IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer" or "GNWT")

-and-

The UNION OF NORTHERN WORKERS
(PUBLIC SERVICE ALLIANCE OF CANADA)

(the "Union" or the "UNW")

RE: GRIEVANCE #17-P-02136 (Lieu Time Policy)

AWARD

Heard: July 13 and 14, 2021

Issued: Issued November 30, 2022

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

Appearances:

For the Employer:

Jeremy Walsh, Counsel
Kirsty Hobbs, Articling Student
Tyler Vibert, Labour Relations Advisor
Blair Chapman, Assistant Deputy Minister of Operations, Department of Lands, witness

For the Union:

Michael Penner, Counsel
Anne Marie Thistle, Director Membership Services UNW, witness
Avery Parle, Service Officer UNW, witness

I. INTRODUCTION

[1] This matter involves a policy grievance submitted by the Union to arbitration in October 2017, asserting that the Employer's unilaterally generated Lieu Time Policy as set out in its Human Resources Manual (the "HRM") violated Article 23.05(b)(iii), the "Lieu Time" provision of the Collective Agreement between the parties expiring March 31, 2016 (the "Collective Agreement") [Exhibit 1].

[2] This matter proceeded to an arbitration hearing (the "Hearing") in July 2021. Prior to the Hearing the Union and the Employer provided the Board with both documents and authorities, detailed below, augmented by the *viva voce* evidence of the witnesses presented to the Board and followed by counsels' oral argument to conclude the Hearing.

[3] Pursuant to Article 37 of the Collective Agreement, the parties accepted the composition and jurisdiction of the Board to hear and determine the merits of grievance #17-P-02136 (the "Grievance").

II. EXHIBITS

[4] 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 2 – Union Book of Documents, individually described at Tabs 1 – 7

1. Email from A. Thistle to D. Mathisen – January 24, 2016
2. Email from D. Mathisen to A. Thistle – January 25, 2016
3. Email form A. Thistle to D. Mathisen – January 30, 2016
4. Email from A. Thistle to M. Yap – November 3, 2016
5. Email form M. Yap to A. Thistle – November 4, 2016 (with attachments)
6. Email form A. Thistle to M. Yap – December 22, 2016
7. Email from A. Thistle to M. Yap et al. – March 23, 2017

Exhibit 3 – Employer Book of Documents, individually described at Tabs 1 – 29

1. 2021-06-30 - 0609 - Lieu Time_My HR
2. 2021-06-25 - Email - Drew Robertson (FIN) - RE Lieu Time Caps
3. 2021-06-25 - Devin Roberts (BDDEC) - FW Lieu Time Cap
4. 2021-06-23 - Email - Merle Carpenter - Lieu Time Maximums
5. 2021-06-23 – Email - Matthew Yap (JUS Legal Registries) - Lieu Time Maximums
6. 2021-06-23 - Email – Heather Meacock - Lieu Time Maximums
7. 2021-06-22 - Email - Michaela Miltenberger - Lieu Time Maximums
8. 2021-06-22 - Email - Maria Voudrach - Lieu Time Maximums
9. 2021-06-18 - Email - Trina Brothers – FW Lieu Time Maximums
10. 2017-10-16 - Avery Parle - Grievance #17-P-02136 –Referral to Arbitration

11. 2017-09-25 - Letter – David Stewart – Grievance Response #17-P-02136 – Lieu Time Policy
12. 2017-09-06 – Email – Debbie Moss - RE Lieu Time – DM's Briefing
13. 2017-09-06 - Email - Kevin Whitehead RE Lieu Time – DM's Briefing
14. 2017-09-06 – Email - Michaela Miltenberger RE Lieu Time – DM's Briefing
15. 2017-09-06 – Email - Pam Reid - RE Lieu Time – DM's Briefing
16. 2017-08-23 – Step 2 grievance – Avery Parle
17. 2017-08-03 – Letter - Tara Hunter – Grievance Response #17 – P-02136 – Lieu Time Policy
18. 2017-07-27 - Email – Avery Parle and Cheryl MacKay – RE Grievance 17-P-02136
19. 2017-07-04 – Step 2 grievance – Avery Parle
20. 2016-11-03 – Email – Matthew Yap – Human Resource Manual Updates – HRM 609 – Lieu Time
21. 2014-12-17 – Email – Mark Riepl – Human Resources Manual Updates – HRM 609 – Lieu Time
22. 2011-11-04 – Policy – Human Resource Manual – HRM 609 – Lieu Time with approval form
23. 2009 Human Resource Manual – Lieu Time Policy section 609
24. 2006 Human Resource Manual – section 609 – Lieu Time
25. HRM 608 – OverTime July 2002
26. 2005-2009 UNW Collective Agreement – s. 23
27. 2009-2012 UNW Collective Agreement – s. 23
28. 2012-2016 UNW Collective Agreement – s. 23
29. 2016-21 UNW Collective Agreement – s. 23

III. AUTHORITIES

[5] For the Union:

TAB 1 *Aventis Pasteur Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 1701 (Overtime Grievance),* [2006] O.L.A.A. No. 302, 85 C.L.A.S. 307

TAB 2 *Taan Forest Limited Partnership v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 (Contractors Grievance),* [2017] B.C.C.A.A.A. No. 3, 130 C.L.A.S. 70

TAB 3 *Toronto District School Board v. Canadian Union of Public Employees (Hamilton Grievance),* [2016] O.L.A.A. No. 185

Tab 4 *Union of Northern Workers v. Northwest Territories (Public Service Act, Minister) (Pay Step Grievance)*, [2009] N.W.T.L.A.A. No 2

[6] For the Employer:

TAB 1 Brown and Beatty, *Canadian Labour Arbitration,* 5th Edition, para 4:1510 – Rule Making

TAB 2 Brown and Beatty, *Canadian Labour Arbitration,* 5th Edition, para 4:1520 – Rule Making as an exercise of management's perogrative

TAB 3 Brown and Beatty, *Canadian Labour Arbitration,* 5th Edition, para 4:1524 – The reasonableness requirement

TAB 4 Brown and Beatty*, Canadian Labour Arbitration,* 5th Edition, para 4:1526 – Notification

TAB 5 *Marine Petrobulk LP and SIU (Saine), Re,* 2019 CarswellNat 3200, 140 CLAS 344

TAB 6 *UNIFOR, Local 576 and Canadian Keyes Fibre Inc. (Shiers), Re,* 2017 CarswellNS 411, [2017] NSLAA No. 3

TAB 7 *Association des jurists de justice c. Canada (Procureur general),* 2017 CSC 55, [2017] 2 R.C.S. 456

TAB 8 *Nor-Man Regional Health Authority v Manitoba Association of Health Care Professionals,* 2011 SCC 59

IV. RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

ARTICLE 2
INTERPRETATION AND DEFINITIONS

2.01 For the purpose of this Agreement:

(v) "May" shall be regarded as permissive and "shall" and "will" as imperative.

