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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JANICE SAWKA

Grievor

and

STATISTICAL SURVEY OPERATIONS

Employer

Indexed as
Sawka v. Statistical Survey Operations

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Nina Ziolkowski, counsel

For the Employer: Caroline Engmann, counsel

Decided on the basis of written submissions, filed September 25 and October 17 and 24, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] This grievance is about the denial of education leave without pay by Statistical Survey Operations ("the employer"). Janice Sawka ("the grievor") was a part-time telephone interviewer employed at a call centre in Winnipeg, Manitoba, where she conducted interviews with members of the public about issues of interest to the employer. The language requirement of her position was English essential; she was not required to carry out her duties in French.

[2] However, from a desire to improve her French capability, the grievor enrolled in a weekly evening French course and requested education leave without pay pursuant to clause 45.01 of the collective agreement between the employer and the Public Service Alliance of Canada ("the bargaining agent").

[3] Her request was initially denied, primarily because the employer felt that education leave without pay was intended for full-time programs of continuous study. However, during the grievance procedure, the employer added to its rationale and correctly exercised its discretion by fully considering and applying the criteria set out in clause 45.01.

[4] I find that clause 45.01 does not exclude the possibility of granting education leave for non-continuous study, and I uphold that aspect of the grievance. However, the employer is not prohibited from considering the non-continuous nature of an education program when it exercises its discretion to consider an education leave request.

[5] I further find that the matter is not moot, as alleged by the employer, simply because the grievor completed her studies and left the employ of the employer.

[6] In the absence of any element of surprise, prejudice to the bargaining agent, or any issue of procedural fairness, I also find that the employer cannot be held to its original reason for denying the leave. It is entitled to rely on the reason(s) expressed during the grievance procedure and outlined in the grievance responses. Accordingly, I find that it exercised its discretion reasonably and in accordance with the criteria set out in clause 45.01.

II. Background

[7] The grievor worked at Statistical Survey Operations as a part-time indeterminate computer assisted telephone interviewer. She was covered by the Statistical Survey Operations - Office collective agreement that expired on November 30, 2011. Her assigned workweek ("AWW") consisted of 27.00 hours; however, her offer letter made it clear that it was not a guaranteed minimum, as follows:

> *… Your hours of work will average approximately 27.00 hrs/week for the first three months. Thereafter, your hours of work will be assigned by your supervisor and reviewed periodically. Nothing in this offer of employment shall be construed as guaranteeing minimum or maximum hours of work.*

[8] The grievor's availability, as she provided, included weekday nights and weekend days or nights. She usually worked 5 evening shifts per week, for a total of approximately 26 to 32 hours per week.

[9] The grievor had some knowledge of French but had lost some of her abilities due to not using it. She wished to improve her French skills to the point that she would be able to conduct interviews in French, to potentially expand her career with the employer. In both 2011 and 2012, she requested French language training in her yearly performance evaluation learning plans, but none was offered to her.

[10] In November and December 2012, the grievor advised several supervisors that she intended to enrol in a weekly French course starting in January 2013. She submitted her availability seven weeks in advance, as required, and advised the employer that she would be available to work only four evening shifts per week, instead of five. She excluded Thursday evenings, and accordingly, the employer did not schedule her to work them. On January 7, 2013, she began a weekly Thursday evening course offered through the Université de Saint-Boniface and Alliance Française.

[11] Subsequently, the grievor learned about education leave without pay under clause 45.01 of the collective agreement. On January 20, 2013, she wrote to Amanda (Amy) Jackson, a manager, as follows:

> *I would like to request your assistance regarding a matter dealing with my AWW.*
>
> *As you know, I recently dropped down to 4 shifts a week in order to pursue French language upgrade training. I did this after being*

