



**YUKON TEACHERS LABOUR RELATIONS BOARD
COMMISSION DES RELATIONS DE TRAVAIL
DU PERSONNEL ENSEIGNANT DU YUKON**

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Reference No. No de référence
369-YG-7

December 19, 2011

Mr. Peter Shklanka
Kestrel Workplace Legal Counsel LLP
2695 Granville Street
Suite 206
Vancouver BC V6H 3H4

Ms. Rosemary Tait
Acting Director, Staff Relations
Yukon Public Service Commission
Box 2703
Whitehorse YT Y1A 2C6

Dear Mr. Shklanka:

Dear Ms. Tait:

Re: Reference to Adjudication – Policy Grievance
Before: Joan M. Gordon
Date of decision: December 19, 2011

Enclosed is a copy of the decision concerning the above-cited matter.

Yours truly,

Handwritten signature of Lisa Woodstock in cursive.
Lisa Woodstock
Manager, Case Management Services
(613) 990-1753

Encl.

c.c.: D. Rody
S. Schorr
A. Kinsey-Jansen

LW/slm

YPSLRB File 369-YG-7



*Yukon Education
Labour Relations Act*

Before an adjudicator

BETWEEN

YUKON TEACHERS' ASSOCIATION
Bargaining Agent

and

GOVERNMENT OF THE YUKON
Employer

Indexed as

Yukon Teachers' Association v. Government of the Yukon

Re: Policy grievance - severance pay for acting principals on retirement or resignation

REASONS FOR DECISION

Before: Joan M. Gordon, adjudicator

For the Bargaining Agent: Peter Shklanka

For the Employer: Stephanie Schorr

Heard at Whitehorse, Yukon
October 17 and 18, 2011

I. Introduction

[1] At issue in this policy grievance is whether administrative or supervisory allowances are included in the calculation of severance pay when a teacher appointed to act in the absence of a principal or vice-principal ("acting principal") retires or resigns. The parties agreed I am properly constituted and have jurisdiction to hear and determine the issues in dispute.

[2] The resolution of this dispute involves the interpretation of the language in the collective agreement between the Yukon Teachers' Association ("YTA" or "Association") and the Government of Yukon ("the Employer"), expiry date June 30, 2009 ("the collective agreement"), most particularly clauses 2.01(g), 28.03(a) and 14.05(a), which provide as follows:

2.01 For the purpose of this Agreement:

...

- g) "Daily rate of pay" means an employee's daily rate calculated on the basis of five (5) divided by 950 hours times the employee's basic salary plus administrative or supervisory allowances, according to Appendix "A", "B", or "C".*

...

28.03 Severance Pay on Retirement

- a) On termination of employment, an employee who retires and is eligible for an immediate annuity or immediate allowance as defined under the Public Service Superannuation Act ... shall be paid severance pay equal to the product obtained by multiplying five (5) times the equivalent of the full-time daily rate, by the number of full-time completed years of employment to a maximum of thirty-five (35) years, less any period in respect of which the severance pay was granted....*

...

14.05 Acting Pay

- a) A teacher appointed by the Superintendent to act in the absence of a Principal or Vice-Principal in excess of three (3) cumulative instructional days per school year shall be entitled to receive a daily allowance from the*

time of appointment to the termination of the acting appointment in accordance with Appendix "A", Schedule II. Acting appointments will not be made for periods of less than one-half (1/2) of an instructional day.

[Emphasis added]

[3] The YTA's position is that severance pay for teachers who are acting principals on their date of retirement or resignation must be calculated using the "daily rate" formula under clause 28.03(a), which is expressly defined under clause 2.01(g) to include both the employee's "basic salary" plus "administrative or supervisory allowances" associated with their performance of additional or special duties as specified in Appendices "A", "B" and "C". The YTA says the collective agreement expresses that entitlement in clear and unambiguous terms and does not involve, as the Employer claims, any consideration of the teacher's employment status or substantive position.

[4] The Employer's position is that severance pay is a reward for the permanent or indeterminate position into which the employee was hired. The Employer says an employee's status is inherently included in the concept of "an employee's daily rate" of pay under clause 2.01(g), and maintains that, when teachers are appointed to acting principal positions under clause 14.05, they are entitled to receive their teacher's salary plus acting pay, which is a concept distinct from administrative or supervisory allowances. As acting principals were not hired into indeterminate principal positions, their "daily rate" of pay is not affected by their acting pay for purposes of calculating severance pay. The Employer contends that the collective agreement is clear and unambiguous in this regard.

