BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 44

(the "Employer")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION
(NORTH VANCOUVER TEACHERS' ASSOCIATION)

(the "Union")

PANEL:	Andres Barker, Vice-Chair
APPEARANCES:	Brandon Hillis, for the Employer Michael Shapiro, for the Union
CASE NO.:	2023-001356
DATE OF DECISION:	January 23, 2024

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union alleges the Employer breached Sections 6(1) and 6(3)(d) of the *Labour Relations Code* (the "Code") by investigating the conduct of an elected Union officer and inquiring into internal union affairs. The Employer denies breaching the Code.

2 I find I am able to decide this matter on the basis of the parties' written submissions and without an oral hearing.

II. BACKGROUND

3 The Employer is a large school district, the British Columbia Teachers' Federation (the "BCTF") is a trade union under the Code, and the North Vancouver Teachers' Association is a local of the BCTF.

4 The relevant background to the application primarily centers on Darleen Saxer, who is a teacher and the Union's elected Chief Staff Representative ("CSR") at Highlands Elementary School ("Highlands"), and Deborah Wanner, who is the Principal at Highlands. Article A.31 of the collective agreement outlines certain provisions concerning the CSR, which is a position elected by the bargaining unit. The collective agreement states the CSR has the right to represent the interests of the Union to the school administration and will receive time off and access to clerical support.

5 On June 9, 2023, Saxer sent an email to all teachers at Highlands (the "Email") addressing certain matters, including a scheduled Union school staff committee ("SSC") meeting (the "SSC Meeting"). Article A.32 of the collective agreement recognizes the right of school staff to form an SSC, which may study and make recommendations to the school administration on any matters of concern to the staff. The provisions provide access to certain information and outline a process for school administration to consider recommendations made by the SSC.

6 The Email stated as follows:

> Happy Friday!
>
> On Monday June 12, there will be a meeting at recess in the library to discuss staff assignment. We, then, will have our final vote. The organization has not changed much and those impacted I have already spoken to personally.
>
> On Tuesday June 13, there will be an NVTA meeting at lunch in the library with a union table member present. The union is there to help us manage our school concerns. For example, I personally felt

unsupported on Thursday June 1 by our administration and I would like to take action about this.

On the 13th, I will be providing the union table members with a written letter which includes all of your/our concerns. The union will read this, and provide us with direction on what the next steps can be. As all organizations, we have a boss in our school, however, our boss also has a boss and they should be aware of what our working conditions are like.

I have been listening to you and have heard your concerns. Here is what I would like from you...

If you have a concern(s), I need to know. You can either, e-mail me, text me or call me anytime over the weekend. I will also be in at 8:00 am on Monday if you would prefer to speak in person and for me to write it for you. **Please use personal e-mail ONLY.**

These concerns could include but are not limited to:

- Lack of support - please provide examples
- Harassment - aggressive pressure or intimidation
- Discrimination- the unjust or prejudicial treatment of different categories of people,
- especially on the grounds of ethnicity, age, sex, or disability.
- Abuse language
- Etc.

I ask that you bring forward your concerns to me and NOT at the meeting. No concerns will be addressed at the meeting that are not written down. The full scope of the concerns must be written down so that we can properly address the situation.

The letter will not be signed and no names will be included in the letter.

If you do not wish to attend the meeting on the 13th, that is OK. Please note, all information discussed at this meeting is PRIVATE and CONFIDENTIAL, nothing is to be shared with anyone outside the Highlands NVTA. I also ask that you do not discuss the results of the meeting on school grounds.

If you send me your concerns, please do not reply all.

Be in touch!

Darleen …

(emphasis in original)

7 The Union held the SSC Meeting on June 13, 2023. Two teachers subsequently approached Wanner and advised that in the course of the meeting, and in front of a number of their colleagues, Saxer made disparaging comments about Wanner which included statements about her mental health. The Employer says it does not have particulars of what was said, but the fact such comments were made had an adverse impact on Wanner and made her feel targeted, hurt, and humiliated.

8 Wanner contacted Sarah Beere, the Employer's Human Resources Manager. Wanner advised Beere of what she had heard from the teachers who had approached her and asserted the alleged comments amounted to bullying and harassment.

