

IN THE MATTER OF AN ARBITRATION brought pursuant to the Ontario *Labour Relations Act*,
1995 as amended
(Grievances #100-231-150 and #100-232-304 - Buchanan)

BETWEEN:

HEADWATERS HEALTH CARE CENTRE
(the "Employer")

- and -

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1
(the "Union")

PRELIMINARY AWARD

Sole Arbitrator:

Marilyn A. Nairn

Hearing held:
(by videoconference)

October 15, 2020

APPEARANCES

For the Union:

Aleisha Stevens

For the Employer:

Robert W. Little

PRELIMINARY AWARD

1. SEIU, Local 1 (the "Union") referred two grievances for determination. The first challenges the decision of Headwaters Health Care Centre (the "Employer") to impose a letter of warning on the Grievor, Alex Buchanan. The second alleges that the Employer failed to properly award a position to the Grievor. The Employer raised a preliminary objection with respect to the second grievance. It asserts that the position sought was a job assignment, such that placement in the role was subject only to the proper exercise of the Employer's discretion. The Union asserts that it was a vacancy to be awarded pursuant to the job posting provisions in the collective agreement. The parties agree that the test for reviewing the Employer's actions would be different depending on the proper characterization of this activity. This decision deals with that preliminary issue.

2. The Grievor is an Advanced Care Paramedic ("ACP"). The role at issue is that of Relief Paramedic Superintendent ("RPS").

3. The ACP performs the duties of a Primary Care Paramedic ("PCP") as well as additional duties providing a higher level of care that require greater skill and training. These paramedics work in four platoons. Each platoon also has a Superintendent who holds ACP qualifications. The Employer characterized the Superintendent as a lead hand. There is no dispute that Superintendents are members of the bargaining unit.

4. On April 23, 2018 the Employer posted a document called an "Interest Posting" for a job titled Relief Paramedic Superintendent, whose function was "to provide relief on an as-needed basis". The document had a "posting number" and a closing date and set out the required qualifications for the role. The "job summary" advised that the Superintendent in the Paramedic Service is responsible for assisting with the day-to-day operations of the department. The RPS role is to provide relief for the Superintendent when they are otherwise absent from the workplace. The Grievor applied to this Interest Posting but was not successful. Four other candidates, all ACPs, were successful.

5. The work of the Superintendent and the RPS includes work such as completing incident reports, taking sick calls, assigning staff, approving and assigning overtime, collecting shift reports, and other ancillary duties relating to stocking supplies and checking trucks. Although there was some dispute between the parties, an RPS is generally scheduled for weekend coverage when the Superintendent is absent but may also fill in during the week if a Superintendent is absent. Superintendents remain part of the emergency deployment plan, although it appears that Superintendents and RPS can respond to emergency calls and provide first responder assistance, whereas PCPs and ACPs must respond.

6. The central terms of the collective agreement provide for responsibility pay in Article 17.07 for the temporary assignment of duties of a higher paying classification outside the bargaining unit. However, there is no dispute that the work performed by Superintendents and

by the RPS is paid in accordance with a note in Schedule A of the collective agreement, which provides:

Superintendent/Lead Hand

Whenever an employee is assigned responsibility to support, lead or oversee work of an employee, and/or be assigned overall responsibility for operations within their assigned department...for a tour of duty, the employee shall be paid a premium of two dollars (\$2.00) per hour in addition to her or his regular salary and applicable premium allowance.

(emphasis in original)

7. Schedule A of the collective agreement is a wage schedule that sets out a list of job classifications with an accompanying wage grid for each classification. There is no classification of Superintendent listed in the wage schedule, nor any classification of Relief Paramedic Superintendent.

8. There was a classification of Lead Hand Housekeeper in Schedule A of the collective agreement with an attendant wage rate. There is a further note in Schedule A that states:

The Lead Hand Housekeeper position: when current incumbent leaves job, the job will revert to Housekeeper plus responsibility pay and the classification will be removed.
****June 2018 HSK Lead Hand eliminated as per CA.**

(emphasis in original)

9. In accordance with the asterisked note, since June 2018, the classification of Lead Hand Housekeeper has been eliminated from Schedule A and the role is now governed by the note. Housekeepers performing the additional responsibilities are paid the hourly premium beyond their regular salary.

