

IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
B.C. *LABOUR RELATIONS CODE*, RSBC 1996 c. 244 (the “*Code*”)

BETWEEN:

**BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS’
ASSOCIATION /
BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 54
(BULKLEY VALLEY)**
(the “Employer” or the “District”)

AND:

**BC TEACHERS’ FEDERATION /
BULKLEY VALLEY TEACHERS’ UNION**
(the “Union” or “BVTU”)

(Post & Fill Grievance)

AWARD

ARBITRATOR:	JULIE NICHOLS
COUNSEL for the EMPLOYER:	KEITH MITCHELL
COUNSEL for the UNION:	MICHAEL PROKOSH
DATES of HEARING:	APRIL 27, 2021 and OCTOBER 11 & 13, 2022
DATE of SUBMISSIONS:	JANUARY 5, FEBRUARY 17, and MARCH 10, 2023
DATE of AWARD:	MAY 9, 2023

Introduction:

This case arises from a Grievance, dated July 27, 2018, respecting the interpretation of Article E.22.1 of the parties' Collective Agreement. Article E.22 is entitled Posting and Filling Vacant Positions and Article E.22.1 addresses the post and fill process that occurs in May and June each year (the "P&F Process"), among other things. The P&F Process typically involves a number of rounds of postings and some of the postings may be for assignments that are less than a 1.0 full time equivalent ("FTE") position.

Article E.22.1 in the 2013-2019 Collective Agreement provides, in part:

In this Article "vacancy" means a newly created position or an existing position vacated by the incumbent which the Board intends to fill. All vacancies of 20 days or more shall be posted. All teachers in the District are eligible to apply for all vacancies. During spring post and fill (May to June 30), when a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing or will increase his/her FTE for the following year. [my emphasis]

The parties disagree on the meaning of the last sentence of the provision.

The Union takes the position that the clear language of Article E.22.1 means teachers can apply for any continuing assignment in subsequent rounds, regardless of whether there is an increase to their FTE. It also says teachers can apply for a temporary assignment in a subsequent round, if the assignment increases their FTE (but not where their FTE stays the same or decreases).

The Employer maintains that teachers, who accept a continuing position in the first round, are not eligible to apply for a position in subsequent rounds unless the position increases their FTE. That is, teachers can only apply for positions in later rounds that improve their situation (i.e., by virtue of being a continuing position or a position of greater FTE). It says the parties' consistent past practice supports its interpretation.

The hearing occurred virtually. The Union called three witnesses: Karin Bachman, Ilona Weiss, and, Catherine Quanstrom, all former BVTU Presidents. The Employer called five witnesses: Bev Young, Chris van der Mark, and Rod Allen, all past District Superintendents; Toni Perreault, Assistant Secretary Treasurer of the District; and, Bobbie Kingsmill, Human Resources Administrator and Executive Assistant to the Superintendent. All witnesses were excluded from the hearing until they were called to testify.

Background & Chronology

There are areas of significant disagreement both in relation to what occurred and what, if any, meaning should be attributed to the events. I find that the witnesses each testified to the best of their ability, based on genuinely held beliefs. While there are stark differences in the testimony, in my view the conflicts do not arise from any attempt to mislead or to fabricate evidence. Rather, the discrepancies are a result of differing perspectives, which have been impacted by circumstances and the passage of time.

Both parties' submissions reference what appears to be their notes of the evidence at the hearing. However, it is the arbitrator's notes that have been considered in arriving at the conclusions that follow. Only the testimony that is relevant to my determinations has been summarized and areas of disagreement are noted. Specific aspects of evidence will be addressed more fully in the analysis that follows.

Prior to 2013, the language of Article E.22.1 had been in place since, at least, the 1992-1994 Collective Agreement. The relevant part of provision appeared as follows in the 2006-2011 Collective Agreement:

ARTICLE E.22: POSTING AND FILLING VACANT POSITIONS

E.22.1 In this Article "vacancy" means a newly created position or an existing position vacated by the incumbent which the Board intends to fill. All vacancies of 20 days or more shall be posted. All teachers in the District are eligible to apply for all vacancies. When a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing. ...

Rod Allen began working in the District in 2000, was Assistant Superintendent from 2003 to 2006 and Superintendent from 2006 to 2008. He testified that, from 2000 to 2006, the District experienced declining enrollment, which led to potential layoffs. The circumstances were exacerbated with a school closure. To address this situation, a "job fair" was set up to provide for an accelerated posting process. The job fair process involved: identifying the most senior surplus teacher across the District; establishing a "layoff line" (for all teachers with less seniority than that senior teacher); and, giving notice of displacement to all teachers under the layoff line. This resulted in a huge number of potentially laid off teachers, who then participated in the job fair.

At the job fair, positions were physically posted on the walls of a room. Teachers lined up by seniority and went into the room to choose an assignment from the wall. Once they met with the applicable Principal and their

qualifications were confirmed, they were assigned to their chosen position. The District, the Union, and the teachers were all dissatisfied with this process, which was highly emotional and stressful for those involved.

In approximately 2006, Mr. Allen was asked to meet with the BVTU Executive to discuss a different approach. He met with representatives from the Union, including then BVTU President Harold Jordan, and, later, BVTU President, Charlene Watts. He testified that they looked at the Collective Agreement, with a view to “sticking with” the language and implementing an approach that was less disruptive, respected seniority, and gave teachers a choice.

Mr. Allen testified that, in 2007, Post & Fill Guidelines (the “Guidelines”) were discussed and agreed upon by the parties to jointly articulate the P&F Process. This was done to achieve clarity, given the P&F Process was often emotional. The 2007 Guidelines provided:

Staffing Process Guidelines

The following guidelines are meant for information only, in the event of a discrepancy in language or process, the Collective Agreement will take precedence.

...

7) Posting and filling will continue as positions become available. Once a teacher has accepted a job during the spring post and fill, he/she can only move to a job of greater FTE than the job previously posted into, or move from a temporary assignment to a continuing one. As a result, a teacher may relinquish the previous position and that job is re-posted.

Mr. Allen indicated that “every word was discussed and agreed” in the Guidelines and it was a joint document. More specifically, paragraph 7 reflected the parties’ mutual understanding of how the P&F Process would work. The Union raised no objection to the P&F Process while he worked in the District.

Similar Guidelines were prepared each year. The language regarding the P&F Process (as outlined above) appears in the Guidelines for 2008 (para. 7), 2009 (para. 7), 2010 (para. 4), 2011 (para. 4), 2012 (para. 4), 2013 (para. 4), and 2014 (para. 3). The line stating “[t]he following guidelines are meant for information only, in the event of a discrepancy in language or process, the Collective Agreement will take precedence” (the “Top Line”) appears in all of the Guidelines. There was no dispute that the Top Line meant that, if there was a discrepancy in terms of language or process between the Guidelines and the Collective Agreement, the latter took precedence.

Bev Young was a Vice-Principal and a Principal in the District; the Assistant Superintendent in 2007; and, the Superintendent from 2008 to 2011 (after Mr. Allen). She provided a similar description of the job fair. Her understanding of the P&F Process was that, if a teacher applied for a position in the first round of postings, they could only apply for positions in later rounds that allowed them to go from a temporary to a continuing position, or to a position that increased their FTE (as outlined in the 2007 Guidelines).

Ms. Young testified that she met with BVTU President, Ms. Watts, in 2008 and discussed the P&F Process. The Guidelines were shared with the Union. She confirmed that, each year, she and Ms. Watts also attended meetings with teachers to discuss the P&F Process and answer questions. The Guidelines were reviewed at those meetings. She could not recall any occasion where the P&F Process (as she understood it) was not followed. Nor, could she recall an example where a teacher sought a position with reduced FTE, after taking a position in the first round.

