IN THE MATTER OF AN ARBITRATION brought pursuant to the Ontario *Labour Relations Act, 1995*
(Grievance #CP13-02-0003)

BETWEEN:

CITY OF TORONTO
(the "employer")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79
(the "union")

AWARD

Arbitrator:	Marilyn A. Nairn
Hearing held:	April 2, 2015 (Toronto, Ontario)

APPEARANCES

For the union:	Douglas J. Wray
For the employer:	Cara Gibbons

AWARD

1. The issue in this grievance is whether the City of Toronto (the "employer" or the "City") must pay employees for certain time spent engaged in assessments conducted for purposes of redeployment under Article 21 of the collective agreement.

2. The matter proceeded on the basis of agreed facts. The City employed a number of dispatchers in the Traffic Management Centre of its Transportation Services Division. In late 2012 the City decided to contract-out that work. In accordance with Article 21 of the collective agreement, and by letter dated December 6, 2012, notice was provided to nine affected employees. That letter advised, *inter alia*:

> In accordance with clause 21.04(b), the City will be conducting a search for a permanent vacant position that you are qualified to perform, and that is at a wage grade equal to, higher, or up to three wage grades lower than your deleted permanent base position.
> ...
>
> To be successful in finding a suitable placement as part of the redeployment process, you are expected to:
>
> - cooperate with City staff;
> - make yourself available for meetings with City staff
> - be on time for appointments, interviews and assessments;
> - make yourself marketable and job ready;
> - provide an up-to-date resume;
> - be responsible and responsive.

3. Article 21 of the collective agreement contemplates an assessment. For purposes of this award, that can include one or more meetings for the purpose of reviewing an employee's qualifications and abilities for potential placement in a vacant position. This also includes what were referred to as "meet and greets", where an employee might meet with the manager responsible for a position identified as a possible placement and engage in a 'mutual exploration process'. The parties used the term "assessment" with respect to all of this activity.

4. The dispatchers worked twelve-hour shifts, beginning at 6a.m. or 6p.m. on a three-day on, four-day off schedule. Where the assessment was scheduled during an employee's regularly scheduled working hours, the employee was paid for that time as part of their regular work hours. Where the assessment occurred outside the employee's regularly scheduled working hours, they were not paid for that time.

5. In an e-mail dated January 31, 2013, the union raised the issue of compensation. The City confirmed that "[w]henever possible, [it] schedules employees for assessment during the regular working hours. However, when employees attend assessment during their days off, they are not compensated for overtime". The union filed this grievance taking issue with the City's failure to compensate employees "who are required to participate in assessments on off time".

6. The union could not dispute that the City may not have compensated employees in this circumstance before. The City could not dispute that the union was not aware of this treatment until the events giving rise to this grievance.

7. The relevant provisions of the collective agreement provide:

> 6.02 During the term of this agreement, the parties agree that the salaries and wages to be paid to each employee shall be in accordance with the hourly rate of pay for each job classification…
>
> …
>
> 7.01(a) Each employee shall be paid at the rate of time and one half for all time worked in excess of his/her regular scheduled work day or work week…
>
> …
>
> 7.01(d) Overtime shall normally be on a voluntary basis…
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> …
>
> 7.02(a) Each employee who has completed his/her regular day's work and who has left his/her office, assigned yard work or work location and who is called out and reports for overtime work or who is called out and reports for work on other than his/her regular work day, shall be paid…at a minimum, the equivalent of four (4) hours pay at his/her regular overtime rate…
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> …
>
> **Article 15**
> **JOB POSTINGS**
>
> 15.01(a) Whenever appointments to or promotions to a permanent position within the City are to be made or where it is expected that there is a temporary assignment…The Executive Director of Human Resources shall arrange for the permanent position and/or temporary assignment to be made known…through a Job Posting. Applicants…shall be considered on the basis of any or all of the following factors: seniority, education, training and work experience, ability and appraisal of past performance.
>
> …
>
> **Assessments**
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> 15.05(a) The Executive Director of Human Resources and the Division Head concerned will decide jointly on the need for an examination(s) for the purpose of determining qualified candidates…Should passing an exam be required to qualify for a particular…position...it will be conducted in a manner that will provide a fair assessment of those candidates being assessed…
>
> …
>
> **Scheduling of Examinations**
>
> 15.16 Whenever possible, examinations will be held during working hours. The Division Head will grant leave of absence with pay to those employees in

the Division who have made application for and have been accepted for admission to such examinations. For employees subject to shift work, every effort will be made by the Division Head to reschedule the employees so that the employees will not be required to work a shift immediately before or after an examination.

