

May 11, 2011

By E-Mail Only

Honourable Stephanie Cadieux

Ministry of Labour, Citizens' Services and Open Government

P.O. Box 9068 Stn. Prov. Government

Victoria, British Columbia

V8W 9E2

Re: Vancouver Island University and Vancouver Island University Faculty Association

Section 76 Special Mediator Appointment

Dear Minister,

Pursuant to the Section 76 *Labour Relations Code* appointment, I have attached my non – binding recommendations with respect to the outstanding matters.

A copy of the submission has been e-mailed to the parties. Based on the appointment letter dated April 11, 2011, the parties have ten days from the date of this submission to either accept or reject the recommendations.

If there are questions regarding the submission, please contact me.

Yours truly,

Mark J. Brown

cc. Ralph Nilson, President and Vice – Chancellor, Vancouver Island University

Dan McDonald, President, Vancouver Island University Faculty Association

Trevor Hughes, Assistant Deputy Minister, Industrial Relations Division

IN THE MATTER OF A COLLECTIVE BARGAINING DISPUTE

BETWEEN

VANCOUVER ISLAND UNIVERSITY

("VIU")

AND

VANCOUVER ISLAND UNIVERSITY FACULTY ASSOCIATION

(the "Association")

Re: *Labour Relations Code* Section 76 Recommendations

SUBMITTED TO: Honourable Minister Stephanie Cadieux
Ministry of Labour, Citizens' Services and Open Government

SUBMITTED BY: Mark J. Brown
Mediator / Arbitrator

DATE OF SUBMISSION: May 11, 2011

I. BACKGROUND

VIU received University status in 2008. Moving from the status of a College to a University College and then to University status has created a cultural shift and challenges. However, both committees are committed to maintaining the credibility of the institution in the community and in particular with its students.

VIU receives approximately 49% of its funding from the Provincial Government, 30% from tuition, and the balance from research grants, cafeteria revenue, donations and other revenue sources.

The parties commenced negotiations for a renewal Collective Agreement in November of 2010. Between November of 2010 and the end of February 2011, the parties met approximately ten times but were unable to reach a Collective Agreement.

A Labour Relations Board mediator was then appointed. Despite resolving most issues with the assistance of the Board's most experienced mediator in a further ten days of meetings, the parties were unable to conclude negotiations.

One of the original proposals from the Association was a no lay off clause. Over the course of negotiations the Association changed its position to include "financial exigency" language in order to protect its members against what it might consider to be unjustified layoffs.

The Association describes financial exigency as the designation of the institution being in a state of financial emergency; in effect it means there is a crisis that threatens its continued existence. The Association refers to other university collective agreements that contain financial exigency language. The Association asserts that it is necessary to restrict faculty lay off to financial exigency or program redundancy situations in order to ensure that the academic freedom of the faculty and the academic objectives of VIU are maintained.

The importance of these proposals to the Association was heightened due to VIU stating that it needed to reduce its budget by 10% over three years; and, there was potential layoffs in the sociology department.

A labour dispute commenced in early March of 2011. Students were unable to attend classes and the status of the school year was in jeopardy. On April 10, 2011, the parties reached a Memorandum of Agreement which stated in part:

1. The Association agrees that it will terminate its strike activities and recall its members to work effective April 11, 2011.
2. All items contained in the University's offer for settlement dated April 6, 2011 tendered at about 8:30 pm as attached with the exception of the 2 outstanding issues as outlined in point 2 of the letter to the Minister of Labour dated April 10, 2011 shall amend the collective agreement expiring March 31, 2010 and be brought into full force and effect on April 11, 2011.
3. The parties agree that, in addition to the items in the University's offer as per point 2 above, the attached 6.6.1.1. will replace the existing language of the collective agreement and take effect on the same date as the other changes to Article 6.