Ms. Toni Perreault has worked at the District since the early 1990's and was involved in the P&F Process from 2007 until 2012. She met annually with the Superintendent (e.g., Mr. Allen) and the BVTU President (e.g., Ms. Watts) to go over the Guidelines for the year as well as the dates for postings and for meetings with teachers. She confirmed the Union and the Superintendent developed the Guidelines to make the P&F Process less stressful than the job fair. She understood the 2007 Guidelines (para. 7) reflected the parties' agreement as to how the Collective Agreement would be interpreted and applied, noting the Union expressed no disagreement before the Grievance was filed. Each year, she arranged meetings in Houston and Smithers to talk to teachers about the P&F Process and answer questions. Ms. Watts and, later, Ms. Bachman attended the meetings as BVTU President and no disagreement was raised. Ms. Perreault is not aware of any teacher in a continuing position in the first round of the P&F Process moving to a position with less FTE in a subsequent round.

Karin Bachman was BVTU Local Bargaining Chair from 2003 to 2010; BVTU Vice-President from 2006 to 2010; BVTU President from July 2010 to June 2014; and, has been BVTU Treasurer since 2014. She confirmed that Ms. Watts had been BVTU President from 2006 to 2010 and passed away in 2010.

Ms. Bachman testified that the Guidelines were drawn up by the Employer and reviewed with the Union. In her view, the Top Line meant that the Guidelines were explanatory and the Collective Agreement took precedence. While she

was BVTU President, she understood Article E.22.1 meant that after a teacher applied for an assignment for the coming year, they were not eligible to apply for another assignment, unless it was continuing (regardless of whether it had greater, the same, or less FTE). She testified that, as far as she was aware, that was what occurred and there were no problems.

In cross-examination, she confirmed that, as BVTU President, she went over the Guidelines each year with the Superintendent and she never indicated they did not reflect the parties' agreement. No problems were raised with her and there were no grievances. She attended meetings with Ms. Perrault in Houston and Smithers, where Ms. Perrault reviewed the Guidelines and answered questions. She could not recall (but did not dispute) that Ms. Perrault had explained that, once a teacher accepted a position, they could only move to a position with greater FTE or from a temporary to a continuing position. She agreed that that notion was stated in the Guidelines.

Ms. Bachman was involved in bargaining for the 2013-2019 Collective Agreement. On May 28, 2013, the Union proposed the following changes (noted in bold) to the first paragraph of Article E 22.1:

Date: *May 28/13* Time:

BVTU Proposal

ARTICLE E.22: POSTING AND FILLING VACANT POSITIONS

E.22.1 In this Article "vacancy" means a newly created position or an existing position vacated by the incumbent which the Board intends to fill. All vacancies of 20 days or more shall be posted. All teachers in the District are eligible to apply for all vacancies. **During the spring post and fill season from the beginning of May to June 30th of each year, when a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing or will increase his/her FTE for the following year. If the teacher relinquishes the previous position, that position will be re-posted.**

Ms. Bachman testified that one change referred to the timing of the P&F Process so teachers would know the end of the "season" when they can apply for assignments. The addition of the phrase "or will increase his/her FTE for the following year" was proposed to reflect the current practice at the time. She noted the addition of the last sentence that addressed "reposting" was part of the Guidelines. With respect to the current practice at the time, she believed a teacher in a continuing position could apply for a subsequent continuing position (regardless of FTE). She testified that the reference to "continuing" had always been there and was not an issue, but a teacher in a temporary assignment could not later apply for an assignment with a lower FTE.

The Employer's bargaining notes, dated May 7, 2013, identify the Union's proposal and note "wording changes to reflect current practice". Ms. Bachman agreed these notes reflected what was said at the table. The Union's bargaining notes, dated May 28, 2013, indicate Ms. Bachman stated she had drafted the Union's proposal and it "was taken from the staffing guidelines that we have been operating on. Because there wasn't anything in the CA..." and that "putting this in does bring clarity". She also stated that she "took the last line of E.22.1 right out of the Staffing Guidelines... that's been what we are doing, so we are hoping you are ok with that. ...". The Employer did not wish to add language about re-posting, but agreed to clarify the timing of the P&F Process and to add "or will increase his/her FTE for the following year." On June 4, 2013, the Union proposed the following to reflect their discussions:

U #10 -- as per negotiation discussions on May 28, 2013.

Date: June 4, 2013 **Time:** 9:44

BVTU Proposal

ARTICLE E.22: POSTING AND FILLING VACANT POSITIONS

E.22.1 In this Article "vacancy" means a newly created position or an existing position vacated by the incumbent which the Board intends to fill. All vacancies of 20 days or more shall be posted. All teachers in the District are eligible to apply for all vacancies. **During post and fill (May to June 30th), when a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing or will increase his/her FTE for the following year.**

Ms. Bachman confirmed that the Employer did not seek any clarification and the parties signed off on Article E.22. The 2013-2019 Collective Agreement reflected the Union's last proposal.

In cross-examination, Ms. Bachman agreed that the Union's proposed changes were to reflect the current practice as well as some of what was in the Guidelines, and there was no intent to change the practice. She confirmed there was no discussion of any intention that differed from the Guidelines. She maintained the reference to the phrase "or will increase his/her FTE for the following year" applied when a teacher is in a temporary assignment, not a continuing one. She felt the Union's proposed language was "what was happening with post & fill". However, she could not identify a specific individual who had posted into another continuing assignment of equal or lesser FTE. Nor, could she recall any discussion with the Superintendent to that effect, noting no one told her a teacher could not do that. She agreed there were no grievances regarding the P&F Process from 2006 until 2018.

Chris van der Mark was the District's Assistant Superintendent from 2008 to 2010 and Superintendent from 2011 to 2018. He testified that the "nuts and bolts" of the P&F Process were if a teacher took a position in the first round, they could go from a temporary to a continuing position or from a continuing to another continuing position with a greater FTE. A teacher could not apply for a continuing position with less FTE in a later round. He confirmed that, because of the history, there were yearly discussions about the P&F Process with the Union representatives of the day and no objection was raised prior to the Grievance.

Mr. van der Mark was also involved in 2013 bargaining. He testified that the Union's proposal regarding Article E.22.1 was to reflect the "current practice" in order to get clarity. He did not understand the addition of the term "or" in the last sentence meant a teacher was now free to move into any continuing position in a subsequent round. Nor, did he understand that the parties had negotiated any change from the practice that had been followed by the District. Rather, he understood they were trying to "firm up" what had been happening to get rid of any confusion. His understanding of the language was reflected in the 2014 Guidelines (para. 3). In cross-examination, he agreed that Ms. Bachman had indicated "the last line" of the Union's initial proposal was taken from the Guidelines and that the District did not want to include the reference to reposting.

Iлона Weiss, now retired, was a teacher in the District, the BVTU President from July 2014 to June 2017, and a Union Representative from July 2017 to June 2019. She explained that she suffered a stroke in 2018, which affects the time it takes her to process information, but not her memory.

Ms. Weiss indicated that, in her first year as BVTU President, she met with Mr. van der Mark to discuss the Guidelines, the Collective Agreement and the P&F Process. She testified that he brought her attention to the last sentence of Article E.22.1, explaining that, in the past, after the first round, a teacher could not post into another continuing position unless it was the same or greater FTE. He further indicated that since the language was changed to include the term "or", teachers could now post into any continuing position "or" a position of greater FTE. He stated this had not been previously allowed, but was now going to be allowed.

Mr. van der Mark confirmed he had regular conversations with Ms. Weiss about the P&F Process, but could not recall the discussion about the last sentence of Article E.22.1 specifically. However, he denied that he agreed that

a teacher could post into any continuing position in a subsequent round. He noted that would be “the complete opposite” of what the parties had been doing, a “significant departure” from how they functioned, and he would not make that kind of decision without involving Human Resources.

