

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

WINNIPEG SCHOOL DIVISION,

Employer,

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2348-15,
(Community and Intercultural Support Workers),

Union.

RE: Layoff Grievances

AWARD

BEFORE:

MICHAEL D. WERIER, Q.C., Chair
ROBERT A. SIMPSON, Nominee of the Division
WILLIAM M. SUMERLUS, Nominee of the Union

APPEARANCES:

KRISTIN L. GIBSON, Counsel for the Division
KRISTINE BARR & KELLY MOIST, Representatives
for the Union

DATES OF ARBITRATION:

July 6 & 7, 2021 (Virtual)

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INTRODUCTION and BACKGROUND

The Winnipeg School Division laid off three Intercultural Support Workers / Community Support Workers because of financial cutbacks.

The collective agreement (Article 10 – set out below) provides that employees shall be laid off in reverse order of seniority provided they have the necessary qualifications, including language and cultural requirements to do the remaining work.

The job involves working with immigrant families and serving as a liaison between the school, families and the community. Part of the job involves being able to communicate with families in their language spoken at home.

The Grievors had seniority over others, but were laid off because the Division, based on their assessment of community demographics and language, determined that the Grievors did not have the language requirements to retain their positions.

There is no dispute that the three Grievors were excellent employees and that there were no performance issues.

A Grievance was filed which set out that the Division breached the collective agreement and requested that the layoff notice be retracted, and that layoff be done in reverse seniority order.

The Step 3 responses from the Division Chief Superintendent to the Grievors were similar, except the specific references to their language proficiencies.

The letter to Mr. Opap is reproduced below:

“I have completed my review of the individual grievance filed on behalf of Mr. Opap.

In my review, I have considered the information presented during our meeting on August 31, 2020, the relevant articles of the collective agreement, a review of the relevant legislation, as well as, information on WSD students, Interdivisional Support Workers (ISW), and languages spoken within the WSD as prepared by WSD's Research and Evaluation department.

As you are aware, ISWs are available in the WSD to assist with students and families who need extra language supports. Our records indicate the language spoken by Mr. Opap is Dha-Anywaa.

As you will see in the attached table, Dha-Anywaa is no longer a top language spoken (by students in non-English homes). In fact, Dha-Anywaa is spoken by less than 1.0% of students at home. This has resulted in the majority (approximately 98%) of Mr. Opap's student and family contacts being conducted in English.

Although, WSD would prefer to have language supports for all students and/or families in the language spoken at home, our funding does not provide for this.

After an examination of the languages possessed by our staff, coupled with the language needs of our students and families, layoffs were conducted to retain those staff members who possess the ability, skill, qualifications, reliability, including language and cultural requirements to perform the remaining work, as per Article 10.01 of the collective agreement.

As a result of the above, I see no contravention of the collective agreement. I therefore have no alternative but to deny this grievance."

OPENING STATEMENTS

Opening Statement of the Union

On behalf of the Union, Ms. Moist stated the facts are largely not in dispute. The three Grievors were permanently laid off pursuant to Article 10 of the agreement. They had greater seniority than other employees who retained their positions.

The Union stated that the Grievors were laid off because the Division said they did not have the required language qualifications. The Union denies this and maintains that the Grievors were qualified, and had good performance reviews.

While the Division alleged that the Grievors were not proficient in certain languages spoken by families requiring service, the Union responded that there were many languages that ISW could not speak, but all students and families received assistance.

Opening Statement of the Division

On behalf of the Division, Ms. Gibson did not dispute that the Grievors had seniority over those retained and further agreed that the Grievors were valuable workers with no performance issues.

The Division stated that this case dealt with a narrow legal issue arising out of Article 10.01 (reproduced below).

The Division said that the language in Article 10 is unusual. While it starts off typically, it specifically sets out two specific required qualifications including “language and cultural requirements to perform the remaining work”.

The Division noted that the job postings refer to language.

The Division highlighted that the language spoken by families and students was not always the same, and that it was driven by Division demographics at the time. The languages spoken by the Grievors were higher profile when they were hired, but due to changing demographics these languages are no longer spoken in the Division.