[5] Alternatively, the Employer asserts that if the collective agreement language is found to be ambiguous, its interpretation is supported by the extrinsic evidence presented in its case. The YTA strenuously objects to the admission or consideration of any of the extrinsic evidence, arguing that it fails to disclose any ambiguity, is irrelevant and self-serving, fails to establish any meeting of the minds involving the application of the collective agreement to the circumstances of this dispute, or should be given no weight.

II. Collective agreement provisions

[6] In addition to clauses 2.01(g), 14.05(a) and 28.03(a), the following provisions of the collective agreement were either referred to or bear consideration in resolving the issue in dispute:

...

2.01 For the purpose of this Agreement:

...

- d) "Biweekly Rate of Pay" means a permanent employee's annual salary and any applicable allowances divided by 26.000. The biweekly rate of pay for a temporary employee shall mean that employee's annual salary and any applicable allowances divided by 22.000.

...

ARTICLE 14 **PAYMENT OF SALARIES**

- 14.01 a) Employees shall be paid a salary for services rendered in accordance with the appropriate Appendix calculated on a biweekly rate of pay basis.
- b) A teacher appointed to a position which required the performance of special or additional duties, as designated in Appendix "A", Schedule II, shall receive an allowance in accordance with Schedule II, calculated on a biweekly rate of pay basis, in addition to the salary referred to in 14.01(a) above.

...

14.04 Pay Periods

...

- (b) All permanent employees shall be paid the balance of their salary, less one pay cheque on the last payday which falls within the school year. The final pay cheque less any necessary deductions shall be paid on the following scheduled payday.

14.05 Acting Pay

...

- b) The daily allowance mentioned in 14.05(a) above, shall be calculated by dividing the allowance to be paid in accordance with Appendix "A", Schedule II, by the number of instructional hours per day divided by

950 hours for each day the employee has acted, provided the employee has acted in excess of three (3) instructional days.

...

ARTICLE 20
SICK LEAVE

...

20.04 Pre-Retirement Leave

- i) *An employee who retires from the Public Service and who is eligible for an immediate annuity or an immediate allowance as defined under the Public Service Superannuation Act ... may convert up to a maximum of thirty-three and one-third percent (33 1/3%) of the total earned but unused sick leave credits, to a maximum of three-hundred (300) hours, to be paid pre-retirement leave. Such pre-retirement leave shall be taken during the period immediately prior to the employee's effective date of retirement. An employee may elect to receive an equivalent cash payout in lieu of pre-retirement leave. An employee will be permitted to take a combination of pre-retirement leave and monetary payment, as long as this does not result in disruption to the teaching cycle.*

- ii) *The hourly rate of pay for pre-retirement leave or payout in lieu will be calculated on the basis of one (1) divided by 950 hours times the full-time equivalent of the employee's basic salary and administrative or supervisory allowances, according to Appendix "A", "B", or "C" as appropriate.*

...

ARTICLE 28
SEVERANCE PAY

...

28.02 Severance Pay on Resignation

- a) *Upon resignation, an employee who has five (5) or more years of continuous employment is entitled to be paid by the employer severance pay equal to the product obtained by multiplying the employee's full-time equivalent of daily rate by 2.5 by the number of full-time equivalent completed continuous years of employment to a maximum of thirty-five (35) years....*

28.03 Severance Pay on Retirement

...

- b) The periods for which severance pay is payable under this clause shall not include periods of employment terminated by rejection on probation or dismissal for cause, and shall not include periods of employment separated by more than five (5) years during which the employee was not employed with the employer. Notwithstanding the foregoing, and for greater clarity, this benefit does not apply to periods of employment as a temporary employee outside the bargaining unit, unless that service is continuous and contiguous with subsequent service in the bargaining unit.

...

Appendix "A" Schedule I

Teacher Pay Grid Effective March 1, 2009 1.2% Increase to Salaries and Grids (Annual and Bi-weekly Rates)				
Years of experience	Category IV	Category V	Category V Plus	Category VI
0	57,398	61,767	62,819	63,870
biweekly	2,207.62	2,375.65	2,416.12	2,456.54
1	60,097	64,519	65,590	66,660
biweekly	2,311.42	2,481.50	2,522.69	2,563.85
2	62,800	67,252	68,347	69,442
biweekly	2,415.38	2,586.62	2,628.73	2,670.85
3	65,502	69,999	71,116	72,233
biweekly	2,519.31	2,692.27	2,735.23	2,778.19
4	68,206	72,747	73,882	75,081
biweekly	2,623.31	2,797.96	2,841.62	2,885.31
5	70,908	75,493	76,652	77,811
biweekly	2,727.23	2,903.58	2,948.15	2,992.73
6	73,608	78,239	79,418	80,597
biweekly	2,831.08	3,009.19	3,054.54	3,099.88
7	76,310	80,985	82,185	83,384
biweekly	2,935.00	3,114.81	3,160.96	3,207.08
8	79,017	83,732	84,952	86,173
biweekly	3,039.12	3,220.46	3,267.38	3,314.42
9	81,726	86,477	87,717	88,957
biweekly	3,143.31	3,326.04	3,373.73	3,421.42
10	84,429	89,226	90,489	91,751
biweekly	3,247.27	3,431.77	3,480.35	3,528.88

