

Tim Dunford
Board Chair
Saanich Schools (SD63)

October 5, 2023

Dear Tim:

Re: Letter dated September 25, 2023, regarding Labour Relations bulletin

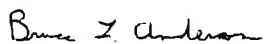
I am writing in reply to your letter dated September 25, 2023. Your letter requests rationale from BCPSEA for distributing the bulletin titled *Labour Relations - Moving Allowances for New Hires*, sent on September 14, 2023, to BCPSEA Trustee Representatives only and not to full boards of education.

The specific bulletin you refer to is of a confidential labour relations matter that deals with the application of the collective agreement. Distribution of BCPSEA materials must be consistent with BCPSEA's conflict of interest requirements. Under our conflict of interest requirements, information pertaining to confidential labour relations issues can only be shared with stakeholders who are not in a conflict of interest position.

As per our bylaws, BCPSEA Trustee Representatives cannot be in a conflict of interest position pertaining to labour relations matters; however, other members of boards of education may be in conflict in relation to BCPSEA's requirements. Thus, from time to time, there will be materials that BCPSEA can share with Trustee Representatives, but not with full boards of education. Trustee Representatives may update their Boards on the general topics of such materials, but cannot share the communications nor details within the materials.

For further information, please see BCPSEA's attached conflict of interest guidelines and FAQ.

Yours truly,



Bruce L. Anderson
Chief Executive Officer
BCPSEA

c: Alan Chell, Chair, BCPSEA Board

Conflict of Interest and Collective Bargaining

Frequently Asked Questions

Background

1. What are the rules concerning trustee conflicts of interest?

There are two sources of rules relating to trustee conflicts of interest.

First, the *School Act* prohibits a trustee from participating in or influencing decisions of the Board of Education (the Board) in respect of which the trustee has a pecuniary interest. A “pecuniary interest” is a direct or indirect interest that could monetarily affect the trustee or their spouse, parent, or child. Trustees must disclose pecuniary interests and not take part in the discussion or vote — or attempt to influence in any way the vote — of the Board in that matter.

It should be noted that the *School Act* also provides that a pecuniary interest does not preclude a trustee participating in or influencing a decision of the board if that interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the trustee.

Second, the common law places a duty on statutory bodies such as boards of education to ensure they act in accordance with their statutory duties. This includes protecting the integrity of their processes and ensuring that their members are not biased and do not have the appearance of bias. The test for a non-pecuniary conflict is whether a reasonably well-informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that the trustee could be influenced by the trustee’s personal interests. Participating in a decision in which a trustee has a personal interest is sufficient to establish bias or the appearance of bias.

2. How do I determine if my potential conflict would be considered “remote or insignificant”?

Even where a trustee may consider their pecuniary interest to be so remote or insignificant that it cannot reasonably be regarded as likely to influence the trustee, caution is recommended as the courts have typically applied a very narrow interpretation to this exception. The courts will consider whether a reasonable person, apprised of all the circumstances, would be more likely than not to regard the interest of the trustee as likely to influence their action and decision on the matter. In particular, where the terms of a collective agreement settlement would financially benefit a trustee’s family member, even by a small amount, the courts have tended to find that the pecuniary interest is not remote or insignificant.

Discussion of Example Conflict Questions

1. Can a trustee who is a member of a union participate in Board decisions relating to collective bargaining with teachers or support staff?

Being a member of a trade union does not automatically result in a trustee conflict of interest in collective bargaining. However, there are situations where membership in a union could give rise to a conflict of interest in relation to decisions of the Board concerning collective bargaining. For example, a clear conflict would arise if the trustee were a member of CUPE or the BCTF in another school district. Being a union member in the same or a neighbouring community and/or in a similar type of operation could also give rise to a conflict. It is common for unions and employers to refer to the terms of settlements achieved in other parts of the public sector, particularly in neighbouring communities or similar operations. It is therefore possible that bargaining between another union and employer for a collective agreement that applies to a trustee as an employee could be impacted by a collective agreement settlement between a district and either support staff or the BCTF. For this reason, it is possible that the trustee could be found to have a pecuniary interest (and therefore a conflict of interest) in both support staff and teacher bargaining. Each case must be determined on its own facts.

2. Does a conflict arise if a trustee has a spouse/parent/child who is a member of CUPE or the BCTF in the district?

Section 57 of the *School Act* deems the pecuniary interest of a spouse, a child or a parent of the trustee to also be the pecuniary interest of the trustee, if it is known to the trustee.