The positions held by the Grievors are grant funded essentially. Grants were cut and therefore the Division said they had to cut positions.

The Division acknowledged that they had tough decisions to make. The Grievors' fluency does not represent the languages spoken in the community. The junior employees have fluency and the longstanding article in the agreement makes language important.

RELEVANT PROVISIONS OF THE AGREEMENT

The important Article is Article 10 – Lay-Off and Recall, as set out below:

ARTICLE 10 LAY-OFF AND RECALL

- 10.01 Employees shall be laid off in reverse order of classification seniority provided always that the employees to be retained possess the ability, skill, qualifications, reliability, including language and cultural requirements to perform the remaining work.
- 10.02 The Division shall give the employee written notice of the date on which he is to be laid off at least two (2) weeks before the date on which he is to be laid off or in the absence of such notice shall grant pay in lieu thereof.
- 10.03 Employees who are laid off shall be placed on a re-employment list. Employees placed on the re-employment list shall be called back in reverse order of lay-off starting with the most recently laid off employee and proceeding in descending order to the first employee laid off in the classification from which the employee was laid off, provided that such employee(s) possess, the ability, skill, qualifications, reliability including language and cultural requirements, to perform the work.
- 10.04 Notification of recall following a lay-off shall be sent by certified letter to the last reported address of the employee. The onus is on the employee to keep the Division informed of their latest address.
- 10.05 No new employee shall be hired until those laid off who meet the requirements of the job have been given an opportunity of recall subject to the ability, skill, qualifications reliability, including language and cultural requirements, to perform work assigned.
- 10.06 Grievances concerning lay-offs and recalls shall be initiated at Step 2 of the Grievance Procedure.

Also of relevance is Article 13, which states:

ARTICLE 13 STAFF CHANGES

- 13.01 When a new position is created or when a vacancy of a permanent nature occurs inside the bargaining unit the Division shall notify all employees of the position.
- 13.02 Such notification shall contain the following:
- Nature of position, qualifications required including language and cultural considerations, knowledge and educational skills required, wage or salary rate or range and closing date for applications.
- A copy of each notification shall be provided to the Union at the time notification is made.
- 13.03 When filling a newly created or vacant position appointment shall be made of the applicant senior in service provided the applicant's previous service with the Division, qualifications and ability merit such action.
- 13.04 All successful applicants for transfer shall be placed on a trial period of six (6) months after which the placement may be confirmed. If such successful applicant, during the trial period, is found unsuitable for the position, the applicant shall be replaced and they shall revert to their former position.

EVIDENCE OF THE UNION

Huzaifa Ibrahim is one of the Grievors. He immigrated to Canada from Ghana. He has an extensive education, including a Master's Degree in Educational Administration from Brandon University and a Bachelor of Science Degree from the University of Manitoba. He works as a Childcare Support Worker for Winnipeg Child and Family Services.

Ibrahim confirmed that the languages he speaks (in addition to English) are Dagbani Hausa, Fante and Twiis, in addition to three or four languages spoken in Ghana.

He acknowledged that less than 1% of students spoke his three languages at home and all his students and family contacts are conducted in English.

If he cannot converse with the clients in their language, the Division has a list of interpreters or he can enlist the assistance of other students.

He stated that part of the job is to advocate for students on academic and social issues. He liaises with teachers. He also talks to parents who need help with something such as a job application.

Ibrahim delivers these services mostly in English and 99.7% English with students. He stated the students love ISWs and appreciate their assistance.

On cross-examination Ibrahim agreed that his work as an ISW was not confined just to school.

It was suggested that it would be helpful to speak the languages spoken by students and families. Ibrahim stated most speak English, but if they don't, and speak Arabic, he will have to call someone to assist. It hasn't happened in a while. Ibrahim acknowledged he has a teaching certificate and taught at Sisler, Gordon Bell and St. John's High Schools.

