Employment & regulations

Four questions and answers

Laura Bickerton completes her series of three columns on aspects of teacher regulation. In this issue, she addresses the interconnections between the regulatory and employment arenas in which BC educators work.

Most educators who work in BC schools have limited understanding of the interconnections between the regulatory and employment arenas in which they work. Over the years, the BC College of Teachers and teacher regulation have received comments and questions related to the jurisdictions under a regulatory structure as they relate to employment. I hope this article addresses some of the concerns through identifying pertinent examples, relevant case law and legislation; in addition to clarifying how regulatory actions and the *Standards for Educators* (*Standards*) interact with, yet are different from, employment procedures and protocols.

Can a superintendent make a report to the Commissioner for Teacher Regulation (Commissioner) about the incompetence of an educator before the relevant collective agreement protocols have been completed?

The simple answer is yes. It is important to understand the way in which the regulatory provisions are different from collective agreement provisions. A collective agreement is between an employer (the school board) and the union that represents teachers in the district. It sets out how the two parties will work together in various situations. One of these situations relates to the evaluation of teachers. In most collective agreements, the process of evaluating a teacher involves three formal observations, associated communications and remediation efforts. In the event that an observation finds the teaching to be unsatisfactory, various interventions are implemented and further observation is scheduled. The board can only act to discipline a teacher for a finding of incompetence following three unsatisfactory reports.

However, the requirement for three unsatisfactory reports in the collective agreement does not prevent a superintendent from reporting a finding of incompetence to the Commissioner.

The requirement for the superintendent to report to the Commissioner can be found in the *School Act*. *Section 16(6)* provides for the superintendent to report breaches of the certification standards, including those relating to competence. This section of the *Act* is separate from the section which deals with reports of discipline that *must* be reported to the Commissioner.

Report of dismissal, suspension and discipline regarding authorized persons

16 (6) If the superintendent of schools considers any conduct by, or the competence of, an authorized person to be in breach of the certification standards, the superintendent must send to the commissioner a report, in writing, regarding that conduct or competence if it is in the public interest to do so.

Because the reporting provision is outside of the collective agreement, the superintendent is able to make a report under *Section 16* even if the collective agreement provisions have not been completed. Serious concerns about the ability of an educator to carry out the duties of a teacher or administrator and to meet the *Standards* can arguably be considered a matter of the public interest.

If, after one or two observations and evaluations, the superintendent believes that the public interest requires that a report be made to the Commissioner, then the report must be made. If there is a conflict between a statute, such as the *Teachers Act*, and a col-

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lective agreement, the statute prevails. A collective agreement cannot contain provisions which are contrary to statutory obligations of either employers or employees.

How do you differentiate between an employment issue that does not need to be reported to the Commissioner and a regulatory issue that does?

This question presumes that there is a distinction between types of misconduct and incompetence, some of which can be limited to a response at the employment level only. However, misconduct and incompetence are the purview of both employment and regulation. The question, then, is not whether misconduct or incompetence belongs only to the employment arena but whether the action has risen to the level that requires a regulatory response. So, when does an infraction or a breach of the *Standards* become serious enough to report to the Commissioner?

Consider two teachers who react angrily to students by yelling at and belittling them. One teacher has an unblemished record and has never acted in such a manner. She is, however, feeling stress because her husband has been hospitalized and she is preoccupied with worry. A second teacher has been warned repeatedly and has been issued letters of expectation, provided with assistance and mentorship, and issued a letter of direction with warnings of possible dismissal. Parents have complained. The misconduct in these cases is identical – both breach *Standard 1* – but the degree and circumstances are different. As an administrator, you may ask yourself these questions:

- *Do I have concerns that students are being seriously harmed?*
- *Do I have concerns that this action will be repeated?*
- *Does the teacher show evidence that he/she understands the effect of the behaviour and will learn from it?*
- *Is the teacher or administrator willing to honestly atone for his/her mistake?*

The response in the first case would likely be to talk with and support the teacher and the students, with the reasonable assumption that the teacher would not repeat the actions, learn from the situation and show remorse. The second case causes more concern for the public interest – *students are much more at risk of serious emotional harm* – and demands that more be done. A report to the Commissioner is appropriate.

Why do teachers face two disciplinary processes? Why does the principle of "double jeopardy" not apply to regulatory decisions?

Consider a situation in which an employer suspends a teacher or administrator for repeatedly claiming sick days to attend sporting events. Why should this be dealt with by another authority when the educator has already paid a penalty? How can he/she be tried twice for the same act?

In fact, a single act can result in disciplinary actions in many arenas as there are many different contexts to consider. The principle of double or, more correctly, multiple jeopardy is widely misunderstood. Within a single system, if you are found not guilty, you cannot be tried again. The case is over. But, anyone can be tried for that same act more than once provided the process is for a different purpose and is in a different court. For example, an acquittal in criminal court, which exists to protect the public safety, does not preclude a charge being brought in civil court, which exists to compensate victims. A Human Rights complaint may also be made and heard in yet another court. Employers may terminate employment for the same act and the Commissioner may instigate proceedings related to a breach of the *Standards*, which can result in the loss of a teaching certificate. All of these "courts" make findings and determine penalties related to their specific jurisdiction.

In other words, an educator may be found not guilty in a criminal court, but found to have breached the *Standards* by a hearing panel. Employment contracts, policies and collective agreements determine whether an educator will continue to be employed while the regulatory process determines whether the educator can continue to hold a teaching certificate.

Why do the Standards speak to educators' off-duty conduct? If teachers are competent and conduct themselves at work, why worry about what goes on away from work?

Most professions are subject to *Standards* that speak to "conduct unbecoming a professional." This conduct can happen in any context and does not have to occur while at work. *Standard 2* speaks to conduct unbecoming in the following way:

Standard 2: Educators are role models who act ethically and honestly.
Educators act with integrity, maintaining the dignity and credibility of the profession. They understand that their individual conduct contributes to the perception of the profession as a whole.

Educators are accountable for their conduct while on duty, as well as off, where that conduct has an effect on the school system.

Canadian courts have upheld this "higher standard" for professionals and the case law is clear that the public expects educators to be role models for the students they teach.

The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence, and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system… [Shewan v. Board of School Trustees of School District #34 (Abbotsford), 1987 159 (BC CA)]

What this and other court decisions tell us is that off-duty conduct does have an effect on the teaching environment and on the confidence that the public has in the education system. Because of the higher standard expected of educators in relation to the Standards, educator misconduct may be subject to sanctions when other groups are not.

As an administrator, it is important to be well versed in the policies and collective agreements that frame your employment responsibilities, but it is equally important to understand your legal and regulatory responsibilities and how they play out in your work. The *School Act* and the *Teachers Act* are pivotal to your doing the job of administration well and need to be understood and implemented to keep students safe and to protect the public interest. bcp vpa

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