4. The parties agree that they will not engage in or authorize any strikes or lockouts from April 11, 2011 to September 1, 2011.
5. If the parties reach agreement on the outstanding issues in the Special Mediation as described in the letter to the Minister of Labour dated April 10, 2011, those provisions, along with the University's offer for settlement dated April 6, 2011 will become the new collective agreement between the parties.
6. If the parties are unable to reach agreement on the outstanding issues in the above mentioned Special Mediation, the only issues on which the parties may negotiate to the point of strike or lockout are the two issues as outlined in the letter to the Minister of Labour dated April 10, 2011.
7. Notwithstanding point 5 above, the Collective Agreement may be opened for full and normal collective bargaining by either party at any time after November 30, 2011, in accordance with Section 46 of the Labour Relations Code of British Columbia.
8. Beginning April 11, 2011 and until May 11, 2011, the University cannot issue any notices of layoff of VIUFA members.
9. The parties agree that the protocol agreement signed by the parties on the 5th day of October 2010 shall be null and void after April 11, 2011, except in the case of the two outstanding issues that are subject of mediation as described in the letter to the Minister of Labour dated April 10, 2011.
10. This agreement shall be valid only after ratification by the members of the VIUFA, by the Board of Governors of the Vancouver Island University, and by the Board of Directors of the Post Secondary Employers' Association.
11. All parties will recommend the ratification of this agreement to their principals.

On April 11, 2011, the Minister appointed me under Section 76 of the *Labour Relations Code* to meet with the parties in an attempt to resolve the outstanding issues in dispute, which are all proposals tabled by the Association. The issues in dispute were specifically set out in the appointment notice as follows:

6.6.4.4. Except where a Program Redundancy has been declared, a faculty member cannot be laid off if the result of the lay off would be that a program would be discontinued or suspended.

6.6.5.8. In the event that a notice is given under article 6.6.5.4. the University shall not, until the end of the following fiscal year, fill any new excluded positions or reclassify any existing excluded employees unless agreed to by an independent committee of three people, made up of one person appointed by the Association, one person appointed by the University, and a third person either agreed to be the two appointees or, failing that, appointed by the Labour Relations Board under Section 104 of the Labour Relations Code.

6.6.5.9. If the University intends to fill an excluded position the University shall offer that position to any qualified faculty member where the hiring of that faculty member will either save a layoff or allow for the recall of a laid off faculty member.

6.6.5.10. If notice of layoff for budgetary reasons is given, the University shall:

a) provide to the Association any further information that the Association requests pertinent to the budgetary shortfall or its remedy, including but not limited to a report from the President outlining the economies taken to date;

b) allow the Association, prior to January 15, to make proposals to the University to avoid layoffs which shall be accepted providing that the proposals are viable. If any of the proposals are not implemented and layoffs are not entirely avoided, then the appropriate Vice-President shall provide to the Association a written report detailing a comprehensive rationale for the rejection of each proposal not fully implemented prior to any layoff notices being issued; and

c) If in spite of the provisions of (a) and (b) above, layoffs are nevertheless required, then the University will consult with the Senate as to where the layoffs will occur.

It is also important to set out the provisions that are relevant from the April 6, 2011 document that form part of the renewal Collective Agreement in order to put the outstanding issues into context:

ARTICLE 6.6 - LAYOFF

Effective June 30, 2011, the University and the Association agree to amend Articles 6.6.3, 6.6.4, 6.6.5, 6.6.6 to read as follows:

6.6.3 Definitions

The following definitions apply throughout Article 6.6:

6.6.3.1 "Lay off" refers to the loss of the employment specified in a faculty member's regular contract.

6.6.3.2 "Seniority" is defined in Article 6.2.1 of this agreement.

6.6.3.3 "Bumping" is defined as the displacement of a faculty member in another department, program or service area, by a member with more seniority within the Association bargaining unit.

6.6.3.4 "Program" means a program as defined by the Senate.

6.6.3.5 "Program Redundancy" arises when the Board accepts a recommendation from the Senate that a program be discontinued.

6.6.4 Seniority Principle and Seniority Groups

It is recognized that the principle of seniority shall govern the application of this Article.

6.6.4.1 It is recognized that the selection of faculty members to be laid off within one of the groups identified in Article 6.2.8 shall be in reverse order of seniority subject to the senior employee(s) having the qualifications to perform the remaining work available within the group following the effective date of lay off.

6.6.4.2 Notwithstanding the above, no faculty member employed by the University as at May 1, 1993 who has at least fifteen years of seniority will be laid off if there are junior faculty members remaining in the group to which the faculty member is assigned.