9 On June 21, 2023, a Highlands teacher forwarded a copy of the Email to Wanner, who considered it to be further evidence of bullying and harassment.

10 The Employer says it determined Wanner had raised a complaint of bullying and harassment against Saxer, and, in accordance with its policy obligations and its legislative obligations under the *Workers' Compensation Act*, R.S.B.C. 2019 c. 1 (the "*WCA*"), it was obligated to address and respond to the complaint.

11 On September 12, 2023, the Employer issued what is known as a "C22 Notice". Article C.22 of the collective agreement concerns disciplinary matters and mandates the issuance of notice where an investigation is to be conducted. The Employer asserts it felt procedurally obligated to issue a C22 Notice because of the potential for discipline and, in the event no such notice was issued, it may be precluded from issuing discipline if the circumstances ultimately warranted it. The C22 Notice stated the Employer was seeking to investigate and clarify whether Saxer's actions were made in good faith or were insubordinate or defamatory towards Wanner. The C22 Notice also advised an external investigator had been assigned to the matter and directed Saxer to not discuss the matter with anyone "outside of their required involvement in this investigative process".

12 On September 13, 2023, the Union grieved the Employer's investigation of Saxer. It cited breaches of the Code and cited collective agreement articles relating to management rights, CSRs, SSCs, and recognition of the Union.

13 As of the time of the parties' submissions, the Employer's investigator has sought to interview members of the Union about the Email and about the discussions that took place at the SSC Meeting. The Union has objected to these attempts. On September 29, 2023, the Employer grieved what it asserted was the Union's interference in the investigation through the Union preventing the investigator from conducting interviews. The Employer cited various collective agreement articles including those relating to management rights and CSRs.

III. POSITIONS OF THE PARTIES

14 The Union says the Employer's conduct breached Sections 6(1) and 6(3)(d) of the Code. It argues the application engages the doctrine of union official immunity. It

says the Board has long held that employers cannot assert a right to discipline union officials for conduct in the performance of their union duties except where the conduct of the union officer goes beyond the bounds of lawful union activity and the conduct of the union officer is detrimental to legitimate employer interests.

15 The Union says Saxer is an elected officer and the CSR at Highlands. It asserts Saxer sent the Email from her personal email address in the course of performing her CSR duties, and nothing in the Email could possibly be construed as going beyond the bounds of lawful union activity, nor is there anything in the Email that could be detrimental to the legitimate interests of the Employer.

16 It says the Employer has no right to investigate or discipline Saxer for performing the CSR duties in question. It says the real reason behind the Employer's investigation and the threat of discipline is retaliation against Saxer for engaging in lawful union activities in performing her CSR duties in order to deter her and others from engaging in similar conduct in the future. It argues the SSC Meeting was an internal union matter and any discussions that may have occurred during this meeting are privileged and should be off limits to the Employer.

17 The Union further asserts this is not a circumstance where deferral to arbitration would be appropriate for, among other reasons, the fact the collective agreement does not expressly restrict the right to conduct workplace investigations and the result of the investigation may not lead to discipline. It says, therefore, without a breach of the collective agreement, an arbitrator does not have jurisdiction to adjudicate this unfair labour practice complaint.

18 The Union seeks: declaration that the Employer breached the Code; an order that the Employer must cease and desist from further breaches of the Code; an order that the Employer post a copy of the Board's decision in this application in all schools in the School District and email it to all teachers employed by the Employer; and any other remedy that the Board considers appropriate.

19 In response, the Employer submits it has not breached the Code by investigating the allegations brought against Saxer, and it says it is acting for legitimate reasons. It says, in particular, it is complying with its obligation, pursuant to its policies as well as obligations imposed upon it by the *WCA* and WorkSafeBC, to address and respond to complaints of bullying and harassment, including through conducting an investigation.

20 It says the Union's sole claim is that the impropriety arises because Saxer is shielded from investigation by virtue of the doctrine of union steward immunity such that comments alleged to be made by her should not attract any scrutiny. It argues this position finds no support in the jurisprudence and is, indeed, contradicted by it. It says the Board's policy establishes the concept of union steward immunity is not absolute and union stewards are not immune from being subject to investigations into alleged misconduct and such investigations do not, in themselves, constitute an unfair labour practice.

