IN THE MATTER OF AN EXPEDITED ARBITRATION

BETWEEN:

THE BOARD OF EDUCATION, SCHOOL DISTRICT NO. 40 (NEW WESTMINSTER)

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 409

(the "Union")

RE: GENERAL POLICY GRIEVANCES (IMPROPER LAYOFFS)

ARBITRATOR:	Irene Holden
COUNSEL/REPRESENTATIVES:	Robert Weston For the Employer
	Natasha Morley For the Union
SUBMISSIONS:	April 7 and 21, 2015
DATE OF AWARD:	June 22 , 2015

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INTRODUCTION

In September of 2014 I was appointed by the New Westminster School District, No. 40 and Local 409 of the Canadian Union of Public Employees as arbitrator pursuant to Article 9.02(c) of the parties' Collective Agreement. There were a number of outstanding individual and general policy grievances as a result of a transfer/layoff process undertaken by the School District in May of 2014.

In early October of 2014 I met with the parties and the parties were successful in finding a resolve to the individual grievances, but not to the general policy grievances which related specifically to the process utilized by the Employer during the May layoffs. The parties continued to meet in an attempt to resolve the policy grievances. I met with the parties on November 19, 2014 but a settlement was not reached.

Following an interim award regarding a jurisdictional issue, the parties agreed to a written submission process for the policy grievances. This award is as a result of the parties' submissions.

AGREED STATEMENT OF FACTS

The parties had agreed to a statement of facts for the original mediation/arbitration and the Union relied on this statement in its submission regarding the general policy grievances. I have only reiterated those statements which were relied upon in these proceedings and which outline the process utilized by the Board which is the subject matter of this arbitration. The statements also provide the background to the dispute and provides historical context as well.

1. In April of 2014, a number of budgetary cutbacks were approved by New Westminster School District in departments throughout the district. **Original Agreed Statement of Facts Para. 2**

2. In May of 2014, the Board informed seven employees (the "Employees") that they would be subject to a board initiated transfer ("BIT") under Article 4.06 of the collective agreement, as a result of budgetary cutbacks in their respective departments. The Employees were transferred into positions at different school locations within the district. **Original Agreed Statement of Facts Para. 4**

3. The four employees that were already occupying the positions, which the Employees were transferred into, were consequently displaced from these positions. **Original Agreed Statement of Facts Para. 6**

4. On May 14, 2014, the Union sent a letter to the Employer giving it notice that it was in violation of the Collective Agreement. **Original Agreed Statement of Facts Para. 8**

5. In particular, the Union claimed that by using BITs under Article 4.06 to transfer the Employees, the Employer had violated the Employees' rights to: a) receiving layoff notice and bumping any employee with less seniority pursuant to Article 4.05 of the Collective Agreement; and b) exercise their right to severance pay pursuant to Articles 3.03 and 3.04 of the Collective Agreement. **Original Agreed Statement of Facts Para. 9**

6. The Employer denied these violations and stated that these BITs were within its management rights. **Original Agreed Statement of Facts Para. 10**

Lay Off Past Practice

Layoffs in 2009

7. In May of 2009, the Employer laid off twenty-one employees in the Education Assistance ("EA") classification as a result of budgetary cutbacks (the "May 2009 Layoffs"). **Original Statement of Facts Para. 16**

8. These layoffs were conducted in accordance to Article 4.05 of the Collective Agreement, whereas the employees being laid-off were:
   a) given one month's notice;
   b) the most junior in seniority in the EA classification;

c) given the right to bump any employee with less seniority granted they were qualified for the position and;
d) allowed to exercise their severance pay option under Article 3.04 of the Collective Agreement where applicable.
Original Statement of Facts Para. 17

Layoffs in 2013

9. In May of 2013, the Employer laid off twenty-seven of the most junior employees in the EA classification under section 54 of the *Code* [*Labour Relations Code*] as a result of budgetary cutbacks (the "May 2013 Layoffs"). **Original Statement of Facts Para. 23**