6.6.4.3 Faculty with more than 15 years of seniority, as of May 1, 1993, will not be laid off except in cases where a program redundancy has been declared, or in a non-instructional area where there is no longer a demonstrable need for the service.

6.6.4.4 Except where a Program Redundancy has been declared, a faculty member cannot be laid off if the result of that lay off would be that a program would be discontinued.

6.6.5 University Responsibilities

6.6.5.1 It is recognized that the University has a responsibility to explore all alternative ways of preventing the layoff of regular faculty members.

6.6.5.2 It is further recognized that the University must have bona fide reasons for the layoff of regular faculty members.

6.6.5.3 The University shall not prepare budgets in such a way that any faculty position or alternative position is financially unsupportable for the purpose of bypassing the steps outlined in Article 8.2.1.

6.6.5.4 On or before October 15th of each year, the University will meet with the Association to present preliminary budget assumptions for the following academic year. The University will give notice at this meeting if there are budgetary shortfalls projected for the following academic year.

6.6.5.5 If notice was given according to 6.6.5.4, then the University shall, on or before December 15th give notice to the Association if it is expected that the budgetary shortfall will precipitate faculty layoffs. The Association can, by January 15th, make a presentation to the Vice – President Academic & Provost outlining alternatives to the potential layoffs.

In the absence of such notice on or before December 15th, there shall be no layoffs except in the case of a Program Redundancy.

6.6.5.6 The University will provide to the Association:

- a) Annual Audited Financial Statements including all related Variance analysis reports;
- b) Quarterly Management Variance and Forecast reports;
- c) The Draft Annual Budget Plan prepared for Board approval;
- d) The consolidated budget submissions from Deans and Directors as presented to the Vice Presidents;
- e) The Annual CAUBO Information Return; and
- f) The University will provide additional detailed information related to the documents in (a)-(e) above, upon request by the Association.

6.6.5.7 The information listed in 6.6.5.6 will be provided to the Association as soon as available.

6.6.6 Layoff Process & Responsibility for Notice

6.6.6.1 When the layoff of faculty members appears to be necessary, the following process shall be followed during the academic year in which the layoff may occur:

6.6.6.1.1 Not later than at the time of formal notice being given to a faculty member the Administration shall provide a written outline of the reasons for the proposed lay off to the faculty member and to the Chief Personnel Steward of the Association.

6.6.6.1.2 A faculty member being terminated from his/her position shall be given formal written notice of the lay off at least four (4) months prior to the effective date of lay off being served.

6.6.6.1.3 All alternatives to the layoff of the faculty member involved shall be explored at this time by both the University and the Association. The Chief Personnel Steward of the Association shall be provided with all data and material relied upon by the University in arriving at this decision. The Association can, within twenty (20) working days of receiving formal written notice of the layoff, make a presentation to the University outlining alternatives to the layoff of the faculty member.

6.6.6.1.4 The implementation of any of the alternatives identified above must be agreed to by:

- a) The Faculty Member;
- b) The Chief Personnel Steward of the Association;
- c) An appropriate senior administrator.

The University shall not unreasonably deny any viable alternative.

6.6.6.2 When a recommendation is made by the Senate that may result in a declaration of program redundancy which may result in the layoff of member(s), the University shall notify the Association and the faculty member(s) involved, by a minimum of six (6) months prior to formal notice of layoff.

6.6.6.3 When written notice is given to the faculty member, the University shall provide the reasons for lay off and inform the faculty member(s) of his/her rights as outlined in these Articles.

I met with the parties on April 19 and May 2, 2011. After thorough discussion on the matters in dispute it was clear that the parties were so polarized in their positions that an agreement was not achievable.

Accordingly, I am submitting non – binding recommendations for the parties’ consideration pursuant to the terms of my appointment.

II. RECOMMENDATIONS

Before setting out my recommendations, I will make some general comments.

The parties’ relationship is strained. Even though there have been virtually no layoffs for many years, there is a lack of trust between the parties with respect to the budgeting process, VIU’s administrative approach to budget shortfalls, and the reaction from staff to decisions made by the Administration. There is a poor relationship that can only be remedied by both parties working hard to achieve trust and respect.

Collective agreement language cannot be written to automatically improve trust and respect. The parties will need to implement terms of the Collective Agreement and embark on positive and transparent discussions in order to improve the relationship.

