

**IN THE MATTER OF A BOARD OF ARBITRATION ESTABLISHED PURSUANT
TO THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT**

BETWEEN:

THE PARTICIPATING HOSPITALS

(THE “HOSPITALS”)

- AND -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE “UNION”)

CENTRAL ISSUES

BOARD OF ARBITRATION

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**HEARINGS WERE HELD IN TORONTO ON JUNE 25 AND 26, 2014, AND THE
BOARD MET IN EXECUTIVE SESSIONS ON AUGUST 1 AND SEPTEMBER 8, 2014**

A W A R D

1. This Board of Arbitration was constituted pursuant to the *Hospital Labour Disputes Arbitration Act* (“*HLDA*”) to settle central issues between the Participating Hospitals (the “Hospitals”) and OPSEU with respect to individual collective agreements for approximately 50 hospitals and 60 bargaining units.

2. The parties have agreed on a two year term, from April 1, 2014 until March 31, 2016. All matters agreed upon by the parties shall be incorporated into the new collective agreements.

3. Bargaining on a centralized basis has occurred between a number of unions and the Hospitals since 1976, and nine of the OPSEU Central Agreements have been resolved by arbitration since that time. As there are numerous arbitration awards describing the unions in this sector, the composition of the various bargaining units, including the OPSEU bargaining units, and the bargaining history and arbitration awards with respect to OPSEU, ONA, CUPE and SEIU (the four unions that bargain centrally with the various participating hospitals), it is unnecessary to set out or describe these matters here.

4. With respect to the current round of bargaining, on September 29, 2013, the Hospitals and CUPE reached a settlement of their central issues. On December 6, 2013, the Hospitals and SEIU settled the central issues for their renewal collective agreements. The CUPE settlement included a four year term, from September 29,

2013 to September 28, 2017, and the SEIU settlement covered a slightly longer period, from October 11, 2013 to December 31, 2017, a period of 51 months. Both CUPE and SEIU agreements in each contract year provided for both wages increases of 0.7% and lump sum payments of 0.7%. In the CUPE settlement, there was also a \$25.00 per year increase in coverage for chiropractor services as of September 29, 2014, a \$25.00 per year increase for physiotherapy beginning September 29, 2015, small improvements to standby premiums effective as of different dates, and increased footwear allowances, and in the SEIU settlement, there was also increases in chiropractic and physiotherapy benefits, standby premiums, footwear allowances, and vacation entitlement after 12 and 20 years of service.

5. As can be seen, the CUPE and SEIU agreements largely mirrored each other, and were identical with respect to wages increases and lump sum payments (except insofar as the different anniversary dates led to different effective dates of the increases or lump sum payments). This pattern between CUPE and SEIU has generally been followed over many rounds of bargaining and many collective agreements.

6. The Hospitals and ONA were unable to negotiate a renewal collective agreement, and their disputes were referred to arbitration. On April 30, 2014, a Board of Arbitration chaired by William Kaplan issued an Award (the "ONA Award") determining the matters in dispute. As the parties had not agreed otherwise, the collective agreement awarded was for a two year term, from April 1, 2014 to March 31, 2016, the same term as the agreements before us. That Board of Arbitration did not

follow the CUPE/SEIU pattern, awarding instead wages increases of 1.4% and 1.4% in each contract year. That decision stated:

. . . It is noteworthy that in their last round these parties agreed to two years of zeros with modest lump sums followed by an ATB of 2.75% in the third year. The current economic climate has also, for obvious reasons, been carefully taken into account.

