

IN THE MATTER OF AN ARBITRATION

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

(the “Union”)

AND

HAY RIVER HEALTH & SOCIAL SERVICES AUTHORITY

(the “Employer”)

Re: Policy Grievance-Educational Allowance

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

Janice Maslanko - Counsel
Anne Marie Thistle - Advisor

Appearing for The Employer:

Marie-Pier Leduc - Counsel
Jennifer Croucher - Manager, Human Resources

A virtual hearing was held on August 24, 2022.

AWARD

INTRODUCTION

The Union claims in this grievance that the Employer violated article 57 of the current collective agreement for the period April 1, 2016 to March 31, 2021 by failing to pay a monthly educational allowance to Registered Nurses (“RN’s”) with a Baccalaureate Degree (“BSN”) who were members of the bargaining unit at the time of the signing of the collective agreement on January 14, 2020. The Employer maintains that the grievance should be dismissed because the educational allowance provision was only intended to apply to RN’s with a BSN degree who were members of the bargaining unit at the time the previous collective agreement was signed on January 21, 2013 for the period of April 1, 2012 to March 31, 2016.

The Union elected not to call any witnesses. The Employer called Jennifer Croucher, the Manager of Human Resources, for the purpose of providing bargaining history evidence.

SUMMARY OF THE EVIDENCE:

Ms. Croucher began her employment as a Human Resources Officer in 2007. She was promoted to her current position as the Director of Human Resources in February 2012.

Ms. Croucher led the negotiations for the 2012 round of bargaining for the Employer. She introduced into evidence the Employer’s Proposal for the April 1, 2012-March 31, 2016 collective agreement, as well as her bargaining notes.

Ms. Croucher first noted that there was an Educational Allowance provision in the April 1, 2009 to March 31, 2012 collective agreement which reads as follows:

ARTICLE 57: EDUCATIONAL ALLOWANCES

57.01 A Registered Nurse with special preparation of not less than six (6) months approved by the Employer and who is employed in the special service for which has utilized the course within four (4) years prior to employment.

57.02 An employee may not qualify for more than one payment under categories in Article Articles 57.03 through 57.05.

57.03 A Registered Nurse who has successfully completed the CHA/CNA course Nursing Unit Administration and/or Midwifery course and is employed in a Capacity utilizing the course(s) will be paid an additional twenty-five (\$25.00) per month.

57.04 An employee who has passed an accredited one year university course in his/her field approved by the Hospital and is employed in a capacity utilizing this course will receive an additional fifty dollars (\$50.00) per month.

57.05 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month.

The first bargaining meeting for the 2012-2016 collective agreement took place on July 23, 2012 at 9:00 a.m. Ms. Croucher testified the Employer proposed that the entire article 57 Educational Allowance provision be deleted as the Hay River Job Evaluation Plan did not distinguish between a Diploma and a Baccalaureate degree. Ms. Croucher's notes indicate that the Union would not agree to this proposal as it would be viewed by the RN membership as a concession to the Employer.

The next bargaining session took place the following day on July 24, 2012 at 9:00 a.m. Ms. Croucher's notes indicate that the Employer proposed to eliminate all the provisions from articles 57.01 to 57.04 from the 2012 collective agreement but to "*grandfather 57.05 date of ratification*". Ms. Croucher testified that to "*grandfather*" meant that the RN's on strength at the time of ratification of the collective agreement would retain

their entitlement to the \$50 per month. Any RN with a BSN hired after the date of ratification would not receive the educational allowance.

The next bargaining meeting took place on July 24, 2012 at 11:00 a.m. Ms. Croucher's notes indicate the Union agreed in principle to the Employer's proposal: *"57.05-in agreement to grandfather & remove the rest of the following"*.

At a further bargaining session held on October 2, 2012 the Union proposed that the grandfathering of article 57.05 begin at the time of "signing" instead of "ratification" of the collective agreement. Ms. Croucher's notes of this proposal state: *57.01 "Date of Signing b/c nobody remembers date of ratification"*. Ms. Croucher's notes from a further bargaining session that same day indicate that the Employer agreed with the change: *"57.01-Okay w/day of signing"*.

