<u>IN THE MATTER OF</u>: *The Civil Service Collective Bargaining Act*, **S.N.S. 1989, c. 71, as amended**

- and -

<u>IN THE MATTER OF</u>: **A Policy Grievance Concerning the Interpretation of Memorandum of Agreement #2**

BETWEEN:

<u>THE NOVA SCOTIA GOVERNMENT AND GENERAL EMPLOYEES UNION</u>

(hereinafter called the "UNION")

- and -

<u>NOVA SCOTIA PUBLIC SERVICE COMMISSION</u>

(hereinafter called the "EMPLOYER")

<u>Counsel</u>:

David Roberts
for the Union.

Sarah Bradfield
and
Alicia Arana-Stirling
for the Employer.

<u>Arbitrator</u>:

Bruce Outhouse, Q.C.

Hearings held at Halifax on September 14, 29 and 30, 2015.

DATE OF DECISION: February 11, 2016.

DECISION

In the winter and spring of 2015, the Employer issued layoff notices to employees in the Department of Community Services, Department of Natural Resources and Economic and Rural Development. In dealing with those layoff notices, a dispute arose between the Union and the Employer concerning the application of Memorandum of Agreement #2 in the Master Civil Service Agreement.

MOA #2 contains provisions which state that the Employer shall, in certain circumstances, ask employees who are working in the same classification, department and geographic location as an employee receiving a layoff notice to voluntarily resign and accept severance, thereby making their position available to the employee who received the layoff notice. Despite requests by the Union, the Employer declined to issue a call for voluntary resignations in connection with the 2015 layoffs on the basis that such calls are not required if there is a vacancy in the same position classification title anywhere in the province which can be offered to an employee impacted by a layoff notice. The Union disagreed and took the position that a call for voluntary resignations must be made before an impacted employee is required to exercise his or her displacement (bumping) rights.

The grievance reads as follows:

"March 31, 2015

Via email: yazbekcm@gov.ns.ca

Ms. Cynthia Yazbek
Executive Director, Employee Relations
Public Service Commission
5th Floor, WTCC
1800 Argyle Street
Halifax, NS B3J 2V9

Dear Ms. Yazbek:

Re: NSGEU Policy Grievance – Union File# P-15-331 – MOA #2

This is a policy grievance pursuant to Article 29.09 of the Civil Service Master Agreement. The NSGEU and the Employer disagree over the interpretation and application of Memorandum #2 of the Agreement. The parties have discussed this dispute and have been unable to reach a satisfactory agreement.

The Employer is interpreting Memorandum #2 in a manner that allows it to avoid its obligations under Memorandum #2 and Article 37.16 of the Agreement.

The Employer is not consulting with the Union as required by Article 1.1 of Memorandum #2 and it is not applying Articles 1.2, 1.3, 1.4 and 1.5 of Memorandum #2 to create opportunities for employees who have opted to exercise placement and displacement rights.

The Employer is interpreting Article 1.1 of Memorandum #2 in a manner that is unreasonable and which ignores the provisions of Article 37.16 of the Agreement. The Employer is insisting that if a vacancy exists anywhere in the Province in the position classification title of an employee who has opted to exercise placement and displacement rights, sufficient vacancies will exist within the meaning of Article 1.1 of Memorandum #2 to a [sic]

allow it to avoid applying the remainder of Memorandum #2.

As a result, the Employer is denying employees whose positions have become redundant, whose positions have been relocated, or who would otherwise receive a notice of layoff, placement and displacement rights in their own geographic location as provided for by Article 37.16. Employees are being forced to choose options which they would not have chosen if they had received the benefit of Memorandum #2.

As a remedy, the Union seeks a declaration that the Employer is acting contrary to Articles 7.01, 37 and Memorandum #2 of the Civil Service Master Agreement, and an order that any employee who has been adversely affected by the Employer's violation of the Agreement be restored to the position they would have been in had the Employer followed the provisions of the Agreement.

In view of the importance of this matter, I propose that the Union and the Employer agree to expedite the process of selecting an adjudicator and scheduling a hearing.

Sincerely,

Robin MacLean
Director of Negotiations & Servicing
..."

The grievance was heard on September 14, 29 and 30, 2015. At the outset of proceedings, the parties agreed that I was properly appointed as sole arbitrator and had the requisite jurisdiction to determine the grievance. At the conclusion of the hearing, the parties also agreed to waive any time limit that would otherwise apply to the issuance of my decision.

The parties submitted the following Agreed Statement of Facts:

"Agreed Statement of Facts

[1] Civil Service Master Agreement April 1, 2012 – March 31, 2015, concluded on September 3, 2013. Article 37 and Memorandum of Agreement #2 are provided at Tab 1.

[2] March 31, 2015 the NSGEU filed policy grievance #P-15-331. The grievance alleges violation of MOA #2 in that the Employer is not consulting nor interpreting Article 1.1 accurately. The grievance is provided at Tab 2.

[3] The prior Civil Service Master Agreement, in effect April 1, 2010 – March 31, 2012, included Memorandum of Agreement #3 – Article 37, attached at Tab 3.

[4] Article 37 – Employment Stability has been in place, with only minor amendments, over many collective agreements. One of the agreements prior to 2010 also included an enhanced severance program associated with the employment stability provisions. Tab 4 provides the relevant provisions of the collective agreements for the period November 1, 1997 through March 31, 2010. While not specifically included in the collective agreement, the parties also agreed to the application of the Transition Support Program to bargaining unit employees, as referenced in attached May 25, 2000 media release.

[5] Article 37 provides for election between three options to impacted employees: placement/displacement; recall; resignation with severance. The placement/displacement process involves three (3) phases based on expanding geography, with five (5) steps in each phase. The steps consist of i) Placement in same classification, same department; ii) Placement in same classification, any department; iii) Placement in other classification, same department; iv) Placement in other classification, any department; v) Displacement in same classification, any department. An impacted employee

retains the right, during those phases, to elect recall or resignation with severance.

[6] Following the October 21, 2010 conclusion of the 2010-2012 Master Agreement, there were 14 calls for voluntary resignation/relocation. This included 596 emails inviting employees to express interest in the option to voluntarily relocate or voluntarily resign with severance. 65 applications were received in response. The table of data regarding these calls is provided at Tab 5. An example of the documentation sent to employees regarding the Voluntary Call and a response to same are also provided at Tab 5.

[7] Since September 3, 2013 and the agreed upon MOA #2, there have [been] multiple layoffs pursuant to Article 37. There has been one call for voluntary resignation/relocation which related to the closing of Empire House, noted below. Between July 7 and July 11, 2014 two Caseworker 4 employees located in Bridgewater within the Department of Community Services were invited to apply for Voluntary Resignation with Severance. One employee applied and was accepted for same.

[8] The layoffs have included the below listing of significant events.

June 2014 DCS closes Empire House.

January, 2015 DCS closures of Barrington and Guysborough offices.

February 27, 2015 seasonal DNR (parks) and ERDT (Visitor Information Centres) employees are laid off.

April 9, 2015 ERDT, SNS, CCH, Finance & Treasury, Environment, Energy and Justice employees laid off. Total of 80 permanent bargaining unit employees received notice of layoff.

May 21, 2015 DCS Dayspring closure resulting in layoffs of 15 bargaining unit employees.

