IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer" or "GNWT")

-and-

The UNION OF NORTHERN WORKERS, a Component of the
PUBLIC SERVICE ALLIANCE OF CANADA

(the "Union" or the "UNW")

RE: GRIEVANCE #17-P-GNWT-NTHSSA-02096 (Employer Policy/Directives)

AWARD

Heard: August 13, 2020

Issued: July 28, 2021

Arbitrator: J. Alexander-Smith (the "Board")

Appearances:

For the Union:

Michael Penner, Counsel
Anne Marie Thistle, Director Membership Services UNW

For the Employer:

Trisha Paradis, Counsel
Georgina Rolt, Adjudication Advisor
Camilla Offredi, Adjudication Adviser

INTRODUCTION

[1] This matter involves a policy grievance concerning the Employer's introduction of a workplace rule effective February 1, 2017, applicable to those employees of the Northwest Territories Health and Social Services Authority (NTHSSA) – Yellowknife Region seeking to utilize the Casual Leave provisions under Article 21.08 of the Collective Agreement expiring March 31, 2016 (the "Collective Agreement") [Exhibit 1].

[2] Prior to the hearing, the Union and the Employer provided the Board with an Agreed Statement of Facts along with supporting documentation which together constitute the entirety of the evidence before the Board in determining the merits of the grievance. The parties also provided the Board with their respective authorities, later augmented by oral argument at the virtual hearing on August 13, 2020.

[3] The parties accepted the composition and jurisdiction of the Board to hear and determine the merits of grievance #17-P-GNWT-NTHSSA-02096 – (Employer Policy/Directives) (the "Grievance").

FACTUAL BACKGROUND

[4] **AGREED STATEMENT OF FACTS ("ASOF"):**

1. On January 5, 2017, the Northwest Territories Health and Social Services Authority – Yellowknife Region ("NTHSSA-Yellowknife Region") held a general staff meeting for the staff of the Yellowknife Primary Care Clinic ("YPCC") and Frame Lake Community Health Clinic ("FLCHC"). A copy of the Minutes from this staff meeting is attached as Exhibit "A".

2. One of the agenda items from this staff meeting was "casual leave." As reflected in the Minutes, Lisa Rayner (Manager of the YPCC) indicated that *"our use of casual leave has been increasing lately and this impacts operations."* Staff were advised that, commencing February 1, 2017, they would be required to submit a note after their appointment confirming that they attended an appointment. Staff were also informed they should be aware of what types of appointments are considered for casual leave and that *"management has the authority to ask what your appointment is to ensure that we are not approving outside of the collective agreement."*

3. Management from NTHSSA-Yellowknife Region developed a form for staff to use to provide the requested confirmation of "casual leave" appointments. A copy of this form is attached as Exhibit "B".

4. Leave can be retroactively denied if an employee does not provide the completed form after their appointment; however, the Employer has the discretion to still approve the leave if an employee does not provide the completed form.

5. The Union filed Grievance #18-P-GNWT-NTHSSA-02096 *[sic]*on March 24, 2017. It is attached as Exhibit "C".

6. The Employer denied the Union's grievance at the final level on May 3, 2017. The denial letter is attached as Exhibit "D".

7. The Human Resources Manual addresses the Employers policy and process regarding 'Other Leave With Pay' which is captured under Article 21 of the Collective Agreement as 'Other Types of Leave'. Section 0812 of the Human Resources Manual is attached as Exhibit "E".

8. The NTHSSA-Yellowknife Region employs physicians and other medical professionals. The NTHSSA-Yellowknife Region is familiar with the practitioners in Yellowknife and may become aware of staff assignments to specialized clinics or to particular areas of practice.

9. Yellowknife is a community of approximately 20,000 residents. There are a limited number of professionals in specialized health care fields (such as psychiatry, counselling, gynecology/women's reproductive health), as well as in other fields to which Casual Leave applies, such as lawyers. Some of these professionals are sole practitioners, and they may or may not have administrative staff.

