

**In an arbitration pursuant to the collective agreement**

**BETWEEN:**

**Service Employees International Union, Local 1 Canada**

**("the Union")**

**And**

**Eatonville Care Centre**

**("the Employer")**

**Re: Grievance Bargaining Unit Work, No. 100-232-107**

Matthew Wilson – Sole Arbitrator

**For the Union:**

Kathryn Carpentier  
Maria DaSilva  
Vida Saka  
Jonathan Reid

**For the Employer:**

Melissa Keeshan  
Linda Calabrese  
Selene Pancho

Hearings were held by video on March 17, 2021; January 14, February 7, 28, May 6, 2022.

## **Award**

This case is about whether the creation of two non-union positions, Behavioural Supports Ontario (“BSO”) Manager and Supervisor infringe the collective agreement.

These positions were created in April 2018 following a funding agreement between the employer and the Mississauga Halton Local Health Integration Network (“the LHIN”). As part of the funding agreement, the new positions had to satisfy specific criteria set by the LHIN. One of those stipulations is that the BSO Manager be part of the management team. There were other conditions stipulated for both positions. The employer determined that both positions ought to be excluded from the bargaining unit. The union filed this grievance, arguing that both positions were performing bargaining unit work and also were covered by the scope clause in the collective agreement.

Although the BSO Manager and Supervisor were created in 2018, an iteration of these positions had previously existed and were included in the bargaining unit up until April 2018 when the LHIN changed the funding criteria. As will become clear when I review the evidence, very little changed with respect to their day-to-day duties.

For the following reasons, I conclude that the BSO Manager and Supervisor perform bargaining unit work in violation of the collective agreement and that both positions fall within the recognition clause of the collective agreement.

### **The Evidence**

I heard evidence from Mary Selene Pancho, the BSO Manager who had previously worked as the BSO RPN prior to her layoff. Linda Calabrese, Vice President of Operations, also testified.

Ms. Pancho has worked for the employer for almost 8 years as an RPN. In 2015, she was hired into the role of BSO RPN. Her role had a broader focus on behavioural assessments in the home for residents that exhibited behavioural issues. Ms. Pancho was not responsible for working on the unit or administering medications.

Ms. Pancho worked closely with Vladana Mitrovic, the BSO PSW. Ms. Mitrovic passed away during the course of this proceeding and did not testify. There was no real dispute about the evidence that Ms. Pancho gave about Ms. Mitrovic’s duties and activities.

The BSO RPN and BSO PSW worked on the unit each day visiting the individual residents who had behavioural issues. This consumed most of their mornings. In the afternoons, the BSO RPN performed documentation duties off the unit while the BSO PSW remained on the unit to provide resident care.

Ms. Pancho estimated that about 50% of the duties of the BSO RPN were providing direct care while that estimate was higher at 75% for the BSO PSW. They generally worked 7:00 a.m. to

3:00 p.m., Monday to Friday. These hours could change depending on referrals from staff, or the needs of families and residents.

Ms. Pancho also assessed new applicants to determine how they would respond when giving medication or receiving care. She also updated care plans based on the residents' behaviour. Ms. Pancho made recommendations about care for residents to improve their behaviour and provided training for staff.

On February 14, 2018, Ms. Pancho and Ms. Mitrovic received a layoff notice that announced the elimination of their positions effective April 11, 2018. They were advised that they may exercise their bumping rights under the collective agreement. In a meeting with the employer, Ms. Pancho was told that the position was going to become a management position.

The employer posted for two management positions: BSO Manager and BSO Supervisor. Both Ms. Pancho and Ms. Mitrovic applied for the newly created management positions and were awarded the positions in March 2018 with the plan to start in that role in April 2018.

Ms. Pancho described her daily activities as the BSO Manager as still using the same referral system, checking on the residents' behaviour, and assessing and finding triggers for the behavioural issues. The BSO Manager participates in the huddles on the floor and discusses interventions being used for the residents. The BSO Manager checks to ensure the interventions are being applied and follows up with staff. She describes her main duty as speaking with the Charge Nurse to ensure that the staff are following care plans of the residents.

