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Citation: 2016 PSLREB 76

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

BRIAN ALLEN, DAVID DUNCAN, JOLANTA MALGORZATA KANABUS-KAMINSKA, DAVID O'NEIL, DARWIN REED, AND THE RESEARCH COUNCIL EMPLOYEES' ASSOCIATION

Applicants and Grievors

and

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent and Employer

Indexed as

Allen v. National Research Council of Canada

In the matter of a policy grievance and individual grievances referred to adjudication

Before: David Olsen, adjudicator

For the Grievors and Applicants: Christopher Rootham, counsel

For the Employer and Respondent: Michel Girard, counsel

Heard at Ottawa, Ontario,
July 20 to 22, 2015.

I. Policy grievance and individual grievances referred to adjudication

[1] On March 4, 2014, the Research Council Employees' Association (RCEA or "the bargaining agent") referred to adjudication a policy grievance dated December 9, 2013, which reads as follows:

> *The Research Council Employees [sic] Association (RCEA) grieves the employer's practice of reducing the total Work Force Adjustment ("WFA") benefits payable to employees in the Technical Category bargaining unit by the amount of severance paid to those employees under article 56.9 of the collective agreement. The RCEA grieves that this is contrary to articles 56.7, 56.1 and 55.1 of the collective agreement, as well as the terms of the Workforce Adjustment Policy incorporated into the collective agreement through article 55.1 of the same.*

[2] The RCEA sought an order declaring the following:

> *… that the employer had violated the collective agreement; that the employer correctly interpret the collective agreement going forward and stop reducing the total WFA benefits payable to employees in the technical category bargaining unit by the amount of severance paid to those employees under article 56.9 of the collective agreement; and that the employer recalculate the WFA benefits for employees in the technical category who have been laid off from their employment since January 15, 2013.*

[3] The National Research Council of Canada (NRC or "the employer") stated that the relevant articles of the Technical Category collective agreement for technical officers (TO) were properly interpreted and applied at the time workforce adjustment (WFA) benefits calculations were made. The collective agreement is between the National Research Council (NRC) and the RCEA, and it expired on March 31, 2014 ("the collective agreement").

[4] On February 21, 2014, the employer responded to the grievance at the final level of the grievance process in part as follows:

…

> *Following the arbitral award of January 15th, 2013, section 56.7.1 of the TO collective agreement reads as follows:*
>
> *"Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted severance pay, retiring leave, rehabilitation leave or a cash gratuity in*

> *lieu thereof by the Public Service, a federal crown corporation, the Canadian Armed Forces or the Royal Canadian Mounted Police.*
>
> *Under no circumstances shall the maximum severance pay provided under article 56 be pyramided.*
>
> *For greater certainty, payments made pursuant to 56.9 to 56.12 or similar provision in other collective agreements shall be considered as a termination benefit for the administration of this clause."*
>
> *"No matter the reason for termination, the total termination benefits applicable in each circumstance will take into consideration payments already made pursuant to 56.9 to 56.12. In the case of a workforce adjustment, the 3 components (severance, outplacement, notice) have been in the past and will continue to be calculated respecting the cap of 70 weeks as stated in section 3.6.13.4 of the NRCs WFA policy.*
>
> *As such, I consider that the NRC's processing of severance and WFA lay-off benefits was not in breach of clauses 55.1, 56.1, 56.7 and 56.9 of the TO collective agreement nor of section 3.6.13 of the NRC WFA policy. I further find that the NRC has correctly interpreted and applied the severance pay provisions of the TO collective agreement and the NRC WFA policy with respect to the administration of severance and WFA termination benefits."*

[5] On February 26, 2014, the bargaining agent referred a number of individual grievances to adjudication concerning the interpretation or application of the same provisions of the collective agreement referred to in the policy grievance. The grievances are detailed in the following paragraphs.

[6] Brian Allen filed a grievance dated December 12, 2013. He grieved that the employer had incorrectly calculated the value of his WFA benefits as announced to him on November 26, 2013.

[7] David O'Neil filed a grievance dated December 9, 2013. He grieved that the employer had incorrectly calculated the value of his WFA benefits as announced to him on December 4, 2013.

[8] Darwin Reed filed a grievance dated December 6, 2013. He grieved that the employer had incorrectly calculated the value of his WFA benefits as announced to him on December 4, 2013.

[9] On February 21, 2014, the employer responded to all three grievances at the final level, stating that the relevant articles of the collective agreement were properly interpreted and applied when the grievors' WFA benefits calculations were made.

[10] David Duncan filed a grievance dated December 9, 2013. He grieved that the employer had incorrectly calculated the value of his WFA benefits as announced to him on June 19, 2013.

[11] On February 21, 2014, the employer responded to the grievance at the final level, noting that he was notified of his surplus status and was provided with information about the WFA exercise, including his WFA termination benefits, on June 19, 2013, and that the grievance was not presented within the prescribed time limit of 35 days as per his collective agreement, making it untimely. The employer denied the grievance on that basis.

[12] Despite the timeliness issue, the employer stated that the relevant articles of the collective agreement had been properly interpreted and applied at the time his WFA benefits calculations were made.

[13] Dr. Jolanta Malgorzata Kanabus-Kaminska filed a grievance dated December 10, 2013. She grieved that the employer had incorrectly calculated the value of her WFA benefits as announced to her on October 24, 2013.

[14] On February 21, 2014, the employer responded to the grievance at the final level, noting that she was notified of her surplus status and was provided with information about the WFA exercise, including her WFA termination benefits, on October 24, 2013, and that the grievance was not presented within the prescribed time limit of 35 days as per her collective agreement, making it untimely. The employer denied the grievance on that basis.

[15] Again, despite the timeliness issue, the employer stated that the relevant articles of the collective agreement had been properly interpreted and applied when her WFA benefits calculations were made.

[16] On March 27, 2014, the RCEA applied under s. 12 of the *Public Service Labour Relations Board Regulations* (SOR/2005-79; "the former *Regulations*") for an extension of time to file the grievances of Mr. Duncan and Dr. Kanabus-Kaminska.

[17] On April 10, 2014, the employer advised the Public Service Labour Relations Board ("the former Board") that it maintained its position that the grievances were untimely and that it was ready to present its timeliness arguments.

[18] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* came into force, creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Board and the former Public Service Staffing Tribunal.

[19] On the same day, the consequential and transitional amendments contained in the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40), also came into force, which provided that proceedings commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, were to be continued under that Act as amended. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the Board.

The extension of time applications

[20] In a decision released concurrently with this decision I have granted the applications with respect to the requests of Mr. Duncan and Dr. Kanabus-Kaminska for extensions of time to file their individual grievances.

III. Context and nature of the issues in dispute with respect to all the grievances

[21] Before January 15, 2013, employees with more than 10 years of service were paid severance of 0.5 weeks per year of service up to 26 years of service if they resigned from their employment or 1 week per year of service, up to 30 weeks' pay, if they were eligible for retirement.

[22] Effective January 15, 2013, as a result of an arbitral award, the provisions dealing with severance pay for voluntary departures were eliminated from the collective agreement.

[23] In exchange for eliminating those provisions, the arbitral award gave employees the option of cashing out their accumulated severance under the existing provisions immediately as if they were eligible for retirement on the basis of 1 week per year of service up to 30 weeks on the basis of their current wage rates or of waiting until they resigned or retired and being paid on the basis of their wage rates at that time.

[24] This was the first time in which severance was paid to TOs without them being separated from their employment.

[25] In an article dealing with layoffs, the collective agreement sets out an entitlement to severance pay as well as a formula for calculating it in the event an employee is laid off.

[26] The arbitral award also provided that severance benefits payable to an employee under the layoff clause were to be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefits, such as severance pay.

[27] The arbitral award specifically provided that payments made under the provisions giving employees the option to cash out up to 30 weeks of severance pay were to be considered termination benefits.

[28] The NRC's WFA policy, effective July 1, 2004, and negotiated between the employer and the bargaining agent, establishes benefits for employees who are identified as surplus.

[29] Those benefits include a notice period of 20 weeks plus 1 week for every year of continuous service composed of either notice worked or a lump sum in lieu of notice, an outplacement benefit equivalent to the greater of 8 weeks' pay or $8000, and severance pay on layoff as per the applicable collective agreement.

[30] The WFA policy provides that the maximum benefits to which a surplus employee is entitled under the policy cannot exceed the equivalent of 70 weeks of pay.

[31] In the event the benefits calculated under the formula exceed the equivalent of 70 weeks of pay, the notice period entitlement, composed of either notice worked or a lump sum in lieu of notice, is to be reduced as necessary to maintain a cap of 70 weeks.

[32] The employer takes the position that payments already made to employees who exercised their option to cash out up to 30 weeks of severance pay and who were subsequently laid off are to be included in the calculation of the cap of 70 weeks of pay.

[33] The RCEA takes the position that only the severance benefits payable on layoff under the collective agreement are reduced by amounts previously paid on account of

severance; i.e., the net amount of severance paid on layoff is to be used in the calculation of the 70 weeks of pay cap.