APPENDIX "A"
SCHEDULE II

For the purposes of this schedule, allowance means compensation payable for the performance of special or additional duties.

1. **Principals and Vice-Principals Allowances**

In addition to the basic salary, each Principal shall be paid an annual administrative and supervisory allowance as follows:

Basic Allowance:

Determined by the category of the school, criteria based on number of programs supervised - a) Primary and/or Intermediate, or b) Junior High and/or Senior High.

<i>Category 1</i>	<i>(1 programme)</i>	<i>\$4,320</i>
<i>Category 2</i>	<i>(2 programmes)</i>	<i>\$5,400</i>

Effective July 1, 2008:

<i>Category 1</i>	<i>(1 programme)</i>	<i>\$4,750</i>
<i>Category 2</i>	<i>(2 programmes)</i>	<i>\$5,830</i>

Supervisory Allowance:

Based on the actual number of professional staff (teachers) and paraprofessional staff (educational assistants, remedial tutors, native language instructors) supervised, up to and including a maximum of 42 on the regular staff of the school as follows:

<i>The first 2-6 Professional & Paraprofessionals</i>	<i>\$530/year/employee</i>
<i>The next 7-18 Professional & Paraprofessionals</i>	<i>\$490/year/employee</i>
<i>The next 19-42 Professional & Paraprofessionals</i>	<i>\$402/year/employee</i>

The allowance payable to a Vice-principal shall be 50% of the allowance paid to the principal of that school.

[Emphasis added]

III. Provisions of the Yukon Education Labour Relations Act

[7] The parties referred to the following provisions of the Yukon *Education Labour Relations Act* ("ELRA") during their submissions:

...

Probation for principal

105(1) A principal shall be on probation for two years from the date of appointment.

(2) Only a person qualified as a teacher may be appointed as a principal.

...

(6) On the termination of the appointment of a principal who was employed as a teacher immediately before the appointment as principal, the principal shall be entitled to remain employed as a teacher.

(7) When no notice of termination is given during the probationary period, the contract of employment of the principal shall continue until and unless terminated in accordance with this Act.

...

Terms and conditions of employment

108(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment of an employee shall be:

(a) the provisions of this Act and regulations, and the Education Act and regulations;

(b) the terms and conditions not inconsistent with any Act and regulations of the collective agreement negotiated under this Act; and

(c) the terms and conditions not inconsistent with paragraphs (a) and (b) agreed to between the employees employed in an attendance area and the superintendent.

...

Temporary employment

109(1) An employee may be employed on a temporary basis during part or all of a school year as may be agreed to by the employee and the superintendent and the employment may be renewed for part or all of the next school year.

IV. Provisions of the Yukon Education Act

[8] The parties noted the following provisions of the Yukon Education Act during their submissions:

...

School Councils

113(1) A Council shall

...

(c) participate in the selection procedures for persons to be interviewed for the position of principal and select for appointment a principal;

...

Employment of staff

170(1) The Minister

(a) shall appoint a principal for each school and may appoint a principal for more than one school;

(b) may appoint teachers to administrative or supervisory positions, including vice-principals; and

(c) shall employ teachers, teaching assistants and other technical support staff necessary for the proper functioning of the school.

...

(4) Staff in schools operated by School Boards are employees of the Government of the Yukon.

V. Argument and analysis**A. Extrinsic Evidence**

[9] As noted at the outset of this decision, the YTA objects to the admission or consideration of the extrinsic evidence presented by the Employer. I will address this issue first.

[10] In support of its alternative interpretation, the Employer presented extrinsic evidence in the form of negotiating history, past practice of payments made to employees who retired as acting principals, and opinion evidence about the nature of employment relationships between the Employer and teachers and principals under the Yukon *Education Act*. The Employer contends that the negotiating history supports its interpretation because it establishes that the parties did not discuss acting principals in 1998 when they negotiated the current definition of "daily rate". Similarly, says the Employer, the nature of employment relationships in the Yukon and

the way the salary provisions have worked in real life support its contention. The Employer maintains the extrinsic evidence also supports a finding that the parties intended to distinguish between teachers in acting principal and vice-principal roles, who are only entitled to receive acting pay, and teachers appointed to permanent or indeterminate principal positions, who are entitled to receive administrative and supervisory allowances and to have those allowances included in the calculation of their severance pay benefit.