> *told that Statistics Canada would not give me any support for language training. Since that time I have discovered there is such assistance available to me through my collective agreement. This is found under article 45, subsection 45.01,* ***Education Leave Without Pay****.*
>
> *Because of this I am requesting your help arranging that one day per week be covered by the above-mentioned article.*
>
> *Here is what I would like:*
>
> *1. I request that I be granted one shift per week to be covered by article 45,* ***Education Leave Without Pay****, to protect my AWW.*
>
> *2. After above request is granted, I will rescind my request for a 4-shift week, which was granted in December 2012. As I understand it, this will put my shifts automatically back up to the norm of 5 shifts per week.*
>
> *3. I would like this arrangement to begin as soon as possible.*
>
> *I ask your assistance as to the proper way to submit the necessary paperwork, and would appreciate a meeting with you at your earliest convenience.*
>
> [Emphasis in the original]

[12] The next day, the grievor met with Ms. Jackson, who advised the grievor that she would have to check with her superiors as no one had ever requested this leave. In mid-January, the grievor spoke with Bonnie Holte, Assistant Director, Operations, Western Region and Northern Territories. On January 31, 2013, she submitted her leave form for education leave without pay, and on February 28, 2013, she followed up with an email to Ms. Holte. She was advised that her request was being considered.

[13] On March 12, 2013, Ms. Holte denied the request, stating as follows:

> *Hi Janice,*
>
> *Sorry for the delay in getting a response to you, but I have finally just heard back from Ottawa on this. According to the Employer, the intent of that clause is that the leave requested is to undertake full-time studies over a continuous period of time.*
>
> *As previously mentioned with you, I have communicated with the Regional Manager of Programs in Winnipeg that as long as you are giving us availability of 4 days per week that this should be considered as providing full availability for assignment of work purposes.*
>
> *I would also encourage you to arrange for a testing on your French capability so that there is a formal assessment on where you are at in meeting the bilingual requirements as an Interviewer.*

[*Sic* throughout]

[14] On April 11, 2013, the grievor filed her grievance, in which she stated that she had been denied education leave without pay and requested, among other things, that she be awarded one shift per week from Jan 31, 2013, as education leave without pay, in her words, "…to protect my AWW and other benefits".

[15] The grievor continued taking weekly French courses for about three years, until the spring of 2016, and left the employ of the employer in the fall of that year.

III. Collective agreement provisions

[16] Clauses 45.01 to 45.04 of the collective agreement set out the following:

> ***Education Leave Without Pay and Career Development Leave***
>
> *45.01 The Employer recognizes the usefulness of education leave. Upon written application by the employee and with the approval of the Employer, an employee* ***may*** *be granted education leave without pay* ***for varying periods of up to one (1) year****, which can be renewed by mutual agreement, to attend a recognized institution* ***for studies in some field of education in which preparation is needed to fill the employee's present role more adequately or to undertake studies in some field in order to provide a service which the Employer requires or is planning to provide.***
>
> *45.02 At the Employer's discretion, an employee on education leave without pay under this Article may receive an allowance in lieu of salary of up to 100% (one hundred per cent) of the employee's annual rate of pay, depending on the degree to which the education leave is deemed, by the Employer to be relevant to organizational requirements.…*
>
> *45.03 Allowances already being received by the employee may at the discretion of the Employer be continued during the period of the education leave. The employee shall be notified when the leave is approved whether such allowances are to be continued in whole or in part.*
>
> *45.04 As a condition of the granting of education leave without pay, an employee shall,* ***if required****, give a written undertaking prior to the commencement of the leave* ***to return to the service of the Employer for a period of not less than the period of the leave granted.***
>
> ***If the employee:***
>
> *(a) fails to complete the course,*
>
> *(b)* ***does not resume employment with the Employer on completion of the course****, or*

> *(c) ceases to be employed, except by reason of death or lay-off, before termination of the period he/she has undertaken to serve after completion of the course,*
>
> ***the employee shall repay the Employer all allowances** paid to him/her under this Article during the education leave or such lesser sum as shall be determined by the Employer.*
>
> [Emphasis added]

[17] The employer also relies on article 29 of the collective agreement, the general provision on granting leave, and in particular clause 29.08(a), which states as follows:

> *29.08 Leave will only be provided:*
>
> *(a) during those periods in which employees are scheduled to perform their duties ….*

IV. The bargaining agent's submissions

[18] The bargaining agent submits that by denying the requested leave, the employer violated clause 45.01 of the collective agreement.