It is fair to say that the parties were quite far apart in their view as to the appropriate resolution of the different issues in dispute. On the key issue of compensation, the participating hospitals offered 0.4% in each of the two years, while the Association sought an ATB of 2% a year, together with numerous other economic improvements. To be sure, there is an established settlement pattern in this sector – the CUPE and SEIU central settlements – albeit not for units of exclusively professional employees like this one. In the case of both CUPE and the SEIU, and unlike the situation with ONA, there have been *no* years of zero compensation increases (lumps only). The recent CUPE and SEIU central settlements provide for compensation increases of 1.4% a year made up equally of ATB and lump sums (and, to be sure, a longer term). It is noteworthy that in these other central settlements, unlike this award, improvements were made to insured benefits, premiums, vacations and allowances. This award, which only modestly increases compensation, must be considered and placed in that context and in the context of the bargaining history of the parties more generally about which considerable evidence was led.

The awarded across-the-board (“ATB”) wages increases of 1.4% in each year were the only improvements or changes awarded by the Board of Arbitration in that Award, as all other proposed changes by both parties were dismissed.

7. The OPSEU central agreements are now the only central ones remaining outstanding. With respect to wages increases, OPSEU argues that ONA and OPSEU have over many years and rounds of bargaining or awards consistently been considered to be primary comparators for each other, just as CUPE and SEIU have for each other. OPSEU submits that this Board ought therefore to look to the ONA Award as setting the pattern for wages increases in this round. Nevertheless, the Union proposes not

only ATB increases of 1.4% and 1.4% in each year, as were granted in the ONA Award, but also further increases of 3.3% in all steps of the grid for RT's (Registered Technologists), in order to reestablish start rate parity with RN's, and the introduction of a 25 year wage step for RT's at 1.8% above the current maximum.

8. The Hospitals submit that the appropriate wages increases are 0.4% ATB and 0.4% lump sums in each of the contract years. The Hospitals also request lower start rates for new employees in all classifications that are 3.0% below the current start rates. They argue that the voluntary settlements reached in this round by CUPE and SEIU ought to be persuasive, as they best indicate the appropriate increases that the parties would have agreed to themselves, and therefore ought to be replicated by this Board. They assert that this Board should not to give as much weight to the ONA Award because it was imposed and not negotiated, and as well, because in this sector ONA has not consistently been considered to be the primary comparator for OPSEU. Further, submit the Hospitals, ONA is not in fact the best comparator for OPSEU because there is such significant overlap between the OPSEU bargaining units and the CUPE and SEIU bargaining units, and unlike ONA, OPSEU bargaining units are not composed of exclusively professional employees. The Hospitals assert (amongst other arguments) that there is continued weakness in the Ontario economy since the CUPE and SEIU settlements, hospital funding is frozen at zero percent and government policy is that there is no money available to fund compensation increases, the collective agreements in issue here will only be for two years (unlike the four year agreements agreed to by CUPE and SEIU) and the shorter term justifies lower increases, and the ONA Award was a "clear outlier".

9. Taking into account the statutory factors or criteria and all the relevant circumstances, for a number of reasons we conclude that the appropriate wages increases shall be the same as were awarded in the ONA Award, 1.4% ATB in each of the two contract years. First, bargaining history strongly indicates that over a significant period and many rounds of bargaining, both the parties and arbitration boards have considered OPSEU and ONA to be the operative comparator for wages for each other. Second, although ONA is composed almost entirely of professional employees and there are large numbers of non-professional employees in the OPSEU units, it remains true today that the majority of employees in the OPSEU bargaining units are professionals. For this reason, ONA continues to be the most appropriate comparator for purposes of wages in the hospitals sector. Third, apart from the lengthy history of OPSEU and ONA being treated as the most relevant comparators, in the preceding round the parties both considered ONA to be the primary comparator. Through a mediation process, ONA had already agreed to increases of 0%, 0%, and 2.75%, as well as lump sums in years one and two, and OPSEU then subsequently agreed in mediation to the same result. The parties having agreed in the immediately preceding round that ONA is the main comparator for OPSEU, we see little reason to depart from their conclusion in this round. Fourth, we are not persuaded that the economy in the province has sufficiently deteriorated (if at all) since the CUPE and SEIU settlements, or since the ONA Award, such that lesser increases than were awarded to ONA are appropriate here. Fifth, while the agreements here will only be for two years, so too are the ONA agreements decided by the ONA Award. Sixth, we do not consider the ONA Award in all the circumstances to be inappropriate or a “clear

outlier”, given the circumstances and the rationale expressed in the ONA Award. Much of the same analysis engaged in by that Board is applicable here, as the circumstances here are similar insofar as OPSEU also received no increases in the first two years of the prior agreements.

