

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BOARD OF EDUCATION OF SCHOOL DISTRICT
NO. 8 (KOOTENAY LAKE)

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 748

(the "Union")

ARBITRATOR: John Kinzie

COUNSEL: David Woolias and Karen Holloway,
for the Employer

Susanna Allevato Quail and Nicole Veitch,
for the Union

DATES OF HEARING: October 26, 27, 28, 29 and 30, 2020;
February 17, 18 and 19,
March 2, 3 and 4, 2021

AWARD

I

This proceeding is concerned with a review of the Education Assistant position pursuant to Article 17 of the parties' collective agreement. That review commenced in and around December, 2013. The last review prior to the one that led

to this proceeding was performed in 2002 when the Education Assistant position was known as the Paraeducator position. At that time, the Paraeducator position was evaluated at 529 points which equated to Pay Scale 8 on the parties' wage schedule.

A review under Article 17 of the collective agreement can involve both the job description for the position as well as the wage rate. With respect to the job description, the concern is that it provides an accurate description of the duties and responsibilities of the job as well as an accurate description of the qualifications necessary to perform them. With respect to the wage rate for the position, the concern is that those duties and responsibilities are properly rated under the parties' job evaluation plan. The point total then determines which pay scale in the wage schedule the position falls within.

In the case of the Education Assistant position which is before me in this proceeding, the Employer contends that even after the review of the duties and responsibilities of the job and a new job description for it, there has been no meaningful change to those duties and responsibilities from the duties and responsibilities of the Paraeducator position in 2002. In these circumstances, the Employer submits that there is no justification for reviewing its rating under the plan. In response, the Union contends that there have been changes and thus a re-rating of the position is justified.

Under the parties' point factor job evaluation plan, there are three out of the nine factors in dispute. They are decision making, contacts and sensory demand. Based on the Union's rating of the Education Assistant position under these three factors, its revised points total came within the point band for Pay Scale 11. Based on its contention that the duties and responsibilities of the Education Assistant position had not changed since the time it was the Paraeducator position, the Employer submits that the ratings of the Education Assistant position under those three factors should be the same as the ratings for the Paraeducator position in 2002. On this reasoning, the wage rate for the Education Assistant position would remain at Pay Scale 8.

Should I be convinced that a re-rating of the Education Assistant position was justified and that such a re-rating resulted in an increased points total for the job that in turn resulted in an increase to the position's wage rate, the question would then arise as to what date should be the effective date for the change in the position's wage rate? Put another way, what date should that increased wage rate be retroactive to?

II

The background facts to this proceeding are as follows.

The collective agreement between these parties has for many years now contained a process for the evaluation of new and revised positions as well as the periodic review of all existing positions in the bargaining unit at least once every five years. This responsibility is vested in a Joint Job Evaluation Committee (hereinafter the "JJEC") composed of four representatives from the Employer and four representatives from the Union. If the JJEC is not able to reach agreement on a particular matter before it, either party may advance the matter to arbitration under the terms of the collective agreement. See Article 17 of the collective agreement.

The parties to that agreement have also agreed that in performing its responsibility to evaluate jobs in the bargaining unit, the JJEC should utilize the Job Evaluation Plan agreed to between the Okanagan Labour Relations Council, which represented various school boards in the Okanagan valley, and the Canadian Union of Public Employees, Local 523 [hereinafter the "Plan"]. The Plan is a point factor plan made up of nine different factors, being education, experience, decision making, consequence of error, responsibility for human resources, contacts, physical demand, sensory demand, and working conditions. Each factor in turn is broken down into different levels or degrees that ascend from the lowest level of skill/responsibility to the highest level of skill/responsibility. Points are assigned to each level or degree within a factor. The points also increase as one ascends the scale of the various degrees within the factor.

Once a job has been rated under all nine factors of the Plan and assigned to a degree statement under each factor that best reflects the skills/responsibilities of that job, the points reflected by those assignments are totalled. The wage schedule in turn also reflects a hierarchy with wage levels for jobs rising the higher the level of points it achieves on its evaluation under the Plan. Each pay grade within the wage schedule has a band of points assigned to it. For example, Pay Scale 8 equates to a point total between 501-540, Pay Scale 9 between 541 and 580 points, Pay Scale 10 between 581 and 620 and Pay Scale 11 between 621 and 660 points. Thus, a position's pay grade will reflect the point total it achieves from being evaluated under the Plan.

To assist the JJEC, the parties, and arbitrators in their interpretation and application of the Plan, the Plan describes each factor in terms of what it is measuring and each degree statement particularizes the scope of responsibility, skill and/or effort required of an employee at that level. Further, there are notes to raters attached to each factor which provide raters with a variety of advice to assist them in evaluating a job under each of the factors.

The first step in the evaluation process is for the JJEC to ensure that the duties and responsibilities of the position under review as well as the qualifications required to perform them are accurately described in the current job description. If they are not, then the JJEC must revise the job description so it does accurately describe those duties and responsibilities as well as the necessary qualifications.

Once a proper and accurate job description has been prepared and the parties to the collective agreement have agreed to it, the JJEC can then turn to rating the position under the Plan.

The predecessor position to the Education Assistant position was evaluated under the Plan in 2002. A job description was prepared dated February, 2002 and approved by both parties to the collective agreement. At that time, the position was titled Paraeducator and its approved job description read as follows:

“Job Summary:

An employee assigned to the school(s) school based team to provide specialized support for students (generally with special needs) as directed by the Principal. If the student(s) the Paraeducator is assigned to work with requires a (sic) IEP, the Paraeducator will be expected to work as a member of the IE Planning Team.

Job Requirements:

1. College of the Rockies SPEDA course; Selkirk College Classroom and Community Worker Program and/or equivalent College Program recognized by other School Districts in the Province, or a minimum of one (1) year college level training in the Human Services field with a focus on training in behaviour management, students with special needs.
2. Ability to work effectively with students and adults.
3. Ability to communicate appropriately with other staff members, students and parents as directed.
4. Ability to be part of a collaborative team, maintaining a professional attitude and confidentiality in working relationships with all school personnel, students, parents and the public.
5. Ability to work as part of school based planning team as required – see Special Services District Handbook – page 7 and Collective Agreement – page 101.
6. Ability to be flexible and work with minimal supervision.

7. May be required to dispense approved medications as prescribed by the student's doctor in accordance with Board Policy No. 310 (September 22, 1998) and be required to sign Request for Medication Form attached thereto. Training will be provided.
8. Ability to work with non-compliant students in a non-confrontational manner. Training in non-violent crisis intervention will be provided.
9. Child-related team requirements and special skills needed will be identified for special assignments. Any special skills required will be outlined on the specific Job Duties portion of the Job Description.
10. May be required to have a valid B.C. (Class 5) Driver's License.
11. Must have understanding and knowledge of safe work practices.
12. Perform other job related duties as may be required.

Job Conditions:

1. Work may be physically, emotionally and mentally demanding, depending on the assignment."

At that time, the JJEC rated the Paraeducator position as follows:

<u>Factor</u>	<u>Degree</u>	<u>Points</u>
Education	5	107
Experience	1	19
Decision Making	3	75
Consequence of Error	3	60
Human Resources	1	8
Contacts	4	80
Physical Demand	3	60
Sensory Demand	3	60
Working Conditions	3	<u>60</u>
Total Points		529

529 points equates to Pay Scale 8 on the parties' wage schedule.

In or about December, 2013, the JJEC began reviewing a number of jobs within the bargaining unit to ensure that the job descriptions continued to accurately describe the duties and responsibilities of these jobs and the qualifications necessary to perform them, and that the pay grades assigned to them continued to reflect a proper evaluation of those duties, responsibilities, and qualifications under the Plan. One of the positions brought forward for review at this time was the Paraeducator position, now known as the Education Assistant position.

Over the course of several meetings of the JJEC, its members discussed the contents of the February, 2002 Paraeducator job description and whether any changes to it were required. Incumbents in the position were consulted on this question and their responses were the subject matter of further discussions at the JJEC. In or about February, 2015, these discussions were interrupted by discussions taking place at the provincial level regarding education assistants involving the B.C. Public School Employers' Association (hereinafter the "BCPSEA") and the B.C. Regional Office of the Canadian Union of Public Employees. The JJEC agreed to table their discussions regarding their Education Assistant position until the discussions at the provincial level had been completed.

The JJEC did not resume its discussions concerning the Education Assistant position until the March 11, 2016 meeting. At that meeting, it decided to resume its consideration of the Paraeducator position in light of the fact that nothing was coming out of the provincial level discussions. It decided that a new job description was required for a newly titled Education Assistant position and it further agreed that that job should be re-rated under the Plan. At the June 16, 2016 meeting of the JJEC, the two parties, the Employer and the Union, agreed to the new job description and signed off on it on June 21, 2016. That job description for the newly titled Education Assistant position reads as follows:

Job Summary:

An employee who under the direction and instructional supervision of the teacher and/or Special Education teacher or Principal is assigned to the school based team to provides (sic) assistance in the delivery of regular or alternate programs of study with an individual or group of students, to assist teachers and other professionals to carry out their work with identified student(s). If the student(s) Education Assistant is assigned to work which requires an IEP, the Education Assistant will be expected to work as a member of the IE Planning Team.

Job Requirements:

1. College of the Rockies SPEDA course; Selkirk College Classroom and Community Worker Program and/or equivalent College Program recognized by other School Districts in the Province, or minimum of one (1) year college level training in the Human Services filed (sic) with a focus on training in behavior management, students with special needs. Successful completion of current Autism Training course.
2. Gives close continuous supervision on an individual basis within the following categories:
 - Physically dependent with multiple needs (i.e. The student requires assistance at all times for feeding dressing toileting mobility personal hygiene and monitoring blood sugar.)
 - Intensive behavior intervention (i.e. The student consistently/persistently demonstrates extremely disruptive, antisocial behavior and/or demonstrates profound withdrawal or internalizing behaviors which may be of danger to self and/or others.)
3. Provides care to designated students' medical needs as directed by a health professional where the consequences for error are not life threatening, in accordance with Board Policy No. 310 and be required to sign Request for Medication Form attached thereto. Training will be provided.
4. Assists with the implementation of behavior modification techniques/conflict resolutions strategies, problem solving models and assists with general classroom management. Works with non-compliant students in a non-confrontational manner. Training in non-violent crisis intervention will be provided.
5. Adapts and/or modifies classroom and curriculum materials to meet student and/or group specific needs as directed.
6. Assists with assessment of student's progress by compiling information regarding behavior and recoding (sic) individual progress, i.e. Journals, observation sheets as required.

7. Communicates appropriately with other staff members, students and parents as directed.
8. Be part of a collaborative team, maintaining a professional attitude and confidentiality in working relationships with all school personnel, students, parents and the public. Attends Individual Education Plan (IEP) and consultative meetings with teachers and other district staff.
9. Works as part of school based planning team as required – see Independent Learning Services Education Assistant Handbook, Collective Agreement and student safety plan.
10. Uses a wide range of equipment including adaptive technology, augmentative communication devices, computer systems and software.
11. Be flexible and work with minimal supervision.
12. Child-related team requirements and special skills needed will be identified for special assignments. Any special skills required will be outlined on the specific Job Duties portion of the Job Description.
13. May be required to have a valid B.C. (Class 5) Driver's License.
14. Must have understanding and knowledge of safe work practices.
15. Perform other job related duties as may be assigned.

Job Conditions:

1. Work may be physically, emotionally and mentally demanding, depending on the assignment.”

The members of the JJEC then proceeded to rate the Education Assistant position under the Plan. That rating produced a point total that increased the position's wage rate to Pay Scale 11.

The Union agrees that the Employer could not sign off on this higher wage rate for the Education Assistant position without BCPSEA's approval. The Employer approached BCPSEA for that approval and after some time passed, BCPSEA advised

the Employer that after consulting with the Public Sector Employers' Council, it would not approve the new wage rate. The Employer communicated this result to the Union at a Labour-Management meeting on February 21, 2018.

BCPSEA's refusal to approve the new wage rate for the Education Assistant position has resulted in the matter being referred to arbitration pursuant to Article 17 of the collective agreement.

I now turn to review the evidence I received concerning the duties and responsibilities of the Education Assistant position and the qualifications required to perform them.

The role and responsibilities of a teacher are succinctly described in Section 17 (1) of the School Act as including

“... designing, supervising and assessing educational programs and instructing, assessing and evaluating individual students and groups of students.”

The role of teacher assistants (also known as education assistants) are similarly described in Section 18 (1) of the Act as persons who “assist teachers in carrying out their responsibilities and duties under this Act.” They are to perform this work under the general supervision of, *inter alia*, a teacher, principal or vice principal.

By way of qualifications, and generally speaking, a teacher must have obtained a Bachelor's Degree in Education and pursuant to Section 19 (1) of the School Act hold a certificate of qualification as a teacher. A teacher assistant or education assistant, again generally speaking, will be expected to have successfully completed a one year education assistant certificate program at a community college such as the College of the Rockies in Cranbrook and Selkirk College in Castlegar.

