

**IN THE MATTER OF AN ARBITRATION
UNDER THE COLLECTIVE AGREEMENT
AND THE ONTARIO *LABOUR RELATIONS ACT***

BETWEEN:

MACKENZIE HEALTH

(“the Employer”)

AND

ONTARIO PUBLIC SERVICE EMPLOYEE’S UNION

(“the Union”)

**RE: Tamil Mooka
2017-0374-0005, 2018-0374-0003**

AWARD

Arbitrator:	Barry Stephens
For the Union:	Jane Letton, Ryder Wright Blair & Holmes
For the Employer:	Robert Hickman, Counsel

Heard in Richmond Hill, Ontario on September 25, 2019

AWARD

[1] At the hearing on September 25, 2019 the grievor failed to produce all documents that this Board had previously ordered him to produce in accordance with orders issued to the parties on February 4 and February 11, 2019. In addition, the grievor insisted at the hearing on September 25, 2019 that he would not proceed with the hearing unless he was permitted to testify first.

[2] The union counsel sought direction from OPSEU on September 25 with respect to the grievor's request. I was advised by union counsel that the union was not agreeable to proceeding on the basis of the grievor's request. OPSEU took the position that the normal order of proceeding should be followed, i.e. that the employer should proceed first to present the evidence supporting just cause for discipline. After being advised of the union's position on the matter, the grievor maintained his refusal to participate in a hearing that followed the normative legal procedure. In addition, as noted above, the grievor had failed to produce all of the ordered documentation. Given both of these facts, the hearing could not proceed on September 25.

[3] Despite the delay and cost associated with the grievor's position and continued failure to fully comply with the disclosure order, I declined to dismiss the grievance on September 25, and gave the grievor an opportunity to reconsider. As a result, after the September 25 hearing I issued the following interim order to the parties:

The case before me involves a written warning and termination imposed on the grievor.

At the hearing on September 25, 2019 the grievor raised a request that he be permitted to present his evidence first, contrary to the standard order of proceeding in disciplinary cases, and despite contrary advice from union counsel.

Union counsel sought instructions from her client and advised me that OPSEU's position was that the case should proceed in the normal fashion, i.e. with the employer having the burden of proof and being required to proceed first to present evidence to support allegations of just cause for discipline against the grievor.

The grievor was advised of the union's decision. He indicated that he was not prepared to proceed with the hearing in accordance with the union's direction, i.e. in accordance with normal arbitral procedure in disciplinary cases. Even if I thought it appropriate for the union's case to proceed first, and I do not, it would not be proper to entertain such a request unless it came from one of the parties to the dispute.

The hearing was adjourned and the grievor was given time to seek advice on the issue.

One of the roles of an arbitrator is to ensure proper procedure and efficient use of scheduled hearing dates. For this reason, I am ordering that the union has fourteen days from today's date in order to confirm that the grievor will participate in the hearing in accordance with the normal order of procedure. Unless I have written confirmation signed by the grievor by the end of business hours on Wednesday, October 8, 2019 declaring that the grievor will appear and participate in the hearing on the basis outlined above, I will deem the grievances before me to have been abandoned.

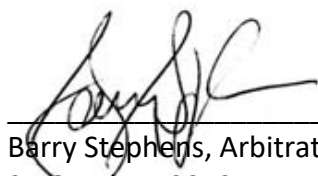
I note that the September 25 order went on to direct the grievor again to produce all of the relevant documents, making it the third time disclosure was ordered.

[4] I have been advised by union counsel that the union has not been able to secure the grievor's agreement to follow normative hearing procedure, nor has the union been able to secure the grievor's cooperation with respect to the production of all of the relevant documents that were the subject of the three orders. The union requested the grievor's cooperation and he responded on October 7 as follows:

"I wish to proceed with the above grievances against my Employer Mackenzie Health and I understand and agree that is a group grievance discipline and dismissal case, will proceed to present my case first before the employer present their case."

[5] Arbitrators have a legislated mandate to resolve disputes between unions and employers under collective agreements. The grievor is not a party to the collective agreement. The union and the employer are the only parties. The union, quite reasonably, declined to agree with the grievor's unusual and ill-advised procedural request. There is no question in my mind that the union's position is correct and represents the grievor's best interests. Obviously the grievor does not agree. It is impossible to continue with a fair hearing in circumstances where the grievor declines to cooperate with proper hearing procedure, and also fails to comply fully with orders of the Board.

[6] Unfortunately, there has not been a positive response to the October 8 deadline set out in the September 25 order. Given all of the above, the grievances are deemed to have been abandoned and are dismissed.



Barry Stephens, Arbitrator
25 October, 2019