[19] It argues that the reason given to the grievor for the denial was articulated by Ms. Holte in her March 12, 2013 email: "According to the Employer, the intent of that clause is that the leave requested is to undertake full-time studies over a continuous period of time."

[20] The bargaining agent submits that this interpretation of clause 45.01 violates the collective agreement by imposing a requirement that its language does not contain. The clause's language expressly allows for education leave to be taken in multiple periods, and nothing in it indicates that education leave must be taken in a continuous period. Accordingly, the plain meaning of the language should be applied. The bargaining agent further notes that when interpreting a collective agreement, s. 229 of the *Federal Public Sector Labour Relations Act* provides that the Board's decision may not have the effect of requiring the amendment of the agreement.

[21] The bargaining agent cites several well-established rules of collective agreement interpretation, for example, that to determine the parties' intention, the cardinal presumption is that they are assumed to have intended what they have said, that the meaning of the agreement is to be sought in its express provisions (see Brown & Beatty, *Canadian Labour Arbitration*, at 4:2100), and further that the agreement must be interpreted according to the primary and natural meaning of the language the parties

used. If the plain and ordinary language is unambiguous, is not excluded by the context, and is sensible with reference to the extrinsic circumstances, then that meaning must be taken conclusively as being the parties' intention (see *PCL Construction Ltd. v. Construction & General Workers' Union, Local 1111* (1982), 8 L.A.C. (3d) 49 at para. 23).

[22] Clause 45.01 states that an employee may be granted leave without pay for "… varying periods of up to one (1) year …". The plain meaning of that phrasing is that the leave can be taken in multiple periods that may be of different durations. The bargaining agent argues that this interpretation is supported by both the dictionary definitions of "varying" and "periods" and by the case law.

[23] The Merriam-Webster Dictionary defines "varying" as something that changes or becomes different, and the word "periods" is plural in the collective agreement phrasing at issue. By using these words, the parties clearly intended to allow employees to take multiple periods of education leave of different lengths.

[24] This reasoning is also supported by the former Public Service Labour Relations and Employment Board's (PSLREB) analysis in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2016 PSLREB 47, in which the employer argued that a sick-leave bank had to be accessed in a single continuous use, while the union argued that it could be used multiple times. The clause at issue in that case provided that "… sick leave will be granted to the employee for a period of up to two hundred (200) hours …". The PSLREB found that use of the phrase "a period" did not mean that it had to be an uninterrupted period and that an employee was entitled to an advance of sick leave any number of times up to the cap of 200 hours. Nothing in the clause indicated that the bank of 200 hours had to be accessed in a single continuous use.

[25] The bargaining agent submits that the employer exercised its discretion arbitrarily by adding a requirement that is not present in clause 45.01. Accepting that that clause gives the employer a great deal of discretion to grant or deny education leave, nevertheless, the bargaining agent argues that the employer must not exercise this discretion in an arbitrary or discriminatory fashion or in bad faith (see *Salois v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 88 at para. 24). As noted in *Myers v. Treasury Board (Correctional Service of Canada)*, 2005 PSSRB 26 at para. 6,

"… such exercise of discretion cannot be tainted by considerations that would render it arbitrary or discriminatory."

[26] According to the bargaining agent, the grievor put a great deal of effort, time, and her own money into taking French courses after the employer ignored her requests for French training and then denied her unpaid education leave. She did not ask for paid leave or for the employer to cover the cost of the course. She asked only for unpaid leave to protect her benefits, which were based on her work availability. By denying it because the course of study was non-continuous, the employer failed to recognize that many employees may choose to take part-time or short-term education courses rather than full-time studies.

[27] The bargaining agent seeks a declaration that the employer violated clause 45.01 and asks that the grievor be made whole for all lost wages, benefits, and pay equity settlement payments that she would have been entitled to but for the employer's refusal of her education leave.

