IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE UNION OF NORTHERN WORKERS

- and-

GOVERNMENT OF THE NORTHWEST TERRITORIES

Re: Policy Grievance – Use of Relief Employees (Appendix A1)

SUPPLEMENTARY AWARD

BEFORE:

John Moreau, Q.C. - Arbitrator

IN ATTENDANCE FOR THE UNION:

Rebecca Thompson	- Grievance & Adjudication Officer, PSAC
Anne Marie Thistle	- Director, Membership Services, UNW
Caitlan Lacey	- Observer
Todd Parsons	- Witness

IN ATTENDANCE FOR THE EMPLOYER:

Karen Lajoie	- Counsel, GNWT
Cheryl McKay	- Adjudication Advisor, Labour Relations, GNWT
Shaleen Woodward	- Witness

The Hearing was held in Yellowknife, NWT on May 24 & 25, 2017.

SUPPLEMENTARY AWARD

INTRODUCTION

In my award of August 21, 2017, I reserved jurisdiction with respect to any issues or remedial directions that may be required in the implementation of the Award.

On December 13, 2017, the Employer advised that it had attempted to engage the Union with respect to defining relief workers at the negotiating table but had been unsuccessful in that regard. The Employer requests that I exercise my jurisdiction and provide a written decision with respect to the Employer's estoppel submissions, based on the evidence presented and the submissions of counsel at the hearing of May 24, 25, 2017.

The following is my analysis and decision upholding the Employer's position on the estoppel submission.

ANALYSIS OF THE ESTOPPEL ISSUE:

The evidence is that the Union issued the grievance at the second level on September 9, 2016 claiming that the Employer was utilizing Relief employees in facilities which do not provide services on a daily basis. The Union first raised the issue on July 31, 2016 in an email from to the Employer to the Director of Membership Services for the Union (Ex 8). The Employer, as noted in its Step 2 Reply (Ex. 7), indicated that it had been providing Relief Worker Reports to the Union since December

2006 for Sheriff Officers and, by 2009, up to 6 categories of employees were being included in the Relief Worker Reports being sent to the Union.

Accordingly, for 7 years (between 2009 and 2016) the Employer supplied the monthly Relief Worker Reports and there was no issue raised by the Union with respect to the manner in which the Employer was assigning work to various categories of employees including: Sheriff Officers, Custodians, Parks Officers, Health Records Clerks, Clinic Nurses and Reprocessing Technicians. The absence of any objection by the Union to the Employer's practice with respect to the assignment of relief work through 3 collective agreements (2009, 2012 and 2016) is evidence on its face that the Union accepted the manner in which Article A1.01 in Appendix "A" was being interpreted by the Employer.

In addition, the stream of monthly Relief Worker Reports provided by the Employer since 2007 did not trigger any objection by the Union. The fact that the provision of Relief Worker Reports by the Employer was interrupted for the period between 2013 and 2016 does not undermine the Employer's position. There is no evidence before me in that regard that the Union expressed any concern to the Employer that it was not receiving any Relief Worker Reports during this period of time.

I note the comments of the authors Mitchnick and Etherington in *Labour Arbitration in Canada* (2nd edition) (Lancaster House) at p.406 *"...in cases where it is the union that is said to be estopped from bringing a grievance to enforce what it now asserts to be its contractual right, acquiescence in the contrary practice followed by the employer must be proven".* The Employer, in my view, has demonstrated that the Union

has in fact acquiesced in the Employers' practice of assigning relief workers to a number of positions. Those positions have been clearly set out in the Relief Worker Reports since December 2006, without objection from the Union.

The Employer has demonstrated that it has satisfied all the elements of an estoppel: representation, reliance and detriment or prejudice. [1]

In that regard, the Employer has been following its practice of assigning relief workers to the various positions without objection from the Union since the introduction of the Relief Employees provision in the 2005-2009 collective agreement. The absence of any objection from the Union to this ongoing practice over some 7 years constitutes a representation to the Employer by the Union that article A1.01 Appendix "A" was to be administered in the manner practised by the Employer. The Employer continued to act and rely on that representation through 3 collective agreements until the Union filed the grievance in September 2015. In terms of detriment or prejudice, it would be detrimental to the Employer operationally, particularly at the various affected sites in the Stanton hospital, if it was required without the opportunity of further negotiations to alter the

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[1] See: *Penticton (City) and CUPE, Local 608* (1978) 18 LAC (2d) 307 (Weiler) cited in *Mitchnick/Etherington* Labour Arbitration in Canada (2nd ed) at p. 406:

(1) it made a representation, either by words or conduct, including, in some circumstances, silence:

(2) the representation was intended to be acted on by the other party; that is, to affect the parties legal relations, and

(3) the other party did in fact rely on the representation, to its detriment or prejudice.

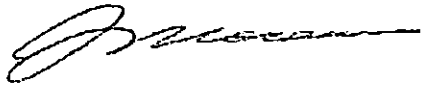
manner it has been assigning relief workers since the introduction of Article A1.01 Appendix "A".

CONCLUSION

The Union is estopped from enforcing the provisions of Article A1.01 Appendix "A" under the current collective agreement given its longstanding acquiescence to the Employer's manner and practice of assigning relief workers.