Ms. Weiss indicated that she also met with Bobbie Kingsmill in the 2014-2015 school year to ensure they agreed on how the P&F Process would work. She testified that Ms. Kingsmill created a “Cheat Sheet” so they could easily answer questions from teachers and the Cheat Sheet appeared as follows:

Post and Fill Guidelines

Round 1

- All teachers in the District can apply for all vacancies (CA Article E.22.1)

Round 2 (Layoff or TTOC)

SPRING POSTING		ROUND 2,3,4,ETC	YES	NO	CA Article
CONTINUING	Can I post into another	CONTINUING	✓		E.22.1
CONTINUING	Can I post into another	TEMPORARY		✓	E.22.1
TEMPORARY	Can I post into another	TEMPORARY	✓		NOT IN CA, THEREFORE ONLY WITH SBO APPROVAL
TEMPORARY	Can I post into another	CONTINUING	✓		

TEACHERS CURRENTLY IN A CONTINUING CONTRACT		NOT LAID OFF		NOT A TTOC	
Spring Postings – round 2,3,4, etc.					
CONTINUING	Can I post into another	TEMPORARY	✓		For one year – CA Article E.22.2c
CONTINUING	Can I post into another	CONTINUING	✓		The teacher will have deemed to give up their current continuing assignment to take the new one.

Less than 1.0 Continuing can post into 1.0 Temporary if it will increase FTE. (E.22.1)

Ms. Weiss testified that she was “very sure” Ms. Kingsmill gave her a copy of the Cheat Sheet. In her view, the Cheat Sheet indicated teachers could post into any continuing position (regardless of FTE) in later rounds. She believed Ms. Kingsmill had made the Cheat Sheet to point out the change in practice.

Ms. Kingsmill, has been with the District since 2011 and has been involved in the P&F Process since 2012. She described the process the District undertakes to determine staffing needs. She testified that the Superintendent and the BVTU President would meet to discuss the Guidelines (including important

dates for layoffs and postings) and she would manually update the Guidelines with new dates.

Ms. Kingsmill confirmed that, in 2015, she attended a meeting with Mr. van der Mark and Ms. Weiss to discuss the P&F Process for that season. They reviewed the Guidelines and everyone was “on the same page”. The 2015 Guidelines (para. 3) provide:

Posting and filling will continue as positions become available. When a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing.

[Note: the same paragraph appears in the 2016, 2017, 2018 Guidelines]

Ms. Kingsmill indicated that, during that meeting, they decided a document would assist to clarify the P&F Process and confirm the practice currently in place. She testified that she prepared a chart (the “P&F Chart”) that appeared as follows:

1) In Round 1, all teachers in the District are eligible to apply for all vacancies.
(Collective Agreement Article E.22.1)

2) TEACHERS CONTINUING TO THE DISTRICT (due to layoff, TTOC)

AFTER ROUND 1		YES	NO	Comments
<i>If I am in a</i>				
CONTINUING CONTRACT (spring posting)	Can I posting into another...	CONTINUING CONTRACT (Round 2,3,4 etc....)	✓	As per E 22.1
CONTINUING CONTRACT (spring posting)	Can I posting into another...	TEMPORARY CONTRACT (Round 2,3,4 etc....)		As per E 22.1
TEMPORARY CONTRACT (spring posting)	Can I posting into another...	TEMPORARY CONTRACT (Round 2,3,4 etc....)	✓	Not referenced in the CA. Therefore mgnt determines if this is an acceptable practice.(i.e. For more FTE.)
TEMPORARY CONTRACT (spring posting)	Can I posting into another...	CONTINUING CONTRACT (Round 2,3,4 etc....)	✓	

3) TEACHERS CURRENTLY IN A CONTINUING CONTRACT (Teachers not on layoff or a TTOC)

<i>If I am in a</i>		YES	NO	Comments
CONTINUING CONTRACT	Can I posting into another...	TEMPORARY CONTRACT (Spring Postings)	✓	For one year. Referenced in Article E.22.2c.
CONTINUING CONTRACT	Can I posting into another...	CONTINUING CONTRACT (Spring Postings)	✓	For more FTE Only. The teacher will have deemed to give up their current continuing assignment to take the new one.

There is conflicting testimony respecting the P&F Chart and the Cheat Sheet referred to by Ms. Weiss. To add to the confusion, Ms. Kingsmill acknowledged that she referred to the P&F Chart as a “cheat sheet”.

Ms. Kingsmill testified that she sent a draft of the P&F Chart to Mr. van der Mark and Ms. Weiss, who both reviewed it and agreed on its content. In her

view, the P&F Chart was the District's document that was "built together" to confirm the parties' practice. She maintained that the reference "For more FTE only" was included from its creation and she did not change it. Ms. Kingsmill also testified that the Cheat Sheet was created by Ms. Weiss. She explained that she had denied Ms. Weiss' request to use the P&F Chart as the Union's document and, as a result, Ms. Weiss created the Cheat Sheet "based on" the P&F Chart.

Ms. Weiss and Ms. Kingsmill attended meetings with teachers in Houston and Smithers in 2015, 2016, and 2017. Ms. Weiss testified that they reviewed the P&F Process and referred to the Cheat Sheet as a guide. She indicated that there were always some teachers who wanted to post into a position with lower FTE, the change was a "big deal", and teachers were very happy that they were allowed to do this. However, she could not recall any specific teachers who took a position in the first round and then later moved to one with less FTE.

Ms. Kingsmill maintained that she only referred to the P&F Chart in the meetings with teachers and did not have a copy of the Cheat Sheet. She indicated that she gave Ms. Weiss a copy of the P&F Chart when they met with teachers and gathered the copies after the meeting. Ms. Weiss did not raise any disagreement about what Ms. Kingsmill presented at those meetings. Ms. Kingsmill first became aware of a dispute when the Grievance was filed.

Ms. Bachman and Ms. Weiss both confirmed that the Employer would send job postings and letters confirming a teacher's accepted position. However, the Union did not receive offer letters, teacher's applications, or emails regarding what positions teachers could or could not apply to.

In cross-examination, Ms. Kingsmill was referred to examples of teachers (e.g., S. Young and C. Becker) who, in 2018, sought to apply to certain postings in a subsequent round of the P&F Process. She testified that her responses to those teachers (i.e., that they could not apply for a continuing position with lower or equivalent FTE in subsequent rounds) reflected the parties' long standing past practice. She acknowledged there is no specific reference to the practice in Article E.22.1.

Ms. Quanstrom has worked as a teacher in the District since 2006 and was the BVTU President from July 2017 to June 2020. She testified that she understood that Article E.22.1 in the 2013-2019 Collective Agreement meant that a teacher who took an assignment in the first round would still be eligible to take a subsequent assignment if it was continuing (even if it was for the same

or less FTE). She indicated that she was not aware of any other practice until the issue arose in 2018. The Grievance was filed on June 27, 2018.

In cross-examination, Ms. Quanstrom confirmed that copies of the Guidelines would be kept in the Union office. She was referred to the 2007 Guidelines (para. 7) and agreed it appeared the Union would have been aware of the District's interpretation since, at least, 2007 (but noted that she was newly employed at that time). She also agreed that she attended the information meetings led by Ms. Perreault and Ms. Watts in 2008 or 2009 and the information in the 2009 Guidelines (para. 7) would have been shared.

Ms. Quanstrom was involved in bargaining the 2019-2022 Collective Agreement. She indicated that, in negotiations, the District proposed the following change to paragraph 1 of Article E.22.1:

ARTICLE E.22: POSTING AND FILLING VACANT POSITIONS

E.22.1 In this Article "vacancy" means a newly created position or an existing position vacated by the incumbent which the Board intends to fill. All vacancies of 20 days or more shall be posted. All teachers in the District are eligible to apply for all vacancies. During spring post and fill (May to June 30), when a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing or will increase his/her FTE for the following year. *During the spring post and fill (May to June 30), when a teacher has applied for and accepted a temporary or continuing assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless:*

- I. The assignment is continuing, in the case of a temporary contract teacher or,*
- II. Will increase a continuing teachers's FTE for the following year.*

The Union took the position that the proposal limited a teacher's ability to move from a continuing position to more suitable position, if one comes up. The Employer's bargaining notes indicate the Union believed the current language allowed teachers to move from a continuing position to a continuing position. The District maintained that this was a point of contention and "under current language they are not eligible once they take a position". Ultimately, as reflected in the Union's notes, the District indicated it just wanted clarity and "will work with language we have". The proposal was withdrawn and the language remained unchanged.