The BSO Manager also does home visits for new applicants to the home to assess their behaviour and help determine if the employer can accommodate the residents. Ms. Pancho testified that she and Ms. Mitrovic visited applicants in their private residences and hospitals. These visits were scheduled with the admission coordinator who checks Ms. Pancho's availability.

In terms of direct care to residents, Ms. Pancho testified that they provide care when assessing behaviour. If the staff want information about interventions, Ms. Pancho demonstrates as part of her coaching of the staff. Ms. Pancho testified that she does perform rounds, but that time is spent with residents on her active list and is behavioural focused. However, in cross-examination conducted some eleven months later, Ms. Pancho confirmed that the BSO Supervisor provided direct care to residents such as showering and assisting with feeding.

As part of the change to the BSO Manager and Supervisor, Ms. Pancho and Ms. Mitrovic participated on the hiring committee. She explained that there is an employment engagement specialist who reviews resumes, conducts phone interviews, and proposes potential candidates for hiring. Ms. Pancho and Ms. Mitrovic then participate in the interview process. For the hiring of PSWs, Ms. Pancho asks a set of pre-determined questions. Ms. Mitrovic writes notes, including noting the applicant's behaviour during the interview.

When hiring PSWs, Ms. Pancho and Ms. Mitrovic conducted the interview and then reported back to the hiring committee. She estimated that she was involved in the hiring of more than 20 PSWs. I was shown minutes of these meetings. Ms. Pancho and Ms. Mitrovic essentially gave their opinions about which applicants should be hired.

Again, by the time the cross-examination was conducted, the duties had changed. Ms. Pancho testified that her role in interviews had diminished and she was only involved when invited by the employment engagement specialist. This had occurred on three occasions in the previous three months. The BSO Supervisor no longer had a role in the interviews.

Ms. Pancho was asked about her involvement in the discipline process and she seemed to believe she was involved in issuing discipline. However, her evidence was only about being present when non-disciplinary counselling letters were issued. She explained that she was called upon by the employment engagement specialist to be present when she (the employment engagement specialist) was issuing counselling letters for attendance issues. The counselling letters were signed by the Director of Care.

Ms. Pancho testified that she had counselled employees on the floor. However, when probed for details, she explained that if she saw someone doing a task incorrectly, she would tell the person to stop. She gave one example where an employee was performing foot care and not listening to the resident's crying. Ms. Pancho told the employee to stop with the foot care.

Ms. Pancho also described one of her functions in resolving conflict between staff and the residents. She testified that if a staff member and a resident are having a conflict, she would speak with both individuals to try to resolve it. If the staff member needed to be reassigned, she would speak with the unit manager. If all agreed, the PSW (as was Ms. Pancho's example) would be assigned to a different resident.

In terms of scheduling, Ms. Pancho's role is limited to identifying the residents that need additional staff resources (e.g. one to one). Ms. Pancho explained that some residents require one-to-one care because their behaviour poses a risk to other residents or the staff. When Ms. Pancho identifies the need for one-to-one care, she advises the Assistant Director of Care. A decision is made by the Behavioural Support team about whether a one-to-one assignment is made. In one example, Ms. Pancho recommended to the treating psychiatrist that a male PSW be assigned to the resident to reduce the behavioural issues. In that instance, there were no male PSWs, so a male security guard was assigned.

Ms. Pancho testified that in her previous role as BSO RPN, she was only able to recommend that one-to-one care be implemented. In her role as BSO Manager, she is able to initiate the one-to-one care.

As part of the scheduling evidence, Ms. Pancho testified that she makes the list of residents that are scheduled to see the chaplain. At the end of the day, the chaplain meets with Ms.

Pancho to discuss the interactions with the resident and Ms. Pancho updates the residents' charts. Ms. Pancho or Ms. Mitrovic may ask the chaplain to do passive exercises with the resident. They also determine which residents can use the spiritual room.

Ms. Pancho was asked about training staff. She testified that the LHIN provides training opportunities and Ms. Pancho may invite some PSWs to attend to that training. This training might be used towards a certificate or to improve their resumes.

As part of her duties, Ms. Pancho initiated a new program titled "All About Me". Although I did not hear evidence about the program, Ms. Pancho testified that it was an example of an initiative that she took within the Home for the benefit of residents.