10. For all these reasons, accordingly, effective April 1, 2014 there shall be an ATB wages increase of 1.4%, and a further ATB increase of 1.4%, effective April 1, 2015.

11. With respect to the two other wages improvements requested by OPSEU, an additional ATB increase of 3.3% for RT’s (to achieve RT/RN start rate parity) and the introduction of a 25 wage step for RT’s, we decline to award either proposal. Having concluded that it is appropriate to apply the approach taken by the ONA Award to the OPSEU bargaining units, we note that no other wages improvements or compensation improvements were awarded in the ONA Award. In light of that Award, and the state of the economy and government funding in the sector, we are not persuaded that either of these two other wage requests should be granted.

12. We also reject the Hospitals’ request for lower start rates for all new employees. New start rates were not a component of the ONA Award, and granting them here would have the effect over time of diluting the impact of the wages increases awarded herein when compared to the increases ONA received. As well, the impact of such a change appears to be greater than was estimated by the Hospitals, and we are not disposed to award such a dramatic change.

13. OPSEU seeks changes to a number of provisions with respect to what it characterizes as job security issues. While valid arguments can be made in support of all these proposals, the approach taken by the ONA Board of Arbitration was to focus on the comparatively large wages increases it was awarding but otherwise leave the status quo intact, an approach we consider for the most part to be appropriate here. Given the costs of the wages increases we have awarded and the economy and funding realities, changes to existing provisions that may carry significant or unknown potential costs implications, or that might change the manner in which the Hospitals can currently manage their operations, are not warranted in this round, and accordingly, we decline to award any of the requested job security changes.

14. The benefits improvements requested by the Union with respect to increased premium pay, vision care coverage and vacations are rejected, again because of the costs of granting such requests, in the context of the wages increases awarded and the economic reality for the Hospitals at this time. The Hospitals' request for a change in the entitlement basis for vacation is also rejected, as we are not satisfied that any such change is merited.

15. With respect to other changes requested by the Hospitals, there shall be no changes except as outlined below. The Hospitals' proposal for changes to the sick leave scheme is so comprehensive and transformational that it could fairly be characterized as a "breakthrough" item, and we are not prepared to award it or to tinker with individual aspects of the current system, such as the percentage paid by employees for coverage.

16. We decline to remove the existing rights of grievors to challenge at arbitration the denial of LTD, as we are not satisfied there is demonstrated need or justification for changing the current system to leave the ultimate decisions in this respect solely in the hands of the insurer.

17. The Hospitals ask that the percentages in lieu be reduced for all part time employees, and for an additional reduction for former full time employees who retire early and are rehired to work part time, on the basis that the rehired employees currently receive benefits partially funded by the Hospitals and ought not, therefore, to also receive the full percentage in lieu paid to other part time employees. With respect to this latter request, the Hospitals made a good theoretical argument for why the percentage in lieu payable to such employees should be reduced. However, we are not disposed to make any changes in this Award to the percentages in lieu, consistent with the general approach we have taken.

18. Finally, both parties made submissions with respect to the scheduling of short shifts. In their Briefs and during submissions, it became apparent that both parties at least agree that changes that would improve the exchange of information and meaningful discussion of issues surrounding any proposed scheduling changes would be beneficial. Effective the date of this Award, Article 29.02 is accordingly amended to read:

Article 29.02 Innovative/Flexible Scheduling

Where the Hospital and the Union agree, arrangements regarding Innovative/Flexible Scheduling, including shifts of less than 7.5 hours, but not less than 4 hours, may be entered into between the parties on a local level.

