



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

P.O. Box 1525, Station
Ottawa, Ontario K1P 5V
Tel: (613) 990-180
Fax: (613) 990-184

February 26, 2018

Reference No No de référence
366-YG-47

Mr. Ethan Emery
Executive Director
Yukon Teachers' Association
2064 - 2nd Avenue
Whitehorse YT Y1A 1A9

BY EMAIL/PRIORITY POST

Mr. Gary Adams
A/Director, Labour Relations
Public Service Commission
Government of Yukon
Box 2703
Whitehorse, Yukon Y1A 2C6

BY EMAIL/PRIORITY POST

**Re: Grievor: Melanie Bennett
Before: Paul Love
Date of decision: February 26, 2018**

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

Yours truly,

Caitlin Foster
Registry Officer
(613) 990-1828

Encl.

c.c.: D. Rody
I. H. Fraser
J. R. Tucker
M. Bennett

CF/hb



Yukon Education
Labour Relations Act

Before an adjudicator
appointed by the Yukon Teachers
Labour Relations Board

BETWEEN

MELANIE BENNETT

Grievor

and

GOVERNMENT OF YUKON

Employer

Before: Paul Love, adjudicator

For the Grievor: James Tucker

For the Employer: Ian H. Fraser

Heard at Whitehorse, Yukon,
September 8 and November 6, 2017.

REASONS FOR DECISION

I. Grievance referred to adjudication

[1] Melanie Bennett (“the grievor”), represented by the Yukon Teachers’ Association (YTA) in her grievance, is employed as the principal at Elijah Smith Elementary School in Whitehorse, Yukon.

[2] The issue is whether the grievor is entitled to special services pay under clause 14.06(b) of the collective agreement between the Government of Yukon and the YTA (effective July 1, 2015, to June 30, 2018; “the collective agreement”) for work she performed after the end of a school year selecting new employees for the following school year. That clause provides as follows:

14.06 Special Services

...

b) A Teacher who is in receipt of an allowance in accordance with Appendix “A”, Schedule II, and who agrees to render service when school is not in session (outside of the 980 hours of instruction) at the request of the employer, and if such service is over and above the service required in return for the allowance pursuant to Appendix “A”, Schedule II, the teacher shall be paid 1/196 times the employee’s full-time equivalent annual salary for each day of work in accordance with Appendix “A”, Schedule I, with ½ day being the minimum amount payable.

[Emphasis in the original]

[3] The employer’s position is that the grievor’s time spent working during the summer is covered by the School Management Responsibilities Allowance (“SMRA”) set out as follows in Appendix “A”, Schedule II:

2. School Management Responsibilities Allowance

In recognition of the leadership and management duties Principals and Vice-Principals are required to perform outside of the regular school calendar, two lieu days per school year shall be granted to Principals and Vice-Principals. At the end of the school year, unused days will be paid out at 1/196th of their annual salary and allowances.

[Underline emphasis added]

[4] The grievance was referred to adjudication under ss. 64 to 67 of the *Education Labour Relations Act*, RSY 2002, c.62 (“ELRA”).

[5] On September 8, 2017, the grievor testified, as did Douglas Rody, a YTA staff relations officer, and Hilary Skilnyk, the principal at Robert Service School in Dawson City, Yukon. On November 6, 2017, I heard from Superintendent Area 3 Bill Bennett, Assistant Deputy Minister Michael Woods, Superintendent Area 1 Greg Storey, and Superintendent Lauren Taillefer.

A. Documents about Ms. Skilnyk's special services pay and the hearing adjournment

[6] At the hearing, the grievor attempted to introduce documents that related to special services pay that the employer granted to Ms. Skilnyk as a result of her work on a staffing process during the summer of 2016. The documents were tendered for the purpose of showing that the employer inconsistently applied the collective agreement to employees in similar circumstances. The employer objected to the documents being entered through Ms. Bennett as she had no personal knowledge (they were hearsay), and it would have been deprived of the full opportunity to question Ms. Skilnyk about the facts surrounding her request.

[7] Certain of the documents particularly the pay stubs, could be characterized as business records and so would be excepted from the hearsay rule.