The role of education assistants and growth in their responsibilities are tied to the adoption, by successive provincial governments and boards of education, of a policy directing that students having special needs be included in regular classrooms with their peers who do not have special needs, wherever possible. It is recognized though that in many cases, those students with special needs will have to be accommodated in various ways if they are going to be able to function effectively in that classroom. Providing those accommodations and services to facilitate the inclusion of students with special needs in regular classrooms, so that teachers can instruct, assess and evaluate them, is a primary responsibility of education assistants.

The nature of these accommodations and the services that will be provided to the individual student with special needs will be set out in the Individual

Education Plan (hereinafter “IEP”) for that student. In its document entitled “Special Education Services – A Manual of Policies, Procedures and Guidelines” dated April, 2016, the B.C. Ministry of Education states that an IEP

“... is a documented plan developed for a student with special needs that describes individualized goals, adaptations, modifications, the services to be provided, and includes measures for tracking achievement. An IEP must have one or more of the following:

- the goals or outcomes set for that student for that school year where they are different from the learning outcomes set out in an applicable educational program guide; or
- a list of the support services required to achieve goals established for the student; or
- a list of the adaptations to educational materials, instructional strategies or assessment methods.”

As with her other classroom students, the classroom teacher is responsible for designing, assessing and supervising the educational programs for the students with special needs in her classroom. In this regard, the Ministry of Education’s Special Education Services Manual comments that:

“Teachers are expected to design programs for students with special needs. Teachers’ assistants play a key role in many programs for students with special needs, performing functions which range from personal care to assisting the teacher with instructional programs. Under the direction of a teacher they may play a key role in implementing the program.

While teachers’ assistants may assist in the collection of data for the purpose of evaluating student progress, the teachers are responsible for evaluating and reporting on the progress of the student to parents.

In cases where teachers’ assistants perform health-related procedures they should be given child-specific training by a qualified health professional (See Inter-Ministerial Protocol – *Nursing Support Services for Children and Youth with Special Health Care Needs*).”

In performing these program responsibilities, the classroom teacher may call on the school-based team to assist her in developing and implementing instructional and management strategies and to coordinate support resources for her students with special needs. Membership on the team will usually include the school's principal, a learning assistance teacher, a counsellor, district resource staff, classroom teachers, and education assistants assisting teachers with those particular students.

Having engaged in this consultative process to develop an IEP for a student with special needs and possibly a related safety plan and behaviour management plan if circumstances required, it is expected that all teaching staff and support staff will act in accordance with the planning, goals and strategies described in them. Such consistency of action makes it more likely that the desired outcomes may be achieved. If any staff member has a concern about any of the goals or strategies after some experience, the proper course is to bring the concern back to the school-based team to revisit the issue and not simply to go off and act according to his own opinion. The latter course can lead to inconsistency and confusion and quite possibly defeat achieving the goals and outcomes being sought for that special needs student. It may also give rise to civil liability should a student be injured as a result.

Once developed, the Ministry of Education's Special Education Services Manual identifies a number of purposes an IEP serves:

- “• It formalizes planning decisions and processes, linking assessment with programming.
- It provides teachers, parents, and students with a record of the educational program for an individual student with special needs, and serves as the basis for reporting the student's progress.
- It serves as a tool for tracking individual student learning in terms of agreed-upon goals and objectives.
- It documents the relationships between any support services being provided and the student's educational program.
- It provides parents and students with a mechanism for input into the individualized planning process.”

Documents prepared by the Employer and other organizations describe in more detail the specific duties and responsibilities of paraeducators and education assistants in performing their role in supporting and assisting classroom teachers.

At a time when the Paraeducator position was in place, the Employer's Student Services Department published a District Handbook outlining the various special education services available in the school district. The Handbook also discussed the respective roles and responsibilities of teachers and paraeducators in providing those services. Regarding classroom teachers working with paraeducators, the Handbook states that:

“Teachers have the responsibility for designing, implementing and evaluating the entire educational program; paraeducators assist Teachers in this responsibility. The following are the teacher's responsibilities in directing the work of the paraeducator:

1. monitor that the paraeducator has the appropriate information and skills necessary to carry out assigned duties
2. initiate discussion with the paraeducator to develop a positive working relationship and clear communication procedures
3. schedule paraeducators' work day and meeting times
4. inform the paraeducator of the classroom management structure, discipline plan, expectations of the students, etc.
5. Arrange for resources required for paraeducator to complete assigned tasks
6. arrange for a workplace for the paraeducator in or out of classrooms as appropriate
7. model/teach techniques to paraeducators to use in instructional and behavioural assistance
8. provide direction to the paraeducator in the use of specific techniques, strategies, appropriate language, etc.
9. include the paraeducator in the IEP process

10. inform the paraeducator of their tasks related to the implementation of the IEP
11. ask the paraeducator for input during the Teacher's assessment and reporting process (Teachers must not direct the TA to evaluate or report student progress)
12. direct the paraeducator regarding the purpose of, the content and the format of home/school communication
13. refrain from directing paraeducators to assume
14. professional duties that are the responsibility of Teachers"

(at 41-42)

In this regard, the paraeducator was advised during her orientation that she may not

"Initiate program changes.

Be used as substitute for teachers.

Present new curriculum concepts and skills without guidance from the teacher.

Be given primary responsibility for instructional and management tasks.

Be assigned to attend collaborative meetings in lieu of the teacher.

Be given primary responsibility for ensuring the inclusion of one or more students.

Be used to carry out tasks usually assigned to other staff members in the building.

Take full responsibility for arranging and supervising field trips, assemblies, or school related errands.

Be responsible for assigning grades to a student or marking subjective or essay tests.

Develop lesson plans, assignments, or Individual Education/Transition Plans.

Impose disciplinary consequences without consultation with a teacher or administrator.

Treat injuries or other medical needs of a student without permission from appropriate personnel.

Be responsible for selecting and/or developing materials for special tutorial groups.

Design skill demonstrations for the class or small groups.

Report learning difficulties and requests for help to anyone except the classroom or support teacher.

Communicate directly with parents and others.

Enter information in a home/school communication book independently."

(at 45-46)

The Handbook also contained a "collaborative checklist" whose purpose was to serve as "a discussion guide to help classroom teachers and teacher assistants develop a collaborative working relationship." It covered areas such as "instructional support", "behavior management", "personal care assistance", and "supervising community activities to enhance life skills".

Now with the Education Assistant position in place, the Employer has put out an Education Assistant and Youth Family Worker Handbook, which also addresses the roles and responsibilities of the classroom teacher in relation to the education assistant assisting her, in very similar language to that found in the earlier Student Services Department's District Handbook. This includes sections describing the duties and responsibilities of classroom teachers, activities and responsibilities that the education assistant may not undertake, and a "collaborative checklist" which "is intended to be used as a discussion guide to help EAs/YFWs develop a collaborative working relationship with their classroom teacher and other school staff" Again, these "instructions" are conveyed to new education assistants during their orientation.

With respect to the “collaborative checklist” in the Education Assistant and Youth and Family Worker Handbook, one of those duties is providing instructional support to the students in the classroom under the direction of the classroom teacher. While the primary focus of an education assistant will be on the student(s) with special needs in the classroom, she will also be engaged from time to time with their peers in the class as well. Instructional support duties may include helping students understand concepts presented by the teacher, reading to students and listening to them read to her, supervising independent or small-group work, helping students work on projects or assignments, helping them select resources or materials, helping them become more independent, and reinforcing concepts taught by the teacher or other professionals such as speech and language pathologists or occupational therapists.

A second duty or responsibility is assisting the classroom teacher under her direction in managing student behaviour inside the classroom. This role may include the education assistant reinforcing appropriate student behaviour in accordance with the teacher’s plan by demonstrating and practising behaviour concepts and by modelling appropriate behaviour, supervising students in various settings such as gym, assemblies and outside before and after school and during noon hour, checking that students complete tasks in class, encouraging positive student behaviour, and helping students with developing positive peer relationships.

A third area of responsibility is providing assistance to students with special needs requiring it with matters of personal care such as toileting, seizure management, feeding, administering of medications, clothing/dressing, positioning and safe mobility. In these circumstances, the education assistant is provided with appropriate training by a professional prior to being required to perform the specific personal care duty.

An education assistant is also expected to assist the classroom teacher in matters pertaining to classroom organization such as engaging students in keeping their classroom tidy, by filing student papers and by taking attendance. The education assistant may also support the classroom teacher by observing students and recording their academic behaviour and progress as well as their social behaviour.

An education assistant can also be expected to assist a teacher by preparing, collecting and distributing classroom materials under the teacher’s direction. This area of responsibility includes creating instructional games and learning centres, preparing displays, creating, adapting, modifying materials under the teacher’s direction and creating social stories.

Education assistants may also accompany and supervise students on a variety of trips and outside activities such as field trips, shopping trips, work experience and work study trips and ones using public transportation.

Education assistants also participate in a variety of meetings and discussions having to do with matters such as program planning sessions, IEP meetings, review meetings, safety plan meetings and behaviour management meetings.

There is a close parallel between the activities that teachers are involved in and those that engage education assistants as well. That is because education assistants are primarily responsible for assisting teachers in carrying out their roles and responsibilities. However, the Employer's handbook advises education assistants to keep in mind this fundamental distinction; they are not teachers and therefore they "may not – act in the role of a teacher." They are responsible for supporting the teacher's plan for learning and classroom management and they "may not – divert" from those plans.

This theme is also the focus of a third document put before me in this proceeding. That document is a joint paper prepared and published by the B.C. Teachers' Federation and the B.C. wing of the Canadian Union of Public Employees titled "Roles and Responsibilities of Teachers and Teacher Assistants/Education Assistants". In this regard, those two organizations agree and state that:

"Inherent in the School Act and Special Education Policy, Procedures and Guidelines is the teacher's responsibility for designing, implementing, and evaluating the educational program, and the teacher assistant's role to assist teachers in this responsibility. Both the teacher and the teacher assistant facilitate the inclusion of students with special needs. It is their joint role to encourage the student to become an independent learner and member of the classroom, school, and community.

In order to foster a co-operative, respectful working relationship, teacher assistants need to be aware of those responsibilities that are specific to teachers.

Similarly, teachers need to be aware of job descriptions and the parameters of the responsibilities of teacher assistants."

For example, the joint paper notes that both teachers and teacher assistants are involved in different ways in "designing programs and planning and organizing learning experiences for students with special needs." However, the two organizations recognize that it is the teacher who is responsible for actually designing the instructional program, planning the learning activities, developing the IEP, designing learning and skill development goals, and providing the teacher assistant with the requisite information regarding classroom management structure, discipline plan and expectations for students. The teacher assistant will participate

in the process leading to the design of these programs and activities, for example, by relating their observations regarding the student under consideration and by discussing with the teacher her concerns regarding goals and activities. The principal role of the teacher assistant in this regard is working with the student to implement his instructional program and learning activities. Through this contact with the student and his instructional program and related learning activities, the teacher assistant gathers relevant information and knowledge about the student and his instructional program which the teacher assistant can pass on to the teacher.

The joint paper also recognizes that teachers and teacher assistants are involved in different ways in “implementing programs for students with special needs”. In this regard, a teacher will instruct and supervise student learning including defining specific techniques, strategies to be used in individual situations, whereas it is the role of the teacher assistant to implement those specific techniques and strategies to facilitate student learning.

A third area where the two are involved in different ways is the responsibility for “assessing, evaluating, reporting and recording student progress.” While the teacher carries all of these responsibilities related to the assessment and evaluation of students in her classroom, the teacher assistant is responsible for observing the student and documenting his inner strengths, achievements and needs while carrying out his daily learning activities. That information may then be used by the teacher to amend, adapt or modify the student’s instructional program.

At one point in time, education assistant positions were student-specific. Positions were posted based on a specific student who had specific needs. This would enable an education assistant to specialize to a degree. For example, if she preferred dealing with students with behaviour management issues, she could restrict her job applications to students who had been identified as having that particular special need.

That ability to specialize has been blunted to some degree. Now education assistants post into jobs in a particular school. That school may or may not in the particular school year have a student with a special need in her preferred area. Further, having once posted to a particular school, her assignment thereafter is a matter for the principal of the school. However, Shellie Maloff, the current Principal of Mount Sentinel Secondary School, testified that in making education assistant assignments, principals endeavoured to match student needs with education assistant skills. In her evidence, Laury Carriere, another principal in the school district, said much the same thing; that principals endeavoured to match classroom assignments to education assistant preferences in terms of student ages and needs.

This change in the nature of education assistant assignments may explain the different perception of their role and responsibilities some of the education assistants had and testified to during the hearing. Pursuant to Section 18 (1) of the

School Act, teacher assistants are employed “to assist teachers in carrying out their responsibilities under this Act.” However, in her evidence, Rena Bens, an education assistant in School District No. 8 (Kootenay Lake), said that it was her job to support the students in the classroom to which she had been assigned, to build a relationship with them, and to offer them emotional and physical support. This responsibility in particular applied to any students with special needs placed in that classroom.

While this perception may be somewhat understandable when work assignments were made on a student-specific basis, Ms. Bens continued to view that as the governing relationship, even after assignments were changed to a particular school and from there to a particular classroom. From this perception, Ms. Bens went on to say that the education assistant often had more knowledge and understanding regarding a particular student with special needs in a particular classroom than did the teacher, and based on that knowledge and understanding, was in a better position to know how to handle the student than did the teacher. Further, she said that the teacher was often busy with the other students in the classroom who did not have special needs, so she would decide how the student with special needs should be supported academically and keep the classroom teacher informed as to what she was doing.

