IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BC PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 39 (VANCOUVER)

(the "Employer")

-and-

BC TEACHERS' FEDERATION/ VANCOUVER TEACHERS' FEDERATION

(the "Union")

(Return from Secondment Leave Grievance)

ARBITRATOR:	John B. Hall
APPEARANCES:	Peter A. Csiszar, for the Employer Robyn Trask, Diane Irvine and Kerri Fisher, for the Union
HEARING:	October 9 & 10, 2018 and April 23 & 24, 2019 Vancouver, BC
AWARD:	June 3, 2019

AWARD

I. INTRODUCTION

Every year, a small number of teachers working for the Employer seek secondments as Faculty Associates at either the University of British Columbia ("UBC") or Simon Fraser University ("SFU") pursuant to Article G.21.29 of the parties' Collective Agreement:

> 29. Secondment
>
> Leave of absence due to approved secondment for any reason shall guarantee the employee a return to the same or comparable position and priority shall be given for placement.

Secondments to UBC are typically for the full school year (i.e., September 1 to June 30) and, unless renewed, the teachers return to their positions with the Employer at the beginning of the next school year. In contrast, secondments to SFU are generally for the period September 1 to April 30. The Employer holds the view that returning a seconded teacher to the classroom for the remainder of the school year (that is, for the months of May and June) would be educationally disruptive because the timing does not align with a "natural break". The Employer has accordingly adopted a practice of approving secondments to SFU on condition that the teacher take personal leave without pay for the remaining two months of the school year. It also allows teachers to go on the regular Teacher Teaching on Call ("TTOC") list once their secondments end if they do not want to take personal leave. The practice has been followed by the Employer for many years. However, it has never been documented, and the Union contends it had no knowledge of how the Employer was applying Article G.21.29 to partial year secondments until the events giving rise to the present dispute.

The grievance raises a number of issues respecting the interpretation of the secondment language. The Union maintains that teachers must be returned to "the same

or comparable position" when the secondment to SFU ends. For purposes of this grievance only, and the limited circumstances of teachers returning from secondment part-way through the school year, the Union is willing to accept a permanent TTOC position as comparable.

The Employer emphasizes the requirement for secondments to be "approved" and submits it is entitled to offer a teacher personal leave for the two months as a condition of granting the leave. The Employer says additionally that the entire period of the leave (i.e., September 1 to June 30) constitutes the secondment, such that a teacher is returned through the spring transfer process to the same position in accordance with Article G.21.29 at the beginning of the next school year.

Both parties rely on the plain wording of the Collective Agreement provision in issue. The Employer additionally points to its lengthy practice without objection from the Union as an aid to interpretation.

There is also an issue related to the scope of the grievance. More particularly, the grievance was filed after an elementary teacher seconded to SFU, Diana Cantor (the "Grievor"), brought her situation to the attention of the Vancouver Elementary School Teachers' Association ("VESTA") and sought its assistance. The Union now seeks at arbitration various forms of relief on behalf of "all affected teachers" back to the date that the grievance was filed. This includes not only other elementary teachers represented by VESTA but also secondary teachers represented by the Vancouver Secondary Teachers' Association ("VSTA"). The Employer submits that the grievance should be confined to the Grievor's individual circumstances.

II. BACKGROUND

The facts necessary to address the parties' legal arguments can be recorded in relatively brief terms.

The Union is certified to represent all teachers in Vancouver, although the VSTA and VESTA are recognized as autonomous locals by the British Columbia Teachers' Federation. While they operate "very separately" on a day-to-day basis according to the evidence at arbitration, there are a number of joint committees. The two Associations typically copy each other when grievances are filed (as occurred here), and meet jointly to discuss issues that impact both teacher groups.

The Grievor has a full-time continuing contract with the Employer. She applied in 2014 to work as a Faculty Associate with SFU because she was interested in doing more professional development and working with student teachers. She was aware of curriculum changes at SFU including Indigenous education and more special education. She also wanted to personally challenge herself and return to the District and contribute to her profession. The Grievor was offered and accepted a position for September 1, 2015 to April 30, 2016.

The Grievor began making inquiries of both the Employer and VESTA in March of 2015, as well as contacting other teachers, regarding what she could do during May and June of 2016 after her employment with SFU ended. She hoped to be given "priority call out" as a permanent TTOC during those months, but learned she could only be placed on the regular TTOC list. The evidence indicates that permanent TTOCs have the same pay and benefits as continuing teachers and are guaranteed work, while regular TTOCs are paid at a lower rate and are not guaranteed work.