Whenever a shift schedule of less than 7.5 hours but not less than 4 hours is proposed by either party, the following will apply:

- The party proposing the change will provide the details of its proposal, including the rationale, in writing, to the other party.
- The proposal must be department/area/employee specific.
- Unless they agree otherwise, the parties will then schedule a meeting to discuss the proposal.
- If the other party does not agree to the proposal, it must provide its reasons in writing.

The model agreement with respect to such scheduling arrangements is set out below:

[followed by the existing Model Agreement]

19. We remain seized for any matters arising from the referral to arbitration and this Award, including any matters inadvertently missed.

Dated this at Toronto, this 18th day of September, 2014



Chair: Robert J. Herman

Dissent attached.

Employer Nominee: Rob Little

Dissent attached.

Union Nominee: Terry Moore

Dissent of Robert Little

I respectfully dissent on the basis that the Hospitals made strong arguments that the current economic climate, including the state of Hospital funding, warranted a lower across-the-board wage increase and/or other cost offsets.

“Robert Little”

Robert Little

Union Nominee Dissent, Participating Hospitals and OPSEU, September 15, 2014

I should first of all underline my agreement with the Chair's finding that ONA is the appropriate comparator for OPSEU in this part of the hospital sector. Despite strong bargaining history and arbitral support for this conclusion, the Hospitals have been anything but consistent on this important question, preferring instead to argue for the comparator that most closely supports their desired outcome in any given round.

Appropriate comparator determinations guide all bargaining in the Hospital sector and opportunistic "comparator shopping" from one round to the next adds an additional element of uncertainty and reduces the likelihood of voluntary settlements. I hope this award will encourage the Hospitals to finally treat this issue as a settled matter.

Having found ONA to be the appropriate comparator, the Chair goes on to award the ONA "Kaplan round" across-the-board wage increases but no other improvements, monetary or otherwise, even in situations where OPSEU was simply trying to catch-up to previously bargained or awarded ONA standards and/or sector-wide norms.

This represents a lost opportunity because, as the Union argued, catch-up improvements are easier for Hospitals to absorb at a time when the industry standards are fixed, not moving targets.

In my view, there is simply no justification for not bringing OPSEU vacation, shift premium and insured benefit levels into line with the previously existing ONA standards.

But my biggest problem with the Chair's award is the failure to bring OPSEU's job security language into line with both ONA and sector-wide standards. The Union provided compelling evidence of ongoing job security threats that clearly demonstrated the need for improved Contracting Out, Work of the Bargaining Unit, Notice of Elimination of Position, and Full Time Position Protection language.

As justification for not awarding these improvements, the Chair offers this explanation:

"(W)hile valid argument can be made in support of all these proposals, the approach taken by

the ONA Board of Arbitration was to focus on the comparatively large wage increases it was awarding but otherwise leave the status quo intact, an approach we consider for the most part to be appropriate here."

It is important to note that all the outstanding issues argued before the ONA Board were compensation or monetary issues. There were no language issues for the Kaplan Board to reject based on the size of the wage award, only other monetary items.

More importantly, however, ONA, as well as the other hospital central bargaining groups, already have identical or comparable job security protections to those OPSEU now seeks to incorporate in its Agreement. And, in contrast to the circumstances in which ONA and others were awarded their current language, OPSEU provided this Board with concrete example after concrete example of real current job security problems and consequences being experienced by its members across the province. None of the facts asserted by the Union was convincingly refuted by the Employer. Nor was there any evidence tabled by the Employer indicating that identical or comparable language in other central agreements had caused them serious difficulties or harm.

In addition to numerous current job security threats, the Union also presented persuasive evidence of on-going provincial government budgetary, administrative and legislative pressure on the Local Health Integration Networks (LHINs) and hospital administrators to outsource or otherwise reduce the costs of providing many of the services provided by members of these bargaining units.