(w) "Overtime" means work performed by an employee in excess of or outside of his/her regularly scheduled hours of work.

ARTICLE 4
APPLICATION

1.01 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 9
EMPLOYER'S DIRECTIVES

9.01 The Employer shall provide the Union with a copy of all Personnel Directives or other such instruments within thirty (30) days of issuance.

ARTICLE 17

LEAVE – GENERAL

17.06 An employee's leave request shall not be denied based solely on the Employer incurring additional overtime costs.

ARTICLE 23

OVERTIME

23.05 (a) An employee who is required to work overtime shall be entitled to a minimum of one hour's pay at the appropriate rate described below in (b).

(b) Overtime work shall be compensated as follows:

(i) at time and one-half (1 ½) for all hours except as provided in Clause 23.05 (b)(ii);

(ii) at double time (2) for all hours of overtime worked after the first four (4) consecutive hours of overtime and double time (2) for all hours worked on the second or subsequent day of rest, provided the days of rest are consecutive.

Consecutive hours of overtime will not be considered interrupted when:

(a) one unpaid meal break of up to one hour is taken after a minimum of three consecutive hours have been worked and the employee returns to work after the meal break; or

(b) the overtime commences immediately prior to the start of the employee's regular hours of work and continues immediately following the conclusion of the employee's regular hours of work.

(iii) In lieu of (i) and (ii) above, the Employer may agree to grant equivalent leave with pay at the appropriate overtime rate to be taken at a time mutually agreeable to the Employer and the employee. Any unused equivalent leave may be carried over into the next fiscal year.

(c) "First day of rest" is defined as the twenty-four (24) hour period commencing at midnight of the calendar day on which the employee completed his/her last regular shift, and

(d) When the first and second or subsequent day of rest are consecutive, "second or subsequent day of rest" is defined as the period immediately following expiration of the first day of rest and ending at the time of commencement of the employee's next regular shift.

ARTICLE 37
ADJUSTMENT OF DISPUTES

37.22 The arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement, or to increase or decrease wages.

V. FACTUAL BACKGROUND

[7] Anne Marie Thistle, the Union's Director of Membership Services, is tasked with overseeing the Union's Service Department, including its Service Officer(s). In that capacity, Ms. Thistle is involved in grievances, collective bargaining, member representation, negotiation and essential services on behalf of the UNW. She, along with Avery Parle, a Service Officer, were directly involved in the circumstances resulting in the Grievance before the Board.

[8] Ms. Thistle explained that in her experience the Employer introduced, updated and/or discontinued workplace policies which apply to designated employees, including members of the bargaining unit, as set out in the Employer's HRM. One such policy is its Lieu Time Policy which, as of the date of the Hearing, was set out at section 0609 of the HRM.

[9] From time-to-time Ms. Thistle received from the Employer HRM Policy updates, at times in large numbers. It was her invariable practice to acknowledge via email receipt of the correspondence from the Employer containing updated electronic links to the applicable policies sent to her by a variety of employees of the GNWT. This receipt acknowledgement was accompanied with Union's standard caveat that merely "receiving" the updates from the Employer did not operate to jeopardize the Union's right to grieve whatever unilaterally developed policy or policy revision the Employer had put in place.

[10] By way of example, on January 24, 2016 Ms. Thistle responded to an email sent by Dave Mathisen, then the Manager of Labour Relations for the GNWT which included a number of links to Policy updates (collectively referred to as the "Policies"), in the following fashion:

> *Hi Dave,*
>
> *Please note that while the Union appreciates being sent notices of updates to the HRM Manual,* ***this does not constitute the UNW's agreement with the Employer. These issues have not been negotiated and as such there may exist wording which implies an intent different than that of the C.A. The UNW reserves the right to grieve any issue which may arise out of these unilaterally developed policies which may be in conflict with the C.A. As always the UNW reserves the right to take issue with any unilaterally developed policy.*** *Thank you Anne Marie*
>
> [Exhibit 2-1, emphasis added by the Board]

[11] In response to Ms. Thistle's email, Mr. Mathisen replied "Duly noted" the next day. [Exhibit 2-2].

[12] The next exchange of information of relevance to the Grievance occurred in early November 2016, at which the Union was provided with additional links to updated Policies which on this occasion included an update to the Lieu Time Policy found at HRM 0609. This particular update did not contain any revisions relevant to the issues raised in the Grievance [Exhibit 2 -5]. It did, however, trigger a series of interactions between the Union and the Employer which ultimately led to the Grievance now before the Board.

[13] In response to the HRM 0609 update, Ms. Thistle requested copies of the policy prior to its latest revision. The Union thereafter identified several inconsistencies between Article 23.05(b)(iii) of the Collective Agreement and Guideline #5 of the Lieu Time Policy. For ease of reference, those provisions are set out below:

> Article 23.05(b)(iii) of the Collective Agreement provides:
>
> *In lieu of (i) and (ii) above,* ***the Employer may agree to grant equivalent leave with pay at the appropriate rate to be taken at a time mutually agreeable to the Employer and the employee. Any unused equivalent leave may be carried over into the next fiscal year.***
>
> The Employer's HRM 0609 Guideline #5 provides:
>
> ***Employees may not accumulate more than 75 hours of lieu time per fiscal year*** *(80 hours for employees who work eight hour days). This applies to all Departments/Agencies. This amount does not include LIEUSTATS banks established for some employees for hours worked on Designated Paid Holidays.*
>
> [Emphasis added by the Board]

[14] The parties were at odds in their respective interpretations of the applicable Guidelines and Article 23.05 of the Collective Agreement.