V. The employer's submissions

[28] The employer states that the bargaining agent failed to meet its burden to demonstrate that on the balance of probabilities, the employer contravened the collective agreement. Clause 45.01 gives it discretion to grant education leave without pay to employees based on certain specified criteria. It denied the grievor's request for that leave because in its view, the criteria were not met. It exercised its discretion in good faith and in a reasonable, fair, and non-discriminatory manner.

[29] The employer points out that as early as November 2012, when the grievor provided her availability schedule, she had already planned to take the Thursday night French course and had informed it that she was not available to take any shifts during that time. Only on realizing that reducing her availability might impact her AWW did she decide to request education leave without pay. The sole reason for making the leave request, as outlined in her January 20, 2013 letter and the grievance, was to protect her AWW.

[30] On March 12, 2013, the employer denied the grievor's request. It indicated that the intent of the clause was to provide leave to undertake full-time studies over a continuous period. It also addressed her stated reason for requesting the education

leave, stating that "… as long as you are giving us availability of 4 days per week that this should be considered as providing full availability for assignment of work purposes."

[31] As well, the employer encouraged the grievor to undergo formal French testing to assess her level of proficiency and the effort that would be needed to attain the language requirement for a bilingual interviewer position as follows: "… I would also encourage you to arrange for a [*sic*] testing on [*sic*] your French capability so that there is a formal assessment on where you are at in meeting the bilingual requirements as an Interviewer."

[32] Like the bargaining agent, the employer cites general principles of collective agreement interpretation, such as giving the parties' words their ordinary and plain meanings and considering them in the context of the collective agreement as a whole. If faced with a choice between two linguistically permissible interpretations, the Board may be guided by the purpose of the particular provision, the reasonableness of each possible interpretation, the administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. The employer further submits that the fact that a particular provision may seem unfair is not a reason to ignore it, if it is otherwise clear.

[33] According to clause 45.01, the employer may grant education leave without pay to an employee to attend a recognized institution in some field of education for varying periods of up to one year, which can be renewed by mutual agreement. When exercising its discretion, the employer will consider whether the proposed education is required to fulfil the employee's current role or whether the employer requires it for a service currently or planned to be provided.

[34] The underlying purpose of the leave is to benefit the employer's needs and interests. The employer retains the discretion to determine whether the course of studies is needed for its operations.

[35] The grievor's desire to upgrade her French language skills was commendable; however, the employer had no requirement for her to become bilingual as her position was English essential. The employer provides French training to those required to meet the essential language criteria of their positions. Nonetheless, it suggested that she be

tested to assess her French language skill levels to determine the proper course of action. She declined the offer.

[36] The employer submits that the request was for leave without pay and that it was made to protect the grievor's AWW and to guarantee her a certain number of hours. It confirmed that four days per week would be considered full availability for work assignment purposes. Further, granting the grievance would have the effect of amending the collective agreement by incorporating a new criterion in clause 45.01 — granting leave to protect a part-time employee's assigned workweek or increasing her or his hours.

[37] The employer notes that the bargaining agent's argument focusses exclusively on the interpretation of the words, "varying periods of up to one year." This is based on Ms. Holte's initial response that "… the intent of that clause is that the leave requested is to undertake full-time studies over a continuous period of time."

[38] However, the bargaining agent failed to address the employer's subsequent responses during the grievance procedure in which it articulated that the grievor had not met the criteria for education leave under clause 45.01. At the second level, the employer expanded on its initial position to the leave request and explained that the criteria for granting the leave included the relationship between the education program and the employer's needs, as well as the employee's expected future contribution to the employer.

VI. Issues

[39] The issues to be determined boil down to these three:

1) Can the language of clause 45.01 of the collective agreement be interpreted as requiring that education leave without pay be granted only for full-time continuous study?

2) If not, can the employer be held to what it said in its initial denial, or can it rely on the reasons it provided subsequently, during the grievance procedure?

3) If it can rely on its later reasons for the denial, do those reasons indicate that it exercised its discretion reasonably?