[11] The YTA opposes the admission and arbitral use or weighting of the Employer's extrinsic evidence for several reasons. The YTA says that generally, none of the extrinsic evidence discloses any ambiguity in either the circumstances to which the parties intended the relevant contractual language to apply or the concepts of basic salary and administrative or supervisory allowances under clause 2.01(g).

[12] With respect to the evidence of past practice, the YTA makes two submissions. First, it says there is no evidence establishing that it was ever aware of, or acquiesced to, the Employer's severance pay conduct. Second, the practice evidence on which the Employer relies was created for the purposes of, and in the course of, an earlier policy grievance between the parties, which was settled on a "without prejudice" and "without precedent" basis.

[13] With respect to the negotiating history evidence, the YTA asserts that it fails to establish any consensus between the parties in favour of the Employer's contention that the inclusion of administrative and supervisory allowances in the definition of the severance pay provision in 1998 was mutually intended to apply only to employees holding indeterminate principal positions and to exclude acting principals at the date of their retirement.

[14] As to the Employer's opinion evidence about an alleged distinction between acting and temporary employment status under the Yukon *Education Act* and the collective agreement, the YTA submits that the testimony constitutes self-serving evidence of the interpretation the Employer argues in this dispute and accomplishes nothing more than establishing that the parties hold differing interpretations of the collective agreement.

[15] Both parties referred during their presentations to a series of letters relating to an employee, who will be referred to by the initials "KT", whose individual grievance

about his severance pay and employment status was not consolidated with this policy grievance. Those letters confirm a series of offers by the Superintendent and acceptances by KT of vice-principal and acting principal positions and appointments, temporary full-time assignments as principal, and appointments to act in the absence of the principal (the latter letter was signed by the Director of Human Resources). The Superintendent's letters about acting/temporary principal positions and assignments include specified dates when the acting positions start and end. In their closing arguments, both parties submitted that, for the purposes of determining the issues in dispute in this policy grievance, I need not determine the several contentious issues about the proper characterization of KT's employment status during the years covered by those letters. Those issues will presumably be determined, if necessary, in the context of the adjudication of KT's individual grievance.

[16] Having considered all that was presented and submitted to me about this issue, including the authorities cited by the parties, I find I need not determine the specific objections about the admissibility, relevance or weight to be attached to the extrinsic evidence because on the basis set out below, I have no *bona fide* doubt about the meaning of the language the parties agreed to include in the collective agreement as it applies to the circumstances in this case, and I am persuaded that the extrinsic evidence discloses no ambiguity in this regard. In my view, reliance on the extrinsic evidence constitutes an attempt to alter the scope of application of the parties' clear agreement about including administrative or supervisory allowances in the calculation of severance pay. Extrinsic evidence is not properly relied on for that purpose. See *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 115; and, *Health Employers Association of British Columbia v. Teamsters Local Union No. 31* (1998), 77 L.A.C. (4th) 237. Had I entertained a *bona fide* doubt about the meaning of the collective agreement language as it applies to the circumstances in this case, the extrinsic evidence would not have resolved that doubt. I would have been unable to find the extrinsic evidence disclosed the parties' mutual intention.

[17] For these reasons, I have not summarized the extrinsic evidence in this decision.

[18] Before turning to an analysis of the central issue in this dispute, I will briefly address onus of proof and the purpose of severance pay benefits.

B. Onus

[19] The Employer contends that the YTA bears the onus of proving its interpretation establishes that management breached the collective agreement by not including administrative and supervisory allowances when calculating severance pay for teachers retiring from acting principal positions. In other words, the YTA has to prove that the parties expressly agreed in 1998, when the current definition of "daily rate of pay" was negotiated, that employees retiring from acting principal positions would fall within the new definition.

[20] The YTA submits that it bears no special or additional onus of proof in an interpretation dispute such as this case: *Surrey School District No. 36 (British Columbia Public School Employers' Assn.) v. British Columbia Teachers' Federation/Surrey Teachers' Assn.*, [2009] B.C.C.A.A.A. No. 27 (QL) ("*Surrey School District*").