[8] I determined that this evidence could not be introduced through the grievor and that Ms. Skilnyk had to be called as a witness if the YTA was relying on the evidence.

[9] Paragraph 15.3(1)(e) of the *ELRA* provides that the board has the power to “. . . accept any evidence, whether admissible in a court of law or not . . .”, and this would include hearsay evidence. However, I must consider an issue of fairness as well as the weight to be attached to the evidence. All the grievor can reliably state is that she received from Ms. Skilnyk the documents about her claim for special services pay. The grievor has no personal knowledge of the facts related to that claim.

[10] However, the documents are relevant only if they advance the proposition that Ms. Skilnyk received the pay in circumstances similar to the grievor's, thus demonstrating that the employer inconsistently applied the collective agreement. In the absence of hearing from Ms. Skilnyk about those circumstances, it is difficult to determine the relevance and weight to attach to documents about her receipt of special services pay and the facts applying to her situation.

[11] Given that the SMRA is new collective agreement language, it was important with respect to the fairness of this hearing and the inferences to be drawn from the testimony and documents that the employer had the opportunity to explore the facts surrounding Ms. Skilnyk being granted special services pay by cross-examining her.

[12] The parties agreed that Ms. Skilnyk could testify by teleconference call, as she was at work in Dawson City, some five hours' travel from Whitehorse. She did so in the early afternoon of September 8, 2017. This matter was then adjourned to permit the employer the opportunity to call testimony dealing with her evidence. Before the YTA attempted to introduce her documents, the employer anticipated that it would call no evidence and that the evidence would consist of the grievor's testimony and the "Agreed Statement of Facts with Appended Undisputed Documents" ("the agreed statement of facts"). I allowed the adjournment.

[13] As a result of Ms. Skilnyk's testimony, I allowed the employer an opportunity to call evidence, which necessitated the adjournment.

II. Summary of the evidence

[14] The parties filed the agreed statement of facts (Exhibit G-2). They agreed in it that "... the following facts are true and not in dispute in this grievance":

1. *Melanie Bennett has been employed as principal of Elijah Smith Elementary School, ("ESES"), since 2012.*
2. *June 20, 2016 was the last day of the 2015/2016 school year that school was in session at Elijah Smith Elementary School.*
3. *All aspects of the process of hiring teachers to work at ESES is controlled by the YG Department of Education.*
4. *YG Department of Education requires school Principals to conduct interviews and make the selection in the process of hiring teachers to work at Yukon schools.*
5. *YG placed postings for two staff teaching positions at ESES in the spring of 2016, (the "Postings"), which postings permitted teachers interested in the positions to submit applications until the closing date of the postings, which was June 20, 2016. (Document attached at Tab "A")*
6. *Melanie Bennett screened, interviewed and contacted candidates for the Postings. This work took 5 full days, (June 21, 22, 23, 24 and 27), and two half days, (June 25*

and 29).

7. *On June 29, 2016, Melanie Bennett submitted a request for pay under the Special Services Provision of the Collective Agreement. (Document attached at Tab "B")*
8. *On July 7, 2016, Superintendent Prysruk denied Melanie Bennett's request for pay. (Document attached at Tab "C")*
9. *On August 31, 2016, Melanie Bennett and YTA filed a grievance. (Document attached at Tab "D")*
10. *On November 1, 2016, a complaint level meeting was held pursuant to Article 10.10(a) of the Collective Agreement between the YTA and YG, (the "Collective Agreement").*
11. *On November 15, 2016, Superintendent Prysruk provided her decision from the complaint level meeting. (Document attached at Tab "E")*
12. *On January 11, 2017, a grievance level hearing was held pursuant to article 10.10(b) of the Collective Agreement.*
13. *On February 1, 2017, ADM Woods provided his decision from the grievance level hearing. (Document attached at Tab "F")*

[Emphasis in the original]

A. For the grievor

[15] Ms. Bennett testified that in June of 2016, she was paid for two days in lieu as the SMRA for the 2015-2016 school year.