[9] As of August 2015, 104 of the impacted bargaining unit employees placed.

[10] Tech Change meetings were held on January 21, February 18, March 18, April 15, May 20, June 17, July 15 and August 19, 2015. Several sample agendas for the meetings are provided at Tab 6.

[11] Commencing March 12, 2015 the Employer and Union began to hold regular Transition meetings. These were at times in addition to the Tech Change meetings and at times overlapping with those meetings. Transition meetings were held on March 12, March 18, April 9, April 15, April 21, April 29, May 12, May 20, May 27, June 3, June 11, July 2, July 15, August 5, and August 19, 2015.

[12] Starting in early March, the Union requested a list of government wide vacancies that might be available for placement. Initially, the employer was not able to provide such information because the system reports did not accurately identify positions available to be filled. The Employer worked with departments to determine which positions were in fact available for placement and therefore a true vacancy. In late April, with the availability of more accurate vacancy information, the parties reached an agreement on a without prejudice basis. The Employer agreed to provide the Union with information at each transition meeting on vacancies in the classifications for which Transition was seeking to affect placement that week. As vacancies are added and deleted on a continuous basis the parties understood that any vacancy information provided was a snapshot in time and subject to change.

[13] Accordingly, at least by late April, the meetings included updates on specific employees impacted by layoff, overall data on the number of impacted employees remaining in each classification (by location and department) and information on known vacancies for those classifications being actively worked on at that time. Detailed information in the form of Weekly Transition Reports was provided from the Employer to the Union. Sample reports (May 6 and June 11, 2015) are provided at Tab 7.

[14] Transition meetings included discussion of vacancies and possible need for a call for voluntary resignation with severance. Specifically, the May 12, 2015 Transition Meeting included a suggestion by the Union that there should be a call for voluntary resignation

among PDO 1-2. At the May 20, 2015 Transition Meeting the Union indicated it may push for a call to the PDO 1-2 group. The Employer agreed to look at the numbers and further noted the need to consider departments impacted by a call, given the reality that a call within the same department was not an option as ERDT ceased to exist. The employer also acknowledged the transition difficulties for rural areas. Discussion between the parties regarding the intent of MOA #2 and its interpretation took place. One week later, at the May 27, 2015 Transition Meeting there was reference to consideration of a call to PR 13 and the Union also raised Clerk 3 position. Further, there was discussion of the Employer's approach to assessment for call.

[15] The Tech Change and Transition meetings were in addition to fairly regular contact between Employer and Union representatives via email and phone regarding impacted bargaining unit employees."

The attachments to the Agreed Statement of Facts are too voluminous to include in this decision. Only the relevant sections of Article 37 and all of MOA #2 from Tab 1 are reproduced below.

"**ARTICLE 37 – EMPLOYMENT STABILITY**

37.01 Consultation

(a) The parties shall continue with their joint committee of equal representation of the Union and Public Service Commission, as represented by the Employee Relations Division, for the purpose of cooperation and consultation on employment stability. The committee shall appoint additional representatives as needed and shall meet as required to discuss matters of concern between the parties related to technological change and circumstance identified in Article 37.06.

(b) The joint committee shall be responsible for:

(1) defining problems;

(2) developing viable solutions to such problems;

(3) recommending the proposed solution to the Employer.

(c) The Employer will provide the joint committee with as much notice as reasonably possible of expected redundancies, relocations, re-organizational plans, and technological change.

(d) It is understood that the joint committee provided for herein shall be a single committee to cover all civil service bargaining units represented by the Union.

37.03 Introduction

The Employer agrees that it will endeavour to introduce technological change in a manner which, as much as is practicable, will minimize the disruptive effects on employees and services to the public.

***37.06 Layoff**

(a) An employee(s) may be laid off because of technological change, shortage of work or funds, discontinuance of a function or the reorganization of a function, or due to contracting out.

(b) Where an employee's position is relocated, he/she shall be offered the position in the new location. The employee may decline the offer, in which case the remaining provisions of Article 37 shall apply.

(c) Where an employee's position becomes redundant the remaining provisions of Article 37 shall apply.

37.08 Union Consultation

Where employees are to be laid off, the Employer will advise and consult with the Union as soon as reasonably possible after the change appears probable, with a view to

minimizing the adverse effects of the decision to layoff [sic] an employee(s).

***37.13 Prior to Issuing Layoff Notice**

The Employer shall not give a notice of layoff to any employee before the Employer has first attempted, in the following sequence:

(a) in a departmental reorganization, to fill vacancies with qualified employees whose positions are eliminated as a result of the same reorganization in accordance with the placement procedures in Article 37.16(a)(1) and 37.16(a)(3).

(b) where the Employer is able to identify that a layoff is expected, to provide the affected employee(s) with the opportunity to exercise deemed placement rights in accordance with Articles 37.16(a)(1) and 37.16(a)(3).

(c) where the Employer is able to identify that a layoff is expected, to provide the affected employee(s) with the opportunity to exercise deemed placement rights in accordance with Articles 37.16(a)(1) and 37.16(a)(3) with respect to bargaining unit positions where a casual is employed. An employee who is placed in such a bargaining unit position shall maintain their existing status with all associated rights and benefits under the Collective Agreement.

(d) An employee who is offered placement

(i) in accordance with Article 37.16(a)(1); and

(ii) in a position which has the same designated percentage of full time employment; or

in the case of seasonal employees, in a position which has the same benefit plan entitlement and the same number of weeks as the seasonal period in the last fiscal year,

cannot decline to accept the placement.

(e) An employee who is offered placement in accordance with Article 37.16(a)(3) may decline to accept the placement in which case, the remaining provisions of Article 37 shall apply.

37.14 Notice of Layoff

(a) Forty (40) work days notice of layoff shall be sent by the Employer to the Union and the employee(s) who is/are to be laid off, except where a greater period of notice is provided for under (b) below.

(b) Where the Employer lays off ten (10) or more persons within any period of four (4) weeks or less, notice of layoff shall be sent by the Employer to the Union and employees who are to be laid off, in accordance with the following:

(1) forty (40) work days if ten (10) or more persons and fewer than one hundred (100) persons are to be laid off;

(2) sixty (60) work days if one hundred (100) or more persons and fewer than three hundred (300) are to be laid off;

(3) eighty (80) work days if three hundred (300) or more persons are to be laid off.

(c) Notices pursuant to this section shall include the effective date of layoff and the reasons therefore.

(d) An employee in receipt of layoff notice shall be entitled to exercise any of the following options:

(1) to exercise placement/displacement rights in accordance with the procedures set out in Article 37.16; or

(2) to accept layoff and be entitled to recall in accordance with Article 37.18;

(3) to resign with severance pay in accordance with Article 37.20.

An employee who intends to exercise placement/displacement rights pursuant to (d)(1)

above will indicate such intent to the Employer within ten (10) calendar days following receipt of the layoff notice. If the employee does not indicate such intent within this period, he/she will be deemed to have opted to accept layoff in accordance with (d)(2) above.