10. These layoffs were conducted in accordance to Article 4.05 of the Collective Agreement, whereas the employees being laid-off were:
a) given one month's notice;
b) the most junior in seniority in the EA classification;
c) given the right to bump any employee with less seniority and;
d) allowed to exercise their severance pay option under Article 3.04 of the Collective Agreement where applicable.
Original Statement of Facts Para. 24

Board Initiated Transfers Past Practice

11. The following is a summary of the manner in which BITs were used by the Employer between 1992-2014:

a. The Employer did not proceed with BITs in instances where the Union did not agree to the transfers in question.
b. The Employer used BITs to transfer employees in situations whereas the entire school was relocated to a new location.
c. The Employer, in consultation with the Union, used BITs to transfer employees to different locations within the district due to interpersonal or performance issues.
d. The Employer used BITs to carry out a swap of a position, whereas the employees being swapped agreed to the swap.
e. BITs were used in accordance to Letter of Understanding #8: No Layoffs During the School Year (the "LOU No. 8"). LOU No. 8 was negotiated by the Employer and the Union in order to give job security to employees by restricting layoffs after September 30 of every school year. LOU No. 8 was

renewed for the 1999 to 2003 and 2003 to 2006 Collective Agreements. In the 2006 to 2010 rounds of bargaining, the LOU was not renewed, however, the parties consented to renewing it outside of the Collective Agreement. During the 2010 to 2012 round of collective bargaining, the LOU was deleted in its entirety.

f. The Employer used BITs to transfer employees that were junior in seniority, but gave them a choice as to which location/position they wanted to transfer into.

g. In the summer of 2010, the Employer proceeded with BITs of custodial staff for team cleaning in the summer. The Union grieved these BITs and proceeded to arbitration, where the grievance was dismissed.

Original Statement of Facts Para. 28

COLLECTIVE AGREEMENT PROVISIONS

The sections of the Collective Agreement most relevant to this dispute are as follows:

4.05 Layoff and Recall

(a) **Definition of Layoff**

A layoff shall be defined as any reduction in the regular hours of work as defined in this Agreement. Employees who are laid off shall be notified one (1) month prior to the layoff. If the employer fails to give one (1) month's notice, the employee shall receive one (1) month's pay in lieu of notice.

(b) **Role of Seniority in Layoffs**

Both Parties recognize that job security shall increase in proportion to length of service. Therefore, in the event of a layoff, employees shall be laid off in the reverse order of their bargaining unit wide seniority.

(c) **Bumping**

(i) An employee about to be laid off may bump any employee with less seniority, providing the employee exercising the right is qualified to perform the work of the less senior employee. The right to bump shall include the right to bump up.

(ii) a) When a position is vacant and an employee who has been laid off is qualified pursuant to Article 4.04(a), the laid off employee shall have the first priority to fill the vacant position. The employee will still retain recall rights to his/her former position for up to one (1) year.

b) Effective October 1, 1996, it is understood that any vacant position will be posted pursuant to Article 4.02(a). First priority will go to a laid off employee if that employee is the most senior of the qualified applicants.

(d) **Severance Option**

An employee about to have his/her hours reduced may elect not to bump and may instead choose to take severance pay as provided in Article 3.04 under the conditions **shown** below:

(i) The effect of the reduction in hours is to change an employee's status from regular to school term, or;

(ii) The employee's hours of work are being reduced by one (1) or more hour(s) per shift in the school year, and;

(iii) The laid off employee is at least (50) years of age.

(e) **Recall Procedure**

Employees shall be recalled in the order of their seniority.

(f) **No New Employees**

Effective April 1, 1996, new employees shall not be hired until those laid off have been given an opportunity of recall. Employees on recall shall be offered casual employment in classifications for which they are qualified prior to casual employees without seniority. If the employee cannot be contacted or fails to respond as requested, the Board shall be deemed to have made the offer to the employee.