In cross-examination, Ms. Quanstrom acknowledged that, in 2019 bargaining, the Union was aware that the District disagreed with the Union's interpretation of Article E.22.1.

Finally, there was some evidence from Ms. Weiss about communications respecting the P&F Chart between herself and Mr. McDiarmid, the current Superintendent, in Spring 2020. For context, it should be noted that Ms. Weiss had moved out of the Province and had called Mr. McDiarmid to request a reference letter. There was no mention of the P&F Process during the call.

On April 30, 2020, Mr. McDiarmid emailed Ms. Weiss to provide the requested reference letter and attached the P&F Chart. He asked her “is this the sheet you remember using when you worked with [Ms. Kingsmill] at staffing time?” Ms. Wiess replied on May 14, 2020, noting “I had a good look at the post and fill document and yes, that was what we agreed on. It was what I used as my template to answer questions. ...”

However, at the hearing, Ms. Weiss indicated that she would like to “retract” her emailed reply, noting she had not been in the Union office for years. She testified that, when she looked at the P&F Chart, it did not occur to her that there would have been changes. She noted that she had no vested interest in Union matters at that time and no access to her post and fill binder at the Union office. She had looked at the attachment for less than a minute and had not taken the matter seriously. She had assumed it was the same sheet “but prettier”, but now she was “100%” sure the P&F Chart is not the Cheat Sheet she was given in 2015.

Positions of the Parties:

The Union

The Union submits that its interpretation should prevail given the ordinary meaning of the express and unambiguous words of the Collective Agreement. On the negotiated language, it says a teacher, who has accepted an assignment for the coming year, may apply for any continuing assignments “or” any temporary assignments that increase their FTE. Applying established interpretation principles, it argues that Article E.22.1 is clear and the term “or” in the last sentence should be taken to mean “either-or”.

The Union maintains the language does not require or support a conjunctive reading of “or” for the provision to make sense. It says the Employer’s interpretation is only linguistically permissible if the term “and” is substituted for the negotiated term “or”. However, an arbitrator cannot amend the terms of the Collective Agreement and may only choose a more “reasonable”

interpretation where there are two linguistically permissible interpretations, which is not the case here.

The Union argues there is no need to consider or give weight to extrinsic evidence since there is no ambiguity in the language. Extrinsic evidence should be carefully employed and can only clarify the Collective Agreement, not contradict it (i.e., change the “or” to “and”). In any event, it says the requisite elements for past practice to assist an interpretive aide have not been established. Thus, the practice does not reflect mutual intention respecting the meaning of the language.

In that regard, it submits that any practice prior to the 2013-2019 Collective Agreement related to different language and is, therefore, irrelevant. After the 2013-2019 Collective Agreement, any practice was inconsistent (i.e., the Guidelines changed in 2015) and only related to a five-year period. It notes Ms. Kingsmill conceded there is no specific provision that reflected the Employer’s claims respecting past practice. The Union also maintains it did not have the requisite knowledge of any past practice, noting the documents it received during the P&F Process contained only rudimentary administrative information and other relevant documents were not shared. The Guidelines were meant “for information only” and the Collective Agreement was to take precedence in the event of a conflict. There was no way the Union could ascertain whether the Employer was complying with the Collective Agreement and, absent a complaint, had no reason to question the application of Article E.22.1. Once the issue was raised, the Grievance was filed.

In terms of the doctrine of estoppel, the Union submits that the necessary elements have not been established. It notes that the existence of a past practice, itself, is insufficient to establish an unequivocal representation. There must be evidence of a commitment to continue a practice such that it is reasonable for the other party to rely upon that commitment to its detriment. The past BVTU Presidents each testified they were unaware of the asserted practice and received no complaints about the application of Article E.22.1. Thus, there was no agreement to continue any practice; nor, was there acquiescence (by someone with the requisite authority) that could amount to a representation that the Union would not rely on a strict interpretation of the Collective Agreement. Further, it says there has been no detrimental reliance. The Employer raised Article E.22.1 in 2019 bargaining and later withdrew its proposal. Thus, even if estoppel had been established, it would cease on June 30, 2019 at the end of the 2013-2019 Collective Agreement.

With respect to the evidence, the Union argues that the testimony of Ms. Young, Ms. Perreault and Mr. Allen is irrelevant and should attract no weight. It says any past practice prior to the 2013-2019 Collective Agreement is also irrelevant (given the provision is clear and the language was different). Further, any evidence of Ms. Perreault and Mr. Allen attributing statements to Ms. Watts is uncorroborated hearsay as it relates to whether there was agreement between the parties regarding the interpretation of the Collective Agreement. Given Ms. Watts passed away in 2010 and cannot respond, it would be inappropriate to give that evidence any weight.

The Union also submits that Ms. Weiss' May 2020 email confirming the P&F Chart was the document the parties had used for the P&F Process should be accepted as a mistake. She was not provided with the necessary context to properly consider Mr. McDiarmid's inquiry (e.g., there no indication of the outstanding Grievance). It maintains her testimony was credible and unshaken. As such, her evidence should be preferred over Ms. Kingsmill's (which was inconsistent and evasive) and Mr. van der Mark's (as he did not specifically refute the details and timing of their conversation about the change to Article E.22.1). It also notes that the Employer could have called Mr. McDiarmid to give evidence respecting the 2013 and 2019 rounds of bargaining, the 2020 communications with Ms. Weiss, and to corroborate Ms. Kingsmill's testimony. As he was not called to testify, it says an adverse inference should be drawn.

In relation to the Employer's request for rectification, the Union says the Collective Agreement reflects what the parties mutually agreed to in 2013 bargaining. As the doctrine of rectification concerns documents, not intentions, it would be inappropriate to apply it here. In any event, there is insufficient evidence to meet the high threshold for the doctrine to be applied.

The Union relies on the following authorities: *Sensient Flavors Canada Inc. and USW, Local 3950*, [2011] OLAA No. 17 (Luborsky); *Canadian Mental Health Assn. and BCGEU*, [2019] BCCAAA No. 81 (Jackson); *Pacific Press and GCIU, Local 25-C*, [1995] BCCAAA No. 637 (Bird); *Catalyst Paper and CEP, Local 1123*, [2012] BCCAAA No. 73 (Hall) ("*Catalyst Paper (Hall)*"); *Louisiana-Pacific Canada Ltd. and USW, Local 1-405*, [2013] BCCAAA No. 53 (Gordon); *Catalyst Paper Corp. and CEP, Local 1123*, [2013] BCCAAA No. 28 (Pekeles); *PRT Growing Services Ltd. and BCGEU*, [2022] BCCAAA No. 131 (Rusen); *British Columbia Society for the Prevention of Cruelty to Animals and CUPE, Local 1622*, [2009] BCCAAA No. 111 (Holden); *Citywest Telephone Corp. and IBEW, Local 337*, [2011] CLAD No. 149 (Dorsey); *John Bertram & Sons Co. and IAM, Local 1740*, [1967] OLAA No. 2 (Weiler); *Nanaimo Times Ltd.*, [1996] BCLRBD No.