***37.16 Placement/Displacement Procedures**

(a) Subject to consideration of ability, experience, qualifications, or where the Employer establishes that special skills or qualifications are required, according to objective tests and standards reflecting the functions of the job concerned, an employee in receipt of layoff notice, who has not been placed in accordance with Article 37.06(b), or whose position has become redundant, shall have the right to be placed in a vacancy in the following manner and sequence:

(1) a position in the employee's same position classification title, or position classification title series, within the employee's same geographic location and the same Department, Board, Commission or Agency;

(2) if a vacancy is not available under (1) above, then a position in the employee's same position classification title, or position classification title series, within the employee's same geographic location, in any other Department, Board, Commission or Agency;

(3) if a vacancy is not available under (2) above, then any position for which the employee is qualified within the employee's same geographic location and same Department, Board, Commission or Agency;

(4) if a vacancy is not available under (3) above, or the employee has declined a vacancy in accordance with provisions of 37.16(b), then any position for which the employee is qualified within the employee's same geographic location in

any other Department, Board, Commission or Agency.

At each of the foregoing steps, all applicable vacancies shall be identified and the employee shall be assigned to the position of his/her choice, subject to consideration of the provisions herein. If there is more than one employee affected, their order of preference shall be determined by their order of seniority. Vacancies pursuant to (3) and (4) above shall include all vacancies in the other Civil Service bargaining units represented by the Union.

(b) (i) A full-time employee is not required to accept a vacant position which has a lower maximum salary than that of the employee's classification;

(ii) A part-time employee is not required to accept a vacant position or displace into a position which has a lower maximum salary than that of the employee's classification or which has a greater than 10% increase of full-time employment;

(iii) A seasonal employee is not required to accept a vacant position or displace into a position which has a lower maximum salary than that of the employee's classification, lesser benefit plan entitlements or which is more than two (2) weeks longer or shorter than the seasonal period in the last fiscal year;

(iv) An employee who declines a vacancy, in accordance with Article 37.16(b), at any step in the placement procedure under Article 37.16 shall be entitled to exercise his/her rights at the next subsequent step in the procedures outlined herein.

(c) If a vacancy is not available under any of the foregoing steps or has been declined in accordance with 37.16(b), the employee shall have the right to displace another employee with lesser seniority who is in the same position classification title, or position classification title

series, within the same geographic location and any Department, Board, Commission or Agency. Such displacement is subject to consideration of Article 37.09 and the employee to be displaced shall be one who has the least seniority among those whom the employee in receipt of layoff notice is entitled to displace.

(d) An employee who has elected to exercise displacement rights in accordance with (c) above and has been unable to do so, shall be entitled to exercise placement rights to vacant position(s) in respect to other locations in his/her Region, as outlined in Appendix 6. Such placement rights shall be exercised in respect to any location on a Region-wide basis, in accordance with the provisions and sequence set out in 37.16(a) and 37.16(b) and, wherein the employee is entitled to a choice of position, such entitlement shall also apply to choice of location.

(e) If a vacancy is not available under (d) above or has been declined in accordance with 37.16(b), the employee shall have the right to displace another employee with lesser seniority who is in the same position classification title, or position classification title series, within the same Region and any Department, Board, Commission or Agency. Such displacement is subject to consideration of Article 37.09 and the employee to be displaced shall be one who has the least seniority among those whom the employee in receipt of layoff notice is entitled to displace.

(f) An employee who has elected to exercise displacement rights in accordance with (e) above and has been unable to do so, shall be entitled to exercise placement rights to vacant positions in respect to locations in other Regions. Such placement rights shall be exercised in respect to any location on a province-wide basis, in accordance with the provisions and sequence set out in 37.16(a) and 37.16(b) and, wherein the employee is entitled to a choice of position, such entitlement shall also apply to choice of location.

(g) If a vacancy is not available under (f) above or has been declined in accordance with 37.16(b), the employee shall have the right to displace another employee with lesser seniority who is in the same position classification title, or position classification title series,

and any Department, Board, Commission or Agency in any Region. Such displacement is subject to consideration of Article 37.09 and the employee to be displaced shall be one who has the least seniority, among those who the employee in receipt of layoff notice is entitled to displace.

(h) An employee who chooses to exercise rights in accordance with 37.16 may elect at any step, beginning with Article 37.16(a)(1), to accept layoff and be placed on the recall list or to resign with severance pay in accordance with Article 37.20.

(i) A permanent employee who is placed in a term position shall retain his/her status as a permanent employee.

(j) An employee placed or recalled to a vacancy which has a lower maximum rate of pay than that applicable to the employee's classification, shall be paid the maximum rate of pay of the lower classification.

(k) An employee who is displaced pursuant to Article 37.16 shall be entitled to the full rights contained in Article 37 and shall be considered to be in receipt of a layoff notice from the Employer. A displaced employee shall not be considered to be laid off for purposes of the period of notice required under 37.14, but shall be entitled only to the number of work days' notice remaining thereunder from the time the employee initially in receipt of notice exercised his/her displacement rights under this Article.

(l) An employee will have a maximum of two (2) business days to exercise his/her rights at any of the foregoing steps of the placement/displacement procedures provided for herein.

***37.20 Severance Pay**

(a) At the end of the twenty-four (24) month period referred to in 37.19, or at any earlier time as an employee in receipt of notice of layoff wishes to terminate employment and waive recall rights, the employee shall be granted severance pay equal to four (4) weeks for every year of service to a maximum of fifty-two (52) weeks pay and for a minimum of four (4) weeks pay. Where there is

a partial year of service, the severance payment will be pro-rated on the basis of number of months of service.

37.22 Geographic Location

For the purposes of this Article, 'geographic location' means that area within a radius of thirty-two (32) kilometers (20 miles) of the actual building or other regular place of employment of the employee; except that, within the Halifax-Dartmouth Metro area, 'geographic location' is that area within a radius of sixteen (16) kilometers (10 miles) of the actual building or other regular place of employment of the employee.

MEMORANDUM OF AGREEMENT #2 – ARTICLE 37

This Memorandum of Agreement shall be effective from the date of signing of this tentative agreement until the signing of the next Collective Agreement.

Notwithstanding Article 37, an employee whose position has become redundant, whose position has been relocated or who would otherwise receive a notice of layoff may not be laid off except as provided in Clause 4.3 of this Memorandum, but may:

a) Exercise the placement and displacement rights under Article 37 of the Collective Agreement;

b) Accept a voluntary layoff and be entitled to recall in accordance with Article 37;

c) Voluntarily resign with severance pay in accordance with Article 37.20.

1.0 VOLUNTARY RELOCATION / VOLUNTARY RESIGNATION & SEVERANCE

1.1 Application

Where an employee has opted to exercise placement and displacement rights under Article 37 of the Collective Agreement and, after consulting with the Union, the Employer concludes that it is unlikely the Employer will have sufficient vacancies to affect placement in

accordance with Article 37.16, the following provisions shall apply.

1.2 Voluntary Relocation

(a) Where positions have been relocated, the Employer shall ask for volunteers from the same classification, same department, and same geographic location as the employee whose position has relocated, who wish to relocate and be offered relocation expenses in accordance with the Collective Agreement. The call for voluntary relocation may include further calls for voluntary relocation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary relocation under this provision.

(b) Where the process outlined in 1.2 (a) does not result in the creation of sufficient vacancies for employees whose positions have been relocated, Article 1.3 shall apply.

