HOSPITAL LABOUR DISPUTES ARBITRATION ACT

IN THE MATTER OF AN ARBITRATION DEALING WITH AN INTEREST DISPUTE

BETWEEN:	PARTICIPATING NURSING HOMES
AND	SERVICE EMPLOYEES INTERNATIONAL UNION,
	LOCAL 1, CANADA
ARBITRATOR:	J.F.W. Weatherill

Mediation meetings were held in this matter at Richmond Hill on August 11, 12, 29 and 30, 2011; arbitration hearings were held on August 31 and September 1, 2011.

D. Wray, for the union.

R. Bass, for the employers.

Union representatives and committees: B. Philp, A. Przybylo, S. Eastman, R. McKenzie, P. Conlon, C. Winterburn, M. Newell, S. Tracz, M. Lindsay, C. McDowell, S. Cashmore, E. Thompson, N. Freeman, M. Mercer, P. Mallen, B. Johnston, A. Patterson, D. Green, F. Reyes, L. Cousineau, M. Colis, S. Williams, S. Osborne, G. Gray, D. Lin.

Employer representatives: R. Gingrich, T, MacDermid, M. Hoare, J. Rhinelander, N. Desjardins, J.Wood.

AWARD

The parties are agreed that I have been duly constituted as arbitrator in this matter pursuant to the *Hospital Labour Disputes Arbitration Act*. The dispute is in respect of the renewal of the collective agreements in effect between the union and the several employers, which are, for the most part at least, due to expire on September 14, 2011. The parties have held significant negotiations, and prior to the hearings set out above, have resolved a number of issues. During the mediation meetings prior to this arbitration, a number of other issues have been resolved. The issues which have been agreed to are set out in Union Exhibit 3 in these proceedings, and are incorporated by reference in this award. There remain, however, a number of issues which are not resolved; these were addressed at the arbitration hearings, and will be determined by this award.

The parties did not agree with respect to the term of the new collective agreement. Accordingly, in accordance with the *Hospital Labour Disputes Arbitration Act*, I have no jurisdiction to award a term longer than one year. This award will therefore be for a term of one year from September 15, 2011 until September 15, 2012. This is subject to the retained jurisdiction referred to at the conclusion of this award.

The participating nursing homes consist of some 98 homes, many of which form part of substantial chains. The participating homes have engaged in central bargaining with this union for many years, the number of participating homes having increased over the years. The collective bargaining relationship is a mature one, and both parties agree that this group is the leading group in its sector.

In the present case, the employer has not argued inability to pay. It has, however, emphasized the precarious nature of the global, Canadian and, in particular provincial current economy, which is close to a state of recession. Provincial funding is a major element of the employers' revenues, and these employers operate on a for-profit basis. It is clear that, as far as the period covered by this award is concerned, any increase in the wage envelope provided by the Province is to be devoted to staff increases, and not to wage increases. The deployment of the funds in this envelope is not a matter over which the employers have any control. It does not follow from this that there may be no wage increases for the employees in these bargaining units. It is , however, clear that in these circumstances very substantial increases would not be justified: their probable result would be a freeze on hiring, and the quite possible implementation of lay-offs.

In considering and determining the various union and employer demands, I shall bear in mind the criteria set out in the *Act*, as well as the generally accepted notion that the goal of interest arbitration with respect to bargaining units where the right to strike has been abrogated, is to "replicate" what might be achieved in free, private-sector collective bargaining. In my view, the appropriate comparators in this respect are mostly to be found in the nursing home sector, bearing in mind that the present group are the leaders therein.

I shall deal with the question of wages at the end of this award. In dealing with the other matters, however, I bear in mind the notion of a total economic package. Most of the proposals with which I must deal involve a cost - or in some cases a saving - and I attempt to assess, as far as the material before me permits, the overall effect of all of these provisions.

The employer has put forward a proposal with respect to the scope of the bargaining unit, arguing that a newly-created position, that of "RAI" - Resident Assessments Instruments Coordinator - be excluded from the bargaining unit. The union requests that this position be explicitly included in the bargaining unit and a rate established therefor. The employer argues that I have no jurisdiction to make any determination in this respect, and that the question of the inclusion or exclusion of the RAIs from the bargaining unit is one either for rights arbitration or for the Ontario Labour Relations Board. While it may be that I would have jurisdiction to determine the question of inclusion or exclusion as ancillary to my mandate with respect to the collective agreement, there is simply not sufficient evidence or other material before me to permit a reasoned determination of the question. It appears that, in some cases at least, RAIs have been considered to come within the bargaining unit, and that union dues have been deducted and remitted in such cases. To the extent that may be the case, it is my award that the wage increase awarded here be applied to such persons, at least until such time as the question of their inclusion or exclusion in the bargaining unit has been decided. I make no other award in this respect.

