

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF A GRIEVANCE FILED BY KRISTY NANTON DATED
MAY 10, 2017 AND A GRIEVANCE FILED BY THE RIVER EAST TRANSCONA
TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY DATED
MAY 15, 2017

BETWEEN

THE RIVER EAST TRANSCONA TEACHERS'
ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY
and KRISTY NANTON,

(hereinafter referred to as the "Association" and the "Grievor"
respectively),

- and -

THE RIVER EAST TRANSCONA SCHOOL DIVISION,

(hereinafter referred to as the "Division")

AWARD

ARBITRATOR

Blair Graham, Q.C. - Sole Arbitrator

APPEARANCES

Garth Smorang, Q.C. - on behalf of the Association and the Grievor

David Simpson - on behalf of the Division

AWARD

INTRODUCTION

On July 18, 2017, I was appointed by the Manitoba Labour Board (the "Labour Board") as Arbitrator, pursuant to ss.130(5) of *The Labour Relations Act* (the "Act") to hear and determine two grievances pursuant to the expedited arbitration provisions of the Act. The two grievances were:

- (i) the individual grievance of Kristy Nanton (the "Grievor") dated May 10, 2017;
- (ii) the grievance of the Association dated May 15, 2017.

Both grievances are based on the same circumstances, contain the same allegations against the Division, and seek the same relief. Accordingly, the grievances were heard together.

The hearing was initially scheduled to proceed on August 8, 2017, but was adjourned by consent, and with the approval of the Labour Board, to August 28 and 29, 2017.

The hearing of the grievance proceeded on August 28 and 29, 2017 in Winnipeg, Manitoba. There were no preliminary issues raised by the parties.

These proceedings are governed by the terms of a collective agreement between the Division and the Association, which became effective on July 1, 2014 and will remain in effect until June 30, 2018, and may be renewed thereafter (the "Collective Agreement").

The dispute between the parties relates to the transfer of the Grievor from Neil Campbell School, which transfer was to be effective on September 5, 2017. The dispute engages the provisions of Article 16 of the Collective Agreement, entitled

“Transfer”, and the provisions of a Memorandum of Understanding between the Division and the Association dated October 13, 2015. The Memorandum sets forth a protocol to be “followed by the Division in exercising its right to transfer teachers in accordance with the Collective Agreement”.

On August 30, 2017, I advised the parties in writing of my decision, in view of the impending start of the 2017/2018 school year. I did so on the understanding that an Award containing the reasons for my decision would be provided within 28 days of the completion of the hearing, i.e. within 28 days of August 29, 2017.

My decision was to allow the grievances of the Grievor and the Association, and to rescind the transfer of the Grievor from Neil Campbell School to Wayoata School, which was to have been effective September 5, 2017. The reasons for my decision are outlined herein.

THE COLLECTIVE AGREEMENT PROVISIONS

Article 16 of the Collective Agreement states:

“ARTICLE 16. TRANSFER

- 16.01** The Association recognizes the right of the Division to transfer teachers employed by the Division to schools under the jurisdiction of the Division.
- 16.02** The Division shall exercise its discretion to transfer in a manner that is fair and reasonable. A copy of all written notices of transfers shall be sent to the President of the Association. The Division shall, wherever possible, consult with teachers who are being involuntarily transferred prior to making a final decision. A copy of all written transfer notices shall be sent to the president of the Association.
- 16.03** In making transfer decisions the Division shall consider the educational needs of the students, the administrative needs of the Division and those concerns raised by the teacher prior to making a decision. However, in the absence of exceptional circumstances, the Division shall be guided by the

educational needs of the students and the administrative needs of the Division.

- 16.04** In the case of any teacher who has been given notice of transfer following May 31st and wishes to resign before June 30th of that year, the Division agrees to accept the resignation provided it is offered in writing within 7 days of the notice of transfer.”

The Memorandum of Understanding dated October 13, 2015, which forms part of the Collective Agreement states:

“The Parties agree that the protocol set out below will be followed by the Division in exercising its right to transfer teachers in accordance with the Collective Agreement.