1.3 Voluntary Resignation

The Employer shall ask for volunteers, from the same classification, same department and same geographic location as employees seeking placement pursuant to a layoff notice, which shall include the employees in receipt of layoff notice, who wish to resign and be offered a severance payment in accordance with this Memorandum. The call for voluntary resignation and severance may include further calls for voluntary resignation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary resignation under this provision.

1.4 Simultaneous Calls

A call for Voluntary Relocation and a call for Voluntary Resignation with Severance may be issued simultaneously.

1.5 Relocation or Severance Offered

Each relocation or severance offered to one employee must result in the placement of another employee whose position is redundant or relocated, or result in severance to an employee whose position is redundant or relocated and who is otherwise awaiting placement.

1.6 Seniority

If there are more volunteers than required, approval of voluntary relocation and voluntary resignation applications shall first be provided to employees, in receipt of a layoff notice, in accordance with seniority and then to other volunteers, in accordance with seniority.

1.7 Operational Considerations

Notwithstanding anything in this Memorandum, the Employer reserves the right to restrict relocations and the resignation with severance offer as a result of operational considerations. For example, where too many volunteers within a classification are from within a single work location, it may not be possible to permit all to relocate or resign.

1.8 Placement

Where positions become available as a result of this process, employees in redundant or relocated positions will be placed in accordance with Article 37.16, subject to consideration of ability, experience, qualifications, or where the Employer establishes that special skills or qualifications are required, according to objective tests and standards reflecting the functions of the job concerned. Where the Employer determines that training is needed for an employee to qualify for placement in existing or anticipated vacancies, training shall be provided in accordance with Article 37.05 and Section 1.9 below.

1.9 Training Prior to Placement

(a) Where the Employer determines training is required, operational requirements permit and an assessment of the employee's skills concludes it is reasonable to expect the employee can be trained for the

position, the Employer shall make available appropriate training programs or training opportunities.

(b) The Employer and the Union will meet as part of the Technological Change process to discuss potential training programs and opportunities which may facilitate the placement of the employee in a position and to consider extending the time lines required for the employee to make the necessary choices in the placement/displacement process.

(c) The nature of the training shall be determined by the Employer following its discussion with the Union.

(d) Subject to the criteria identified in 1.9 (a) above, the training may be for a period of up to twelve (12) months. There may be circumstances under which the Employer concludes that training in excess of twelve (12) months is appropriate.

2.0 PROCESS OF VOLUNTARY RELOCATION / VOLUNTARY RESIGNATION

2.1 Employees shall have five (5) work days following receipt of the notice to submit their application for Voluntary Relocation or Voluntary Resignation and Severance Payment.

2.2 The Employer will assess the level of interest and determine provisional acceptance, subject to operational requirements in accordance with this Memorandum.

2.3 Employees shall, within fifteen (15) work days following a meeting with a representative of Human Resources, indicate their decision with respect to voluntary relocation or resignation. The actual date of relocation or voluntary resignation will occur with the agreement of the Employer. Upon relocation, the employee will be entitled to relocation expenses in accordance with the Collective Agreement. Upon resignation, the employee will be entitled to the severance under this Memorandum.

2.4 Where the Employer reaches its reduction target through this voluntary method, the process ceases.

3.0 SEVERANCE PAYMENT UNDER THE VOLUNTARY RESIGNATION PROCESS

3.1 Severance for the purpose of this Memorandum shall be equal to four (4) weeks for every year of service to a maximum of fifty-two (52) weeks pay and for a minimum of eight (8) weeks pay. Where there is a partial year of service, the severance payment will be pro-rated on the basis of a number of months of service. The entitlement of an employee to severance pay shall be based on an employee's total service as defined in Article 1.02 of the Master Agreement.

3.2 The Employer will continue to participate with employees in the provision of group life and medical plans for the number of weeks used to calculate the payment in Clause 3.1.

3.3 An employee who resigns in accordance with these provisions and is immediately eligible for and immediately accepts a pension pursuant to the provisions of the *Public Service Superannuation Act* shall be entitled to receive the Public Service Award under Article 34 of the Collective Agreement in addition to the severance payment under Clause 3.1 provided that the maximum combined payment does not exceed fifty-two (52) weeks.

3.4 An employee in receipt of severance pursuant to this Memorandum, who is re-employed with the Government of Nova Scotia, will be required to repay a portion of the severance. The repayment amount will be calculated on a pro-rated basis by considering the number of weeks on which the severance was based and the number of weeks remaining in such period.

3.5 Employees accepting severance payment under this Memorandum, will be required to sign a release statement verifying their resignation and agreement to sever any future claims for compensation and benefits from the Employer.

4.0 REASONABLE OFFERS OF ALTERNATIVE EMPLOYMENT

4.1 Where, following the placement/displacement process in Article 37.16, an employee has not been offered a position with an equivalent maximum salary and the

same or greater designated percentage of full-time employment, an employee shall be made a reasonable offer of alternative employment in accordance with the following:

i) an employee with less than three years of service shall be offered a position with a maximum rate of pay of 90% or more of the employee's current maximum rate of pay and the same or greater designated percentage of full-time employment;

(ii) an employee with three or more years of service shall be offered a position in the same geographic location with a maximum rate of pay of 90% or more of the employee's current maximum rate of pay and the same or greater designated percentage of full-time employment; or shall be offered two positions in different geographic locations with a maximum rate of pay of 90% or more of the employee's current maximum rate of pay and the same or greater designated percentage of full-time employment.

4.2 Where an employee accepts placement pursuant to clause 4.1 and the employee's salary is less than the employee's current salary shall not be reduced and the employee will be eligible to receive pay increments in the new position and any negotiated increases in rate of pay up to the maximum rate for the new position. If an employee's actual salary is greater than the maximum rate in the new position, the employee's salary will not be reduced, but the employee will be red circled.

4.3 Should an employee refuse placement in accordance with article 4.0, the employee shall be deemed to be laid off and placed on the recall list.

5.0 APPLICATION

For the purposes of this Memorandum, 'employee' means a permanent employee, or a term employee with three (3) or more years of service."

In addition to the Agreed Statement of Facts, both parties called oral evidence. Keiren Tompkins and Robin MacLean testified on behalf of the Union. At the time of the grievance, Mr. Tompkins was the Union's Executive Director and Ms. MacLean was its Director of Negotiations & Servicing. Mr. Tompkins subsequently retired and Ms. MacLean succeeded him as Executive Director. Both Mr. Tompkins and Ms. MacLean have extensive experience with the Union negotiating and administering Civil Service collective agreements, including Civil Service Master Agreements.

Ann Marie Lahey, Wendy Hudgins and Cynthia Yazbek testified on behalf of the Employer. Ms. Lahey was Acting Manager, HR Business Partner at the Public Service Commission and served as Senior Transition Co-ordinator from the end of 2011 until 2013. Ms. Hudgins is the current Senior Transition Co-ordinator, having assumed that position in August of 2014. Ms. Yazbek was the Employer's Executive Director, Employee Relations & Benefits, at all times material to the grievance and was lead negotiator for both the 2010-2012 and 2012-2015 Master Agreements. All three have extensive HR experience.

I do not propose to summarize the evidence of the individual witnesses. The record did not disclose any material contradictions of a factual

nature and credibility is not an issue. What differences there are among the witnesses involve opinions about the interpretation and the application of MOA #2 and, as such, are ultimately issues for me to decide.