The union has proposed an amendment to article 5, Union Security, to require the employers to submit lists of dues deductions in electronic format and to include the current addresses, telephone numbers, Social Insurance Numbers and other information. Some of this is already required under the current collective agreement. The employers resisted this demand on grounds of administrative expense and, more particularly, that some of the information requested could not be provided due to legislation respecting privacy. While some expense might be involved for some employers moving to an electronic system, this would, arguably at least, lead to long-term economies. As to privacy concerns, these have been dealt with in a number of arbitration awards to which I was referred (including submissions made today by each

party), and in my view do not prevent compliance with such a requirement. The union will, in my view, be subject to privacy laws in respect of the control and utilization of such information. The union's request in respect of article 5 is granted.

The union has proposed an addition to Article 15, which deals with leaves of absence. The proposal involves a potential reassignment in certain cases of pregnancy. In my view, this matter is sufficiently dealt with in the current law with respect to accommodation. Sufficient justification for this amendment to the collective agreement has not been established. The request is not granted.

The union has proposed a number of amendments to article 15.13 - bereavement leave. The union has withdrawn its proposed amendment to article 15.13(g), and the employers have agreed that in article 15.13 (d), the word "spring" should be replaced by "delayed" with respect to interment. I agree with the union that in articles 15.13 (a), (b) and (c), references to "the day of the funeral" should be eliminated, and my award is that the collective agreements be modified accordingly. In all other respects, the union's requests relating to article 15.13 are not granted.

Both parties have proposed amendments to article 17, shift premiums. The employers' proposal, now withdrawn, would have involved a small roll-back of benefits, and the union, while withdrawing its proposal to eliminate the shift-rotation condition for shift premiums which is now in the collective agreement, retains its proposal for an increase in the night-shift premium. This premium, while less than that in some agreements in potential comparators (where other offsetting factors may apply) is not out of line, even although it may not have been increased in recent years. In view of the need to consider the total cost of compensation, and my award with respect of wages generally, I do not consider that this improvement should be made

at this time.

The union has proposed an increase in the Responsibility Allowance paid to RPNs when they carry out some additional responsibilities of an absent RN for a period of more than ½ shift. The allowance is currently $7.50 per shift. The union's comparison to the ONA Central Nursing Home agreement, where a $10.00 per shift allowance is paid to an RN replacing a Director of Care is not, I think, a precise one, but there is justification for responsibility pay. There was no increase provided for in the current agreement, and I consider that in the circumstances the amount should be increased to $8.00 per shift. I so award.

With respect to holidays, the union's proposal for an amendment to the qualifying days provision has been withdrawn. The union has, however, proposed an addition to article 20.06 (which provides for the granting of lieu days where employees are required to work on holidays) which would permit employees to bank up to five lieu days, to be used within twelve months. Although such a provision may not involve an additional wage cost, since the entitlement to either pay or time is already in the agreement (although there could be circumstances where its application could involve additional cost), this is not a normative provision and would involve some additional administrative burden on an employer. I do not consider this provision should be granted at this time.

The union has proposed a number of amendments to article 21, which deals with vacations. The first of these is an addition to article 21.01, which established the vacation year. The union proposes an addition to the effect that "gross earnings shall include all earnings from the previous year, including, but not limited to vacation payments". In my view, vacation pay is simply the continuation of regular pay during

the period an employee is taking the vacation to which he or she is entitled. To calculate one year's vacation pay on a basis which includes the amount paid out as vacation pay in the previous year is not a form of pyramiding; vacation pay is earned, and is properly taken into account in calculating gross earnings. The union's proposal makes that clear, and I award the union's proposal in this respect.

The union proposed amendments to articles 21.08 to 21.13 which would accelerate entitlements to vacation, and increase the maximum vacation (at 28 years of service) to eight weeks. This would be an expensive amendment to the agreement, and current rates of vacation are reasonable and within the appropriate norms. The union's proposal in this respect is not granted.

The union has withdrawn its proposal to delete section 21.14 of the collective agreement.

The union has proposed amendments to vacation pay entitlements for part-time employees which mirror the proposal referred to above, which dealt with full-time employees. For the reasons set out above, this proposal is not granted.

Finally, with respect to vacations, the union has proposed that article 21.11 of the part-time agreement be deleted and that new language be substituted therefor, providing, essentially, for the payment of vacation pay to part-time employees at the time the vacation is taken. The current agreement provides for payment of vacation pay with each pay. The current provision was won by the employer in an earlier arbitration, but the union has found that the experiment has created a difficulty for many of the employees involved, for whom these "forced savings" would provide holiday funds. I have not been persuaded that the administrative burden of making

this change would be as great as the employer suggests, and the argument that it would involve paying vacation pay on top of vacation pay has, I believe, been dealt with above. The union's proposal in this respect is allowed.