On October 4, 2012, the parties reached a tentative collective agreement for the period from April 1, 2012 to March 31, 2016. The Minutes of Settlement in regards to the new article 57 reads:

Grandfathering of existing employees benefit and NEW Numbering of this Article

57.01 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month **provided the employee was a member of the Bargaining Unit upon date of signing of this Collective Agreement.**

The above provision, numbered 57.01, was incorporated into the April 1, 2012 to March 31, 2016 collective agreement. It was signed on January 21, 2013 and reads as follows:

ARTICLE 57: EDUCATIONAL ALLOWANCES

57.01 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month provided the employee was a member of the Bargaining Unit upon date of signing of this Collective Agreement.

Ms. Croucher confirmed that RN's hired after the date of signing of the 2012-2016 collective agreement (January 21, 2013) did not receive the \$50.00 per month allowance. Only those RN's holding a BSN degree and were members of the bargaining unit on January 21, 2013 continued to receive the \$50 per month through to the end of the collective agreement on March 31, 2016.

The Union tabled its proposal for the April 1, 2016 to March 31, 2021 collective agreement on June 6, 2017. There was no reference or changes proposed to the previous Education Allowance provision, article 57.01. The Employer replied shortly thereafter with its proposal for the same collective agreement and, similar to the Union, there were no references or changes proposed to article 57.01.

Article 57.01, according to Ms. Crouther, was carried over without any discussion at the bargaining table into the April 1, 2016 to March 31, 2021 collective agreement. In her words the parties "*...did not talk about it*".

The April 1, 2016 to March 31, 2021 collective agreement was signed on January 14, 2020. Article 57.01 is identical in wording to the April 1, 2012 to March 31, 2016 provision. It reads as follows:

ARTICLE 57: EDUCATIONAL ALLOWANCES

57.01 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month provided the employee was a member of the Bargaining Unit upon date of signing of this Collective Agreement.

It was Ms. Croucher's understanding at the time of the signing of the 2016-2020 collective agreement, when article 57.01 was renewed word-for-word from the 2012-2016 collective agreement, that only those nurses on strength as at January 21, 2013 would receive the \$50 per month allowance. In her view, no other RN's besides the group of grandfathered RN's from 2013 were entitled to the \$50 per month. The RN's who were on strength at the time of the signing of the 2016-2021 collective, for example, were not entitled to the \$50 per month as they were not part of the grandfathered group of RN's who were members of the bargaining unit on January 21, 2013.

SUBMISSIONS OF THE UNION

The Union maintains that the language in article 57.01 is clear and unambiguous. Those RN's who held a BSN degree and were members of the bargaining unit on the date the collective agreement was signed on January 14, 2020 are entitled to the \$50.00 per month. There is no indication in article 57.01, or elsewhere in the 2016-2021 collective agreement, that the \$50 per month was intended to apply only to the members of the bargaining unit as of the date the previous 2012-2016 collective agreement was signed. The Union maintains that the previous 2012-2016 collective agreement is irrelevant for purposes of determining their rights under the current 2016-2021 collective agreement.

The Union noted that the testimony of Ms. Croucher was that neither party tabled any new proposals with respect to article 57.01 at the negotiations for the 2016-2020 collective agreement. Article 57.01 in the 2016-2021 collective agreement is identical to the wording of the 2012-2016 provision. Those RN's with a BSN who were bargaining unit members on January 14, 2020 are therefore entitled to the \$50.00 per month. The Union submits to find otherwise would amount to an alteration of the collective agreement by the arbitrator, which is expressly prohibited under article 37.16.

The Union underlines that the negotiations for the 2016-2021 collective agreement involved experienced parties who had negotiated several collective agreements in the past.

The Union requests a Direction that that the Employer pay the \$50.00 per month to the affected members who held a BSN degree and were members of the bargaining unit on January 14, 2020.

SUBMISSIONS OF THE EMPLOYER

The Employer submits at the outset that the onus lies with the Union in a policy grievance to adduce evidence in support of their interpretation of the collective agreement. In this case, the Employer notes that the Union failed to provide any evidence to support their interpretation of article 57.01. By contrast, the Employer, through the testimony of Ms. Croucher, demonstrated through her bargaining notes and the Minutes of Settlement that the mutual intention of the parties at the time of negotiations of the 2012-2016 collective agreement was to grandfather the \$50 per month educational

allowance being paid under article 57.05 in the previous 2009-2012 collective agreement into a new article 57.01.