...

Article 21
EMPLOYMENT SECURITY AND REDEPLOYMENT

21.01 The City may place in other positions any permanent employee(s) who will be displaced and may be laid off by reason of:

...
(b) the contracting out of any work now performed by employees;
...

Notice of Redeployment and Layoff

21.02 ...

(d) The City will provide employee(s) with no less than thirty (30) calendar days of written notice of layoff.

...

Joint Redeployment Committee

21.03
(a) A Joint Redeployment Committee shall be established to discuss the placement of permanent employees who received notice under clause 21.02(d).

...

Employee Placement (Matching)

21.04
(a) An employee who has received notice of layoff may be provided with the option to accept a voluntary separation package, if offered by the City, prior to being placed in a vacant permanent position under this Article.

(b)

(i) A permanent employee who has received notice [of layoff] shall be placed by the City in an available vacant permanent position which the employee is qualified to perform. The permanent placement shall be higher, equal to or up to three (3) wage grades below the employee's base wage grade.
(ii) In the event there are two (2) or more employees who can perform the work, the employee with the most seniority shall be placed in the position....
(iii) The City will assess the employee's qualifications and ability to perform the required work of the permanent position for which the employee is being considered.

(iv) The job posting provisions of Article 15 do not apply to placements under this Article.

(v) If the City determines that no permanent vacancy exists that the employee is qualified to perform, the employee shall proceed to Article 35.

...

Training

21.07 ...if the City identifies a permanent position into which the affected employees may be placed, and the City determines such placement may require up to a maximum of one (1) month training for the employee to be able to perform the work, the City shall provide the training, at its expense, that it considers necessary. To the extent that it is practical to do so, training will be provided during the employee's regular working hours.

...

Article 35
LAYOFF AND RECALL

...

Notice of Layoff – Permanent Employees

35.07 (a) A permanent employee who has been identified for layoff, and who has not received notice of layoff under Article 21, shall receive no less that fifteen (15) calendar days written notice of layoff.

...

35.08 ...a permanent employee who has received a notice of layoff in accordance with clause 35.07(a) or has not been placed in a vacancy under Article 21 shall elect...one of the following options...

Summary positions of the parties

8. It was the position of the union that the assessment was part of the redeployment process under Article 21 of the collective agreement. Further, it argued that the redeployment process was mandatory. This distinguished the process from a job posting scenario, argued the union, where an employee's participation was voluntary and done at their initiation by virtue of having applied for the posting. Given that the redeployment process was mandatory, argued the union, time spent in the assessment was time "worked" within the meaning of Articles 7.01(a) and 7.02(a) of the collective agreement. There was also a non-rebuttable presumption created, argued the union, by the fact that employees engaged in an assessment during regular working hours were paid for that time. The employer could not, argued the union, credibly argue that this was not work when it paid most employees for engaging in the assessment.

9. The union argued that Article 6 of the collective agreement required that employees be paid the wages set out for their classification. Articles 7.01(a) and 7.02(a) provided for either

overtime pay or minimum call-back pay should an employee be required to attend work outside their regularly scheduled hours. Article 21 set out the redeployment process and was specifically distinguished from the job posting provisions in Article 15, argued the union, by virtue of the language in Article 21.04(b)(iv) of the collective agreement. The lay-off and recall provisions in Article 35 of the collective agreement were noted.