[21] This is the YTA's grievance, and it bears the onus of establishing its claim that the Employer has contravened the collective agreement by administering the severance pay provisions as it has in the circumstances at issue here. However, the YTA bears no special or additional onus of proof due to the fact that this dispute pertains to the interpretation of the collective agreement. This issue was addressed by Arbitrator Korbin in *Surrey School District*. In cases involving the interpretation of collective agreement language, my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties. When I conduct this analysis, I find "neither party bears any special onus of proof" (see *Surrey School District*, at paragraph 37).

[22] At paragraph 38 of *Surrey School District*, the nature of the task facing an adjudicator in collective agreement interpretation disputes is described in these terms:

... 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. The principles applicable to this task are reviewed in Brown & Beatty, Canadian Labour Arbitration, supra, at pages 4-29 to 4-49. 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 the disputed words are found is a primary source of their meaning.

[Emphasis added]

C. Purpose of severance pay benefits

[23] Arbitral regard for the purpose of severance pay is frequently noted in awards determining employees' entitlement to this benefit. I find the prevailing arbitral consensus on the purpose of severance pay benefits under collective agreements is reflected as follows at paragraph 43 of *Surrey School District*, wherein Arbitrator Korbin quotes Arbitrator Hall's discussion of the purpose of severance pay in *Re Atco Lumber Ltd. v. I.W.A. Canada, Local 1-405* (2004), 130 L.A.C. (4th) 76, at 87-88:

This brings me to the purpose of severance pay. It has been described as "an earned benefit ... in exchange for which, the employee rendered service": Re Health Employers Assn. of British Columbia and H.E.U., [2002] B.C.C.A.A.A. No. 130 (QL) (Gordon) [para. 17] [summarized 69 C.L.A.S. 247], citing Brown & Beatty, Canadian Labour Arbitration, 3rd ed. (Aurora, Ont.: Canada Law Book), at para. 8:3800. Other authorities hold that severance pay has a broader justification. According to Re Telegram Publishing Co. and Mark Zwelling and Gottlob Essig (1972), 1 L.A.C. (2d) 1 (Carter), varied for other reasons by 67 D.L.R. (3d) 404 (C.A.), it additionally reflects the investment employees have in their employer's business that is lost when the employment relationship is terminated:

Severance pay recognizes that an employee does make an investment in his employer's business - the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . .

The same decision earlier equated the promise of severance pay to "a bank account in which deposits were made by the employer on the basis of the employee continuing to render services" (p.17).

D. Analysis of the collective agreement

[24] I will now consider the terms of the collective agreement and the central issue in dispute: Did the parties intend administrative or supervisory allowances to be included

in the calculation of severance pay when a teacher in an acting principal appointment retires or resigns?

[25] The YTA contends that the parties' intention under clauses 28.03 and 2.01(g) is expressed in clear terms, and the language provides a straightforward formula applicable in all cases irrespective of an employee's status or substantive position at the time of retirement or resignation. The YTA's position is that the Employer is directed to calculate the retiring or resigning employee's daily rate by determining both his or her basic salary and any administrative or supervisory allowances attached to his or her performance of additional or special duties as specified in the applicable Appendix at termination of employment.

[26] The YTA emphasizes the absence of any words in the collective agreement signalling an intention to calculate severance pay based on employment status or substantive position, the latter concept having no reference whatsoever in the relevant contractual terms. The YTA also emphasizes that under Article 14, the payment of salaries, and in particular clause 14.05 providing for the payment of acting pay for teachers who act in the absence of a principal, is tied to the performance of special or additional duties which attract the allowances expressly included in the calculation of the daily rate under clause 2.01(g). The payment of acting pay is not tied in any way to the substantive position held by, or the employment status of, the employee. Additionally, the YTA notes the absence of any language in clauses 28.03(a) and 2.01(g) referring to a point in time before the date of retirement or resignation. Referring to the recognized purpose of severance pay benefits and the reasoning in the authorities that the calculation of severance pay turns in each case on the language of the collective agreement, the YTA submits that the Employer's interpretation requires language linking the calculation of the daily rate to employment status or substantive positions held before the date of retirement or resignation to be read into clause 2.01(g), because no such language was included in that provision.

[27] In support of its position the YTA relies on the following authorities: *Surrey School District*; and, *McLean v. Treasury Board (National Defense)*, PSSRB File No. 166-02-21049 (19910327).

[28] The Employer contends that, when the clear language of clauses 28.03 and 2.01(g) is read in the context of the clauses 14.05 and 20.04 and the nature of employment relationships under the Yukon *Education Act*, it must be found that all

teachers are paid basic salaries but only teachers appointed to indeterminate principal or vice-principal positions are entitled to be paid administrative or supervisory allowances under Appendix "A", Schedule II. Implicitly acknowledging the absence of any express language in clause 2.01(g) referring to an employee's status or substantive position, the Employer submits that the concept of "an employee's daily rate" should be construed as necessarily including the daily rate of pay applicable to an employee's substantive position. Thus, says the Employer, the only employees whose daily rate attracts both basic salary and administrative or supervisory allowances are those who are appointed indeterminate principal or vice-principal positions as their substantive positions.