1. Consultation with a teacher who is being involuntarily transferred shall be face to face.
2. The consultation shall take place with the teacher before the transfer decision is finalized. This will be clearly communicated to the teacher at the meeting.
3. There shall be a balanced number of participants in the meeting, as between the Association and the Division.
4. If the member requests representation at the meeting, a representative from the Association will be entitled to attend.
5. The Division agrees that the decision to transfer will not be linked to evaluation or teacher discipline.
6. There will be an opportunity for a discussion of options or other scenarios as an alternative to the transfer proposed by the Division and where the teacher raises other options or scenarios the Division will consider them prior to making a final decision.
7. Provision for appeal against a transfer decision shall be available to all teachers. The appeal shall be made directly to the superintendent of the Division and the time for filing a grievance shall not begin to run until the superintendent has rendered a decision on the appeal.

8. The protocol will be followed by the Division in the ordinary course. In the event that particular circumstances exist that prevent the Division from following any of the above, the Division will notify the Association. The Association reserves the right to question whether or not the Division should have followed the protocol, and, if necessary, to grieve."

The Association also submits that s.80 of *the Act* is applicable. Section 80 of *the Act* stipulates that every collective agreement shall contain a provision obliging the employer, in administering the collective agreement, to act reasonably, fairly, in good faith, and in a manner consistent with the collective agreement as a whole, and if a collective agreement does not contain such a provision, it shall be deemed to do so.

THE EVIDENCE

The evidence in these proceedings consisted of the testimony of four witnesses and eighteen exhibits. The Association and the Grievor called one witness in support of the grievances, namely the Grievor. Three witnesses were called on behalf of the Division, namely Greg Daniels, an Assistant-Superintendent of the Division responsible for Human Resources relating to professional staff, Gerald Hector, the Principal of Neil Campbell School, and Jamie Evans, a half-time Vice-Principal and half-time Teacher/Librarian at Neil Campbell School.

Although there were small differences between the evidence of the Grievor and the evidence of the other witnesses on some immaterial points, the relevant background facts are essentially uncontested. They are summarized below.

1. The Grievor is a teacher, and has been a teacher for thirty years. Her entire teaching career has been spent at Neil Campbell School.
2. Neil Campbell School is an elementary/early years school, featuring both a French Immersion program and an English program. The Grievor has taught in both programs. She has taught Grade 1 and Grade 2 and a Grade 1/2 split class in the French Immersion Program. She has also taught Grade 1 and Grade 2 in the English

Program. The Grievor's most recent work experience has been in the English Program; she has not taught in the French Immersion Program for many years. In the last five school years the Grievor has been teaching Grade 1 in the English Program.

3. During most of the Grievor's tenure at Neil Campbell School, the school was a Kindergarten to Grade 6 (K-6) school. Consistent with a trend in the Division, the school became a K-5 school, commencing in September, 2016, for the 2016/2017 school year. Neil Campbell School was the last elementary school in the Division to lose its Grade 6 class.

4. Although student enrollment in the Division as a whole is increasing, enrollment at Neil Campbell School, at least in the English Program, is declining. As a result of the loss of the Grade 6 students and the declining enrollment of students in the English Program, the Principal and Vice-Principal of Neil Campbell School recognized the distinct possibility that one or more teachers at the school might be declared "surplus" for the 2016/2017 school year, which is to say the teaching staff at the school might be reduced. This would normally involve the transfer of the teacher or teachers declared as "surplus" to another school within the Division.

5. The Principal of the school, Mr. Hector advised the teaching staff of that possibility for the 2016/2017 school year in the early months of 2016. However, for various reasons, including the willingness of a Grade 6 teacher at Neil Campbell School to transfer to a middle school effective September, 2016, the Division did not declare any of the remaining staff at Neil Campbell School to be "surplus" for the 2016/2017 school year.

6. Mr. Daniels, an Assistant-Superintendent in the Division is a senior administrator in the Division who is responsible for assigning Full-Time Equivalent Teachers (FTEs) to the forty-two schools in the Division. Mr. Daniels is the person who identifies the "surplus" situations, namely the schools who will have their complement of teaching staff reduced in any given year. FTEs are assigned by Mr. Daniels based on the budget established by the Division, school enrollments, and preferred or targeted

teacher/student ratios. Declining enrollments are the most common reason for declaring a teacher to be “surplus”.