[16] She confirmed that she did not have any control over the timeline of posting vacant positions, which is up to Human Resources and the superintendent. She stated that she wanted to "get this going" earlier in the year. She was unaware why the posting process was delayed, but in multiple meetings with her superintendent, she requested that it be actioned before the end of the school year. She was not able to consider who to interview until the posting period closed, and Human Resources supplied her with a list of persons who could be considered for hiring, including employees with a hiring preference.

[17] Ms. Bennett testified that she understood that in 2015 and 2016, other principals performed similar work and were paid the SMRA.

[18] In cross-examination, Ms. Bennett testified that she performs many duties outside of instructional hours during the school calendar and that often, she finishes her work at 6:00 or 7:00 p.m. She tried very hard to have the employer conduct the hiring process during the regular school year. The employer imposed the scheduling of this process, and she believes that she is entitled to pay for the work she did on it.

B. Mr. Rody

[19] Mr. Rody, who was a member of the YTA bargaining team, testified about the bargaining history of the SMRA for the current collective agreement. Three bargaining sessions took place: March 20 - April 1; April 29 and 30 and May 1; and May 12 and 13, 2015. An agreement was reached on May 13, 2015.

[20] Mr. Rody testified that the SMRA was an employer proposal in the 2015 negotiations. The YTA's initial comment was that it should apply to vice-principals as well as principals. During the second session, further discussion of the article was referred to when the parties were to have financial discussions.

[21] Mr. Rody referred to Superintendent Prysuk's email of November 15, 2016, which was a response to the grievance (Exhibit G-2, Tab E). He stated that at no time during or after bargaining did the employer convey the following information about the SMRA in the email:

...

... *This new language was intended to cover the following:*

- *establishing a shared vision for the school that is aligned with the school council and Yukon Education's direction and initiatives;*
- *demonstrating leadership at the school by effectively assessing the school's instructional programs and practices in order to improve student achievement at the school;*
- *effectively managing the school's human resources (e.g. staffing teaching positions during the summer; performing effective performance evaluations of school-based staff etc.);*
- *consulting with the First Nation served by the school and including in the school program activities that are relevant to the culture, heritage, traditions, and practices*

of the First Nation;

- o *attending administrators' management meetings and development training both prior to and throughout the school year.*

Staffing the school is a requirement of the year end administrative duties of the principal [sic] The lieu days were provided in recognition of these additional duties.

...

[Emphasis in the original]

[22] Mr. Rody testified that the employer never told the YTA about the intent of the proposal. He stated that had the employer provided information that the SMRA was to cover the five bulleted items and work done over the summer, the YTA would have rejected the proposal. He stated that had the YTA agreed to accept two days' pay for ". . . goodness knows how many days over the summer, I think we would have had a revolt on our hands. It would be foolish to think that we agreed to that."

[23] The employer did not significantly challenge Mr. Rody's testimony in cross-examination, in which he testified that no modifications were made to article 14 to ensure that there was no overlap between it and the SMRA. He noted that bold text in the collective agreement identifies new language. Some changes were made to article 14 as a result of an amendment to the *Education Act*, RSY 2002, c.66, about increasing the length of the instructional year by 30 hours to 980 (it had formerly been 950 hours) and to changing a days' pay to 1/196th (formerly 1/190th) of the full-time-equivalent annual salary.

[24] In re-examination, Mr. Rody testified that the employer did not convey to the YTA that the SMRA was intended for anything other than recognizing extra work done by principals and vice-principals during the school year.

C. Ms. Skilnyk

[25] Ms. Skilnyk testified that she has been the principal at Robert Service School, which offers kindergarten to grade 12, since August of 2015. She testified that during the summer of 2016, she was involved in interviewing and selecting employees for her school. She prepared a summary of her involvement (Exhibit G-4). The Tr'ondëk Hwëch'in First Nation was involved in the hiring and had a member on the hiring panel.

[26] Ms. Skilnyk submitted a request for special services pay on August 12, 2016 (Exhibit G-3), and received \$6916.71 under article 14 of the collective agreement on or about May 24, 2017, as reflected in her pay advice (Exhibit G-5).