VII. Reasons

A. Does clause 45.01 require a full-time continuous period of study?

[40] With respect to the first issue, I agree with the bargaining agent that clause 45.01 cannot be interpreted as requiring that education leave without pay be granted only for the purpose of a continuous period of full-time study. Such an interpretation would violate the collective agreement by imposing a requirement that its language does not contain.

[41] The clause's language expressly allows taking education leave in varying periods. It may be that the parties had periods of several months in mind when they negotiated this. The language in clauses 45.02 to 45.04 (which provide for educational allowances and commitments to return to work after education leave) suggests that longer, continuous leaves might well have been top of mind for the negotiators. However, if there was any intent to restrict education leave to only those kinds of courses, it was not expressed. Nothing in the language of clause 45.01 restricts education leave to a continuous period. Accordingly, there is no reason that it could not be granted for a weekly evening course of study.

[42] I adopt the PSLREB's reasoning in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, which dealt with a similar language issue. It stated as follows at paragraph 176:

> *[176] In my view, the ordinary and plain meaning of clause 31.04 of the collective agreement is that if an employee who qualifies for sick leave under clause 31.02(a) has insufficient or no sick leave credits, then the employee is entitled to an advance of sick leave with pay any number of times up to the cap of 200 hours. There is nothing in clause 31.04 to indicate that the bank of 200 hours must be limited to a single use rather than the total number of hours provided. The employer's interpretation strains the language of clause 31.04 to a degree that would substantially denude it of its intention or meaning. Reading in a one-time use requirement would require the Board to change the wording of the collective agreement, which it is prohibited from doing by s. 229 of the PSLRA.*

B. Changing rationale for the exercise of employer discretion

[43] The bargaining agent states that the employer's original denial was based solely on the fact that the request was not for a continuous course of study and that it must

be held to that rationale. If that rationale does not reflect a proper interpretation of clause 45.01, then the employer's exercise of discretion based on it was arbitrary.

[44] On the other hand, the employer argues that the bargaining agent focusses exclusively on the employer's first response to the grievor and ignores its later responses during the grievance procedure that were based on the fact that her request did not meet the criteria of clause 45.01, specifically that the leave be: "… for studies in some field of education in which preparation is needed to fill the employee's present role more adequately or to undertake studies in some field in order to provide a service which the Employer requires or is planning to provide."

1. The initial denial

[45] Although the employer's first response, in the email dated March 12, 2013 from Ms. Holte, did effectively deny the leave because it was not for continuous study, I think it is important to note two things. Firstly, the response did not definitively rule out the possibility of education leave for non-continuous study. Secondly, in my view, without expressly stating it, the response implicitly took into account the clause 45.01 criteria of the employer's needs.

[46] The initial denial states that it is the **intent** of the clause that education leave be for continuous study; it does not state that education leave could never be granted for a non-continuous program. To the contrary, it suggests that the grievor have her French capability tested so that the employer can assess how close she is to meeting the bilingual requirements as an interviewer. This suggests a willingness on the part of the employer to at least consider a future education leave, if not the current one, for the grievor to pursue French training. And it does not stipulate that any future request would have to be for a period of continuous study.

[47] As well, the initial denial suggests that the employer was cognizant of the criteria for considering an education leave request in the context of its needs — in this case, its need for French speaking interviewers. This is implicit in its offer to her of a formal language assessment, to determine "… where [she was] at in meeting the bilingual requirements as an Interviewer."

2. Second-level grievance response

[48] On May 17, 2013, the employer denied the grievance at the second level in a letter from Lise Rivais, Director, Western Region and Northern Territories. Ms. Rivais indicates that she considered "… the following factors in my decision as I believe that they speak to your individual case." She goes on to reiterate that "… this leave is normally granted for a continuous period of time."

[49] Again, I note the less than definitive language. Like the initial denial, the second-level grievance response does not state that study for a continuous period is absolutely required. It states that that is the kind of study for which education leave without pay is normally granted.