[15] In support of the Union's position, Ms. Thistle contrasted the general wording of Article 23.05(b)(iii) with the specific language of Article 16.09, which was introduced in this particular collective agreement, dealing with the treatment of statutory holidays falling on a day of rest as follows:

> **16.09 This Clause applies only to employees whose regular work week is not Monday to Friday inclusive and whose shift schedule requires the employee to regularly work designated paid holidays except for those employees included under Appendix A10 – Health Care Practitioners:**
>
> **(i) On April 1 of each year a full-time employee shall be entitled to a designated paid holiday bank equivalent to the number of designated paid holidays as specified in Article 16 in the current fiscal year multiplied by the employee's standard daily hours of work (7.5 or 8). For employees who are shift workers for only part of a year, the designated paid holiday bank shall be equivalent to the number of designated paid holidays which occur while the employee is a shift worker.**

> **(ii)** **Banked hours shall be taken at a time mutually agreeable to the Employer and the employee. Any unused banked hours shall be paid out at the end of the fiscal year.**
>
> **(iii)** **When more than one (1) employee requests time off with pay for these purposes and for operational reasons not all employees are granted the leave, length of service with the Employer shall be the sole deciding factor.**
>
> **(iv)** **When one employee(s) applies for vacation leave and another employee(s) applies for banked hours off under this clause, the request of the employee applying for vacation leave shall receive first preference.**
>
> **(v)** **When an employee is required to work on a designated paid holiday as part of the employee's regularly scheduled hours of work or as overtime when the employee is not scheduled to work, the employee shall be paid in addition to the hours the employee has banked had the employee not worked on the holiday twice (2) the employee's straight time rate for all hours worked. This time may be banked, and paid out in accordance with paragraph (ii).**
>
> **(vi)** **An employee scheduled to work on a designated paid holiday shall be paid at the applicable overtime rate for all hours worked from 00:01 to 24:00 on the designated paid holiday.**

[16] Ms. Thistle pointed out that Article 16.09 (i) expressly addressed the treatment of shift workers (such as Corrections Officers and Health Care workers) and explained that they are "front-loaded" in their "stat bank" which operates as a separate leave bank, and represents the statutory holidays covered under Article 16 multiplied by their daily work hours. As a result of the nature of shift work, should a shift worker be required to work on a statutory holiday, the collective agreement provides that those hours may be paid out at the applicable rate, or banked. At the end of the fiscal year, should an employee have unused hours in the "stat bank", Article 16.09(ii) mandates that those hours be paid out, and not "carried over into the next fiscal year", as provided in Article 23.05(b)(iii).

[17] Ms. Thistle acknowledged that earlier versions of the Employer's Lieu Time Policy had been in place back to 2002, at that time described as HRM 608, which provided in part:

> 24. Instead of paying for overtime**, a department may agree to grant lieu time:** equivalent leave with pay at the appropriate overtime rate. It must be taken at a time agreeable to both the department and the employee.
>
> 25**. Each department may establish its own rules for lieu time based on operational requirements. The granting of lieu time is strictly at the department's discretion.**
>
> 26. As a general rule, **an employee should accumulate no more than 25 days of lieu time**. **If the department determines that an employee is accumulating too**

> **much lieu time, it may refuse to grant any more until the employee has used some of the accumulated credits.**
>
> 27. As a general rule, **no more than five days lieu time should be carried over from one fiscal year to the next**.
> [Exhibit 3-25, emphasis added by the Board].

[18] Under HRM 608, it is apparent that the Lieu Time Bank was refillable in light of the wording of Guideline 26, which provides that the department could refuse to allow an employee to accumulate additional lieu time **"…until the employee has used some of the accumulated credits**." [emphasis added by the Board]

[19] The next version of the Employer's Lieu Time Policy provided to the Board is dated October 2006, and provides in part:

> 8. The granting of lieu time is strictly at the discretion of management in a Department, Board or Agency.
>
> 11. **Employees may not accumulate more than 75 hours of lieu time per fiscal year** (80 hours for employees who work eight hour days). This applies to all Departments, Boards and Agencies. **This maximum is not a rolling refillable bank.**
>
> 12**. If the employee has reached their maximum lieu time for the fiscal year, the employee will automatically be compensated for the overtime as a cash payment on his/her pay cheque.**
>
> 13**. A maximum of 37.5 hours (40 hours for individuals who work eight hour days) lieu time may be carried over from one fiscal year to the next. If lieu hours are carried over, they count as part of the new fiscal year's limit. For example, if an employee carries over 37.5 hours, he/she may only earn a maximum of 37.5 lieu hours in that new fiscal year.**
>
> 14. GNWT employees may only carry over 37.5 hours. All hours in excess of this limit shall be paid out.
>
> 17. **Managers have the option of setting lower maximums for lieu time within their divisions**. However, it then becomes the manager's responsibility to monitor any accumulation under the 75 hours maximum.
> [Exhibit 3-24, emphasis added by the Board].

[20] Ms. Thistle testified that to the best of her knowledge, the Union was not made explicitly aware of this policy at the time that it was issued because the Union had not been sent all Employer policies within 30 days of their issue as mandated under Article 9 of the Collective Agreement. In checking those Union records available to her, she noted updates to the HRM began coming in around 2010, without describing which particular updates had been received.

[21] In comparing the Employer's Lieu Time Policy with Article 23.05(b)(iii) of the Collective Agreement, the Union concluded that the language of the HRM Guidelines was incompatible with the language of the Collective Agreement on several levels. In the first place, Ms. Thistle noted

that the Employer had unilaterally imposed a cap on the annual number of lieu time hours at 75 hours (the "CAP"). She further noted that Guideline #6, the CAP was described as a non-refillable maximum of lieu time hours annually. In contrast, the Collective Agreement identified no cap on lieu time hours and expressly contemplated a carry-over of any unused equivalent leave into the next fiscal year.

[22] According to Ms. Thistle during her time with the UNW, the Union had never endorsed the imposition of a cap on the accumulation of lieu time hours or the imposition of a non-refillable lieu time bank. Rather, Ms. Thistle was aware that the Union had increasingly been contacted by members of the bargaining unit in various departments throughout the GNWT with complaints/concerns about variations in the Lieu Time CAP or because of an inability to take lieu time at all, depending upon a manager's decision within a department or agency.

[23] Since the introduction of the CAP in the Employer's HRM 0609 in October 2006, the Collective Agreement had been renegotiated; as reflected in the Collective Agreement expiring March 31, 2012; the Collective Agreement expiring March 31, 2016 and the Collective Agreement expiring March 31, 2021.

[24] At no time since the introduction of the CAP was the Lieu Time Policy raised in bargaining, by either party.

[25] In cross-examination, Ms. Thistle was asked why the Union failed to raise the Policy in bargaining subsequent to the filing of the Grievance, to which she responded:

> *Members raise proposals. In the Union's view, the language of the collective agreement was clear and unambiguous. There was no reason for the Union to introduce a proposal on that Article* [23.05(b)(iii)]. *I cannot speak to why the Employer didn't.*

[26] It was also about this time that Avery Parle joined the UNW as a Service Officer. In addition, he continued to work as a Relief Corrections Officer for the GNWT. In this latter role, Mr. Parle had considerable experience with the Employer's application of its Lieu Time Policy, having worked many hours of overtime at the Employer's request with a concomitant loss of family and personal time away from work.

[27] In his role as a Service Officer, Mr. Parle undertook a review of the Lieu Time Policy as well as the provisions of Article 23.05(b)(iii,) in conjunction with his personal research into the identified inconsistences between the lieu time provisions in the Collective Agreement and the Employer's HRM 0609.