[27] She did not request advance approval for that payment, and her superintendent made no suggestion that she was required to obtain advance approval before engaging in the work. At no time did her superintendent promise her payment.

[28] She stated that the only difference between this and other hiring work was that there was a Tr'ondëk Hwëch'in First Nation representative on the hiring panel. With or without that member, she would have had to undertake the same steps to hire someone.

[29] She was paid for 12.5 days of work. Her request for special services pay was for 4 days in June (June 27 to 30) and 8.5 days in July (July 4 to 8, 11, 12, and 26 to 29, some of which were half-days).

[30] In cross-examination, she stated that a similar process of First Nations involvement in hiring was in place at Robert Service School. Such a "pilot project" was underway there to the extent of securing permission for that involvement. Such involvement is not the usual practice in the Yukon, but it is a natural step, and according to Ms. Skilnyk, the Yukon government supports it.

[31] Many of the steps in the hiring process were outside Ms. Skilnyk's control. For example, she had no control over the timing of the postings, the priority criteria to be applied, and the selection of candidates she was to interview.

[32] In cross-examination, she stated that she participated in mandatory training about the hiring process. She stated that the only difference between the hiring process in 2016 was that there was a First Nations representative, which made for four rather than three committee members. She stated that First Nations involvement made the hiring process more transparent.

[33] Ms. Skilnyk also clearly stated that the late posting of the position caused the work to occur during the summer, not First Nations involvement in the hiring process.

[34] Ms. Skilnyk considered that her involvement in the selection process after the posting closed, which occurred entirely after the last day of school in the summer of

2016, was above and beyond a principal's usual work. However, at no time did her superintendent acknowledge or promise that she would be paid for this work.

D. Mr. Bennett

[35] Mr. Bennett testified that he approved Ms. Skilnyk's request for special services pay. He explained that in 2016, the hiring process was not complete by the time school ended in June. Ms. Skilnyk had a lot of hiring to do — he believes she had seven or eight positions to fill. He told her to work and that she would be compensated.

[36] Mr. Bennett received Ms. Skilnyk's written request for compensation (Exhibit E-1). He asked her for more information to back up her request and received her summary of time (Exhibit G-3) and summary of work (Exhibit G-4.) He approved her request and sent it to Mr. Woods for his approval. Teacher Recruitment Officer Christine Curtis approved it on December 9, 2016.

[37] Mr. Bennett testified that the 2016-2017 school year was his first as superintendent and that he could not comment on how usual it was that a principal would be engaged in hiring during the summer. He said that it is becoming more usual that First Nations are involved in hiring, which he anticipates will increase in the future as a memorandum of understanding is in place about it. Two of the eight schools in his rural Yukon district have First Nations hiring involvement.

[38] Mr. Bennett testified that he received an email from Laurette Sylvain, manager of staff relations, Human Resources Services, Department of Education, dated July 5, 2016 (Exhibit E-2), which contained the following direction for denying special services pay for “. . . additional hours [worked] to complete competitions”:

...

Some of you have received requests from VPs and Principals for special services pay for working additional hours to complete competitions. I would suggest you respond as follows:

...

We are in receipt of your request for Special Services pay . . .

I certainly appreciate the additional work duties you have performed outside of your normal instructional hours, however you are being compensated for this type of

additional work under Appendix "A", Schedule II, #1 as well as the School Management Responsibilities Allowance (Appendix "A", Schedule II, #2). These allowances are in addition to your basic salary and are payable for the performance of special or additional duties. Therefore special services pay is not applicable in this case.

...

[39] In cross-examination, Mr. Bennett admitted that if principals under his supervision worked during the middle of the summer months to hire staff and sought his approval for pay, he would authorize it.

[40] In re-examination, he testified that he had been a principal for 12 years. His understanding was that he would work a week after the last day of school and a week or two before the school year started. If hiring took place in the summer, he would approve it. He also testified that he really did not understand the policy and collective agreement on the point of special services pay.