The BSO Manager and Supervisor complete a monthly report for the LHIN that includes both statistics and details about activities with residents. Ms. Pancho explained that these are essentially the same reports that they completed when they were in their former roles.

Ms. Pancho explained that since she has taken on the management role, she feels that staff treat her differently and that she has more authority on the floor. However, there was no evidence that she had any greater authority in the role of BSO Manager.

I also heard evidence from Linda Calabrese, Vice President of Operations. Ms. Calabrese explained the funding model, including the terms and conditions stipulated by the LHIN. She explained that the funding for the behavioural support program can only be used for salary and benefits specific to the BSO program. As of January 1, 2018, all funding for salary and benefits was to be used for the BSO Team Lead and Team Lead Assistant.

The position summaries for the BSO Manager and Supervisor identify the titles as BSO Team Lead and Team Lead Assistant. Ms. Calabrese testified that the LHIN permitted the employer to change the titles as long as "BSO" was included. The employer decided to refer to the positions as Manager and Supervisor.

## **Analysis**

The union alleges that the employer breached two provisions of the collective agreement by excluding the BSO Manager and Supervisor positions. First, it argues that the incumbents are performing duties normally performed by employees in the bargaining unit and such work directly caused the layoff (and the elimination) of the BSO RPN and PSW positions. It references Article 13.01 of the collective agreement which reads as follows:

13.01 Persons excluded from the bargaining unit shall not perform duties normally performed by employees in the bargaining unit which shall directly cause or result in the layoff or reduction in hours of work of an employee in the bargaining unit.

The employer argues that the layoff was directly caused by the elimination of the funding by the LHIN in January 2018. It emphasizes the words “directly cause or result” in the layoff. It also argues that the evidence is that the duties performed by the BSO Manager and Supervisor are not the same as the BSO RPN and PSW, although it recognizes some overlap.

The second allegation put forward by the union is that the exclusion of the two positions breached the recognition clause of the collective agreement. That provision reads as follows:

### **Article 2 – Scope and Recognition**

The Employer recognizes the Union as the sole collective bargaining agent for all its Employees in the nursing Employers (sic) in the Province of Ontario, save and except registered nurses, physiotherapists, occupational therapists, supervisors, foreman, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than twenty-two and one-half (22 ½) hours per week, and students employed during the school vacation period.

The employer argues that both positions are properly managerial. It cites the evidence with respect to hiring, counselling letters, scheduling, as well the decision-making authority on the units that impact staff.

The union referred me to the following arbitration awards: *Ontario Public Service Staff Union v. Ontario Public Service employees Union (Grievance 2017-28, New Position)*, [2018] O.L.A.A. No. 34 (Wilson); *Simcoe Muskoka District Health Unit v Ontario Nurses’ Association*, 2012 CanLII 70333 (ON LRB); *Women’s College Hospital*, 2016 CanLii 90849 (ON LRB); *Yee Hong Centre for Geriatric Care v Service Employees International Union, Local 1 Canada*, 2017 CanLII 75993 (ON LA), (Goodfellow); *Leisureworld Caregiving Centres v. Service Employees International Union, Local 1 Canada (RAI Grievance)*, [2013] O.L.A.A. No. 30 (Goodfellow); *Chartwell Kanata Retirement Residence and Service Employees International Union, Local 1 Canada*, unreported, February 23, 2015 (Randazzo); *Globeground North America Inc. v. International Assn. of Machinists and Aerospace Workers, District 140*, [2004] C.L.A.D. No. 589 (Ready).

The employer referred me to the following arbitration awards: *Cariboo Pulp and Paper Company v Unifor, Local 115*, 2014 CanLII 38240 (BC LA) (Lanyon); *Ontario Council of Regents for the Colleges of Applied Arts and Technology v. Ontario Public Service Employees Union (Lamothe Grievance)*, [2000] O.L.A.A. No. 220 (Simmons); *Canadian Union of Public Employees v. Children’s Aid Society of Ottawa- Carleton*, 2001 CanLII 21300 (ON LRB) (Chapman); *The Society of Energy Professionals, IFPTE Local 160 v Hydro Ottawa Limited*, 2021 CanLII 92484 (ON LRB); *Revera Long Term Care Inc. v Service Employees International Union, Local 1 Canada*, 2018 CanLII 3892 (ON LA) (Misra); *Re Salvation Army Grace Hospital and O.P.S.E.U., Local 425*, [1996] O.L.A.A. No. 1021 (Brown).