7. In order to assign FTEs and to determine whether a surplus will be declared at a particular school, Mr. Daniels uses both a computer program, and projections from the schools themselves. The projections from the schools are initially received by Mr. Daniels in December. Those projections are further reviewed in February of the next year, based in part on data relating to actual enrollments of the schools for the upcoming year, which have occurred by that time.

8. Mr. Daniels typically communicates with the principals, whose schools may be in a surplus situation, relatively early in a calendar year. He typically does so in January based on the December projections and again in March after the enrollment figures from February are available.

9. In January, 2017, as a result of the budget Mr. Daniels was required to work within, the declining enrollment in the English Program at Neil Campbell School and the relatively small class sizes at that school, Mr. Daniels decided to allocate fewer FTEs to the school for the 2017/2018 school year. This meant that the teaching staff at the school would be reduced and that at least one teacher would be declared “surplus”.

10. In January, 2017, Mr. Daniels forwarded a memo to the principals of the schools which had been identified as having at least one “surplus” teacher. Mr. Hector received a copy of the memo. The subject of the memo was the “Identification of Surplus Teachers”. It provided the principals with information with respect to the process to be following by principals in choosing which teacher(s) were to be designated as “surplus”, the manner in which term positions would be dealt with in the process, and the timetable for the identification and notification of the surplus teachers.

11. An additional document entitled “Surplus Identification Guidelines” was attached to the memo, which provided information to the principals as to the type of announcement to be made at a staff meeting with respect to an impending staff

reduction and the possibility of a teacher being declared “surplus”, and with respect to the development of criteria upon which to base the decision as to which teacher would be selected. The Guidelines also provided information to principals as to the specific steps to be taken in the process, both prior to spring break and after spring break.

12. The actual decision as to which teacher or teachers would be declared surplus is made by the principals of the schools involved, on the basis that principals have the best information with respect to their schools, their student populations and teaching staff.

13. With respect to both the 2016/2017, and 2017/2018 school years, Mr. Hector had strongly urged Mr. Daniels not to change the teaching complement at Neil Campbell School. Not unexpectedly, Mr. Hector’s efforts were not successful with respect to the 2017/2018 school year. Mr. Hector received the memo from Mr. Daniels dated January, 2017, reviewed it several times, and then attempted to follow the process outlined in the memo.

14. By early February, 2017, Mr. Hector had been advised by Mr. Daniels that at least one teacher at Neil Campbell School would be declared surplus. On February 3, 2017, at a Staff Development meeting, Mr. Hector advised all of the teaching staff at Neil Campbell School that the school would likely be in a “surplus situation” in the English Program for the 2017/2018 school year and that a surplus situation might also exist in the French Immersion Program. Mr. Hector therefore asked if any teachers wished to initiate a transfer to another school within the Division. He further advised that if they did, they should notify him accordingly by February 22, 2017.

15. Mr. Hector was not advised by February 22, 2017 by any teacher of a wish to be transferred. Therefore, at a staff meeting on that day, Mr. Hector advised the teaching staff that the school would be in a surplus situation for the 2017/2018 school year. He also advised the staff that in the near future each teacher would be asked to fill out a form outlining their past teaching experience, their first and second choices with

respect to which grade they would like to teach for the upcoming school year, and whether they would be willing to transfer to another school within the Division.

16. On March 17, 2017, Mr. Hector met individually with all of the teachers in the English Program at Neil Campbell School. He explained that at least one teacher in the English Program would be declared "surplus" and that the teaching staff in the English Program would be reduced. He also specifically stated that the decision would result in the teacher involved being transferred to another school and would not result in the teacher's employment being terminated. Mr. Hector also emphasized that a transfer can be a positive development in a teacher's career. He further indicated that because the Division recognized that transfers can be difficult for teachers, Mr. Daniels would attempt, to the extent possible, to give effect to the transferred teacher's stated preferences as to school and the grade to be taught.