If the job of an arbitration board is to, in large measure, replicate what the likely outcome of free collective bargaining would have been, then surely this Board ought to have given more weight to the job security threat level to OPSEU members as well as the differences in job security provisions in the ONA (and other central agreements) designed to address those threats.

The examples of job security threats provided by the Union were real, not theoretical, and that reality caused the Union to place the achievement of more balanced job security protections as its highest non-wage goal in this round of bargaining. The evidence also showed that the ONA Agreement (and indeed all other Hospital Central Agreements), already have the same or comparable provisions OPSEU is seeking for its own membership.

Surely the application of "replication theory" involves more than the rote application of the appropriate comparator's latest award or settlement. ONA is not experiencing a comparable job security threat but, in any event, already has the job security language OPSEU is seeking to achieve.

Given the above circumstances, I have no trouble agreeing with Union counsel's assertion that its members' job security experience and concern over future threats would have caused the Union to bargain to impasse in order to achieve standards already enshrined in other Central Hospital Agreements.

Would the Hospitals have been able to successfully resist conceding the same or comparable language that covers all other hospital bargaining units? We obviously cannot be certain of this but I think it's reasonable to suggest that at least some movement on the Union's job security package would have been conceded.

The clear evidence of ongoing job security threats together with the fact that the ONA award for the same term was limited to across-the-board wages increases, created an opportunity for the Chair to bring OPSEU's language more into line with hospital industry norms. In my opinion, the Chair's unwillingness to do so represents a failure to replicate the likely outcome under free collective bargaining conditions.

All of the above begs a very perplexing question - "If not now, when?" Periods dominated by very tight fiscal policy are also periods of rising job security risk as employers scramble for ways and means to reduce budgets. Employer expectations for historically low compensation increases are clearly being recognized but what about employee concerns regarding rising job security risk? This is precisely the type of bargaining environment in which you'd expect to see improvements to substandard job security language assuming, as is certainly the case here, that demonstrated need is present.

In all likelihood, the fiscal situation will improve down the road and hospital unions will once again be in a position to press for real increases in purchasing power. If OPSEU hasn't achieved improvements to its job security language by then, the prospects for catching up to ONA standards, while keeping pace on monetary issues at the same time, will be far more challenging than they are today.

For all of the above reasons, I believe OPSEU's job security language ought to have been brought into line with ONA Central standards in this round.

The awarding of new procedural language in Article 29.02 with respect to Innovative/Flexible Scheduling Agreements deserves a couple of comments.

First of all, this new language should not be seen as a step toward achievement of the Hospitals' proposal to increase their authority to introduce "short shifts". In fact, the Hospitals' evidence of alleged Union inflexibility in considering Local Hospital flexible scheduling practice proposals was completely and totally refuted by the Union.

However, the contradictory nature of the evidence about the parties' on-the-ground Flexible/Innovative Scheduling experience (Article 29.02) lead the Board to conclude that a few new formal procedures for bargaining such proposals might improve both party's understanding of the factual context in which such discussions take place and thereby minimize misunderstandings.

If the Hospitals want the Union to give Flexible Scheduling proposals more in depth consideration they would be well advised to treat discussions under this clause in a manner similar to regular bargaining. In place of informal hallway conversations, formal written notice should be given to the OPSEU Staff Representative assigned to the affected Local, in addition to representatives of the Local Union.

Finally, I should take this opportunity to indicate my support for the Chair's rejection of a large number of Hospital concessionary proposals, including major changes to the current sick leave system, part time payment-in-lieu of benefits, and the introduction of a new lower start rate for new hires.

In my view, the Hospitals failed to demonstrate any need for these significant alterations to the

current agreement. In addition, the Union tabled rebuttal evidence demonstrating that the Hospitals' costing data on these items was seriously flawed, underestimating the actual cost of the proposed cuts to the bargaining unit and the resulting savings to the Hospitals.

All of which is respectfully submitted.

“Terry Moore”

Terry Moore, Union Nominee, September 15, 2014