10. When an employer makes claim on an employee's time, argued the union, the employee is entitled to be paid for that time. So, for example, noted the union, in the *Steinberg Inc.* case, *infra,* where employees could not attend an employer video presentation outside working hours, they were shown the video during work time and were paid. The issue was whether the time constituted "work", argued the union, and the cases relied on supported that conclusion. Further, it argued, there was a presumption that payment was to be made unless the collective agreement said otherwise. Nothing in this collective agreement spoke expressly to any limit on payment for time spent in assessments, argued the union.

11. The union referred me to and I have reviewed: *Re Allied Chemical Canada, Ltd. and United Automobile Workers, Local 89,* (1975) 8 L.A.C. (2d) 26 (O'Shea); *Steinberg Inc. v. United Food and Commercial Workers Union, Local 486,* (1985) 20 L.A.C. (3d) 289 (Foisy); *Canadian Airlines International Ltd. v. Canadian Union of Public Employees (Airline Division),* (1993) 38 L.A.C. (4th) 160 (Burkett); *St. Paul's Hospital and Hospital Employees' Union,* [1996] B.C.C.A.A.A. No. 454 (Munroe); and *Insurance Corp. of British Columbia v. Office and Professional Employees' International Union, Local 378,* (2002) 106 L.A.C. (4th) 97 (Hall).

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12. It was the position of the employer that this was not "work" and that it was no different from a regular job posting assessment. It distinguished *Allied Chemical, Steinberg Inc., Canadian Airlines*, and the *Insurance Corp of B.C.* cases, *supra*, on the basis that those cases involved circumstances that were a normal part of an employee's duties. It distinguished the *St. Paul's* case, *supra,* on the basis that the employee in that case was required in a substantial way to accommodate the employer's schedule. In this case, argued the employer, whenever possible, the assessment was scheduled during working hours.

13. Not only was this not work, argued the employer, there was nothing in Article 21 or the rest of the collective agreement providing for payment in these circumstances. Nor was there any language regulating the scheduling of the assessments, noted the employer.

14. The employer argued that Article 21.04(b)(iv) of the collective agreement did not make the whole of Article 15 inapplicable to these circumstances. The parties contemplated this issue in Article 15.16 of the collective agreement, argued the employer, noting that where examinations were scheduled during working hours, a paid leave of absence was expressly provided for, and not recognition of paid work time.

15. The employer relied on the *Toronto Public Library Board* case, *infra*, where employees participating in job posting interviews outside of regular working hours were not compensated, even though employees attending within regular working hours were compensated. In *Wexford,*

infra, it was found that the employer was not required to compensate employees, argued the employer, in circumstances where employees otherwise faced layoffs similarly to these dispatchers. While participation in the assessment and redeployment process was expected of employees, an employee could always choose not to participate, argued the employer, and the process was therefore not compulsory.

16. The employer referred me to and I have reviewed: *Toronto Civic Employees Union, Local 416 v. Toronto Public Library Board,* (2008) 172 L.A.C. (4th) 435 (Shime); and *The Wexford Inc. and Canadian Union of Public Employees, Local 3791*, unreported decision of Arbitrator Albertyn dated April 25, 2001.

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17. In reply, the union argued that the characterization of the activity did not change just because it was done outside of regular working hours. It remained 'work'. It reiterated the presumption that one is paid for work unless the collective agreement says otherwise. Specific collective agreement language was therefore not required, argued the union. The issue was not what happened when an assessment was made under Article 15 of the collective agreement, argued the union. Nor did it make sense to read Article 21.04(b)(iv) as excluding only part of Article 15, argued the union. Article 15, it argued, spoke to a voluntary process. In this case, the employer's action in contracting out the work triggered the employer's obligation to place these employees in other positions - a very different context from a job competition process, argued the union.

18. The arbitrator in the *Toronto Public Library Board* case, *supra*, was not referred to the decision in *St. Paul, supra*, noted the union. In any event, that case involved a posting where the employee volunteered to engage in the process, argued the union. There was no suggestion that an employee scheduled for an assessment outside of working hours could refuse, noted the union. They were expected to attend when scheduled for an assessment, a situation that was hardly voluntary, argued the union. Further, noted the union, the shared expectation was that the employee was to participate in the process and a failure to do so could give rise to disciplinary consequences, argued the union.