I will address each issue separately.

## Decision

### Bargaining unit work

It is a trite principle that external funding sources, whether it be from the LHIN or any other source, is not a basis to justify a violation of the collective agreement. The employer and the union are bound to the terms of the collective agreement. If funding is made available to the employer, but has stipulations that result in an infringement of the collective agreement, the employer's only option is to negotiate with the union.

Here we have LHIN funding being made available to the employer for assistance with residents who need behavioural supports and resources in the Home. The correspondence from the LHIN identified the positions as BSO Team Lead and Team Lead Assistant. One of the stipulations of the funding was that the BSO Team Lead be part of the management team. It is unclear what was meant by "management team". The employer decided to rename the positions as BSO Manager and Supervisor and exclude the positions from the bargaining unit.

There was no stipulation that the BSO Supervisor be part of the management team. I heard no evidence about why the employer decided to create this position as non-union other than there was a sprinkling of management-like duties. I will address this in more detail when I address the issue of whether the positions are covered by the recognition clause.

The first issue is whether the BSO Manager and Supervisor are performing duties normally performed by employees in the bargaining unit. If the answer is yes, the next issue is whether this directly caused or resulted in the layoff or reduction in the hours of work of an employee in the bargaining unit. The onus is on the union to establish both elements.

The context of the creation of the BSO Manager and Supervisor positions is important. Up until April 2018, the employer utilized an RPN and PSW to perform the behavioural services in the Home. The BSO RPN and PSW performed the daily tasks with the residents who required behavioural assessments and supports. In April, 2018, the BSO Manager and BSO Supervisor replaced the bargaining unit positions of BSO RPN and BSO PSW. The correspondence from the LHIN dated January 29, 2018 says as much in the following paragraphs:

As part of the revisions made to the BSO initiative for the long-term care sector within the Mississauga Halton LHIN, each Home will be expected to use the funding to fill and maintain the BSO Team Lead and BSO Team Lead Assistant positions as per the Full Time Equivalent ("FTE") allocation provided in Schedule A and the job descriptions provided in Schedules B and C respectively. **These positions will replace the existing BSO Registered Practical Nurse ("RPN") and BSO Personal Support Worker ("PSW") positions that are currently funded.** (emphasis added)

Thus, it is apparent that the BSO Manager and Supervisor replaced the BSO RPN and PSW.

The evidence about the duties being performed leads me to the conclusion that the BSO Manager and Supervisor are performing the same or substantially similar duties as the BSO RPN and Assistant positions, prior to their elimination.

In assessing the evidence, the employer only called the BSO Manager and Ms. Calabrese. The incumbent in the BSO Supervisor position did not testify. Sadly, the employee that filled the position in January 2018 passed away during the course of the hearing. However, I heard evidence that a new employee was hired as the BSO Supervisor. The union asks that I draw an adverse inference from the failure to call the incumbent of the BSO Supervisor position.

It is available to me to draw an adverse inference from the failure to call the incumbent. I understand that she was working in the position and otherwise available when the employer's evidence was being tendered. I was given no explanation for why she was not called as a witness. It is likely that her evidence would have been helpful to the determination of the issues in this case as she could testify to the day-to-day duties. I can only presume that her evidence would not have been helpful to the employer's case and I find it appropriate to draw an adverse inference from the failure to call the incumbent.

Even if I did not draw an adverse inference, Ms. Pancho testified that the new incumbent does not perform all of the duties as the previous incumbent. She does not participate in hiring or interviewing. She also provides direct care to residents in the way of showering and assisting residents with behavioural issues.

Ms. Pancho testified that the BSO RPN and PSW were the main supports for behavioural issues at the Home. They were responsible for the residents that were identified to have needs related to behavioural issues. This required her to work outside of her normal hours in order to assess the residents and interact with them.

Ms. Pancho testified that she spent 50% of her duties providing direct care to residents. The afternoons were generally spent charting and updating records. She also assessed new applicants to determine if the Home could accommodate their needs. She updated care plans, made recommendations about care for residents and provided training to staff.