40; *BCPSEA and BCTF*, [2008] BCCAAA No. 113 (Kinzie); *Oceanview Development and CSWU, Local 1611*, [2014] BCCAAA No. 33 (Nichols); *Harbour Cruises Ltd.*, [2004] BCLRBD No. 182; *Fording Coal Ltd. and USW, Local 7884*, [2002] BCCAAA No. 205 (Lanyon); *Faryna v. Chorny*, [1951] BCJ No. 152; *R. v. Parent*, [2000] BCJ No. 2772; *Steele*, [2001] BCLRBD No.77; *West Fraser Mills and USW, Locals 1-424 and 1-425*, [2017] BCCAAA No. 125 (McPhillips); *Capital West Partners v. Playtime Community Gaming Centres Inc.*, 2014 BCSC 86; *BC Ferry Services Inc. and BCFMWU*, [2013] BCCAAA No. 43 (Hall).

The Employer

The Employer argues that the well-established interpretive principles apply here, including consideration of the provision’s purpose and the contextual evidence. Where there are two competing interpretations, the analysis should also assess which interpretation is reasonable and makes labour relations sense. It submits that the Union’s interpretation does not make sense as it would mean the parties agreed to exclude only teachers in temporary positions from later posting into positions of the same or less FTE. There is no logical reason to negotiate such an exclusion.

The Employer says the term “or” can be read disjunctively or conjunctively, depending on: the context; the parties’ practice; the purpose of the language; whether the language has changed; and, whether the result would be absurd. In this case, the terms “continuing” and “increase his/her FTE” modify and refer back to “further assignments” when read in the proper context.

With respect to the evidence, the Employer says the testimony of Mr. Allen, Ms. Young, and Ms. Perreault is relevant to provide labour relations context. Mr. Allen’s testimony relates to the history of the job fair, what led to the Guidelines, and the parties’ agreement as to how Article E.22.1 would apply. Ms. Perreault addressed the creation of the Guidelines and how they were used, without disagreement. Ms. Young gave evidence about the history of the job fair and her experience with the P&F Process. To the extent the testimony of Ms. Weiss differs from that of Mr. van der Mark or Ms. Kingsmill, it says the Employer’s evidence should be preferred. It also submits that Ms. Weiss’ 2020 email about the P&F Chart should be accepted as it is consistent with the Guidelines and what was communicated to teachers.

In terms of extrinsic evidence, the Employer submits that the parties have consistently applied Article E.22.1 in a particular manner given the history of dissatisfaction with the job fair approach. The established past practice was

reflected in the Guidelines, the application of Article E.22.1 prior to the 2013-2019 Collective Agreement, and in meetings with teachers. The parties then amended the provision to reflect the Guidelines as they had already agreed on the meaning and application of Article E.22.1. This informed how Ms. Kingsmill addressed specific applications from teachers (e.g., S. Young) and the creation of the P&F Chart. This evidence must be considered against the lack of examples that would support the Union’s interpretation.

In the alternative, the Employer argues that the Union should be estopped from insisting on a strict application of Article E.22.1, given it was well aware of the Employer’s application of the provision and did not indicate it would rely on a new interpretation.

In the further alternative, given the clear mutual intent of the parties, the Employer says Article E.22.1 should be rectified (i.e., “or” should be changed to “and”) to accurately reflect their actual agreement in the document and correct a mutual mistake in drafting the provision.

The Employer relies on the following authorities: *Versa Services Ltd. and HEU*, [1998] BCCAAA No. 53 (Laing); *News Publishing Co. Ltd. and CEP, Local 226*, [1996] BCCAAA No. 104 (Korbin); *HEABC and HEU*, [1998] BCCAAA No. 15 (Gordon) (“*HEABC (Gordon)*”); *Maple Ridge School District No. 42 and CUPE, Local 703*, [2004] BCCAAA No. 182 (Kinzie); *Mission School District No. 75 and CUPE, Local 593*, [2002] BCCAAA No. 399 (Foley); *HEABC and HEU*, [2002] BCCAAA No. 130 (Gordon); *Prince Rupert School District No. 52 and IUOE, Local 882-B*, [2003] BCCAAA No. 148 (Blasina); *H.H. Vivian & Co. v Clergue*, 41 SCR 607; *Olympic Motors (WC1) Corp -and- LAMAW, Local 1857* (2021), 334 LAC (4th) 434 (Saunders); *AUPE -and- Alberta Health Services* (2022), 337 LAC (4th) 256 (Bartel); *London (City) -and- CUPE, Local 107* (1974), 7 LAC (2d) 46 (Hinnegan); *University of Windsor -and- CUPE, Local 1001* (2010), 199 LAC (4th) 129 (Crljenica); *Windsor-Essex Catholic District School Board -and- OECTA* (2012), 215 LAC (4th) 303 (Randall); *Tilden Car Rental Inc. and UFCW, Local 175*, [1992] 28 CLAS 46 (Briggs); *FBI Foods Ltd. -and- UFCW, Local 1172-2-FBI* (1985), 22 LAC (3d) 157 (Emrich); *Burnaby (District)*, [1978] BCLRBD No. 19; *John Bertram & Sons, supra*; *Surrey School District No. 36 and Surrey Teachers’ Assn.*, [2004] BCCAAA No. 150 (Taylor); *Sooke School District No. 62 and Sooke Teachers’ Assn.*, [1995] BCCAAA No. 27 (McPhillips); *City of Penticton and CUPE, Local 608*, [1978] BCLRBD No. 26; *BC Rail Ltd.*, [1992] BCLRBD No 153; *Chilliwack (District) and CUPE, Local 458*, [1991] BCCAAA No. 53 (Hope); *Vernon Fruit Union*, [1976] BCLRBD No 55; *West Fraser Mills and USW, Locals 1-424 and 1-425* (2017), 286 LAC (4th) 382 (McPhillips); *Distillery, Rectifying, Wine & Allied*

Workers' International Union of America, Local 153 v. Canadian Park & Tilford Distilleries Ltd., [1973] BCJ No. 710; *Renew Crew Foundation and BCGEU*, [2013] BCCAAA No. 176 (Atkinson).

Decision:

It is clear from the submissions that there is no real disagreement on the collective agreement interpretation principles, per se. The crux of the dispute relates to the application of those principles to the facts and relevant language in issue in this case.

The matter is further complicated by conflicts in the evidence, which will be addressed generally and specifically below. As noted, in terms of credibility, I do not find that any witness attempted to intentionally fabricate evidence. However, some recollections clearly conflict. I have applied the analysis set out in *Faryna v. Chorny*, *supra* to determine what is more likely to have occurred on the balance of probabilities, considering all relevant circumstances.

Turning to the arbitral approach to collective agreement interpretation, the principles have been summarized in an array of authorities. In brief, the fundamental task of an arbitrator is to determine what the parties mutually intended in the language they bargained. The collective agreement is the primary resource for the analysis and further principles will be applied, depending on the language in question and the interpretive issues that arise in each case (see: *Pacific Press*, *supra*). In *HEABC (Gordon)*, *supra*, Arbitrator Gordon described a number of principles, including the importance of a purposive and contextual analysis (at para. 36):

The interpretive task is to discover the mutual intention of the parties as expressed in the words they have agreed to in the collective agreement.... ..When faced with a choice between two linguistically permissible interpretations, arbitrators may be guided by the reasonableness and/or practical labour relations implications of each possible interpretation. As a guide to the proper interpretation of a provision, arbitrators may search for its purpose and will view the language in its normal and ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. The context in which disputed words are found is a primary source of their meaning.

Many other authorities referenced by the parties emphasize the following notions: all words should be given meaning; ordinary words should be given their plain meaning (unless there is evidence of a different intention); and, a

harmonious interpretation is preferred. An arbitrator's interpretive mandate does not include the power to alter the collective agreement. Finally, there is no special onus of proof on one party to establish its interpretation; rather, the determination focuses on which competing interpretation reflects the parties' mutual intention (see, for example: *Catalyst Paper (Hall)*, *supra*).

While it is helpful to summarize the interpretive principles, their application will depend on the specific facts and interpretive issues that arise. The parties have referenced a number of authorities that address provisions that include the term "or". Each of those cases was decided on the language in dispute within the context of that particular case. For example, *PRT Growing Services*, *supra*, related to language respecting paid holidays and upheld the recognition of the National Day for Truth and Reconciliation ("NDTR"). That case quotes extensively from *Olympic Motors*, *supra*, which dealt with a similar issue.