E. Mr. Woods

[41] Mr. Woods saw the hiring by Ms. Skilnyk as unique. Under the self-government agreement, the Tr'ondëk Hwëch'in First Nation had the legal right to be involved in the education of its children. In May of 2016, the First Nation indicated that it wanted to be involved in the hiring. The Dawson City school year ends at the end of May. Mr. Woods does not explicitly recall having an understanding with Ms. Skilnyk that she would be compensated for extra time worked, but he acknowledged that her circumstances were exceptional.

[42] He said that normally, a request for special services pay would be submitted in advance, would be approved by the superintendent, and would then be sent to Human Resources. He was involved due to the exceptional nature of the request. He also testified that the Yukon government was late in supplying the staffing allocation to Ms. Skilnyk and other principals in 2016. The approval of Ms. Skilnyk's special services pay application was delayed because the government wanted to look at all such applications together.

[43] He testified that Ms. Sylvain's email (Exhibit E-2) contained the response to be provided to any principal requesting special services pay.

[44] In cross-examination, Mr. Woods testified that all the First Nations in the Yukon are interested in hiring involvement. The arrangement with the Tr'ondëk Hwëch'in First Nation is the furthest along.

[45] In cross-examination, Mr. Woods admitted that the employer's position on the denial of special services pay for summer work (Exhibit E-1) was never discussed with the YTA. He admitted that it was the employer's unilateral interpretation of the collective agreement. He was involved in the bargaining of the current collective agreement. He agreed that the SMRA was an employer proposal, and there was no discussion about the intent of the proposal during collective bargaining. In particular, the employer did not disclose that it was intended to compensate principals for work done during the summer.

F. Mr. Storey

[46] In response to leading questions from counsel, Mr. Storey testified that the Yukon government's response to special services pay requests for work done during summer recruitment processes was not a new policy. He acted in accordance with the directions set out in Ms. Sylvain's email.

G. Ms. Taillefer

[47] In reviewing Ms. Sylvain's email (Exhibit E-2), Ms. Taillefer said that hiring is a duty of principals and that no extra pay was to be remitted for doing it during the summer. She stated that this was the policy in July of 2016.

[48] In cross-examination, Ms. Taillefer was questioned about her approval of a request for special services pay for a principal during the summer of 2015 (Exhibit E-3). She stated that it was for work preparing as a witness for an appeal.

[49] She confirmed that before receiving Ms. Sylvain's email about how to respond to special services pay requests (Exhibit E-2), there was no written policy about paying it.

H. From the documents

[50] It is clear that the employer relied on its interpretation of special services pay as expressed in Ms. Prysuk's email of November 15, 2016, in which she stated in part as follows:

...

As per Appendix "A" Schedule II, #2 of the YTA collective agreement, "In recognition of the leadership and management duties Principals and Vice-Principals are required to perform outside of the regular school calendar" ...

- *establishing a shared vision for the school that is aligned with the school council and Yukon Education's direction and initiatives;*
- *demonstrating leadership at the school by effectively assessing the school's instructional programs and practices in order to improve student achievement at the school;*
- *effectively managing the school's human resources (e.g. staffing teaching positions during the summer; performing effective performance evaluations of school-based staff etc.);*
- *consulting with the First Nation served by the school and including in the school program activities that are relevant to the culture, heritage, traditions, and practices of the First Nation;*
- *attending administrators' management meetings and development training both prior to and throughout the school year.*

Staffing the school is a requirement of the year end administrative duties of the principal [sic] The lieu days were provided in recognition of these additional duties.

...

[Emphasis in the original]

[51] A further reason that Mr. Woods relied on for upholding Ms. Prysuk's denial (Exhibit G-2, Tab F, page 6) is expressed as follows:

...

The requirement of the Request for YTA Special Services pay is that advance approval is required. The request form clearly states this requirement. In this case advance approval prior to work being completed was not authorized. Thus, this grievance is denied.

...

III. Summary of the arguments

A. For the grievor

[52] The YTA supplied a seven-page written argument on behalf of the grievor, which it supplemented by oral argument.

[53] The YTA argued that the grievor worked five full days and two half-days after June 20, 2016, the last day of school. She applied for and was denied special services pay. The employer offered two rationales. The first, in Ms. Prysuk's complaint decision, was that the work was covered by the SMRA. The second, by Mr. Woods in the grievance decision, was that the grievor required advance approval, which she did not obtain.

