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Ontario Labour Relations Board HIGHLIGHTS

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NOTICES TO THE COMMUNITY

White Areas

The Board is considering eliminating the "White Areas" in the province (for construction industry matters). Please see the attached request for submissions.

New Part-time Vice-Chair

The Board welcomes **Paulene Pasieka** as a new part-time Vice-Chair. She was Counsel with Ontario Power Generation Inc. (2002-2014), a self-employed Employment Consultant and a Partner with Filion, Wakely & Thorup where she specialized in employment and labour law. She holds a Bachelor of Science degree in Mathematics and a Bachelor of Laws degree from Queen's University.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of this year. These decisions will appear in the November/December issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

***Public Sector Labour Relations Transition Act* – Settlement – Unfair Labour Practice –** OPSEU, which represents paramedical employees at North Bay Regional Health Centre (NBRHC) including occupational therapists (OT's) and physiotherapists (PT's), and a partial paramedical bargaining unit at Health Sciences North (HSN), that did not include OT's or PT's, was given notice by NBRHC and HSN that certain services would be transferred to HSN as part of a transition of geriatric services from NBRHC to HSN – OPSEU file an application under PSLRTA – ONA, which represents a bargaining units of nurses at both NBRHC and HSN filed an application for certification for a bargaining unit at HSN that included OT's and PT's – OPSEU intervened in ONA's certification application and ONA intervened in OPSEU's PSLTRA application – ONA, HSN and OPSEU signed Minutes of Settlement (MOS) agreeing that a certificate would issue to ONA for the agreed upon paramedical unit at HSN, subject to certain terms – ONA then served notice to bargain, filed a request for an appointment of a conciliation officer, which the Minister appointed over the objections of HSN – HSN brought an ULP application alleging that ONA had breached the terms of the settlement in the certification application by requiring HSN to bargain prior to the outcome of the pending PSLTRA proceeding – The Board began by noting that the terms of settlement that a party is seeking to enforce must be clearly and expressly set out in the settlement and that this approach is particularly apt in a case like this where the term of settlement that the Board is being asked to enforce determines an issue that is scheduled to be decided by a panel of the Board in a separate proceeding – The Board found that the terms of the MOS did not include an agreement that PSLTRA applies to the integration nor was there sufficient evidence before the Board for it to make a finding under PSLTRA, even if that application were before it – The Board also noted that the parties were

sophisticated and if they had wished to explicitly agree that PSLTRA applied without reservation they could have done so – Finally, although the Board did agree that PSLTRA is the preferred forum for resolving these types of disputes, it did not find this to be sufficiently compelling to interpret the MOS to mean the parties agreed that PSLRTA applied – Accordingly the MOS has not been violated – Application dismissed

HEALTH SCIENCES NORTH; RE: ONTARIO NURSES' ASSOCIATION; OLRB File No. 1760-16-U; Dated December 13, 2013; Panel: Paula Turtle, Vice-Chair (22 Pages)

Representation Vote – Status – Termination – In an application for termination of bargaining rights the representation vote resulted in a tie, subject to one challenged ballot – In dispute was the status of an individual promoted to a "temporary" position outside the bargaining unit following the certification application – The union argued that the individual was not employed in the bargaining unit on the date of the termination application and thereby should be excluded from the voting constituency – The employer countered that the individual's right to return to her "home" position inside the bargaining unit demonstrated an ongoing interest in union representation and, by extension, an entitlement to vote – A majority of the Board held that the individual was entitled to vote and have her ballot counted and accordingly ordered a second representation vote – Specifically, past representation by the union, the fixed nature of her "temporary" position, a right of return to her "home" position and continued performance of former job duties demonstrated "congruency of interests" with the bargaining unit (see *WHL Management Limited Partnership*) – Further, status disputes in termination applications are distinguishable from those in certification applications in that informational equality between parties minimizes the risk of gerrymandering and jockeying – Matter continues