If a trustee's spouse/parent/child is a member of CUPE or the BCTF in the district, then the child would have a pecuniary interest in the CUPE or BCTF bargaining. Pursuant to s. 57 of the *School Act*, the trustee would therefore have a pecuniary interest as well. This will amount to a conflict of interest in almost all instances, unless it can be determined that the trustee's interests are so remote or insignificant that their spouse/parent/child would not benefit from the financial increases in the collective agreement. The courts have set a high threshold for establishing a remote or insignificant interest. Even a modest monetary gain or loss by the spouse/parent/child will be enough to trigger a deemed pecuniary interest.

In addition, it is possible that a non-pecuniary conflict may be present. A reasonable apprehension of bias (even if there is no actual bias) could be found on the basis that informed observers would believe that the trustee would favour a settlement with the BCTF that benefitted their spouse/parent/child.

Since it is possible that a support staff settlement could be impacted by the teacher settlement, and *vice versa*, this trustee would be in a conflict in relation to both teacher and support staff bargaining regardless of which union their spouse/parent/child was a member.

3. What if the spouse/parent/child is a member of CUPE or the BCTF in another district?

Since collective bargaining in one district could impact collective bargaining in another district, a pecuniary conflict can still be found in relation to both teacher and support

staff bargaining, regardless of the fact that a trustee's spouse/parent/child is a member of CUPE or the BCTF in another district.

4. What does the definition of “child” include?

“Child” is not restricted to a biological or adopted child and is defined to include a person whom the trustee has demonstrated a settled intention to treat as a member of his or her family. As a result, it is possible that “child” can be found to include a “step-child” and other persons. It’s also important to note that the jurisprudence makes no distinction between a dependent child and an adult independent child.

5. What does the definition of “spouse” include?

“Spouse” means a person who is married to a trustee or who is living with the trustee in a marriage-like relationship and has lived as such for a continuous period of at least two years. A person is not a “spouse” if they are separated and living apart from the trustee and they have entered into a separation agreement or there is a court order recognizing the separation.

6. What if a trustee’s sibling is a member of CUPE or the BCTF?

Unlike the terms “child,” “parent,” and “spouse,” the *School Act* does not list “sibling” as a family relationship that would trigger a deemed pecuniary interest.

However, a trustee’s sibling being part of a union may create a reasonable apprehension of bias under common law principles of conflict of interest. The existence of a sibling relationship may lead to concerns that a trustee will not act objectively in exercising their duties. A careful review of the circumstances of the relationship will need to be conducted to determine if a conflict exists.

7. What if a trustee has a family member who is a member of a public sector union outside K-12 public education?

The Public Sector Employers’ Council (PSEC) is responsible for overseeing bargaining for all public sector employers in British Columbia. PSEC establishes a mandate to which all public sector employers must adhere. Although other public sector unions are subject to different working conditions and environments, all public sector unions are still subject to the same bargaining mandate. Public sector unions may coordinate their bargaining strategy with respect to the PSEC mandate and model their proposals after other settlements in the public sector. A connection to a family member represented by a different public sector union could potentially create a conflict of interest for a trustee. Deals that improve the working conditions of BCTF or CUPE members could be used to improve the working conditions of other public sector unions.

A pecuniary interest could therefore be found in relation to a trustee’s spouse/parent/child who is a member of another public sector union. In addition, a reasonable apprehension of bias (even if there is no actual bias) could be found on the basis that informed observers would believe that the trustee would favour a settlement with the BCTF or CUPE that benefitted their family member in another public sector union.

8. What if a trustee or their spouse/parent/child is a retired teacher?

As long as the trustee or their spouse/parent/child has retired long enough ago that a retroactive wage settlement would not result in the receipt of any payments, then the fact that they are a retired teacher with no immediate plans to return to teaching is unlikely to give rise to a pecuniary interest or a non-pecuniary conflict, provided there are no immediate plans to return to teaching.

9. What if the trustee is a union official?

A trustee serving as a union official of the BCTF or CUPE would clearly be in conflict under the non-pecuniary conflict of interest principles. Depending on the situation, a trustee serving as a union official of a different union could be in a conflict under the non-pecuniary conflict of interest principles depending on the circumstances.

As a union official, the trustee's role is to represent members of that union and act in their best interests. This could lead to a reasonable apprehension of bias on the basis that a reasonable person may believe that the trustee would not act in the interests of the Board because they would not want the BCTF or CUPE collective agreement to contain terms that would be detrimental to the membership of the trustee's union.

In addition, it is common for union constitutions to contain rules concerning the conduct of officials that include the requirement to refrain from activities which could be detrimental to the members of that union and sanctions for breaching those rules. This could also lead to a reasonable apprehension of bias on the basis that if the BCTF or CUPE collective agreement contained terms the trustee's union believed to be detrimental to the interests of that union's membership, the trustee could be charged with misconduct under the union's constitution and could be subject to sanctions such as a written reprimand, a fine, suspension, or expulsion from membership or suspension from or prohibition on the right to hold office.