In cross examination, Ms. Bens was referred to the school district’s Education Assistant and Youth and Family Worker Handbook and its statement that it is the classroom teacher’s responsibility to plan and implement behaviour management strategies for all students so as to provide a safe and effective learning environment, while it is the education assistant’s responsibility to implement these behaviour management strategies as specified by the classroom teacher, principal, and/or the student’s case manager, also a teacher. Ms. Bens was asked if she agreed with that description of the positions’ respective responsibilities. She responded in the negative. She explained that in her experience, the classroom teacher implements behaviour management strategies with regard to students in the classroom generally, while she, as the education assistant, dealt with those matters in relation to the students with special needs specifically assigned to her. She went on to say though that she had never experienced a teacher giving her directions regarding any of the students she was specifically assigned to work with. She said that the teacher would not have spent as much time as she had with that student. On the contrary, she said, the teacher would ask her for tips on how to manage the student on those occasions when she would have to go to the washroom or the like.

In cross examination, Ms. Bens also testified that she did not simply assist the classroom teacher prepare instructional materials under her direction. Instead, she said that she operated more independently than that. For the student(s) she was working with, she did the developing and then sought the teacher’s approval afterwards. She explained further that she had to develop the materials because that was the situation she had been placed in.

A second education assistant who testified in this proceeding, Victoria Strebchuk, expressed similar views as to the independence with which she performed her duties. For example, Ms. Strebchuk was asked about learning resources and who develops them. She replied that this issue usually arose in circumstances where the teacher had taught the lesson and then gave the students an assignment related to it. She was then responsible for working with the students to help them where necessary to complete the assignment. Sometimes the teacher gave her materials to work with the students on; other times she developed her own materials to help the students understand. She said that she would have to figure out why the student was not learning, not getting it, and then find a solution. She said that education assistants had to do a lot of problem solving. In this regard, she referred to an example pertaining to geometry in a Grade 8 class. The teacher had taught the lesson, but some of the students were not getting the concept the teacher had taught. She was asked to take time with those students who had not got the concept and to try different methods to convey those concepts to them so that they would get them. She said the teacher would periodically check in on her.

She said that that was pretty typical of what education assistants did. She said that they each had their own tool kit, i.e., different ways of modifying work for different grade levels and that they called on them as necessary. She also explained that the education assistants knew the curriculum and, in addition, they would be in the classroom when the teacher was teaching the lesson.

Ms. Strebchuk was also referred to paragraph 5 of the 2016 job description for the Education Assistant position which reads:

“Adapts and/or modifies classroom and curriculum materials to meet student and/or group specific needs as directed.”

Ms. Strebchuk explained that sometimes the classroom teacher told her to modify or adapt instructional materials and in what manner, but more often (she estimated 70% of the time), she simply did it and in the way she thought best in all of the circumstances.

With respect to student misbehaviour and behaviour management, Ms. Strebchuk testified that she did not receive a lot of information and instruction from the teacher regarding the subject. Instead, she said that she had to rely to a great extent on her own experience and instincts in dealing with such matters. She also explained that education assistants were trained in the MANDT System.

Misha Chernoff was the third education assistant to testify. He often worked with behaviourally challenged students. He referred to one such student he worked with for two and one-half years. The student was elementary school age and was suspected of being autistic. He suffered from high anxiety which resulted in verbal outbursts and his attacking others which was why he couldn't be tested for autism.

When he first started working with this student, Mr. Chernoff said that the student was not doing much academically. The student could not read. He did not know the alphabet and he was not able to count to 10. Because of his emotional outbursts, Mr. Chernoff said he frequently had to remove the student from the classroom. However, when that student left the school district some four years later, he was in the classroom, reading pretty well but not yet at his grade level, adding and subtracting and loving to read to others. Mr. Chernoff said the student had made up a lot of ground with his support.

Mr. Chernoff was asked if the student was following an academic plan developed for the student. He replied in the negative, explaining that no one had been able to connect with him. As a result, he said, he himself had had to build a program for the student. He said that the classroom teacher had no involvement in creating that program because the student was rarely in the classroom. The student's case manager wasn't involved either he said. He went on to comment that people were frightened of this student.

Mr. Chernoff was referred to the IEPs developed for students with special needs, and in particular, to the strategies set out in them for dealing with various issues should they occur. Initially in his employment, Mr. Chernoff said he reviewed the IEPs for the students he was working with, but not so much later when he became more experienced. More recently, he said, IEPs for his students were not always available to him. He testified further that he found these strategies very structured and that often they simply did not work. He preferred building relationships with his students and found that he achieved more success in dealing with them that way than dealing with them according to the "book". With respect to the safety plan prepared for the students he was working with, Mr. Chernoff commented that with respect to the suspected autism student discussed above, he was the school district's safety plan. When the student engaged in violent outbursts, he was the one called upon to calm him down. Lately, he said that it was he who was asked to provide strategies to the teacher for dealing with a particular student, not the other way around. That was because he interacted with the students a lot more than the teacher with the result that he would get to know them a lot better than the teacher would.

Colleen Kuny was the fourth education assistant to testify. She was referred to a situation where she was working with four different students in a classroom. She said the teacher had taught a lesson and then she had to assist the four students with an assignment based on that lesson. She said she had had to adapt the assignment in four different ways to take into account the needs of the students. She knew how to adapt the assignment to reflect their needs because of how well she knew each of the students.

Ms. Kuny was also asked to whom she would go, if she had tried all of the recommended strategies to address a particular behaviour management issue and

none of them had worked. Ms. Kuny replied that she would approach the classroom teacher if he was present or a counsellor or an administrator. She testified that it was her responsibility to provide her students with a calm environment in which they felt safe in and could learn.

Education assistants in School District No. 8 (Kootenay Lake) have been provided with training in the MANDT System which is evidence-based training directed at reducing violence in the workplace or other social situations where people come together. The system is directed at providing people functioning within those situations with proven, evidence-based techniques for conflict resolution and de-escalation to help prevent violence. In her evidence, Ms. Bens said she had taken the MANDT training course and she agreed that it had taught her strategies on how to de-escalate a situation before it got out of control. In addition, she said, the Safety Plan developed for each behaviourally challenged student in conjunction with his IEP often contained strategies for dealing with that particular student when he acted out. She said she would draw on both sets of strategies, i.e., from the MANDT System training and from the student's Safety Plan and would use the one most appropriate for the situation that the student was in. However, she said that she had never had a classroom teacher teach her any behavioural techniques.

Ms. Strebchuk, in her evidence, emphasized the importance of being able to intervene before events reached the stage of the student escalating her misbehaviour. If events proceeded past that point, to the meltdown stage, the classroom teacher may have to remove the student from the classroom or the education assistant may have to suggest that course of action to the teacher, seeking her approval. On the other hand, if the education assistant was able to de-escalate the situation such that the student could return to a calm state, Ms. Strebchuk said that whatever learning activity was then going on for that student could then be re-introduced.

Mr. Chernoff testified that he took his MANDT System training some eight years ago. He said that he did not find the training particularly helpful because the strategies it taught were very prescribed. Instead, he emphasized the importance of building a lot of trust with the students he worked with. In effect, he said, he was his students' safety plan. Based on that trust, should an escalating situation arise, he would seek to calm it and de-escalate through listening, calm discussion and persuasion.

In her evidence, Ms. Kuny said that she did not find the MANDT System training that she received helpful. She testified that it had been developed for use in the military, not for school students. Further, she said the MANDT System training did not teach her anything she did not already know. Instead, she tried to respond to the situation that was actually happening with the student by staying calm, being reassuring, and by trying to get the student help from others if that was necessary.

Finally, if these responses did not successfully de-escalate the situation, she would remove the student from the situation or classroom.

With respect to education assistants' hours of work, the evidence indicated that those hours varied to a degree depending presumably on each school's instructional day. In her evidence, Ms. Strebchuk said that she started work at 8:20 a.m. School doors were opened at 8:25 a.m. and she and the students were expected to be in the classroom by 8:40 a.m. Classes and instruction would take place until 10:15 a.m. when recess occurred. Recess lasted for 15 minutes. Classes resumed at 10:30 a.m. and would run until 11:30 a.m. During the COVID-19 pandemic, schools scheduled two separate and distinct lunch breaks to help ensure there was social distancing amongst the students, particularly while they were inside eating their lunches. During one of the lunch breaks, the education assistant would be performing noon-hour supervision duties while students were eating their lunches and then playing outside. During the second lunch break, those education assistants would be having their own lunch breaks. Lunch would finish at 12:55 p.m. and classes would resume. The instructional day would finish at 2:47 p.m.

In addition, education assistants in School District No. 8 (Kootenay Lake) are entitled to two paid 15 minute coffee breaks during the day. While most are able to take their morning coffee break, most are not able to fit the afternoon one in by the end of the instructional day.

During the hours education assistants are working, Ms. Bens testified that they always had to be on alert watching the students to ensure there weren't any conflicts developing. They had to stay one step ahead of the students. As a result, she said, the education assistants had to be "on" 100% of the time. She added that the "kids" were too unpredictable for the education assistant to take a mental break while she was with them during an activity.

Reference was also made to "LIF time" for education assistants. LIF is short for Learning Improvement Fund. From this fund, education assistants are paid for one hour a week, taken either at the beginning of the school day or at the end of the school day depending on the school, and most often on Wednesdays. From a pay perspective, the one hour's pay was justified on the basis that it compensated the education assistant for the fact that she did not receive a paid afternoon break for any of the five days of the week. Out of the 60 minutes, 15 of them were used for the education assistant to have an afternoon break and then the remaining 45 minutes were used by education assistants as their weekly preparation time, or to gather resources, or to meet and collaborate with their classroom teachers on matters relevant to students in their classrooms. LIF time for education assistants has been in place for the past three to five years.

I now turn to address the issues that arise for determination in this proceeding.

The first issue involves the question of whether the Union must demonstrate that there has been a change in the duties and responsibilities of the Education Assistant (formerly the Paraeducator) position since its last evaluation in 2002 in order to justify a review of that job. In this regard, Article 17.02 to 17.04 provide that:

“17.02 Role of Committee

The role of the Joint Committee will be to review and make recommendations for new and revised positions. Either party may engage advisors to assist them in this process.

17.03 Process

(a) Revised Positions:

Where an employee or Supervisor believe (sic) that the duties and/or responsibilities of the position have changed, the proposed changes will be forwarded to the Joint Committee for review. Any changes to the job description and rate of pay will be set by mutual agreement of the parties to the Collective Agreement.

(b) New Positions:

Any new position created by the Board, shall have the job description and rate of pay set by mutual agreement of the parties to this Collective Agreement. In the event of failure to agree the matter shall be resolved via the arbitration provisions of this Collective Agreement.

Failure to reach mutual agreement in (a) and (b) above shall be resolved by referring the issue direct to Arbitration as per the provisions of this Collective Agreement. Notwithstanding (a) above, all positions will be reviewed at least once every five (5) years.

17.04 On-Going Review

To ensure job descriptions are current and relevant, either Party may request, in writing, that a review take place as follows:

- (a) A maximum of three (3) to be under review at any one time. This number can be increased by mutual agreement.
- (b) The review will be initiated within thirty (30) days of the written request.
- (c) Where review of a position has not been requested within the five (5) year period, it will be the responsibility of the Joint Committee to complete the review.”

Following two mediation sessions, but prior to the commencement of the hearing into the merits of this dispute, I was asked to address the following issue in a preliminary way. I agreed to do so. That issue was described as follows:

“Under Article 17.03 of the collective agreement, in the absence of substantive changes to the duties and/or responsibilities of an existing job with an existing rate of pay, does an arbitrator have jurisdiction to change the existing rate of pay?”

See my letter decision in this matter dated October 6, 2020, at 2.

My summary answer to that question was as follows:

“Finally, returning to the issue posed to me by counsel, I am of the view that:

1. the question is *not* whether there have been ‘substantive changes’ to the Paraeducator position; the question is whether there have been any changes to the duties and responsibilities of that position; and
2. if so, whether those changes are sufficient to alter the rating of the position under the factors contained in the parties’ Plan sufficient to bring the position’s point total into a higher band and pay scale on the wage schedule. It is the Plan and a position’s rating under it that determines that position’s rate of pay.”

(at 4-5)

After considering the evidence of the four education assistants it called to testify and the three principals called by the Employer, the Union submits that I must conclude that the duties and responsibilities of the Education Assistant position have been changed since the last time it was evaluated as the Paraeducator position in 2002. It says new duties and responsibilities of the position include having to complete a current autism course and being able to use adaptive technology, both of which are not found in the 2002 Paraeducator position job description. A third change, the Union maintains, are the requirements to deal with more complex medical and care issues as well as behaviour management issues found in students with special needs attending schools. These changes are reflected, the Union contends, by comparing paragraph 3 in the 2016 Education Assistant position job description with paragraph 7 in the 2002 Paraeducator job description. With respect to behaviour management issues, it says that paragraph 2 of the Education Assistant job description contemplates an expanded, more complex support role to be performed by the education assistants. This expanded responsibility is consistent, the Union submits, with the change in education assistant assignments from student-specific to school-based. This change involved an increased exposure of education assistants to students in the classroom other than students with special needs.