Odik Opap was hired by the Division in October 2014 as an ISW. He has obtained certificates as an Educational Assistant and as an EAL Teacher. He has been a Community Development Tutor since 2012.

He speaks DHA-Anywaa and an Arabic dialect which is common to South Sudan. He has spoken both these languages in his work as an ISW.

He agreed that the information in the Division's Step III grievance response is accurate. Dha-Anywaa is spoken by less than 1% of students at home and approximately 98% of his students and family contacts are conducted in English.

Opap described the nature of his work as an ISW. He supports families and students when they first arrive. He helps with the paperwork to enroll students at school. He sets up appointments for an English assessment, doctor, eye exams, hearing tests, etc.

If the children don't speak English he sets up a contact with the Community Connector or goes to a list of translators to get assistance.

Opap stated that he never has been unable to deliver satisfactory services. He does a report for the Division outlining his time spent with students and the languages used. In his report he listed Dha-Anywaa and Arabic.

On cross-examination, Opap acknowledged he commenced working as an EA in early 2014 and as an ISW in the fall of 2016. He was not aware that he had an option to be on a list to work as an EA after his layoff as an ISW. He did not work last year and was on social assistance from September to February.

He allowed that he speaks basic broken Arabic as he has been away for fifteen years. If he needs assistance dealing with families from Syria, he seeks assistance from others, including very often from Sandy Deng.

Joseph Fofanah was first hired as a Refugee Advisor for the Division and served as a consultant to the Child Guidance Clinic. He has a Master's Degree in Development Studies and studied Education / Geography as an Undergraduate. He came to Canada in 2003 and obtained a Teachers' Certificate in Education, and has done school counselling.

Mr. Fofanah's languages are Gbandi and Creole, which are spoken by less than 1% of students. All of Mr. Fofanah's contacts are conducted in English. He related that he is able to access resources to accommodate different languages.

Fofanah testified that language has not impaired his ability to service people. He stated that relationships are important in addition to language. He said he had never been told that he didn't meet the requirements of the ISW position.

On cross-examination Fofanah confirmed that he was qualified as a teacher and worked in 2020-2021 at Grant Park High School as a Guidance Counsellor. He had no indication whether he had a teaching job for next year.

Sandy Deng testified she began work as a CSW in 2007. The classification became ISW. Deng is currently employed as a Senior ISW. The work involves community liaison between schools and newcomer families and children. ISWs are the contact for the initial intake and do a language and needs assessment. They do referrals to other agencies as needed and work with students to help them integrate and get settled.

She indicated that ISWs provide language support and makes it easier to have language as an asset to deliver services.

Deng explained that coordinators supervise ISWs and the immediate supervisor is the school Principal. The Newcomer Coordinator reports to the Superintendent.

Deng stated that the role of linguistic skill is to facilitate communications. A lot of the work is cultural. She said that she can relate to refugees and when she speaks their language it is easier to relate. She stressed that ISWs are much more than interpreters.

Deng stated she speaks English, Arabic and Dunka and has a lot of interactions with families in both Arabic and Dunka. She speaks in English sometimes when communicating with agencies or setting up programs.

Deng identified certain documentation representing a Union analysis of Division documents regarding languages spoken by students and not by staff. Twelve languages were not spoken by staff.

One of the languages not spoken by staff is Russian. Staff use English or they access interpreters based off a list they have.

Deng commenced employment as a Community Liaison Officer which ultimately became an ISW. In her work history there was never enough staff to cover all languages. Currently there is no staff that speaks Somali or Kurdish. Deng said that there was not a job description for the ISW position.

On cross-examination Deng confirmed her jobs evolved from Refugee Advisor to Community Liaison Officer (CLO) to Cross Cultural Support Worker (CCW) to one job, being the ISW position.

She acknowledged it would be helpful internally to have an ISW who spoke Somali and Kurdish.

Deng confirmed that a job posting in 2017 for a Community Support Worker listed a number of languages as a requirement (including Arabic and Somali).

On re-examination, Deng stated she speaks English to her Somali students and needs interpreters for some of her Somali students.