The uncontradicted evidence from Ms. Croucher supports a finding that the clear intention of the parties behind the grandfathering of the article 57 provision was to “freeze” a certain group of employees at the specified time of January 21, 2013 who would continue to receive the *status quo* payment of \$50 per month (as set out in the previous 2009-2012 collective agreement). In essence, the grandfathering agreement was to protect a benefit to that specific group of RN employees with a BSN as at the date of signing of the 2012-2016 collective agreement (January 21, 2013), but not the other bargaining unit RN members with degrees hired afterwards.

The evidence does not support a finding that there was an agreement to carry forward with a further grandfathering of article 57.01 for the 2016-2021 collective agreement. Indeed, there is no reference in any of Ms. Croucher’s bargaining table notes from the 2016 round of negotiations to article 57.01. There is also no evidence of proposals or discussions at the bargaining table during the 2016-2020 round of negotiations concerning article 57.01.

In the absence of such bargaining notes or discussions on article 57.01, the Employer submits that the proper interpretation to draw from the evidence is that the parties did not turn their minds to a continuation of the payment of \$50 per month during their negotiations for the 2016-2021 collective agreement. The only understanding reached between the parties with respect to article 57.01 was from the negotiations for the 2012-2016 collective agreement; that is only those grandfathered RN’s with the BSN

degree at the time of signing of the 2012-2016 collective agreement on January 21, 2013 would receive the \$50 per month allowance.

In the alternative, the Employer claims that the Union is estopped from enforcing article 57.01 in the current collective agreement. The Union at the bargaining table in 2012 made it clear that they were negotiating a benefit only for those RN's who were members of the bargaining unit as at January 21, 2013 under a collective agreement which would expire in 2016. The Employer, to its detriment relied on the Union's representation that it would not be seeking an educational allowance for those RN's hired after January 21, 2013. The Union is therefore estopped from claiming a similar benefit under the 2016-2021 collective agreement given its representations to the contrary at the time of the 2012-2016 negotiations.

The Employer concluded its submission by suggesting that an adverse inference be drawn for the Union's failure to call witnesses who were at the bargaining table to support their position. Those witnesses were readily available and able to testify on the negotiations that took place with respect to article 57.01 leading up to the 2012-2016 collective agreement.

The Employer filed in support the following decisions: *Dufferin-Peel Catholic District School Board and CUPE, Local 2026 (2026-11-10), Re*, 2017 CarswellOnt 4322; *University of Manitoba and UMFA, Re*, 2021 CarswellMan 242; *LIUNA, Local 183 and Ontario Excavac Inc., Re*, 2019 CarswellOnt 3042; *Zehrmart Limited v. United Food and Commercial Workers Union, Local 1977*, 2009 CanLII 25971; *Canadian Office and Professional Employees Union, Local 343 v Unifor*, 2018 CanLII 7584; Brown & Beatty,

Canada Labour Arbitration, 5th edition, section 2:47: *The Basic Elements of Estoppel*.

Brown & Beatty, *Canada Labour Arbitration*, 5th edition, section 3:86: *Failure to Call a Witness*

ANALYSIS

The principles with respect to contract interpretation are well-known and were referred to in the *Dufferin-Peel Catholic District School Board* decision cited by the Employer. The Arbitrator in that case noted the Supreme Court of Canada decision in *Sattva Capital Corporation v. Creston Moly Corporation*, [2014] 2 S.C.R. 633. In that decision, the Supreme Court endorsed the modern approach to contract interpretation, including the relevance and use of extrinsic evidence:

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement ... The goal of examining such evidence is to deepen a decisionmaker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ...

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract ..., that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. ...

A similar view was expressed by the Arbitrator in *Labourers' International Union of North America*:

13 It is common ground that the tests established in arbitral jurisprudence followed in this jurisdiction permit the introduction of extrinsic evidence to expose a latent ambiguity, to assist in the resolution of a latent or patent ambiguity, or to set out the surrounding circumstances that might also assist in one's appreciation of the nature, extent and particulars of the parties' bargain. It is also settled that extrinsic evidence is not to be used to add to, vary, contradict, or take away from the parties' agreement and that evidence of

one party's subjective intent or aspiration is of no utility absent its recognition and acceptance by the other party.