The oral evidence did provide additional context with respect to the evolution of MOA #2 and Article 37 – Employment Stability, to which MOA #2 is integrally connected. Article 37 dates back to the 1984-86 Civil Service Collective Agreements. In the mid-1990's, government put in place an Early Departure Incentive Plan ("EDIP") to assist with workforce readjustments. It provided that before an employee was given a layoff notice, the employee would first be offered an incentive severance payment if they voluntarily resigned. If the employee declined the offer, then the same offer would be made to other permanent bargaining unit employees in the same classification, department and geographic location as the impacted employee. If another employee volunteered to resign, then the impacted employee would assume the vacated position and be spared from layoff. In 2000, the EDIP was replaced by a Transition Support Program which included an enhanced severance package for employees who were being laid off.

In the 2010-2012 Master Agreement, the parties included "Memorandum of Agreement #3 – Article 37" which is the predecessor to MOA

#2. For the most part, MOA #3 and MOA #2 are identical. However, there are two substantive differences. First, MOA #3 only applied to layoffs whereas MOA #2 also applies to relocations. Second, the language of Article 1.1 in MOA #3 is quite different from the corresponding language in MOA #2. Specifically, Article 1.1 in MOA #3 reads as follows:

> **"1.0 Voluntary Resignation and Severance**
>
> 1.1 Following the process outlined in Article 37.13 of the Agreement, should the Employer determine that there are still redundancies, the Employer shall ask for volunteers from the same classification and same Department, who wish to resign and be offered a severance payment in accordance with this Memorandum. The call for voluntary resignation and severance may include further calls for voluntary resignation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary resignation under this provision."

The corresponding language in MOA #2 is as set out below:

> **"1.1 Application**
>
> Where an employee has opted to exercise placement and displacement rights under Article 37 of the Collective Agreement and, after consulting with the Union, the Employer concludes that it is unlikely the Employer will have sufficient vacancies to affect placement in accordance with Article 37.16, the following provisions shall apply.

1.2 Voluntary Relocation

(a) Where positions have been relocated, the Employer shall ask for volunteers from the same classification, same department, and same geographic location as the employee whose position has relocated, who wish to relocate and be offered relocation expenses in accordance with the Collective Agreement. The call for voluntary relocation may include further calls for voluntary relocation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary relocation under this provision.

(b) Where the process outlined in 1.2 (a) does not result in the creation of sufficient vacancies for employees whose positions have been relocated, Article 1.3 shall apply.

1.3 Voluntary Resignation

The Employer shall ask for volunteers, from the same classification, same department and same geographic location as employees seeking placement pursuant to a layoff notice, which shall include the employees in receipt of layoff notice, who wish to resign and be offered a severance payment in accordance with this Memorandum. The call for voluntary resignation and severance may include further calls for voluntary resignation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary resignation under this provision."

Both sides led evidence of past practice and negotiating history to explain the differences between MOA #3 and MOA #2. It is clear from that evidence that the experience gained by the parties in applying MOA #3 was the most significant driver of the changes.

In 2012, a number of government offices were relocated throughout the province and many of the Union's members in those offices did not want to move with their jobs. While MOA #3 did not cover relocations, the parties agreed to apply it in an effort to minimize the impact of relocation on the affected employees. As indicated in paragraph 6 the Agreed Statement of Facts, there were 14 separate calls inviting employees to express interest in offering to relocate or resign with severance, thereby avoiding the need for other employees from having to relocate. Also of note is the fact that, although MOA #3 provided that calls for voluntary resignations would be made before any layoff notices were issued, the parties agreed that it made sense to wait and see whether there were enough vacancies to accommodate the impacted employees before making the calls. While the record is not entirely clear on the point, it appears that the calls were made prior to any impacted employees having to decide whether to exercise their bumping rights.

From the Union's standpoint, the process worked effectively and without any problems. However, from the Employer's perspective, the process was administratively cumbersome, caused confusion and concern among the employees who received the offers and, in the end, only resulted in approximately 10 vacancies which were filled by employees who would otherwise have been

redundant and laid off or displaced by another employee. The great majority of the impacted employees were placed in vacancies and there were very few displacements.

During bargaining for the 2012-15 Master Agreement, the parties readily agreed to include Article 1.2 in MOA #2 to cover relocation situations. The same also seems to be true with respect to limiting calls to the same geographic area in Article 1.3. However, negotiating the language of Article 1.1 proved to be more difficult and the parties exchanged several proposals at the table before reaching agreement.

It is clear from the evidence both parties recognized that calls for voluntary resignation should not be made until after layoff notices were given rather than before. This is not surprising given they had applied MOA #3 that way even though, as already indicated, it expressly contemplated that calls would be made before layoff notices were issued. In effect, the parties were changing the language of MOA #2 to reflect the manner in which they had applied MOA #3. They did this by removing the reference to Article 37.13 ("Prior to Issuing Layoff Notice") with Article 37.16 ("Placement/Displacement Procedures"). However, beyond making this change, the parties did not engage in any discussion at the

bargaining table about precisely when during the multi-step process set out in Article 37.16 that calls for voluntary resignation should be made. The parties simply did not address that issue.

Likewise, the record shows that there was no discussion during bargaining about the phrase "to affect placement" found in Article 1.1. Mr. Tompkins testified that he was the author of the phrase and said that he mistakenly used the word "affect" rather than "effect". At the hearing, the Union requested rectification to correct the mistake. The Employer opposed rectification; however, it acknowledged in argument that the word "affect" was probably misused. In any event, it is clear that the parties never turned their minds to this issue during negotiations.

Union Position

The Union says that the fundamental proposition on which the Employer relies – namely, that it has no obligation to issue a call for voluntary resignations if there is a single vacancy in the same classification anywhere in the province – is based upon a misinterpretation of MOA #2. Such an interpretation would, in the Union's view, compel employees receiving notices of layoff to exercise their displacement rights prior to any calls being made. The Union

submits that one of the most important purposes of MOA #2 (and MOA #3 before it) was to avoid displacements. Indeed, in the Union's view, requiring an impacted employee to displace another employee deprives the impacted employee of the intended benefit of the call.

The Union acknowledges that the Employer has some discretion in concluding whether there are sufficient vacancies to effect placement. However, it says that the Employer's conclusion must be reasonable. The Union submits that it is not reasonable for the Employer to deem that a vacancy anywhere in the province is sufficient for placement purposes under MOA #2. In this connection, the Union emphasizes that the concept of employee choice is fundamental to the process under Article 37, as reflected in the fact that employees can only be required to accept placement in a vacant position in the employee's "same position classification title, or position classification title series, within the employee's same geographic location and the same Department, Board, Commission or Agency". This is the first step as described in Article 37.16(a)(1). Impacted employees are entitled to decline placement in any other vacancies and move on to the next step in the process under Article 37.16.

The Union points out that the second step under Article 37.16(a)(2) involves placement in a vacancy in another department, board, commission or agency, but still in the same classification and geographic location. The third step under Article 37.16(a)(3) involves placement in any vacancy for which the employee is qualified within his or her same geographic location and department, board, commission or agency. Step four under Article 37.16(a)(4) involves placement in any position for which the impacted employee is qualified in any other department, board, commission or agency, but within his or her same geographic location.