17. Mr. Hector estimated that his initial meetings with the teachers on March 17 would have each lasted between ten to twelve minutes. The Grievor testified that her meeting with Mr. Hector lasted "five minutes max". The Grievor advised Mr. Hector that she did not wish to be transferred. She completed the form stating that her first preference was to teach Grade 1 and that her second preference would be to teach Kindergarten or Kindergarten in the French Immersion Program. With respect to the question relating to her willingness to move to another school, she responded "no thanks".

18. The decision as to which teacher would be designated as "surplus" was a very difficult one for Mr. Hector. The decision was not performance based. Mr. Hector considered all of the teachers in the English Program to be teachers of a very high quality. Mr. Hector consulted with Mr. Daniels on several occasions in March with respect to the decision. He did so to ensure he understood how term positions were to be factored into the process, and to make sure that no other relevant considerations were overlooked, such as whether any of the teachers being considered had been transferred in the previous three years. Mr. Hector was conscientious in attempting to follow the process and the steps outlined in Mr. Daniels January, 2017 memo. He also

consulted with his Vice-Principal, Jamie Evans, who expressed her view that the Grievor should not be declared "surplus".

19. During the course of his testimony, Mr. Hector provided a detailed description of the factors he considered and the thought process which he went through in arriving at his decision that the Grievor should be the teacher declared as "surplus". He recognized that his decision would result in her being transferred from Neil Campbell School to another school. Among other things, Mr. Hector considered the specific experience and skill set of each teacher in the English Program relative to the needs and educational profile of the students expected to be enrolled in the school. Mr. Hector also explained that all of the teachers in the English Program was potentially subject to being declared "surplus". He also explained that it was ultimately not necessary to declare a "surplus" in the French Immersion Program at the school for the 2017/2018 school year, and the basis upon which he decided not to assign the Grievor to the French Immersion Program at Neil Campbell School for the 2017/2018 school year.

20. Mr. Hector ultimately made his decision that the Grievor would be the "surplus" teacher on either April 4 or 5, 2017. He met with the Grievor on April 6 at approximately 2:50 p.m. and advised her of the decision. The Grievor was stunned and upset. She reacted emotionally and expressed her incredulity at the decision, using an expletive to emphasize her dismay. Mr. Hector assured her she was an excellent teacher, and that Mr. Daniels would attempt to address her preferences with respect to school and grade. He also talked about change being a good thing. The Grievor was not processing what Mr. Hector was saying, and wanted him to stop talking and for the meeting to end, so that she could compose herself and collect her thoughts. As a result, the meeting was brief. Mr. Hector advised the Grievor that he was willing to meet with her again. When the meeting ended, the Grievor immediately went to the staff washroom and cried.

21. On April 11, 2017, Mr. Hector met again with the Grievor. His purpose in meeting with her on April 11 was to speak to her in greater detail about her preferences for the upcoming year, in order that he could provide that information to Mr. Daniels. He

had some information with respect to her grade level preferences from the form she had completed on March 17, but he had no information as to her preferences for other schools within the Division. Mr. Hector sensed that the Grievor was angry about being declared surplus and about having to leave Neil Campbell School. She repeated her preferences to teach Grade 1 or Kindergarten, but offered no other information relating to preferences as to school. Instead the Grievor attempted to focus on why she had been chosen as the "surplus" teacher. The meeting was brief. It is also likely that during that meeting, Mr. Hector provided the Grievor with a letter dated April 10, 2017 addressed to her from Mr. Daniels. The letter was a form letter addressed to teachers being "seriously considered for transfer" providing some possible reasons for such a decision and outlining factors that are typically considered in the decision-making process. The letter also contained a handwritten post-script from Mr. Daniels, indicating he would contact the Grievor by April 13 to discuss her "teaching assignment for next school year". The Grievor acknowledged receiving the letter but initially thought she had received it in her mail box at the school through the intra-divisional mail.

22. On April 12 or 13, 2017, the Grievor received a phone call from Mr. Daniels. Their conversation was short. Mr. Daniels wanted to receive information from the Grievor about her grade preferences and her preferences with respect to schools. She confirmed the information about grade preferences which she had previously given to Mr. Hector. She provided no preferences as to schools, stating that she had only ever worked at Neil Campbell School, and did not know anything about other schools. The conversation ended with Mr. Daniels indicating he would do his best to provide her with a position for the upcoming school year in accordance with a her stated grade preference.