[50] Having established this, the second-level response then elaborates that education leave is granted based on the following criteria:

> *•the extent to which courses lead to a degree in a discipline related to Agency needs;*
>
> *•the employee's expected future contribution to the Agency;*
>
> *•the degree to which the employee will likely benefit from the training in terms of improved personal qualifications and/or promotional opportunities;*
>
> *•the employee's past contribution to the Agency and work performance;*
>
> *•the portion of the degree that the employee has already completed on their own time; and*
>
> *•the duration, cost and location of the leave;*
>
> …

[51] It is very clear that the employer does not rely solely on its view that the grievor's education leave should not be granted because it was requested for a non-continuous course of study. At the second level, it clarified and explicitly stated that it had considered and applied the clause 45.01 criteria to the grievor's request.

[52] Further, Ms. Rivais reiterates the suggestion that the grievor be formally assessed and indicates that a new leave request could be considered, depending on the results of the assessment:

> *Please note that every case is reviewed on a individual case by case basis, and I encourage you to continue with an assessment of your current French languages skills so that a determination can be made in terms of how many hours it may take you to be deemed as qualified to conduct French interviews. If it is deemed that the acceptable language proficiency can be obtained within the foreseeable future a review by virtue of a new leave request can be submitted for consideration. The above listed criteria will be used as factors in this request.*
>
> [*Sic* throughout]

[53] Again, there is no suggestion that a future request would have to be for full-time continuous study, in order to be considered.

3. Fourth-level grievance response

[54] If there were written responses at either the first or the third level of the grievance procedure, neither party produced them in evidence. However, both parties adduced the fourth-level response, dated May 9, 2014. The reasons it gave differed from both Ms. Holte's initial denial and from Ms. Rivais' second-level response. The fourth-level response focussed on the following:

- the timing of the grievor's request, coming as it did after she had already notified the employer of her reduced availability and had started the course;
- the fact that she was already providing what was considered "full availability" for work assignment purposes (four shifts); and,
- the fact that survey work was available during the days, evenings, and weekends; therefore, the grievor could increase her availability without impacting her French course by taking a day shift on a weekday (but for her restricted availability due to her other job).

[55] The fourth and final grievance response reads, in part, as follows:

…

> *The granting of leave under Article 45.01 is at the employer's discretion when they have evaluated the situation and made a determination. The decision to pursue this course, while commendable, was not taken in consultation with your management team. If you intended to request leave, the leave should have been requested in advance of your decision to enroll for the course. In this case, you requested leave after you had already changed your availability and commenced your course. Survey work is available during the days, evenings and weekends and I understand that you are already providing a full availability*

> *of four shifts, taking into consideration the evening you are unavailable due to your course. You stated at the grievance hearing that you have another job and that this affects your availability for interviewing shifts. The restrictions on your availability for interviewing work from another job are not within our control and therefore cannot factor into the planning of our work schedules.*
>
> …

[56] It appears that the focus of the employer's rationale for its denial changed again at the fourth level, likely because, as it noted in its grievance response, the grievor confirmed at the fourth-level meeting that her availability was restricted to evenings because she had another job during the day. That appears to have put things into a somewhat different perspective for the employer. Its analysis focussed more on the fact that the grievor's reduced availability from five shifts to four was not solely due to her Thursday evening French class but rather to her weekday job with another employer.

[57] Nevertheless, the employer once again reiterated that the grievor should be formally assessed and committed to offering French interview work, or later re-testing, depending on the outcome of the assessment:

> *At the hearing you agreed to have your second language proficiency evaluated at the end of your current French course in June. If you are evaluated at a working level for French interviews, management is prepared to offer you additional work to include French languages cases when available. If you are not deemed to be at the working level at the end of June, we agree to retest you again in the future, at your request and, if successful, will again extend the offer of French language interviews when available.*
>
> [*Sic* throughout]

4. Can the employer be held to the reason(s) expressed in its initial denial?

[58] In any event, the bargaining agent does not argue that the employer should be faulted for this change of reasons or that it should be held to its fourth and final rationale for the denial. It challenges only the first rationale and submits that the employer should be held just to that one, ignoring the discussions, exchanges of information, and responses that took place during the grievance procedure.