As can be seen, all four steps under Article 37.16(a) are limited to the impacted employee's geographic location as defined in Article 37.22 (a radius of 16 kilometers from the employee's place of work in the Halifax-Dartmouth Metro area and a radius of 32 kilometers elsewhere in the province). The Union contends that when the four steps under Article 37.16(a) have been exhausted, the Employer must make the call for voluntary resignations under MOA #2. This is so, according to the Union, because the impacted employee cannot move forward to the next phase of the Article 37.16 process without first exercising their right to displace another employee pursuant to Article 37.16(c). The Union underscores the fact that employees never get to the regional or provincial phases in Article 37.16 unless

they have tried unsuccessfully to exercise displacement rights in their own geographic area. Thus, in the Union's view, delaying the call for voluntary resignations until after displacement rights are exercised would largely defeat the purpose of MOA #2.

The Union maintains that MOA #2 and Article 37.16 should be interpreted together in a consistent manner. It points out that Article 37.08 requires the Employer to consult with the Union with a view to minimizing the adverse effects of layoffs. It says that the goal of minimizing such adverse effects must be kept in mind when interpreting MOA #2. The Union also notes that MOA #2 contains a notwithstanding clause which makes it clear that calls for voluntary resignation supplement Article 37 and that MOA #2 trumps Article 37 where they are not consistent with one another. The Union cites the following authorities on the interpretation of collective agreements: ***Nova Scotia Government and General Employees Union and Her Majesty the Queen in Right of the Province of Nova Scotia (Department of Justice/Corrections)*** (February 27, 2008), unreported (Ashley); ***Nova Scotia Government and General Employees Union and Colchester East Hants Health Authority*** (June 30, 2015), unreported (Lafferty); and ***Nova Scotia Government and General Employees Union and Nova Scotia Community College*** (October 25, 2012), unreported (Ashley).

Turning to Article 1.1 of MOA #2, the Union says it is very clear that vacancies are to be assessed in the context of placement only, not placement and displacement. Hence, in the Union's view, calls for voluntary resignation must precede the exercise of any displacement rights.

The Union argues that the use of the word "affect" in Article 1.1 creates a patent ambiguity. It says that "affect" was used by mistake and the correct word is "effect". To use the normal meaning of the word "affect" in this context would, so the Union submits, produce a nonsensical result. It maintains that the intended meaning of "to affect placement" is "to bring about placement". This being the case, the Union requests that Article 1.1 be rectified by deleting the word "affect" and replacing it with "effect".

With respect to the use of incorrect words in documents and the doctrine of rectification, the Union refers to the following authorities: ***Graham v. 10 Tecumseh Ave. West Inc.***, 2015 ONSC 2704; ***The Toronto Police Services Board and The Toronto Police Association*** (April 9, 2008), unreported (Kaplan); and ***Zeller's Inc. and United Food and Commercial Workers International Union, Local 1518*** (March 11, 2001), unreported (Thompson).

With respect to extrinsic evidence, the Union submits that the use of same is permissible in this case because of the patent ambiguity created by the misuse of "affect" in Article 1.1. On this point, the Union cites ***United Brotherhood of Carpenters and Joiners of America, Labourers International Union of North America, International Association of Bridge, Structural and Ornamental Iron Workers, International Union of Operating Engineers, and International Brotherhood of Electrical Workers and Strait Crossing Joint Venture*** (July 6, 1997), unreported (Christie).

The Union highlights the fact that calls for voluntary resignation pursuant to Article 1.3 are limited to the same classification, the same department and the same geographic location. Calls to a broader range of employees can only be made after consultation with the Union and are not mandatory. The Union notes that the EDIP which was in effect for a number of years operated on the basis that employees who would otherwise be laid off were first offered the opportunity to voluntarily resign and receive an enhanced severance package. If the employee did not accept the package, then it was next offered to other permanent bargaining unit employees in the same classification, same department and same geographic location. The Union says that MOA #3 worked much the same way and that MOA #2 should do so as well.

The Union urges that little weight should be given to the Employer's complaints about the difficulties it experienced in administering calls under MOA #3. It characterizes the problems described by the Employer as minor impediments which, in any event, should not have any bearing on the Employer's assessment of whether or not there are sufficient vacancies to effect placement of the impacted employees. It also underscores the fact that the calls in 2012 resulted in 10 employees being placed who would otherwise have been laid off.

The Union contends that the Employer's position is contradictory. It says that, on the one hand, the Employer recognized through its own witnesses that everyone wants to avoid displacements. On the other hand, it has taken an approach which forces displacements before calls are made for voluntary resignations. The Union asserts that the Employer's practice of not making calls if there is a single vacancy anywhere in the province has effectively ended calls under MOA #2. It points out that there has only been one such call and that was in the summer of 2014. There have been numerous redundancies since then but the Employer has refused to make any calls. The Union submits that there is nothing in the bargaining history or language of MOA #2 which shows that such a "sea change" was ever intended by the parties.

For all of the above reasons, the Union requests that the grievance be allowed and a declaration granted to the effect that calls for voluntary resignations must be made following the fourth step in Article 37.16(a).

Employer Position

The Employer says that the fundamental object in construing a collective agreement is to ascertain and give effect to the intention of the parties based on the language of the agreement, not to rewrite the agreement or to infer intention. In this regard, it cites ***Canadian Blood Services and Nova Scotia Union of Public Employees, Local 12***, 2000 CarswellNS 563 (Outhouse); and ***Halifax (Regional Municipality) and Nova Scotia Union of Public Employees, Local 13***, 2001 CarswellNS 670 (Outhouse).

The Employer argues that there is no need in the present case to resort to extrinsic evidence. It says there is no ambiguity in Articles 1.1 or 1.3 of MOA #2. More specifically, it denies that the use of the word "affect" in Article 1.1 creates an ambiguity. Instead, as previously mentioned, it opines that "affect" was probably misused and that, in any event, the issue does not need to be determined. With respect to restrictions on the use of extrinsic evidence, the Employer cites

WHL Management Ltd. Partnership v. U.F.C.W., Local 175, 2011 CarswellNat 6563 (Monteith).

Even if bargaining history is found to be admissible, the Employer says that it is of no assistance in resolving the dispute at hand. In this connection, the Employer stresses the fact that there was no discussion during bargaining about the timing of calls.

The Employer submits that the language of Article 1.1 is very clear and that the call provisions which follow only apply if it concludes that it will not have sufficient vacancies to place impacted employees "in accordance with Article 37.16". The Employer says that the reference to Article 37.16 is critical because it embraces all of the steps in Article 37.16, not just the steps in 37.16(a) as the Union contends. The Employer argues that, if the parties had intended the call provisions to apply after the four placement steps in 37.16(a), then they could easily have accomplished that by referring to Article 37.16(a) in Article 1.1, rather than to Article 37.16 as a whole. This is especially so, in the Employer's view, having regard to the very detailed step-by-step procedure set out in Article 37.16 for dealing with layoffs. Reference on the latter point is made to ***Nova Scotia***

Government Employees Union and Department of Human Resources (December 11, 1995), unreported (Outhouse).

The Employer submits that taking a plain meaning approach to Article 1.1 does not lead to an absurd or unworkable result. It says that there is nothing in Article 1.1 which requires calls for voluntary resignations to be made prior to an impacted employee having to exercise his or her displacement rights. On the contrary, so it maintains, no call is necessary if there is a suitable vacancy anywhere in the province. The Employer says it is clear the process works very well without making any calls for voluntary resignations, as evidenced by the fact that 104 employees who received layoff notices in the winter and spring of 2015 were successfully placed in vacancies.