In the past, at the time of the 2002 job description, the Union maintains that education assistants had more flexibility to remove students with special needs they were responsible for, from the classroom. For example, a student might be removed to provide him with the quiet he needed to focus on a particular lesson. Or the alternative, the education assistant might remove a student with special needs because his misbehaviour was disrupting the teaching going on in the classroom for the other students. Now, the Union says, the Employer has mandated that students, even those with special needs, should not be excluded from the classroom unless clearly required. This change in policy, it says, has necessitated the education assistants having to learn and become proficient in more extensive techniques and strategies to deal with disruptive student behaviour so as to keep all students in the classroom, wherever possible.

The Union submits that paragraph 5 of the 2016 job description also constitutes a new duty and responsibility for the education assistants. This paragraph provides that education assistants can adapt and/or modify classroom and curriculum materials to facilitate student learning.

The Union also maintains that paragraph 6 of the 2016 job description reflects a new duty and responsibility for education assistants requiring them to assist teachers with the assessment of students' progress by compiling information regarding behaviour and recording individual progress.

Finally, the Union refers to the education assistants' responsibility to provide noon-hour supervision to students while they are eating their lunch and while they are playing outside during the lunch break. At the time of the 2002 job description, the Union says that education assistants did not perform this duty. Instead, the Employer hired employees specifically to perform this duty. As of 2016, the Employer no longer employed employees as noon-hour supervisors. That responsibility was assigned to the education assistants.

For its part, the Employer maintains that the duties and responsibilities of the education assistants have, but for one duty, not changed since the time of the 2002 job description. The one exception, the Employer submits, is their responsibility to supervise students while they are on their noon-hour lunch break. However, at the same time, this exception, it says, is not particularly germane because the Noon-Hour Supervisor position was the lowest rated and paid job in the school district. While it acknowledges that the 2016 job description is considerably more detailed than the 2002 job description, the Employer contends that both job descriptions describe essentially the same job of a support staff position assisting teachers to carry out their responsibilities under the School Act, i.e., to design, supervise and assess education programs and to instruct, assess and evaluate individual students and groups of students.

Pursuant to Article 17, the role of the JJEC is to review positions within the Union's bargaining unit to ensure that the job descriptions prepared for them are accurate, current and relevant and that they are properly rated under the Plan. Once it has completed its review, the JJEC is then obliged to make recommendations to the Employer and the Union as to whether they should approve the job description for the position under consideration and as well approve the wage rate for the position resulting from its rating under the Plan.

The authority of the JJEC to conduct these reviews arises in four different situations. First, the JJEC can embark on a review of an existing position "where an employee or Supervisor believe (sic) that the duties and/or responsibilities of the position have changed" See Article 17.03 (a). A second situation where the authority of the JJEC to conduct a review arises is where a new position is created. See Article 17.03 (b) of the collective agreement. During its review, the JJEC will have to create a job description for the position or review one created for it initially by the Employer and then rate those duties and responsibilities under the Plan. Once these matters are determined, it makes a recommendation to the Employer and the Union regarding approval of the job description and approval of its wage rate based on the rating of the position under the Plan.

The third circumstance where an obligation arises to conduct a review of a position is when either party to the collective agreement requests it. See Article 17.04, opening paragraph. The fourth situation involves a responsibility put on the

JJEC to initiate and complete a review of every bargaining unit position at least once every five years even if one of the parties to the collective agreement has not requested it. See Article 17.04 (c).

While I am satisfied that a finding of a change in the duties and responsibilities of a position is necessary before the JJEC can change a job description and re-rate a position pursuant to a review being conducted under Article 17.03 (a), I am of the view that no such limitation, i.e., requiring proof of change, applies to the JJEC undertaking a review of a position under Article 17.04. There is no reference to such a limitation in Article 17.04 like there is in Article 17.03 (a). Secondly, an Article 17.04 request for review emanates from one or other of the parties to the collective agreement or from the JJEC itself pursuant to its obligation to review all positions in the bargaining unit at least once every five years. I am of the view that such reviews have a broader purpose of ensuring that all of the job descriptions for positions in the bargaining unit continue to be “current and relevant”, and that all of those jobs continue to be properly rated under the Plan and therefore appropriately ranked relative to one another. Jobs can evolve over time and, with changes in personnel on the JJEC, so can the interpretation and application of the Plan. Periodic reviews by the JJEC can hopefully prevent such drift and inconsistencies in interpretation and application from occurring.

The issue posed to me for decision in my preliminary award was premised on Article 17.03 (a) of the collective agreement. That provision does reference a change to the duties and responsibilities of a position. However, the case before me is in fact a review by the JJEC pursuant to Article 17.04 (c), not Article 17.03 (a). In my view, such a review does not require proof of a change in the duties and responsibilities of a job, or a change in the qualifications necessary to perform them, as a condition precedent to the JJEC revising the position’s job description or reviewing its rating under the Plan. Instead, the purpose of that review is to ensure the continuing accuracy of the job description and the continuing accuracy of its rating under the Plan after the passage of five years.

As part of its review of the Paraeducator (Education Assistant) position, the JJEC did revise the job description for the position. The Employer and the Union approved that revised job description on June 21, 2016. Accordingly, I accept that job description as an accurate description of the duties and responsibilities of the Education Assistant position as of that date, as well as of the qualifications necessary to perform them. In these circumstances, I am also of the view that the JJEC was then entitled to rate the Education Assistant position under the Plan based on the new job description. After the parties failed to mutually agree on that rating, and therefore on the wage rate for the Education Assistant position, that dispute was properly referred to arbitration and it is now before me to resolve. Because I am dealing with a review under Article 17.04 (c), it is not necessary for me to find that there has been a change in the duties and responsibilities of the position before I am able to consider the position’s rating under the Plan. While change may be a

relevant consideration in such a review, it is not a condition precedent to a review undertaken pursuant to Article 17.04 (c).

IV

The Employer maintains that the Education Assistant position should be rated the same as the Paraeducator position was under the Plan in 2002. That rating is set out above at page 5 of this Award.

The Union supports the JJEC's recommendation of a wage rate set at Pay Scale 11, but it differs with the JJEC on some of its individual factor ratings. The Union's ratings for the purposes of this proceeding are as follows:

<u>Factor</u>	<u>Degree</u>	<u>Points</u>
Education	5	107
Experience	1	19
Decision Making	5	125
Consequence of Error	3	60
Human Resources	1	8
Contacts	5	100
Physical Demand	3	60
Sensory Demand	5	100
Working Conditions	3	<u>60</u>
Total Points		639

639 Points equates to Pay Scale 11 on the parties' wage schedule.

The parties disagree on the rating of the Education Assistant position under three factors: decision making, contacts, and sensory demand. I now turn to consider each of those factors and which of the parties' ratings for each is the most appropriate.

The first of those factors is decision making.

This factor

“... measures the level of decision making inherent in the job with respect to the identification and resolution of problems, the exercise of judgment, the complexity of problems and the freedom to implement solutions.”

The Plan then describes six different levels or degrees of decision making based on these criteria. Those six different degrees of decision making are:

- “1. Duties are straightforward or highly repetitive and are covered by well-defined procedures or detailed instructions. Choices of action are limited and most work problems are referred to the supervisor or senior co-workers.
2. Duties are straightforward, following standardized procedures or instructions with minor variation in work procedure or task sequence. Work problems not covered by procedures or instructions are referred to the supervisor or senior co-workers.
- 3 Duties are varied, following established procedures and policies with some judgment required to determine the most appropriate of a limited number of alternatives. Only non-routine or unusual situations are referred to the supervisor or senior co-workers.
4. Duties are diverse or specialized, following established procedures and policies with moderate judgment required to determine the most appropriate of a variety of alternatives. The exercise of initiative is a normal requirement but is restrained by program objectives. Direction is sought when apparent solutions to problems are not within the intent of established practices.
5. Duties are complex or specialized, following broad policies, procedures, precedents or guidelines. Considerable judgment is required in the analysis of information or situations to define problems and to determine the most appropriate alternative. Only highly unusual and complex problems are discussed with the supervisor.
6. Duties are highly complex, diversified or specialized, in the application of policies, procedures, precedents and guidelines. Initiative and independent judgment are required in the investigation of problems, and in the analysis and interpretation of facts in order to determine appropriate solutions. The exercise of initiative is extensive and involves complex, far reaching and sensitive issues. Only major issues or highly unusual situations are discussed with the supervisor.”

To assist those rating jobs under the Plan and more particularly the decision making inherent in a job, the Plan provides a number of “notes” to guide them in interpreting and applying the degree statements. Those “notes to raters” advise that:

- “A. Complexity and magnitude of problems must be considered in terms of the judgment, analytical ability, and initiative required in deciding upon the appropriate choices of action.
- B. Freedom to implement solutions must be considered in terms of the existence of instructions, procedures, policies, precedents and the nature and extent of supervision received.
- C. It is important to evaluate the decision making that is permitted within the parameters and constraints of the position and not the capability of the incumbent. Initiative is the mandated authority to carry out assignments.
- D. When evaluating a position under this factor, the majority of the items of the selected degree must be met (e.g., a position meets one of the three items in Degree 2 and two of the three items in Degree 3; the position is, therefore, properly evaluated in Degree 3).
- E. Decision making permitted while temporarily covering-off for another, or more senior, position is not rated unless an incumbent is required to cover-off duties on a regular basis.
- F. Task sequence is interpreted to mean prioritization.
- G. In the absence of a written policy and procedures manual, past practices will be considered.”

Overall, I am of the view that this factor is concerned with the difficulty inherent in the job in identifying and resolving problems. The level of difficulty will vary with the degree of initiative, analysis and judgment required to both identify problems and then resolve them.

For example, at Degree 1, duties are “straightforward” in the sense that they are “covered by well-defined procedures or detailed instructions”. In these circumstances, it will be relatively easy to identify a problem. It will either be

addressed in those procedures and instructions, in which case so will its solution with only limited choices of action left to the position, or it will not be addressed there, in which case the position must refer the problem to a supervisor or senior co-worker to address. This level of work requires very little in the way of initiative or analysis, the evaluation of information, or the exercise of freedom or discretion to implement solutions. Both the identification of a problem and its resolution are straightforward and require only limited choices of action on the part of the incumbent. There is virtually no freedom for the incumbent to work out and implement solutions to problems,

However, by Degree 3, duties are no longer all straightforward. Some will be, and as a result, the identification of, and the solution to, work problems will be relatively easy following reference to “established procedures and policies” Some duties may, on the other hand, be of a different kind or quality, i.e., they may vary from those whose performance are straightforward. Those duties may require an incumbent to engage in some analysis and exercise some initiative, discretion and judgment to choose the most appropriate solution to a problem from amongst “a limited number of alternatives.” In this sense, the position’s duties are varied, i.e., some are straightforward, governed by “established policies and procedures”, while others are more difficult, engaging the incumbent in “some” degree of initiative, analysis, judgment and discretion. However, even these latter duties are “routine” or “usual” in the sense that the “established procedures and policies” set out a “limited number of alternatives” from which the incumbent can choose. If the “limited number of alternatives” do not provide an appropriate solution to the problem, the matter is to be referred to a supervisor or senior co-worker for resolution. It no longer belongs to the incumbent in the position under consideration. At this level, a position has some freedom to implement solutions, but it is still limited.

By Degree 5, duties are complex. Policies, procedures and instructions no longer provide clear answers to the identification of, and resolution to, work problems, even to the extent of laying out a “limited number of alternatives” from which the incumbent is to choose. Instead of being “well-defined”, “detailed”, and “established”, policies, procedures, precedents, and guidelines at the Degree 5 level are “broad”. They may point generally towards some broadly expressed goals and purposes to guide a decision maker, but the final decision on identifying and resolving a problem will require an incumbent to gather and analyze the relevant information, “define” the problem and the possible solutions, analyze all the circumstances of the situation and reach a conclusion as to what the solution should be. In my view, it is the requirement for an incumbent, in the face of “broad”, general and non-specific “policies, procedures, precedents or guidelines”, to exercise “considerable judgment . . . in the analysis of information or situations to define problems and to determine the most appropriate alternatives” that makes the duties concerned “complex”. At this level, a position has a fairly “broad” freedom to identify problems and work out solutions. That freedom is only limited to the extent that

problems are “highly unusual and complex”, and even then the limitation on its freedom is that it discuss the problem with its supervisor.

The Union takes a different approach to determining whether a particular duty is complex or not. It has regard to the task and the different elements that go into performing it. It then forms a conclusion based on the Oxford English Dictionary’s definition of “complex” as

“... consisting of or comprehending various parts united or connected together; formed by combination of different elements; composite, compound.”

In its written argument, it made reference to a number of examples of complex duties based on this form of analysis. For example, it submits that:

“EAs do perform tasks that differ from one another. The job description includes duties ranging from feeding, dressing, and toileting; to intensively intervening in students’ disruptive, antisocial, and dangerous behaviour; to adapting and modifying learning materials.