SOUTHLAKE REGIONAL HEALTH CENTRE; RE: MRS. SHEILA ELIZABETH STREET-WALKER; RE: ONTARIO PUBLIC SERVICES EMPLOYEES UNION (OPSEU) LOCAL 387; OLRB File No. 1159-16-R; Dated December 8, 2016; Panel: Mary Anne McKellar, Vice-Chair and Judith A. Rundle, Board Member; dissent: Shannon McManus, Board Member (13 pages)

Employment Standards – Termination – Wilful Misconduct – In this employer application for review of an Order to Pay, at issue was the exemption from entitlement to termination pay due to misconduct, disobedience or wilful neglect of duty – The employer, a health centre, alleged among other grounds that the employee, a data entry clerk, failed to transfer patient records to the responsible physician in a timely manner – The employee claimed that she was overworked and that the health centre was understaffed – The Board test for wilful misconduct and wilful neglect of duty is whether the doing of something or the failure to do something is "serious and wilful," that is, "deliberate, intentional or so reckless as to be, in effect, intentional" (see *Services Plus* Aquatics and *Rea International*) – Based on the evidence, the employee's failure to transfer patient records was sufficiently serious and reckless to constitute a wilful neglect of duty – Specifically, the employee knew that she had 300 unassigned records in her inbox but had not taken steps to remedy the problem or inform the employer, thereby placing both the health centre and its patients at a serious risk of harm –The employee was not entitled to termination pay – Appeal allowed

8536350 CANADA INC o/a THE JOSEPH ESQUEGA HEALTH CENTRE; RE: KAYLA BACHMANN; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0681-16-ES; Dated December 8, 2016; Panel: Adam Beatty, Vice-Chair (13 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – B settled her discharge grievance and then filed a DFR against ONA, which the Board dismissed – The court found the Board was entitled to address the merits summarily and without holding a hearing – There was nothing in the material to sustain the allegation that she was denied procedural fairness – The applicant failed to show the Board's decision was unreasonable – Application dismissed

BAILEY V ONTARIO LABOUR RELATIONS BOARD; 2016 ONSC 8061 **(**Court File No. 173/15); Dated: December 21, 2016; Panel: Nordheimer, C.J., Horkins J., Pattillo J. (4 pages)

Certification – *Colleges Collective Bargaining Act, 2008* – Judicial Review – Practice and Procedure – Representation Vote – The Board decided to hold a representation vote in June, as OPSEU had requested, rather than October the time the Council asserted was appropriate – The Board considered a variety of factors and concluded that the employees currently at work were "substantially representative of the employees likely to be substantially affected by the vote" – The Council sought review of the Board's ruling – The court noted that these issues "could not be more central to the specialized expertise of the Labour Board" with the decision involving the "interpretation of a home statute and application of labour relations principles" – The court found the Board applied a reasonable interpretation of the provisions in question and that it reached a reasonable result within a range of reasonable outcomes – Application dismissed

COLLEGE EMPLOYER COUNCIL V ONTARIO PUBLIC SERVICE EMPLOYEES UNION; 2016 ONSC 7768 (Court File No. 308/16); Dated: December 9, 2016; Panel: Malloy J., Drambot J., Ramsay J. (3 pages)