The Grievor received a letter from the Employer on April 8, 2015 advising that her leave had been granted. The letter identified "Secondment Leave" for September 1 to April 30, 2016 and "Personal Leave Without Pay" for May 1, 2016 to June 30, 2016. The Grievor testified that she had not asked for a personal leave and was "very, very upset and worried" about how this would affect her financial situation. As events ultimately unfolded, the Grievor did go on the regular TTOC list for the two months but her overall income was reduced significantly from what she would have earned in her

continuing position. She additionally had to purchase benefit coverage which cost about $550 and there was a negative impact on her pension contributions. Despite these consequences, the Grievor accepted another secondment with SFU for September 1, 2016 to April 30, 2017 because the first appointment had been "a very rich and valuable personal development" and being able to support younger teachers was "an incredible experience".

More generally, the Employer does not contest the Union's view that secondment leaves are an important negotiated benefit for teachers. They provide teachers with the opportunity to enrich their work experiences and gain knowledge and experience in the most current educational practices and theories. At the same time, these teachers are contributing to the teaching profession by mentoring and educating new teachers. Further, the Employer benefits from secondments through the expertise developed by returning teachers and through the role of seconded teachers as representatives of the employer which attracts new teachers to the District.

The Grievor acknowledged in cross-examination that she knew secondment to SFU required the Employer's prior approval. She also knew before beginning both secondments that she would have the option of taking personal leave or being placed on the regular TTOC list for the final two months of the school year. Further, she could have rejected the terms of the secondments approved by the Employer but chose instead to proceed with both of the appointments. She additionally agreed that she was not "forced" to take personal leave as part of the secondment.

Ms. Chloe McKnight is the current VESTA President. She began working full-time in the VESTA office during the 2014-2015 school year when she was the Second Vice-President. Ms. McKnight testified that the Union first became aware that teachers were having issues with personal leave being attached to secondments when the Grievor contacted the VESTA office in March of 2015. The Union began looking into the situation and brought the subject up at a labour/management meeting in May of 2015 in order to seek clarification of the Employer's practice. Once the Employer's position was

known, Ms. McKnight stated the Union moved forward with its "usual process" doing research and eventually filing a grievance at Step 3 in January 2016. No timeliness objection was raised by the Employer, and the Union requested additional information regarding how teachers are paid while on secondment.

The Employer provides the Union with a list of teachers who are on various forms of leave two or three times a year. One of the categories is secondment (recorded as SEC) and the list includes the start and end dates of the leave. The Union's staff uses the lists to keep its database up to date. Ms. McKnight stated that the Union would not know from this list whether a teacher had returned to work at the end of the secondment, and would not know the teacher was on personal leave unless the teacher advised the Union. The Employer does not copy the Union on any of the correspondence it sends to teachers regarding the terms of their secondments.

The current VSTA President is Katherine Shipley. She was seconded to SFU as an Associate in the Faculty of Education during the 2009-2010 and 2010-2011 school years. Ms. Shipley was placed on personal leave for May and June during both years pursuant to the Employer's practice. A letter she wrote to the Employer in March 2010 recorded her understanding that "I will be able to TOC for the months of May and June as my contract at SFU only goes until the end of April". Ms. Shipley became a Member at Large on the VSTA Executive during the 2014-2015 school year and has had some role with the Union since 2011. She did not testify at the arbitration.

Ms. Carmen Batista is now the Associate Superintendent – Employee Services with the Employer. She has been responsible since 2011 for approving various forms of leave for teachers, including secondments. It was her testimony that approval of the Grievor's request was consistent with the approach the Employer has taken since 2011 to leave requests for less than one school year. Further, when she became responsible for approving leaves, she consulted with a Leave Clerk who had over 20 years' experience, and was told that personal leave is "usually attached [to secondments] to get the full year". The Employer tendered documents regarding numerous secondments to SFU over

the years which included personal leave for the remainder of the school year. The earliest example was from 1991.

Ms. Batista was directed in cross-examination to letters the Employer has sent to SFU which refer to a "Board policy". She agreed the Employer does not have a written policy and described its approach as "a practice".