10. The Union asserts the Employer is in violation of Article 21.08 - Casual Leave by requiring employees to submit this written confirmation of "casual leave" appointments. The Employer asserts that there is no violation since Casual Leave is granted at the Employer's discretion. The Collective Agreement is enclosed as a separate document.

[5] The Board noted a typographical error in the description of the reference number of the Grievance at paragraph 5 of the ASOF, which the Board has corrected in this Award.

EXHIBITS

[6] The additional documents submitted to the Board in connection with the Grievance were entered into the Record as Exhibits as follows:

Exhibit 1 – COLLECTIVE AGREEMENT Between The Union of Northern Workers and The Minister of Human Resources expires March 31, 2016

Exhibit A – General Staff Meeting Minutes dated January 5, 2017 (3 pages)
Exhibit B – Blank confirmation of appointment note (1 page)
Exhibit C – Submitting at Step 2 dated March 24, 2017 (2 pages)
Exhibit D – Letter dated May 3, 2017 to Ms. Tina Korycki (2 pages)
Exhibit E – Other Leave With Pay dated August 11, 2020 (4 pages)

AUTHORITIES

[7] For the Union:

1. *Northwest Territories Health and Social Services Authority (Re)*, 2019 NTIPC 2 (CanLII).
2. Office of the Information and Privacy Commissioner, "Review Report 17-156" (2018), online: *Northwest Territories Information and Privacy Commissioner* <https://atipp-nt.ca/documents/atipp-reviews/download-info/review-report-17-156>.
3. David M Beatty, Donald J Brown & Adam Beatty, *Canadian Labour Arbitration*, 5th ed (Toronto: Thomson Reuters Canada, 2006, loose-leaf): 4:1520, 4:1525, 4:2326.
4. *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34.
5. *Lumber & Sawmill Workers Union Local 2537 v KVP Co*, ("KVP") 1965 CarswellOnt 618, [1965] OLAA No 2.
6. *Peace Country Health v United Nurses of Alberta*, 2007 CanLII 80624 (AB GAA).

[8] For the Employer:

1. *Southlake Regional Health Centre v Ontario Nurses' Association*, 2016 CanLII 33289 (ON LA).
2. *Centennial College of Applied Arts and Technology v Ontario Public Service Employees Union*, 2007 CanLII 16816 (ON LA).
3. *Government of the Northwest Territories v Union of Northern Workers (Public Service Alliance of Canada)*, 2019 CanLII 94008 (NT LA).
4. University of British Columbia v. CUPE Local 116 [no citation provided]
5. *York University v York University Staff Association*, 2012 CanLII 41233 (ON LA).

RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

ARTICLE 2
INTERPRETATION AND DEFINITIONS

2.01 For the purpose of this Agreement:

(t) "Leave of Absence" means absence from duty with the Employer's approval.

ARTICLE 4
APPLICATION

4.01 The provisions of this Agreement apply to the Union, the employees and the Employer.

ARTICLE 5
CONFLICT OF PROVISIONS

5.03 Where there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

ARTICLE 7
MANAGERIAL RESPONSIBILITIES

7.01 Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.

ARTICLE 21
OTHER TYPES OF LEAVE

CASUAL LEAVE

21.08 (1) Employees may be granted casual leave with pay to a maximum of two (2) hours, with no charge against special leave credits, for the following purposes:

(a) Medical, Dental**, School Authority** and Legal Appointments

Whenever it is necessary for an employee to attend upon his/her doctor, dentist, lawyer, or appointments with school authorities during working hours he/she may be granted casual leave for these purposes.

(b) Other Casual Leave

The Deputy Head may grant an employee casual leave for other purposes of a special or unusual nature.

(2) **Casual leave under 21.08(1)(a) may be extended to a maximum of four hours if:**

(a) travel within the Northwest Territories but outside of the employee's community is required to attend a dental, legal or school authority appointment under 21.08(1)(a); and

(b) access to the dental services, legal services or the required school authority is not provided in the employee's community.

(3) Casual leave under 21.08(1) and 21.08(2) may in all cases be granted only for the period of the appointment and travel to and from the appointment.