[34] All the grievors were given the opportunity to cash out their severance pay in advance of being subject to layoff, and all of them exercised that option to varying degrees.

[35] The bargaining agent filed an aide-memoire with the Board reciting the calculation of WFA benefits before January 15, 2013, a description of the situation after January 15, 2013, a comparison of the WFA benefits calculations for hypothetical employees according to it and the employer, and the collective agreement language differences between the TO group and all other groups. In addition the bargaining agent filed a comparison of the actual differences between the parties with respect to the WFA calculations for the grievors appended to the decision as Appendix 1.

A. Extrinsic Evidence with respect to the merits of the policy grievance

[36] Joan Van Den Bergh handles all the labour relations issues for the RCEA and was involved in the interest arbitration that led to the collective agreement at issue. She testified with respect to the negotiating history before the arbitral award was issued, including an employer proposal to add language to clause 56.7.1 of the proposed collective agreement. She also testified about the evidence that was given at the terms-of-reference hearing and about the background to the WFA policy.

[37] Benoit Chartrand is the senior labour relations advisor for the NRC and represents it at collective bargaining negotiations with the Professional Institute of the Public Service of Canada (PIPSC) and with the RCEA. He gave evidence about the context of this dispute and about the terms-of-reference hearing.

[38] Other than the evidence of context, evidence with respect to negotiating history is characterized as extrinsic evidence that the Board may rely on as an aid to interpretation in the event the Board concludes that the language used in a collective agreement is ambiguous.

[39] Neither party objected to the other adducing evidence of that nature. No argument was made when the evidence was adduced as to whether the collective agreement language was or was not ambiguous. The issue was addressed by both the employer and bargaining agent in final argument.

B. Evidence with respect to the context of the dispute

[40] Mr. Chartrand referred to the collective agreement, in particular to clauses 56.2.1 and 56.3.1.

[41] He explained that clause 56.2.1, entitled "Resignation", provided that an employee who had 10 or more years of continuous service was entitled on resignation to severance pay equal to the amount obtained by multiplying half the employee's weekly rate of pay by the number of completed years of continuous employment, to a maximum of 26 weeks' pay.

[42] Clause 56.3.1, entitled "Retirement", provided that on his or her termination, a full-time employee who was entitled to an immediate annuity or annual allowance under the *Public Service Superannuation Act* (R.S.C., 1985, c. P-36), or a part-time employee who regularly worked 12 or more hours per week but less than 30 hours a week, was entitled to a severance payment with respect to the employee's complete period of continuous employment of 1 week's pay for each complete year of continuous employment, to a maximum of 30 weeks' pay.

[43] As a result of the arbitral award dated January 15, 2013, effective that date, those two voluntary types of severance pay ceased to exist and were deleted from the collective agreement. That was done in exchange for employees being paid severance benefits.

[44] Indeterminate employees on January 16, 2013, were entitled to be paid severance equal to 1 week's pay for each complete year of continuous employment, to a maximum of 30 weeks.

[45] Employees were given an option at their discretion to be paid as a single payment at the rate of pay of their substantive position as of January 16, 2013, or as a single payment at the time of their terminations, based on the rate of pay at the termination date, or a combination of the two options.

[46] Employees were given six months from the effective date on which the collective agreement was signed to exercise their options. Those who did not make a selection were deemed to have chosen to be paid severance at the times of their terminations.

[47] Mr. Chartrand stated that what was unique about these provisions was that this was the first time severance was paid to employees without them being separated from

employment. It was done because the employer wanted to remove the provisions from the collective agreement that entitled employees to be paid severance on voluntary termination, as in resignation and retirement.

[48] In the collective bargaining negotiations that preceded the arbitral award, the employer had tabled language proposing to delete the two voluntary types of severance pay as well as language proposing to give employees the right to cash out their severance pay. Language had also been tabled in a proposed clause 56.7.1 to reduce severance benefits on layoff by amounts previously paid on account of termination benefits, including severance pay.

[49] Ms. Van Den Bergh stated that for the first time, during mediation in June 2012, the employer raised a proposal to add language to that previously proposed.

[50] The new proposal read as follows: "This payment shall also be included in the Workforce Adjustments [*sic*] (WFA) calculations with respect to the maximum total layoff benefits to which a surplus employee is entitled under the NRC WFA policy".

[51] She stated that the mediation occurred after the bargaining agent applied for interest arbitration. The employer provided the language with the severance pay article on the first day of mediation. She identified the change as one that was not in the previous proposals.

[52] She asked the NRC's negotiator, Gerry Bauder, what the new language was about and what it meant. He purportedly explained that the employer was concerned about a loophole in the proposed severance pay article to the effect that someone could argue that he or she was not being laid off if he or she had previously received severance pay.

[53] She said that that explanation did not make much sense to her. She pushed the NRC negotiator, who finally acknowledged that the NRC wanted language to ensure that the maximum benefit employees could receive through a combination of severance pay for any reason and WFAs would be 70 weeks.

[54] She stated that she raised a scenario with him of a hypothetical employee who cashes out his severance pay today and then is laid off 20 years later and asked whether the amount paid for severance today would count towards the 70 weeks. He answered in the affirmative.

[55] The bargaining agent did not agree to include the proposed additional language in the TO collective agreement; nor did it agree to permit the employer to include the proposed additional language in the terms of reference to arbitration.

[56] She referred to the former Board's terms-of-reference decision, *Research Council Employees' Association v. National Research Council of Canada*, 2012 PSLRB 115 ("the terms-of-reference decision"), dated October 23, 2012, which established the matters in dispute upon which the arbitration board was to make an arbitral award.

[57] In that decision, the PSLRB Vice-Chairperson excluded the above-noted sentence of the employer's proposal for clause 56.7.1 of the collective agreement from the matters in dispute upon which the arbitration board could render an arbitral award.

[58] The employer subsequently also proposed that the same language be added to the five other collective agreements governing the relationships between the RCEA and the NRC. The RCEA did not agree to include it in those collective agreements.

[59] The RCEA applied for arbitration for the other collective agreements. The arbitration boards for the other five collective agreements decided to include the language in those agreements.

[60] Mr. Chartrand responded to Ms. Van Den Bergh's testimony concerning the additional language that the NRC wanted to add to clause 56.7.1 of the collective agreement and the explanation for that language given by Mr. Bauder, the NRC's negotiator.

[61] He referred to the NRC's WFA policy that was effective on July 1, 2004, and in particular to the benefits that an employee who is identified as surplus is entitled to receive on layoff that are listed in s. 3.6.13.1, as follows:

> - *a notice period of 20 weeks plus one week for every year of continuous service or portion thereof;*
> - *an outplacement benefit equivalent to 8 weeks' pay or $8,000 whichever is greater;*
> - *severance pay on lay-off [sic] as per the applicable collective agreement or compensation plan (for un-represented [sic] employees).*

[62] The maximum benefits to which a surplus employee is entitled under the WFA policy is an amount not exceeding the equivalent of 70 weeks of pay. In cases in which a surplus employee has opted to receive the $8000 versus the 8 weeks' pay as an outplacement benefit, the $8000 is deemed to represent 8 weeks' pay for the purpose of determining the maximum entitlement of 70 weeks of pay.

[63] Mr. Chartrand then referred to s. 3.6.13.4, which provides : "The employee's notice period entitlement, comprised [*sic*] of either notice worked, a lump sum in lieu of notice or a combination thereof, will be reduced as necessary to maintain a cap of 70 weeks of pay entitlement."

[64] He then referred to the pertinent provisions of the collective agreement that were amended by the arbitral award of January 15, 2013.

[65] The arbitral award reflects that the parties resolved the issue of removing severance pay on resignation and retirement from the collective agreement and that they agreed to the changes to those articles reflected in Appendix A of the award.

[66] The parties agreed to amend clause 56.7 of the collective agreement.

[67] The collective agreement that expired on March 31, 2011, included entitlements to severance pay in the case of resignation in clause 56.2 and in the case of retirement in clause 56.3.

[68] Clause 56.7 contained a provision prohibiting pyramiding severance pay benefits and specified the rate of pay to which an employee would be entitled as of the termination of employment date.

[69] As noted, the arbitral award provided that effective January 15, 2013, clauses 56.2, on resignation, and 56.3, on retirement, were to be deleted from the collective agreement.

[70] The arbitral award also amended clause 56.7 to read as follows:

> ***56.7.1*** ***Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefits such as severance pay, retiring leave, rehabilitation leave or a cash gratuity in lieu thereof by the Public Service, a federal crown corporation, the Canadian Armed Forces or the Royal Canadian Mounted Police. Under no circumstances shall the maximum severance*

> *pay provided under article 56 be pyramided. For greater certainty, payment made pursuant to 56.9 to 56.12 or similar provision in other collective agreements shall be considered as a termination benefit for the administration of this clause.*

[71] Mr. Chartrand stated that the employer proposed to add the following language, for clarity: "This payment shall also be included in Workforce Adjustments [*sic*] (WFA) calculations with respect to the maximum total layoff benefits to which a surplus employee is entitled under the NRC WFA Policy".