[54] The YTA stated that the employer's unilateral intention about the purpose of the SMRA, which was not discussed with the YTA during bargaining, cannot bind it; the collective agreement language prevails. The employer promulgated its unilateral policy that no special services pay would be paid for summer involvement in staffing. There was no consultation with the YTA.

[55] Further, the YTA stated that there is no requirement in clause 14.06(b) for advance approval. The fact that the employer created a form for use by employees applying for special services pay (Exhibit G-2, Tab B) that contains the phrase "*Advance Approval Required*" is not determinative of the grievor's rights.

[56] The YTA stated that the employer's interpretation of clause 14.06 and the SMRA is incorrect. The SMRA is meant to cover work during the school year. If days are not worked, the principal is paid for lieu days. The grievor had been paid for her lieu days in 2016. To suggest that the SMRA covers work during the summer makes the special services pay article meaningless, as one has to receive that allowance to also qualify for special services pay.

[57] The principal's duties are defined in s. 196 of the *Education Act*. Section 170 provides that the minister ". . . shall employ teachers . . . necessary for the proper functioning of the school" and that staff in schools are employees of the Yukon government.

[58] The grievor submitted paragraph 4:1200, entitled "Ancillary Documents", of Brown and Beatty, *Canadian Labour Arbitration*, Fourth Edition.

[59] The YTA stated that the employer has not consistently applied the interpretation they rely upon as some principals are paid for summer work and some are not.

[60] The grievance should be allowed.

B. For the employer

[61] The employer supplied an eight-page written argument, which it supplemented by oral argument.

[62] It submitted that teachers, vice-principals, and principals work 12 months of the year and are paid for 12 months of work via biweekly pay periods. As a matter of convenience, summer pay is remitted as a lump sum. The parties have agreed that hiring is a duty of the principal. Further, while hiring as a duty is not explicitly set out in s. 169 of the *Education Act*, it falls easily under the basket clause in paragraph (v), as follows:

169 A principal of a school shall

...

(v) perform other reasonable duties as assigned by the director or superintendent

[63] On reading clauses 14.06(a) and (b), it becomes clear that under clause (a), teachers who provide educational services during the summer receive extra pay. The base rate is 980 hours. The entitlement to special services pay for principals is calculated on a different basis. To receive extra pay under clause (b), a principal has to prove the following:

- the principal agreed to provide the service;
- the service was rendered when school was not in session; and
- the service was over and above the duties of a principal.

[64] In this case, there is no proof of an agreement by the grievor to provide the services, and hiring work done by the principal is not over and above his or her duties; it is a duty of the principal, and it is covered in the SMRA.

[65] Before the SMRA, the only allowances for principals were the basic and supervisory allowances in Appendix "A".

[66] The employer stated that nothing turns on Ms. Skilnyk's evidence. Hers were unique circumstances and not evidence of a past practice or estoppel. The single instance does not clarify any ambiguity in this very clear collective agreement. See *CNR v. CAW/TCA Canada, Local 100* (2004), 137 L.A.C. (4th) 282, *Edmonton (City) v. Civic Service Union, No. 52* (1995), 48 L.A.C. (4th) 161, and *Int'l Ass'n of Machinists, Local 1740 v. John Bertram & Sons Co. Ltd.* (1967), 18 L.A.C. 362.

[67] If the employer has unfairly administered the collective agreement by paying persons such as Ms. Skilnyk in the past, the proper remedy is to stop these payments and to have the adjudicator direct that the employer reclaim them from those who wrongly received them.

[68] The collective agreement does not specify holiday or vacation times. The reality is that if things work smoothly, a principal has quite a bit of time off. There is a balance, and if the clause is strictly construed, it will lead to more formality.

[69] The grievance should be dismissed.