21 The Employer says, in short, it has a legitimate basis for its actions and there is no basis upon which to suggest, beyond mere conjecture from the Union, that such actions have had an impact on the administration of the Union. It says, alternatively, to the extent it has had any impact, there is no basis on the materials presently before the Board for it to conclude that the impact is anything other than incidental or inadvertent.

22 The Employer further denies its conduct breached Section 6(3)(d) of the Code and it says the Union has provided no evidence to suggest that the Employer's decision to conduct an investigation was motivated, in whole or in part, by anti-union animus.

23 Finally, it says the matter ought to be deferred to the arbitration process. It says the Union's claim that it may not be able to bring this matter to arbitration runs directly in contrary to the fact that it has filed a grievance over this very issue and claimed that a number of collective agreement provisions have been breached. It says there is no basis to accept the Union's submission that it would be left without recourse if this issue is not addressed by the Board.

24 It is unnecessary to recite the whole of the Union's reply submission except to note several responses. The Union takes the position the C22 Notice issued to Saxer concerned the Email and therefore what may have occurred during the SSC Meeting on June 13, 2023 is not relevant to the investigation or this proceeding. On the matter of deferral, the Union reiterates that without discipline being issued, an arbitrator will be without jurisdiction to adjudicate the alleged breaches of the Code, and it says the Board's adjudication of the present application would almost certainly resolve the two grievances which concern the validity of the investigation and the Union's opposition to what it says is an unlawful investigation.

IV. ANALYSIS AND DECISION

25 The Union asserts the Employer's conduct with respect to its investigation of Saxer breached Sections 6(1) and 6(3)(d) of the Code.

26 I first address the Employer's preliminary argument that this matter should be deferred to arbitration.

27 The Board's policy is to defer disputes arising out of a collective agreement to the parties' dispute resolution process (*Repap Carnaby Inc.*, BCLRB No. B31/94 ("*Repap*")). The Board will make an exception to this policy where: the grievance and arbitration provisions will be incapable of affording an adequate remedy; the issue is unusual and not a matter normally subject to third-party arbitration; the contract interpretation dispute is inextricably intertwined with the law and policy of the statute; or a collective agreement interpretation issue is necessarily incidental to the disposition of a matter properly before the Board (*Repap*, p. 11).

28 The Board has applied its policy of deferring disputes to arbitration in scenarios where an employer's actions are alleged to breach both the collective agreement and the unfair labour practice provisions of the Code (see, for example, *B.C. Ice and Cold*

Storage Limited, BCLRB No. 377/83 and *Host International of Canada, Ltd.*, BCLRB No. B5/2019). In such cases, the Board is generally satisfied an arbitrator appointed under the parties' collective agreement is capable of addressing the relevant portions of the Code and providing an appropriate remedy.

29 In *City of Colwood*, BCLRB No. B165/2017 ("*Colwood*"), the panel noted an arbitrator only has jurisdiction to determine unfair labour practice allegations that are raised in the context of a breach of the collective agreement. In circumstances where an employer does not discipline an employee, it is possible an arbitrator would not have jurisdiction over the union's unfair labour practice allegations with respect to the manner of an employer's investigation and the Board would be the only forum available to address the union's concerns. In *Colwood*, the panel was satisfied that the union's ability to resolve its unfair labour practice complaint with respect to the employer's investigation of statements made by the union president to a bargaining unit member should not depend on whether the employer ultimately decided to impose discipline.

30 In the present case, the Union has filed a grievance in relation to the Employer's investigation. However, while it cites certain collective agreement articles on its letter to the Employer notifying it of the grievance, it is not apparent to me from the parties' submissions how those articles provide the Union with a means to rely on the unfair labour practice provisions of the Code to prevent the Employer from making inquiries into the content of the SSC Meeting. In light of the uncertainty as to whether the grievance and arbitration provisions will be capable of affording an adequate remedy, I decline to exercise my discretion to defer the subject matter of the Union's application to arbitration. I am also satisfied that the outcome of this decision is likely to resolve both of the outstanding grievances surrounding this matter.