In *Olympic Motors*, *supra*, Arbitrator Saunders found the language in issue was broad enough to recognize federal holidays (the employer operated in the provincial jurisdiction), but went on to consider whether the parties had agreed to recognize only 10 statutory holidays "or any other day proclaimed by the provincial or federal government". He applied a contextual analysis to determine whether the parties intended the term "or" to be disjunctive (exclusive) or conjunctive (inclusive) (at paras. 25, 27):

The next question is whether the plain meaning of Article 11.02 limits the number of statutory holidays to a total of ten so that any additional statutory holiday must be substituted for one of the 10 listed. The Employer draws upon the use of the word "or" at the beginning of the disputed proviso. I accept the proposition that the word "or" is typically disjunctive. However, this is not invariably the case as a matter of English usage. The word "or" can be used to convey a non-exclusive list of more than two items — for example, telling children they may have chocolate bars, or potato chips, or licorice. Thus, the meaning of the word "or" is context-dependent. In the present context, I find the word "or" is used to delineate circumstances by which a holiday is established, over and above the list of 10 designated ESA holidays. In other words, a day may qualify as a holiday because it is one of the ten days in the list set out in Article 11.02, or it may qualify as a holiday because it is proclaimed by the provincial or by the federal government.

...

In any event, I do not find the interpretive question strictly turns on English usage. In my judgement, the use of the word "or" is appropriately understood to operate in furtherance of the purpose of Article 11.02. As noted above, an ordinary and grammatical reading may not assist if the context of the disputed provision and its place in the collective agreement as a whole shows the words were used in a different sense to accomplish a specific purpose.

In *Alberta Health Services, supra*, Arbitrator Bartel also dealt with the question of whether there was a mutual intention to recognize the NDTR. He held the term “or” was inclusive (i.e., connected two or more possibilities), when interpreted in context (at para. 36):

I also find I cannot agree with the Employer that the use of the word "or" in both Agreements was disjunctively used and intended to set out a list of mutually exclusive options. I recognize that "or" is a very common conjunction in the English language, which is capable of either connecting two (or more) possibilities (a conjunctive use), or outlining two mutually exclusive alternatives (a disjunctive use). For example, to say that a blouse is available to be purchased in blue "or" gray "or" white means any one of those possibilities are available. To accept one does not exclude the others. To ask if it is Tuesday "or" Wednesday requires a choice of mutually exclusive alternatives and only one can be correct. In *Prodaniuk v. Calgary (City)*, the Court quoted from *R. v. Szczerba* 2002 ABQB that "or" is "presumed to be inclusive unless it is clear from the context in which it is used that it is meant to be exclusive" (at para. 86). In that case, the Court quoted the following from Professor R. Sullivan. I consider I am able to take notice of Professor Sullivan's considerable expertise and authority on the subject of interpretation:

"Or" is always disjunctive in the sense that it always indicates that the things listed before and after the "or" are alternatives. However "or" is ambiguous in that it may be inclusive or exclusive. In the case of the exclusive "or", the alternatives are mutually exclusive: (a) or (b) or (c), but only one of them to the exclusion of the others. In the case of the inclusive "or", the alternatives may be cumulated: (a) or (b) or both; (a) or (b) or (c) or any two, or all three. ...[T]he inclusive "or" expresses the idea of "and/or"...In legislation, "or's" are presumed to be inclusive, but the presumption is rebutted where it is clear from the context that the listed alternatives are meant to be mutually exclusive (at para. 86)

These passages illustrate the arbitral task, which is to determine the parties' mutual intention by applying a purposive and contextual analysis.

Thus, the analysis respecting Article E.22.1 involves determining whether the parties mutually intended: that a teacher (who has accepted a continuing assignment) can apply for a subsequent assignment as long as it is continuing (i.e., the “or” is disjunctive or exclusive); or, that the teacher may only apply when the later continuing assignment increases their FTE (i.e., the “or” is inclusive, meaning “and/or”).

For convenience, the last sentence in Article E.22.1 provides:

... During spring post and fill (May to June 30), when a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing or will increase his/her FTE for the following year.

I do not find the term “or” to be so clear that it can be taken on its face to be disjunctive. Rather, the term is context dependent and it is necessary to engage in a contextual assessment of the parties’ intention. Accordingly, I turn to the factual chronology and the extrinsic evidence, which may potentially assist in resolving the ambiguity (see: *Burnaby (District), supra*).

The purpose for considering extrinsic evidence was aptly described by Arbitrator Kinzie in *BCPSEA, supra* (at paras 25-27):

Arbitrators can also have regard to various forms of extrinsic evidence if they conclude from the evidence they have heard that there is a bona fide doubt as to what the parties had intended from a consideration alone of the words they had used to express their intentions. One source of such evidence is the exchanges the parties may have had across the bargaining table when they negotiated the provisions in dispute. Another source is the manner in which the wording of those provisions has changed over successive collective agreements. A third source of such evidence is the practice the parties may have developed in applying the disputed provisions. The employer may have interpreted them in a particular way and the union, with knowledge of how the employer was interpreting and applying them, may not have objected or grieved. Such evidence would provide the arbitrator with evidence of what the parties mutually intended by the words they used in their collective agreement.

The requirement for mutuality is critical. It is a point which is made forcefully by the Labour Relations Board of BC in its decision in Board of School Trustees, School District No. 57 (Prince George), [1976] BCLRBD No. 41, BCLRB No. 41/76, where it stated that:

"... there is extrinsic evidence of various types and value. At one end of the spectrum is objective evidence such as negotiating minutes signed by both parties or the past practice of parties. Such evidence must be given considerable weight because in both examples it reflects a mutuality of intent measurable by objective standards. At the other end of the spectrum is subjective evidence of a party's intentions or impressions of what in fact was achieved at a bargaining session. Unless such impressions are supported by evidence validating those impressions, they are of no value. The intent of one party is only significant when the extrinsic evidence allows an arbitration board to attribute it to the other party." (at 9)

With respect to the uses of past practice evidence to assist in resolving a bona fide doubt as to the meaning to be given to words used by the parties in their collective

agreement, the arbitration board in *John Bertram & Sons Co. Ltd. (1967)*, 18 L.A.C. 362 (P.C. Weiler) commented that:

"Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice." (at 368)

The Union relies on *Sensient Flavors Canada, supra*, to argue that past practice prior to the 2013 Collective Agreement is irrelevant as an aide to interpretation because the language was different in the 2006-2011 Collective Agreement. I disagree. First, Arbitrator Luborsky concluded the language in that case was clear. Second, his comments about relevance related to a practice that was in place prior to the first collective agreement. Therefore, the practice could not reveal intention because it arose before the language existed. That situation is distinguishable from the facts here. Article E.22.1 existed in (and prior to) the 2006-2011 Collective Agreement. The parties applied it and discussed it in 2013 bargaining and beyond. In my view, past practice relating to how Article E.22.1 has been used, discussed, and evolved is relevant to and informs the contextual interpretive analysis.

The Union also takes issue with the evidence of Ms. Perreault and Mr. Allen in relation to statements they attributed to Ms. Watts, past BVTU President. It relies on *Canadian Mental Health Assn., supra* for the proposition that uncorroborated hearsay evidence cannot be relied upon to prove a point. I note that Arbitrator Jackson was addressing aggravated damages in that case and the fact an employer's allegations of cause for dismissing an employee were unproven and based on unsubstantiated rumour.