(4) Employees may be granted casual leave with pay to a maximum of one day per occurrence where the employee's physician requires him/her to attend regular or recurring medical treatments and checkups. Such casual leave shall not be unreasonably denied.

> **(5)** With the concurrence of the Employer, in circumstances where an employee feels that he is unable to effectively continue to work due to an adverse situation occurring during regularly scheduled shift or workday hours, the employee will receive casual leave with pay for the remainder of that shift or work day. Said leave shall not be charged against any leave credits.

THE GRIEVANCE

[9] Casual Leave under Article 21.08 of the Collective Agreement is an uncapped form of leave with pay, which is both unearned and without charge against leave credits, but which may only be accessed by eligible employees with the approval of a supervisor to attend medical, dental, legal or school authority appointments during regular work hours.

[10] On January 5, 2017, at a General Staff Meeting employees of the NTHSSA – Yellowknife Region were notified of its adoption of an "Appointment Confirmation" requirement for those wishing to access Casual Leave, summarized at page 2 of the General Staff Meeting Minutes [Exhibit A], as follows:

> *Appointment Confirmation*
>
> - *Lisa indicated that our use of casual leave has been increasing lately and this impacts operations.*
> - ***Starting February 1, 2017 staff will be required to submit a note after their appointment confirming that they attended an appointment.***
> - *Staff should be aware of what falls under casual leave (i.e. medical, dental, school authority, etc.) and that management has the authority to ask what your appointment is for to ensure that we are not approving outside of the collective agreement.*
>
> [emphasis added by the Board)

[11] The Union submitted the Grievance on March 24, 2017, asserting that the Employer's Appointment Confirmation form [Exhibit B] was a violation of Article 21.08 and, further, that it may also constitute a violation of a member's privacy or cause a member to refrain from seeking or attending a necessary appointment as a consequence of the Employer's unilaterally imposed rule.

[12] In reply by letter dated May 3, 2017 [Exhibit D], the Employer denied the Grievance and asserted, in part:

> *Article 21.08 states that casual leave "…may be granted…whenever it is necessary…" As such, this article contemplates this leave type being discretionary. Therefore, as casual leave is granted at the Employer's discretion, it is reasonable to expect the Employer will undertake to assess and monitor requests for casual leave and manage casual leave use. Because of this, the practice of requiring confirmation of attendance at appointments, when casual leave is granted, is not inconsistent with the Collective Agreement. In addition, this policy is supported by the KVP Case in that it is not unreasonable, it is clear and unequivocal, it was brought to the attention of all affected employees prior to implementation, and its requirement has been consistently enforced.*

> *Prior to receiving approval for casual leave, employees must request such leave from their supervisor, which requires that the employee state what type of appointment they plan to attend i.e. doctor/lawyer/counsellor/dentist etc. Therefore, the requirement of having a form signed by a staff member of the appointment-office does not reveal private information about the appointment or the employee, which the supervisor was not already privy to.*

[13] Accordingly, the Grievance submitted to the Board pursuant to Article 37.19 of the Collective Agreement requires a determination as to whether the Employer's requirement that its Appointment Confirmation form be completed and returned by employees seeking Casual Leave constitutes as a violation of the Collective Agreement.

SUBMISSIONS OF THE PARTIES

The Union

[14] It is the Union's position that Casual Leave is a bargained form of leave under this and a predecessor collective agreement which had been in place well before the Employer's unilaterally imposed Appointment Confirmation rule (the "Rule") was implemented effective February 1, 2017.

[15] Although it acknowledges that the granting of Casual Leave is at the Employer's discretion under the Collective Agreement, the Union asserts that the Rule is inconsistent with Article 21.08 and therefore violates the Collective Agreement.

[16] The Union further submits that even should the Board conclude that the Rule fails to offend the negotiated terms of the Collective Agreement, the Board should nonetheless conclude that the Rule is unreasonable as the information sought thereunder is prejudicial to and invasive of a member's privacy. In doing so, the Union urged the Board to consider Arbitrator Sim's comprehensive analysis of the evolution of privacy rights in *Peace Country Health*, supra.