Although teachers on partial year secondment are placed on unpaid personal leave for the remainder of the school year, Ms. Batista explained that the Employer is prepared to put them on the regular TTOC list if requested by the teacher. All such requests since 2011 have been approved. Some teachers take advantage of the personal leave and the Employer "does not hear from them" until the next school year.

Certain leave requests for less than a full school year will be approved by the Employer if they begin and end on a "natural break" (e.g., from September 1 to December 31). In other situations, the Employer will work with the institution to arrange a leave period that is "educationally sound" having regard to the impact on student reporting, parent/teacher conferences and other considerations. For example, one secondment request from SFU in 2017 was for the period November 27, 2017 to June 30, 2018. Ms. Batista spoke with the University and a revised request for January 1, 2018 to June 30, 2018 was approved. Ms. Batista testified that the original request would not have been approved. She also stated that she needs to look at the impact on the school and students where a leave request does not align with a natural break, and that requests are considered on a "case-by-case" basis.

III. HISTORY OF THE GRIEVANCE

The Grievor initially contacted the Union in March of 2015 regarding the circumstances surrounding her first secondment leave. The subject of Secondment Leave Duration was discussed at a Teachers' Personnel and Staffing Advisory Committee

meeting held on May 25, 2015. The Union was informed by the Employer that teachers who return at the end of April can be put on the TOC list or take personal leave until the end of the school year. Although the present Step 3 grievance was not filed until January 21, 2016 the Employer has not advanced a timeliness objection. The remedies sought in the grievance included clearing "the Grievor's personal file of all related correspondence" and making "the Grievor whole". There is no dispute that these were references to Ms. Cantor.

A Step 3 meeting was held on February 9, 2016 and the Employer provided its response on November 8, 2016:

> This letter is in response to a Step 3 grievance meeting held on February 09, 2016. In attendance at that meeting was Carmen Batista, Senior Manager - Staffing, Floraza Cardoso, Employee Relations Advisor and Chloe McKnight, Vice President, VESTA.
>
> When an employee is seconded to another organization for less than one school year an employee is granted a personal leave for the month(s) after the secondment ends. Employees are welcome to work as Teachers On Call (TTOC). This practice has been in place for over 20 years.
>
> The union contends that the employee, if the employee's requests, should be guaranteed work and offered the position of permanent TTOC after the secondment ends.
>
> The employer can offer work as a TTOC but cannot guarantee work or offer the position of permanent TTOC.

The grievance was referred to arbitration through a letter from BCTF Legal Counsel on February 15, 2017. The letter captioned VESTA (there was no reference to VSTA) and alleged how the Employer had breached the Collective Agreement in "[i]n this Vancouver Elementary School Teachers' Association case". The remedies sought included "… an order that *any affected teachers*, including Diana Cantor, be made whole" (italics added).

The Union provided particulars of its case by letter dated August 10, 2018 which again listed VESTA but not VSTA in the caption. The letter detailed the Grievor's circumstances but also spoke more broadly to "[t]eachers whose secondment is unilaterally changed to personal leave by the employer". The remedy identified included "an order that all affected teachers be made whole".

The Employer provided its particulars in response by letter dated September 19, 2018. The letter set out its position in some detail and explained the "long-standing practice". No issue was taken over the scope of the Union's referral to arbitration.

The Union's opening statement at arbitration began by stating: "This case concerns the right of teachers in the Vancouver Teachers' Federation … to return to the same or a comparable position following an approved secondment …" (para. 1). The remedies sought included "compensation to make the affected grievors whole" (para. 60). It became clear in the course of the proceeding that the Union was seeking remedies on behalf of both elementary teachers represented by VESTA and secondary teachers represented by VSTA. The Employer objects, and submits the grievance must be confined to the Grievor's circumstances.

IV. ANALYSIS

The parties' arguments raise a number of questions regarding the interpretation of Article G.21.29 which is the only Collective Agreement provision governing secondment. One of those questions is whether the Employer's longstanding practice can be used to support its position.

The rules surrounding the use of extrinsic evidence generally were confirmed by the Labour Relations Board in *Nanaimo Times Ltd.*, [1994] BCLRBD No. 40. The specific use of past practice as an aid to interpretation has long been governed by the "strict limitations" articulated in *John Bertram & Sons Co. and International Association*

of Machinists, Local 1740, (1967) 18 LAC 362 (P.C. Weiler). Past practice may also be used to found an estoppel; however, that alternative plea was abandoned by the Employer in final argument in order to allow an interpretation of Article G.21.29 on the merits.