31 Turning to the merits of the application, a recent summary of several cases addressing the Board's policy on the matter of union official immunity and the Employer's right to investigate matters asserted to be union business was set out in *The Board of Education of School District No. 42 (Maple Ridge – Pitt Meadows)*, 2021 BCLRB 156 ("*School District 42*"):

> The Union's allegations around the Hewson Disciplinary Letter invoke the doctrine of union official immunity, which is intended to protect union officials from discipline for legitimate acts done while conducting union business. The Board has frequently applied the framework as expressed in *Richmond Lions*, in which the panel stated the boundaries of immunity must be drawn in a manner that balances the need to preserve the viability of the employment relationship with the legitimate right of the union to carry out its responsibilities without undue interference from the employer. This balance is achieved by requiring proof of conduct that is both beyond the bounds of lawful union activity and detrimental to the interests of the employer (*Richmond Lions*, p. 9).
>
> The application also raises issues with the scope of the Employer's investigation. In *City of Colwood*, BCLRB No. B165/2017, the panel

noted an employee may be subject to discipline for misconduct occurring while they are acting in their capacity as a union representative, and an employer must be entitled to investigate whether misconduct occurred (para. 30). Therefore, the fact an employer elects to investigate the conduct of an employee who was acting in the capacity of union official does not, in and of itself, amount to an unfair labour practice (*ibid*).

The Board's decision in *University of the Fraser Valley*, which dealt with an employer's workplace investigation that overlapped with internal union affairs, is also of assistance to assessing the allegations that the Employer's investigation breached the Code.

That proceeding concerned allegations that an employer's investigation into harassment complaints against three union executive officers that were initiated by two other union officers breached Sections 6(1) and 6(3)(d) of the Code. The issue arose because the union asserted the complaints involved confidential, internal union communications, confidential communications during various mediation processes, and solicitor-client communications regarding labour relations matters with the employer and the internal affairs of the union.

In considering the allegations under Section 6(1), the panel assumed, without deciding, that the employer had statutory obligations regarding workplace bullying and harassment, including a duty to have a policy in place addressing these issues. However, the panel also found the union had a competing legitimate interest in protecting the confidentiality of internal communications between union officers, mediation processes, and its solicitor-client communications (*University of the Fraser Valley*, para. 131).

In applying a "balancing of interests" approach, the panel noted that the internal and confidential information referred to in the complaints was of a highly protected nature, and it was difficult to imagine how an investigator could proceed without delving into the internal confidential and privileged affairs of the union (*University of the Fraser Valley*, para. 132). The panel further found the employer did not provide any substantive argument or evidence of spillover of the dispute into the workplace or impact upon the complainants' ability to perform their jobs for the employer (*University of the Fraser Valley*, para. 133).

The panel concluded that, on an objective standard, and based on the particular and unique circumstances of the case, the employer's conduct in pursuing the investigation of the harassment complaints as it did constituted interference with the administration of a trade union contrary to Section 6(1) of the Code (*University of the Fraser Valley*, para. 137).

(paras. 70-76)

32 To the above I add that unions, as the exclusive bargaining agent, have a statutory duty to fairly represent the bargaining unit, which may require a union to take certain actions and make certain inquiries to ensure it has fulfilled its legal obligations to its members.

33 In the present case, and following the Board's policy in *Colwood*, I find the Employer has not breached Section 6(1) or 6(3)(d) of the Code through the mere act of commencing an investigation in relation to what it determined was potentially a breach of its respectful workplace policies. As noted in *University of the Fraser Valley*, BCLRB No. B24/2018 ("*University of the Fraser Valley*"), while there may be limitations on the information an employer may gather as part of an investigation that involves alleged misconduct committed by an employee acting in their capacity as a union representative, this is a separate issue from whether an employer may turn its mind to the matter at all.

34 This leaves the issue of whether the Employer has breached the Code by attempting to make inquiries into statements made at a Union meeting held by an elected Union representative outside the workplace which was intended to address bargaining unit member concerns with respect to staff assignments and, potentially, other workplace issues. The question is whether the Employer's interests in determining what Saxer said about Wanner at the SSC Meeting outweighs the Union's interest in protecting the confidentiality of its meetings with membership that are intended to discuss workplace concerns. The Employer relies on the Email and the statements made to Wanner by two Highlands teachers about Saxer's comments about Wanner at the SSC Meeting.