[28] The Union concluded that it was appropriate to file a policy Grievance as opposed to individual grievances at this time, as the Lieu Time Policy applied to all members of the bargaining unit.

[29] Mr. Parle commenced the grievance process on July 4, 2017 in accordance with the protocols set out in Article 37. During the Hearing, he explained that although this was one of the first grievances that he had drafted, he had concluded that both the Policy itself and its application to

individual employees were unreasonable. Accordingly, the Union sought a declaration that the Employer was in violation of the Collective Agreement through its unilaterally generated Lieu Time Policy and an order that it be rewritten to ensure compliance with the Collective Agreement. In the Union's view, in order to achieve compliance with Article 23.05 the CAP must be removed and the Lieu Bank be made, once again, re-fillable throughout the GNWT.

[30] In Mr. Parle's experience as a Relief Correctional Officer, his overtime hours reached the CAP within the first two months of the fiscal year; demonstrating how unreasonable the arbitrary CAP worked for those asked to work so much overtime. The Union did not dispute the theory of a cap on Lieu Time hours so long as it operated in accordance with Article 23.05 and was expressed as a reasonable exercise of the Employer's Managerial Responsibilities under Article 7, as articulated both by arbitrable jurisprudence, as noted with approval by the Supreme Court of Canada.

[31] On cross-examination, Mr. Parle testified that the value of lieu time was best illustrated within the context of a work-life balance, based upon his experience as a Relief Corrections Officer. He described the negative impact on that work-life balance in the need to work the overtime hours required of him. Yet, he also explained that, in theory, it would be possible to recapture that balance on the "back end", by being able to take a portion of the banked lieu time hours at another time, when circumstances permitted. In his view, in theory, this would support the "carry over" option rather than a strict payout of lieu time hours each fiscal year.

[32] Mr. Parle identified employees in health care, corrections, wildlife officers and finance as those most likely to hit the CAP; while he also acknowledged that it would have little to no impact on many other GNWT employees, a result which he found inherently unfair.

[33] The Union acknowledged that Article 23.05(b)(iii) gave the Employer a dual level of discretion; firstly, in the granting of lieu time and, secondly, in the utilization of banked lieu time at a time agreeable to the Employer and the employee. However, it also asserted the Employer's exercise of that discretion in the taking of lieu time had to be reasonable, based upon operational requirements at the time the decision was made; in contrast to the operation of the CAP, which denied any exercise of that discretion once the CAP was met as the Policy mandated that any hours over the CAP be paid out, with limited carry-over privileges.

[34] On cross-examination Ms. Thistle said that to her knowledge no one at the Union had been assigned to review Employer policies.

[35] Ms. Thistle noted that under Article 5 of the Collective Agreement, in the event of any conflict between the Lieu Time Policy and the Collective Agreement, the provisions of the Collective Agreement would prevail.

[36] In reply, the Employer denied the Grievance and maintained that management had been properly delegated the authority to set lieu time caps under Article 7 of the Collective Agreement, in the absence of any language in the Collective Agreement which restricted or limited that right.

[37] The Employer asserted that its Lieu Time Policy expressed its significant operational concerns with the accumulation of lieu time and that it constituted a reasonable exercise of its management rights in directing its workforce which, in its view, included the appropriate delegation of authority within individual departments or divisions to impose lower lieu times caps where necessary.

[38] Blair Chapman appeared at the Hearing as the Employer's sole witness. At the time of the Hearing, Mr. Chapman was employed as the GNWT's Assistant Deputy Minister of Operations with the Department of Lands. However, earlier in his career he had been employed in a variety of others positions within the GNWT, including stints within Labour Relations and within the Department of Management and Recruitment Services which included front line Human Resources support for a ten-year period prior to January 2006.

[39] Mr. Chapman was familiar with the Employer's Lieu Time Policy, commencing in 2002. Although he was no longer working in Human Resources when the October 2006 Lieu Time Policy was introduced, he was familiar with the concerns that had earlier been raised by various departments with the accumulation of lieu time itself, along with the practicalities associated with the utilization of banked lieu time.

[40] According to Mr. Chapman, the Employer had a particular concern with the accumulation of lieu time for employees in positions which habitually required "back filling", such as for those employed in 24-hour operations in Corrections and Health Care, or in seasonable positions such as for those assigned to highway crews. In Mr. Chapman's words:

> *So, if I was using 8 hours of my lieu time, somebody would come in typically at an overtime rate, so they would accumulate more overtime than for the 8 hours they were using to cover my shift: at time-and-a-half for the first 4 hours and at double-time for the second 4 hours; thereby accumulating 12 hours of overtime for replacing an 8-hour shift.*

[41] Mr. Chapman spoke of the challenges the Employer experienced in its efforts to manage what it considered an excessive amount of lieu time accumulating at various locations throughout the GNWT, as opposed to a more straightforward payment of overtime for hours worked. In an effort to balance the interests of both the Employer and its employees in such circumstances eventually led the GNWT to its introduction of an annual 75-hour non-refillable lieu time cap, first expressed in the October 2006 Lieu Time Policy, and thereafter.

[42] Mr. Chapman explained that into the early 2000s, most GNWT departments were operating with their own Human Resources (HR) personnel who generated a variety of department-specific HR policies. Thereafter, the Employer elected to centralize Labour Relations within the Financial Management Board and endeavoured to manage its limited resources; in part, through the later introduction of a GNWT-wide maximum 75-hour lieu time cap.

[43] The imposition of the maximum lieu time CAP across the board reflected the Employer's efforts to balance lieu time with the combination of the various other forms of leave to which employees of the GNWT were entitled, which Mr. Chapman described as "*some of the most generous leave provisions in Canada*". Such leave entitlements included Annual Leave, Winter Bonus Leave, a significant number of Statutory Holidays and mandatory leave with paid days over Christmas, each

of which was negotiated between the parties. On that basis he found the CAP and the one week lieu time carry-over into the next fiscal year reasonable, for some of the GNWT employees.

[44] Within the CAP, it is the employee's decision to take lieu time or overtime pay.

[45] However, Mr. Chapman opined that in the absence of the CAP, accumulated lieu time could continue to grow which may then result in the following:

> (1) It would get to a point where operationally we could not approve all the lieu time, which is self-defeating;
> (2) It would also put us in a situation where fundamentally it would be very difficult to manage, especially where in some of our regional offices we have only 2-3 people who are delegated/designated under the various pieces of legislation to carry out some of these activities; which together would have a very significant effect and which could be very costly as well. Trying to manage overtime and coverage could be a problem as well.

[46] Mr. Chapman acknowledged that the Lieu Time Policy allowed managers to set a lower cap when operational circumstances required it, so long as it was approved by a Deputy Head.