[72] The WFA policy contains a link to the payment of severance pay. This is to be contrasted with the Treasury Board's WFA policy, which contains no reference to severance pay.

[73] The language was not added on account of timing as it had not been introduced during negotiations.

[74] That language was added to the collective agreements for the other nine bargaining units and for the executive. All 10 bargaining units as well as the executive are covered by the same WFA policy. Layoff benefits are all calculated the same way. For the NRC, the key components were consistency, fairness, and equity. It is a custodian of public funds.

[75] Mr. Chartrand explained that all parties negotiated s. 3.6.13.4 of the WFA policy, which caps an employee's notice period entitlement at 70 weeks on layoff. It is a transition support mechanism. The more years of service, the larger the severance, but it then plateaus. He referred to the National Joint Council WFA Directive and in particular to Appendix C, which outlines the transition support measures in terms of payments by weeks of pay.

[76] The layoff transition support measure reaches a maximum of 52 weeks of pay after 16 years of service; after 29 years of service, it starts to decline, to 34 weeks after 35 years of service and then to 4 weeks after 45 years of service. It is on a bell curve that plateaus at 16 years of service. The greater the number of years of service, the less need for transition support and the greater the likelihood of qualifying for superannuation.

[77] After reviewing the RCEA's methodology, Mr. Chartrand contended that its methodology was not the correct interpretation of the collective agreement as it had not been the parties' intent to create a potential windfall for employees.

[78] He then referred to two examples that had occurred within the preceding year within the TO group which examples reflected the significant differences between the RCEA's proposed calculation method and the NRC's method that was currently in use for calculating severance and WFA benefits.

[79] The examples were with respect to two employees with very similar years of continuous service, plus or minus, 42 years.

[80] The only difference factually is that one employee elected to receive severance payments in advance of termination when the employee had that option, and the other employee elected to receive severance pay only on termination.

[81] The first two examples reflect the NRC's method, and the second two examples represent the RCEA's method, as follows:

NRC Method

Employee Name	Years of Service	Severance Pay: Advance Payout or Paid on Termination	WFA Layoff Benefits Received
Employee A	42 years of service	Advance payout: 30 weeks	Notice period: 17 weeks Outplacement: 8 weeks Severance pay: 45 weeks Total compensation entitlement: 70 weeks, per WFA language Compensation received at termination: 40 weeks (70 weeks less the advance of 30 weeks) Advance received at severance discontinuance: 30 weeks The employee receives a total of 70 weeks of compensation.
Employee B	42 years of service	No advance payout	Notice period: 17 weeks Outplacement: 8 weeks Severance pay: 45 weeks Total compensation entitlement: 70 weeks — maximum per WFA language

			Compensation received at termination: 70 weeks Advance received at severance discontinuance: 0 weeks The employee receives a total of 70 weeks of compensation.

RCEA Method

Employee Name	Years of Service	Severance Pay: Advance Payout or Paid on Termination	WFA Layoff Benefits Received
Employee A	42 years of service	Advance payout: 30 weeks	Notice period: 47 weeks Outplacement: 8 weeks Severance pay: 15 weeks (45-30 weeks advanced.) Total compensation entitlement: 70 weeks — maximum per WFA language Compensation received at termination: 70 weeks Advance received at severance discontinuance: 30 weeks The employee receives a total of 100 weeks of compensation.
Employee B	42 years of service	No advance payout	Notice period: 17 weeks on discontinuance of severance pay Outplacement: 8 weeks Severance pay: 45 weeks Total compensation entitlement: 70 weeks — maximum per WFA language Compensation received at termination: 70 weeks Advance received at severance discontinuance: 0 The employee receives a total of 70 weeks of compensation.

[82] Mr. Chartrand observed that based on the same examples, for an employee in the core public service applying the Treasury Board's WFA policy, the total compensation would be 58 weeks, comprising 45 weeks of severance (be it 45 weeks at termination if deferred or 30 at the discontinuance of the severance pay provision and 15 at the time of termination) and 13 weeks of the transition support measure.

[83] He stated that based on those numbers, the NRC failed to see why the RCEA was claiming that the NRC's WFA payments fell below what was in place with the rest of the core public service. He also questioned why NRC employees with the same years of service would expect to receive 100 weeks of total compensation, almost double what their core public service counterparts would receive.

[84] In cross-examination, Mr. Chartrand acknowledged that he was not at the bargaining table for the TO group and that he was present only at the bargaining table for the PIPSC bargaining units. He also acknowledged that he was not a compensation advisor but a labour relations advisor to the NRC and that he was not with the NRC when the WFA policy was negotiated in 2004.

[85] He was referred to paragraph 16 of the terms-of-reference decision, which states: "The employer agreed with the bargaining agent that accepting the late proposal would mean, in some circumstances, a reduction of the benefits available to laid off employees under the WFA."

[86] He was asked whether he agreed with that statement. He answered that he did not. He added that the employer did not agree when the decision was released. He was asked whether the NRC wrote to the Board's Vice-Chairperson to correct the statement or bring an application for judicial review. He answered in the negative.

[87] He was then referred to paragraph 26 of the decision, where the PSLRB Vice-Chairperson stated: "On this point, the parties agreed that the inclusion in the collective agreement of the late proposal would, in some circumstances, reduce the amount of benefits payable to some employees in a WFA situation."

[88] He was asked whether he agreed with that statement. He answered that he disagreed with it. He stated that the NRC did not write to the PSRLB Vice-Chairperson to correct the statement because it would not have made any difference in the result as the contested language would not be referred to the arbitration board.

[89] He was then referred to paragraph 28 of the decision, at which the PSLRB Vice Chairperson stated: "In this case, the employer did more than vary or clarify its position. It fundamentally increased what it wanted from the bargaining agent in comparison to its last position before the request for an arbitration board was made."

[90] Mr. Chartrand did not agree with this statement.

[91] He was questioned concerning his statement that the NRC's layoff benefits were more generous than those of the core public service. He qualified his answer by stating that what he had intended to say was that in some circumstances, the NRC's benefits were more generous.

[92] He stated that the NRC's WFA policy is negotiated with all the bargaining agents at one table and not in negotiations for individual collective agreements.

[93] In re-examination, Mr. Chartrand was referred to the last part of paragraph 16 of the terms-of-reference decision, which reads:

> *[16] … However, the employer argued that the late proposal is simply a modification to a proposal that was submitted and negotiated before the bargaining agent applied for arbitration. The employer stated that the objective of the late proposal is to avoid the double dipping of severance benefits by laid off employees. It does not introduce new terms and conditions of employment in relation to the proposals discussed during the negotiations. Instead, it clarifies the intent of the employer's initial severance pay proposal. The employer argued that the issues of severance pay and double dipping were discussed during negotiations and that the late proposal simply clarifies the intent of its initial severance pay proposal.*

[94] Mr. Chartrand stated that he agreed that the proposal was to clarify only the language.

[95] Ms. Van Den Bergh stated that she was involved in the negotiation of the NRC WFA policy in 2004. She stated that the negotiations involved the NRC, PIPSC, and RCEA and that they covered 10 bargaining units and thus 10 separate collective agreements. The parties wanted to come up with a policy that applied to everyone; however, the policy was to be negotiated outside collective bargaining.

[96] She stated that it was agreed that to maintain a cap of 70 weeks of pay, the notice period was to be reduced. She recalled that the cap was in place before 2004. In her view, the cap was specific to layoff benefits.

[97] She stated that the severance pay component on layoff referred to in the WFA policy refers to the provisions in the different collective agreements. There is no authority in the policy to revise the severance pay provisions in the collective agreement.

C. Summary of the arguments on the merits of the policy grievance

1. For the RCEA

[98] The collective agreement's wording is clear and unambiguous and does not permit the NRC to reduce WFA benefits as a result of severance having previously been paid to employees through the discontinuance of paying severance on voluntary departure.

[99] The important provision in the collective agreement requiring interpretation is clause 56.7.1.

[100] Clause 56.1 deals generally with severance pay. Clause 56.1.3 deals with calculating severance pay on layoff. For example, an employee with 30 years of service would be paid on layoff 4 weeks' severance for the first year of service and 1 week for each successive year of service.

[101] After calculating the severance pay, it is necessary to apply clause 56.7.1, which provides that any payable severance benefits shall be reduced by any severance pay already granted. There is to be no pyramiding. This is new language to reflect that payments made under clauses 56.9 to 56.12 shall be considered termination benefits for the administration of clause 56.7.1.

[102] That clause does not state that any payments made shall be considered termination benefits for all purposes and specifically does not state that any payments made shall be considered termination benefits for the purposes of the WFA policy.

[103] That clause appears throughout collective agreements in the public service. A number of decisions have interpreted it. Two of them differ in their approaches. Neither mirrors the employer's position.