Ms. Pancho confirmed that as the BSO RPN she was responsible for coaching the staff on how to deal with behavioural issues. She received specific training from the LHIN that was focused on resident behaviour. Ms. Pancho led training seminars about various topics for the PSWs and RPNs. As just one example, she and Ms. Mitrovic led a training session about dealing with confused residents. She also made recommendations to the Home about changes that could be made to assist the residents.

Ms. Pancho also referred residents to the Geriatric Mental Health Outreach Team ("GMHOT") in her role as BSO RPN. She was responsible for completing the Quality Management Audit Report on a quarterly basis. She also completed a monthly report for the LHIN.

As the BSO Manager, the same referral system for resident behaviour issues is used. She checks on residents' behaviour, makes assessments and tries to find the triggers for the resident behavioural issues. She works with the staff and the Charge Nurse to ensure the care plans are being followed. She confirmed that she still provides direct resident care, but mostly when assessing the behaviour of the residents. She confirmed that she still performs rounds, spending time with residents on her list. The evidence demonstrates that very little changed.

The evidence with respect to the BSO Supervisor is less clear because the current incumbent did not testify. Throughout her testimony, Ms. Pancho spoke on behalf of herself and the BSO Supervisor. Ms. Pancho testified that the BSO PSW spent approximately 75% of her time providing direct resident care. As the BSO Supervisor, she works most of the day on the various units. As the BSO PSW, she spent most of her day on the units. Ms. Pancho testified that the BSO Supervisor continues to provide direct resident care in the way of assisting with showering and other daily activities. Ms. Pancho testified that she is hoping to transition to less patient care, but there was no timeline provided. Again, very little changed.

Ms. Pancho explained that she usually works 9:30 a.m. to 5:30 p.m., but these hours are flexible depending on the behaviours of the residents. If a resident exhibits behavioural issues in the mornings, Ms. Pancho and the BSO Supervisor will come in early to see if they can observe the resident's behaviour. This might also occur in the evening or on weekends. She explained that her role was to assess the behaviours of the resident, find the appropriate intervention based on the triggers of the behaviour.

This is very similar to the following portions of the job description of the BSO RPN:

- Do progress notes and behavioural risk assessments by reviewing residents' behaviour for the past 3 months
- Goes to the unit with the BSO PSW, and does the care to resident ourselves in order to monitor the behaviour and the possible triggers. Discusses with unit staff about the triggers
- Formulating intervention and monitors if this intervention will work
- BSO team coaches direct care staff with intervention and monitors until the unit staff is able to do it alone

In terms of assessing new residents, very little has changed. As the BSO RPN and PSW, they assessed the behavioural characteristics and needs of the residents to ensure the Home could accommodate them. Ms. Pancho's evidence was consistent with the following portions of the BSO RPN job description:

For new admission:

- Reviews charts and does Behaviour risk assessment and updates the careplan as needed.

- Goes to the unit and welcomes the resident to the home.
- Does the baseline MMSE within 7 days from admission.

As the BSO Manager and Supervisor, this responsibility continued. Ms. Pancho confirmed that they meet with new residents to do a behavioural risk assessment. These duties were not assigned to another employee in the bargaining unit. The only difference that I could detect in the evidence is that the BSO Manager and Supervisor may go to the residents' home or to the hospital to meet with the family or resident.

Ms. Pancho still provides coaching to staff, updates care plans, and communicates with staff about changes in resident behaviour. She still provides a monthly report to LHIN and communicates with the GMHOT in the same manner.

Thus, based on the evidence, I find that the BSO Manager and Supervisor perform the same or substantially similar duties that were previously performed by the BSO RPN and PSW. There was no evidence that the duties of the BSO RPN and PSW ceased to be performed or were assigned to other employees. Rather, the evidence strongly supports that these duties continued under the new non-union positions of BSO Manager and Supervisor.

I also find that the assignment of duties to the BSO Manager and Supervisor directly resulted in the layoff of the BSO RPN and PSW. There is no other reasonable way to see the situation. The most compelling evidence is Ms. Pancho's testimony that she was told the reason for the layoff was that the positions were going to be management positions.