With respect to Health and Welfare Benefits, the union has proposed that employers pay benefit premiums to the SEIU Benefits Trust, in the amount required by the benefit trust plan to maintain equal or comparable benefits. The union has also requested that the employers provide the union with detailed information with respect to existing benefit plans. It may be that such a scheme, once fully developed, would provide economies of scale and administration which would be of benefit to all concerned. At the present time, however, the costs are not known, and the effort required for the establishment of and conversion to such a scheme would be prohibitive. As well, the requirement of providing all the information the union seeks is, in my view, an unduly onerous one. These proposals are not allowed.

Both parties have made a number of detailed proposals relating to specific benefits. It is noted that the employers pay 100% of the premiums for major medical coverage and for vision care, whereas dental care premiums are shared on a 50/50 basis. The first of these is higher than the norm and the second is lower. It is my view that in the present circumstances, the current provisions of the collective agreement should continue, subject to the following changes effective with the coming into force of the new collective agreement: 1) the vision care plan shall increase to $200.00 per 24 month period; 2) the dental plan shall include coverage for dentures, crowns and braces, subject to 50% co-insurance; 3) the cap on the dental plan shall remain at $2000.00 per individual and per family member.

The current agreement provides that part-time employees receive $0.40 per

hour in lieu of benefits. The union proposes that employees now be given the option of participation in benefits on a pro-rata basis, or an in-lieu payment of 14% of hourly rates. Either of these represents a dramatic increase in costs to the employer. In my view, the option of pro-rata participation is not one which should be granted at this time. The 14% payment, although there are some precedents for it or something like it in other agreements, would represent a very substantial immediate jump in employer costs. I note, however, that the $0.40 in-lieu payment has been in effect since 2007, and in my view, some increase is called for. (It would appear that the in-lieu payment was negotiated some time ago as a trade-off for a fixed number of sick days for part-time employees). It is my award that the current provisions remain in effect, except that the amount of the in-lieu payment shall be $0.50 per hour.

Both sides advanced proposals relating to sick leave. In my view, the union proposals have excessive cost implications, while the employers proposal, while involving some cost savings, also extends benefits and coverage for many employees, and advances standardization across nursing homes. The employers' proposal with respect to the amendment of article 24.01(b) is granted, except that the claimable amount of lost time shall be eighty-five per cent (85%).

The union has proposed that supernumerary nurses (recently graduated RPNs) be deemed to have no seniority within the bargaining unit. The purpose of this appears to be to offer a degree of advantage to other employees in job posting cases. The job posting provisions are in the form of a competition clause. The supernumerary nurses are, however, employees, and as such are subject to a probationary period like all others - and are members of the bargaining unit like all others. Under the present terms of the collective agreement, they acquire seniority like all others. The recognition and protection of seniority is usually regarded as a

fundamental benefit of a collective agreement, and I am not persuaded that there are sufficient reasons to deprive these particular employees of that benefit. This proposal is not granted.

The union seeks the removal of the reference to pay equity which appears as a note to the wage grid. This note, referring to a Pay Equity adjustment made many years ago, has remained in succeeding agreements and, whatever its effect may be, I am not persuaded that its removal is necessary. This request is not granted.

The current agreements require the employers to pay two cents per hour to a fund for paid education leave, to upgrade employee skills in respect of their union functions. The employers seek to transfer this amount, designated for the fund, to union dues payments. This has no adverse effect on the union or its fund, and allows the employers to account for the payment appropriately. This request is granted.

The union seeks to "harmonize" the classifications of Health Care Aide and Personal Support Worker. It appears that these terms refer to what is, in practice, the same job, all workers in these categories now being certified under the same process. There are, it appears, some administrative reasons for maintaining one or the other of the titles in certain collective agreements. While this may appear anomalous, I make no award in this respect, except to note that whether the job title is one or the other of the above, it shall have no effect upon wages or the application of other provisions of the agreement.