[17] The Union recognizes the Employer's right to manage its workforce, subject only to the negotiated terms of the Collective Agreement. In assessing the merits of the grievance and the Employer's application of its unilaterally imposed Rule, it urged the Board to consider not only the traditional *KVP* factors but also the impact of the Rule upon the privacy rights of the employees, including an attendant "absence of anonymity" within this small northern community.

[18] It is in this context that the Union asserts that the Employer's adoption of a two-pronged approval system with its pre-appointment management approval and post-appointment verification form can result in the identification not only of the service provider seen by an employee but, particularly in the case of medical appointments, in the identification of the nature of the service(s) sought; thereby violating a member's privacy rights.

[19] The Union disputes any suggestion that the Rule is merely an expression of a legitimate business interest imposed to ensure that the Casual Leave provisions under the Collective Agreement are being used appropriately by affected employees and further asserts that the Employer has been unable to demonstrate any evidence in support of such an assertion.

[20] The Union argues that in instances where the Employer may have some doubt about the veracity of the employee's Casual Leave request or that Casual Leave was being misused, it asserts that there were already options in place to assess individual circumstances without resorting to a universally mandated Rule requiring the signature of the service-provider when it is neither necessary nor reasonable to do so.

[21] In its assessment of the mandatory application of the Rule, the Union urged the Board to consider the treatment of Sick Leave at Article 20 of the Collective Agreement; noting that there is no blanket obligation to provide the Employer with a medical certificate except in circumstances of a *"…demonstrated and reasonable basis of doing so"* [Article20.04]. It further submits that this is a reasonable approach to a member's request for Casual Leave.

[22] For these reasons, the Union submits that the Employer's unilateral imposition of the mandatory Appointment Confirmation form is unreasonable in that it can only be seen to be a means to dissuade those employees from applying for Casual Leave, notwithstanding that it is a bargained right under the Collective Agreement.

[23] The Union also submits that since a supervisor has the discretion to approve the Casual Leave request even in the absence of an Appointment Confirmation form, the Rule is therefore arbitrary.

[24] The Union urged the Board to reject the Employer's justification for the Rule. It submits the even had the Employer produced any objective evidence of an increase in Casual Leave requests which in turn impacted upon operations, which it asserts it did not, it submits that the Employer already had the discretion to deny the leave request. In the Union's view, this reality demonstrates only that the Rule is over-reaching and unreasonable.

[25] The Union's additional authorities in support of the Grievance are set out at paragraph [7] above.

[26] The Union urges the Board to allow the Grievance and seeks a Declaration that the Employer has violated Article 21.08 of the Collective Agreement in its adoption of an unnecessary and unreasonable mandatory Appointment Confirmation form and in violation of the privacy rights of its members.

[27] In Reply, the Union pointed out that the Employer's Human Resource Manual excerpt "Other Leave with Pay" [Exhibit "E"] was produced by the Employer without the consent or endorsement of the Union.

The Employer

[28] At the commencement of the Employer's submissions, counsel advised that the Appointment Confirmation form is no longer in use, pending the outcome of this arbitration. More specifically, the Employer seeks the Board's guidance on the extent to which the Employer can implement processes to support its oversight of the Casual Leave provisions set out in the Collective Agreement.

[29] In particular, the Employer seeks a ruling as to whether the information sought in its Appointment Confirmation form (or something similar) is within the scope of Article 21.08 of the Collective Agreement.

[30] In response to the Union's submissions, the Employer clarified that all employees of the NTHSSA – Yellowknife Region were subject to the Appointment Confirmation Rule as of February 1, 2017, and not just its casual employees.

[31] It is the Employer's position that Casual Leave is distinct from other types of leave in that it is not "earned" by an employee, nor does it generate a "leave bank", such as the earned and banked accruals for Vacation Leave and Sick Leave under the Collective Agreement. Rather, it submits, Casual Leave is a discretionary form of paid leave which may be granted by the Employer where operational requirements permit for the specific purpose of permitting employees to attend necessary dental, medical, legal or school authority appointments that are only accessible during regular work hours, and which at times may require a cover-off during an employee's absence.