[104] In *Martin v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-28191 (19981029), [1998] C.P.S.S.R.B. No. 97 (QL), the issue arose of what to do in circumstances in which severance had previously been paid with respect to an employee's prior military service. When Mr. Martin transferred to Transport Canada, he had 19 years of military service. He was paid 9½ weeks of severance under the rules in place for the military. He worked for Transport Canada for five years. When NAV CANADA was created, his employment was deemed to have been terminated for severance purposes, although he was appointed to a new position there.

[105] He had anticipated being paid severance pay from Transport Canada, calculated on the basis of his continuous service from the day on which he joined the military minus any severance already paid by the Department of National Defence. He had anticipated receiving 16 weeks of severance pay; that is, 25 weeks' pay minus the 9 weeks' pay he had received upon leaving the military. However, he received only six weeks' pay.

[106] It was acknowledged that the approximately 19 years he had spent in the military constituted continuous employment for the purpose of calculating his severance from Transport Canada. However, the employer took the position that the amount of money he had received as a termination benefit from the military was immaterial as the period for which he was granted severance pay, namely, the whole period spent in the Canadian Forces, was to be deducted from his severance benefits.

[107] The adjudicator in that case interpreted a clause identical to clause 56.7.2. She acknowledged that the purpose of the clause in question was to prevent the double payment of severance pay and pyramiding. She observed that a literal reading of the clause in question suggested that severance benefits were to be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit. She observed that a literal application of those words was unfeasible and queried how one subtracted time (a period of continuous employment) from money (severance benefits).

[108] She concluded that the clause contained a latent ambiguity, which became apparent when one attempted to apply it. She concluded that the parties' intent (one week's pay per year of continuous employment) and the purpose of the clause, which was to prevent the double payment of severance pay and pyramiding, could be respected by

applying an interpretation of the clause founded on the logical premise that pay is deducted from pay and that it cannot be deducted from time.

[109] In the circumstances of that case, she concluded that the grievor's severance pay should have been calculated by reducing the amount of severance pay owed to him, on the basis of his continuous employment, by the amount of severance pay that he had received upon leaving the military. To the same effect, see also *Burzynski v. Treasury Board (Canadian International Development Agency)*, 2008 PSLRB 60.

[110] Under that "pay-for-pay" approach, the severance amount is calculated and then reduced by the amount that has already been paid. WFA benefits are not calculated and then reduced using clause 56.7.1 6.

[111] Counsel referred to the case of Mr. Allen. Counsel noted that clause 55.1 of the collective agreement provides that the NRC WFA policy shall form part of the collective agreement.

[112] Mr. Allen had in excess of 42 years of continuous service before being laid off. His notice period under the WFA was 20 weeks for the 1st year and 1 week per year of service after that, for a total of 61 weeks. He was paid 8 weeks' salary for outplacement. He was entitled to severance pay on layoff under clause 56.1.3; namely, 44.6 weeks.

[113] Applying the entire article, severance benefits shall be reduced by termination benefits such as severance pay. Severance benefits and severance pay are synonymous. In his case, he had already been paid 30 weeks, so his severance pay on layoff was reduced to 14.6 weeks. That resulted in a total number of weeks payable on layoff of 62 + 8 +14.6, totalling 84.6 weeks. Under the WFA policy, the maximum number of weeks can be 70. So, that total was 14.6 weeks over the maximum.

[114] That reflects the approach in *Martin*.

[115] The employer's position is that layoff benefits under the WFA policy are to be reduced by the amount previously paid on account of severance, while the union's position is that only the severance benefits under the collective agreement are to be reduced by the amount previously paid on account of severance.

[116] The bargaining agent's position is that there is no ambiguity in clause 56.7.1 of the collective agreement. However, if the Board concludes that there is ambiguity, then it

could be resolved in its favour by referring to the language that the employer proposed for this bargaining unit and did not receive.

[117] This language proposed by the employer was not just for clarification — it was for a distinct term and condition of employment. The PSLRB Vice-Chairperson stated at paragraphs 26 to 28 of the terms-of-reference decision that it was a separate term and condition that reduced WFA benefits. The witness for the employer disagrees. This Board is bound by that determination.

2. <u>For the employer</u>

[118] This policy grievance raises the issue of whether the employer's practice of including the amount of severance pay that employees had already received, referred to as "severance termination" in clause 56.9 of the collective agreement, in the layoff benefits calculation outlined in the WFA policy conforms with the collective agreement.

[119] The burden of proof and onus were on the grievor to on a balance of probabilities establish that the employer contravened the collective agreement. See *Campbell v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 57 at para. 27.

[120] When assessing a dispute relating to the interpretation of a collective agreement, the Board's role is to determine the parties' true intent by referring to the ordinary meanings of the words they used. The Board is to refrain from modifying clear terms and conditions of employment.

[121] The entire collective agreement must be looked at to give context to the words used in it. The WFA policy is incorporated by reference into the collective agreement. One cannot have a collective agreement and two documents. They must be read together. See *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras. 50 and 51.

[122] A clear expression of intent is required to confer a financial benefit; see *Wallis v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 180 at para. 37.

[123] The WFA policy is deemed to form part of the collective agreement by virtue of clause 55.1 of the agreement.

[124] Section 3.6.13.1 of the WFA policy provides for benefits for employees who are deemed surplus, which include a notice period, an outplacement benefit, and severance pay as per the applicable collective agreement. That section does not state "net severance pay"; nor does it state the "unpaid part of severance pay".

[125] The maximum benefits to which a surplus employee is entitled cannot exceed the equivalent of 70 weeks of pay. The calculation of the three items, being the notice period, the outplacement benefit, and the severance pay, cannot exceed 70 weeks. If the total benefits exceed 70 weeks of pay, then the employee's notice period entitlement is to be reduced as necessary to maintain that cap of 70 weeks.

[126] Clause 56.1 of the collective agreement provides for severance pay on layoff. Severance pay is calculated in accordance with clause 56.1.3 using a formula that is based on an employee's years of continuous employment. The employer stressed the word "continuous" before "employment".

[127] The collective agreement contains an interpretation and definition clause. Clause 4.1.5 provides that "continuous service" and "continuous employment" have the same meaning.

[128] Referring to the employer's example discussed in evidence, an employee with 42 years of service would be entitled to severance on layoff of 45 weeks; that is, 4 weeks of pay for an employee with 20 or more years of continuous employment plus 1 week's pay for each succeeding complete year of continuous service.

[129] Employees have been given the option to cash out their severance or to defer it to their terminations. The voluntary cash-out is provided in clause 56.9 of the collective agreement, which is entitled "Severance Termination". The maximum that can be cashed out is 30 weeks. All the grievors that filed grievances chose to cash out.

[130] An employee who took a voluntary payment in 2013 and who was then subsequently laid off in 2015 would still have been entitled to severance pay on layoff, which is calculated in accordance with clause 56.1.3.

[131] The number to be used under s. 3.6.13.1 of the WFA is the severance pay calculated pursuant to clause 56.1.3 of the collective agreement, which is based on continuous service.

[132] In the example, for an employee with 42 years of service, the severance pay calculation on layoff would amount to 45 weeks, based on the formula set out in the clause, which is based on years of continuous service. The amount the employee would receive would be less than 45 weeks because pursuant to clause 56.7.1, the lump-sum payment paid in accordance with clause 56.9 has to be subtracted from the total amount to which the employee would otherwise be entitled.

[133] Clause 56.7.1 ensures that the severance benefits are only those for which other forms of termination benefits have not already been paid. It applies the rule against pyramiding benefits in the case of severance pay.

[134] Contrary to the bargaining agent's submission, applying the collective agreement that way does not reduce an employee's overall amount of severance entitlements based on his or her years of continuous service.

[135] To calculate the severance pay on layoff pursuant to the WFA policy, the overall or total amount is included as the layoff benefit. The 45 weeks of severance is included, not the net amount calculated under clause 56.7.1 of the collective agreement.

[136] Clause 56.7.1 has no application to the WFA policy calculation; that clause dictates only the actual severance payment the employee receives. The lump-sum payment received is an advance payment. One must look at the overall entitlement.

[137] If the lump sum paid in advance is not included in the amount calculated as the layoff benefit, then the amount of severance payable for continuous service would be artificially reduced, thus increasing the amount payable on account of the notice period.

[138] All the grievors had more than 20 years of service. The bargaining agent's approach would ignore the fact that for an employee who received a lump-sum payment, the payment would affect the notice period payable. Seeking to use only the net payment of severance pay greatly reduces the severance pay calculation for continuous service.

[139] The bargaining agent wants to break the calculation of continuous service into two distinct periods. Severance payments are based on the total period of continuous employment.

[140] The bargaining agent's position would keep the notice period artificially low. The NRC submitted that that was not the parties' intent.

[141] When calculating the notice period, the bargaining agent asks that all the years of continuous service be taken into account, but when calculating severance pay, it asks that the years of continuous service be split up and that only the net amount paid on layoff be taken into account, not the 30 weeks already paid in advance. That approach does not make sense in light of the severance pay clause, clause 56.1.3. The bargaining agent is trying to take advantage of a windfall for a small minority of its members.