A closer examination of the transition supports this statement. Ms. Pancho and Ms. Mitrovic were told on February 14, 2018 that their positions would be eliminated effective April 11, 2018. The employer then posted and interviewed Ms. Pancho and Ms. Mitrovic for the positions of BSO Manager and Supervisor. They were offered the positions on or about March 14, 2018 to start April 2, 2018. The transition from BSO RPN and PSW to BSO Manager and Supervisor was seamless.

The employer argued that the phrase "which shall directly cause or result in the layoff or reduction in hours of work of an employee in the bargaining unit" as contained in Article 13.01 meant immediate, rather than root cause. It relied on *Cariboo Pulp and Paper Company, supra* where the arbitrator found that the layoff was a result of attrition and thus was not directly caused by the assignment of bargaining unit work to non-union employees. These are very different circumstances than before me. Here the evidence is that there was a seamless transition from the layoff in March 2018 to the rehiring of the incumbents in April 2018 with very little change in duties.

The employer emphasized that it was the change in the funding requirements that was cause of the layoff. It points to the decision of Arbitrator Brown in *Salvation Army Grace Hospital*, *supra*, where the arbitrator stated the following:

18 The decisions reviewed above reveal the ambiguity latent in words such as "cause" or "result". An event typically has more than one cause, with some causes being more proximate than others. In the broadest understanding of causation, an event is caused by any condition the absence of which would prevent the event from occurring. According to this definition, a fire is caused not only by an arsonist possessed of a match but also by the presence of combustible materials. In *Cooper Tools*, Professor Palmer adopted a broad definition of cause in concluding a layoff could be caused by an arrangement that had existed since long before employees were laid off. Arbitrators in other cases rejected this conclusion because they defined a "cause" or "result" more narrowly as meaning only a direct one, even though no such modifier appeared in the collective agreement.

I need not weigh into this debate as the facts of this case do not require it. The LHIN funding did not stipulate that both positions had to be non-union. That was a decision made by the employer. While the employer argued that the change in funding was the cause of the layoff, it was the employer that decided to create the positions as non-union and give them their managerial titles. The LHIN funding only stipulated that the BSO Team Lead (renamed by the employer as BSO Manager) be part of the management team. It is not clear what was meant by this requirement. However, the cause of the layoff was the employer's decision to transfer the duties of the BSO RPN and PSW to the newly created BSO Manager and Supervisor. While I accept the employer's argument that there is no obligation to maintain positions that are not funded, the elimination of two positions and the transfer of those duties to non-union positions infringes upon the bargaining unit work provisions of the collective agreement. It is not a tenable argument to rely on LHIN funding to transfer bargaining unit work to a non-union position in violation of the collective agreement.

The employer argued that the union had conceded the issue by not filing a grievance challenging the layoff. However, it was a stipulated fact that the union did not file a grievance at the time of the layoff because it believed the funding had been discontinued. It was not aware that the employer planned to create two non-union positions to perform the same duties. Thus, the absence of a grievance challenging the layoff has no impact on the analysis.

I have carefully reviewed the cases referred to me by the employer. They offer little assistance in interpreting Article 13.01 in light of the specific facts of this case. None of the cases referred to me involved a situation where the bargaining unit positions were eliminated and then immediately reappear as non-union positions with the incumbents hired back to fill the non-union positions with minimal change in the duties.

Article 13.01 precludes non-union employees from performing duties normally performed by employees in the bargaining unit which directly cause or result in the layoff or reduction in

hours of work of an employee in the bargaining unit. Ms. Pancho and Ms. Mitrovic were laid off as the BSO RPN and PSW, and then offered the non-union position of BSO Manager and Supervisor. The excluded positions perform the duties normally performed by the BSO RPN and PSW.

Therefore, I conclude that the employer has violated Article 13.01 of the collective agreement.

### **Recognition Clause Issue**

The issue requires a determination of whether the positions of BSO Manager and Supervisor are supervisors or above the rank of supervisor. If they are supervisors, they are excluded from the bargaining unit by virtue of the Article 2 of the collective agreement. In making their submissions, the parties made reference to s. 1(3)(b) of the *Labour Relation Act, 1995*.