[32] Counsel referred the Board to Arbitrator Ponak's 2019 decision in *Government of the Northwest Territories v Union of Northern Workers (Public Service Alliance of Canada),* supra, in which he had occasion to consider the scope and exercise of the Employer's discretion in allowing or denying a Casual Leave request under Article 21.08 of the Collective Agreement. In this case, Arbitrator Ponak concluded that the Employer was required to exercise its discretion on a case-by-case basis, acting reasonably. Accordingly, the Employer argues that it needs relevant information in order to reasonably exercise its discretion in managing Casual Leave requests.

[33] The Employer submits that although Article 21.08 identifies the negotiated categories of appointments for which Casual Leave may be granted, it does not otherwise restrict or limit how the Employer is to exercise its discretion in assessing Casual Leave requests. Accordingly, it is the Employer's position that it is entitled to implement policies and protocols to formalize Casual Leave procedures as a component of its right to manage its workforce.

[34] It further asserts that its introduction of the Appointment Confirmation form for the purpose of verifying that the leave taken was for a purpose authorized under Article 21.08 is a reasonable component of managing discretionary leave and responding to operational hurdles occasioned by an employee's absence during regular work hours. Counsel referred the Board to the Employer's Human Resource Manual, which sets out requirements for supporting documentation for other forms of leave as well. [Exhibit E].

[35] The Employer asserts that its Appointment Confirmation form requires only the most basic information: nature of appointment (medical, dental, legal, school authority), name and date/time of attendance at the appointment and a signature; language which mirrors the wording in the Collective Agreement, with no add-ons. There is no requirement that a practitioner sign the form; nor is there a request for any information beyond that which the Employer is entitled to manage its workforce and perform its obligations under the Collective Agreement.

[36] The Employer submits that its adoption of the Appointment Confirmation Rule is not inconsistent with Article 21.08 or does not violate the Collective Agreement, as asserted by the Union or at all.

[37] The Employer argues that the factors in assessing a unilaterally imposed workplace rule in *KVP*, supra, continue to apply and have been met in this case.

[38] In further response to the Union's assertions regarding privacy violations, the Employer submits that the Union has overstated the nature of living in a small community. It further disputes that the information required to complete the Appointment Confirmation form somehow violates or infringes an employee privacy rights in any manner; noting that the form requires the identification of the category of appointment, the employee's name, the date and time of the appointment and a signature; no other information is requested.

[39] The Employer submits that merely identifying the category of appointment without particulars is also not a violation of the Collective Agreement, as the categories on the form merely replicate the categories of appointments for which Casual Leave may be granted under Article 21.08.

[40] The Employer submits that Casual Leave is in no way analogous to Sick Leave or Special Leave under the Collective Agreement, despite the Union's assertions to the contrary. Those forms of leave are not discretionary; they are contractual entitlements under the Collective Agreement.

[41] The authorities upon which the Employer relies are set out in paragraph [8] above.

[42] In the Employer's view, the Union has failed to produce evidence to establish even a *prima facie* violation of the Collective Agreement or a privacy breach and as such, it urges the Board ought to dismiss the grievance in its entirety.

ANALYSIS

[43] In determining the merits of this Grievance, I have carefully considered the documentary evidence submitted to the Board as set out in the Agreed Statement of Facts, along with the supporting documents entered as Exhibits in these proceedings, and the submissions and authorities presented by counsel.

[44] It is not disputed that, unlike Sick Leave and Vacation Leave, Casual Leave is an unearned discretionary entitlement under the Collective Agreement. Yet it is a form of paid leave that is recognized under the Collective Agreement, one which may or may not be granted at the Employer's discretion.

[45] It is also not disputed that the parties agreed to this special discretionary form of paid leave to accommodate an employee's attendance at a necessary medical, dental, school authority or legal appointment which could not otherwise be scheduled outside of regular work hours, as set out at Article 21.08 (1)(a). However, under Employer policies the granting of Casual Leave was subject to operational requirements which would permit the employee's absence during regular work hours. Prior to February 1, 2017, NTHSSA-Yellowknife Region employees required only the prior approval of their supervisors to access paid Casual Leave.