[47] Mr. Chapman was involved in collective bargaining of several collective agreements with the UNW, including the 2005 – expiring March 31, 2009 collective agreement [Exhibit 3-26]. He recalled that problems involving the need to back-fill positions, thus spawning many more hours of overtime/lieu time primarily for those in Corrections and in Health Care, was an issue. He recalled that at that time the GNWT had been utilizing casual employees and described a number of good conversations with the UNW while they collectively grappled with trying to find a solution to this problem, which resulted in the use of relief employees.

[48] On cross-examination, when asked to speak to the Employer's justification for the changes to the Lieu Time Policy, Mr. Chapman explained that it was developed to curtail the unlimited accumulation of lieu time on behalf of employees which would otherwise lead to some calamity in the future should the caps or limits not be in place. He also noted that the Lieu Time Policy (cap and carry-over provisions) were in keeping with similar provisions found in other types of leaves bargained and conferred under the Collective Agreement.

[49] Mr. Chapman conceded that it is solely a decision of management to request or impose overtime and further agreed that there is no language in Article 23.05(b)(iii) referencing a 75-hour, or any, cap. He also conceded that once the CAP was reached, a manager could only authorize overtime (not lieu time), which would have to be paid out in accordance with the Employer's Policy.

[50] Mr. Chapman was unable to explain what, if any, analysis resulted in the decision to impose the CAP on lieu time in 2006 or thereafter, but thought that there may have been HR Policy people involved in such an analysis. He did say that the CAP was intended to address the financial (budgetary) consequences of earning banked time in one year but taking or accessing those hours in another fiscal year. In summary, he said the goal of the revisions to the Lieu Time Policy was to create a level playing field amongst all GNWT departments by imposing the same CAP.

[51] Mr. Chapman was of the view that in the absence of any express language such as found under Annual Leave within the Collective Agreement, the Policy was an attempt to find a discretionary determination of what would be appropriate across the board. He testified that based upon his experience and even in the absence of any specific analysis in setting the CAP, he found the 75-hour cap reasonable, despite the identified degree of disparity between nurses and corrections officers, et al, and those working Monday-Friday, 9 am- 5 pm cycle.

VI. SUBMISSIONS OF THE PARTIES

The Union

[52] It is the Union's position that the issue in this Grievance is concise and district: whether the Employer's Lieu Time Policy fettered its discretion in the granting lieu time or in the utilization of lieu time contrary to the terms of Article 23.05(b)(iii) of the Collective Agreement, and submits it has indeed done so.

[53] While the Union does not dispute the Employer's right to direct the workforce in that it schedules its workers, commissions and approves overtime and in doing so, it is in unilateral control of each of these elements. It further concedes that employees can accept or decline to work overtime in most, but not all, circumstances.

[54] Nonetheless, the parties have bargained that employees who are either required to work overtime or who agree to work overtime have the right to request of the Employer that they be granted lieu time to be taken at a mutually convenient time rather than paid out the overtime hours worked under Article 23.05(b)(iii).

[55] The Union concedes that at this stage the Employer has the discretion to agree or to deny the request for lieu time with the only stipulation being that with that power of discretion, it must be exercised reasonably.

[56] The Union submits that a reasonable exercise of discretion requires some type of analysis of the particular request, the circumstances in which the request is made and the actual operational consequences of that request for the grant of lieu time to be made. It further notes that the manager's decision to grant lieu time does not end the matter, as a second level of discretion is maintained to object or deny taking of lieu time unless it is mutually agreeable.

[57] Accordingly, it argues that management maintains entire control over the process in terms of any possible calamitous result from the granting of lieu time or the employee "cashing in" their lieu time.

[58] The Union submits that the Employer has interpreted its discretionary power to justify imposing the artificial limits set out in the Policy once the CAP is met; the manager can no longer exercise his/her discretion to grant lieu time as contemplated under Article 23.05(b)(iii), but rather is compelled by virtue of the Employer's Lieu Time Policy to deny any further request for lieu time, thereby merely imposing a rule.

[59] It further argued that even if an employee is allowed to use some of the lieu time accumulated up to the CAP, thereby reducing the lieu time hours below the CAP, the manager is still compelled

to deny any further requests for the accumulation of lieu time because the Employer's Policy provides that the "lieu time bank" is not refillable; in contrast to Article 23.05(b)(iii) which provides that any unused equivalent leave may be carried over into the next fiscal year, without limit; despite the Employer's interpretation to the contrary.

[60] Counsel pointed out should the Board conclude that Article 23.05(b)(iii) is ambiguous, using tools of construction having regard to the distinction between the first and second sentences within Article 23.05(iii), reveals that the parties intended that the discretion to approve lieu time or not is assigned to the Employer, while that discretion is not similarly assigned to the Employer in terms of any discretion to carry over unused equivalent leave which, the Union submits, that to avoid an absurdity must be an election of the employee.

[61] Counsel also submitted that its interpretation of Article 23.05(b)(iii) is to be preferred, having regard to the whole of the Collective Agreement. The Board is asked to consider that when the parties intend for terms of leave to be truncated, they have used language to that effect; such as in Article 16.09 and its treatment of the "stat leave bank"; or in the treatment of a conflict between a request for Vacation Leave versus a request for Holiday banked time.

[62] The Board is also asked to consider the contractual language bargained in Article 17 which deals with Leave Generally as an aggregate, including Vacation Leave, Special Leave and Time Off in Lieu, which specifically provides at 17.06 that a leave request shall not be denied based solely on the Employer incurring additional overtime costs; one of the justifications expressed by Mr. Chapman for the Employer's Lieu Time Policy.

[63] The Union submits that the parties have already addressed the interplay between the various types of leave through the contractual process, making the creation and implementation of the Lieu Time Policy more problematic; moreso since it is only the Employer who authorizes overtime and the cost of that overtime.

[64] Counsel submitted the Collective Agreement contains express provisions where the parties intended maximum caps and liquidation and carry-over as negotiated provisions such as those found in Article 18.04 (vacation carry-over provisions); and as set out n Articles 22.18 and 22.19 (compensatory leave).

[65] As such, it is the Union's position that when the parties intended to truncate the rights of the employee in terms of how they accumulated leave, including how they carried over leave from year-to-year and the amounts of leave they had available to them; that language was expressed in the collective agreement; unlike the language bargained in Article 23.05(b)(iii), demonstrating no intention to truncate the discretion bestowed upon the Employer.

[66] The Board is asked to conclude that the creation of the Lieu Time Policy is, in essence, importing the truncated negotiated language of the collective agreement through a unilateral Employer Policy.