23. On April 21, 2017, Mr. Daniels sent an e-mail to the Grievor asking her to call him. She promptly did so. Mr. Daniels advised the Grievor that her teaching position for the upcoming school year would be teaching Grade 1 and/or Grade 2 at Wayoata Elementary School. The Grievor asked some questions as to why the assignment was

at Wayoata, and if there were other choices. Mr. Daniels answered the Grievor's questions and the call ended.

24. On May 11, 2017, a letter was sent from Mr. Daniels to the Grievor confirming her transfer and the assignment at Wayoata Elementary School effective September 5, 2017. The Grievor filed her grievance on or about May 10, 2017 and the Association filed its grievance, on her behalf, on or about May 15, 2017.

THE POSITIONS OF THE PARTIES

The Position of the Association and the Grievor

The position of the Association and the Grievor is simple and straightforward. They assert that the plain and literal interpretation of both Article 16 of the Collective Agreement and of the Memorandum of Understanding dated October 13, 2015 require the Division to consult with teachers who are being involuntarily transferred, before a final decision with respect to the transfer is made. This means that when a teacher has been identified as likely to be transferred, that teacher must be notified of the impending decision and must be provided with an opportunity to outline his or her position with respect to the transfer, and if opposed to the transfer, to discuss options or other scenarios.

The Association and the Grievor also assert that the arbitral authorities in Manitoba are entirely consistent with such an interpretation. In this case, the Association and the Grievor say that the Division breached the provisions of the Collective Agreement and the Memorandum of Understanding, because the Division had no meaningful consultations with the Grievor prior to declaring her "surplus", which decision inevitably resulted in her being transferred from Neil Campbell School.

With respect to remedy, the Association and the Grievor argued that a declaration would be a hollow remedy, and that the only effective remedy in the circumstances would be to rescind the transfer.

The Position of the Division

The Division's position is somewhat more nuanced. The Division advances two alternate arguments.

Firstly, the Division says that the decision to declare a teacher as "surplus" should be regarded as separate and distinct from the decision to transfer a teacher from a particular school to another school. The Division argues that whatever obligation to consult arises under the Collective Agreement, does not arise in relation to the decision to declare a teacher "surplus". Such an obligation only applies in relation to a decision to transfer a teacher. In this case, the Division submits that it offered the Grievor several opportunities to meaningfully consult with respect to the transfer decision (namely on March 17, April 6, April 11, April 13 and April 21, 2017) but on each occasion, the Grievor declined to consult or to engage in a meaningful discussion with respect to her position or perspective.

Secondly, the Division says that if the decision to declare the Grievor as surplus was not separate and distinct from the decision to transfer her from Neil Campbell School, the consultation which occurred on March 17, 2017, in the context of the information which had been given to all teachers, including the Grievor, in the staff meetings on February 3 and February 22, 2017, was meaningful and sufficient. According to the Division, the consultation on March 17, 2017 was in compliance with Article 16 of the Collective Agreement and the Memorandum of Understanding.

In terms of remedy, the Division argued that there was simply no position for the Grievor at Neil Campbell School for the 2017/2018 school year, and that it would be inappropriate to impose a financial burden on the Division, effectively requiring it to "overstaff" a school. Therefore, even if the Association's and the Grievor's arguments are accepted on the merits of the grievances, the remedy in this case should be limited to a declaration that a breach of the Collective Agreement had occurred.

ANALYSIS

The Division's arguments were interesting and very capably presented by Mr. Simpson.

There are no provisions in the Collective Agreement dealing with a decision to declare a teacher "surplus" or with the assignment of "FTEs" to particular schools. The Division has an unfettered right to make those decisions.

The Division also has the right to transfer the teachers which it employs, from one school to another school within the Division. However, the Division's right to transfer teachers is limited, by the express wording of Article 16 of the Collective Agreement and the Memorandum of Understanding. According to Mr. Simpson, the limits on the Division's right to transfer outlined in Article 16 of the Collective Agreement are minimal. The Division must act fairly and reasonably and the Division must consult, "wherever possible", with teachers "who are being involuntarily transferred".