These tasks are not only varied, they are themselves complex. EAs do not perform a variety of simple tasks, making their duties merely varied at a level 3 rating. They perform a variety of complex tasks that combine different elements to achieve objectives, at a level 5 rating.”

(at paras. 115-116)

Later in its argument, it refers to the duty referenced in the 2002 job description of “dispensing medication”. It contends that this task is “generally simple rather than complex” (at para. 134). It then refers to the responsibility under the 2016 job description of “provid[ing] care to designated students’ medical needs” and submits that it is “complex” (at para. 135). It goes on to argue that:

“As described above, this broader set of duties involves closely watching students to identify when a need arises and the nature of the need, and responding appropriately to that need, which might require the EA to support the student with feeding, dressing, toileting, mobility, personal hygiene, and monitoring blood sugar.

This change to the job description codifies another way in which the job has become more complex. The role has

changed from the simple task of dispensing medication, to the complex task of providing care for medical needs, which combines multiple elements of monitoring the student, identifying when a need arises, understanding non-verbal communication from a student, and carrying out specific duties related to medical needs.”

(at paras. 135-136)

Next, it contends that:

“Behaviour modification techniques are complex. They combine multiple components. EAs described the complex techniques they use to modify student behaviour in great detail.”

(at para. 138)

A few paragraphs later in its argument it contends that:

“As reflected in the above testimony, modifying student behaviour is a complex duty, comprising multiple elements. EAs closely attend to the student and the environment, adapt their response to match the student’s needs in that moment, select the strategy that will work best in that moment,

monitor the effectiveness of the approach they use, and change course as needed.”

(at para 143)

Finally, by way of example, the Union maintains that:

“Adapting and modifying classroom and curricular materials is inherently complex work. It has multiple components. It requires EAs to combine their understanding of the abilities of the student or students they are supporting with their knowledge of different ways learning materials can be adapted or modified, and their awareness of both the classroom teacher’s curricular objectives and the student’s personalized goals. Combining all of that, EAs determine how they will adapt or modify materials to meet the needs of one or several students.”

(at para. 225)

With respect to the complexity of the duties of an education assistant, the Union summarizes its view as follows:

“The changes to the JD that the parties incorporated in 2016 represent a significant increase in the complexity of EA duties. EAs have new, complex duties related to closely, continuously supervising students with multiple physical needs and students who require intensive behaviour intervention; providing care to students’ medical needs; behaviour modification, conflict resolution, problem-solving, and classroom management; adapting and modifying materials; compiling information and recording student progress; and using technology. EAs do all of this in the context of school-based postings, where they have to be ready and able at any time to work with any student, instead of being able to rely on established procedures and routines for one designated student. They do all of this while rotating through any assignment with any student in a school.

The complexity of EA duties increased significantly between 2002 and 2016 and this component of the Decision-Making factor now aligns with the level 5 rating: the duties are complex, rather than merely varied.”

(at paras. 237-238)

Having considered all of the evidence and argument, I do not agree with the Union’s approach for determining the meaning of the words “complex” and “complexity” for the purposes of the Decision-Making factor in the Plan. In my view, those words and others like them are to take their meaning from the way they are used in the context of the Decision-Making factor considered as a whole. I adopt this interpretive approach to the interpretation and application of all three factors in dispute.

If a position’s decision concerning identifying problems and working out solutions to them are governed by “well-defined procedures” or “detailed instructions”, they will be relatively easy and straightforward. Then, if anything that does not fit within those procedures or instructions may be referred to supervisors to handle, one can see that decision making in these circumstances is quite straightforward and there is virtually no freedom to implement solutions.

However, as procedures, instructions, and policies become less “well-defined” and “detailed”, and instead, more room for initiative, analysis, judgment and the

exercise of discretion creeps into decision making, it becomes less straightforward and more difficult. Recourse to supervisors is still available, but only in respect of “non-routine or unusual situations”, not most problems. “[E]stablished procedures” will still provide some easy answers to problems, but still leave areas that will have to be analyzed by the position and judgment and discretion exercised in working out the solutions. These latter decisions are “varied” in the sense that aspects of the position’s decision making are straightforward, but others require the exercise of some freedom to implement solutions entailing some initiative, analysis, judgment and discretion.

Then, decision making starts moving to the other end of the continuum, becoming increasingly more difficult. Procedures, policies and guidelines are no longer “well-defined”, “detailed” or “established”. They do not provide clear answers in respect of identifying problems and working out solutions to those problems. Instead, they are more “broad” in terms of goals and purposes to be achieved, both in terms of identifying problems and working out solutions. The actual decision making is left to the position to investigate the facts utilizing initiative and analysis and then work out an appropriate solution utilizing judgment and exercising discretion. At this level, a position does not have recourse to referring the decision off to his supervisor to make. He can seek his supervisor’s input, i.e., discuss it with him, but the responsibility for making the decision, or exercising the freedom to implement solutions, remains with his position. In my view, this is “complex” decision making within the meaning of Degree 5.

After that, you only have the “highly complex” level of decision making at Degree 6.

Thus, I am of the view that “complex” decision making at the level of Degree 5 occurs where the identification of problems and the working out and implementation of solutions for them require considerable initiative, analysis, judgment and the exercise of discretion because the governing policies, procedures, guidelines and the like are broadly expressed. They are not “well-defined” or “detailed”, providing the answers within their terms. The position, instead, has to work them out itself. Further, it cannot avoid making a decision by referring the problem and its solution off to a supervisor. It has the freedom to implement solutions and it must exercise that freedom. Consequently, the critical element in making a claim for a Degree 5 rating for decision making is being able to demonstrate that the position’s decisions are governed by “broad policies, procedures, precedents or guidelines.”

In addition, the Union submits that:

“The Decision-Making factor as contemplated in this JE Plan is not focused on the question of decision-making authority in

and of itself, that is, who makes the ‘final call’ when high-level decisions are made.

The Decision-Making factor is focused on the complexity and challenge of the decision-making tasks in the job, not the level of ultimate responsibility for decision-making.”

(at paras. 110-111)

I do not agree with this submission. There is no reference to referring difficult decisions off to a supervisor or senior co-worker or to seeking direction, as there are in the previous four levels. Instead, the position is expected at the Degree 5 level to exercise its own “considerable judgment” by analyzing the “information or situations to define problems and to determine the most appropriate alternative.” An incumbent may discuss the matter with a supervisor, but in my view, the expectation at the Degree 5 level is that that incumbent will make the decisions. With the freedom to implement solutions comes the responsibility to do so from a job evaluation perspective.

I now turn to consider the duties and responsibilities of the Education Assistant position and whether their performance is governed by “broad policies, procedures, precedents or guidelines” within the meaning of Degree 5 *or* whether their performance is instead governed by “established procedures and policies” but “with some judgment required to determine the most appropriate of a limited number of alternatives.”, all within the meaning of Degree 3. A further consideration – is it open to the education assistant to refer unresolved, non-routine or unusual situations to a supervisor to resolve or must she resolve the situation herself, possibly after discussing it with her supervisor?

Under the School Act, the teacher is responsible for “designing, supervising and assessing educational programs and instructing, assessing and evaluating individual students and groups of students.” See Section 17 (1). Again, pursuant to the School Act, education assistants are responsible for assisting teachers to carry out those responsibilities. See Section 18 (1). As the title of their position suggests, education assistants are not teachers. Their role is to provide assistance to teachers. They have neither completed the educational requirements to become qualified as a teacher, nor have they been issued a certificate of qualification as a teacher by a professional body.

This role as assistant to a teacher is also reflected in the 2016 job description for the Education Assistant position. The job of an education assistant is summarized in part as follows:

“An employee who under the direction and instructional supervision of the teacher and/or Special Education teacher

or Principal is assigned to the school based team to provides (sic) assistance in the delivery of regular or alternate programs of study with an individual or group of students, to assist teachers and other professionals to carry out their work with identified students(s).”

Both the Employer and the Union have signed off on the job description signifying that it is “current and relevant” within the meaning of Article 17.04 of the collective agreement.

Having considered the matter, I am of the view that an assisting role is not consistent with a rating at Degree 5 under the Decision-Making factor. A position operating under the “direction and instructional supervision” of a higher level position is not, in my view, going to be governed by “broad” policies and procedures and authorized to make final decisions with respect to those matters, after only being obliged to discuss the matter with that higher level position they are assisting. Instead, such a position, in my view, would be governed by “standardized procedures or instructions” at the Degree 2 level or by “established procedures or policies” at the Degree 3 level. Further, in my view, an assisting role contemplates decisions being made by the position with the responsibility, in this case the statutory responsibility, to make them and not by the position that is only playing the role of the assistant. This reasoning also excludes a Degree 5 rating for the assisting role.

One of the principal roles of an education assistant is to provide instructional support to the classroom teacher following the teacher’s delivery of a lesson to the students. The goal is to ensure the students understood what was being taught. The education assistant may review the concepts being taught by the classroom teacher and through the responses of the student assess whether he did in fact understand them or not. The education assistant as an alternative may have been given an assignment to have the students do with the education assistant overseeing them while they are working on the assignment. Either way, the education assistant, who would have been in the classroom when the classroom teacher had delivered the original lesson, would be able to identify if the student was still not understanding the concepts. If the student was not, the education assistant might try some other alternative to get the concepts across to the student. Suggestions as to alternatives to try might come from the classroom teacher or, in the case of a student with special needs, from his IEP, or be based on the education assistant’s other experiences with the student trying to grasp the same or similar concepts in the past. An appropriate alternative would also have to be based on the specific difficulty the student was having with the lesson.

I am satisfied that identifying the problem as one of difficulty understanding the concept being taught would be straightforward and choosing an appropriate response would only require a limited amount of analysis and exercise of discretion

to choose amongst a small number of alternatives to assist the student to understand. If that did not correct the problem, the matter could be “referred” to the classroom teacher to resolve.

With respect to students with special needs, specific educational goals may be established in the IEP having in mind the student’s special circumstances and the education assistant may be assigned a role in implementing the strategies to help him obtain those goals. As an example, I was provided with a sample IEP with names and other identification features deleted. The student was assessed as having “moderate intellectual disability” including a severe deficit in language skills and possible attention deficit hyperactivity disorder. His courses were adapted in light of these disabilities.

With a view to developing his functional literary skills during that particular year, the IEP outlined the following strategies for the education assistant to undertake. First of all, the education assistant was to practise reading with the student on a daily basis. The education assistant was to start by reading the identified passage to the student out loud. The assistant would demonstrate the method of sounding out and using context to guess at words and self-correct errors. The assistant was also to continue to use Lexia to support decoding and comprehension and to use DEAR and EPIC to build concepts and vocabulary. Further strategies were assigned to the education assistant to develop the student’s independent writing abilities including sentence sequencing and use of a word bank and to develop his spelling ability using the Words Their Way spelling programme.

In cases such as this with an IEP, both the problem itself and the solution to it are identified for the education assistant and she simply must carry out the recommended strategies. These are straightforward duties.

In my view, this level of decision making is captured at the Degree 3 level. It involves routine and usual situations for education assistants and routine and usual responses to those types of problems. On the other hand, I am satisfied that these types of situations are not governed by “broad” policies, procedures and guidelines requiring considerable initiative, analysis and judgment in identifying the problem and working out a solution. If the solution to the problem went so far as to require classroom and curriculum materials to be adapted or modified, the job description contemplates that that matter would be “referred” to the classroom teacher and that the education assistant would act “as directed”. See paragraph 5 in the Job Requirements section of the 2016 job description. These limitations are consistent with an assisting role which is properly rated at Degree 3 in this case.

With respect to adaptations and modifications to classroom and curriculum materials, I am of the view that it cannot be any other way. It is the classroom teacher who will have designed the educational program for the student with special needs that is reflected in his IEP. It will be that same teacher who will have specified

the learning outcomes she is expecting the student to achieve from the implementation of that program. The recommended strategies and materials to be used by the education assistant working with the student would also be directed at that program and achieving those goals. If strategies and curriculum materials are to be adapted or modified, it must be because they are somehow inhibiting the student from achieving the learning outcomes set for his education program. In my view, only the classroom teacher can make that determination. Further, only the classroom teacher can adapt and modify classroom and curriculum materials so that they remain consistent with the identified learning outcomes and educational program for the student with special needs. Education assistants are not teachers. They do not have the education and training to make those determinations, nor have they been assigned that responsibility under the School Act. Accordingly, I do not agree with the Union's contention that the "how" of the adaptations or modifications to these materials is left up to the education assistants.

A second principal role education assistants play in classrooms assisting classroom teachers is in managing the behaviour of the students in the classroom, and particularly the behaviour of students with special needs. Again, the classroom teacher is the person primarily responsible for the discipline of the students in her classroom and the role of the education assistant is again to assist her in managing these behaviours. In this regard, see paragraph 4 of the 2016 job description. Identifying a student who is acting out or otherwise misbehaving is not that difficult in my view. The issue requiring some initiative, analysis and judgment is how to address the situation in order to resolve it. Many of these outbreaks, in my view, would be of a routine, usual nature and accordingly, in light of an education assistant's general education and more specific behaviour management training, would not be that difficult to address.