[142] Technically, the clarifying words that the employer wanted to add to clause 56.7.1 do not appear in the TO collective agreement. Since the proposed language was not discussed at negotiations, it could not be included in the terms of reference and therefore could not be dealt with in the arbitral award. The only reason it was not included was that the employer missed the deadline. The arbitral award does not refer to the sentence.

[143] In the meantime, the compensation plan for unrepresented employees and the arbitral awards for all the other bargaining units included the additional language.

[144] To ensure equity for all NRC employees, the fundamental interpretation remains the same. The same calculation method is used for all affected employees at the NRC, even for the TOs. The absence of the additional sentence does not detract from the correct interpretation and the intent of the clauses at issue, which is to avoid pyramiding or double-dipping.

[145] The extra sentence was proposed to provide greater clarity and to properly capture the possible effects of the severance payment under clause 56.9 of the collective agreement as this was the first time that termination benefits were being paid without any terminations occurring — the employees continued to work while being entitled to future severance benefits.

[146] The bargaining agent argued in the alternative that if I did not find the wording clear, I should rely on the terms-of-reference decision for the proposition that the language that the employer proposed was more than just a clarification.

[147] The doctrine of *res judicata* is not rigidly applied in labour arbitration; nor are decision makers and adjudicators bound by the doctrine of *stare decisis*. Decision makers and adjudicators are free to decide differently if one of them believes that a prior decision is manifestly wrong. However, there is no need to find the terms-of-reference

decision manifestly wrong because of the distinction between a terms-of-reference hearing and a decision maker's interpretation of a collective agreement.

[148] In *Stoney Creek (City) v. Canadian Union of Public Employees, Local 1220* (1998), 71 L.A.C. (4th) 272, Arbitrator Knopf reviewed the law on *stare decisis* and cited in *Phillips Cables Limited v. United Electrical, Radio and Machine Workers, Local 510* (1977), 16 L.A.C. (2d) 225 at 232, in part as follows:

…

> *In our view, therefore, there is no real support for the proposition that we are absolutely bound, as a matter of law, to the construction placed on art. 9.04 by an earlier board of arbitration.*
>
> *We turn, then, to the second question: ought we, as a matter of comity and public policy, to follow the earlier award? ….*

…

[149] Arbitrator Swan then quoted Arbitrator Laskin as he then was in *Brewers Warehousing Company Limited v. International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink and Distillery Workers, Local 278C* (1954), 5 L.A.C. 1797 at 1798, as follows:

…

> *It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its duty to determine the case before it on the principles that it believes are applicable.*

…

[150] The terms-of-reference decision concerned what could be referred to interest arbitration. Its role was not to determine the meaning of the new proposed language. At paragraph 16 of that decision, the PSRLB Vice-Chairperson made contradictory statements. He stated as follows:

> *[16] The employer agreed with the bargaining agent that accepting the late proposal would mean, in some circumstances, a reduction of the benefits available to laid off employees under the WFA. However, the employer argued that*

> *the late proposal is simply a modification to a proposal that was submitted and negotiated before the bargaining agent applied for arbitration. The employer stated that the objective of the late proposal is to avoid the double dipping of severance benefits by laid off employees. It does not introduce new terms and conditions of employment in relation to the proposals discussed during the negotiations. Instead, it clarifies the intent of the employer's initial severance pay proposal….*

[151] That has been the employer's position all along. Mr. Chartrand agreed with the statement.

[152] At paragraph 26, the PSLRB Vice-Chairperson stated as follows:

> *[26] … In this case, the employer wants to substantially change the severance pay provisions of the collective agreement. Initially, it submitted a general proposal, and later, a more specific proposal to the bargaining agent. After that, an arbitration board was requested, and the employer then submitted its late proposal. That proposal also dealt with the issue of severance pay, but it asked for a further concession from the bargaining agent in comparison to the employer's earlier proposal. On this point, the parties agreed that the inclusion in the collective agreement of the late proposal would, in some circumstances, reduce the amount of benefits payable to some employees in a WFA situation.*

[153] The terms-of-reference decision contains an inherent contradiction. The employer always intended the additional language as clarification and did not wish to alter the terms and conditions of employment.

[154] The arbitral award for the RCEA and the NRC affecting those bargaining units other than the TO Group and dated June 3, 2014, dealt with the severance pay issue and referred to the TO collective agreement in part as follows:

…

> *[20] The NRC proposed the elimination of the accrual of severance benefits in the event of voluntary departures (resignation and retirement). The employer proposal would preserve current entitlements and allow employees to cash-out some or all of severance or to defer collecting the current entitlement until departure from the NRC….*
>
> *[21] In addition, the NRC proposed the addition of the following article … to clarify that severance payouts are included in Workforce Adjustment calculations:*

> For greater certainty, payments made pursuant to … or similar provisions in other collective agreements shall be considered as a termination benefit for the administration of this clause. This payment shall also be included in Workforce Adjustments [*sic*] [WFA] calculations with respect to the maximum total layoff benefits to which a surplus employee is entitled under the NRC WFA Policy.
>
> …

[23] The bargaining agent recognized that the removal of severance for voluntary departures and the associated improvements to the collective agreement had been established as the pattern in bargaining across the federal public service. It noted that the additional article proposed by the employer with regards to WFA calculations was not part of the pattern. The bargaining agent submitted that this language is inconsistent with what was agreed to for the TO group; is inconsistent with collective agreements in the core public service; and is grossly unfair and entirely without justification. The bargaining agent argued that the employer was seeking an extraordinary concession at arbitration and arbitration is not the proper forum for such a significant breakthrough….

[24] The employer submitted that this language was not included in the TO collective agreement because it was determined by the arbitration board that the proposal was submitted late and was not included in its terms of reference established by the Chair of the PSLRB. The employer further submitted that the clarification it was seeking was not required in agreements in the core public service because the WFA provisions were different for those bargaining units. The employer also submitted that not including this clarification could result in employees being paid more than the 70-week cap contained in the WFA Policy.

[25] The Arbitration Board awards the employer proposal with regard to the elimination of severance for voluntary departures, as set out in Schedule 2 in each of the Terms of Reference. In addition, the Arbitration Board awards the clarification language proposed by the employer. The intent in the WFA Policy is clear that the limit on compensation is 70 weeks. The clarification language proposed by the employer is consistent with this intent and takes into account severance payments received in the context of the severance payout.

…

[155] It is significant that the arbitration board concluded that the employer's proposed language was only for clarification purposes and that it was consistent with the WFA policy's intent to limit compensation to 70 weeks.

[156] The collective agreements for all the other bargaining units contain that language. The language in the TO collective agreement is the odd man out. However, that does not change how the collective agreement should be interpreted. The arbitration board was a tripartite representational board and was composed of three members. The bargaining agent representative did not have a dissenting opinion.

[157] *Martin* and *Burzynski* do not apply. The collective agreement must be applied in coordination with the WFA policy. Severance benefits are part of that policy. The reason most collective agreements in the public service do not include the sentence at issue is that their severance pay and layoff benefits are distinct and unrelated. In the core public service, severance language is completely distinct from layoff language.

[158] At the NRC, the WFA policy combines WFA payments such as notice outplacement and severance and imposes a maximum payment of 70 weeks. This language allows for the reduction of the notice period for any continuous employment of greater than 21 years. The aim of the policy is akin to the transition support measure negotiated in the public service to reflect the bell curve under which payments would increase up to a maximum of 52 weeks and would diminish after 30 years of service.

[159] To recap, the employer considers the extra sentence that it wished to add to clause 56.7.1 a clarification that respects the severance pay article and the WFA policy. To interpret the language in the collective agreement in the manner suggested by the RCEA would allow an increase in compensation for an employee terminated on layoff beyond the 70 weeks provided in the policy, which could be as high as an additional 30 weeks, for a total of 100 weeks. The example of the employee with 42 years of continuous service who received an advance payment of 30 weeks would be the consequence of the RCEA's application of the clause.

[160] As part of the larger public service, there is a duty to ensure that public funds are managed and used appropriately.

[161] In the example of the employee with 42 years of continuous service, adopting the bargaining agent's method would result in a perverse impact. The employee who received

an advance payout of 30 weeks of severance pay would receive a total of 100 weeks of compensation on layoff while an employee with the same number of years of continuous service who decided to defer the severance benefits payment until termination, in this case layoff, would receive 70 weeks of total compensation.

[162] The collective agreement contains no clear expression of intent to confer such a financial benefit.

3. <u>The RCEA's reply submissions</u>

[163] It was argued that clause 4.1.5 of the definition section of the collective agreement provides that the terms "continuous service" and "continuous employment" have the same meaning. That is not what it provides. It states that the terms have the same meaning as in the existing rules and regulations of the NRC.

[164] The employer argued that the overall amount of severance needs to be included when determining the severance pay on layoff referred to in s. 3.6.13.1 of the WFA policy. The phrase "overall amount" does not exist in the collective agreement or in the WFA policy.

[165] It was argued that in its calculation, the RCEA wants to ignore the fact that past sums received on account of severance affect the notice period. The issue is not about what the RCEA wants but about what the collective agreement states.