Accepting the recommendations will be the catalyst to commence working towards a positive work environment. There will be challenges to restore credibility with the community and students. There will be economic challenges. However, both parties are committed to providing excellent education to the students. With the same objective in mind the parties will be able to achieve the desired results.

Rejecting the recommendations will create several problems in my view. It will damage the institution’s credibility in the community. When I say institution I include both parties. It will also damage credibility with the students. The parties must ask themselves, after almost losing this year’s credits, will students return to the institution if a possible work stoppage will occur in September? Will new first year students choose VIU if that possibility exists? Or will new students choose another post secondary institution which has an impact on VIU for not just the 2011/2012 school year but for four years as new students will commence their education somewhere else?

In my view, rejecting the recommendations on the limited number of outstanding issues will have serious consequences for VIU and the Association, especially when one considers that the Collective Agreement expires at the end of March of 2012.

When I review the provisions that have been agreed to date, I think it is safe to say that in a “net zero” collective bargaining environment faced by the public sector, the Association made significant gains in collective agreement language. While the Association may not have achieved everything that it set out to achieve, the parties have a window of opportunity before the expiry of the Collective Agreement to assess whether the amendments to the Collective Agreement, along with efforts to improve the relationship go

far enough or whether some of the issues need to be re-visited in the next round of collective bargaining.

My terms of reference are to issue non-binding recommendations on specific outstanding proposals. As I noted above, all proposals are from the Association. I will address each of the Association's proposals.

Article 6.6.4.4.

The Association proposes that the Article should include a reference to "suspension" as well as "Program Redundancy". Their concern is that any layoff should be as a result of the Senate recommending either program redundancy or suspension, and not that a layoff actually causes the program redundancy or suspension. The Association is concerned that any suspension should not necessarily be in the control of a department, but should involve the Senate.

On the second day of my meetings with the parties, the Association proposed an amendment to Article 6.6.6.2. to include "suspension" in the six month notice provision along with program redundancy.

Because the Senate is in the process of developing a policy on program suspension, I recommend that suspension be included in Article 6.6.4.4. as proposed by the Association. I also recommend a revision to definitions of Article 6 to include suspension. However, I conclude that the Association's proposal with respect to Article 6.6.6.2. is outside of my terms of reference.

Accordingly, I recommend the following:

6.6.3.5. (a) "Program Redundancy" arises when the Board accepts a recommendation from the Senate that a program be discontinued.

(b) "Suspension" arises when the Board accepts a recommendation from the Senate that a program be suspended.

6.6.4.4. Except where a Program Redundancy or suspension has been declared, a faculty member cannot be laid off if the result of that lay off would be that a program would be discontinued or suspended.

Article 6.6.5.8.

The Association proposes that if VIU gives notice of budgetary shortfalls, VIU cannot fill any new excluded position or reclassify any existing excluded employee until the end of the following fiscal year, unless agreed to by an independent panel.

I am not persuaded to recommend inclusion of this provision for three reasons. First, the Association is attempting to negotiate provisions that apply to persons outside of the scope of its certification and collective agreement. Second, it is unclear to me what provisions of the Collective Agreement an independent panel would apply in any event. Third, when VIU

is experiencing a budget shortfall, unnecessary expenditures on third party panels should be avoided if possible.

Having said that, I would be surprised if VIU would fill an unnecessary position, or unnecessarily reclassify someone, if VIU was faced with a financial shortfall. One would expect that the Board would question Administration in the event of such an occurrence.

Article 6.6.5.9.

The Association proposes that if VIU intends to fill an excluded position, it should offer that position to any qualified faculty member where the hiring of the faculty member saves a layoff or allows for the recall of a faculty member.

Again, I am not persuaded to recommend inclusion of this provision because the Association is attempting to negotiate provisions that apply to situations that fall outside of the scope of its jurisdiction.

Having said that, while VIU asserts that it should be able to hire the best possible candidate for excluded positions, it makes sense to consider qualified candidates from current employees along with outside candidates. The Association is not confident that VIU will consider faculty that may be laid off or on the recall list.