[46] As of February 1, 2017, employees wishing to access paid Casual Leave were required to have the Employer's Appointment Confirmation form [Exhibit B] signed by a service provider, confirming the employee's attendance (date and time) at the (medical/dental/school authority/legal) appointment. It is the unilateral introduction of this Rule which triggered the Grievance.

[47] The Employer submits that the Rule is neither a violation of the Collective Agreement nor a breach of a member's privacy. I would agree based upon the evidence before the Board, for the reasons which follow.

[48] I concur with Arbitrator Ponak's interpretation of the scope of the Employer's discretion under Article 21.08 of the Collective Agreement as set out in *Government of the Northwest Territories v Union of Northern Workers (Public Service Alliance of Canada),* supra, in which he concluded at page 9:

> *Employees are eligible for casual leave if they meet certain criteria but the Employer has the discretion whether or not to grant the leave even if the criteria are met. Granting discretion to the Employer distinguishes casual leave from some other contractual leaves.*
> *…*
> *The Employer's discretion to grant or not grant casual leave is not unfettered. It is subject to a reasonableness test.*

[49] Accepting that the exercise of an Employer's discretion to grant or deny a Casual Leave request in any particular case is not unfettered and subject to a reasonableness test; Arbitrator Ponak's decision is not otherwise determinative of the policy grievance before the Board concerning the Employer's introduction of the Rule.

[50] The Union's position is that the Employer is not entitled to impose the Rule in these circumstances; because it is unreasonable, arbitrary and/or for no legitimate business purpose. The Employer's position is that the introduction of the Rule is within its right to manage its workforce.

[51] Article 21.08(1)(a) reflects the agreed categories of appointments for which casual leave may be granted; medical, dental, school authority or legal. Accordingly, if an employee's request for Casual Leave under this section of Article 21.08 failed to fit within these four negotiated categories, I am persuaded the request for Casual Leave could reasonably be denied on that basis. The language of the Collective Agreement is clear and unambiguous.

[52] However, when the request for Casual Leave is for one of the four agreed categories of appointments, while that does not trigger a right to Casual Leave, it does trigger the Employer's obligation to exercise its discretion to grant or deny the leave request.

[53] Article 21.08(1)(a) is silent on how or upon what considerations the Employer's discretion is to be exercised in any given case; just that it has the discretion to grant or deny a Casual Leave request.

[54] Without doubt, the Employer must meet its obligations in the exercise of its discretion under Article 21.08 even where the Collective Agreement is silent.

[55] I am persuaded that the Employer's authority to create workplace policies and rules to administer its obligations under the Collective Agreement and to manage its workforce is expressly set out at Article 7 of the Collective Agreement, which provides:

> *Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.*

[56] More specifically, the Employer adopted policies and rules specifically to address the management of "Other Leaves with Pay" at section 0812 of its Human Resource Manual [Exhibit E], which sets out a number of Guidelines applicable to various categories of "Other Leaves With Pay", which include:

5. Requests for leave with pay may be approved for the following:
    1. Court leave;
    2. Leave to lecture in a field of employment;
    3. Examination leave;
    4. Union business;
    5. Sporting events; or
    6. Firefighting and Civil Air Search and Rescue (CASAR).
6. Other than court leave, leave with pay will be granted only where operational requirements permit the employee's absence.

[57] The Human Resource Manual also details where supporting documentation is required to support the request for paid Leave. By way of example, when required to testify or attend court, a subpoena is required. In other forms of leaves, days or hours away may be capped or not.

[58] The circumstances before the Board are not unlike those set out in *University of British Columbia v. CUPE Local 116 (2002),* in which a change to a Medical and Dental Leave Policy was subject to a policy grievance. The Union grieved the "increasing policing" of medical and dental leave requests by virtue of its demand for "verification of appointments". The Employer's position was that it was exercising its management rights to organize and direct the workforce, including its change in the administration of leaves for medical and dental appointments for service workers, and argued that the change was consistent with the collective agreement.