It is understood by agreement of the parties (paragraph 15 of Agreed Statement of Facts) that the Sheriff's Officers are not properly classified for relief work as the courts do not operate on a daily basis.

I would urge the parties once again to return to the bargaining table to try and resolve their impasse on this issue.



JOHN M. MOREAU

January 17, 2018

Arbitration Award Summary

08-P—00628 – Policy Grievance - Step Increments
08-G—00630 – Group Grievance (PWS) – Step Increments
06-104 – Article 24

Case Outline:

This grievance falls under the Collective Agreement expiring March 31, 2009.

There was a dispute over the interpretation of Article 24.01 (2) of the collective agreement. The employer believed that employees with six or more years of experience could be placed no higher than the 3rd step of the pay grid unless approval was given by the Deputy Head. The Union argued that a new employee with six years of experience should be placed on the 4th step.

This language was new to the current agreement however existed in the previous agreement under Appendix 10.

Employer's Argument:

The Employer raised an estoppel argument based on evidence of past practice as well as the negotiating history of the article.

In the previous round of bargaining, the employer proposed the new language for article 24. The goal was to have provision (A.10.E) apply across the public service. The Employer's past practice of applying the provision was that Step 1 was the pay level for 0 – 4 years experience, Step 2 for 4 – 6 years and Step 3 for 6 years and greater. Newly appointed employees were not hired at a higher step unless approved by the Deputy Head. There was little discussion at the bargaining table and the proposed language was accepted without any objections.

The Employer acknowledged that there was a requirement of 2 years directly related experience for health care workers hired under Appendix 10. Step 1 was applied to the new employees with the minimum 2 years, Step 2 for 2 to 4 years of experience and Step 3 was paid to employees with 6 years of experience and higher.

The same practice was applied to the new article in the collective agreement. In July 2006, a revision to Article 15 of the Human Resource Manual outlined the employer's interpretation being that the "three (3) steps" indicated that Step 3 was the highest a new hire could start at.

The Employer further argued that the wording of the article is ambiguous ("maximum of three (3) steps") and that the provision is unclear as to the starting step; ie. Step 1 or Step 0 (casuals).

The Employer took the position that the pay grid clearly shows the "casuals" category or Step 0 as the starting pay level.

Past practice was asserted in the application of the Appendix and in the understanding the Employer had for the application under Article 24.01 (2).

Union's Argument:

The Union objected to the estoppel argument on the basis of the clear language of article 24.02 (2). The objection was dismissed. The Union later argued that compelling evidence would need to be provided to show that the Union knew or ought to have known how the Employer applied the collective agreement.

There was no indication at the bargaining table regarding the method used to calculate the pay level steps applicable to new employees or of Step 3 being a maximum step. The Union understood the language as Step 1 being the initial step, 2 years of experience would place the new hire at Step 2, 4 years at Step 3 and 6 years of experience and greater would place the new hire at Step 4.

The Union argued that Article 24.01 (2) was applicable to employees that are "appointed". Casual employees are not appointed under the definition in the collective agreement in Article 2.01 (m).

In regards to the Human Resource Manual, the Union provided a letter that had been sent to the employer December 11, 1996 which outlined the Union's maintained position of raising policy issues as they became aware of them. This position was reinforced in a Joint Consultation meeting held on March 6, 2007 where the Union asserted that it did not have the capacity to review all amendments and that it reserved the right to file a grievance within 30 days of becoming aware of the issue.

The Union maintained that the language in the collective agreement was not ambiguous. Also, that that the Employer had misinterpreted the collective agreement by including casuals as appointed employees. Since casuals are not appointed, pay level "0" should be excluded from pay step calculations.

Arbitrator's Decision:

The arbitrator agreed with the Union interpretation of the language in Article 24.01 (2).

Article 24.01 (2) states "newly appointed employees will be credited with one step of the applicable pay range for the position" and the reference to "appointed" excludes casuals, therefore the language must be read to include Steps 1 through 6 and not Step 0.

An employee is entitled to a credit of one step for each two years of directly related experience beginning at Step 1. Therefore, an employee with two years of experience would be placed at Step 2, an employee with four year experience would be placed at Step 3 and an employee with six years of experience would be placed at Step 4.

The arbitrator also decided that the Employer was entitled to believe that Article 24.01 (2) would be applied in a similar fashion in the collective agreement to Appendix 10.E. The Union did not challenge the application of the Appendix and therefore the Employer proceeded on the understanding that they would keep with past practice.

The Union is estopped from claiming the application of Article 24.01 (2) according to its plain and ordinary meaning. The estoppel will continue to operate until the parties return to the bargaining table at which point the estoppel will end.

NOTE: The essence of this award is that, even though the grievances were dismissed, the union is correct in its interpretation of the agreement. The estoppel means that there will be no retroactivity awarded to any employees who may have been affected by the employer's incorrect interpretation. On a go forward basis, if the language does not change during bargaining, the Union's interpretation will stand and from that point forward future employees of the GNWT will be credited with the correct pay step as per the Union's position.