EVIDENCE OF THE DIVISION

Kari-Lee Zaharia, Human Resources Officer for the Division, testified. She started in her position with the Division in 2019. Prior to that she worked as an H.R. Officer for the Town of The Pas from 2011 – 2019. She has a B.A. from the University of Winnipeg and an H.R. Management Certificate from Red River College. Her current role involves labour relations, staffing, payroll, policy reviews and other H.R. duties as directed. She has responsibility for dealing with CUPE 2348.

Zaharia confirmed that there are two classifications set out in Article 5.01 (Seniority). They are similar. Both depend on external funding. The CSW position has a more indigenous focus and ISW has a greater focus on newcomer families. The CSW does not provide as much language support. The ISW is called to different schools if language skills are needed.

Zaharia stated that there is no current job description for an ISW, but postings exist. Zaharia identified a number of documents including a job description for a CLO which aligns best with an ISW role, an undated posting for a Community Liaison Worker, a posting for a Community Support Worker in 2019 which Zaharia concluded was for an ISW position because it had as a requirement one or more of a number of languages. Zaharia testified that this type of requirement was characteristic of ISW positions in general. She said some positions are site specific and some involve movement from school to school.

Zaharia stated that assisting in the reception of ESL students, their transition and integration into the school community was a primary piece of the ISW position. Another duty was providing support to school staff in translating and interpreting information to parents and students related to assessments, report cards and providing teachers with information about students' linguistic cultural backgrounds. Zaharia said the 2019 job posting list of duties and responsibilities was consistent with the requirement of the ISW job.

Zaharia confirmed that there was one seniority list maintained for the Local. She related some background history relating to the layoff. The Union was given notice that layoffs were coming. Karin Seiler, former Superintendent, Education Services, met with the employees in May by teleconference to inform them layoffs were coming, but did not identify who was to be laid off.

Zaharia related her involvement in the layoff decision. In late February or March Seiler approached her about funding cuts that were coming which would affect three ISW jobs.

As a result Zaharia consulted the statistics which contained, among other things, ISW interactions (contacts with students or family).

She identified the same document which was her working copy and had her handwriting on it. Zaharia stated that the language piece was important in order to determine where the highest needs were. ISWs track their own activities.

Zaharia stated that the fact ISWs had degrees did not factor into the layoff decision. "It was solely a language piece."

Zaharia was referred to her handwritten notes below Opap's name which stated "Gordon Bell (Arabic noted). Her understanding was that Opap referred these families to other ISWs fluent in Arabic. Opap did not have a performance evaluation as an ISW.

Zaharia stated she looked at evaluations just to make sure she was covering all the bases. All the available evaluations were good.

Zaharia identified the seven ISWs who were not laid off. The end result was that the three Grievors were laid off. She said that the decision was made pursuant to Article 10.01 and the language and cultural piece. It involved the ability to do the job and based on the statistical needs of the Division. The Grievors did not have the required language skills. Two of them had no interactions with their languages.

Zaharia said after the notice of layoff, Opap provided a few interactions that were not on the charts. Zaharia said she didn't believe these would have made a difference to her recommendations, because statistically the interactions were not there.

On cross-examination Zaharia confirmed Seiler attended the many teleconferences with the ISWs. Zaharia was not there and could not speak to whether seniority, evaluations, and languages were communicated as the factors in layoff.

Zaharia was referred to a 2011 job description for a Community Support Worker. She confirmed that at the time it was a standard older version. She confirmed that approved job descriptions are used for vacancy bulletins. She did not know why there wasn't a job description for the ISW position.

She was referred to the February 1997 job description for a CLO. It was suggested that the Division never employed enough staff to cover all languages. Zaharia said she couldn't speak to the past but presently, the budget cannot cover all languages and the 12 language groups are not receiving service.

It was suggested to Zaharia if the ISWs were not doing their jobs it would be reflected in their evaluations. She responded "perhaps". It was suggested language wasn't the only skill and Zaharia maintained it was a big part.