[59] No authority for such a proposition was provided but for the Ontario Labour Relations Board's decision in *United Steelworkers of America v. Aerocide Dispensers*

Ltd. (1965), 15 L.A.C. 416, which is well known for establishing the principle that an employer must be held to the grounds it used to discharge an employee. That important proposition has been extended to discipline cases and has been applied many times to prevent employers changing the grounds of discharge or discipline to better fit the factual evidence. The inherent unfairness of such tactics, especially in the discipline and discharge context, are obvious and are based on the principle of natural justice that one must know the case one must meet.

[60] The bargaining agent also provided an excerpt from Brown & Beatty, 5th Edition, on "Alteration of Grounds", found in the Chapter 7 ("Discipline") section entitled, "Processing and Proving Discipline Cases". As the excerpt makes clear with a number of case references, as important as this principle is, there are many exceptions to it, even in the discharge and discipline context. At paragraph 7:2200, the authors note the following:

> *… the principle that an employer cannot justify disciplining an employee on grounds that are different from those it gave when the penalty was actually imposed is, however, neither absolute nor inviolable. Many exceptions and limitations have been recognized.*

[61] However, more important than the many exceptions and limitations is the fact that this is not a discipline or discharge case. The bargaining agent acknowledges that this principle is typically applied in that context but suggests that it should also apply in this case.

[62] In *Aerocide*, the Arbitration Board did not say that an employer should be held to the reason first given for any decision, but rather that an employer should be held fairly strictly to the reason first given for discharging an employee (at para. 24 (QL)):

> …
>
> *The board is justified **in a case of challenged discharge** to hold the employer **fairly strictly** to the grounds upon which it has chosen to act against an employee who consequently feels himself aggrieved. **This is not to say that the board should be overly technical** in assessing an assigned cause of discharge but it does mean that it ought not to permit an assigned cause to be reformed into one different from it merely **because the evidence does not support** the assigned cause but rather one something like it. **The parties prepare their submissions to arbitration according to the issues raised by the grievance and the answer or answers thereto, and the case comes to arbitration after having run the***

> ***gauntlet of the grievance procedure and discussions therein.*** *If another cause of discipline emerges from the evidence other than the one stated at the time, it is not an automatic conclusion that the employer would have treated it the same way merely because it finds it necessary to say so because of the turn of the evidence at the arbitration.…*
>
> …
>
> [Emphasis added]

[63] This quote makes a few things clear. One is the importance of context. Deciding to exercise its discretion to not grant education leave without pay for one reason or another is not the same as firing someone for one reason and then asking that the discharge be upheld for an entirely different reason.

[64] Having said that, in some circumstances, an employer can be held to a rationale even outside the discharge and discipline context. However, typically, it would be a final grievance response that could be challenged if the employer, without warning, argued something different at adjudication. Whether in the discipline and discharge context or in other contexts, the principle is grounded in the right to know the case one must meet and in avoiding the element of surprise. It assumes that, as the quote from *Aerocide* makes clear, the parties prepare their cases according to the issues raised, discussed, and answered during the grievance procedure. That is the whole point of the grievance procedure — a fulsome exchange of information.

[65] The exchange of information, including the grievance responses, clearly advised the bargaining agent that the employer's reasons had altered somewhat, at least in focus, since the initial denial. The grievor and the bargaining agent had sufficient notice of this. Had the employer continued to rely on its initial rationale throughout the grievance procedure, such that the grievor and the bargaining agent prepared their case for adjudication based on that rationale alone, then there would have been merit in an argument that an employer cannot simply change its rationale. Such a scenario would raise a clear issue of procedural fairness. However, this could be overcome by a postponement to provide the bargaining agent with an opportunity to adequately prepare for adjudication.

[66] In any event, it was not so in this case. The bargaining agent did not come to the Board thinking that the employer relied only on the initial reason given for denying the leave. There was no element of surprise. The focus of the rationale changed at the

second level and again at the fourth level. It is not open to the bargaining agent to focus only on the employer's initial response, to ignore all the information exchanged during the grievance procedure, and to insist that the employer be held to its initial reasoning.