[29] The Employer asserts that the only benefit acting principals appointed under clause 14.05 are entitled to claim is acting pay, which must be viewed as a concept distinct from the administrative or supervisory allowances paid to principals appointed to that substantive position. Thus, says the Employer, the YTA's interpretation requires the words "acting pay" to be read into the words "plus administrative or supervisory allowances" in clause 2.01(g).

[30] The Employer submits that the purpose of the severance pay benefit in this collective agreement should be viewed as compensation for employees' years of service in the substantive position they were appointed to, not for their years of service in acting roles. The Employer says acting principals have no claim to enhanced severance pay based on their performance of additional or special duties while acting in the absence of a principal.

[31] The Employer also maintains that the YTA's interpretation creates an anomaly under clause 20.04, the pre-retirement leave provision, which, the Employer claims, pays out pre-retirement leave based on employment status or an employee's substantive position. The Employer maintains further that the YTA's approach could result in two employees holding principal positions at a school when one of them is off duty.

[32] In advancing its position, the Employer relies on *Wade Scoffin and Government of Yukon (Department of Health and Social Services) (20090512)*, unreported ("Scoffin").

[33] In reply, the YTA submits that *Scoffin* is clearly wrong and should not be followed and is, in any event, distinguishable for a number of reasons, two of which are that in that case, the concept of weekly rate of pay was not defined in the collective agreement and the external statute addressed the issue of acting pay.

[34] Like the Employer, the YTA supports a contextual reading of the collective agreement, but disagrees with the Employer's asserted outcome of that approach. The YTA notes that pension benefits under the collective agreement are calculated on the basis of what employees earn, not their employment status, and it seeks a harmonious analysis of the severance pay benefit with the pension benefit. As for the Employer's assertion that the Association's interpretation would give rise to an anomaly under clause 20.04 and could create two principal positions in a school, the YTA submits that its interpretation of the calculation of the severance pay language has no such effect. The YTA reiterates that employment status is simply irrelevant to that calculation.

[35] I accept the parties' view that the search for mutual intention regarding the inclusion or non-inclusion of administrative or supervisory allowances in the calculation of severance pay in the circumstances raised in this policy grievance is appropriately conducted from a contextual perspective.

[36] In terms of the contractual context within which the terms relating to the calculation of severance pay for acting principals on retirement or resignation is situated, the first notable agreement of the parties is that captured in Article 14, "Payment of Salaries". Under clauses 14.01(a) and (b), the parties agreed to link the payment of "salaries" and "allowances" to "services rendered" and "the performance of special or additional duties" respectively. They did not agree to link the payment of salaries and allowances to any concept of an employee's substantive position or employment status.

[37] I find the second agreement of note is that teachers, and not just principals and vice-principals, are entitled to claim "an allowance" when they are required to perform "special or additional duties, as designated in Appendix 'A', Schedule II." In my view, the Employer's obligation to pay the same allowance to teachers, calculated as a "daily allowance", as it is obliged to pay to principals and vice-principals, calculated as an "annual allowance", is not limited under the language in the collective agreement by a teacher's appointment to a substantive principal or vice-principal position. This mandatory obligation arises when a teacher is appointed to a position requiring the

performance of special or additional duties: see clause 14.01(b). This claim for an allowance by employees other than principals and vice-principals is confirmed under clause 14.04(c): "... principals *and other employees in receipt of an administrative allowance in accordance with Appendix 'A', Schedule II*, shall continue to perform their administrative responsibilities associated with the payment of an allowance ..." [emphasis added].

[38] The third notable agreement is that the express purpose of the allowances designated in Appendix "A", Schedule II is compensation payable "for the performance of special or additional duties." The purpose of these allowances is not defined as compensation payable for employment status or the substantive position held by an employee.

[39] Fourth, clause 14.05 provides for an entitlement to claim the payment of "a daily allowance ... in accordance with Appendix 'A', Schedule II", when a teacher is appointed by the Superintendent to act in the absence of a principal or vice-principal in excess of three cumulative instructional days per school year. I find clause 14.05 is a payment provision. It provides for a "daily allowance", and it expressly links the entitlement to that allowance to Appendix "A", Schedule II, which in turn sets out compensation for the performance of special or additional duties, not for being the incumbent in an indeterminate principal or vice-principal position.