I now turn to the matter of wages. First, the union has requested, by way of "catch-up", that all wage rates below the central standards be increased prior to the general wage increase. The union does not, however, suggest the reduction of any

rates (and there are some) that are already higher than the central standards. In the immediately preceding arbitration between these parties, arbitrator Jesin, referring to historical reasons pertinent to some homes, as well as the current economic situation and the short term of the agreements, declined to award catch-up, with the exception of one special case. While the circumstances of that special case are not in issue here, the union has referred to a number of homes where wage rates are dramatically lower than the "central" rates. The repetition of percentage increases tends over time to magnify discrepancies of this sort. To make a sweeping catch-up award at the present time would be extremely costly, and would risk ignoring significant local differences, "historical" or otherwise, which would be pertinent to the establishment of appropriate wage levels. In any event, it is my view that if there were to be any attempt at catch-up, it should be incremental. The union has, at p. B 75 of its brief, referred to some six homes which it considers to be "structurally underpaying" its employees and where, as I have noted, rates of wages, especially at the lower end, are dramatically below the "central standard". Although the cut-off point may appear somewhat arbitrary, the six homes referred to do indeed present a special case in this regard. This award will reduce - in some cases considerably, in others minimally - the large wage disparities in those homes. It is my award that for the homes listed at the bottom of p. B 75 of the union brief, wages in all categories be increased by $0.20 per hour, prior to the application of a general wage increase. For the reasons given by arbitrator Jesin, I make no further award in respect of catch-up.

The union has requested wage adjustments to the positions of Food Service Worker (on the grounds of change in job requirements) and of Registered Practical Nurse (on similar grounds, and also to achieve parity with the SEIU hospital agreement). Since it would be possible to deal more thoroughly with these matters under the grievance procedure and since, in the case of the RPNs I am not satisfied

that the hospital agreement in effect dictates rates in other agreements, I do not grant these requests.

The union seeks a general wage increase of 3.25%. The employers have proposed a lump sum payment of $0.15 per hour paid for the 26 pay periods prior to the first pay period in January 2012.

The employers made reference to several recent awards and settlements which are relevant to the situation before me. In *Participating Hospitals and O.N.A.* (June 2, 2011), arbitrator Devlin, in a unanimous award, determined that over a three-year agreement (which had been agreed to), there should be lump sum payments in the first two years and a 2.75% increase in the third year. There were a number of relatively low-cost improvements as well. This was for a bargaining unit of nurses, who are substantially more highly paid than any of the employees in the bargaining units involved in the dispute before me. The lump sum payments began, for the lowest step on the wage grid, at $0.29 per hour. The bargaining units in that case were quite different from those in the present case, and the amount of the lump sum payment is considerably greater than that offered by the employer here.

In *Participating Hospitals and O.P.S.E.U.*, (June 17, 2011), arbitrator Kaplan, also in a unanimous award, determined that over an agreed three-year term there should be lump sum payments in the first two years and a 2.75% increase in the third year. The bargaining unit there was generally of a technical nature, and the lump sum payments began at $0.33 per hour.

In these two cases, the wage increase in the third year would be based on the hourly wages existing at the beginning of the first year, so that although the awards

do not so state, it would seem clear that they reflect a degree of restraint. Nevertheless, they do not constitute strong comparators to the present case, and in any event provided significantly higher payments than the employer has offered here.

Somewhat (but not entirely) similar bargaining units are involved in three recent settlements (each involving the present union) on which the employers rely: *Red Cross Community Health Services* (July 8, 2011), *Revera Home Health (Toronto)* (July 22, 2011) and *CBI Home Health Hamilton* (July 21, 2011). In each of these cases, lump sum payments of $0.15 per hour were agreed to. It was argued that as these were right-to-strike situations, these cases should be considered as relevant to the goal of "replicating" the agreement that might be reached in private collective bargaining. That is so to a degree, but in those situations, where, for one thing, the composition of the bargaining units is, in some ways, not at as high a level as in the present case and where, for another, the real value of the right to strike is, at least in the present economic circumstances, somewhat illusory, the value of these cases as comparators is diminished.

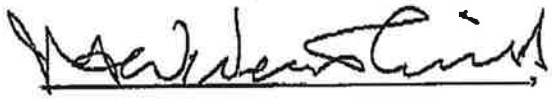
The most important comparators, in my view, are nursing home settlements and awards, both SEIU and non-SEIU. Of the eight non-SEIU awards and settlements from Ontario which the union submitted, and which were made, within (approximately) the last twelve months, increases affecting the period covered by this agreement vary from 1.5 to 2.35%. Of the nine recent SEIU awards and settlements, increases vary from 2 to 3%, most being at the 2% level. In some cases these lead to rates higher than the "central standard", but it seems that in such cases, it is usual for the staffing levels to be considerably lower.

Having regard to the foregoing, to the criteria set out in the *Act*, and to all of

the materials put before me and representations made, I have determined that a general wage increase of 2% is appropriate for the period during which this collective agreement will be in effect, and I so award.

The foregoing constitutes my award in this matter. I remain seised for purposes of clarification; the establishment, if necessary, of precise dates for the terms of any agreements that may still differ from those set out above, further to the *Jesin* award; and the determination, if necessary, that the agreements drafted by the parties in fact conform to this award, including the portions incorporated by reference.

DATED AT OTTAWA, this 8th day of September, 2011,



Arbitrator