(g) **Postings While on Recall**

All employees on recall shall receive copies of all postings. An employee on recall shall be deemed to have applied for any posted position in their former classification with the same hours of work and shift. If the employee is the senior applicant then the employee shall be awarded the position (recalled to that posted position) and shall no longer be on recall.

(h) **Failure to Accept Recall**

An employee on the recall list may reject recall once only to a posted position. If the employee rejects recall on a second time to a posted position, then the employee will be deemed to have voluntarily resigned.

4.06 <u>Board Initiated Transfers</u>

(a) The Board has the right to transfer an employee. If the Board initiates the transfer, it shall be deemed to be involuntary. Normally an employee shall not be involuntarily transferred by the Board more than once in a calendar year.

(b) The Board shall follow the following guidelines when considering a Board initiated transfer:

(i) Such transfer may occur where it is a swap of positions where the employee not being transferred agrees to the swap.

(ii) Such transfer may occur where there is a vacancy in the same classification. In such cases the employer may transfer the employee and shall then post the new vacancy.

(iii) Where the Board initiated transfer involves a swap of positions of different classifications, both employees must agree to the swap; and the positions must have similar responsibilities and duties and the same pay.

(c) The Board shall notify the Union of any Board initiated transfers prior to the transfer. The notice shall include the reasons for the transfer.

Board initiated transfers are subject to the grievance procedure. Except in emergency situations such involuntary transfers shall not take place until the grievance procedure is completed (if a grievance is filed).

THE ISSUE

The issue is whether the Employer breached the Collective Agreement by utilizing the provisions of Article 4.06 which relate to Board initiated transfers, rather then utilizing the layoff and recall provisions found in Article 4.05 of the Collective Agreement.

UNION SUBMISSION

The Union submits that the Employer violated Article 4.06 by conducting Board initiated transfers outside the circumstances outlined in the Article. By using Board initiated transfers in this manner employees were denied their entitlements under Article 4.05 in the case of a layoff and the Employer therefore breached Article 4.05 as well. It is the Union's contention that the transfers were utilized for the express purpose of circumventing the Article 4.05 rights to bumping and severance pay. The Union says this was an unreasonable, dishonest and bad faith exercise of management's

rights and a breach of the common law duty to administer contracts honestly (see *Bhasin v. Hrynew* [2014] SCC 71).

EMPLOYER SUBMISSION

The Employer submits that the language found in Articles 4.05 and 4.06 of the Collective Agreement must be read in concert with each other. As for the "guidelines" found in Article 4.06 they are nothing more than "guidelines". They cannot act as fetters to the Employer's right to initiate transfers when faced with the need to make district wide readjustments in staffing assignments, asserts the Employer.

Further, the Employer submits that Article 4.06 provides for an opportunity for a Board initiated transfer in the event of a vacancy. These vacancies occurred by rearranging the workforce and displacing certain incumbents in a number of positions. The intent was never to deny an employee severance states the Employer, nor any other rights and the transfers indeed protected the senior employees by allowing the employees to retain employment in a substantially similar position. Further, the usage of transfers negates the need to indulge in protracted chain bumping. According to the Employer's submission, the layoff and bumping process can be utilized where there is no Board initiated transfer option or the Employer chooses to not layoff in reverse order of seniority.

ANALYSIS AND DECISION

It is trite law that the objective of Collective Agreement interpretation is to discover the mutual intention of the parties. In so stating, I shall reiterate the rules of interpretation as defined in Arbitrator Bird's 1995 decision *Re Pacific Press v. Graphic Communications International Union, Local 25-C,* [1995] B.C.C.A.A.A. No. 637 (Bird), and referenced in many awards since then.

1. The object of interpretation is to discover the mutual intention of the parties.

2. The primary resource for an interpretation is the collective agreement.

3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.