C. Grievor's reply

[70] In reply to the employer's argument, the YTA pointed to "Letter of Understanding 'D'", at page 57 of the collective agreement, section 1 of which reads as follows:

1. *The parties agree that the terms and conditions of this agreement were negotiated on the basis of 980 school hours (i.e. 196 school days). If the number of instructional hours changes the parties agree to meet and discuss the impact on the various clauses in the agreement.*

[71] The collective agreement is very clear that the SMRA applies to work performed during the school calendar — the school year. The basic allowance, which depends on the number of programs and the supervisory allowance, which in turn depends on the number of employees, relates to activities that occur during the school year. The YTA also refers to article 22 of the collective agreement, about maternity leave, which states that the leave period is "... not more than seventeen (17) consecutive weeks exclusive of the summer vacation period ...".

D. The employer's final reply

[72] The employer noted that a dispute about maternity leave may turn on the interpretation of instructional days, which is a completely separate matter.

IV. Reasons

[73] I am concerned about a basic unfairness that arises when a delay occurs in a hiring process and the employer expects a principal to bear the consequences of that delay. The Yukon government is charged with hiring and employing staff. Principals are expected to play a role in that process, but they have no control over it. I understand that there is complexity in the hiring process as with very little notice, the employer may have to fill many temporary vacancies. I also note that First Nations involvement in hiring is likely to increase in the future. Many First Nations have had a long-standing interest in how their children are educated.

[74] However, in my view, staffing is a normal and expected governmental function in providing a school system. Ultimately, the Yukon government has the duty to ensure that sufficient teachers are in place at the start of the school year. It appears from Mr. Woods' testimony that the government was late issuing the allocation to each school in 2016 for the upcoming 2016-2017 school year. It is unclear why that occurred, but until the allocation is issued, principals have no knowledge of the staffing available for their schools. The timing of the hiring process was impacted. Principals are involved in the process, but ultimately, the government makes the employment offers, and the teachers are its employees.

[75] I see nothing unique about the situation involving Ms. Skilnyk's or Ms. Bennet's involvement in the staffing process. Their schools had to be staffed, as was necessary every year. The Yukon government issues the allocation for the school, which was late. That was in the government's control and not that of the principals. The First Nation participated in the process at Ms. Skilnyk's school, which again was a factor not within her control. In the case of Ms. Skilnyk and Ms. Bennett, the posting was late, and the government set the closing date as the last day of school. Should a principal have to pay the price — e.g., by forfeiting holiday time or working during the summer — because risks materialize in the government's staffing process, none of which are under the principal's control?

[76] I note that neither holiday nor vacation time is set out in the collective agreement or the *Education Act*.

[77] Ordinarily, the fact that an employee is paid an annual salary in biweekly installments does not mean that the employee is actually working or is required to be available for work every day of the year. Physical presence in the school is dependent on instructional days. The collective agreement for teachers, and a principal is also a teacher, is dependent on 980 school hours in 196 school days, 30 hours of which are to be used for non-instructional purposes (see Letter of Understanding "D", Instructional and Non-Instructional Hours).

[78] The grievor's entitlement to pay for the summer staffing work turns on the interplay between special services pay — clause 14.06(b) — and the SMRA. I note that the SMRA is a new term in the collective agreement. It was an employer proposal, agreed to by the YTA without much discussion during bargaining. Including the SMRA did not result in any other changes to the collective agreement. My attention was not drawn to any cases interpreting the SMRA.

[79] The grievor's right to special services pay cannot turn on a requirement imposed by the employer's form that the request be sought in advance. That is not a requirement expressed in clause 14.06(b). While the employer has a right to manage its workforce, which arguably includes developing forms for its employees to use for pay claims, it cannot use that right to override collective agreement entitlements.

[80] To qualify for special services pay under clause 14.06(b), the person has to receive the SMRA. Therefore, this qualification limits the pay to vice-principals and principals as only they are entitled to the SMRA.

[81] Principals are paid on the basis of their positions in the "Teacher Pay Grid" (Appendix "A", Schedule I) and are entitled to the following three allowances under Appendix "A", Schedule II:

- the basic allowance, which depends on the number of programs — i.e., primary, intermediate, or junior or senior high instruction — being offered at the school;
- the supervisory allowance, based on the number of staff members at

the school; and

- the SMRA.