The Division places significant emphasis on the phrase "who are being involuntarily transferred", which appears in Article 16.02 of the Collective Agreement. The Division argues that the phrase demonstrates that the consultation contemplated by Article 16 is to occur after the "surplus" decision has been made i.e. after the teacher to be transferred has been specifically identified.

Mr. Simpson explained that a critical issue in this case is when the consultation referred to in Article 16.02 of the Collective Agreement is to take place. He argued that the specific words in Article 16.02, "consult with teachers who are being involuntarily transferred" (underlining added) are clear in providing that the consultation is to occur after the "surplus" decision has been made. Mr. Simpson pointed to the case law which has developed in this province with respect to teacher transfers. He specifically referred to the following cases:

- *Sunrise School Division v Sunrise Teachers' Association of the Manitoba Teachers' Society* 2012 CarswellMan 459, 112 C.L.A.S. 119;
- *Prairie Rose School Division v Prairie Rose Teachers' Association (Re: Hamm)* 2010 CarswellMan 871, 102 C.L.A.S. 241;
- *Lakeshore School Division v Lakeshore Teachers' Association (Re: MacNeil)* 2004 CarswellMan 1007, 77 C.L.A.S. 385.

In each of those cases, the language with respect to consultation was significantly different from the language in this case. In the earlier cases the language was explicit in requiring consultation between the Division and the teacher, prior to the decision being finalized with respect to the teacher to be transferred. For example, the applicable provision in the *Lakeshore* case, stipulated that:

"The Division shall provide to any teacher being considered for transfer an opportunity for consultation with respect to the transfer and the details of the intended assignment."

Mr. Simpson also pointed out that the wording in the Memorandum of Understanding, attached to the Collective Agreement is consistent with the proposition that consultation in the River East Transcona School Division may occur after a teacher has been declared surplus, i.e. after the teacher to be transferred has been finally selected.

Paragraph 1 of the Memorandum of Understanding states:

"1. Consultation with a teacher who is being involuntarily transferred shall be face to face".

Mr. Simpson maintained that imposing a requirement upon the Division to consult with a teacher prior to the decision being finalized would effectively amend and reword the Collective Agreement to import much stricter wording into the Agreement than is actually present in the Agreement. As Mr. Simpson remarked, that is something an arbitrator cannot do.

Mr. Simpson also emphasized that consultation is a two-way street. The obligation of the Division is to provide affected teachers with an opportunity to consult. Mr. Simpson says that the Division provided such opportunities to the Grievor on several occasions, namely on March 17, and April 6, 11, 13 and 21, 2017. However the Division submits that on each of those occasions, the Grievor declined to meaningfully participate in the discussion and simply stated that she wished to stay at Neil Campbell School and outlined her grade preferences.

As a related but alternate argument, the Division says that even if the relevant provisions of the Collective Agreement and the Memorandum of Understanding are interpreted as requiring the Division to consult with the Grievor prior to her being declared surplus, the Division complied with that requirement as a result of the meeting between Mr. Hector and the Grievor which occurred on March 17, 2017. By that time, as a result of the staff meetings on February 3 and February 22, 2017, the Grievor knew, or ought to have known that Neil Campbell School would be in a surplus situation for the 2017/2018 school year and that the teaching staff in the English Program would be reduced. Mr. Hector had explained the purpose of the March 17 meeting to the Grievor, and the process he would be using in making the transfer decision. The Grievor did not engage in a meaningful discussion with Mr. Hector. She simply indicated she did not wish to be transferred and completed the form presented to her. She provided no information to Mr. Hector with respect to her background, qualifications or personal preferences which would affect the Division's decision. Similarly she did not provide any information which would be relevant to the other factors to be considered by the Division, as outlined in Article 16.03 of the Collective Agreement, namely the educational needs of the students and the administrative needs of the Division.