4. Extrinsic evidence may clarify but not contradict the collective agreement.

5. A very important promise is likely to be clearly and unequivocally expressed.

6. In construing two provisions, a harmonious interpretation is preferred rather than one that places them in conflict.

7. All clauses and words in a collective agreement should be given meaning if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.

9. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

Although these principles were issued in 1995, twenty years ago, they have become the guiding principles behind most Collective Agreement language interpretations. According to these principles the primary resource is the language in the Collective Agreement but extrinsic evidence such as bargaining evidence or evidence of past practice, can be utilized as an interpretative tool to assist in arbitral deliberations.

The evidence reveals that there were to be budgetary cutbacks in certain areas of New Westminster School District in May of 2014 in an effort to meet funding requirements. The School Board meeting minutes dated April 29, 2014 confirms cuts were to take place amongst the Education Assistants; amongst the administrative staff in Community Education/Columbia Square Alternative Learning Centre; in Continuing Education support staff; in the Child and Youth Care Worker classification; and in Learning Services. The financial contribution to the budget, as a result of the cutbacks, was also recorded in the minutes of that meeting.

As a consequence, seven positions were identified for elimination. Instead of invoking the layoff and recall provisions under Article 4.05 of the parties' Collective Agreement, the employees occupying these seven positions were "reassigned" to other positions; in all but one instance, these seven employees displaced the incumbents of the positions to which they were being reassigned. The letters issued to the employees whose positions had been eliminated indicated that the employees were being "reassigned to a new location" in order to meet "the operational requirements of the board" in accordance with Article 4.06 of the Collective Agreement.

Instead of affording the employees the rights to bumping opportunities, recall and/or severance, as outlined in Article 4.05 of the Collective Agreement, the Employer decided to control the outcome by initiating an involuntary transfer first; the Employer further created vacancies by displacing junior incumbents in the positions to which the employees were being transferred. In so doing, the Employer has violated both Articles 4.05 and 4.06 of the Collective Agreement, according to the Union.

The Employer argues that there has been no violation of Articles 4.05 and 4.06. These articles need to be read "in concert" asserts the Employer. It is trite law that a Collective Agreement should be read as a whole but a review of Article 4 in the parties' Collective Agreement indicates that it is a conglomeration of post and fill provisions,

employee initiated or lateral transfers, Board initiated transfers, layoff and recall provisions, apprenticeship programs, reclassification, contracting out, etc. Further, there appears to be no linkage between Board initiated transfers and layoff and recall provisions found in Articles 4.05 and 4.06 of the Collective Agreement.

Within the body of Article 4, wherever there is a linkage, the linkage is identified within the article. So for example, severance pay found in Article 3.04 is referenced in Article 4.05 as an option in the layoff and recall process if the employee chooses not to bump. Conversely there is no such linkage between Articles 4.05 and 4.06.

The Employer argues that the management right found in Article 4.06 to involuntarily transfer an employee remains unfettered and the "guidelines" outlined in the article have been met in the sense that the displacements created the vacancies. Further, "guidelines" found in Article 4.06 are only considerations and do not constitute restrictions on its right to initiate Board transfers, asserts the Employer. First of all, I do not accept the argument that a vacancy created by employees being displaced meets the general definition of "vacancy" which indicates an unencumbered position. Rather I liken what took place in May of 2014 to a controlled bumping scenario. The Employer tried to control and dictate what position the employees could bump into – in contrast to the bumping provisions in Article 4.05 of the Collective Agreement which allows the senior employee being laid off to bump a junior employee if the senior employee is qualified to perform the job. Had it not been for the displacements, there would have been no vacancies.

I agree that the language in Article 4.06 and its usage of the word "guidelines" suggests that the guidelines are not a mandatory consideration but the language in Article 4.06(b) and the usage of the phrase "shall follow" the "following guidelines" establishes mandatory obligations for the Employer. The guidelines provide for Board initiated transfers to occur where a swap of positions occurs (i.e., employees A and B

swap their positions – employee A assumes Employee B's position and vice versa), and/or where there is a vacancy in the same classification.