[67] In anticipation of an estoppel argument by the Employer, the Union argued that under Article 9.01 the Employer is obliged to provide the Union with a copy of all Personnel Directives or such instruments within 30 days of issuance. It submits that while there is no denying the Lieu Time Policy has been long-standing and publicly accessible on the Employer's website, Mr. Chapman

provided no evidence to establish that the Employer had complied with Article 9.01 at its inception or during the process of its creation, and in the absence of evidence of any consultation with the Union on this issue.

[68] Counsel argued that the Employer failed to reasonably establish the required element of detrimental reliance in support of an estoppel argument. It submitted that no evidence that the language under Article 23.05(b)(iii) could not itself control the accumulation of lieu through the simple exercise of the Employer's discretionary authority, exercised reasonably. Nor has it provided quantitative evidence to establish that the 75-hour cap is necessary in terms of either the budgeting process or to meet human resource management processes.

[69] The Union submitted that even Mr. Chapman conceded the gross disparities between departments in terms the application of the 75-hour cap, yet instituted a policy that picked an arbitrary number and applied it across the board, resulting in an unfair treatment to those asked or required to work excessive amounts of overtime, while at the same time disentitled to the personal time away "at the back end", as Mr. Parle testified.

[70] The Union relies on the authorities set out at paragraph 5 above, to support its position that the Employer has not met its evidentiary burden to establish the estoppel and even if the Board finds otherwise, it submits that as the Grievance was filed in 2017 and objected to the Employer's Lieu Time Policy, clearly put the Employer on notice as to its position on the Policy.

[71] Finally, the Union seeks declaratory relief, even if only on a go-forward basis, should the Board find no equitable reason not to find that the elements of an estoppel are made out.

The Employer

[72] It is the Employer's position that the limits on lieu time and the limits on the carryover of lieu time reflect a reasonable exercise of its management rights which, it argues, are not restricted by or inconsistent with the bargained terms of the Collective Agreement.

[73] The Board is urged to conclude that the fact that Article 23.05.(b)(iii) does not contain the very specific language used elsewhere in the Collective Agreement in terms of limiting leave or carryover of leave demonstrates the parties' intention to leave these issues to the Employer to make that decision in the exercise of its discretion concerning lieu time.

[74] Counsel submits that if the parties intended otherwise, the parties could have included the specific language set out in connection with other forms of leave in the Collective Agreement.

[75] The Employer submits that a reasonable interpretation of Article 23.05.(b)(iii) grants the Employer the discretion to grant lieu time at all and, also grants the Employer the discretion to grant any carryover of lieu time into the next fiscal year.

[76] It is also the Employer's position that it has exercised the discretion granted to it under Article 23.05 not to prohibit lieu time but to reasonably limit lieu time, as it has a right to do.

[77] The Employer disputes that its Lieu Time Policy is neither unreasonable nor inconsistent with the Collective Agreement and otherwise satisfies the essential elements set out in the *Re Lumber &*

Sawmill Workers' Union, Local 2537, and KVP Co. Ltd., 1965 CanLII 1009 (ON LA). It argued that the Lieu Time Policy is clear, unambiguous and notoriously known to employees through its HRM and its posting to its website.

[78] In its submissions, the Lieu Time Policy strikes a reasonable balance between the Employer's need for certainty in its operational requirements versus the employees right to be compensated for their time. Up to the CAP, it is within the employee's discretion to elect lieu time or paid overtime.

[79] The Employer argued that its operational needs must be met in circumstances where there are already a number of other forms of Leave granted to its employees. In its view, the issue with lieu time is the uncertainty as without the Policy, it is not known how much lieu time will be obtained or earned during the year, as illustrated through Mr. Chapman's evidence when one employee covers for another employee taking lieu time and earns even more lieu time in doing so.

[80] Another Employer's concern was that operationally it may not be able to approve all the lieu time earned or accrued, which could lead to disputes. The CAP creates certainty between the Employer and the employees.

[81] Counsel conceded that the evidentiary basis of the 75-hour cap is less than "exact", but that the Employer concluded that two weeks of lieu time was a reasonable amount. Counsel also conceded that the CAP disproportionately affected shift workers and seasonable workers (corrections, hospital workers, finance employees at "year end" and winter road crews), while office workers may never reach the 75-hour threshold.

[82] It is the Employer's submission that the CAP levels the playing field throughout the GNWT and avoids giving individual managers greater discretion to allow lieu time within their departments.

[83] In the alternative, the Employer argues that the Union is estopped from asserting its strict legal rights in light of the Employer's long-standing, consistent and transparent Lieu Time Policy of which all employees were made aware. It asserts that if the Union was unaware of the Policy, it ought to have been aware, given the CAP has been in place since 2006 and that the Union had been provided notices of changes to the Policy in 2006 and thereafter.

[84] Relying on the Supreme Court of Canada's decision in the *Nor-Man Regional Health Authority v Manitoba Association of Health Care Professionals*, 2011 SCC 59, the Employer submits that it was entitled to assume the Union had accepted its practice and to rely on the Union's acceptance in not seeking to negotiate a change or to exercise a right to advance a timely grievance.

[85] At the very least Counsel argued that the Union had "constructive notice" of the Policy through its posting on the website and therefore acquiesced to the Employer's practice over the years.

[86] Counsel also pointed out that this section of the collective agreement has survived four rounds of bargaining and it would appear that each party feels Article 23.05(b)(iii) is clear and unambiguous, although with divergent interpretations. Counsel suggested that the clause might need further review during bargaining.

[87] The Employer disputes that merely "reserving the right" to grieve a Policy does not give the Union license to take no steps until it deems otherwise; which would necessarily lead to an inequitable result.

[88] The Employer argued that it suffered a detrimental reliance in this case as a result of the Union's acquiescence with the Policy for 15 years through the Employer foregoing opportunities to bring the contractual language in line with its practices during previous rounds of bargaining.

[89] The Employer submits that its Policy is reasonable and that it exercised its managerial responsibilities reasonably. It further submits that in any event, the Union has failed to meet its onus to establish a violation of Collective Agreement and in the result, the grievance should be dismissed.

Union Reply

[90] The Union disputes the Employer's interpretation of "detrimental reliance" and further disputes that it was established in this case.

[91] The Union argued that the Grievance when filed four years earlier (at the time of the Hearing), it made it very clear to the Employer that it was **now** aware of the Policy and that it disagreed with the Policy and that it believed the Policy breached the Collective Agreement as its terms were not supported by the language of the Collective Agreement.

[92] Once informed of the Union's position, the Employer chose to keep the language in the Collective Agreement [Article 23.05(b)(iii)] as is through two subsequent collective agreements.

[93] As such, it cannot now say that it detrimentally relied on the Union's acquiescence, as it did not.