[166] It was argued that the RCEA wants to double-dip. That is not its position. It is clear in the collective agreement that there can be no double-dipping on severance.

[167] It was also argued that it does not make sense that someone with 42 years of service would receive only 15 weeks of severance on layoff. The reason that makes sense is that the employee has already received 30 weeks of severance.

[168] It was argued that the RCEA is trying to take advantage of a technicality. The fact that the clarifying words do not appear in the TO collective agreement is not a technicality. The language is not in the collective agreement.

[169] It was argued that the NRC is conducting itself in this manner because it wants equity and consistency for all its employees. There are 10 separate bargaining units. The terms and conditions of employment are different between different bargaining units.

There is no reason the rules for WFA benefits cannot be different between different collective agreements particularly in this case because the collective agreement language is different.

[170] It was argued that the aim of the WFA layoff benefits is to create a bell curve similar to that in the core public service. That is simply incorrect. The WFA policy provides a steady increase in benefits until 70 weeks is reached, at which point the increase stops.

[171] With respect to the principle of collective agreement interpretation, which states that language that confers a financial benefit must be clear, the RCEA stated that it was not familiar with any case supporting that principle. *Wallis* states otherwise. It does not require categorizing benefits as financial or nonfinancial and applying different rules of interpretation.

IV. Reasons for decision

A. Context

[172] The background facts are not in dispute. As noted, before January 15, 2013, NRC employees with more than 10 years of service were paid severance of 0.5 weeks per year of service for up to 26 years of service if they resigned from their employment or 1 week of pay per year of service up to 30 weeks if they were eligible for retirement and then retired.

[173] Effective January 15, 2013, provisions dealing with severance pay for voluntary departures were eliminated from the collective agreement, in exchange for which employees were given the option of cashing out their accumulated severance at 1 week per year of service up to 30 weeks on the basis of their current wage rate or if they waited until retirement or layoff, on the basis of their wage rates at that time.

[174] The collective agreement sets out an entitlement to, as well as a formula for calculating, layoff benefits in the event of layoff.

[175] The arbitral award provided that severance benefits payable to an employee under the layoff article were to be reduced by any period of continuous employment in respect of which the employee had already been granted any type of termination benefits such as

severance pay, and in particular, the payments made under the cash-out provisions were to be considered termination benefits.

[176] The WFA policy that is incorporated into the collective agreement establishes benefits for employees identified as surplus. Those benefits include a notice period of 20 weeks, plus 1 week for every year of continuous service or a lump sum in lieu of notice; an outplacement benefit equivalent to the greater of 8 weeks' pay or $8000; and severance pay on layoff as per the applicable collective agreement.

[177] The WFA policy provides that the maximum total layoff benefits to which a surplus employee is entitled under the policy cannot exceed the equivalent of 70 weeks of pay, in which case the notice period entitlement, composed of either notice worked or a lump sum in lieu of notice, is to be reduced to maintain the cap of 70 weeks.

[178] The RCEA takes the position that the net amount of severance paid on layoff after the deduction of advance payments of severance is to be used in the calculation of the 70 weeks of pay cap.

[179] The employer took the position that payments already made to employees who exercised their option to cash out their severance pay in advance and who were subsequently laid off are to be included in the calculation of the 70 weeks of pay cap.

[180] The burden of proof of course rested with the bargaining agent to establish a contravention of the collective agreement. When a bargaining agent asserts a right to a monetary benefit, it carries the burden of demonstrating that there exists precise language in the collective agreement that imposes an obligation on the employer to pay the benefit in question; see *Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910* (1982), 4 L.A.C. (3d) 323 at paras. 19 and 20. See also the discussion in Palmer and Snyder, *Collective Agreement Arbitration in Canada*, Fifth Edition, at paragraph 19.40, in which the authors state that "… the principle has been established that arbitrators ought not to impose a monetary obligation on an employer which the employer did not bargain to pay particularly where the purported obligation rests on doubtful or ambiguous language."

[181] It is trite law that the Board's objective when interpreting a collective agreement is to discover the intention of the parties to the agreement on the matter in dispute. That intention must be gathered from the written instrument, which is the collective

agreement. The Board's function is to ascertain what the parties meant by the words they used.

[182] Decision makers have developed a number of rules of construction as aids to interpreting collective agreements. Some of them appear to me to be of assistance in resolving the issues in this case.

[183] The basic rule of construction is that the clear words of the collective agreement are to be given their ordinary and plain meaning. In *Re: Massey-Harris Co. and U.A.W., Local 458* (1953), 4 L.A.C. 1579 at 1580, the rule was expressed in this manner:

> *… we must ascertain the meaning of what is written into that clause and to give effect to the intention of the signatories to the Agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply its language in the apparent sense in which it is used, notwithstanding that the result may be obnoxious to one side or the other. In those circumstances it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or to add words to accomplish a different result.*

[184] Another well-settled rule is that all the terms of the collective agreement must be read together as a whole. See *Re United Steelworkers, Local 5046* & *Construction Aggregates* Corp. (1958), 9 L.A.C.187 at 190.

[185] In *Ontario (Ministry of Children and Youth Services) v. Ontario Public Service Employees Union*, 2010 ONSC 4006 (QL), the Ontario Divisional Court applied the Supreme Court of Canada's direction and comments on contract interpretation in *Consolidated-Bathurst v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, to collective agreements negotiated in the labour relations context. At page 11 of *Consolidated-Bathurst*, the Supreme Court of Canada stated: "Where words may bear two constructions, the more reasonable one that produces a fair result must certainly be taken as the interpretation which would promote the intention of the parties."

[186] Arbitrators and adjudicators have determined that a collective agreement is to be construed as a whole and that each word should be given some meaning; i.e., this is a rule against redundancy. See *Re Int'l Brotherhood of Electrical Workers, Local 1589, and Philips Electronics Industries Ltd.* (1965), 15 L.A.C. 455.

[187] Collective agreements are to be interpreted without resorting to extrinsic evidence unless they are ambiguous. See *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] S.C.J. No. 56 (QL) at paras. 42 and 43, as follows:

> *42 The general rule prohibiting the use of extrinsic evidence to interpret collective agreements originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.*
>
> *43 One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term (See Leggatt v. Brown (1899), 30 O.R. 225 (Div. Ct.).) However, determining when one falls within the scope of this exception is far from easy, as even what can be said to constitute a patent ambiguity is unclear. Some authorities have held there must be more than the arguability of different constructions of the agreement (Re Milk & Bread Drivers, Local 647, and Silverwood Dairies Ltd. (1969), 20 L.A.C. 406), while others suggest that the appropriate test is lack of a clear preponderance of meaning stemming from the words and structure of the agreement (Re Int'l Ass'n of Machinists, Local 1740, and John Bertram & Sons Co. (1967), 18 L.A.C. 362). An ambiguity is to be distinguished from an inaccuracy, a novel result or a mere difficulty in construction. There is also the issue of whether an ambiguity need to be a patent one to warrant the introduction of extrinsic evidence or whether a latent ambiguity involving the uncertain application of otherwise clear words to the facts of the case is sufficient. If a latent ambiguity is taken to be sufficient, the further question arises as to whether extrinsic evidence may be introduced for the purpose of determining the existence of the ambiguity….*

[188] Having reviewed the canons of construction, I will turn to the language of the collective agreement and the WFA policy.

B. <u>Relevant provisions of the WFA policy and the collective agreement</u>

[189] For ease of reference, I have reproduced the following provisions of the WFA policy and the collective agreement, which are relevant to the disposition of these grievances:

…

[From the WFA policy]

3.6.13.1 An employee who is identified as surplus is entitled to receive lay-off benefits which include:

- *a notice period of 20 weeks plus one week for every year of continuous service or portion thereof;*
- *an outplacement benefit equivalent to 8 weeks' pay or $8,000 whichever is greater;*
- *severancepay on lay-off as per the applicable collective agreement or compensation plan (for un-represented employees).*

The maximum total benefits to which a surplus employee is entitled under this policy shall be an amount not exceeding the equivalent of 70 weeks of pay….

…

3.6.13.4 The employee's notice period entitlement, comprised of either notice worked, a lump sum in lieu of notice or a combination thereof, will be reduced as necessary to maintain a cap of 70 weeks of pay entitlement.

…

3.6.16 Severance Pay

3.6.16.1 An employee shall receive severance pay on lay-off as per the applicable collective agreement or compensation plan (for un-represented employees).