In terms of evidence heard at arbitration, it is well-established that uncorroborated hearsay, alone, may not be relied upon to establish a central fact. However, here, the Employer called evidence from witnesses that were present for discussions to testify about what they saw, what they heard, and their understanding of the content and import of those discussions. That is not hearsay evidence; rather, it is evidence of the witness' direct experience. While an individual may no longer be available to refute the conclusions of witnesses that were present in certain discussions, that does not mean the witness'

evidence is hearsay. In any event, there are aspects of the evidence of Ms. Perreault, Mr. Allen, and Ms. Young that relate to or are consistent with the testimony of the others. The fact that Ms. Watts cannot testify, does not necessarily mean the evidence is uncorroborated.

Turning to the relevant chronology, I note that the P&F Process arose in the aftermath of the job fair. The parties agreed the job fair was problematic and they met to find a “better way”. As a result, the Guidelines were established in 2007 when the parties decided to move away from the job fair and “stick with” the Collective Agreement. Recall, Article E.22.1 in the 2006-2011 Collective Agreement included the sentence “When a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing.” Thus, it included an existing limitation respecting the ability to apply for later postings.

The paragraph in the Guidelines from 2007 to 2014 relating to the P&F Process provided:

Posting and filling will continue as positions become available. Once a teacher has accepted a job during the spring post and fill, he/she can only move to a job of greater FTE than the job previously posted into, or move from a temporary assignment to a continuing one. As a result, a teacher may relinquish the previous position and that job is re-posted

Mr Allen testified that the Guidelines were discussed with members of the Union Executive, including BVTU President Mr. Jordan and, later, Ms. Watts. He confirmed the paragraph noted above reflected the parties’ agreement as to how the P&F Process would work. His evidence was not attributed solely to Ms. Watts and his understanding of the parties’ agreement was not challenged in cross-examination. Ms. Perreault was present for the discussions with Mr. Allen and Ms. Watts. Her evidence was consistent with Mr. Allen’s. Ms. Young, who was Superintendent after Mr. Allen (from 2008-2011), also testified that she met with Ms. Watts about the P&F Process and that the Guidelines were shared and discussed with the Union. She could recall no occasion when the approach described in the Guidelines was not followed.

Ms. Bachman was BVTU Vice-President from 2006 to 2010 and BVTU President from 2010 to 2014. She testified that she understood Article E.22.1 meant a teacher could apply for a later posting if it was continuing, regardless of the FTE. She believed the provision was applied this way because they “did not have any problems”. However, she confirmed that: the parties were using

the Guidelines in 2010 when she was BVTU President; she reviewed them with the Superintendent each year; and, she never raised a concern that they did not reflect the parties' agreement. She also attended meetings with Ms. Perreault when the Guidelines were reviewed with teachers. She did not dispute the fact that, in those meetings, Ms. Perreault explained that once a posting was accepted, a teacher could only move to a position of greater FTE or from a temporary to continuing position.

The Guidelines stated expressly that they were for "information only" and that, in the event of a discrepancy, the Collective Agreement would take precedence. Yet, the Guidelines, on their face, did not permit a move to a subsequent continuing position with less FTE, even though the Collective Agreement in place at the time included the phrase "unless the assignments are continuing". On the evidence, the approach to the P&F Process was clearly identified in the Guidelines, discussed by the parties, and implemented with the involvement and knowledge of the Union on a yearly basis, without complaint. This supports the conclusion that the Union was content with the approach and never raised a concern that it or the Guidelines were inconsistent with the language of Article E.22.1.

Thus, I accept the testimony of the Employer's witnesses that, from 2007 until bargaining in 2013, the parties agreed upon the approach to the P&F Process as reflected in the Guidelines. That is, a teacher could apply to a later posting if it had a greater FTE or involved a move from a temporary to a continuing position. Given there is no specific evidence to the contrary, I also accept that that is how Article E.22.1 was applied.

Ms. Bachman was directly involved in 2013 bargaining and was responsible for drafting the Union's proposal to amend Article E.22.1 by adding the phrase "or will increase his/her FTE for the following year" to the provision. She explained that the proposal was to reflect the current practice and the phrase was not mentioned in the Collective Agreement. She testified that her understanding of the "current practice" was a teacher could apply for a later continuing position (regardless of FTE), but teachers in a temporary position could not apply for a position with less FTE. However, she explained that "continuing" had "always been there and wasn't an issue so we didn't write any more about it". She acknowledged the proposal reflected "some" of what was in the Guidelines and confirmed it was not intended to be a change. The proposal was to reflect what was happening 'as much as she knew'. She confirmed the Union did not advise the Employer it was looking for something different from the Guidelines.

The difficulty with Ms. Bachman's view of the "current practice" and the Union's proposal is that it is at odds with the Employer's consistent evidence about the application of Article E.22.1 and the Guidelines on their face. There is no evidence that the P&F Process was applied as she suggested. Again, her understanding of the practice appears to be based on the fact she received no complaints from teachers. Yet, the Guidelines, which she was aware of and which were reviewed each year, do not only restrict teachers in temporary positions. The restriction that a teacher "can only move to a job of greater FTE than the job previously posted into" is a general one, followed by reference to the ability of a teacher in a temporary assignment to move to a continuing one.

I note the Union's proposal, itself, makes no specific reference to teachers in temporary assignments, nor does it expressly limit the phrase "or will increase his/her FTE for the following year" to teachers in temporary positions. Further, the Union's bargaining notes indicated that the proposal was taken "from the staffing guidelines that we have been operating on. Because there wasn't anything in the CA..." and that "putting this in does bring clarity".

There was some evidence about the last line of the Union's proposal being taken "right out of the Staffing Guidelines". The Employer was not open to adding the last line about re-posting. The Union revised its proposal accordingly and it was signed off by the parties. I do not find much turns on the parties' back and forth over this "last line".

Rather, I find it is clear on the Union's evidence that its proposal was intended to clarify (not alter) the P&F Process and was based, generally, on the Guidelines. The phrase "or will increase his/her FTE for the following year" appears in the Guidelines and was added to the provision by agreement. There is no evidence that the Union sought a change in approach such as the requirement for greater FTE would only apply to teachers in temporary positions. If that had been the Union's intention, one would expect some indication in the proposal or the parties' discussions. Thus, the evidence does not support the finding that the parties shared a mutual intention in 2013 bargaining to alter the application of the term "continuing" in Article E.22.1 or to modify the established approach, as expressly set out in the Guidelines.

Ms. Weiss was BVTU President from 2014 to 2017, after Ms. Bachman. Ms. Weiss testified that she met with Mr. van der Mark, Superintendent at the time, to discuss the P&F Process. There is a stark contrast in the evidence about

their discussion. She also gave evidence respecting the Cheat Sheet and the P&F Chart. Her evidence sharply conflicts with that of Ms. Kingsmill. I will address the specific conflicts below, but note generally that there are several difficulties with Ms. Weiss' evidence and, as a result, I prefer the testimony of the Employer's witnesses.

First, Ms. Weiss maintained that Mr. van der Mark brought the new language in Article E.22.1 to her attention after she became BVTU President. She testified that he explained it was a change and, going forward, teachers in continuing positions could take a later posting, regardless of an increase in FTE. Mr. van der Mark could not recall a specific conversation with Ms. Weiss, but generally denied her account, noting that would have been a "significant departure" from what the District had been doing.

Having considered what is more likely in all of the circumstances, I cannot accept Ms. Weiss' evidence on this point. First, she did not attend 2013 bargaining and has no personal knowledge of the parties' negotiations. Second, her account is inconsistent with Ms. Bachman's evidence and the Union's bargaining notes that the Union's proposal was not a change; rather, it was intended to clarify what was happening (based, at least in part, on the Guidelines). Third, Mr. van der Mark attended 2013 bargaining and his evidence was unshaken respecting the past practice (i.e., there was no circumstance where a teacher could apply for a position of less FTE in a subsequent round) and that the parties intended to clarify the P&F Process, not change it. Finally, Ms. Weiss testified that there were always some teachers who wanted to post into positions with less FTE and the "change" in the Article E.22.1 was a "big deal" that teachers were happy about. However, when pressed, she had no clear recollection of an example of a teacher taking a later posting with less FTE.