19. The decision in *Wexford, supra,* was irrelevant, argued the union, as it involved the payment for training costs, not pay for time spent undertaking the training. It did not involve an issue as to whether or not taking the training constituted work, argued the union.

DECISION

20. A review of the arbitration decisions cited reflects two related and basic propositions. First, time "at work" can include time spent on activities other than those included in an employee's job description and those not directly related to production. See *Steinberg Inc., supra*, at paragraph 28. Second, there is a presumption that, when an employer exercises its right to require an employee's attendance, time 'at work' will be compensated. As noted by Arbitrator Burkett in *Canadian Airlines, supra,* at paragraph 7:

> ...It would be unusual for a collective agreement to require employees to attend at work for whatever reason without pay. Indeed, there are a number of awards in which it has been found that payment is required under the collective agreement whenever the employer makes any demands upon an employee's time outside of her/his normal working hours.

21. That presumption in favour of compensation for time worked will apply unless rebutted by express language in the collective agreement. As stated in *Insurance Corp of British Columbia, supra,* at paragraph 27:

> ...Arbitrators have generally accepted the proposition that, where an employer makes a claim on an employee's time, the employee is entitled to compensation in the absence of some specific collective agreement provision to the contrary.

22. The decisions cited review a variety of fact situations that consider whether the claim involved "time worked" and/or whether time spent was "required" in some way by the employer.

23. So, for example, in *Re Allied Chemical Canada, supra,* when an employee was asked by the employer to remain after his shift to discuss his work record, that additional time was found to be "time worked" for purposes of the overtime provisions of the collective agreement. It was noted that had the employee refused to remain, without proper cause, he might make himself subject to a disciplinary response.

24. In *Steinberg Inc., supra*, the employer convened a video presentation followed by a wine and cheese reception. The arbitrator found, after a lengthy review of the cases, that the time spent at the video presentation was "work". In concluding that the employees were entitled to be compensated for that time, the arbitrator noted:

> 33 The fact that employees attended voluntarily or not at the meeting...is not determinant [sic]...This is clearly not a case where employees have unilaterally decided to perform unscheduled work in order to claim overtime pay.
>
> 34 The evidence is clear that management strongly encouraged employees to attend the meeting and there is no dispute that it had scheduled the meeting and authorized employees' attendance...
>
> 35 The fact that management did not take any disciplinary measure on those who did not attend is irrelevant in view of the fact that overtime work ...is voluntary...

25. It was also the case that the few employees who had not attended were directed to watch the video presentation during their regular working hours and were paid for doing so.

26. The arbitrator in *Steinberg Inc.,* distinguished those facts from the facts in *Re Cooper Tool Group*, cited at paragraph 26 of the *Steinberg Inc.* decision. In *Re Cooper Tool Group*, employees working on an incentive basis attended work early to prepare, enabling them to be more productive during normal working hours, thereby increasing their pay. It was found that that preparation was performed voluntarily even though the employer was aware of it. The overtime claim was rejected on the basis that employees could not unilaterally choose to perform work outside their scheduled hours and then claim compensation. In *Steinberg Inc.,* the arbitrator

found, at paragraph 26, that "the decision of the employees to attend the [video presentation] was far from being a unilateral decision. The meeting was planned and scheduled by the employer for its benefit".

27. The decision in *Wexford Inc., supra,* deals with a claim for the payment of courses and related costs, not the payment of time. However, the arbitrator did consider the meaning of the words "required by the Employer". He concluded that the facts reflected a voluntary process, not one required by the employer.

28. In that case, the existing Health Care Aide classification was being eliminated and employees were advised that they could upgrade their skills in order to be considered for the new job classification of Personal Support Worker. The employer provided seventeen months notice to employees in order that they would have time to engage in training. However the employer declined to pay for the training and the grievance was brought. The union argued that employees were obligated by economic necessity (the alternative being a possible lay-off) to upgrade their qualifications and thus, were "required by the employer" to take the training.