The Employer notes that voluntary resignations under MOA #2 can entail some additional costs. This is because Article 3.3 entitles employees who voluntarily resign to receive their Public Service Award in addition to the normal severance payment, provided that the maximum combined payment does not exceed 52 weeks. However, the Employer does not argue that this additional cost is the reason it avoided making calls in 2015. Rather, it says that it is a factor which needs to be kept in mind.

The Employer also argues that administrative feasibility is another factor which must be considered. It says that the Union's interpretation of MOA #2 makes it too complex and that it would be completely unworkable. It suggests that the Union is seeking a "free-for-all on this issue" which would leave everyone – employees and administrators – without a clear understanding of the process. By way of authority on this point, the Employer refers to ***The Hamilton Entertainment and Convention Facilities Inc. and The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. 129*** (January 11, 1996), unreported (Bendel).

For all of the above reasons, the Employer submits that the grievance should be dismissed.

Reasons and Conclusion

For the reasons set out more fully below, I have decided to allow the grievance. I am satisfied that the purpose of MOA #2, like Article 37, is to minimize the adverse effects on employees who receive layoff notices. During each phase of the process in Article 37, placement opportunities precede displacements. This is completely in keeping with the purpose of minimizing the

adverse effect of layoffs. Displacements, on the other hand, most often serve only to transfer the adverse impacts to less senior employees. MOA #2 supplements Article 37 and should be interpreted in a manner consistent with the latter's purpose unless, of course, the parties have agreed otherwise. I find nothing in MOA #2 which indicates that the parties intended to limit its application to only those circumstances where the Employer concludes that there is no suitable vacancy for the laid off employee(s) anywhere in the province.

Article 37 contains two express references to its purpose. They are found in Articles 37.03 and 37.08 which read as follows:

> "**37.03 Introduction**
>
> The Employer agrees that it will endeavour to introduce technological change in a manner which, as much as is practicable, will minimize the disruptive effects on employees and services to the public.
>
> **37.08 Union Consultation**
>
> Where employees are to be laid off, the Employer will advise and consult with the Union as soon as reasonably possible after the change appears probable, with a view to minimizing the adverse effects of the decision to layoff [sic] an employee(s)."
>
> [emphasis added]

Article 37.16 clearly adopts placements as the principal mechanism for minimizing the disruptive or adverse effects of layoffs, whether due to technological change or otherwise. As described in paragraph 5 of the Agreed Statement of Facts, the placement/displacement process established under Article 37.16 involves three separate phases based on expanding geography – the employee's geographic location, then the region and then province-wide. Each geographic phase contains four sequential placement steps which are set out in Article 37.16(a) as follows:

> "(1) a position in the employee's same position classification title, or position classification title series, within the employee's same geographic location and the same Department, Board, Commission or Agency;
>
> (2) if a vacancy is not available under (1) above, then a position in the employee's same position classification title, or position classification title series, within the employee's same geographic location, in any other Department, Board, Commission or Agency;
>
> (3) if a vacancy is not available under (2) above, then any position for which the employee is qualified within the employee's same geographic location and same Department, Board, Commission or Agency;
>
> (4) if a vacancy is not available under (3) above, or the employee has declined a vacancy in accordance with provisions of 37.16(b), then any position for which the employee is qualified within the employee's same geographic location in any other Department, Board, Commission or Agency."

If an impacted employee is not successfully placed at either of these four steps, then he or she has the right under Article 37.16 to displace the least senior employee in the same position classification title, or position classification title series, in any department, board, commission or agency within the same geographic location. If the employee is unable to do so, whether due to lack of seniority or some other reason, then he or she is entitled to exercise placement rights on a region-wide basis pursuant to Article 37.16(d).

The placement process in the region follows the same four steps as set out in Article 37.16(a). Again, if the employee is not successfully placed in a vacancy in phase 2, then he or she is entitled to exercise displacement rights on a region-wide basis pursuant to Article 37.16(e).

If the employee is unable to exercise such displacement rights, then he or she is entitled to exercise placement rights on a province-wide basis pursuant to Article 37.16(f). Again, placement follows the same four steps as phases 1 and 2. Finally, if the employee is not successfully placed in phase 3, then he or she has the right to displace any employee with less seniority who is in the same position classification title, in any department, board, commission or agency anywhere in the province.

MOA #2, as its title implies, is closely linked to Article 37. As argued by the Union, it supplements Article 37.16 by providing an additional means of minimizing adverse effects on employees who receive layoff notices. It does so by requiring the Employer, in circumstances where it concludes it will likely not have sufficient vacancies to "affect placement", to offer voluntary severance packages to employees from the same classification, same department and same geographic location as the impacted employees. Such offers, if accepted, would open up vacancies for impacted employees.

None of the foregoing is in dispute. The issue at hand is at what point in the placement/displacement process calls for voluntary resignations are to be made. The Union's position is that they must be made if an impacted employee has not been successfully placed in his or her own geographic location (phase 1). The Employer, on the other hand, takes the position that calls for voluntary resignations do not have to be made at all if there is a suitable vacancy available anywhere in the province in which the impacted employee could be placed.

The issue turns on Articles 1.1, 1.2 and 1.3 of MOA #2 which, for convenience, are reproduced again below:

"1.1 Application

Where an employee has opted to exercise placement and displacement rights under Article 37 of the Collective Agreement and, after consulting with the Union, the Employer concludes that it is unlikely the Employer will have sufficient vacancies to affect placement in accordance with Article 37.16, the following provisions shall apply.

1.2 Voluntary Relocation

(a) Where positions have been relocated, the Employer shall ask for volunteers from the same classification, same department, and same geographic location as the employee whose position has relocated, who wish to relocate and be offered relocation expenses in accordance with the Collective Agreement. The call for voluntary relocation may include further calls for voluntary relocation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary relocation under this provision.

(b) Where the process outlined in 1.2 (a) does not result in the creation of sufficient vacancies for employees whose positions have been relocated, Article 1.3 shall apply.

1.3 Voluntary Resignation

The Employer shall ask for volunteers, from the same classification, same department and same geographic location as employees seeking placement pursuant to a layoff notice, which shall include the employees in receipt of layoff notice, who wish to resign and be offered a severance payment in accordance with this Memorandum. The call for voluntary resignation and severance may include further calls for voluntary resignation from a broader range of employees where an insufficient number of employees have volunteered. The Employer shall consult with the Union on the scope of such further calls for voluntary resignation under this provision."

I propose to deal first with the meaning of the word "affect" in Article 1.1. I am satisfied that this is a case where the wrong word was put in the document inadvertently and it does not reflect the true intention of the parties. The words "affect" and "effect" are often confused even though they have two distinct meanings. I note that *The Oxford Paperback Dictionary* contains a cautionary comment on this point immediately following the definition of "affect". In the context of Article 1.1, the ordinary meaning of "affect" clearly does not make sense. Literally construed, to affect placement would mean to influence placement. It is hard to conceive what influencing placement could mean or how it could be applied. Surely, what the parties had in mind was to effect placement – i.e., to place impacted employees in vacant positions.