As to Opap referring students/families to his co-workers, Zaharia said she followed up with the Newcomer Supervisor and also Opap confirmed that in his testimony at this hearing.

She couldn't give a definitive answer that he referred to co-workers in every instance. Zaharia stated that Ibrahim testified that he would call Deng to assist.

Zaharia acknowledged that she noted Arabic under Opap's name on the chart because it is in his resumé, so she noted it. She also checked with the Newcome Coordinator. She wasn't able to answer why it wasn't noted that there were referrals to colleagues or whether he would have some numbers on his chart if Arabic was noted.

SUBMISSION OF THE UNION

The Union stated that Article 10 of the agreement sets out the framework for layoff and seniority is a part of it.

The Union noted that there was much common ground between the parties and there were no performance issues with the Grievors.

The Union highlighted that the Arbitration Board did not receive evidence from the ultimate decision maker on the issue of language requirements. The Division's witness, Zaharia, was not the decision maker, and supported the decision.

The Union stated that the Grievors' evidence that they could extend support was largely unchallenged. There were no complaints from students or failure to perform. The Union argued that the Grievors met the threshold under Article 10. They were productive employees. The test is not who is the best. Rather, the Division must show how the Grievors were not performing their work. The Union emphasized that the Division's witness had no day-to-day responsibility.

The Union reviewed each of the Grievors' work history and performance.

Fofanah has extensive experience, a positive performance appraisal, his interactions are high, and he is productive. He knows the challenges facing immigrants and he meets the cultural requirements.

Opap's CV reflected that he works as a Community Development Tutor. He is fluent in Arabic and a South Sudanese dialect. He testified that he calls upon two colleagues who speak fluently.

The Union said that all his colleagues testified that they call in others.

The chart in evidence showing interactions and language fluency did not set out Arabic fluency even though this was on his resumé. The Union stated that Zaharia had the original job application which included Arabic fluency, but was unaware of this until receiving production of documents.

The Union maintained that based on his record and productivity, he should not have been laid off.

Ibrahim has two university degrees, a diploma and a certificate. In his work he supports students and families. He was never advised he failed to meet the requirements of the assigned duties.

A performance review was not conducted. His productivity aligns with the others. The Union stressed that he has a solid work record, seniority, and should be reinstated.

Deng is the most senior of the Grievors. She testified that ISWs are not simply interpreters. They have always provided services to students and families where they don't have language expertise. Deng uses English in addition to her language.

Deng identified two documents, being the Union analysis of the Division's documents setting out the percentage of different languages spoken by students.

The Union submitted that there are not enough ISWs for all the various languages spoken. Most ISWs have used assistance. The cultural skills are essential.

The Union reviewed Zaharia's evidence. She confirmed the Division does not have a sufficient budget to hire ISWs for every language. She confirmed the Grievors' work performance was not an issue.

The documentation shows that for 35% – 40% of the target population, there are no ISWs with the pre-required language skills.

The Union noted that Zaharia testified that her role was to enact the decision which was made by Karin Seiler. The Union stressed that the Division did not call to testify the Superintendent or the Newcomer Coordinator. The Union argued that a negative inference should be drawn as no one from the Division testified about the day-to-day work performed by the Grievors.

The Union stated that the Division was ignoring the services being delivered in thousands of interactions with no complaints.

The Union challenges the Division's position that lack of linguistic ability can be a sole criteria to lay off, especially when the statistics show that ISWs cannot speak the language of 40% of the students.

In sum, the Union submitted that the grievances should succeed. The Grievors can do the work even though at times they need assistance. All ISWs are in the same position. The senior ISWs can do the job and should not be laid off.

The Union referred to the following authorities:

1. *Labour Arbitration in Canada* (Third Edition), Lancaster House
 - Chapter 19: Seniority Rights Defined
 - Chapter 21: Layoff and Recall
 - Chapter 20: Promotion;
2. *U.E., Local 512 v. Tung-Sol of Canada Ltd.*, 1964 CarswellOnt 520;
3. *Vancouver Coastal Health Authority and Hospital and HAS BC, Re*, 2006 CarswellBC 4371, [2006] B.C.C.A.A.A. No. 190, 155 L.A.C., (4th) 182, 87 C.L.A.S. 256.