…

[From the collective agreement]

Article 55: Workforce Adjustment Policy

55.1 The NRC Workforce Adjustment Policy shall form part of this collective agreement ….

Article 56: Severance Pay

*****Effective January 15, 2013 articles 56.2 and 56.3 are deleted from the collective agreement.***

56.1 Lay-Off

56.1.1 *In the event that the Council decides that layoff of one or more employees is necessary, the parties agree to consult jointly prior to the implementation of lay-off procedures.*

56.1.2 *An employee who has one (1) year or more of continuous service and who is laid off is entitled to be paid severance pay as soon as possible following the time of lay-off.*

56.1.3 ***In the case of an employee who is laid off for the first time, the amount of severance pay shall be for the first (1st) complete year of continuous employment two (2) weeks' pay or three (3) weeks' pay for employees with ten (10) years or more and less than twenty (20) years of continuous employment, or four (4) weeks' pay for employees with twenty (20) or more years of continuous employment, plus one (1) weeks' pay for each of succeeding complete year of continuous service and, in the case of partial year of continuous employment, one (1) weeks' pay multiplied by the number of days of continuous employment divided by three hundred and sixty-five (365).*

56.2 Resignation

56.2.1 ***Subject to clause 56.3, an employee who has ten (10) or more years of continuous service is entitled to be paid on resignation from the Council severance pay equal to the amount obtained by multiplying half of the employee's weekly rate of pay on the effective date of resignation by the number of completed years of continuous employment to a maximum of twenty six (26) weeks.*

56.3 Retirement

56.3.1 *On termination of employment, an employee who is entitled to an immediate annuity under the* Public Service Superannuation Act, *or when the employee is entitled to an immediate annual allowance under the* Public Service Superannuation Act *… shall be paid a severance payment in respect of the employee's complete period of continuous employment, comprised of one (1) weeks' pay for each complete year of continuous employment, and, in the case of a partial year of continuous employment, one (1) weeks' pay multiplied by the number of days of continuous employment divided by 365, to a maximum of thirty (30) weeks' pay.*

56.7 General

56.7.1 ***Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefits such as severance pay, retiring leave, rehabilitation leave or a cash gratuity in lieu thereof by the Public Service, a federal crown corporation, the Canadian Armed Forces or the Royal Canadian Mounted Police. Under no circumstances shall the maximum severance pay provided under article 56 be pyramided. For greater certainty, payment made pursuant to 56.9 to 56.12 or similar provision in other collective agreements shall be considered as a termination benefit for the administration of this clause.*

…

56.9 Severance Termination

*(a) **Subject to 56.7 above, indeterminate employees on January 16, 2013 shall be entitled to a severance payment equal to one (1) week's pay for each complete year of continuous employment and, in the case of a partial year of continuous employment, one (1) week's pay multiplied by the number of days of continuous employment divided by three hundred and sixty five (365), to a maximum of thirty (30) weeks.*

*****Terms of payment***

56.10 **Options

***The amount to which an employee is entitled shall be paid, at the employee's discretion, either:*

*a. **As a single payment at the rate of pay of the employee's substantive position as of January 16, 2013, or*

*b. **As a single payment at the time of the employee's termination of employment from the Council, based on the rate of pay of the employee's substantive position at the date of termination of employment from the Council, or,*

*c. **As a combination of a. and b., pursuant to 56.11c.*

56.11 **Selection of Option

*a. **The Employer will advise the employee of his years of continuous employment no later than three (3) months following the official date of signing of the collective agreement.*

*b. **The employee shall advise the Employer of the term of payment option selected within six (6) months from the effective date of signing of the collective agreement.*

> *c. **The employee who opts for the option described in 56.10c must specify the number of complete weeks to be paid out pursuant to 56.10a. and the remainder to be paid out pursuant to 56.10b.*
>
> *d. **An employee who does not make a selection under 56.11b. will be deemed to have chosen option 56.10b.*
>
> …
>
> [*Sic* throughout]

C. <u>Analysis</u>

[190] Clause 3.6.13.1 of the WFA policy, which is incorporated into the collective agreement, entitles employees who are identified as surplus to receive layoff benefits, as follows:

> *a) notice period of 20 weeks plus one week for every year of continuous service or portion thereof* [Section 3.6.13.4 states that the notice period entitlement is to be comprised of either notice worked or a lump sum in lieu of notice or a combination thereof]*;*
>
> *b) an outplacement benefit equivalent to 8 weeks' pay or $8,000 whichever is greater;*
>
> *c) severance pay on lay-off [sic] as per the applicable collective agreement ….*

[191] The WFA policy provides that the maximum layoff benefits to which a surplus employee is entitled under it is an amount not exceeding the equivalent of 70 weeks of pay. In the event the maximum benefits exceed the cap of 70 weeks, then the notice period, composed of either notice worked, a lump sum in lieu of notice, or a combination thereof, is reduced.

[192] At clause 3.6.16.1, the WFA policy reiterates that an employee shall receive severance pay on layoff as per the applicable collective agreement.

[193] Clause 56.1.2 of the collective agreement, under the heading "Lay-Off [*sic*]", provides that an employee who has one year or more of continuous service and who is laid off is entitled to be paid severance pay as soon as possible following the layoff. Clause 56.1.3 sets out a formula for calculating the amount of severance pay on layoff, which increases with the number of years of continuous employment.

[194] Clause 56.7.1 provides that severance benefits payable to an employee under it shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit, which includes severance pay paid pursuant to clauses 56.9 to 56.12 of the collective agreement, if the employee has opted to receive up to 30 weeks of accumulated severance pay.

[195] The narrow issue presented for resolution in this case is what is the "… severance pay on lay-off [*sic*] as per the applicable collective agreement …" referred to in the WFA policy at clause 3.6.13.1 for the purpose of calculating "[t]he maximum total benefits to which a surplus employee is entitled …" under the policy, which cannot exceed "… the equivalent of 70 weeks of pay."

[196] To graphically illustrate the position of the parties, I reproduce the two examples that reflect the differences in each party's calculations for the two employees with 42 years of continuous service who were laid off. For clarity I have included the detailed arithmetic that was not included in the original exhibit.

[197] One employee (A), opted to receive in advance, 30 weeks of severance payments pursuant to article 56.10 a. within six months from the effective date of signing of the collective agreement at his rate of pay as of January 16, 2013. He was subsequently laid off.

[198] The other employee (B) opted to receive all of his severance pay at the time of his termination of employment when he was laid off at the rate of pay as of the date of his termination pursuant to article 56.10 b.

Type of Benefit	**Parties Disagree**	
	Employee A 42 years of service Advance payout of severance of 30 weeks prior to lay off	
	NRC version	***RCEA version***
Notice Period (WFA 3.6.13.1)	20 weeks + 1 week per year of continuous service 20+42 =62 weeks	62 weeks
Outplacement Benefit (WFA 3.6.13.1)	8 weeks	8 weeks

Severance pay on lay off (collective agreement 56.1.3)	4 weeks per 1st year +1 week each succeeding year =45 weeks gross severance pay including advance payout	45 weeks reduced by advance payment of 30 weeks advance payout = 15 weeks (net)
Subtotal	***115 weeks***	***85 weeks***
Maximum of 70 weeks calculated by reducing the "Notice Period" (WFA 3.6.13.1 and 3.6.13.4)	115 weeks -70 weeks = 45 weeks in excess of 70 week cap	85 weeks -70 weeks = 15 weeks in excess of 70 week cap
Revised Notice Period If Subtotal >70 Notice Period reduced to maintain 70 weeks cap	62 weeks(notice period)-45 weeks in excees of 70 = 17 weeks	62 weeks-15 weeks = 47 weeks
Total	***70 weeks Total Compensation*** Layoff benefits received at termination 40 weeks +30 weeks paid in advance=70	***100 weeks Total Compensation*** Layoff benefits received at termination 70 weeks +30 weeks paid in advance

Type of Benefit	**Parties Agree**
	Employee B 42 years of service No advance payment prior to lay off
Notice Period (WFA 3.6.13.1)	20 weeks + 1 week per year of continuous service 20+ 42 = 62 weeks
Outplacement Benefit (WFA 3.6.13.1)	8 weeks
Severance pay on lay off (collective agreement 56.1.3)	4 weeks per 1st year+ 1 week each succeeding year 45 weeks
Subtotal	***115 weeks***
Maximum of 70 weeks calculated by reducing the "Notice Period" (WFA 3.6.13.1 and 3.6.13.4)	115 weeks- 70 weeks= 45 weeks In excess of 70 week cap

Revised Notice Period If Subtotal >70 Notice Period reduced to maintain 70 weeks cap	62 weeks- 45 weeks =17 weeks
Total	***70 weeks Total Compensation***

The bargaining agent contends that the severance pay on layoff is the net severance pay paid to the employee after deducting the severance paid in advance while the employer contends that it is the gross amount of severance pay including the amount of severance paid in advance.

The collective agreement

[199] Clause 56.1, under the heading "Lay-Off [*sic*]", provides that an employee who is laid off is entitled to be paid severance pay as soon as possible after the layoff. Clause 56.1.3 expressly sets out a formula for calculating severance pay on layoff. The operative words used in the clause are "… the amount of severance pay shall be …". After that, it recites the formula. The WFA policy expressly refers to employees being entitled to severance pay on layoff as per the applicable collective agreement.

[200] Clause 56.7.1 states that **severance benefits payable to an employee under the Article** shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefits (emphasis added).