The onus is on the employer to justify the exclusion from the bargaining unit (See the cases cited in *The Society of Energy Professionals, IFPTE Local 160, supra*. As was the case in *Yee Hong Centre for Geriatric Care, supra*, the onus is a heavy one as the core duties were previously performed by bargaining unit members.

The employer referred me to the decision of the Ontario Labour Relations Board in *Hydro Ottawa Limited, supra*, which relied on the seminal decision in *Corporation of the City of Thunder Bay, [1981] OLRB Rep. Aug. 1121* to articulate the objectives of the s. 1(3)(b) exclusion:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor its members will have "divided loyalties".

The employer argued that the managerial duties assigned to the BSO Manager and Supervisor were integral to why the positions ought to remain excluded from the bargaining unit. It relies on the evidence about involvement in hiring, monitoring the newly hired employees, involvement in the attendance management program, the assignment of work and the training of staff. It argues that these are inherently managerial duties that could not be performed by employees in the bargaining unit as it would give rise to a conflict of interest.

I am not persuaded by the employer's arguments. In my view, the evidence about the duties performed by the BSO Manager and Supervisor do not go as far as the employer argues.

I start by noting that the BSO Manager and Supervisor have no direct reports. They have no responsibility to hire, fire, promote, demote, discipline, or impact earnings.

Ms. Pancho testified that the BSO Supervisor no longer participates in the interview process. While there may be a plan to bring this duty back to the BSO Supervisor, no such evidence was tendered. Without this duty, there is nothing remotely close to a managerial duty being performed by the BSO Supervisor.

The involvement in the hiring process was minimal. Ms. Pancho did not make any decisions about who should be hired. Rather she (and in the early days, the BSO Supervisor) interviewed candidates who applied to be PSWs and RPNs. The evidence is that the job application is screened by the employment engagement specialist who determines if an interview is appropriate. Thus, Ms. Pancho has no discretion about who is interviewed. Ms. Pancho then asks prescribed questions and Ms. Mitrovic recorded the answers. If the candidates satisfied specific criteria, Ms. Pancho informed the hiring committee. It is not clear that she had any role beyond interviewing the candidates with prescribed questions to ensure they met the minimal qualifications.

There was no evidence that Ms. Pancho made any decision with respect to hiring or that she had any authority to make an independent decision. There was also no evidence, other than her perception that she made recommendations, that her recommendations were effective or followed. Without any decision-making authority, and only minimal participation in interviews of PSWs, it cannot be said that Ms. Pancho is performing a managerial task. Even if this is a managerial task, it is minimal and a very small component of the job.

It is so minimal that over the course of this hearing, the duty was assumed by the employment engagement specialist so that Ms. Pancho rarely performed the duty at the time of her cross-examination.

In terms of monitoring new hires, there was no evidence that Ms. Pancho conducted performance reviews or had any role in assessing their performance. The evidence was that she met with the hiring committee to update them on how new hires were doing in their first few months of employment. If asked, Ms. Pancho might review the orientation material. However, there was no evidence that this had ever occurred.

Ms. Pancho was asked about her involvement in the discipline process. Although Ms. Pancho believed she was involved in the discipline process, the evidence is that her involvement was limited to non-disciplinary counselling letters about attendance. Ms. Pancho does not sign the letter or make any determination about who receives the letter.

The letters entered into evidence were issued by the Director of Care, not Ms. Pancho or Ms. Mitrovic. They are standardized letters that identify dates of absences. In correspondence entered into evidence, the employee engagement specialist asked Ms. Pancho and Ms. Mitrovic if they were available because she needed to deliver a letter that day. It appears that Ms. Pancho's role (there was no evidence about Ms. Mitrovic's role) is to be in attendance at the

meeting, but without any authority. Thus, the evidence does not support the employer's argument that Ms. Pancho is involved in the discipline process.

Ms. Pancho was asked about her role in reassigning staff for performance related issues. She testified that if there are conflicts between staff and the resident, she tries to resolve it by speaking with individuals. If the conflict cannot be resolved, she advises the appropriate manager and discusses a solution. There was no evidence that Ms. Pancho had any authority to unilaterally reassign an individual. Rather, she could only recommend that a reassignment be made and such reassignment had no impact on the economic livelihood of the employee. It was the manager's responsibility to determine if this was appropriate.