The Verification Form in *UBC,* supra, is replicated below for ease of reference:

REQUEST RECORD FOR LEAVE FOR MEDICAL/
DENTAL APPOINTMENTS
CUSTODIAL DEPARTMENT, DEPARTMENT OF PLANT
OPERATIONS - U.B.C.

NAME: _____

IN ACCORDANCE WITH ARTICLE 17.03 IN THE COLLECTIVE AGREEMENT BETWEEN THE UNIVERSITY AND C.U.P.E. 116, THIS RECORDS A REQUEST FOR A LEAVE OF ABSENCE FOR MEDICAL/DENTAL APPOINTMENT ON:

DATE OF APPOINTMENT: _____

TIME OF APOINTMENT: _____

TIME LEAVING WORK: _____ DATE: _____

SIGNED: _____

In this case, Arbitrator Taylor concluded that the Employer policy was generated to administer the medical and dental appointment provisions of the collective agreement. He also found the Verification form was "reasonable and minimalist in its impact" and did not constitute an invasion of the privacy of members and that the Employer's policy itself was not inconsistent with the collective agreement, at pgs. 16-17:

> *The meaning of Article 17.03 is derived from the plain and ordinary language which the parties have chosen to express their bargain. Except for emergency treatment, all requests for leaves of absence for medical and dental appointments shall be submitted at least five working days in advance. The cardinal presumption is that the parties are assumed to have intended what they said.*
>
> *There is no language in Article 17.*03 *to suggest that so long as employees submit their request within the time period stipulated that the Employer is bound to grant the request. Article 17.03 speaks only to the submission of requests. It does not say that requests must, as of right, be granted. To so conclude would be to read into Article 17.03 words which are not there and a meaning which the plain language will not bear.*
>
> *Article 17.03 provides that an employee's attendance may be excused to attend a medical or dental appointment but nowhere in Article 17.03 has the Employer relinquished its management right to grant or deny the requests. It would take clear and unequivocal language in order to reach that conclusion.*
>
> ********

> *Article 17.03 requires employees to submit requests for leaves to attend a medical or dental appointment. The Employer has prescribed a form to administer that request; a form which does not infringe the collective agreement. The Employer is obligated to administer Article 17.03 in a fair manner. This includes consideration of requests on an individual basis and in a manner which is not arbitrary or discriminatory as those words are generally understood in matters of this kind.*

[59] I concur with Arbitrator Taylor's reasoning. I am persuaded that, as in the *UBC* case, there is nothing in the wording of Article 21.08 which limits or restricts the Employer's right to adopt policies and protocols to administer Casual Leave and nothing which causes me to conclude that the Employer relinquished its management right to grant or deny a Casual Leave request, so long as it acts reasonably in administering Casual Leave requests under Article 21.08 and in exercising its discretion thereunder.

[60] There is also nothing in the plain language of Article 21.08 to limit or restrict the Employer's right to implement an Appointment Confirmation protocol in its administration and management of Casual Leave under the Collective Agreement as a component of its right to manage its workforce pursuant to Article 7. I am persuaded that the Employer's form [Exhibit B] is both "reasonable and minimalist"; requiring the bare minimum of non-personal information it feels necessary to manage its obligations under Article 21.08 Collective Agreement.

[61] In my view, the evidence before the Board is insufficient to establish a violation of a member's right of privacy through the introduction of the Appointment Confirmation form. Indeed, I find that the wording on the form does not require a member to disclose confidential information at all.

[62] Although the Union asserted that requiring a signature from a service provider (directly or indirectly) is sufficient to trigger a privacy violation, there is no evidence before the Board of a single incident in which a signature of an otherwise unidentified person violated a member's privacy. Nor is there any evidence that a signature on the Appointment Confirmation form actually triggered an identification of a particular medical or dental clinic/office or school authority or legal service, and even if it were otherwise, such an association does not establish a violation of a member's privacy, without more. This argument merely raises the possibility of identifying the nature of an eligible appointment under Article 21.08, which falls well short of satisfying its onus of establishing, at minimum, a *prima facie* violation of the Collective Agreement.