[40] Fifth, I find that in negotiating the terms and conditions of employment under this collective agreement, the parties turned their minds to the concept of employment status, including language expressly referring to this matter where they intended it to apply. See, for example, clauses 2.01(d), 14.04(b) and 28.03(b), wherein employee entitlements are qualified by the terms "permanent", "temporary", and "temporary employee outside the bargaining unit" respectively. The parties did not include any similar term referring to employment status or substantive position in clause 2.01(g).

[41] Moreover, I am persuaded that the relevant terms and conditions applicable to the payment of salaries and allowances for the performance of duties, as well as the severance pay benefit, are governed by the negotiated provisions in the collective agreement, and not by external statutes. The *Education Act* and the *ELRA* establish the framework for employment relationships falling within the relevant statutory regime and specify certain rules about the selection and employment of principals. However,

unlike the circumstances in *Scoffin*, I find the issue in dispute in this case falls to be determined under the terms of the collective agreement.

[42] With respect to the Employer's reliance on *Scoffin* for the purpose of severance pay, I am satisfied that Adjudicator Taylor's conclusion that severance pay is a benefit related to an employee giving up rights associated with the substantive position does not accord with the prevailing arbitral consensus and should be viewed in the context of the particular circumstances of the collective agreement and statutory regime in that case.

[43] On the basis of the foregoing analysis and findings, I cannot uphold the essential contentions on which the Employer's interpretation is premised.

[44] With this contractual context and these findings at hand, and viewing the language of clauses 2.01(g), 14.05(a), 28.02(a) and 28.03(a) in its normal and ordinary sense, I am persuaded that the YTA's interpretation reflects the parties' mutual intention. Those provisions are repeated here for ease of reference:

2.01 For the purpose of this Agreement:

...

- g) *"Daily rate of pay" means an employee's daily rate calculated on the basis of five (5) divided by 950 hours times the employee's basic salary plus administrative or supervisory allowances, according to Appendix "A", "B", or "C".*

...

14.05 Acting Pay

- a) *A teacher appointed by the Superintendent to act in the absence of a Principal or Vice-Principal in excess of three (3) cumulative instructional days per school year shall be entitled to receive a daily allowance from the time of appointment to the termination of the acting appointment in accordance with Appendix "A", Schedule II. Acting appointments will not be made for periods of less than one-half (1/2) of an instructional day.*

...

28.02 Severance Pay on Resignation

- a) *Upon resignation, an employee who has five (5) or more years of continuous employment is entitled to be*

paid by the employer severance pay equal to the product obtained by multiplying the employee's full-time equivalent of daily rate by 2.5 by the number of full-time equivalent completed continuous years of employment to a maximum of thirty-five (35) years.

...

28.03 Severance Pay on Retirement

- a) *On termination of employment, an employee who retires and is eligible for an immediate annuity or immediate allowance as defined under the Public Service Superannuation Act ... shall be paid severance pay equal to the product obtained by multiplying five (5) times the equivalent of the full-time daily rate, by the number of full-time completed years of employment to a maximum of thirty-five (35) years, less any period in respect of which the severance pay was granted. ...*

[Emphasis added]

[45] In my view, the parties' intention regarding the issue in dispute is clear. Under clauses 28.02(a) and 28.03(a), entitlement to severance pay arises on termination of employment by retirement or resignation. Under clause 14.05(a), acting principal appointments continue from the date the appointments begin until the dates on which they are terminated. Therefore, if an acting principal appointment is not terminated before the date the teacher retires or resigns, the teacher remains an acting principal for the purposes of calculating his or her compensation and benefits.

[46] For eligible employees, severance pay on retirement or resignation is calculated by applying the formula specified in clauses 28.02(a) and 28.03(a), which requires the determination of the employee's daily rate under clause 2.01(g). An employee's daily rate calculation under clause 2.01(g) requires the consideration of two matters: the employee's basic salary and administrative or supervisory allowances according to Appendix "A". I accept the YTA's contention that absent from these provisions is any reference to a period before the date on which employment is terminated by retirement or resignation.

[47] Thus, if, on termination of employment, a retiring or resigning teacher's acting principal appointment has not been terminated, such that he or she is receiving a daily allowance under clause 14.05(a) in addition to his or her basic salary, that daily allowance as acting principal must be taken into account in the calculation of his or

her daily rate under clause 2.01(g) for the purposes of applying the formula under clause 28.03(a).