[94] Secondly, the Union submits that what the Employer is asking the Board to do is to, in effect, import its Policy as an implied terms of the Collective Agreement which would constitute an alteration or amendment to the Collective Agreement, something which the Board is without jurisdiction to do under Article 37.22 of the Collective Agreement.

VII. ANALYSIS AND DECISION

[95] In determining the merits of this Grievance, I have carefully considered the documentary evidence entered as Exhibits and the *viva voce* evidence before the Board in these proceedings, in addition to the helpful submissions and authorities presented by counsel.

Article 23.05(b)(iii)

[96] It is not disputed that unlike the expressly negotiated types of leave with detailed accrual, utilization and carryover provisions set out in the Collective Agreement, such as those contained in Article 18 [Vacation Leave], the parties negotiated a discretionary entitlement under Article 23 [Overtime] providing for an employee-initiated option to request that earned overtime hours be banked as "lieu time" at the Employer's discretion as an alternative to having the overtime paid out when granted, without any limit or cap expressed therein.

[97] However, since lieu time must be granted or authorized by the Employer before it can be "banked" in any event, I am persuaded that Article 23.05(b)(iii) operates to allow the Employer to control how much of the overtime requested or required by the Employer will be permitted to be "banked" as lieu time each time it is requested by an employee in any event. This flexible approach to the accumulation of lieu time allows for and requires individual assessments of operational needs both at the time the lieu time is granted and at the time the lieu time is utilized. The provision is as follows:

> *In lieu of (i) and (ii) above, the Employer **may** agree to grant equivalent leave with pay at the appropriate rate to be taken at a time mutually agreeable to the Employer and the employee. Any unused equivalent leave may be carried over into the next fiscal year.*
> [emphasis added by the Board]

[98] The parties are at odds as to who triggers the carryover provision of unused lieu time then in the "bank" under this clause of the Collective Agreement. The Employer interprets the carryover provision as a component of its discretion to allow, deny or limit carryover of lieu time. The Union asserts that since the Employer has already authorized the creation of the "Lieu Bank" each time an employee requested that it be granted, the carryover election must be in the hands of the employee.

[99] The Board is of the view that Article 23.05(b)(iii) is plain and unambiguous. Using the plain meaning of the words negotiated by the parties therein, it has concluded that it is the employee who triggers the request that overtime hours worked to be banked as lieu time, which may or may not be granted by the Employer. If and once granted, the Board is persuaded that it is also the employee who triggers the utilization request for some/all of the lieu time then banked which, again, may or may not be granted by the Employer if the time off requested by the employee is not agreeable to the Employer, acting reasonably. This makes labour relations sense and makes operational sense since the Employer is tasked with assessing the time off request at the time it has been proffered given the circumstances in play at that time. I am persuaded that this interpretation reflects the clear intentions of parties as reflected with the words used in Article 23.05(b)(iii) to which they agreed.

[100] Turning now to the carryover of any unused equivalent leave in the Lieu Bank, I am not persuaded that the parties intended the Employer's interpretation that the use of the word "may" be carried over into the next fiscal year operates at the Employer's discretion. All of the time in the "Lieu Bank" has already been approved by the Employer in the first instance. Unused time in the Lieu Bank can accrue two ways: no mutual agreement to utilize the time as proposed by the employee or even if suggested by the Employer was achieved or the employee elects to carryover the Lieu Bank into the next fiscal year. To hold otherwise, in my view, would lead to an absurd result. If the Employer retained the discretion to refuse to allow any carryover, then what? In contrast, the carryover contemplated under this clause is that **any unused** Lieu Time may be carried over into the next fiscal year, allowing another opportunity to find a mutually agreeable time to **use** the banked lieu time.

[101] Beyond the plain meaning of the words used, I have also considered the purpose of the employee's election not to take the overtime worked at the Employer's request or requirement as "pay" but, as Mr. Parle persuasively testified, to recapture the personal time "lost" by assisting the Employer in meeting its operational needs "through the back end". What the employee has

elected is time away from work and not money. It is that context which the Board finds that carryover provisions in Article 23.05(b)(iii) intended to respond to the reality that operational needs may not allow an employee to utilize the approved bank time at the time requested but will allow for "any unused" banked Lieu Time to be carried over into the next fiscal year, providing a further opportunity to utilize the banked time. In the Board's view, that is the essence of a "lieu time bank" as negotiated by the parties under the Collective Agreement, a contractual term.

HRM 0609

[102] Turning now to the HRM Lieu Time itself, Mr. Chapman testified that its Policy was revised in October 2006, at which time the Employer imposed the 75-hour cap on lieu time hours, in partial reliance on its discretionary authority under Article 23.05(b)(iii) in doing so, including its carryover provisions, dealt with above.

[103] Mr. Chapman also testified that the Policy is not inconsistent with the Collective Agreement and was created as part of its Managerial Responsibilities under Article 7 of the Collective Agreement. The Lieu Time Policy "Guidelines" provide, in part:

> 11. Employees may not accumulate more than 75 hours of lieu time per fiscal year (80 hours for employees who work eight hour days). This applies to all Departments, Boards and Agencies. This maximum is not a rolling refillable bank.
>
> 12. If the employee has reached their maximum lieu time for the fiscal year, the employee will automatically be compensated for the overtime as a cash payment on his/her pay cheque.
>
> 13. A maximum of 37.5 hours (40 hours for individuals who work eight hour days) lieu time may be carried over from one fiscal year to the next. If lieu hours are carried over, they count as part of the new fiscal year's limit. For example, if an employee carries over 37.5 hours, he/she may only earn a maximum of 37.5 lieu hours in that new fiscal year.
>
> 14. GNWT employees may only carry over 37.5 hours. All hours in excess of this limit shall be paid out.
>
> 17. Managers have the option of setting lower maximums for lieu time within their divisions. However, it then becomes the manager's responsibility to monitor any accumulation under the 75 hours maximum.
> [Exhibit 3-24]

[104] Mr. Chapman was unable to explain how the GNWT determined the calculation of the 75-hour cap, but concluded that two weeks of lieu time was reasonable in his view. He thought perhaps some HR policy people may have undertaken some form of analysis to determine the CAP, but he could not say more.

[105] He did explain that the intent of the policy was to make the Lieu Time Policy consistent with the provisions of other forms of leave in terms of caps and limits on carryover. However, on cross-examination he did not dispute that many such provisions are in fact contractual, having been negotiated by the parties under the Collective Agreement.