With respect to more trying situations arising with students with special needs, individual education plans, safety plans and behaviour support plans for individual students customarily contain recommended behavioural modification responses for particular students. For example, I was provided with a copy of a safety plan for a student with special needs, including an attention deficit hyperactivity disorder. Generally speaking, the safety plan described him as being a "friendly student" who was "capable academically when he was in a positive mindset." However, on occasion, he would resist, ignoring demands, refusing to leave an area, swearing or threatening students or adults, leaving the area without permission and otherwise challenging authority. The purpose of the plan was to ensure that staff working with the student were

"... aware of responses and safety procedures in place to maintain a safe, productive learning environment for [the student] and staff."

His plan went on to describe “certain early warning signs” that were likely to forewarn subsequent problem behaviour and outline strategies to address them. One of those warning signs was the student’s forgetting to take his medication as directed. As a response to this potential failure, the plan directed staff to call the student’s mother to check that he had taken his pill, and if not, that she bring the medication to school so that he could and did take it. Another warning sign was the student’s worry or anxiety that a peer or an adult was against him and that this worry/anxiety had persisted for an unusually long time. A recommended strategy to respond to this “early warning sign” was to provide him with a positive one-on-one interaction with an adult or to provide him with time away from class to do something with an adult to change his mindset.

Next the plan addressed “immediate triggers” that led to the escalation of his “problem behaviour”. One of those triggers was when the student felt like he would not be successful in an academic task he was about to be asked to perform. The recommended strategy to respond to this trigger was that the teacher praise him and direct some positive re-enforcement his way. Another identified immediate trigger was the student feeling threatened by one of his peers. A recommended strategy was that the teacher or education assistant create an opportunity in an activity away from the peer concerned that the student would enjoy and then, once he was calm, help him resolve the situation with the other student he was anxious about.

The plan in this case also provided for a crisis response in case none of the early interventions worked. In the case of increasing anxiety, if the student became disruptive, loud, tearful or tossed work off his desk, a teacher or education assistant was recommended to be empathetic, non-judgmental and to engage him in conversation, create a break from the activity as a way of reducing the academic expectation that he succeed and provide him with the positive attention that he was seeking. In the event the student started to act out in a physical way, the teacher, education assistant and counsellor were advised to seek help from the principal, remove other students from the classroom, while one of them remained with the student in the classroom. Finally, someone was directed to call the student’s mother to advise her as to what was transpiring and to possibly come and pick him up and take him home.

A behaviour plan contains similar information and seeks to achieve a similar goal, i.e., informing teachers, education assistants and the like working with a particular student with special needs of relevant information about the student and the disabilities he suffers from with a view to providing them with strategies to respond to misbehaviour on the student’s part. First of all, the student’s strengths and preferences from an academic perspective are reviewed. Next, his disabilities are identified as well as the misbehaviours that can result when his disabilities are activated. Again, they are quite straightforward. For example, the student concerned had a tendency to become frustrated from working too long. He became

tired, needed to move, and this could generate the inappropriate behaviour, in his case, pinching, pushing and hitting. The behaviour plan then suggested a number of alternative strategies to deal with the acting out. First of all, if the education assistant sensed that the student was becoming tired and frustrated with his current activity, she could change the task the student was performing to something different. Alternatively, she could warn him that if his misbehaviour continued other consequences would follow or he could be given a time out until he calmed down. Or his mother would be contacted so that she could speak to him and reinforce what the education assistant was telling him to do.

Thus, in my view, an education assistant who is assisting a classroom teacher with discipline in her classroom including by utilizing general principles of behaviour modification and non-violent crisis intervention as well as strategies outlined in the safety plans and behaviour support plans for particular students is performing those duties in accordance with either “standardized procedures or instructions” within the meaning of Degree 2 or “established procedures or policies” within the meaning of Degree 3. The identification of cases of misbehaviour and conflict requiring management and crisis intervention is generally straightforward. It is the response to such misbehaviour and conflict where “some judgment” is required. However, through the Employer’s policies and procedures and training such as MANDT System training, and through individual special needs students’ safety plans and behaviour support plans, various alternative solutions to the misbehaviour and conflict are proposed for the education assistant to consider and choose from. The matter of student discipline is not simply left to the education assistant to decide based on only “broad policies, procedures, precedents or guidelines” In my view, that level of initiative and discretion falls within the scope of Degree 3 of the Decision-Making factor.

Another important role performed by education assistants is providing personal care and medical assistance to students with special needs present in the classroom to which they have been assigned. Personal care duties such as feeding, toileting, and clothing/dressing are straightforward for the most part. I can foresee there might be some room for the exercise of some initiative and discretion in the areas of feeding and clothing/dressing, but I do not believe that would extend beyond choosing from a “limited number of alternatives.” With respect to providing assistance in relation to students’ medical needs such as seizure management, administering medications, positioning and assisting with safe mobility, there would seem to be little room for the exercise of discretion. As paragraph 3 of the 2016 job description indicates, these duties are to be performed “as directed by a health professional” and that the education assistant will be provided with training in respect of any medical needs procedure she is performing.

I am satisfied that none of these personal care duties or medical needs duties are being performed under “broad” procedures and/or guidelines. Instead, I am

persuaded that they would be performed in accordance with “established procedures”. In terms of medical needs in particular, it could not be any other way.

In their evidence, the four education assistants who testified regarding the duties and responsibilities of the Education Assistant position purported to describe a role that operated much more independently than that described in the 2016 job description and the School Act. In their view, they were not merely assisting their classroom teachers in educating the students in their classroom. In particular, with respect to students with special needs in those classrooms, in their view, they were the ones, not the classroom teachers, who took the lead in providing them with an education and seeing to their discipline and the management of their behaviour in the classroom. In their view, the classroom teacher was primarily responsible for those matters in relation to the students in the classroom without any special needs, but in respect of those with special needs, that responsibility lay primarily with the education assistants. They spent the most time with those students building a relationship with them that the classroom teacher did not have. In their view, they knew their students best including how to adapt and/or modify classroom and curriculum materials so they could best learn the concepts being taught and how to manage them in circumstances where their behaviour was disrupting the classroom. In effect, in my view, they were suggesting they were equal partners with the teachers in their classrooms in respect of the education and discipline of the students.

Their perception may be explained by the fact that all four of them are experienced education assistants and very good at their job. They are familiar with the different types of disabilities that one finds in students with special needs, and the strategies that work and those that don’t work addressing problems relating to their education and their discipline. However, the stricture found in paragraph C of the “Notes to Raters” for the Decision-Making factor must be remembered:

“It is important to evaluate the decision making that is permitted within the parameters and constraints of the position and not the capability of the incumbent. Initiative is the mandated authority to carry out assignments.”

In my view, education assistants need to heed the advice given in the Joint BCTF/CUPE Paper titled “Roles and Responsibilities of Teachers and Teacher Assistants/Education Assistants” that:

“In order to foster a co-operative, respectful working relationship, teacher assistants need to be aware of those responsibilities that are specific to teachers.”

Pursuant to Section 17 (1) of the School Act, it is teachers who are responsible for educational programs, learning outcomes and instructing, assessing and evaluating

individual students. Pursuant to Section 18 (1) of that Act, it is the role of the education assistant to assist the teacher in that regard.

Education assistants play an important role in classrooms. Inclusion as a policy would not, in my view, work without education assistants being there to support students with special needs and thereby enable them to attend regular classrooms. However, they are not teachers. They have not been educated as teachers and they are not required to possess a certificate of qualification as a teacher. Accordingly, in my view, their job cannot be evaluated as if it was a teaching job. I would note as well that, in my view, the 2016 job description for the Education Assistant position in School District No. 8 (Kootenay Lake) agreed to between the Employer and the Union describes an education assistant job, not a teaching job.

Based on all of the foregoing, I am satisfied that the duties and responsibilities of the Education Assistant position do not entail the interpretation and application of “broad policies, procedures, precedents or guidelines” within the meaning of Degree 5 of the Decision-Making factor. In my view, the work of this position is not “complex” within the meaning of Degree 5 because it is not required to exercise the level of initiative, analysis, judgment and discretion that is contemplated where “broad” policies, procedures, precedents and guidelines govern the work. Instead, I am of the view that the level of decision making of this position is more appropriately captured by Degree 3. The position follows “established procedures and policies” reflected in such documents as the IEPs of students with special needs, safety plans and behaviour support plans as well as “instructions” delivered during orientation regarding the scope of the paraeducator role and now the education assistant role vis-à-vis the role of the classroom teacher found in the Student Services Department Handbook at the time of the Paraeducator position and now in the Education Assistant and Youth and Family Worker Handbook. Matters outside the scope of these “established procedures and policies”, i.e., non-routine or unusual situations, are to be referred to the teacher to be dealt with or for direction. As assistants to the classroom teachers, they perform their work subject to their teachers’ direction. Decisions on the “broad” issues are, in my view, the responsibility of the teachers, not the education assistants.

In conclusion, my rating for the Education Assistant position under the Decision-Making factor is Degree 3.

I now turn to consider the appropriate rating for the Education Assistant position under the Contacts factor. The Employer maintains that it should remain at Degree 4. The Union submits that it should be increased to Degree 5.

The Contacts factor measures

“... the responsibility for effective handling of personal contacts with other staff, students, members of other

organizations and the general public. Consideration should be given to the nature and purpose of such contacts. The following characteristics of the work are to be considered in selecting a degree:

- the purpose of the contact
- the extent to which tact, persuasiveness and negotiating skills are required.”

The Contacts matrix describes three distinct purposes for contacts:

- “A. Purpose is to exchange/discuss information in accordance with current policies and technical practices.
- B. Purpose is to clarify/exchange and discuss information of a detailed or specialized nature (requiring specialized knowledge).
- C. Purpose is to gain cooperation; coordinate activities or program; mitigate high tension or emotional situations.”

In my view, this aspect of the Contacts factor establishes a hierarchy in terms of the reason for the contact. At the base level, i.e., A, is coming into contact with another person simply to exchange and discuss information pertaining to their mutual duties and responsibilities. At the next level, i.e., B, more is involved. That “more” is the responsibility on the part of one party to the relationship to clarify or explain parts of the information being exchanged and discussed so that the other party can understand the import of that information. This circumstance can often arise in situations involving the exchange of specialized knowledge. The highest level within this hierarchy in this plan is C which captures more than just the exchange, discussion, clarification and explanation of information, but also the need to use that information for the purposes of persuading or negotiating the co-operation of the other party or persuading or negotiating with him to coordinate his activities or programs with yours. A third and somewhat unrelated example at this level is the responsibility to use the exchange and discussion of information to persuade the other party to calm down in order to “mitigate high tension or emotional situations”.

The matrix also describes three different levels pertaining to the nature and extent of those contacts:

- “1. Contacts require courtesy
- 2. Contacts require tact and discretion

3. Contacts require human relations and communication skills.”

The parties are agreed that level C best reflects the purpose of the contacts of the Education Assistant position. Where they disagree is in relation to the nature and extent of those contacts. The Union submits they require “human relations and communications skills”. The Employer disagrees and says that only “tact and discretion” are required.

The Plan’s Notes to Raters section concerning the Contacts factor endeavours to give raters an idea as to what was intended to be captured by each of those terms or phrases. The relevant part of those Notes reads as follows:

“E. Tact is: a keen sense of what to do or say in a difficult or delicate situation in order to maintain good relations with others or avoid offense

- implies both skill and consideration in dealings with others and a sympathetic understanding in observing the feelings of others
- skill involved in creating a good impression when meeting strangers or in handling a new or difficult situation.

F. Discretion is: cautious reserve especially in speech

- ability to make decisions which represent a responsible choice and for which an understanding of what is lawful, right or otherwise is presupposed.

G. Communication skills include skills such as oral presentation skills, writing skills (reports, correspondence) listening and observation skills.

H. Human relations skills include such skills as empathy, sensitivity, understanding of human and organizational behaviour, motivational techniques and counselling skills.”

In its argument, the Union maintains that many of the interactions between education assistants and the students they are supporting fit within the scope of the skills enumerated at Level 3. For example, they listen to and observe their students. They have to demonstrate empathy and sensitivity in their dealings with them. They must be able to understand their behaviour, and motivate and counsel them to

change that behaviour where necessary and appropriate. Thus, it says, the Education Assistant position merits a Level 3 rating for the nature and extent of its contacts with students.

My first observation is that there is a considerable degree of overlap between what is captured by the term “tact” at Level 2 and what is encompassed within the term “communication” and the phrase “human relations” at Level 3. “Tact” involves “a sympathetic understanding [of] . . . the feelings of others” while “human relations skills” involve “empathy” and “sensitivity”. “Tact” also involves “a keen sense of what to . . . say in a difficult or delicate situation” and the exercise of observation skills relating to the “feelings of others”, while communication at Level 3 entails the exercise of “listening and observational skills” in the course of its communications. Further, “tact” captures “a keen sense of what to do . . . in a difficult or delicate situation”, while “human relations skills” captures actions that are of a “motivational” or “counselling” nature.