The *John Bertram* requirements cannot be satisfied in the present case. Leaving aside whether the Union knew, or ought to have known, of the Employer's practice regarding partial school year secondments, the language here does not admit of any ambiguity. That is, there is unquestionably a "clear preponderance" in favour of one meaning to be given to the words now in dispute. And, as stated more broadly by the Labour Relations Board in *City of Kamloops*, [1994] BCLRBD No. 140, where the language of a collective agreement is unambiguous, extrinsic evidence cannot be used to alter the meaning of its terms. See also *City of Cranbrook*, [2001] BCLRBD No. 294, at para. 68.

This brings me to the Employer's central defence to the grievance and, more specifically, the reference in Article G.21.29 to "*approved* secondment" (italics added). Subject to certain limitations, the Employer submits that secondment leave is discretionary and that "any conditions" it wishes to attach may be part of that discretion. This includes personal leave where a secondment is less than a full school year because such secondments would not otherwise be granted due to the adverse educational impact of a teacher returning to the classroom outside of a "natural break" in the year. The Employer denies that it has "forced" teachers to accept personal leave as part of a secondment (although it allows that the letters it has sent them could have been clearer), and says it is implicit that a teacher has the choice of whether to accept a secondment with associated personal leave.

The limits which the Employer accepts on the exercise of this discretion include the requirements that it not act for an improper purpose, in bad faith or in an arbitrary or discriminatory manner: *National Arts Centre and P.S.A.C., Local 70291* (1996), 55 LAC (4th) 418 (Roach), at paras 34 and 41. It also cites *Canadian Union of Postal Workers and Canada Post Corp.*, [1999] C.L.A.D No. 547 (Freedman), where the collective

agreement article contained a leave entitlement but was silent on when the leave could be taken. The arbitrator adopted the phrase "operational requirements" as a "good proxy for an approach [to] considering applications" (para. 52), and read the article "as having implicit in it some element of management judgement or discretion, which must at all times be fairly and reasonably applied" (para. 56).

It is not necessary on the present facts to determine whether the potential impact on the delivery of educational services occasioned by a teacher returning to the classroom at other than "natural breaks" in the school year is a sufficient basis to deny a secondment request. Various provisions in the Collective Agreement certainly lend support to the Employer's assertion. For instance, under Article G.21.26, personal leave without pay for less than one year is restricted to certain terms and at various times during the year (the options include a term of three (3) months from January 1 to March 31, or a term of six (6) months from January 1 to June 30). When teachers return from long term sick leave under Article G.20.4.6 at the beginning of the school year, they have the right to return to "the same or comparable position" at the same worksite; however, when teachers return during the school year, they "will be provided a position within the district" but not necessarily at the same worksite. I will not explore the point more fully because this debate (i.e., the Employer's concern over adverse educational impact) must await the appropriate context. The point was expressly not conceded by the Union and, moreover, it maintained the question of whether the Employer can deny leave requests because of the proposed dates is outside the scope of the immediate grievance.

What can be properly said in this proceeding about the nature of the Employer's discretion is that it must be exercised on a case-by-case basis. The need to determine each leave request on its own facts was identified in *Canada Post* at paragraph 55. Absent extenuating circumstances, a blanket policy denying discretionary leaves without considering the merits of the requests is not reasonable: *British Columbia Public School Employers' Association (on behalf of School District No. 36 (Surrey)) –and- British Columbia Teachers' Federation (on behalf of Surrey Teachers' Association) (Leaves of Absence Grievances)*, (unreported) November 15, 2011 (Holden), at pp. 19-20. On the

other hand, an employer may develop general guidelines for the exercise of a contractual discretion. As explained more fully in *Ontario Public Service Employees Union -and- Centre for Addiction and Mental Health*, [1998] OLAA No. 751 (Adams):

> However, it should also be observed that a general discretion to grant a leave of absence does not preclude the decision-maker from developing general guidelines for the exercise of that discretion provided that the principles or guidelines are not "cast in stone" and are consistent with the purpose and nature of a leave of absence. … In short, any purported policy must leave room for an honest assessment of each case, and must itself effect a reasonable disposition of the class of cases for which it was devised. … There is also the need for the employer to engage in a decision-making process which balances the employee's interest against its own needs. Moreover, an employer may not choose its own interests simply because of a cost inherent in the granting of any leave of absence. … (para. 46; case citations omitted)

Although Employer counsel suggested in argument that secondments for less than a school year will simply not be granted, Ms. Batista stated that requests are considered on a "case-by-case" basis. Further, the evidence indicates that the Employer will "work with" an institution to arrange a mutually acceptable secondment period where possible.