I note that the language of the Guidelines changed in 2015. Paragraph 3 read:

Posting and filling will continue as positions become available. When a teacher has applied for and accepted an assignment for the coming year, that teacher will not be eligible to apply for further assignments which are posted unless the assignments are continuing.

This language remained the same in the 2016 and 2017 Guidelines. There was no evidence about how or why this change occurred; nor, was there any evidence that the District's approach to the application of Article E.22.1 changed at this time. However, in 2015, the parties also agreed that a chart

respecting the P&F Process would assist. This leads to the next evidentiary discrepancy.

It is possible that some of the confusion respecting the Cheat Sheet and the P&F Chart may relate to the fact that the documents contain similar content and Ms. Kingsmill acknowledged referring to the P&F Chart as “a cheat sheet”. In any event, Ms. Weiss maintained the Cheat Sheet was created and used by Ms. Kingsmill and did not include the notation “For more FTE only”. Ms. Kingsmill testified that she created the P&F Chart (which always included the reference to “For more FTE only”); the P&F Chart was “built” with Mr. van der Mark and Ms. Weiss to reflect the parties’ practice; and, the Cheat Sheet was created by Ms. Weiss for use by the Union.

In terms of the creation and use of the two documents, I prefer Ms. Kingsmill’s explanation. First, Ms. Kingsmill was able to shed light on the circumstances surrounding their creation. For example, the creation of the P&F Chart mirrored the joint process the parties had used for the Guidelines to clarify the P&F Process. Ms. Kingsmill also explained that the Cheat Sheet was later created because she did not agree that the Union could use the P&F Chart for its purposes. In my view, this provides a reasonable explanation for why two different documents exist. In contrast, Ms. Weiss’ version of events requires the conclusion that the P&F Chart was fabricated.

As an aside, there was an issue raised about whether Ms. Weiss was only shown the P&F Chart or was given a copy of the document. Ms. Kingsmill confirmed she provided a copy of the P&F Chart to Ms. Weiss for use in meetings but then took back the copies. In my view, nothing much turns on that evidence, but it is consistent with Ms. Kingsmill’s position that the Union could not use the P&F Chart for its own purposes.

Further, Ms. Weiss was emailed a copy of the P&F Chart in May 2020, after she had left the District. Mr. McDiarmid (then Superintendent) asked whether this was “the sheet your (sic) remember using when you worked with [Ms. Kingsmill] at staffing time?”. In response, she replied “I had a good look at the post and fill document and yes, that was what we agreed on. It was what I used as my template to answer questions.” Yet, at the hearing, she testified her response was an error as her focus at the time was to obtain a reference letter. In cross-examination, she agreed that she noticed the red check marks in the P&F Chart, but didn’t actually read the document. Given Ms. Weiss’ position on the P&F Chart has changed over time, even with the explanation given, it is difficult to reconcile these inconsistencies.

The Union argues that an adverse inference should be drawn because the Employer did not call Mr. McDiarmid to testify. I do not agree. An adverse inference may be drawn where one party fails to call evidence that would “naturally be expected” – that is, an inference may be made that the “missing evidence” would have been unfavourable to the party that failed to call it (see: *Steele, supra*). However, in my view, there is no missing evidence here. The 2020 emails are in evidence and stand for themselves. Ms. Weiss’ evidence addressed the emails and the phone call that proceeded them. Ms. Kingsmill gave evidence about creating the P&F Chart. While the Employer could have called additional witnesses, a party is not obligated to call every possible witness to corroborate an established fact. Findings of fact are not dependent on the number of witnesses who could potentially be called to testify.

Turning back to the chronology, in 2018, certain employees raised issues with the Employer’s application of Article E.22.1. It should be noted that Ms. Kingsmill’s explanation to those individuals was consistent the Employer’s approach to the P&F Process since 2007 (with the exception of one aspect of one response, which she acknowledged was an error).

Ms. Quanstrom filed the Grievance on June 27, 2018 disputing the fact that teachers in continuing positions were not eligible to apply for later continuing positions. The Employer denied the Grievance. Thus, in 2019 bargaining, the parties understood there was a dispute about the application of the provision. The Employer proposed new language to Article E.22.1 and the parties discussed the issue; it was noted as “a point of contention”. Both parties’ notes show the Employer indicated it wanted clarity and would work with the current language. The Union was not interested in discussing the proposal and, in response, the Employer withdrew it. Article E.22.1 remained the same.

Given these factual findings and considering the extrinsic evidence as a whole, I find that Article E.22.1 is a provision that must be contextually interpreted. This is particularly the case given the history of the parties’ ongoing efforts to gain clarity about the P&F Process after the unsatisfactory job fair. While the language of Article E.22.1 is ambiguous on its face, the extrinsic evidence has offered significant assistance in determining the mutual intention of the parties.

In terms of the past practice, I accept the Employer applied Article E.22.1 in a consistent manner after the parties moved away from the job fair and the 2007 Guidelines were established to when the 2018 Grievance was filed. Indeed,

there is no evidence that the Employer applied Article E.22.1 in a different manner at any time.

Further, the parties engaged in yearly discussions (at least until 2015) that resulted in the Guidelines and, later, the P&F Chart, which were used to explain the P&F Process to teachers in the presence of the Union. This was done for the purposes of achieving clarity for all. While the Guidelines included the reference “for information only”, I accept that the Union was aware of what their content, attended meetings where they were discussed, and raised no objections. This was not as a situation where the Employer acted on its own and the Union had no reasonable way of understanding its interpretation. Given these facts, I find the Union Executive was aware or, at the very least, ought to have been aware of the practice.

The Guidelines and the practice informed bargaining in 2013. The Union proposed new language, but was looking to reflect (not change) the parties’ approach to the P&F Process. This informs the mutual understanding of the existing word “continuing” and puts useful context around the addition of the phrase “or will increase his/her FTE for the following year”. The notion suggested by the Union that the parties agreed the requirement for increased FTE applied only to teachers in temporary positions is inconsistent with the bargaining evidence and the wording of the Union’s proposal.

Further, I note Article E.22.1 has included a limitation respecting eligibility for subsequent postings since, at least, 1992. On the evidence, the parties’ approach after the job fair was to establish a “better way” that involved less disruption while still providing teachers some choice. An approach that limited subsequent applications for teachers in both continuing and temporary assignments, unless a later position would improve a teacher’s position, was consistent and made labour relations sense. There is no evidence that parties wished to chart a different course in 2013.

In the 2019 round, after the interpretive issue had crystallized, the Employer sought clarity in bargaining but was ultimately content to live with the existing language.

Taking all of this into account, the extrinsic evidence supports the conclusion that the term “or” was mutually intended to be inclusive in that it was meant to be applied as “and/or”. Put another way, the terms “continuing” and the phrase “will increase his/her FTE for the following year” are not meant to be exclusive of each other. Rather, the provision applies to all teachers

participating in the P&F Process and there is no basis on which to find the latter phrase was intended only to apply to teachers in temporary positions. As such, Union's interpretation cannot succeed.

The Employer has made an alternative argument that the Collective Agreement should be rectified to change the term "or" to "and". First, that change would not be appropriate given the conclusion that Article E.22.1 allows teachers to apply for subsequent positions that improve their assignment (i.e., because the later position is continuing and/or increases their FTE). The requested change would amount to an amendment of the provision, which would exceed my arbitral mandate.

Second, this is not a case of a drafting mistake. The parties have bargained the existing language and were prepared to live with it, armed with the knowledge that the interpretive issue was contentious and there was the outstanding Grievance. The interpretive issue has now been addressed and no correction of the document is required. In these circumstances, the doctrine of rectification does not apply (see: *Vernon Fruit Union, supra*; *West Fraser Mills, supra*).

Accordingly, the Grievance is dismissed and the Employer's request for rectification is denied.

DATED: this 9th day of May, 2023 in Vancouver, BC.



JULIE NICHOLS, ARBITRATOR