The Division also stressed that Mr. Hector's decision making process as to the teacher to be selected to be transferred was sound. He consulted with Mr. Daniels and Ms. Evans, thoughtfully considered the backgrounds, experiences and skill sets of all of the teachers in the English Program relative to the anticipated educational needs of the student population, and made a difficult decision. He did so in accordance with

the Guidelines which had been provided to him by the Division. Mr. Simpson cautioned against an arbitrator interfering with such a decision by a principal.

As indicated above, the Division's arguments are interesting. However I am unable to accept those arguments for two fundamental reasons.

Firstly, I do not accept the distinction referred to by the Division between the decision to declare a teacher "surplus", and a decision to transfer a teacher from one school to another within the Division. A decision to declare a teacher surplus (which is entirely unrelated to discipline or teacher evaluation) automatically results in that teacher being transferred from the school at which he or she has been teaching to another school. All of the witnesses who testified on behalf of the Division acknowledged that a decision to declare a teacher "surplus" means that the teacher will be transferred to another school. A fundamentally critical aspect of a decision that a teacher is "surplus" is the transfer of that teacher to another school.

The Collective Agreement itself does not make a distinction between a decision to declare a teacher surplus and a transfer decision, but only refers to a single decision, namely a decision to transfer. The effect of accepting the Division's arguments would be that consultation under Article 16 of the Collective Agreement, would be limited to what other schools in the Division the teacher might teach at in the upcoming school year and what subjects might be taught. No consultation would occur in relation to a fundamentally critical aspect of the transfer decision, namely whether or not the teacher will be transferred, contrary to his or her wishes, to another school.

Therefore, I have concluded that the distinction drawn by the Division is an artificial one, and should not be used to interpret or construe the provisions of the Collective Agreement and the Memorandum of Understanding.

Secondly and perhaps more importantly, the plain and literal interpretation of the Collective Agreement and the Memorandum of Understanding is that the "decision" and "final decision" referred to in both the Collective Agreement and the

Memorandum of Understanding is the decision to transfer a specific teacher from one school to another school within the Division.

I am cognizant of the language used by the parties in Article 16.02 of the Collective Agreement and Paragraph 1 of the Memorandum of Understanding. However I am equally cognizant that Article 16.03 of the Collective Agreement requires the Division in making transfer decisions to consider, among other things, "those concerns raised by the teacher prior to making a decision". Similarly I am conscious of the requirements in Paragraph 2 of the Memorandum of Understanding which state:

"2. The consultation shall take place with the teacher before the transfer decision is finalized (underlining added). This will be clearly communicated to the teacher at the meeting."

With respect to the Division's arguments that the Collective Agreement provisions in each of the *Sunrise*, *Prairie Rose* and *Lakeshore* cases were more explicit in requiring consultation with an affected teacher prior to the transfer decision being made, I think that argument disregards Article 16.03 of the Collective Agreement. More importantly that argument either overlooks or inappropriately minimizes the effect of the Memorandum of Understanding. In addition to Paragraph 2 of the Memorandum of Understanding, referred to above, Paragraph 6 of that Memorandum is critically important. It states:

"6. There will be an opportunity for a discussion of options or other scenarios as an alternative to the transfer proposed by the Division and where the teacher raises other options or scenarios the Division will consider them prior to making a final decision."

Article 16 of the Collective Agreement and the Memorandum of Understanding are to be read together. The provisions of one, can and should be used to construe and interpret the provisions of the other. The combined effect of the language of Article 16 and of the Memorandum of Understanding is at least as explicit, and arguably more so, as the wording in the *Sunrise*, *Prairie Rose* and *Lakeshore*

cases, in requiring consultation between the Division and an affected teacher, before the transfer decision is finalized.

Based on the foregoing reasoning, I accept the arguments of the Association and the Grievor as to the meaning and effect of Article 16 of the Collective Agreement and of the Memorandum of Understanding.

The meeting of March 17, 2017, between Mr. Hector and the Grievor did not amount to consultation as required by the Collective Agreement, because at that time, the Division had not made a decision that the Grievor would be declared "surplus" and transferred from Neil Campbell School. Therefore neither Mr. Hector nor the Grievor would have been in a position to specifically address issues with respect to her transfer. Similarly, the March 17 meeting was not "an opportunity for a discussion of options or other scenarios as an alternative to the transfer being proposed by the Division...", as required in Paragraph 6 of the Memorandum of Understanding; no such transfer had yet been proposed by the Division.