Another generally recognized limitation on managerial discretion is that it must be exercised in a manner consistent with terms of the collective agreement. The restriction finds express recognition in Article A.20 which provides:

> Article A.20: MANAGEMENT RIGHTS
>
> The right to manage and operate the school system, and to organize and maintain the efficiency of employees, is the function and responsibility solely of the Board, *subject to the terms and conditions of this Agreement*. All rights and responsibilities concerning the operation of the Board's business not specifically restricted herein shall be reserved to the Board and be its sole responsibility. (italics added)

The same restriction applies to "residual management rights". That is, an employer may act unilaterally on matters not covered by the collective agreement, but will be precluded where the collective agreement "occupies the field": *Canadian*

Broadcasting Corp. -and- Communications, Energy and Paperworkers Union of Canada (2002), 112 LAC (4th) 353 (Knopf). The employer in *CBC* had implemented a policy allowing employees to buy back or cash out the value of their vacation entitlement due to a concern over an accumulating liability for unused vacations. There were two issues: whether the policy violated the annual leave provisions in article 42 of the collective agreement or whether the agreement allowed for the buying and selling of annual leave entitlements; and second, whether the policy and its implementation amounted to a violation of the union's recognition clause and the employer's responsibility to deal directly and exclusively with the union rather than individual employees. Arbitrator Knopf summarized the governing principles:

> The parties do not disagree about the general principles governing this grievance. They have been ably and fairly summarized in the *Long Manufacturing* case [(1997), 63 LAC (4th) 35 (Barton), at pp. 43 and following] and therefore shall not be repeated here. An individual's control over his/her terms or conditions of employment is determined by the collective agreement. Basically, the only ability of an individual to bargain or alter terms or conditions of employment is what, if anything, is allowed specifically in a collective agreement. Further, an employer cannot unilaterally change terms and conditions of employment or act contrary to the collective agreement. However, residual management rights do allow employers to act unilaterally on matters *that are not covered by a collective agreement* … (para. 27; italics added)

In the *Long Manufacturing* award, the employer's initiative was actually more favourable to employees than the collective agreement's existing terms, but it nonetheless contravened the contract (see *CBC*, at para. 30).

The question in *CBC* was whether the collective agreement had "occupied the field" respecting the buying back of annual leave credits or whether it was silent on the matter. The employer argued there was nothing specific which precluded it from allowing employees to buy back the credits. Arbitrator Knopf agreed, but found other articles where the parties had agreed earned leave time could be bought or sold. The parties were sophisticated with a long history of collective bargaining, and she concluded it must be presumed that they would have included language if the same was intended for

accrued vacation time. Further, a back to work protocol negotiated some years earlier had made specific provision for cashing out annual leave. She reasoned:

> By allowing for this pay-out of annual leave in a specific, time limited situation in 1999, it must be concluded that these parties recognized that the collective agreement did not allow for pay-out in other situations. Further, by specifying how accrued leave can be cashed out in three specific instances in the collective agreement, it must be assumed that the parties intended the cash-outs to be limited to those three instances. Accordingly, accepting the Employer's argument would effectively amend or expand the provisions of Articles 42 and 49. It cannot be accepted that an additional opportunity to cash out annual leave falls outside the collective agreement. Where there are specific and detailed articles in the collective agreement that deal specifically with the concept of cash-out of annual leave already, it must be concluded that that field has been occupied. The Annual Leave Policy here purporting to allow the cash-out of annual leave goes beyond the collective agreement provisions when it offers to buy back annual leave in situations not already allowed by the collective agreement. If Articles 42.5, 49.2 and 11 did not exist, management's arguments may have prevailed in this case. But the existence of those provisions militates against acceptance of the Corporation's position. In other words, the collective agreement addresses and occupies the field of when and/or in what circumstances annual leave can be cashed out. Any variation or expansion of this can only be negotiated with the Union as was done in the back-to-back Protocol in 1999.
>
> Management has also strenuously argued that it retains and can exercise all residual rights that are not expressly restricted by the collective agreement. This is a powerful and important argument given that nothing in the collective agreement specifically contradicts management's Policy in this case. However, the management rights clause is not as helpful to the Corporation's position as the argument would suggest. Article 63 sets out an inclusive list of management right and concludes with Article 63.3. Article 63.3 simply provides that management rights "will not be exercised in a manner inconsistent with the provisions of [the] agreement". Therefore, management may not exercise its residual rights in a manner inconsistent with the collective agreement as a whole. … (paras. 36-37)