[48] I do not accept the Employer's contention that the YTA's interpretation requires the words "acting pay" to be read into clause 2.01(g). As I noted earlier, acting pay constitutes a daily allowance as provided for under Appendix "A", Schedule II, and I find it is captured by the words "plus administrative or supervisory allowances" in clause 2.01(g).

[49] Nor do I accept the Employer's contention that the words "an employee's daily rate" in clause 2.01(g) inherently include, or refer to, an employee's substantive position. In my view, nothing in either the language or structure of clause 2.01(g), when viewed in the context of the collective agreement as a whole and employment relationships under the relevant statutes, supports a finding that the parties intended to qualify the calculation of an employee's daily rate of pay by referring to his or her employment status, or by referring to his or her substantive position. The parties' intention under clause 2.01(g) is expressed in clear terms: two matters must be taken into account when calculating an employee's daily rate – i.e., his or her basic salary plus administrative or supervisory allowances according to Appendices "A", "B", and "C". The purpose of those allowances is expressly defined as "compensation payable for the performance of special or additional duties", not for holding a substantive position.

[50] With respect to *Scoffin*, I decline the YTA's invitation to find it is clearly wrong. However, I am persuaded for the reasons outlined in the YTA's submissions that *Scoffin* is distinguishable from the case at hand for a number of reasons. Most notably, it turned on the distinctive language in the collective agreement in that case, which was the product of a different collective bargaining relationship, when considered in the context of a different statutory regime – the *Yukon Public Service Act*. In that context, it was found the resolution of the dispute turned on the nature of temporary assignments, as compared to substantive positions, and on the language of Article 64 of the *Yukon Public Service Act*. The case before me turns instead on the proper interpretation and application of the language in the collective agreement, when read in its distinctive contractual and statutory context.

[51] Nor has the Employer persuaded me that the YTA's interpretation gives rise to either an anomaly with clause 20.04 or the creation of two principal positions at a

school, one of them off duty. With respect to the latter contention, the Employer refers to no language in the collective agreement or in external statutes supporting such a finding. As to an anomaly with clause 20.04, the Employer argues that a teacher who does not achieve 300 hours of acting pay and who chooses the cash payout option will have the payout calculated on the basis of his or her salary, or employment status. I find the YTA's response to this argument persuasive: i.e., if this is the effect of this scenario, it arises from the employee's choice regarding that specific benefit and does not support the reading of employment status into the clear terms applicable to the calculation of the severance pay benefit.

[52] During closing submissions, I queried counsel for the YTA about the implications of the Association's interpretation in circumstances where an acting principal appointment is made a short time before a senior employee retires; i.e., I inquired as to whether it is reasonable to conclude in such circumstances that the parties intended administrative or supervisory allowances to be included in that employee's severance pay calculation. The YTA's response was twofold. First, it emphasized that the same situation arises when an employee is appointed to an indeterminate principal position shortly before retirement: yet, the Employer does not quarrel with the inclusion of administrative or supervisory allowances in the calculation of the teacher's severance pay in that circumstance. Second, the YTA emphasized that control over the start and end dates of acting principal appointments rests with the Superintendent.

[53] These submissions find support in the reasoning in *McLean*. The outcome in that decision turned on the interpretation of distinctive contractual provisions. At the same time, at pages 5 and 6 of that decision, the employer's submissions relating to the "equities" of the parties' interpretive positions – i.e., the "spectre of unjust enrichment" from the employer's perspective – was addressed as follows:

If an employee should not be able to retire from an acting position with an enhanced right to severance pay for performing more responsible duties, why have any acting pay privileges at all? Why not just have a set severance pay for all employees senior and junior, unrelated to pay level? ... As for reaping a windfall, a permanently appointed employee could enhance his/her severance pay just the same by retiring a day after an appointment to a higher position.

... The employer had ample opportunity to end [the grievor's] acting appointment at any time, had it wished to do so. If it was concerned about placing a lower limit upon

her severance benefits, it could have easily done so. It did not, though all the while events were totally within its control.

[54] On the basis of what was presented to me, I find that reasoning has application to this case. Here, the parties did not agree that severance pay for all employees was to be unrelated to pay level. Under clause 14.05(a), the Superintendent controls the start and end dates of acting principal and vice-principal appointments; and, as exemplified in the Superintendent's correspondence with KT, control over the duration of an acting appointment rests with the Superintendent.

[55] For all of the foregoing reasons, I make the following order:

(The order appears on the next page)

VI. Order

[56] The policy grievance is upheld. The YTA is entitled to a declaration that administrative or supervisory allowances are included in the calculation of severance pay when a teacher in an acting principal or vice-principal appointment retires or resigns.

December 19, 2011.

Joan M. Gordon
adjudicator