[106] While 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, it is not an unlimited authority:

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

[107] I am also mindful that Article 5.03 provides that: *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.*

[108] In determining the outcome of the Grievance, I have also considered one of the General Leave provisions under Article 17.06*: An employee's leave request shall not be denied based solely on the Employer incurring additional overtime costs.*

[109] Mr. Chapman testified that the Policy was also necessary to limit the excessive accumulation of lieu time, particularly arising from the need to back-fill positions amongst shift workers. His example suggested that in granting an employee 8 hours of Lieu Time in such circumstances could translate into the replacement employee accruing 12 hours of overtime in doing so.

[110] The circumstances before the Board are not unlike those set out in *Aventis Pasteur Ltd,* supra, a policy grievance relating to the banking of lieu time for overtime hours worked. At issue in that case was whether overtime accumulation in the "bank" could be restricted to a total of 37.5 hours during the calendar year and whether "usage" could be restricted to two days at a time. The Union took the position that the employer had inappropriately fettered its discretion in prohibiting replenishment of the bank and in limiting the use of lieu time off to two days at a time. At para. 8, the arbitrator concluded that the fundamental issue is to determine what the parties have agreed to in this particular collective agreement and found that the parties had dealt with the issue of the overtime bank and usage in a detailed way, and then addressed the cap imposed (one week per year), at para. 9, as follows:

> *As Mr. Phelps emphasized, there is a management rights provision in this agreement and paragraph one of Article 14.05 provides for 'the agreement of the supervisor' with respect to the accumulation of lieu time. However, the parties have specifically addressed the matter of the limit on accumulation, providing in the third paragraph of Article 14.05 that 'Lieu time banked will not exceed one week'.* ***This provision does not, as Mr. Evans emphasized, qualify the one week on an annual basis. I agree with him that the concept of banking is inherently suggestive of deposits and withdrawals. In my view, the most logical interpretation to be given to this specific provision is that there is an agreement that an employee cannot have more that 37.5 hours in his or her bank at a time.*** *The Employer clearly does have discretion with respect to allowing overtime accumulation, however in imposing a ceiling on the accumulation of 37.5 hours on an annual basis,* ***it is my view that there is a violation of the specific agreement that the ceiling is one week on an ongoing basis….****The Employer's discretion, however, does not allow it to impose a rule establishing a ceiling that is inconsistent with the ceiling it has negotiated.*
> *[emphasis added by the Board].*

[111] Similarly, I can only conclude that the Employer's carryover provisions as set out in its Policy is inconsistent with the carryover provisions set out in Article 23.05(b)(iii).

[112] The Union's position is that unless it is contractually negotiated, it is unreasonable for an Employer to fetter its discretion because doing so compromises the discretionary element by removing the "choice", and relied upon the decision in *Toronto District School Board,* supra, which considered a Miscellaneous Leave clause. In that case the Union had argued that if the Employer has a discretion to grant or deny leave, then the Employer is obliged to exercise that discretion reasonably based on the relevant factors of the day, which would include operational requirements and the individual's circumstances, and concluded, "…*but an Employer can't predetermine that outcome with a blanket policy unless it is negotiated." a*nd at para. 71, the arbitrator concluded that in exercising a discretionary power:

> *What is required is a consideration of all the circumstances of the specific case. The proper exercise of discretionary power, which is what the Employer's right to request a certificate for less than three day absence is, requires that the Employer consider all the relevant fact and exclude irrelevant considerations. Focusing on a single fact is akin to applying a blanket policy as it allows the Employer to ignore relevant information.*

And at para. 73, the arbitrator cited a decision by Arbitrator Saltman in his decision at para. 36, as follows:

> *…management cannot fetter, or disable itself from exercising, its discretion by promulgating a fixed policy in order to achieve consistency. It is the essence of a discretionary power that it be exercised in individual circumstances. Nevertheless, it would seem that management fettered its discretion by promulgating the August 22, 2000 policy.*

[113] I concur. I have already found that the Employer's Policy on carryover of Lieu Time was inconsistent with Article 23.05(b)(iii). I am also persuaded that the imposition of the CAP effectively prohibited a manager's exercise of discretion in granting lieu time at all, which is also inconsistent with the provisions of Article 23.05(b)(iii).

[114] Subject only to an analysis of the Employer's assertion that the Union is estopped from insisting on its strict rights under the Collective Agreement, I have concluded that the Union has satisfied its onus of establishing a breach of Article 23.05(b)(iii) of the Collective Agreement.

Estoppel

[115] The Employer asserts that the Union is estopped from relying on Article 23.05.(b)(iii) to enforce its strict legal rights under the Collective Agreement as a result of its ongoing acquiescence with the Employer's Lieu Time Policy.

[116] In my view, the evidence before the Board is insufficient to establish an estoppel in these circumstances for the reasons which follow.

[117] In the first place, no cogent or persuasive evidence was presented to the Board if or when the Employer met its obligation under Article 9.01 of the Collective Agreement, which provides:

> *The Employer shall provide the Union with a copy of all Personnel Directives or other such instruments within thirty (30) days of issuance.*

[118] I note that the Employer's obligation is an imperative obligation, obliging the Employer to reasonably demonstrate that its obligation was in fact performed. Rather, the Board was informed that the Policy was "notorious" and that it was posted on the GNWT website. However, I am not persuaded that an allegation of "constructive knowledge", without an evidentiary foundation is sufficient evidence to meet the Employer's burden under the Collective Agreement.

[119] I accept Ms. Thistle's evidence of her efforts to determine if and/or when the Union received copies of the Policy, and based upon those records that she was able to access, that detail remained elusive.

[120] Based upon the evidence before the Board, I am persuaded that at some point in 2017 the Union became directly and actually aware of the CAP set out in the Policy and its carryover provisions, triggering the Grievance before the Board. The Board accepts the only evidence before it to establish the timeframe of the Union's actual knowledge of the Policy.

[121] That said, I agree with the Employer that a mere indefinite "reservation" of a right to grieve an Employer Policy is not indefinitely sustainable in other circumstances. Here, however, I have concluded that at the very least the Employer has failed to establish an essential component of a successful estoppel argument, that being detrimental reliance in these circumstances.

DECISION

[122] For all of these reasons, the Grievance is allowed. The Board declares that the Employer's Lieu Time Policy is inconsistent with the terms of Article 23.05 of the Collective Agreement on its face having construed the plain meaning of the words bargained by the parties. If it were otherwise, the Board has also concluded that in imposing the CAP, the carryover restrictions and creating a non-refillable Lieu Time bank, the Employer has unreasonably fettered the discretion bargained by the parties under Article 23.05(b)(iii).

[123] The Board, having declared the parties' rights and obligations herein, has concluded that its ruling will have effect from its date of issuance and thereafter, and will remain seized of its jurisdiction without temporal limits should the parties require assistance or clarification in the implementation of the Award.

Dated this 30th day of November, 2022.

J. Alexander-Smith
Arbitrator