How do all of the arbitral statements above apply to the immediate facts? Subject to the limitations identified, I accept that the Employer has a discretion to approve secondments subject to conditions which may take into account is own interests and

concerns such as negative consequences for the delivery of educational programs. In addition to considering secondment requests and determining what conditions might be appropriate on a case-by-case basis, the Employer must ensure the conditions align with the Collective Agreement.

There is nothing in the Collective Agreement which permits the Employer to unilaterally place employees on personal leave without pay. The personal leave provisions in Article G.21.26 are all premised on the teacher applying for the leave (see Articles G.21.26(a) through (c) which set out the various durations of the leaves). The award by Arbitrator Adams in *OPSEU* stands for the proposition that an employer always has the discretion to *grant* an employee an unpaid leave of absence (para. 45). However, I have not been directed to any authority which allows an employer to *require* an employee to take a leave without pay and, in any event, the Employer rejects the Union's contention that teachers have been "forced" to accept the personal leave as part of a secondment.

The reality is that the present circumstances fall somewhere between teachers requesting personal leave as apart of a partial school year secondment and the Employer requiring the leave. The Grievor did not ask for personal leave and knew she could reject the terms put forward by the Employer -- albeit by foregoing the SFU secondment. Accepting the Employer's position at face value, a teacher can decline the personal leave; however, the likely consequence is that the secondment will not be approved.

What can be said with certainty is that teachers appointed as Faculty Associates at SFU have not applied for personal leave following their partial year secondments. In this regard, I find the Collective Agreement has "occupied the field" on the subject of personal leave, and that the overall arrangement proposed by the Employer for partial year secondments does not accord with those terms. Nothing in Article G.21.26 allows for a personal leave from May 1 to June 30. As such, the leave granted to the Grievor (and many other teachers over the years) was inconsistent with the Collective Agreement and constituted an impermissible agreement with an individual employee.

To be clear, the Employer is not obliged to "negotiate" the conditions of a secondment leave with the Union. It retains the right to unilaterally attach conditions to the exercise of its discretion (subject to the limitations recorded above), and to not approve a secondment request if the conditions are not acceptable to the teacher. But where the conditions do not align with the Collective Agreement, the Union must be part of the process in accordance with its status as the exclusive bargaining representative under Article A.2 of the Collective Agreement.

There is a further, and more fundamental, reason why a personal leave cannot be made a condition of a partial year secondment for the period after a teacher's employment with SFU (or with any other institution) absent the Union's concurrence. The reason flows from the true nature of a secondment and Article G.21.29 itself.

The proverbial lynchpin of the Employer's position is that the discretionary leave being approved under Article G.21.29 for a teacher seconded to SFU is for the period September 1 through June 30; that is, for the entire school year. It says the months of May and June on personal leave are part of the "secondment leave" which ends on June 30 in the same manner as a full year secondment to UBC. A teacher who was seconded to SFU has the same priority in the spring transfer process as a teacher who was seconded to UBC, and thus both return to "the same or comparable position" in accordance with the Collective Agreement.

I find this characterization of the leave does not align with the many approval documents prepared over the years by the Employer. Nor does it accord with the Collective Agreement and the ordinary meaning of the word "secondment". The *Concise Oxford Dictionary* defines the verb "second" as meaning to "temporarily transfer (a worker) to another position". The online version of the same reference defines "secondment" as "the temporary transfer of an official or worker to another position or employment". The various documents associated with the Grievor's secondment to SFU reflect the ordinary meaning of the word. The letter she received from the University

advised of a recommendation to appoint her as a full-time Faculty Associate "for the period September 1, 2015 to April 30, 2016". The letter the Employer received from SFU requesting approval "of this secondment" was for the same period. The Employer granted the Grievor leave in this manner (italics added):

> We have received a letter from … the SFU Faculty of Education requesting your secondment to serve as a full-time Faculty Associate during the 2015/2016 school year.
>
> Leave for this purpose is hereby *granted on the following basis*:
>
> September 1, 2015 to and including April 30, 2016 – *Loan/Secondment Leave*
> May 1 to and including June 30, 2016 – *Personal Leave Without Pay*

Letters sent by the Employer to numerous other teachers over the years have expressed a similar demarcation during the school year; namely, "Secondment Leave" followed by "Personal Leave Without Pay".