No mention is made in Article 4.06 about elimination of positions, displacement or "reassignment". The references in Article 4.06(b)(i) and (iii) to a swap of positions imply that both positions would continue to exist in order for the exchange to occur. Article 4.06(b)(ii) speaks to a transfer into a vacancy with the previous position subsequently becoming a vacancy and subject to posting. Consequently, the guidelines suggest that there can be a swap of positions and/or a transfer into a vacancy if the exceptional circumstances call for such a transfer.

Further, there is no reference at all in Article 4 regarding "reassignment" as characterized by the School Board in the letters to the employees whose positions were eliminated. Displacement occurs in one way in Article 4 and that is via the laid off employees exercising bumping rights in accordance with the layoff provisions of Article 4.05, and displacing junior employees in this manner.

The parties did not produce any bargaining history which may serve as an interpretative tool regarding Articles 4.05 and 4.06. However, past practice was introduced in the Agreed Statement of Facts and is also instructive. Past practice demonstrates that Article 4.06 was not utilized when there were budgetary cutbacks in 2009 and in 2013, and that the layoff and recall provisions of Article 4.05 were followed.

Between 1992-2014 the past practice from the Agreed Statement of Facts indicates that the Board initiated transfers were utilized when an entire school was relocated; when there were interpersonal and performance issues involved; when it was a question of an agreed swap in positions; when the employees were junior and were given a choice as to which vacancies they could transfer into; and in the case of temporary transfers. It was in this latter case of creating summer cleaning teams that

the Union grieved the Employer's usage of Article 4.06. In a decision of then Arbitrator Emily Burke, Arbitrator Burke found that the Union could not establish a clear limitation on management's right to temporarily transfer employees in the case before her, and the grievance was dismissed (see the unreported November 15, 2010 decision of Arbitrator Burke between the New Westminster School District and Canadian Union of Public Employees, Local 409 regarding the "Custodian Team Cleaning Grievance"). However, the circumstances were far different in May of 2014 and were not about temporary transfers. These were involuntary permanent transfers of employees and the subsequent displacement of others.

A plain reading of the language found in Article 4.06, coupled with past practice, indicates that Board initiated transfers have never been utilized in the manner in which they were utilized in 2014. If the parties had wanted Article 4.06 to play a part in the layoff and recall provisions, then a reference to same would have been made in both Articles 4.05 and 4.06.

Past practice indicates that the layoff and recall provisions found in Article 4.05 were followed in the layoffs of 2009 and 2013. So too should the provisions of Article 4.05 have been utilized in the case at hand. Because they were not utilized I find that the rights of those employees who were the subject of Board initiated transfers have been abrogated. In addition, because the process implemented by the Board in May of 2014 did not follow the guidelines outlined in Article 4.06 either, the process constituted a breach of Article 4.06 as well.

What occurred in 2014 was the orchestration by the Employer to ensure that there was the least amount of disruption to the school district. Although it is understood why the Employer would not relish the disruption caused by chain bumping and would not want to pay severance pay which would reduce the cost savings allocated to the budgetary cuts, by implementing Board initiated transfers into

the process, the Employer violated the freely negotiated collective bargaining rights of the employees in question. If the Employer wants to change the current Collective Agreement language and have Article 4.06 play a part in the layoff and recall process, it needs to bargain such a provision at the bargaining table.

Given this decision, it is not necessary to address the bad faith argument made by the Union and its reliance on *Bhasin v. Hrynew, supra.*

CONCLUSION

The general policy grievances initiated as a result of the Board initiated transfers in May of 2014 are granted.

Awarded this 22nd day of June, 2015 in the City of Vancouver, British Columbia.

IRENE HOLDEN, Arbitrator