The Union submits that the meaning of article 57.01, as set out in the 2016-2021 collective agreement, is unambiguous and that the RN's with BSN degrees and were bargaining unit members as at January 14, 2020 should receive the \$50 per month educational allowance. The Employer submits that the testimony and evidence introduced through Ms. Croucher supports a finding that a latent ambiguity does exist in article 57.01 and that it is important to consider the "surrounding circumstances" in order to determine the intentions of the parties with respect to the application of article 57.01.

The facts adduced by the Employer indicate that the bargain struck at the time of the negotiations for the 2012-2016 collective agreement was that only the specific group of RN's with BSN degrees who were members of the bargaining unit at the time of signing of the collective agreement would receive the \$50 per month education allowance. The Employer points to the fact that the parties agreed that this was a "grandfathered" provision from the previous 2009-2012 collective agreement. The reference to "grandfathered", the Employer points out, is found not only in Ms. Croucher's bargaining notes for the 2012-2016 collective agreement but also in the Minutes of Settlement for that collective agreement.

Ms. Croucher's understanding at the 2016 round of negotiations for the 2016-2021 collective agreement was that the word "grandfathered" as it was used in the 2012-2016 bargaining meetings indicated to her that the educational allowance benefit was meant to apply only to those RN's with BSN degrees and were members of the bargaining unit at

the time of the signing of the 2012-2016 collective agreement. It would cease on expiry of the 2012-2016 collective agreement on March 31, 2016.

There were never any discussion or proposals, however, during the 2016-2021 negotiations that the carry-over of article 57.01 from the 2012-2016 collective agreement was meant to be restricted to the “grandfathered” RN’s who were bargaining unit members at the time the 2012-2016 collective agreement was signed. Indeed, there were never any discussion at all about the term “grandfathering” in the 2020 round of negotiations.

As noted above, the evidence of one party’s subjective intent cannot be accepted absent *“it’s recognition and acceptance by the other party”*. The extrinsic evidence led by the Employer’s Ms. Croucher in my view is of no assistance in interpreting the rights and obligations found in article 57.01 of the 2016-2021 collective agreement. Ms. Croucher’s understanding of the term “grandfathering” of article 57.01 was never advanced at the crucial time of the negotiation and subsequent signing of the 2016-2021 collective agreement.

In the absence of such evidence, I am unable to accept the Employer’s submission that the earlier reference to “grandfathering” as part of the parties’ proposals and agreement for the 2012-2016 collective agreement provides any interpretative assistance to ascertaining the meaning of article 57.01 in the 2016-2021 collective agreement.

The Employer submits in the alternative that the evidence supports a finding of estoppel. This equitable doctrine is set out as follows in *Brown and Beatty, Canadian Labour Arbitration* at para 2:47:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

In this case, there is no evidence, as noted, that the Employer represented during the critical round of negotiations for the 2016-2021 collective agreement that the education allowance was to be restricted to only those who RN's with a BSN degree who were members of the bargaining unit at the time of signing of the 2012-2016 collective agreement. Nor was there ever any mutual understanding to that effect during the negotiations that preceded the signing of the 2016-2021 collective agreement on January 14, 2020. Accordingly, in the absence of such promise or assurance by the union at the time of negotiations of the 2016-2021 collective agreement, there is no basis for invoking the doctrine of estoppel.

In summary, the words of article 57.01 in the current collective agreement in force between the parties are clear and unambiguous. There is no provision in the current collective agreement which contradicts the right of RN's with a BSN degree to a \$50 per month allowance if they were members of the bargaining unit as at the time of the signing of the 2016-2021 collective agreement on January 14, 2020. Those RN's with BSN degrees who were hired after that date, it is also clear from article 57.01, are not entitled to the educational allowance benefits.

CONCLUSION

The grievance is allowed. I direct that those members of the bargaining unit with a BSN degree at the time of the signing of the 2016-2021 collective agreement on January 14, 2020 are entitled to the \$50 per month allowance. I shall reserve jurisdiction should any issues arise in the implementation of this award.



JOHN M. MOREAU QC
August 30, 2022