In practical terms, it cannot be said that the Grievor remained on secondment once she was no longer working for SFU as a Faculty Associate. As a matter of Collective Agreement interpretation, her leave under Article G.21.29 concluded at the same time and she was no longer a teacher on "[l]eave of absence *due to* approved secondment" (italics added). This triggered her contractual right to return to the same or a comparable position at the beginning of May -- absent some other arrangement acceptable to the Grievor and her bargaining representative.

As the Union argues, return to work at the conclusion of an approved leave is a vital employment protection in the Collective Agreement. The protection addresses not only employment status, but also other negotiated terms including salary and benefits. The Employer's practice has imposed a condition which does not exist in the Collective Agreement, and precludes teachers on partial year secondments from returning to their positions until the following school year. Article G.21.29 can be contrasted with Article G.21.25 respecting parenthood leave without pay. Teachers are "guaranteed a return to

the same position or a comparable one", but the request to return to active duty must be for "the beginning of a new term or semester". There is no equivalent language in Article G.21.29 restricting returns from secondment leave.

This brings me to the Union's position that a comparable position in the circumstances is appointment as a permanent TTOC. The Union says it is "willing to accept" a permanent TTOC position as comparable for "the purposes of this grievance only" (written argument at para. 63), and notes the Employer has in the past placed teachers returning to work on long term or permanent TTOC assignments with the Union's agreement.

What the parties may have done previously by agreement does not assist the interpretative exercise at hand. The phrase "the same or comparable position", or some variation, is used in several provisions of this Collective Agreement. Where parties use the same words in their agreement, they are presumed to have intended the same meaning. Neither party can "pick and choose" the meaning which should apply in particular circumstances in order to achieve a desired outcome. I accept the Union's arguments that permanent TTOCs have greater rights than regular TTOCs, and that they are continuing teachers who are paid at the applicable scale rate and are entitled to benefits. Nonetheless, it simply cannot be said on the evidence before me that a permanent TTOC assignment for two months is comparable to the position of a continuing classroom teacher.

Before considering what remedial consequences might flow from the foregoing determinations, it is necessary to resolve the permissible scope of the Union's grievance. As recorded above, the Employer submits it must be confined to the Grievor's circumstances. I agree the grievance was filed initially on her behalf given its explicit wording. However, during the course of the grievance procedure, the Union requested information from the Employer regarding past practice related to secondment leaves. It learned the Employer's practice (referred to at the time as a "policy") had affected other teachers. The referral to arbitration plainly sought remedies for "any affected teachers,

including [the Grievor]" as did the Union's subsequent particulars. In the absence of any objection from the Employer at the time to the scope of my appointment, I find the grievance was permissibly expanded to include other elementary teachers represented by VESTA.

The same cannot be said regarding the Union's belated attempt at arbitration to include secondary teachers and the VSTA. The latter representative was not identified on any of the grievance correspondence, and the referral to arbitration expressly described the grievance as a "Vancouver Elementary School Teachers' Association case". The Employer's jurisdictional objection is upheld to his extent.

V. DISPOSITION

The Employer opened its case at arbitration with the caution to "be careful what you wish for" in response to the Union's position that personal leave cannot be made a condition of approving Article G.21.29 secondment leave. Assuming, without deciding, that returning teachers to the classroom after a partial school year secondment would be educationally disruptive, the Employer's practice has been a seemingly workable solution which has facilitated numerous secondments to SFU over the years. The practice has been in place for at least two decades without any apparent objection. Some teachers have taken advantage of the personal leave and not returned to the District until the following school year. Others have accepted the Employer's willingness to place them on the regular TTOC list once their secondments have ended -- something which the Employer was not contractually required to offer.

Nevertheless, for reasons explained in this award, I have found that the practice does not accord with the Collective Agreement and has violated the Union's role as the exclusive bargaining representative for teachers. Declarations to that effect are hereby issued. By agreement, I reserve jurisdiction to address any differences which may arise

respecting implementation, including any additional relief which might potentially result from my determinations.

DATED and effective at Vancouver, British Columbia on June 3, 2019.

JOHN B. HALL
Arbitrator