With this degree of overlap between the two levels, how can we distinguish between the two? First of all, the contacts factor involves personal relationships and the elements that are important to their effective handling. Education assistants have two primary personal relationships: one with their classroom teacher and the other with the students with special needs they are supporting in that teacher’s classroom. With respect to the relationship with the classroom teacher, they are providing her, according to the Job Summary section in the 2016 Education Assistant job description, with “assistance in the delivery of regular or alternate programs of study with an individual or group of students” In my view, the contacts between these two professionals who are engaged in a common purpose would be relatively straightforward. They would be communicating “to exchange/discuss information in accordance with current policies and technical practices” and all those contacts would require would be “courtesy”, i.e. being polite and objective. In my view, these contacts would most likely be rated at Degree 1.

For our purposes, the more germane relationship is the education assistant – student with special needs relationship. This relationship is analogous to the relationship between a teacher and a student, i.e., *in loco parentis*. The education assistant does not require the consent, agreement or approval of the student with special needs in order to assist the classroom teacher in delivering educational services to him. Thus, there is not the need for the education assistant to persuade or negotiate with the student in order to gain his cooperation so as to allow her to perform her duties.

Nor, in my view, is the education assistant required to “coordinate activities or programs” with the student with special needs such that she must persuade the student, or negotiate with him, to give his consent or agreement to such coordination. Instead, the education assistant’s communications with the student are primarily directed at supporting the teacher’s instructional program, managing

the student's behaviour in the classroom, and providing any personal care and medical needs required. In those contexts, from time to time, "high tension or emotional situations" may arise and it is the education assistant's communications in those circumstances that, in my view, justify the rating at Level C.

I can envisage two different types of positions within an organization that might merit a Level 3 rating under the Contacts factor in this Plan. One would be a supervisory position. A supervisor responsible for leading and directing a group of employees working under her would benefit from having and utilizing "listening and observation skills", and "empathy and sensitivity", in respect of the employees working under her, as well as the ability to motivate, counsel, and persuade them all with a view to gaining their cooperation and persuading them to do the job that has to be done in the way the supervisor wants it done. An "understanding of . . . organizational behaviour" would also be of assistance.

The second type of position would be one that is responsible for sourcing out new equipment to be used in a department for a particular purpose. There may be different types of equipment available that would be suitable for achieving that purpose. This position would be responsible for investigating the different types and makes of equipment available, analyzing the pros and cons for each different piece, and then making a recommendation to his superior or some other position, which could block his recommendation by withholding his consent or his cooperation, as to which piece of equipment the employer should purchase. In these circumstances, the sourcing position would benefit from "oral presentation skills" as well as "writing skills (reports, correspondence)". It would also benefit from having an "understanding of human and organizational behaviour" in dealing with his superior or some other position whose approval or cooperation is required, seeking to persuade him to purchase the equipment he was recommending to achieve the sought-after purpose.

Again, in my view, the Level C rating for the Education Assistant position under the Contacts factor is justified on the basis that from time to time in the education assistant-student with special needs relationship, "high tension and emotional situations" will arise and the education assistant will have to take steps to mitigate it. That will frequently require the education assistant to take steps to calm the student down and otherwise de-escalate the situation. To achieve that goal, in my view, the education assistant will have to display tact and exercise discretion. What will be required of the education assistant is "a sympathetic understanding in observing" the feelings of the student, "both skill and consideration in dealing with" him, and "a keen sense of what to do or say" in the "high tension or emotional situation" they find themselves in. The education assistant would also benefit from a "cautious reserve" or "discretion" in these circumstances as well.

In my view, the education assistant-student with special needs relationship is not the type of organizational relationship contemplated by Level 3 of the

Contacts factor. It is a personal relationship, but more in the nature of a parent-child relationship than a supervisor-supervised employee relationship or an employee-superior relationship. In my view, it does not call for persuasiveness or negotiating skills nor the types of more formal communication and human relations skills contemplated at Level 3. I am satisfied that “tact and discretion” at Level 2 are sufficient for an education assistant to “mitigate high tension or emotional situations” with the meaning of Level C of the Contacts factor.

Accordingly, I have concluded that the Education Assistant position is properly rated at Degree 4 for the Contacts factor.

I now turn to consider the third and final factor in dispute, i.e., sensory demand. The Plan states that:

“This factor refers to the sensory fatigue that results from performing the duties of the job. The following characteristics of the work are to be considered in selecting a degree:

- the frequency of performing tasks that cause sensory fatigue, i.e. occasional, frequent or almost continuous
- the length of time spent on tasks that cause sensory fatigue, i.e. short, intermediate or lengthy.”

This factor has five levels or degrees which are defined as follows:

- “1. The work involves occasional short periods of concentration which result in only normal sensory concentration.
2. The work involves frequent short, or occasional intermediate periods of sensory concentration.
3. The work involves almost continuous short, or frequent intermediate or occasional lengthy periods of sensory concentration.
4. The work involves almost continuous intermediate or frequent lengthy periods of sensory concentration.
5. The work involves almost continuous lengthy periods of sensory concentration.”

The Notes to Raters for the Sensory Demand factor provide as follows:

- “A. In evaluating this factor, the fatigue resulting from visual and/or auditory (listening) concentration must be determined. To do this analysis, analyze the character of the activities and determine the phases of the work requiring a concentrated effort, their duration and frequency.
- B. Sensory concentration is the focusing of the senses, (i.e. eyes, ears, etc.) on various phases of the work, i.e. read, drive, do precision work, counselling, operating a word processor or dictaphone, etc.
- C. The duration of sensory concentration is measured in terms of:
- Short (about one hour or less)
 - Intermediate (more than one hour but less than two hours) or longer
 - Lengthy (more than two hours) periods of activity.
- D. The frequency of short, intermediate or long periods of sensory concentration must be related to work on a continuing basis throughout the year:
- Occasional - means once in a while over a period of time, i.e. once in awhile on a daily basis or several times daily but not every day
- Frequent - means often over a period of time such as several times daily almost every day
- Almost continuous - means that with the exception of coffee breaks, the activity is continuous almost every day.
- ...
- E. Definition of ‘work period’
See Notes to Raters – Factor 7 – Physical Demand.”

In the Physical Demand factor, the Notes to Raters define a “work period” this way:

“Follow the normal process by determining the facts that apply to the specific job being evaluated. Then this job should be reviewed relative to other jobs for each factor.

This may require looking at a day, a week, a month or even seasons.

In order to maintain the relativity the work period reviewed would be in relation to a full-time position of 7 or 8 hours. (Ignore any difference between 7 and 8 hours as this results from historical collective agreement reasons). If the job is normally a full-time job then rate it as such.

If the position would not be based on a full-time position, the rating sheet that is completed by the Committee should note that the rating is based on a reduced work period.

Examples:

1. Job #109B (School Meals Program Worker) works 1 ½ hours per day. The 1 ½ hours is continuous heavy lifting but it would only be for 1/1/2 hours out of a 7/8 hour day therefore it was rated as a moderate.
2. Job #115C (Storefront Tutor) works two, 6 hour days. This was 12 hours over 35 hours.
3. Job #104 (Teacher Assistant) works 5 hours out of 7 and therefore it should be looked at as 5 out of 7.

....”

In 2002, the Paraeducator position was rated at Degree 3 for the Sensory Demand factor. However, the 2016 Education Assistant job description, agreed to by both the Employer and the Union, reflects a responsibility of an education assistant to provide “close continuous supervision” to students who are “physically dependent with multiple needs” and to students who “consistently/persistently” require “intensive behaviour intervention”. Being continuous, this obligation to closely supervise such a student with special needs applies regardless of the activity in which the student is currently engaged. In my view, students who require constant, close supervision impose a duty and responsibility of sensory concentration on an education assistant. I am satisfied that this degree of concentration would cause sensory fatigue.

Reference was also made to the duty and responsibility of the Education Assistant position to provide noon-hour supervision to students while they are having their lunch and then playing outside, weather permitting. At one time, there was a stand-alone position that was responsible for providing noon-hour supervision of students in these circumstances. I was not provided with a job description for that position, but I was provided with the ratings of that position under the Plan. In respect of the Sensory Demand factor, that position was rated at Degree 1 denoting that its

“... work involves occasional short periods of concentration which result in only normal sensory concentration.”

In my view, “normal sensory concentration” is not the type of concentrated effort that would generate much in the way of sensory fatigue.

In its written Outline of Legal Argument, the Employer then contends that students learn a variety of subjects during the course of a school year and are engaged in a variety of activities during the course of a day. It then submits that:

“Thus, the duration of continuous concentration of EAs working with students is broken into short periods of differing activities throughout the day. The EA moves their focus with the students through all the different phases of their work and the day at regular intervals. The job does not require sustained sensory concentration on one phase of work for extended periods. It involves periods of listening, periods of talking, periods of observation, periods of circulating the room, periods of helping students get out resources and materials or put on their coats, periods of talking to the classroom teacher, periods of noon hour supervision, periods of math, of literacy, of science. It is a job, as Ms. Beddoes described it, that is not ‘static’, but involving regular change in activity and focus.”

(at para. 146)

Later, the Employer maintains that

“Equally, a not insignificant part of each EA’s day is now taken up by noon-hour supervision, a task that provides [a] break from whatever other sensory experience the EA was

previously engaged in”

(at para. 148)

The Union takes issue with the Employer's submission regarding the impact of education assistants performing noon-hour supervision duties on the sensory demands of their Education Assistant position. It says they are expected to perform those duties in line with their 2016 job description so that the sensory demands on them should not change. It maintains in its written Reply that:

"First and foremost, EAs are EAs all day long. They perform the job as set out in their job description from their start time to their end time. If the Employer wanted them not to complete the duties described in the job description during the noon-hour, it should have said so in the job description. It did not.

For example, if the Employer wanted EAs to stop implementing conflict resolution techniques during lunchtime and start again after, it should not have signed off on a job description that requires them to implement those techniques all day."

(at paras. 57-58)

Later in its Reply, the Union asserted that:

"Moreover: if the Employer wanted EAs to drop down to that less demanding type of working during the lunchtime period, it should have said so in the 2016 JD instead of signing off on a JD that requires EAs to perform all of these duties as they arise all day."

(at para. 64)

Having considered the matter, I do not agree with the Union's submissions regarding education assistants performing noon-hour supervisory duties. In my view, the 2016 Education Assistant job description has no application to the performance of those duties. That job description, in my view, only addresses the duties and responsibilities of the education assistant related to assisting a classroom teacher in the delivery of regular or alternate programs of study, to an individual or group of students. Noon-hour supervision duties are not expressly mentioned in that job description, and given that their performance entails the general student body during their lunch break, I am of the view they cannot be reasonably implied as duties related to the performance of an education assistant's regular duties and responsibilities.

Obviously, the need for the noon-hour supervision of the general student body during the lunch break continues and accordingly that job of work must be performed. Those duties in School District No. 8 (Kootenay Lake) have currently been assigned to education assistants. In the past, they have been performed by bus drivers or stand-alone employees hired specifically for that purpose. Regardless, the duties and responsibilities of that job and the qualifications necessary to perform them would be, in my view, those set out in the current job description for the Noon-Hour Supervisor position. Further, for job evaluation purposes, it is the job of Noon-Hour Supervisor that must be rated, not the employees performing its duties. The rating of that job cannot vary depending on whether it is being performed by an education assistant as opposed to a bus driver or a stand-alone employee specifically hired for that job. Thus, what is to be rated for the purposes of the Sensory Demand factor are the duties and responsibilities of the Noon-Hour Supervisor job; not the skills and abilities of the people performing them.

In effect, in my view, education assistants in School District No. 8 (Kootenay Lake) are performing a combined job made up of primarily education assistant duties and responsibilities, but also noon-hour supervision responsibilities. What I am concerned with in this proceeding is the evaluation or rating of the duties and responsibilities of the Education Assistant aspect of that combined job. However, the duties and responsibilities of the Noon-Hour Supervisor position come into play in that regard because the Employer contends that noon-hour supervision constitutes a break from the more concentrated effort required in the Education Assistant position. Recall that the sensory demand for the Noon-Hour Supervisor position is rated at Degree 1 which requires “only normal sensory concentration.”

The most significant aspect of the Education Assistant position for the purposes of the Sensory Demand factor is, in my view, that incumbents are to provide “close continuous supervision” to students who are “physically dependent with multiple needs” and require “assistance at all times” or who “consistently/persistently” require “intensive behaviour intervention”. This close supervision does not vary with the type of activity the student is engaged in. In my view, the period of sensory concentration that is being measured is not the time spent on feeding the student or monitoring his blood sugar or intervening to correct a student’s extremely disruptive behaviour. Instead, I am of the view that the sensory concentration that is being measured is the time that the education assistant has to focus on her student to see if her student requires assistance or she needs to intervene to deal with extremely disruptive behaviour. The need for such assistance or intervention can occur at any time regardless of the activity. Hence, the acknowledgment in the 2016 Education Assistant job description that the supervision must be continuous. Therefore, whenever the class is in session, the education assistant must be providing that supervision. Thus, except for breaks, the requirement for sensory concentration by the education assistant is continuous throughout the day, every day.

I am of the view that the evidence does not establish that this level of supervision and sensory concentration was an expectation or requirement of the Paraeducator position in 2002. A period of sensory concentration that lasts all day, every day is not consistent, in my view, with a Degree 3 rating for the Sensory Demand factor which was the rating that position received in 2002 for that factor.