29. The collective agreement in that case provided that "[w]here employees are required by the Employer to take courses to upgrade or acquire new employment qualifications, the Employer shall pay the full costs associated with the courses". The arbitrator considered that the term "required" incorporated an imperative and was defined as synonymous with "direct, order, demand, instruct, command, claim, compel, request, need, exact" (at pages 13-14). In rejecting the union's claim, the arbitrator likened the situation to that of an employee applying for a job posting. He rejected the union's assertion that the potential loss of one's job made the training mandatory. The decision rested on the conclusion that the training was not required for the employee's job as a Health Care Aide. At pages 14-15, the arbitrator found:

> ...Only when, *within the terms of an employee's existing job*, the Employer requests, asks, commands, or compels an employee to undertake a course of study is the Employer liable to pay the full cost associated with the course. If however, (as here) an employee wants to upgrade his or her skills or qualifications in order to secure employment in a *different* job, without any request, command or compulsion by the Employer to do so, then the Employer is not liable for the costs of the upgrade tuition...
>
> The situation in this case is akin to that of an employee applying for a job posting. The employer says, if you have the requisite qualifications for the position as advertised, you will be appointed to it. Acquisition of the necessary qualifications is then the responsibility of the employee concerned, not of the employer.
>
> (emphasis in original)

30. The collective agreement language in *Wexford* was expressly distinguished from the language in the *E.B. Eddy Forest Products* case, cited at pages 12 and 15 of *Wexford, supra.* In *E.B. Eddy*, a provision very much like Article 21.07 of this collective agreement was considered, where certain training was required to be provided by the employer in a redeployment situation. However the cost of training is not the issue here.

31. *Wexford* may also be contrasted with the decision in *Insurance Corp of B.C., supra*, where it was found that time spent completing written assignments outside of regular working hours for a training program could not be characterized as voluntary where those assignments were required by the training program. Participants in the training had been selected by the employer and the collective agreement provided that the employer would provide the training.

32. The *Toronto Public Library Board* case, *supra,* involved a part-time employee who claimed compensation when he was scheduled for a job posting interview outside of his regular hours of work. The arbitrator found that there was no requirement or compulsion, express or implied by the employer, to attend. The arbitrator noted that, while the grievor had a right to apply for the position, the exercise of that right through attendance at the interview was entirely voluntary or optional. In dismissing the grievance he concluded that:

> ...the interview was not required or compelled work...entitling the grievor to compensation.

33. Those cases may be contrasted with the decision in *St. Paul's Hospital, supra*. In that case, a porter responded to a job posting for a temporary lead hand position. The interview process included both an interview and a written test, lasting two hours. It was scheduled following the conclusion of the porter's night shift. Although concluding that pay might not be warranted for all job application and interview processes, the arbitrator stated at paragraph 12:

> ...I do believe that the grievor's claim has merit. I reach that conclusion upon a cumulative consideration of the following circumstances: first, the duration of the interview process; second, the fact that the interview process included a written test; and third, in the absence of any evidence by the employer of any efforts to conduct all or any part of the interview (oral or written) during the grievor's regular working hours. It appears that in order to exercise his rights under the collective agreement, the grievor was required in a very substantial way to accommodate the employer's schedule...in short, there was no mutuality in the process. In the circumstances, I believe it must be found that the employee was "...requested to work in excess of the normal daily full shift hours" within the meaning of Article 23.01...

34. While that decision appears to stretch the limits, that issue of compensation for time spent in an examination process in response to a job posting process is expressly provided for in this collective agreement in Article 15.16. It specifically provides that time spent in examinations for a job posting will be considered as a leave of absence with pay, not time worked. That is consistent with the notion that such time would not otherwise be considered "work" because the employee is engaging in that activity on a voluntary basis, not at the behest of the employer.

