



Education Law eBulletin

A newsletter for educators

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Freedom of Speech – *Just Outside the Classroom*

Teachers' rights to freedom of speech in the classroom has been a hotly debated topic in the past, especially as they relate to union membership and strike or "work-to-rule" activities. In the past, it has been found that wearing pro-union buttons in the classroom will not automatically result in a detrimental effect to either a school board's capacity to manage or its reputation. On the contrary, in a 2002 Ontario Labour Relations Board decision entitled *ETFO v. Hamilton-Wentworth District School Board*, 2002 CanLII 26879 (ON L.R.B.), the Labour Relations Board found that the school board's refusal to allow a teacher to wear a pro-union button stating "Fair Deal or No Deal" shortly before a strike vote was contradictory to its otherwise tolerant attitude toward more explicit and more controversial political buttons or other materials.

Recently, a teacher's freedom of expression as it pertained to union activity was again under review, but this case did not occur within the context of politically-charged collective bargaining negotiations. In *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [2010] B.C.C.A.A.A. No. 32, a teacher who was the school's union staff representative placed a sign outside her classroom that said "Staff Representative". The principal subsequently removed the sign on the basis that the collective agreement provided a bulletin board for posting union information. The union relied on the collective agreement between the parties as well as the Canadian *Charter of Rights and Freedoms* in seeking a declaration that the sign was a legitimate and constitutionally protected form of expression. The union submitted that the sign was innocuous, provided information to people in the school and reflected the pride of people who were staff representatives for the union. The Union also argued that the removal of the sign was a violation of the collective agreement; although the collective agreement did permit the union to have a bulletin board in each school, it was silent regarding the posting of other signage. Finally, the Union argued that the sign did not impinge on the employer's authority and was not damaging to the employer's reputation.

The employer school board took the position that the sign was legitimately removed given its interpretation of the collective agreement and the provisions of the *School Act*, through which the principal is given overall authority over a school's property, including the right to make decisions about what should be on the walls of a school. Having regard to the *Charter* argument, the employer argued that the grievance should fail at the outset because it sought "access to a particular means" of expression – the walls of a school – which is not available to the Union under the *Charter* insofar as there was "no constitutional right of access to a forum or means of communication."

Ultimately, with respect to the issues raised in the grievance as they related to the *Charter*, the grievance was allowed. The arbitrator found that the "Staff Representative" sign was small and unobtrusive and did not interfere in any apparent way with the operation of the school or the education of students. The arbitrator also found that although the principal had the authority to manage the operations of the school, the removal of the "Staff Representative" sign effectively created the perception that the Staff Representative and the

Union were excluded from the school, especially in light of the fact that the "Staff Representative" sign was the only sign removed.

Conversely, with respect to the issues as they related to the collective agreement, the arbitrator denied the grievance. The arbitrator held that the provisions in the collective agreement did not support the posting of the sign outside the grievor's classroom and that, as a matter under the collective agreement, the employer was entitled to maintain the integrity of school property.

These decisions indicate that decision-makers will likely continue to protect most expressions of union membership or activities in the workplace, as they have done in the past. As was stated in the *British Columbia* decision, "The Union is a significant part of bringing democratic decision-making process to the workplace, as recognized by previous decisions of the Supreme Court of Canada. The sign represented the pride the Grievor and other staff representatives felt in being elected to that position and in representing the Union and its members. "

The two decisions discussed above, among others, demonstrate that decision makers are willing to afford protection to teachers' freedom of speech rights as they relate to union activities. School board administrators should therefore ensure that there is a pressing, *bona fide* and substantial objective prior to making any decision that may inhibit this right.

CASES

The Ontario Court of Appeal allowed an appeal by a School Board from judgment in favour of a land developer in its action to recover damages for the Board's breach of a real estate contract. The Court held that the School Board had breached the agreement, but found that the trial judge had erred in his approach to mitigation; damages were substituted in the amount of \$1. *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2010] O.J. No. 1772.

The British Columbia Court of Appeal dismissed the appeal of the Faculty Association from an arbitrator's finding that he did not have jurisdiction to sit in judgment of a University's Senate policy regarding Student Evaluation of Teaching. *Faculty Assn. of the University of British Columbia v. University of British Columbia*, [2010] B.C.J. No. 679.

The Office of the Ontario Information and Privacy Commissioner ordered that a school board provide a parent with the notes and day books maintained by the teacher, as these records were in the custody or under the control of the Board. *Ottawa-Carleton District School Board*, [2009] O.I.P.C. No. 213.