The Union referenced portions of *Labour Arbitration in Canada* for the principle that in layoff situations, seniority rights are most important to employees.

The Union specifically highlighted the following:

“The weight that will be given to seniority in allocating individual employees’ entitlement to share in a diminishing volume of work depends on whether the parties have included a “threshold” or “sufficient ability” clause, a “competitive” clause, or a “hybrid” clause. The way in which these provisions are interpreted and applied by arbitrators is similar in the context of both layoff and recall, and competitions for a posted vacancy: see Chapter 20.”

The Union stated that Article 10, a threshold clause, places importance on seniority.

The *Tung-Sol* decision emphasizes the importance of seniority to unionized workers and sets out that seniority should only be affected by very clear language.

The Union argued that the Grievors are senior. There is no issue as to their job performance. The Union stressed that 40% of the students are not receiving ISW services in their own language.

The Union relied on Arbitrator Munroe's decision in *Vancouver Hospital*. The Union acknowledged that the facts were different than this case, but linguistic skills were at issue.

In *Vancouver Hospital*, the grievor, a Registered Dietician, was denied a position as a Clinical Dietician on the basis that she was not fluent in Cantonese.

There was evidence that the Grievor, in her previous job, functioned without any complaints and used interpreters when necessary.

Arbitrator Munroe stated, "the test is one of reasonable relevancy; in the sense of the disputed qualification being one that is reasonably required for the duties of the position to be properly carried out." (paragraph 69)

Arbitrator Munroe determined, based on the evidence in that case, that Cantonese fluency was not a reasonably required qualification and that one clinical case with the use of interpreters was optimal.

The Union argued that this reasoning is applicable. The issue is whether the language requirements of the Division are reasonably relevant.

The Union concluded that they are not, and that the work of the ISWs can be done without interference with seniority rights.

SUBMISSION OF THE DIVISION

At the outset, the Division responded to the Union's reliance on the *Vancouver Hospital* decision, and stated that it demonstrates the Union's misunderstanding of what is at play in this case.

The test in *Vancouver Hospital* was whether Cantonese fluency was a reasonable qualification. The Division argued that the difficulty for the Union in relying on that decision is that the agreement at hand (Article 10.01) enshrines linguistic qualification. Article 13 dealing with staff changes includes language and cultural considerations as a qualification.

The Division argued that the parties have recognized the importance of the linguistic piece. There is therefore no need to defend reasonableness as in the *Vancouver Hospital* decision because here the parties have agreed that it is extremely important.

The Division referred to the following decisions:

1. *Barrhaven Manor and CUPE, Local 4000-11 (Layoff), Re*, 2019 CarswellOnt 6936, 140 C.L.A.S. 22, 140 C.L.A.S. 8, 302 L.A.C. (4th) 291;
2. *Nordion (Canada) Inc. and PSAC, Local 70367 (Muldoon), Re*, 2019 CarswellNat 2408, [2019] O.L.A.A. No. 58, 139 C.L.A.S. 57, 301 L.A.C. (4th) 173;
3. *Canadian Broadcasting Corp. v. Assn. of Professionals & Supervisors*, 2006 CarswellNat 3175, 150 L.A.C. (4th) 258, 86 V.L.A.S. 25.

In *Barrhaven Manor*, the Union grieved the layoff of employees who were not affected by a reduction of hours.

The Employer stated that they were relying on this case because it deals with the importance of what the parties have agreed to. The Division argued that where an

Employer has followed the express language of the agreement, unless there is bad faith, the inquiry ends. The Division stated that bad faith is not alleged here.

The Division stated that Zaharia described the process leading to the layoff. The Division did its due diligence. That is the end of it. The Division has the right to make the choice it did, and performance is not an issue, but a “red herring”.

The Division acknowledged that the three Grievors are extremely accomplished. That is not the issue.