Certification – Collective Agreement – Construction Industry – Judicial Review – The Labourers' intervened in the Carpenters application for certification arguing that they held subsisting rights for the very bargaining unit applied for based on the Del-Ko collective agreement – The Board had held that the Del-Ko agreement between the Labourers' and McKay-Cocker did not cover carpenters and carpenters apprentices – The Labourers' sought review of this ruling – The court found the standard of review was reasonableness and having reviewed the agreement and relevant articles the court found the Board's interpretation not only reasonable but correct – Application dismissed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059 V. MCKAY-COCKER; 2016 ONSC 6511 (Court File No. 384/15); Dated: December 15, 2016; Panel: McLean J., Dambrot J., Pattillo J. (10 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Innovative Civil Constructors Divisional Court No. 611/16	0142-16-R	Pending
Yuchao Ma Divisional Court No. 543/16	2438-15-U	Pending
Ming Tang Divisional Court No. 452/16	3607-14-U	Pending
Anishinabek Police Service Divisional Court No. 455/16	0319-13-R & 1629-13-R	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 29, 2017
946900 Ontario Limited Divisional Court No. 239/16	3321-14-ES	Pending
S & T Electrical Contractors Divisional Court No. 406/16	1598-14-U	Pending
Carpenters (*Riverside*) Divisional Court No. 363/16	0630-16-R	Pending
Lee Byeongheon #2 Divisional Court No. 16-2219 **(Ottawa)**	0095-15-UR	Pending
Lee Byeongheon #1 Divisional **Court** No. 16-2220 **(Ottawa)**	0015-15-U	Pending
College Employer Council Divisional **Court** No. 308/16	0625-16-R	Dismissed December 21, 2016 Motion for Leave to Appeal
Labourers' International Union of North America, Local 183 *(Alliance Site Construction Ltd.)* Divisional Court No. 133/16	3192-14-JD	Pending
Public Service Alliance of Canada Divisional Court No. 115/16	0119-13-R	December 19 & 20, 2016
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615-15-UR 2437-15-UR 2466-15-UR	Pending
Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 095-16	0668-15-ES	Pending
David Houle Divisional Court No. 1021-16 **(Sudbury)**	0292-15-U	Pending

Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	Pending
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15	3151-14-G 3716-14-R	January 4, 2017
Labourers' International Union of North America, Local 1059 ***(McKay-Cocker)*** Divisional Court No. 384/15	0883-14-R	Dismissed December 15, 2016
Universal Workers Union, Labourers' International Union of North America, Local 183 ***(Maystar)*** Divisional Court No. 368-15	1938-12-R	Dismissed September 13, 2016 Seeking leave to CA
Carlene Bailey Divisional Court No. 173/15	0480-13-U	Dismissed December 21, 2016
Valoggia Linguistique Divisional Court No. 15-2096 (**Ottawa)**	3205-13-ES	Pending

NOTICE

REQUEST FOR SUBMISSIONS ON

"WHITE AREAS"

This is to advise all interested parties that the Board is considering eliminating the "White Areas" (see: *Bur Oak Resources Inc*. 2016 CanLII 75563 at paras. 8-37) which can be located on the Board's Geographic Area Map on the Board's homepage. This may affect not only the white areas but the descriptions of existing Board areas adjacent to or encompassed by the white areas. In addition to any submissions a party believes will be relevant to the Board's consideration, the Board would appreciate submissions on the following questions:

1. Should the Board create new Board areas? [For example, does it make sense to create a new Board Area south of Area 25 and north of Area 21 to include Hearst, Kapuskasing and Island Falls? Does it make sense to create a new Board Area south of Areas 16 and 17 and North of Areas 11 and 18?] In any event, should the descriptions of Board areas 16, 17 and 19 (within a radius of certain buildings) be changed, and if so, how?

2. Should the Board enlarge current Board areas to include adjacent white areas? [For example, should Areas 19, 20 and/or 21 be expanded to include the white areas adjacent to them? Should Areas 16 and/or 17 be expanded south, or Areas 18 and/or 11 expanded north to include the white areas near them?]

3. In making its decision, in addition to local bargaining patterns and municipal structuring are there other factors the Board should consider in its deliberations?

Please send an email [subject: White Area Submissions], attaching submissions in a Word or PDF document, on or before **January 27, 2017**, to webolrb@ontario.ca. You should receive a reply confirming receipt within one business day. **Please note** that all submissions will be placed on the Board's website (under the "construction industry" links) for public review. Hard copies of submissions may also be sent to the Director/Registrar, Attention: White Area Submissions, 505 University Avenue, 2nd Floor, Toronto, ON M5G 2P1.

Please forward this notice to any party you think may be interested.