10. When not performing relief duties, the RPS works as a paramedic assigned to an ambulance and is responsible for calls in the same manner as other ACPs. Superintendents and RSPs have retained their underlying classification of ACP throughout. When an employee in the Superintendent role stepped down, they carried on as a paramedic and no layoff process was engaged. Similarly, the Grievor had previously acted in the relief Superintendent role, but stepped down in 2017 due to conflicts in scheduling between the relief schedule and his preferred ACP schedule. He remained an ACP.

11. Other relevant provisions of the collective agreement, *inter alia*, provide:

11.01 Where a permanent vacancy occurs in a classification within the bargaining unit or a new position within the bargaining unit is established by the Hospital, such vacancy shall be posted...

11.02 The postings referred to in Article 11.01 shall stipulate the qualifications, classification, rate of pay...

11.03 Employees shall be selected for positions under either Article 11.01 [sic] on the basis of their ability, experience and qualifications. Where these factors are relatively equal...seniority shall govern...

...

25.02

An employee who is promoted to a higher rated classification within the bargaining unit will be placed in the range of the higher rated classification so that he shall receive no less an increase in wage rate than the equivalent of one step in the wage rate of his previous classification...

25.03

When an employee is assigned temporarily to perform duties and assume the responsibilities of a higher paying position in the bargaining unit, for a period in excess of one-half of a shift, he shall be paid the rate immediately above his current rate in the higher classification to which he was assigned...

* * *

12. It is the position of the Union that this role is properly treated as a vacancy requiring posting. It asserted that the onus was on the Employer to establish otherwise. The document posted had all of the trappings of a job posting, argued the Union. The work of the Superintendent and RPS involved a distinct body of work with distinct skills, and was filled on an indefinite basis, argued the Union. The employee performing that work, argued the Union, has been chosen to work in that position and engage those responsibilities. The rate of pay for the position is set out in the wage schedule, argued the Union, and is not paid according to the responsibility pay provisions in the collective agreement. The "assignment", argued the Union, is the act of advising an ACP that they need to come in and perform the work of an absent Superintendent. The Union argued that, in substance, Superintendent was a classification within the bargaining unit and the Employer was seeking to fill a vacant position providing relief in that classification. In reply, the Union reiterated that this work was more than just an addition of functions to a base position. It argued that the layoff language supported its argument as it allowed employees to be placed (assigned) permanently in a position.

13. The Union referred me to the decisions in *Calgary Laboratory Services and HSAA*, [2000] A.G.A.A. No. 76 (Smith); *Greater Niagara General Hospital and ONA*, [1988] 13 C.L.A.S. 26 (Thorne); and *St. Joseph's General Hospital, Elliott Lake and ONA*, [2007] O.L.A.A. No. 370 (Rose).

14. It was the position of the Employer that it was incumbent on the Union to establish that there was a vacancy in a classification so as to trigger the posting language in the collective agreement. The Employer argued that its 'posting' was, as indicated on the document, an effort to attract an expression of interest from ACPs interested in the additional duties of RPS. There is

a presumption, argued the Employer, that lead hand roles are not separate positions and do not fall within the job posting provisions unless there is clear language in the collective agreement to the contrary.

15. The Employer argued that Article 11 in the central terms of the collective agreement required there to be a vacancy in a classification in order to require a posting and that Schedule A did not include a classification for Superintendent or RPS. This is not a technicality, argued the Employer, as wage rates and other provisions in the collective agreement relate to and operate having regard to the classification system, referring to Article 25 as an example. The Employer relied on Schedule A of the collective agreement to argue that the parties had eliminated the Lead Hand Housekeeping classification and had included that role in the note, supporting the conclusion that there was no classification of Superintendent or RPS, rather an assignment of duties to ACPs pursuant to the management rights clause with a corresponding premium. The layoff provisions, argued the Employer confirm that “position” referred to in Article 11 of the collective agreement means a position to which a classification is attached. This was an assignment of work, argued the Employer, and was not subject to the job posting provisions.