35 I first consider that Saxer is a Union representative in a role that requires her to oversee the administration of the collective agreement, which includes investigating potential breaches of the collective agreement and communicating with bargaining unit members. In conducting such business, a Union representative may need to speak candidly to the membership and the membership may need to speak candidly back, and the Union has a legitimate interest in not giving the Employer access to such meetings. I also consider that Saxer sent the Email from a personal email address in the course of performing her role as a CSR and the SSC Meeting was not conducted openly in the workplace but rather was a private meeting between the Union and members of the bargaining unit. I further find it is difficult to see how an investigator could make inquiries about what Saxer said at the SSC Meeting without venturing into matters of what was discussed during the course of formal and internal Union business specifically meant to address such issues as concerns with management and potential allegations of collective agreement breaches by the Employer.

36 In considering the content of the Email, I first acknowledge the Employer does not take issue with the notion of a Union email to the bargaining unit inviting members to a meeting to address workplace assignments and discuss how to approach management with those concerns. The issue instead arises from certain statements made by Saxer within the Email.

37 The portion of the Email the Employer focuses on is Saxer's invitation to provide concerns about a lack of support, harassment, discrimination, and abusive language. The Employer interprets these statements as being potentially insubordinate and defaming. In considering this assertion, I find Saxer's Email does not expressly state that any member of management has engaged in any specific behaviour, nor does it mention Wanner by name. Rather, it only invites the bargaining unit to provide any concerns that may fit within certain categories.

38 Even to the extent the Email could be interpreted as an allusion to Wanner possibly engaging in such actions, the Union is entitled to seek information from the bargaining unit to determine if the Employer is engaging in actions that may justify a grievance alleging the Employer is not in compliance with the collective agreement. Saxer also expressly said any concerns members had would not be openly discussed at the meeting, and Saxer asked that this information be conveyed through private email, text, or phone call. For these reasons, I find the Email does not provide the Employer with sufficient basis to require Saxer or other bargaining unit members to discuss Saxer's statements at the SCC Meeting.

39 As it concerns the statements from the two Highlands teachers to Wanner about Saxer's alleged comments, I find the Employer only received general, unparticularized assertions of what Saxer said, and it does not appear to know more than the allegation that Saxer made disparaging comments that concerned Wanner's mental health.

40 I find the Board's policy should take a guarded approach against allowing an employer to inquire into the conduct of confidential union business, including meetings between elected Union representatives and bargaining unit members meant to foster candid discussion of workplace concerns. To the extent an employer can make inquiries that intrude into such matters on the basis that comments made by a union representative may establish a breach of respectful workplace policies, under the balancing of interests approach as described in *Fraser Valley* and cited above in *School District 42*, I am not satisfied the Employer has received sufficient basis to allow it to make the sought inquiries into the content of the SSC Meeting. I therefore find the Employer has interfered with the administration of the Union and breached Section 6(1) of the Code through the manner in which it has pursued its investigation.

41 The Union says the Employer also breached Section 6(3)(d) of the Code because it sought by threats and intimidation to induce Saxer from continuing to be an officer and a representative of the Union. I am not persuaded the facts as particularized demonstrate this was the Employer's intention in conducting the investigation. Regardless, my findings with respect to Section 6(1) are sufficient to address the labour relations concern raised by the Union.

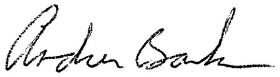
42 With respect to the Union's sought remedies, I find a declaration the Employer breached Section 6(1) of the Code is sufficient to address the breach and it is unnecessary to issue a cease and desist order or to order the Employer to distribute a copy of this decision to all teachers employed by the Employer.

43 As a final matter, I note that effective communication and trust are essential to productive labour relations, and the fact a party can proceed in a certain way does not mean this route will lead to a fruitful environment for collectively addressing workplace concerns. The parties are encouraged to consider utilizing the services of the Board's relationship enhancement program to assist in fostering a cooperative working relationship.

V. CONCLUSION

44 For the reasons given, the application is allowed in part. I declare the Employer breached Section 6(1) of the Code through the manner in which it has pursued its investigation of Saxer.

LABOUR RELATIONS BOARD



ANDRES BARKER
VICE-CHAIR