In my view, this obligation, this duty, this responsibility is in force any time the class is in session. Thus, in my view, the scope of this duty and responsibility is not impacted by education assistants performing noon-hour supervision duties. If the education assistant was not performing noon-hour supervisory duties, she would be on a break of some nature. She would not otherwise be in the classroom performing the duties and responsibilities of her Education Assistant position.

With these understandings, I now turn to assess the duration and frequency of the periods of sensory concentration causing fatigue inherent in the duties and responsibilities of the Education Assistant position. Again, the duty and responsibility to provide close supervision to these two categories of students with special needs does not arise just with respect to certain types of activities. The obligation to do so applies regardless of the activity the student, supported by the education assistant, is engaged in. Thus, the length of time spent on this task is the full day, every day both are in the class. Therefore, I am of the view that the duration of the periods of sensory concentration causing fatigue for the Education Assistant position is “lengthy.”

With respect to the frequency of the periods of sensory concentration causing fatigue for the Education Assistant position, I am of the view that it is continuous every day the class is in session except for coffee and meal breaks. Noon-hour supervisory duties are not performed by education assistants during times they would otherwise be in the classroom and therefore obliged to perform these close supervision duties. Therefore, the frequency of the obligation to provide close supervision of these particular types of students with special needs is in my view properly rated at “almost continuous”.

I should comment further concerning an argument advanced by the Employer regarding the “duration of sensory concentration” involved in the work of education assistants. This argument is based on the daily hours of work of education assistants and the times when coffee breaks and the lunch break take place during those hours. See Ms. Strebchuk’s evidence above regarding her hours of work. The Employer submits that because of coffee breaks and the lunch break, an education assistant is never engaged in a period of activity requiring sensory concentration for longer than two hours, i.e., a “lengthy” duration. Coffee and lunch breaks don’t interfere with the determination as to whether a period of sensory concentration is “almost continuous” or not, but that is because those breaks are expressly excluded. Again, see the definition of “almost continuous”. It “means that with the exception of coffee and meal breaks, the activity is continuous almost every

day.” Because of that exclusion, the frequency of the periods of sensory concentration of the Education Assistant position meets that definition. However, those breaks are not expressly excluded from the definition of what constitutes a “lengthy” duration of sensory concentration.

That being the case, how did the parties mutually intend coffee and meal breaks to be treated for the purposes of calculating the duration of periods of sensory concentration? Unless those breaks are excluded from the calculation of “lengthy”, it would appear that the Education Assistant position, or any other Employer position for that matter, could never satisfy that definition even though they are responsible for providing close supervision of those students all day, every day their class is in session. In my view, such an interpretation is unreasonable and would give rise to an anomalous result. What could be more “lengthy” than a task or responsibility that lasts all day, every day? Thus, there appears to be a gap in the definition of the term “lengthy” which, if left unfilled, would result in an unreasonable interpretation and application of that term. What is missing is a statement as to how coffee and lunch breaks are to affect the calculation of time for the purpose of determining what constitutes a “lengthy” period of sensory concentration. A more reasonable interpretation, in my view, which would also remove the anomalous result, would be to conclude that the parties also intended to have coffee and lunch breaks excluded from the definition of what constitutes a “lengthy” period of sensory concentration. I prefer that more reasonable interpretation. In this way, the calculation of the duration of periods of sensory concentration is consistent with the calculation of their frequency.

Accordingly, I have concluded that the Education Assistant position as reflected in the 2016 job description is properly rated at Degree 5 for the Sensory Demand factor. Its “work involves almost continuous lengthy periods of sensory concentration.”

In summary, my ratings for the Education Assistant position incorporating the ratings approved by the parties as well as my ratings on those factors where they were not able to agree are as follows:

<u>Factor</u>	<u>Degree</u>	<u>Points</u>
Education	5	107
Experience	1	19
Decision Making	3	75
Consequence of Error	3	60
Human Resources	1	8
Contacts	4	80
Physical Demand	3	60
Sensory Demand	5	100
Working Conditions	3	<u>60</u>

Total

569

569 points equate to Pay Scale 9 on the parties' wage schedule.

Returning to the Sensory Demand factor for a moment, if coffee and lunch breaks were not excluded from the calculation of what constitutes a "lengthy" period of sensory concentration, the periods of sensory concentration would still satisfy the definition of "intermediate" periods of sensory concentration, i.e., periods of more than one hour but less than two hours. Then the rating would be "the work involves almost continuous intermediate . . . periods of sensory concentration" which is at Degree 4. Degree 4 for sensory demand generates 80 points, 20 points less than a Degree 5 rating. Thus, if sensory demand is rated at Degree 4, the point total for the Education Assistant position would go down from 569 points to 549 points. 549 points still equate to Pay Scale 9 on the parties' wage schedule.

V

The result then is that the wage rate for the Education Assistant position increases from Pay Scale 8 to Pay Scale 9. I was not provided with a copy of the full collective agreement currently in force between the parties, nor with a copy of the current wage schedule from that agreement. I assume that an increase from Pay Scale 8 to 9 generates an increase in wages payable to education assistants, but I do not know by how much. The parties agree that in these circumstances, those facts raise a question of retroactivity.

With respect to that issue, the Union maintains in its Written Argument that:

"The appropriate effective date for the wage adjustment is June 21, 2016, the date when the parties signed the revised job description. Implementing the wage retroactively to the date the job description was signed would be consistent with compensation principles and principles developed in wage evaluations arbitrations. Further, the Union has been consistent in seeking retroactivity to this date and it would be inequitable to permit the Employer to benefit from its own delay."

(at para. 477)

In response to this argument, the Employer submits in its Outline of Legal Argument that:

"If this Arbitration Board were to find, contrary to the above, that there was a basis for a change to the pay scale applicable

to EAs, it would be necessary to determine when that change is required to be implemented. In doing so, it is necessary for the Arbitration Board to have regard to the normal principles of collective agreement interpretation. In particular, the timing of when a change should be implemented depends on the mutual intention of the parties as derived from the words of the collective agreement and the other presumptions and interpretative principles that apply.

In this case, there is a complete absence of any language in the collective agreement or the Terms of Reference or the Job Evaluation Plan, or the Protocols indicating when a change to a pay scale is to be implemented. In particular, there is no language in any way suggesting that pay increases would be applied prior to agreement being reached between the parties on the re-rating of the position.”

(at paras. 165-166)

Later on, its submission continued:

“In the present case, providing for implementation of an increased wage rate prior to that wage rate being agreed, or in the absence of agreement, determined by an arbitrator, would impose a substantial financial burden on the Employer. Such a substantial monetary benefit should not be presumed but must be demonstrated by express language that makes the mutual intention to provide such a benefit clear. There has been no evidence of such a clear intention in this case.”

(at para. 170)

First of all, I agree that the real issue in a case such as this where a wage increase results from a review of a job under the Plan is when is that increase to take effect. However, I do not agree with the Employer’s submission that “there is a complete absence of any language in the collective agreement . . . indicating when a change to a pay scale is to be implemented”

In the case of “revised positions”, where an employee or supervisor requests a review based on alleged changes to the duties and responsibilities of a job, Article 17.03 (a) of the agreement provides that:

“Any changes to the job description and rate of pay will be set by mutual agreement of the parties to this Collective Agreement.”

In the case of “new positions”, they

... shall have the job description and rate of pay set by mutual agreement of the parties to this Collective Agreement.”

See Article 17.03 (b).

Although not express, I am of the view that the clear implication flowing from this language is that any wage increase arising from the review will be effective the date the parties agree on the new wage rate. The effective date therefore comes at the culmination of the review process. In my view, the language used in Article 17 does not support a mutual intention that the effective date is to be the date when the review process is initiated, i.e., either the date the changes to the job were made or when the employee or supervisor requested the JJEC to review the changes to the job or when the new position was created or when it was referred to the JJEC for review.

If, on the other hand, the parties are not able to reach mutual agreement on the wage rate, with or without agreement on the job description, Article 17.03 provides that

“Failure to reach mutual agreement in (a) and (b) above shall be resolved by referring the issue direct to Arbitration as per the provisions of this Collective Agreement.”

In my view, in these circumstances, the effective date should remain the date the parties concluded that they could not mutually agree as opposed to agree. In these circumstances, the arbitration board steps into the parties’ shoes and makes the agreement for them. To push the date back to the date the arbitration board determines the matter would give the Employer the opportunity and incentive to delay the implementation unilaterally to the prejudice of the incumbents in the position. I am not suggesting that the Employer would actually act in that manner, but that reasonable consequence flowing from that kind of circumstance suggests that that interpretation is not a reasonable one.

Article 17.04 dealing with the reviews initiated by the parties, or by the JJEC pursuant to paragraph (c), does not contain the language found in Article 17.03 (a) and (b) and discussed above. In fact, it does not contain any language pertaining to the effective date for any increase in a position’s wage rate resulting from an Article 17.04 review. Again, there would appear to be a gap in the parties’ language. Having considered the matter, I am of the view that the most reasonable interpretation of what the parties would have mutually intended in these circumstances would be the same approach they adopted in the cases of “revised positions” and “new positions”. Thus, the JJEC would review the job description for the position, revise it if

necessary to ensure it is “current and relevant”, and then it may or may not decide to re-rate it under the Plan. If it does and the re-rating produces an increase in the wage rate, the effective date for that wage increase would, in my view, be the dates the parties mutually agreed to the JJEC’s recommendation to that effect. Alternatively, if an arbitration board had to step into the parties’ shoes and determine the re-rating issue, its award resulting in any wage increase would be effective the same date. To adopt the date of the arbitration board’s award as the effective date would, in my view, not be conducive to the “orderly, constructive and expeditious settlement of disputes” within the meaning of Section 2 of the Labour Relations Code.

One final comment.

On a couple of occasions in this proceeding, I have had to interpret Article 17 of the parties’ collective agreement and the provisions of the Plan in the absence of any bargaining history or past practice evidence and in circumstances where a literal interpretation of the provisions in issue would, in my view, give rise to an unreasonable or anomalous result. In these cases, it seemed to me that the parties could not have mutually intended such an interpretation or result, and that in fact what had probably happened is that they had simply not turned their minds to the issue, with the result that there was “an apparent gap in the terms of [the] collective agreement” or Plan. In these circumstances, I adopted the more reasonable interpretation as the best reflection of what would have been their mutual intentions if they had turned their minds to the issue. See *Andres Wines (B.C) Ltd.*, BCLRB No 75/77, [1978] 1 Can. LRBR 251 where the Board stated that:

“There is nothing that unusual about the presence of such an apparent gap in the terms of a collective agreement. As a practical matter, it is impossible for the parties to a collective agreement to anticipate, to canvass, and then to reach agreement about every contingency which might arise during its term. The fact of life stems from the very nature of a collective agreement

...

But the fact of the matter is that such events do occur during the term of the agreement. The parties may not then reach an accommodation during the grievance procedure. When they take the issue to arbitration, their arbitrator does not have the luxury of deciding not to decide. He must make up his mind about the implications of their general contract language for this peripheral problem. In the absence of any clear indication of the mutual intent of the parties – gathered from either their language or their behaviour – the arbitrator must,

in effect, reconstruct some kind of hypothetical intent. What is it reasonable to assume that typical labour negotiators, having analyzed the nature and purpose of the contract benefit in question, would agree to as a sensible judgment

about who should enjoy the benefit in this unusual situation?”

(at 253)

I raise this matter at this point in my Award only to draw the parties' attention to the lack of clarity at some points in Article 17 and some parts of the Plan with the suggestion that they might want to revisit those provisions and the “apparent gaps” in the current language and what they would like to do by way of filling in those gaps with their own preferred language, if they are not comfortable with my reconstruction of their hypothetical intent. I understand their collective agreement will be coming up for renewal shortly so they will soon have that opportunity.

Returning to the facts of this case, on June 10, 2016, the JJEC agreed to the wording of the 2016 Education Assistant job description and its rating under the terms of the Plan at Pay Scale 11. On June 21, 2016, the Employer and the Union mutually approved the terms of the 2016 Education Assistant job description, but the recommended wage increase from Pay Scale 8 to Pay Scale 11 was not ultimately approved. In this proceeding, I have had to resolve the latter dispute, and although my ratings of the position do not produce a wage increase to Pay Scale 11, they do result in an increase to Pay Scale 9. In light of my interpretation of Article 17.04 set out above, the effective date for the wage increase to the Education Assistant position to Pay Scale 9 is June 21, 2016.

In conclusion, based on all of the foregoing, I am of the view that the Education Assistant position as described in the 2016 job description approved by the parties on June 21, 2016 is properly rated under the Plan at 569 points. 569 points equate to Pay Scale 9 on the parties' wage schedule. Accordingly, I direct that the wage rate for the Education Assistant position be adjusted to Pay Scale 9 retroactive to June 21, 2016 and that the pay for education assistants be adjusted accordingly.

I refer the matter of pay adjustments for individual education assistants back to the parties to work out, but I retain jurisdiction to complete my Award in this matter should any issues arise that the parties are not able to resolve themselves. I also retain jurisdiction to deal with any difficulties that might arise in connection with the implementation of this Award.

It is so awarded.

Dated this 4th day of January, 2022

'John Kinzie'
JOHN KINZIE
ARBITRATOR