16. The Employer referred me to the decisions in *Re United Automobile Workers, Local 199, and Genaire (1961) Ltd.*, (1964) 15 L.A.C. 308 (Reville); *Re Int’l Union of Electrical Workers, Local 522 and Canadian Aviation Electronics Ltd.*, (1965) 17 L.A.C. 358 (Lande); *Millhaven Fibres Limited and Int’l Union of Operating Engineers, Local 729*, unreported decision of Chair Palmer dated July 23, 1971; *Re Coca-Cola Ltd. and United Brewery Workers*, (1974) 7 L.A.C. (2d) 81 (Palmer); *Re Bundy of Canada Ltd. and United Automobile Workers, Local 1285*, (1975) 9 L.A.C. (2d) 169 (Brandt); *Re Heede International Ltd. and International Brotherhood of Boilermakers, Lodge 359*, (1977) 17 L.A.C. (2d) 429 (Weiler); *Glencore Copper Canada and Unifor Local 599*, unreported decision of Arbitrator Surdykowski dated June 19, 2014; *Unifor Local 599-T and Glencore Canada Corporation*, unreported decision of Arbitrator Rogers dated October 17, 2019; *Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500*, [1975] O.L.A.A. No. 94 (Chair Brandt); *Lettuce Serview Limited Partnership and UFCW, Local 1000A (location assignment grievance)*, [2001] O.L.A.A. No. 738 (Surdykowski); and *Sault Area Hospital v Unifor, Local 1359 (Job Posting Process Grievance)*, [2018] O.L.A.A. No. 313 (Albertyn).

* * *

17. For the following reasons I find that the Employer’s interpretation of the terms of the collective agreement must prevail. In order to trigger a job posting requirement and the ensuing assessment contemplated in Article 11 of the collective agreement, there must be a permanent vacancy in a classification or a new position within the bargaining unit. However one characterizes the role of RPS, the evidence indicates that it is not new to the bargaining unit. Any vacancy otherwise requiring posting must be a vacancy in a classification in the bargaining unit. While the parties could have agreed to create a classification of Superintendent and/or RPS, no such classification(s) is listed in Schedule A of the collective agreement.

18. The fact that there was once a Lead Hand Housekeeping classification, which classification was then eliminated from the collective agreement indicates that the parties were aware of the difference between a classification listed in Schedule A with a referable wage grid and the language found in the note to Schedule A. According to that note, Lead Hand Housekeeper is a role exercised by an employee classified as Housekeeper who is paid a premium in addition to their regular wage rate. The amount of that premium is identified in the remainder of the note which is titled Superintendent/Lead Hand.

19. That title reference is the only reference to Superintendent in Schedule A. The Employer treats a Relief Paramedic Superintendent as entitled to the same premium when they act in that relief capacity. Article 25.03 of the collective agreement, dealing with a temporary assignment to higher rated duties, cannot apply, as it presupposes that there is a wage grid referable to a higher rated classification. There is no classification of Superintendent or accompanying wage grid in the collective agreement. Payment is set out in the collective agreement as a premium payment over and above one's regular salary. That regular salary is dictated by the classification held by the employee performing the RPS work, that being, ACP.

20. Similarly, the language of Article 25.02 would not be effective if Relief Paramedic Superintendent was treated as a classification, as a promotion to a higher classification anticipates an established wage grid for that higher rated classification in order to establish the employee's new wage rate. In addition, when the Grievor resigned his earlier placement as RPS, he was not required to wait until there was an ACP vacancy in order to compete for that position. He held that classification throughout the period he also performed the RPS work.

21. The caselaw is of little specific assistance given the particular language found in this collective agreement. Article 11.01 of the collective agreement requires a posting for a permanent vacancy in a classification. Had the parties intended Superintendent and/or RPS to be a classification subject to the other terms governing classifications within the bargaining unit, including this posting requirement, they could readily have included that role in the list of classifications in Schedule A. They did not. The fact that the work is ongoing does not alter the characterization properly accorded to that work, given the clear terms of the collective agreement.

22. Whether or not there is a presumption that lead hand is an assignment of work (and I draw no conclusion in that respect), the language of this collective agreement is clear that the parties intended the role of Superintendent to be governed by the note in Schedule A and not by the classification structure preceding the note. That note expressly recognizes that the work of the Superintendent is an "assignment" of responsibility attracting the premium set out therein. I must give effect to that language. Although not expressly referred to in the collective agreement, there is no reasonable basis on which to come to a different conclusion with respect to the work of the Relief Paramedic Superintendent who performs the same duties as Superintendent but simply on a relief basis.

23. Having regard to all of the above, I hereby find that the role of RPS is not a classification or new position such that Article 11 of the collective agreement applies. Rather, the placement of employees in the RPS role is an assignment of work, subject only to the proper exercise of the Employer's discretion in making that assignment.

24. The hearing of these grievances is scheduled to continue on December 22, 2020.

Dated at Toronto, Ontario this 11th day of November, 2020.



Marilyn A. Nairn, Arbitrator.