[201] Construing this language as a whole, I conclude that that the phrase "… severance pay on lay-off [*sic*] as per the applicable collective agreement …" as used in the WFA policy for the purpose of calculating the maximum layoff benefits to which a surplus employee is entitled is the amount that "shall be" (mandatory) calculated in accordance with the formula set out in clause 56.1.3, which is the gross amount of severance pay payable to an employee in accordance with the formula.

[202] This clear language is reinforced in my view by the language used in clause 56.7.1, which states that the "… severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted … termination benefits…"

[203] Clearly, the collective agreement distinguishes between the severance benefits payable to an employee under the layoff article and the net amount calculated after the reduction of amounts previously paid on account of severance.

[204] In addition, clause 56.7.1 provides that severance benefits payable to an employee under it shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit. The language does not refer to a reduction of severance benefits under the WFA policy.

[205] Moreover, if the words of an agreement may bear two constructions, the more reasonable one, which would produce a fair result, should be taken as the interpretation that would promote the parties' intention.

[206] The example of the two employees with similar continuous service of plus or minus 42 years is instructive. In it, the only difference was that one employee elected to receive severance pay in advance of termination and the other opted to receive it only on termination.

[207] Applying the RCEA's interpretation of the WFA policy and the collective agreement would result in the one employee who elected to receive severance payments in advance of termination receiving a total of 100 weeks of layoff benefits while the other employee who opted to receive severance pay on termination receiving 70 weeks of layoff benefits. Such an application of the collective agreement creates an unfair distinction between employees who are similarly situated.

[208] In my view as well, the bargaining agent was unable to point to clear language in the collective agreement that would warrant conferring that exceptional financial benefit on some employees.

[209] The RCEA argued that I should adopt a pay-for-pay approach such that amounts previously paid on account of severance should be deducted only from the total severance entitlement and not from the notice period set out in the WFA, which is based on years of continuous service. In *Martin*, the employer sought to reduce the employee's severance pay on a deemed layoff not by the amount he had previously received as severance pay but by his previous period of continuous employment.

[210] In this case, the WFA policy establishes that an employee who is identified as surplus is entitled to receive layoff benefits, which include a notice period of 20 weeks

plus 1 week for every year of continuous service or portion of one. Section 3.6.14.1 provides that if the employee does not work the notice period in part or in full, a lump-sum payment equivalent to the employee's regular pay for the notice period not worked will be paid.

[211] This case does not present the same conceptual problem as in *Martin*, in which the PSSRB struggled with subtracting time from money. The WFA policy provides the formula for converting time to money and in my view does not present any difficulty mathematically in calculating the maximum benefits on layoff if that calculation includes amounts previously paid on account of severance.

[212] Clause 56.7.1 of the collective agreement, under the heading "General", expressly incorporates a rule against pyramiding into the collective agreement. As noted, the language reads as follows: "Under no circumstances shall the maximum severance pay provided under article 56 be pyramided (emphasis added)."

[213] Decision makers have developed a presumption against pyramiding benefits. It is a rebuttable presumption. The presumption for example in the classic case presumes that the parties did not intend in the language used in the collective agreement that employees would receive more than one premium in addition to their regular wage rate for the same hours of work.

[214] Decision makers have distinguished between premiums that served the same purpose that attracted the presumption and those that served different purposes and did not attract the presumption. See *Headwaters Health Care Centre v. Ontario Nurses' Assn.*, [2004] O.L.A.A. No. 332 (QL).

[215] Nevertheless, if an agreement expressly prohibits pyramiding, decision makers have held that the rule is more than a presumption; see *Molson Breweries v. National Union of Public and General Employees, Local 325*, [2002] O.L.A.A. No. 878 (QL).

[216] The bargaining agent argued that the application of clause 56.7.1 that provides that severance benefits payable shall be reduced by any severance pay already granted, satisfies the provision prohibiting pyramiding.

[217] This interpretation results in a very narrow application of the prohibition against pyramiding benefits. The parties expressly agreed in clause 56.7.1 that severance benefits payable must be reduced by any severance pay already granted. To also conclude that the

same mischief is the object of the pyramiding prohibition would render the clause redundant.

[218] In my view, the bargaining agent's preferred application of the collective agreement provisions at issue attracts the prohibition on pyramiding, which is widely drafted using this phrase: "Under no circumstances shall the maximum severance pay be pyramided (emphasis added)."

[219] By not including severance payments previously paid to employees subject to layoff when calculating the maximum layoff benefits, the amount of severance payable would be artificially reduced, thus increasing the amount payable on account of the notice period.

[220] In the example of the employee with 42 years of continuous service who received an advance payout of 30 weeks of severance pay, he or she would receive a total of 100 weeks of compensation on layoff, which would be 30 weeks in excess of the amount he or she would be entitled to under the WFA policy. The result is that the employee receives 2 payments of 30 weeks' pay on account of the total layoff benefits. I have difficulty concluding that that is not the type of pyramiding prohibited under the collective agreement.

[221] Neither party took the position that the collective agreement is ambiguous, both arguing that their interpretation of the agreement's words was to be preferred. The bargaining agent's position was that there was no ambiguity in the collective agreement and that if I did conclude that there was ambiguity, it could be resolved in its favour by referring to the language that the employer proposed for this bargaining unit and did not receive.

[222] As discussed, collective agreements are to be interpreted without resorting to extrinsic evidence, unless they are ambiguous. In my view, the collective agreement in this case is not ambiguous, what is at issue however are the competing arguments with respect to the interpretation of the collective agreement.

[223] Nevertheless, the bargaining agent referred to the terms-of-reference decision in support of its collective agreement interpretation. Given that I have found that the collective agreement is not ambiguous, I find that decision of little assistance.

[224] The issue before the PSLRB Chairperson was whether the employer's late proposal could be included in the arbitration board's terms of reference. To determine that question, the Chairperson had to determine whether the parties had negotiated the employer's late proposal before arbitration was requested.

[225] The Chairperson concluded that the late proposal was never discussed with the bargaining agent before it requested arbitration, that the proposal constituted a term and condition of employment, and that it would be contrary to the *Public Service Staff Relations Act* were the proposal included in the arbitration board's terms of reference. At no time did the Chairperson seek to interpret clause 56.7.1 of the proposed collective agreement.

[226] For all of the above reasons, I conclude that the employer has not violated the collective agreement, and I make the following order:

(The Order appears on the next page)

V. Order

[227] I dismiss the policy grievance in file 569-09-147 as well as all of the individual grievances (files 566-09-9655 and 9616 to 9619) on the merits.

August 17, 2016.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board

Actual Differences between Parties

Type of Benefit	**Brian Allen** **41.6 years' service** **Took out 30 weeks'**		**David Duncan** **33.4 years of service** **Took out 15 weeks'**		**David O'Neil** **27.3 years' service** **Took out 12 weeks'**		**M.J. Kanabus-Kaminska** **28.3 years' of service** **Took out 5 weeks'**		**Darwin Reed** **32 years of service** **Took out 30 weeks'**	
	NRC version	***RCEA version***	***NRC version***	***RCEA version***	***NRC version***	***RCEA version***	***NRC version***	***RCEA version***	***NRC version***	***RCEA version***
Notice Period (WFA 3.6.13.1)	62 weeks	62 weeks	53 weeks *	54 weeks	48 weeks	48 weeks	48.7 weeks**	49 weeks	52 weeks	52 weeks
Outplacement Benefit (WFA 3.6.13.1)	8 weeks	8 weeks	8 weeks	8 weeks	8 weeks	8 weeks	8 weeks	8 weeks	8 weeks	8 weeks
Severance (collective agreement 56.1.3)	44.6 weeks	14.6 weeks (net)	37.4 weeks*	21.4 weeks (net)	30.3 weeks	19.3 weeks (net)	31.3 weeks	26.3 weeks (net)	35 weeks	5 weeks (net)
Subtotal	*114.6*	*84.6*	*98.4*	*83.4*	*86.3*	*75.3*	*88*	*83.3*	*95*	*65*
Maximum of 70 weeks Done by reducing the "Notice Period" (WFA 3.6.13.1 and 3.6.13.4)										
Revised Notice Period If Subtotal >70 Notice Period minus *(Subtotal minus 70)*	17.4 weeks (62- 44.6)	48.4 weeks (62- 14.6)	24.6 weeks (62- 14.6)	40.6 weeks (53- 13.4)	31.7 weeks (48- 16.3)	42.7weeks (48-5.3)	30.7 weeks (48.7-18)	35.7 weeks (49-13.3)	57 weeks (52-25)	52 weeks (no reduction)
Total	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***	***70 weeks***
Deduction of "voluntary" severance (*NRC-only*)	(30 weeks)	n/a	(15 weeks)	n/a	(12 weeks)	n/a	(5 weeks)	n/a	(30 weeks)	n/a
Final Total	**40 weeks**	**70 weeks**	**55 weeks**	**70 weeks**	**58 weeks**	**70 weeks**	**65 weeks**	**70 weeks**	**40 weeks**	**65 weeks**

*appears to be a technical error, 1 week missing in notice but 1 week too much severance- but it makes no difference in the end
**unclear why NRC used partial weeks for Notice in this case only – but it makes no difference in the end