10. Is there a distinction between how the conflict "rules" apply with respect to provincial bargaining vs. local bargaining?

In teacher bargaining, monetary items are negotiated provincially and non-monetary items are negotiated locally. The ratification of monetary terms engages the pecuniary interest analysis and the ratification of non-monetary terms engages the reasonable apprehension of bias analysis. Therefore, both the pecuniary interest analysis and the reasonable apprehension of bias analysis apply to a board's ratification of the teacher collective agreement.

While support staff bargaining has been coordinated at a provincial level to provide a framework for bargaining, the bargaining agency for support staff collective agreements rests with each board of education. Each board of education is responsible for bargaining and ratifying its support staff collective agreement, which includes both monetary and non-monetary items. As a result, both the pecuniary interest analysis and the reasonable apprehension of bias analysis apply to support staff bargaining.

11. Do school district management staff involved in collective bargaining have a conflict of interest if they have a family member employed in the district?

The pecuniary conflict of interest provisions of the *School Act* do not apply to district employees.

The cases applying common law principles relating to a non-pecuniary interest typically arise in cases where the decision maker is exercising statutory authority; for example, elected officials, judges, tribunal members. District management staff who are involved in bargaining are not exercising statutory authority. They are required to work within parameters established by the Board. Furthermore, it is the Board, not district management staff, which has the authority to ratify a collective agreement. Accordingly, the concept of bias would generally not preclude the involvement of district management staff in collective bargaining, provided they are working within established policies of the Board concerning conflict of interest. It's also important to reference [BCPSEA Policy 9401, Conflict of Interest Guidelines for Employees Representing BCPSEA](#), which applies to all employees of the province's 60 public school districts, BCPSEA, and the BCPSEA Board of Directors.

Process Questions

1. Whose responsibility is it to determine whether there is a conflict of interest?

In general terms, the responsibility for determining whether a trustee is in conflict or not falls first upon the trustee themselves, second upon the Board, and ultimately upon the Court.

2. What could happen if a conflict is found?

Members of the public who believe a trustee has participated in a decision of the Board despite a conflict of interest can bring a court challenge. If a court finds a trustee has knowingly breached the *School Act* provisions, the court must vacate the trustee's seat and may order the trustee to pay financial restitution. Further, the Board may declare that the decision in question be declared void. If a court finds a trustee has participated in a decision contrary to the common law rules relating to conflicts of interest, the court may set aside the Board's decision in that matter.

3. How does a Board deal with disagreement over whether a conflict exists?

As a general principle, a board of education has the authority to protect and defend its own process. Accordingly, where the Board is concerned that a trustee may have a disqualifying conflict of interest, the Board should obtain information about the apparent conflict, refer to its own Board policies (e.g., Conflict of Interest; Trustee Code of Conduct) and, where appropriate, a legal opinion on the matter.

Based on the information and legal opinion(s) obtained, the Board may decide to take internal measures to prevent the trustee from participating in the decision making process, seek a declaration from the court concerning the conflict, or continue with its proceedings, with the knowledge that there is a risk of court challenge to its actions.

The board can, by resolution, prohibit a trustee from participating in a debate or voting on a matter in respect of which the Board is of the view that the trustee has a conflict. Further, Section 70 provides that a majority of the trustees present at a meeting of the Board may expel a trustee from the meeting for improper conduct, which can include participating in discussions and influencing the vote on a matter in which the trustee has a conflict of interest or disqualifying bias. (Note: "improper conduct" is not defined in the *School Act* and the term "improper conduct" in this context has not been tested/interpreted in a BC court). Any decision to disqualify or exclude a trustee must be made through a fair process.

4. What steps must be taken where there is a pecuniary interest?

If a trustee has a pecuniary interest in any matter and is present at a meeting at which the matter is being considered, the trustee must:

- a. disclose his or her pecuniary interest and the general nature of the pecuniary interest;
- b. not take part in the discussion of or vote on any question in respect of the matter; and
- c. not attempt in any way, whether before, during or after the meeting, to influence the voting on any question in respect of the matter.

In addition, if a meeting is not a public meeting, the trustee who has a pecuniary conflict of interest must leave the portion of the meeting during which the matter is under consideration.

5. What if, due to conflicts, our Board lacks quorum?

If, due to a pecuniary conflict, the number of trustees able to participate in a meeting is insufficient to constitute a quorum, the Board may apply to the Court for an order authorizing the Board to consider, discuss, and vote on the matter that led to the pecuniary conflict. The Board will want to consult with its legal counsel in this regard.

6. Who should I contact to discuss my potential conflict of interest situation?

We suggest that your first point of contact would be your school district's Secretary Treasurer or Superintendent.