shall leave their work without obtaining permission from their Supervisor. Such permission shall not be unreasonably withheld.

It is also maintained that other tribunals have required disclosure of similar types of information, including the British Columbia Information and Privacy Commission which enforces both FOIPPA and PIPA: Workers' Compensation Board, [1997] B.C.I.P.C.D. No. 16; British Columbia (Ministry of Social Development and Economic Security), [2001] B.C.I.P.C.D. No. 7; Vancouver Island West School

District No. 84, [2001] B.C.I.P.C.D. No. 56. Additionally, the British Columbia Labour Relations Board has issued such orders: Governor and Company of Adventurers of England Trading into Hudson's Bay, B.C.L.R.B. No. B226/2004; P. Sun's Enterprises (Vancouver) Ltd., B.C.L.R.B. No. B301/2003). Similarly, so has the Ontario Labour Relations Board in Millcroft Inn Ltd., [2000] O.L.R.B. Rep. July/August 665.

Finally, the Union asserts that the University's insistence that in every case an order must be obtained from an arbitration board before the proper disclosure of this information constitutes an abuse of process: Babavic v Babavic, [1993] B.C.J. No. 1802 (B.C.S.C.); Telus Communications Inc., [2005] B.C.J. No. 378 (B.C.S.C.); Howe Sound Pulp and Paper Ltd., B.C.L.R.B. No. B408/2003. It is asserted this refusal by the University involves significant cost and expense for the Union and requires it to proceed to litigation that may turn out to be unnecessary.

In conclusion, the Union seeks a declaration that in promotion cases the identified information should be disclosed when the Union seeks it in order that it may properly fulfill its duties and defend its rights under the Collective Agreement.

B. The University

The University asserts that there is no basis in this Collective Agreement to create an obligation on the University to produce such documents to the Union, particularly even before a grievance is filed.

Article 6 – Grievance Process in the Collective Agreement states as follows:

6.05 Settling of Grievances

Any complaint or grievance shall first be taken up verbally by the parties. Failing settlement of the complaint or grievance, the grievance shall be stated in writing.

Step 1

The grievance shall be stated in writing and shall state the matter is a grievance and shall be submitted to the Section Head or Supervisor concerned within fourteen (14) working days of occurrence of the action which is being grieved.

Should the Section Head or Supervisor be unable to settle the matter within seven (7) working days following receipt of the letter of grievance Step 2 shall be invoked.