In ***Graham*, *supra***, it was apparent that an important word was missing in a governing document. In dealing with that issue, the court reasoned as follows:

> "[26] The appropriate approach to interpretation in circumstances where a party has used the wrong words (or in this case, omitted a word) is suggested by Hoffman LJ in *Mannai Investment Co. Ltd. v. Eagle Star Assurance*, [1997] 3 All E.R. 352 (HL), a case dealing with interpretation of a lease, and one that has been relied on by the Ontario courts (e.g. *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.*, (1998) 41 O.R. (3d) 321):

> It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying....
>
> [27] An interpreter, then, must look at the context of this correspondence and reject interpretations which are improbable."

I concur with the above approach and conclude that to "influence" placement would, in the context of MOA #2 and Article 37, be a highly improbable interpretation to say the least. Consequently, for the purpose of interpreting Article 1.1, I read "affect" as having the same meaning as "effect", the latter being the word which I am satisfied the parties intended to use. In the alternative, if it is found that it is beyond my authority to reach this result as a matter of interpretation, then I am satisfied rectification is warranted and would be prepared to grant same.

This does not, of course, answer the pivotal question of whether calls for voluntary resignation have to be made under MOA #2 in circumstances where, as here, the Employer concludes that there are sufficient vacancies on a province-

wide basis to effect placement of impacted employees. That is what the Employer did which led to the present grievance. When it addressed its mind to the issue of whether or not it was likely there were sufficient vacancies to effect placement of the impacted employees, it took into account all vacancies throughout the province, not just those in the geographic location where the impacted employees worked. On that basis, it concluded it was likely there would be sufficient vacancies to effect placement. Logically, this drove it to the position which it took at the hearing – namely, that Article 1.1 of MOA #2 does not require that any calls for voluntary resignation be made if there is a suitable position anywhere in the province in which the impacted employee could be placed.

I disagree with the Employer's position. In my opinion, it would render Article 1.3 of MOA #2 almost totally ineffective as a tool for minimizing adverse effects on employees who receive layoff notices. There would be very few instances where there would not be a suitable vacancy available somewhere in the province.

It is important to bear in mind the sequential phases and steps under Article 37.16. In that process, an employee must first exercise placement rights in his or her own geographic region. Before the employee can exercise placement

rights on a region-wide basis, he or she must first try to displace a more junior employee in the same geographic location. Only if the employee is unsuccessful in exercising displacement rights is he or she entitled to move to phase 2 and exercise placement rights on a region-wide basis. If placement within the region is unsuccessful then, before the employee would be entitled to exercise placement rights on a province-wide basis, he or she must seek to displace a more junior employee in the region. If the employee is unsuccessful in doing so, then he or she may finally exercise placement rights on a province-wide basis.

As is apparent from the foregoing, if the only suitable placement for an employee who has received a notice of layoff is at the provincial level, then before the employee is entitled to exercise placement rights with respect to that vacancy, he or she must first unsuccessfully exercise displacement rights in phase 1 and phase 2. If the employee successfully bumps another employee in either phase 1 or phase 2, then the employee could never benefit from the call provision in Article 1.3. At the very best, the employee might benefit from a call at the very end of the placement/displacement process if the Employer concluded, at that stage, that there was no suitable vacancy anywhere in the province where the employee could be placed. Such a result would, in my view, represent almost a complete emasculation of MOA #2.

It is instructive in this regard to consider what would happen, based on the Employer's interpretation, where an employee's position is relocated. Article 1.2 provides that where positions have been relocated, the Employer "shall ask for volunteers from the same classification, same department, and same geographic location as the employee whose position has relocated, who wish to relocate…" and thus create a vacancy in which the impacted employee can be placed.

According to the Employer's interpretation of Article 1.1, however, no calls for voluntary relocation would be necessary if there was a suitable vacancy anywhere in the province in which to place the employee whose position had been relocated. This is because Article 1.1 applies in precisely the same manner to Article 1.2 as it does to Article 1.3. In other words, unless the Employer concludes that it is unlikely it will have sufficient vacancies on a province-wide basis to effect placement of employees whose positions have been relocated, then Article 1.2 cannot be invoked. Its application is subject to the same pre-condition as Article 1.1.

Of course, the very purpose of making calls for voluntary relocation to employees in the same classification, same department and same geographic location as the employees whose positions have been relocated, is to avoid the

adverse effects of forcing employees to choose between their jobs and an unwelcome move. If the Employer's interpretation of 1.1 is correct, it means that there would never be any calls for voluntary relocation because there would always be a vacancy somewhere in the province which would be suitable for the employees whose positions have been relocated – namely, the jobs which they held prior to relocation and which they have the right to retain if they are prepared to move. In short, if the test under Article 1.1 is the likely sufficiency of vacancies on a province-wide basis to effect placement in accordance with Article 37.16 as a whole, then Article 1.2 could never apply. This would be an absurd result and one which I am sure was never the intention of the parties.

In my opinion, the nature of the calls under both Articles 1.2 and 1.3 shed considerable light on the appropriate timing of same. The calls are limited to the same classification, same department and same geographic location as the impacted employee or employees. These limitations are in complete alignment with step 1 of the placement/displacement process set out in Article 37.16(a)(1). Further, impacted employees are required to accept this placement, presumably because it is seen as not having any significant adverse effects on them. It only makes sense, therefore, that calls for voluntary relocation or resignation would be

made at that juncture, and certainly before employees are called upon to exercise their displacement rights at the conclusion of the phase 1 placement process.

The Employer led considerable evidence at the hearing concerning the administrative difficulty of making calls for voluntary resignation early on in the placement/displacement procedure, as well as the anxiety caused to some employees who received the calls. However, that evidence was based on calls made under MOA #3 on a province-wide basis, albeit within the same classification and department as the impacted employees. Under MOA #2, however, calls are limited to the same geographic location which should go a long way to alleviating any administrative difficulties previously encountered under MOA #3. With respect to the reaction of employees receiving the calls, this is something which I am satisfied can be managed by appropriate communication with those employees and their managers. In this regard, I note that there is nothing in the record which suggests that any difficulties were encountered in connection with the one call for voluntary resignation which was made under MOA #2 in 2014.

I appreciate that Article 1.3 contemplates that further calls for voluntary resignation may be made to a broader range of employees where an insufficient number of employees volunteer in response to the first call. Such calls

would obviously be made at a later point in time and involve a greater degree of discretion on the part of the Employer, as implied by the use of the word “may” as opposed to “shall” which applies only to the initial call. Also, before broader calls are made, the parties are required to consult with respect to the scope of same.

In the result, I find that the Employer’s refusal to issue calls for voluntary resignations pursuant to Article 1.3 of MOA #2 based on the availability of province-wide vacancies for placement purposes violated Articles 1.1 and 1.3 of MOA #2. I further find that such calls should be made based on the likely availability of vacancies available for placement in phase 1 of the placement/displacement process and that the calls themselves, if required, should be made before impacted employees are required to decide whether to exercise their displacement rights at the conclusion of phase 1. A declaration will issue accordingly and I will retain jurisdiction to deal with any difficulties which may arise in the implementation of this award.

DATED at Halifax, Nova Scotia, this 11th day of February, 2016.

BRUCE OUTHOUSE, Q.C.
Arbitrator