The evidence about scheduling was minimal. Ms. Pancho testified that her role was limited to assigning one to one support for residents if they exhibited behaviours that were a risk to themselves. If the resident was assigned one to one care, Ms. Pancho recommended the PSW that would be appropriate for the resident. This could result in an extra shift being assigned to the PSW. There was no evidence that this had any material impact on employees.

In one example, Ms. Pancho recommended that a male resident be assigned a male staff person for one-to-one care. Ms. Pancho testified that since there were no male employees who can be assigned, she was instructed to contact a security company to hire a security guard to be assigned. The sole example provided was an instance where Ms. Pancho was given direction not where she gave the direction or exercised authority.

Ms. Pancho was asked to describe the difference in her role in assigning the one-to-one care. She explained that as an RPN she had to wait for managerial approval before the resident received one to one care. As the BSO Manager, she no longer had to wait for managerial approval.

While Ms. Pancho's role with respect to the assignment of one-to-one care seems to have elevated with the new role as BSO Manager, it does not reveal managerial authority. Rather, it reflects her role as the individual tasked with the responsibility of behavioural support for the residents. It could be easily assigned to a bargaining unit employee who has the knowledge and expertise in geriatric behavioural care. It does not give rise to a conflict of interest or confidential information that falls within managerial duties.

Missing from the evidence was any exercise of authority over the employees. In *The Corporation of the City of Thunder Bay* the Board explained the type of decision-making authority that is managerial in nature:

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where

numbers of people work at a common enterprise (especially in the white collar – service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced persons will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid....

Ms. Pancho has expertise and knowledge in geriatric behavioural care of the residents. There is no question that her experience is invaluable to the residents and the staff. She is consulted about techniques and relied on to identify behavioural triggers. She holds a special place on the team and has a role in coordinating the work with respect to the residents with behavioural issues. But, she holds no authority over the staff and her duties do not give rise to any conflict of interest with employees in the bargaining unit. The usual manifestations of a manager – the right to hire, fire, promote, demote, grant wage increases, discipline employees – are not present in this case.

The employer argued that Ms. Pancho exercised some discretion about which employees would receive training and such training opportunities were akin to a performance review and created opportunities for more shifts. The evidence did not support this argument. While Ms. Pancho testified that she recommended which staff received training, there was no evidence that this was a performance review or carried any formality such as a performance review. I heard no evidence that employees enjoyed a monetary benefit from the training. Again, the training opportunities were part of Ms. Pancho's role in coordinating the resources as one of the experts in behavioural issues. It was not an exercise of authority.

It is also important to recognize that most of the duties performed by Ms. Pancho and the BSO Supervisor are the same duties as the BSO RPN and PSW. A cursory review of the job descriptions shows substantial overlap.

The evidence of Ms. Pancho also supports this conclusion. On a day-to-day basis, very little changed as testified to by Ms. Pancho. The positions did not provide direct care to residents on a significant basis. Rather, the positions required coordination with the psychiatrist, coaching staff on how to deal with behavioural issues, making recommendations, training and recommending one to one care. This all continued while in the role of the BSO Manager and Supervisor.

Other than the perception that she was part of the management team, which she believed influenced whether employees accepted her viewpoint, there was no evidence that her authority changed with the managerial position. For the most part, both the BSO Manager and Supervisor performed bargaining unit duties.

The union's bargaining rights are for all employees, save and except specific positions and supervisors. I find that the BSO Manager and Supervisor do not perform duties that exclude them from the bargaining unit. They are not managers as defined by s. 1(3)(b) of the Act. Therefore, the exclusion of these positions from the bargaining unit is a violation of the collective agreement.

### **Summary**

I have determined that the positions of BSO Manager and Supervisor perform duties normally performed by employees in the bargaining unit and the assignment of such duties directly caused or resulted in the layoff of employees in the bargaining unit. I have also determined that those positions are not supervisory and should not be excluded from the bargaining unit.

Therefore, I declare that the employer has violated Articles 13.01 and 2 of the collective agreement.

The issue of remedy is referred back to the parties.

I remain seized should the parties be unable to resolve the remedial issues.

Dated in Whitby, Ontario, this 14<sup>th</sup> day of July 2022.



Matthew Wilson  
Sole Arbitrator