The Grievors were selected for layoff out of seniority because they lacked the language skills required.

The Division maintained that it was not necessary to call the Coordinator because Opap agreed his fluency in Arabic was not good. While there is a gap in coverage, the Union is proposing to make it worse.

The Division stated that all the Grievors recognized that language is critical in dealing with newcomer families. It is not the only piece but as Deng says, it makes the job easier.

The Division pointed out that job postings set out requirements to speak certain languages and to translate and interpret information. The Division said that the junior employees speak most of the languages.

The Division submitted that language proficiency is not a made up qualification. With diminishing resources, the Division has to focus on languages spoken by the community.

The job posting in 2019 lists a number of required languages, none of which were spoken by the Grievors.

In the *Canadian Broadcasting Corp.* case, Arbitrator Picher highlighted that the language the parties have agreed to in a layoff clause is critical. Where an article gives an employer discretion, arbitrators will not interfere with a decision made honestly and reasonably.

In the instant case, the article is a threshold clause with a specific qualification which the Grievors do not meet.

The Division replied to some of the Union's submissions. The Division replied that there was no need to have the Newcomer Coordinator testify. Work performance is not relevant. What is relevant is linguistic ability which was not there. The Grievors did not dispute the Division's Step 3 responses to the grievances.

The Division argued that there was no basis for drawing a negative inference and no reason for the Division to call other evidence.

Zaharia did an assessment as to whether the criteria were met. The Division argued that all they have to do is explain the reasons for the decision, the content of which (Step 3) was acknowledged to be true.

In sum, the Division stated that the grievances should be dismissed. Due to a reduction in funding, the Division had to make a difficult decision to lay off senior capable employees.

The basis for their decision was that the Grievors did not meet the language requirements in the agreement.

REPLY SUBMISSION OF THE UNION

In reply, the Union argued that the Division's cases were not on point and/or the facts were very different.

The Union reiterated that there was no evidence that the language requirements were critical to doing the job of an ISW.

ANALYSIS AND DECISION

This case concerns the proper interpretation of the layoff article in the collective agreement. As the parties indicated at the outset, the main facts are not in dispute.

It is agreed that the Grievors have greater seniority than those ISWs who were not made subject to the layoff. It is acknowledged that the Grievors had excellent performance records. It is not disputed as to what languages are spoken by families/students in the Division. It is not disputed what languages are spoken by the Grievors. The duties and responsibilities of the ISW job are not in dispute.

Further, the parties do not dispute that the Grievors and other ISWs make use of interpreters and colleagues to assist them in communicating with families in languages they don't speak.

It is also asserted by the Division and not challenged by the Union that the demographics in the Division have been changing over time and the languages spoken by newcomer families in non-English homes have evolved.

Finally, it is not disputed that the remaining contingent of ISWs do not speak all the languages spoken by families in the Division.

What makes this a challenging decision is that by all accounts the Grievors are assets to the Division. Two of the three are highly educated, well beyond the levels required for the job. All three Grievors presented in a very credible fashion and are obviously dedicated employees and committed to helping newcomer families.

The Grievors have been able to do the job, to accepted levels, albeit with the assistance of third parties or colleagues, without any apparent complaints and without any apparent concerns from management.

The issue at hand boils down to whether under the specific language in the layoff article, the Division was within its rights to find that the Grievors did not meet the language requirements to do the work going forward.

The Union relies on Arbitrator Munroe's decision in *Vancouver Hospital* in which it was decided that a requirement of Cantonese language proficiency was not reasonably required for the duties of the position of Dietician based on the evidence.

The Division distinguishes *Vancouver Hospital* from the facts at hand in that here the parties had specifically agreed that language was a requirement, but in *Vancouver Hospital*, the requirement was imposed unilaterally pursuant to its management rights.

We agree with the Division that there is a distinction between the two cases. While Arbitrator Munroe found that the particular linguistic ability being demanded was not genuinely needed for due performance of the job, in this case the parties have already expressly agreed to the requirement.