[63] The Board is mindful that disclosure of a category of professional appointments may be disconcerting in some situations. However, there is simply no or insufficient evidence before the Board to establish a violation of a member's privacy or even that a member's personal information was demanded by the Employer through the use of its Appointment Confirmation form. An assertion of the potential for a privacy breach is insufficient without cogent evidence to support the assertion to establish a violation of a member's confidential information.

[64] As detailed above, I am persuaded that the Employer's adoption of a procedural form to inform and supplement the Employer's exercise of discretion in allowing or denying Casual Leave reasonably fits within the Employer's retained authority to manage its workforce under Article 7 of the Collective Agreement; nor is there any evidence before the Board to demonstrate that the Employer's protocols have been unreasonable in its application to affected members.

[65] I am unable to conclude that the significant privacy breaches detailed in the Union's authorities (including intentional disclosure of diagnoses and prognoses) are not analogous to an assessment of the

circumstances before the Board in determining whether the Employer's Appointment Confirmation form, which requires only the category of appointment, date and signature, constitutes a violation of the Collective Agreement. To be clear, I am not persuaded that the information requested on the Employer's form can reasonably be construed as "personal employee information" in the circumstances.

KVP Assessment:

[66] I am equally persuaded that in unilaterally imposing the Rule, the Employer has met the various components set out in *KVP*, supra, as detailed below.

[67] *A rule cannot be inconsistent with the Collective Agreement:* The Employer fashioned an Appointment Confirmation form which replicated the negotiated wording of Article 21.08(1)(a):

- It required that the **category** of the appointment be identified, but not the nature or purpose of the appointment.
- The particular details of the attending service provider (who, where and why) are not required on the Employer's form. A hand-written signature, even if decipherable, would not, without more, in my opinion, reasonably constitute a breach of a member's privacy or a violation of the Collective Agreement.

[68] *A rule must not be unreasonable:*

- I am persuaded that the Employer's form is not unreasonable. Rather, I find that the Employer took reasonable steps to limit the information it requested in order to verify a member's compliance with the parameters of Casual Leave under Article 21.08, without unreasonable intrusion into a member's private affairs.

In reaching this conclusion, I have noted other "leaves" identified in the Collective Agreement in which supporting documentation is required, such as a copy of the subpoena in cases of requests for Court Leave. I am equally persuaded that in performing an oversight function to guard against a mis-use of the categories of leave authorized under the Collective Agreement is not unreasonable without evidence to the contrary.

[69] *A rule must be clear and unequivocal:* I have concluded that the Employer's form is not ambiguous.

[70] *The rule was introduced to employees before its effective date.* The notes of the NTHSSA – Yellowknife Region [Exhibit A] established the affected employees received notice at the January 2017 staff meeting of the Appointment Confirmation form in advance of its effective date on February 1, 2017.

[71] The remaining components of the *KVP* test are not applicable in this case: there is no disciplinary consequence for a violation of the Rule and there is no evidence before the Board that the Rule was or was not consistently enforced before it was suspended pending the outcome of the Grievance.

[72] Having regard to all of the circumstances, I am also persuaded that the mere fact that a supervisor may approve Casual Leave even in the absence of an Appointment Confirmation form does not, without

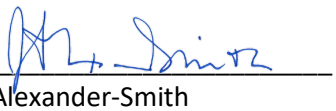
more, demonstrate that the Employer's application of the Rule is therefore arbitrary. Indeed, I find otherwise as it causes me to conclude that it is but a component of the Employer's obligation to reasonably exercise its discretion in the granting or denying of a particular Casual Leave request under Article 21.08 of the Collective Agreement.

[73] In summary, I find that the Employer's Rule is not inconsistent with Article 21.08 of the Collective Agreement and that the information required on the Appointment Confirmation to confirm a member's attendance at a category of appointment authorized under Article 21.08((1)(a) does not thereby establish a violation of a member's private or personal information.

DECISION

[74] For all of these reasons, the Grievance is dismissed.

Dated this 28th day of July 2021.



J. Alexander-Smith
Arbitrator