35. The decision in *Wexford, supra*, cites other cases where time spent was found to be "work". So, in *CBC and Canadian Wire Service*, cited at page 10, the reviewing court affirmed the arbitrator's decision that attendance at a training course was work because "the workshop was directly relevant to the ... job, all employees in the unit were expected to attend...and failure to attend may negatively impact on the employer-employee relationship".

36. And in *Re London and District Association for the Mentally Retarded and OPSEU*, cited at page 11 of *Wexford, supra,* "[a]uthorized and approved conference attendance, although not

mandatory, was the basis for an award that overtime pay was due to those who attended". That decision was also referred to in *Canadian Airlines, supra.*

37. Has the employer here made a claim on the employees' time such that the usual presumption that time worked is to be compensated applies?

38. The collective agreement is clear that Article 15 does not apply to the redeployment process. There is no basis from which to conclude that, notwithstanding Article 21.04(b)(iv), Article 15.16 somehow applies to the redeployment process. Article 15.16 applies in the case of job postings. It recognizes that participation in the job posting process is voluntary, yet seeks to accommodate and compensate employees attempting to compete for a posted position. The assessments in issue are not conducted pursuant to Article 15.05(a) of the collective agreement, but rather, Article 21.04(b)(iii) of the collective agreement.

39. The fact that Article 15.16 exists but expressly does not apply to Article 21, also does not affect the presumption. To the contrary. Having expressly referred to compensation for examinations in terms of job postings, one would also expect express language in order to counteract the prevailing presumption that "work" is to be compensated in the usual course. See also paragraph 34 of the decision in *Insurance Corp of British Columbia, supra.*

40. The collective agreement is silent with respect to time spent engaged in assessments under Article 21 of the collective agreement. The usual presumption that time worked is to be compensated will prevail if the employer has made a claim on the employee's time.

41. There is no doubt that the assessment process benefits both the employer and employee. If matched, an employee will be placed in a vacant permanent position and not be subject to the layoff provisions of the collective agreement. However, it cannot be said that the employee engages in this process voluntarily in the same manner as a job posting. The redeployment process arises only because the employer has made a decision to remove work from the employee, in this case, by contracting out that work.

42. In that situation, the collective agreement requires the employer to redeploy permanent employees where they have the "qualifications and ability" to perform other available work. Article 21.04(b)(i) is clear that such an employee "*shall be placed* by the City in an available vacant permanent position". The City is entitled under Article 21.04(b)(iii) to assess the employee's qualifications and ability in order to meet its obligation to redeploy employees affected by its decision to contract out work.

43. It is also the case that the employer expects employees to make themselves available and to attend a scheduled assessment. That is clear from the letter forwarded to each affected employee. Otherwise the employer may be unable to meet its obligation under Article 21.04(b)(i) of the collective agreement. While it was not apparent that discipline would necessarily be the response, there would no doubt be a negative impact on the employee if the employer alternatively took the position that no attempt at placement was required and its obligation had been met because an employee failed to attend an assessment scheduled outside their working hours.

44. While it is the case that employees scheduled for assessment during working hours were compensated for that time, that fact alone does not necessarily lead to a conclusion that an assessment is "work". However, if it was not work, there was no basis for compensation. Regardless, the same employer obligation and expectation applies whether the assessment is conducted within or outside of regularly scheduled working hours. The employer is making a claim on employee's time in order to be able to meet its obligation under Article 21.04(b)(i) of the collective agreement to appropriately redeploy employees otherwise subject to layoff.

45. Time spent in these assessments is not at the initiation or behest of the employee. I am persuaded that the employer expectation of availability and participation in order for it to be able to meet its redeployment obligation under the collective agreement reflects a claim on the employee's time, such that time spent in an assessment constitutes "work". I find therefore, that employees scheduled for and attending an assessment for redeployment purposes, whether within or outside their normal working hours, were entitled to be compensated appropriately.

46. Having regard to that finding, this grievance is hereby allowed. I remit the matter of the appropriate compensation to the parties and remain seized should any issue arise with respect to the implementation of this award.

Dated at Toronto, Ontario this 14th day of April, 2015.

Marilyn A. Nairn, Arbitrator.