[82] The amount of salary and allowances changes during the term of the collective agreement.

[83] Principals are paid biweekly, throughout the year, but in my view, the payment method is simply a convenient way of paying salary, and it does not drive when the principals are expected to be at work.

[84] The whole concept of the collective agreement is based on instructional days — 196 days or 980 hours. Principals are expected to be at school on those days.

[85] Ms. Bennett testified that she often works beyond 6:00 or 7:00 p.m. and that she attends school council meetings. These are the types of leadership and management duties that would generally be included in the SMRA and that are outside the regular school calendar.

[86] In my view, the clear intent of the SMRA is to compensate a principal for management duties during the school year — hence the tying of the allowance to the “regular school calendar” (see Appendix “A”, Schedule II, section 2). I note that this is a distinct concept, and it would be unnecessary to use these words had the allowance been meant to recognize management duties over a 12-month cycle. The payment of lieu days is calculated on the basis of 196 instructional days and according to Appendix “A”, Schedule II, the days are granted at the “end of the school year”, i.e., usually in June of each year.

[87] A principal not getting the job done, e.g., he or she is not hiring during the school year when it could be done, is potentially a performance issue. All things considered, one would expect most of a principal's duties to be performed during the school year or shortly after it ends. In my view, there is little risk of a flood of special services pay claims, given that the employer does have the ability to manage the performance of principals to ensure that they work as required. On the other hand, it is unfair to expect them to absorb the risks of the employer's actions that result in delaying completing staffing into the summer months.

[88] In turning to special services pay, clause 14.06(b) reads as follows:

b) A Teacher who is in receipt of an allowance in accordance with Appendix "A", Schedule II, and who agrees to render service when school is not in session (outside of the 980 hours of instruction) at the request of the employer, and if such service is over and above the service required in return for the allowance pursuant to Appendix "A", Schedule II, the teacher shall be paid 1/196 times the employee's full-time equivalent annual salary for each day of work in accordance with Appendix "A", Schedule I, with ½ day being the minimum amount payable.

[Underline emphasis added]

[89] This clause is awkwardly worded but it is clear that Ms. Bennett is "[a] Teacher who is in receipt of an allowance in accordance with Appendix "A", Schedule II . . .". Only principals and vice-principals can receive the allowance.

[90] As a matter of contract law, enforceable agreements can be reached verbally, in writing, or through performance. Here it is clear that the grievor did not volunteer her services. "[A]grees to render service" is a broad phrase. Doing so does not require any particular form of communication — it can be written or oral or done by performance. In effect, the employer expected and requested that the grievor perform the duties after the school year ended by setting the closing date for the applications as the last day of school. The grievor did the work required to hire the relevant persons. Similar to a unilateral contract, by performing the services, I find that she agreed to render service. As indicated earlier, there is no requirement that the principal submit an advance request before performing special services work. On the basis of the facts before me, I find that Ms. Bennett agreed to render services at the employer's request when school was not in session.

[91] When considering the services provided, the principal must demonstrate that they are ". . . over and above the service required in return for the allowance . . .". In my view, the staffing work qualifies, as the SMRA is tied entirely to work done during the school year. Per Appendix "A", Schedule II, section 2, it is to recognize "leadership and management duties" during the school year but ". . . outside of the regular school calendar . . .".

[92] The lieu days are paid out at the end of the school year and are not carried forward to the next school year. The calculation is based on a school year of 196 days;

it is clear that service performed outside the 196-day instructional year is "... over and above the service required ... for the allowance ...".

[93] For all of the above reasons, I allow the grievance. In closing, it appears that the parties may be disputing the grievor's exact entitlement. She worked five full days and two half-days, which would ordinarily result in six days' pay, with each day calculated at 1/196 of her annual salary. This is referenced in the agreed statement of facts, at paragraph 6. The special services pay request (Exhibit G-2, Tab B) is for three full days and two half-days of pay.

[94] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[95] The grievance is allowed.

[96] I reserve jurisdiction for a period of 90 days to permit the parties to calculate the amount of special services pay the employer is to pay the grievor.

February 26, 2018.

**Paul Love,
adjudicator**