The meetings of April 6, 11, 13 and 21, did not constitute consultation as required by the Collective Agreement, because by then, the Division's transfer decision had been finalized. I have found that the Collective Agreement requires consultation with an affected teacher before the Division finalizes the transfer decision.

Therefore, the grievances of the Association and the Grievor are allowed.

Before addressing the issue of remedy, two other issues warrant comment. They are as follows:

1. Mr. Daniels and Mr. Hector both impressed me as capable and conscientious individuals who were trying to fulfil their employment responsibilities in the best interests of the Division and the students of the Division. However it was noteworthy that when they were dealing with these matters throughout 2017, neither of them reviewed or sought advice with respect to Article 16 of the Collective Agreement and the Memorandum of Understanding. Instead they relied on the memorandum of January, 2017 and the attached Surplus Identification Guidelines. Those documents, or

earlier versions thereof, may have been prepared by Mr. Daniels' predecessor. Those documents are inconsistent in some important respects with the Collective Agreement and the Memorandum of Understanding, and do not adequately reflect the consultation requirements outlined in the Collective Agreement and the Memorandum of Understanding. In short, although Mr. Daniels and Mr. Hector believed they were following the Guidelines of the Division and were utilizing procedures which had been used in prior years, those Guidelines and procedures did not properly incorporate the requirements of the Collective Agreement and the Memorandum of Understanding.

2. The basis for the decision in this case is narrow. The two grievances have been allowed because the Division failed to consult with the Grievor, as required by the Collective Agreement, prior to making a final decision to transfer the Grievor from Neil Campbell School for the 2017/2018 school year. This decision does not detract from the authority and ability of the Division to declare teachers "surplus". Nor does it detract from the authority and ability of the Division to transfer teachers from one school to another, provided the Division complies with the provisions of the Collective Agreement, including the Memorandum of Understanding. This Award should not be interpreted as suggesting that the Division's decision to declare a teacher in the English Program at Neil Campbell School as surplus for the 2017/2018 school year was unsound. The Award should also not be interpreted as a criticism of Mr. Hector's decision that the Grievor be declared "surplus" or of his decision making process.

With respect to the issue of remedy, the choice was essentially between issuing a declaration that the Division had breached the Collective Agreement, on the one hand, and rescinding the transfer on the other. The most compelling argument in favour of merely issuing a declaration was that a declaration provides the parties with valuable guidance in future cases, whereas rescinding the transfer would impose a financial hardship on the Division by requiring the Division to overstaff Neil Campbell School. The most compelling argument in favour of rescinding the transfer was that a declaration would be a "hollow" remedy, which would not effectively address the harm which has occurred.

A declaration is not a hollow remedy as between the Division and the Association. A declaration will likely impact the conduct of the parties in the case of future transfers, and/or may affect the negotiating positions of the parties in the next round of collective bargaining.

However, a declaration that a breach of the Collective Agreement had occurred, without any further relief, is an ineffective remedy with respect to the Grievor. The breach of the Collective Agreement by the Division had the potential to adversely affect the rights and interests of the Grievor, and the only effective way of preventing those adverse effects is to rescind the transfer.

In terms of the "overstaffing" which will occur at Neil Campbell School, the Division is able to deal that issue whenever it chooses to, provided it complies with the Collective Agreement.

Therefore, the remedy in this case will be a rescission of the transfer of the Grievor from Neil Campbell School to Wayoata Elementary School, which was to have been effective September 5, 2017.


DECISION AND REMEDY

Given the findings and conclusions outlined in this Award, I order that:

1. The individual grievance of the Grievor dated May 10, 2017 and the grievance of the Association dated May 15, 2017 are allowed.
2. The transfer of the Grievor from Neil Campbell School to Wayoata Elementary School, which was to have been effective on September 5, 2017 is rescinded.

3. I shall retain jurisdiction with respect to any issues which may arise with respect to the implementation of this Award.

Dated this 26th day of September, 2017.



Blair Graham, Sole Arbitrator