C. Clause 45.04 - committing to return from education leave

[67] The employer argued that as a condition to grant education leave, clause 45.04 requires that before the leave starts, the employee commits to return to the employer's service for a period at least equal to the leave granted. It argues that the grievor left its employ once she completed her studies and that the grievance ought to be dismissed for this reason, as well.

[68] In my view, this argument is entirely without merit. Firstly, clause 45.04 applies only **if required**. The employer did not require a written commitment from the grievor to return to its service. How could it, when it did not grant her the leave? Secondly, the purpose of this clause is to recoup any education allowance if an employee does not return to work after completing an employer-supported education. The employer can require the recipient of an education allowance to commit to return to its service, failing which he or she can be asked to repay some or all of the allowance. Clearly, this clause could not apply in any way to the grievor who was not granted the leave, let alone an allowance.

D. Mootness

[69] The employer argued that this matter is moot because the bargaining agent failed to demonstrate that the grievor suffered any loss to her wages or benefits as a result of the leave denial, which she requested to protect her AWW and to guarantee her a certain number of hours. The employer confirmed that four days per week would be considered full availability for work assignment purposes.

[70] The employer also argued that there is no need for the Board to make any ruling on the proper interpretation of clause 45.01, on grounds of mootness. The grievor completed the course for which she requested education leave and has since left the employ of the employer. The conditions required for the operation of clause 45.01 no longer prevail, and the matter is moot.

[71] The employer also argues that the matter is moot because there are other grounds for deciding the merits of this grievance; that is, the grievor did not meet the requisite criteria for granting the leave. The course was not required to help her meet the employer's current and future needs or to help her carry out her role as an English-essential interviewer.

[72] I agree with the employer that the bargaining agent did not meet its burden to show that the grievor suffered any loss of wages, benefits, or a pay equity settlement. However, this goes to whether the corrective action requested is warranted. It does not make the matter moot. Nor is it moot because there are other grounds on which to decide the grievance.

[73] Neither is the matter moot because the grievor completed her French training and left the employ of the employer. There is still a live controversy to be determined (see *Borowski v. Attorney General of Canada*, [1989] 1 SCR 342). Mootness in the labour relations context is not decided only in relation to the individual grievor if the matter could impact the bargaining unit. It remains a live issue between the employer and the bargaining agent, and guidance on whether the collective agreement was breached is often helpful. A declaration "… is itself a tangible benefit having implications for the relationship of the parties when similar issues arise in the future" (from *Hilltop Manor Cambridge v. Service Employees International Union, Local 1 & Ontario Nurses' Association* (2018), 295 L.A.C. 4th 17 at para. 56).

[74] That clause 45.01 does not exclude courses of study simply on the basis that they are not full-time continuous periods is a useful matter to be clarified between the parties. It deals with an issue that may well arise again. It cannot be said that the issue is moot.

VIII. Conclusion

[75] Clause 45.01 does not restrict granting education leave without pay to only full-time, continuous periods of study. However, that does not mean that the employer cannot consider the nature of the study program (i.e., its duration or whether it is full-time or continuous) when deciding whether the proposed education will meet its needs. The language of the clause does not restrict education pay to continuous courses of study, but neither does it limit the employer's discretion to consider that factor.

[76] I find that the employer's initial denial implicitly recognized the clause 45.01 criteria which require that the decision be based on its needs. However, if not exclusively, the initial denial was primarily based on the employer's misinterpretation of clause 45.01.

[77] However, the focus of the employer's rationale changed during the grievance procedure, which was made clear in the second-level response. There was no element of surprise or prejudice to the bargaining agent as a result. There is no basis upon which the employer can be held strictly to the main rationale it offered in its first denial.

[78] Therefore, I find that the employer has the discretion to grant or deny education leave without pay, considering the criteria outlined in clause 45.01. I further find that it addressed those criteria and that it applied them reasonably in this matter.

[79] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IX. Order

[80] The grievance is upheld in part.

[81] I declare that clause 45.01 of the collective agreement does not restrict granting education leave without pay to only full-time continuous periods of study.

June 1, 2020

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board