We turn to the specific language of Article 10, mindful of the principles of construction that should be applied to the interpretation task.

The words used in the article should be given their plain and ordinary meaning in order to arrive at the true intention of the parties.

Firstly, we note that the article contains a threshold clause as opposed to a competitive or hybrid one. To be retained the senior employees must, among other things, meet the minimum required qualifications.

The article starts off by setting out a mandatory requirement that a layoff shall (emphasis ours) be in reverse order of seniority.

We are cognizant of the principle that provisions of a collective agreement should be interpreted strictly against undermining seniority.

The remainder of the article of course sets out the other qualifications, requirements, etc. necessary to perform the remaining work.

Under this portion of the article, the Division has to determine and make the assessment as to whether the Grievors meet the threshold qualifications including language qualifications to which the Union has agreed are relevant to the job.

The evidence in this case is that a determination was made based on a review and comparison of the languages spoken by families and those spoken by the Grievors and other junior employees.

There is nothing to suggest that the Division, in doing their assessment, acted in bad faith or arbitrarily or in a discriminatory fashion. Nor is there a suggestion that the statistical information they considered was incorrect or irrelevant.

The Grievors themselves were candid in acknowledging that they accessed outside assistance to have effective communications with certain families and students.

This case involves a close call in light of the importance of the Grievors' seniority and the fact they were able to perform their duties, albeit with assistance periodically.

In the final analysis we have decided to dismiss the grievances.

Ultimately the Division was within its rights to determine that the Grievors did not meet the language qualifications going forward, especially in light of the changing nature of the language requirements of newcomer families being served by the ISWs.

The Union argued that there should be an adverse inference drawn against the Division because the Division chose not to call other witnesses, either a Superintendent or a Newcomer Coordinator, to give evidence surrounding either the layoff decision or the nature of the work done by the ISWs.

We are not prepared to draw such an inference. The Division presented the rationale for the layoff decision based on the job duties and the statistical information which was presented to us. The Union witnesses themselves presented a good overview of the job responsibilities.

We take this opportunity to commend the Grievors for the work performed for the Division. It is unfortunate that cuts in funding had to lead to budget cuts and layoffs.

We wish to thank the parties for their submissions.

DATED at the City of Winnipeg, in Manitoba, this 14th day of February, 2022.



MICHAEL D. WERIER, Q.C.

I concur with the above Award.



ROBERT A. SIMPSON
Nominee of the Division

I ~~concur with~~ / dissent from the above Award.

A handwritten signature in blue ink, appearing to be 'W. M. Sumerlus', is written over the text 'I concur with'.

WILLIAM M. SUMERLUS
Nominee of the Union

Dissent of William Sumerlus

I have reviewed the decision of the majority of the Arbitration Board and do not agree that the grievances should be dismissed. It is my opinion, based on all of the evidence and argument that the grievances should be allowed. I am therefore dissenting from the award of the majority.

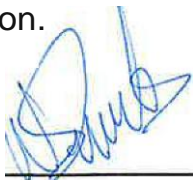
The evidence presented by the Union was clear that the grievors were not only able to do their jobs without the ability to speak the language of the family they were assigned to but did so very well. There was no evidence that their ability to perform the requirements of their position was impacted by the language ability of the grievors.

It was apparent from the evidence that it was not uncommon for language assistance to be utilized by many ISWs. There was no evidence this had resulted in any problems. In fact, the opposite is true of the grievors. Their ability was universally recognized by the Division. A large percentage of students are not assigned an ISW capable of speaking their language. It is my opinion that the evidence established ability to speak the same language was not a real requirement of the ISW position.

On that basis, it is my opinion that seniority should have been followed in the lay-offs as set out in the collective agreement.

The fact that the Division has not in the past and continues to match ISWs with families whose first language is other than those which ISWs are conversant with should have been found to prevent the Division from relying on the strict ability to communicate in the language of the family assigned as a "qualification" and ignore the application of seniority in lay-offs.

I would have allowed the grievances and granted the relief requested by the Union.



W.M. Sumerlus