In order to confirm a commitment to consider qualified faculty in conjunction with all candidates, I recommend that the parties sign a Letter of Understanding outside the scope of the Collective Agreement which states as follows:

In the event that a vacancy for a non-union position arises during a period when there are faculty member(s) on layoff who retain a right of recall pursuant to Article 6.11; or, when there are faculty member(s) in receipt of lay off notice, such employees will be eligible to apply for the non-union position. Provided that a faculty member making such an application possesses the skills, knowledge, ability and qualifications for the vacant position as determined by VIU, the faculty member will be provided with an opportunity to interview for the position.

Article 6.6.5.10

The Association proposes that if notice of layoff is given for budgetary reasons that it will be given pertinent information along with a report from the President outlining economies to date. The proposal includes a provision obligating VIU to accept Association alternatives to avoid layoffs if the alternative proposals are “viable”. Essentially the proposal shifts the onus to VIU to prove that the alternatives are not viable.

I acknowledge that other universities have financial exigency language. In a review of some collective agreement provisions from other institutions, I note that the provisions are complex committee driven procedures that may not have a timely outcome. I also note that some of these provisions have been in place for many years and yet I am aware of only one instance in Ontario in the 1980’s where such language has been invoked.

The exchange of information and constructive dialogue with respect to alternatives is not the issue as the parties have agreed to some new provisions with that in mind. Establishing a complex process that may not be necessary or workable is problematic. From VIU's perspective, it argues that the accountability must be maintained with VIU as it is ultimately responsible.

I am not persuaded that the Association's proposal is necessary in order to accomplish the objectives that both parties have which is to maintain the academic excellence and freedom desired by both parties in conjunction with the financial realities that VIU faces.

The parties have agreed to new provisions in the Collective Agreement that should create more transparent and open dialogue. I will also recommend some provisions set out below to expand on that initiative. However, I am not persuaded to recommend a more cumbersome process at this juncture before the parties have even tested the new Collective Agreement provisions.

Before setting out my recommendation, I note that the Association did propose an amendment to their position wherein the Association would be given an opportunity to make a presentation to the Board and have the Board vote on its proposed alternatives to lay off. VIU rejected the proposal.

I have not included such an amendment in my recommendation for the following reasons. The governance structure of VIU results in the Board being concerned with policy. It does not normally involve itself in great detail with specific issues relating to operations. It delegates that function to the Administration to recommend action to the Board. Administration would normally make budget recommendations to the Board with corresponding data to inform the Board.

The Association's response to that assertion was to give an example of an institution where the Board turned down the recommendation of the administration to increase tuition fees. I view that example as a policy decision made by a Board prior to the administration establishing a detailed recommended budget.

The Association is free to request to make a presentation to the Board. One would think that such a request would not be refused by the Board, especially when the parties are attempting to establish an improved working relationship. If the presentations are not made in a constructive manner then future requests will probably be rejected. However, as the Association is also attempting to improve the relationship one would think that presentations would be beneficial to all concerned.

In my view it would be more productive for the Association to take a constructive approach to the new provisions in the Collective Agreement, in conjunction with my recommendations below, in order to be involved in dialogue with VIU earlier in the process as opposed to concentrating on presentations to the Board when the Association's influence may be less effective as the Administration may have already made certain decisions.

With respect to this issue I recommend the following:

6.6.5.5. If notice was given according to 6.6.5.4., then the University shall, on or before December 15th give notice to the Association if it is expected that the budgetary shortfall will precipitate faculty layoffs.

In the absence of such notice on or before December 15th, there shall be no layoffs except in the case of Program Redundancy.

6.6.5.8. If notice of layoff for budgetary reasons is given, the University shall:

(a) provide to the Association any further information that the Association requests that is pertinent to the budgetary shortfall or its remedy, and

(b) allow the Association prior to January 15th, the opportunity to make proposals to the University to avoid the layoffs. If any of the proposals are not implemented and layoffs are not avoided, the Association will be notified as to the reasons for the rejection of the alternatives to layoffs.

I do not intend to repeat the benefits, and potential concerns, of accepting or rejecting the recommendations set out above.

I urge the parties to recommend acceptance of the recommendations to their principals in order to restore credibility with the community and students and to start the process of rebuilding trust and respect in their working relationship.

Mark J. Brown

Dated this 11th day of May, 2011.