

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *PUBLIC SERVICE LABOUR RELATIONS ACT*

AND IN THE MATTER OF AN ADJUDICATION

BETWEEN

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1252
(Local 4848)

GRIEVOR

AND

AMBULANCE NB

EMPLOYER

Date of Hearing: 15 February 2018

Date of Reasons: 10 April 2018

Arbitrator: John P. McEvoy, Q.C.

For the Union: Patrick Roy (CUPE)

For the Employer: Keith Mullin, Esq. (OAG)

I. INTRODUCTION

1. The present matter concerns two Union policy grievances – the first, dated 29 August 2014; the second, dated 15 April 2015. They are virtually identical and pose serious questions concerning the interplay of seniority (and other rights under the governing collective agreement) and the employer’s obligation to provide services in both official languages.

2. By way of remedy, the Union seeks affirmation of the primacy of collective agreement rights; the employer asserts its constitutional and statutory obligations.

3. Two official languages is a reality for New Brunswick – Canada’s only officially bilingual province. Unlike the federal level, language rights in New Brunswick are not subject to a “where numbers warrant” qualification but are guaranteed by the *Canadian Charter of Rights and Freedoms* on a territorial basis; that is, province-wide. In this sense, the province’s obligation reflects the reality of the Province and is more generous than that at the federal level.

4. In New Brunswick, the *Official Languages Act*, S.N.B. 2002, c O-0.5 (as amended) applies to Ambulance NB (“ANB”) by virtue of the definition of “institution” as a body “established to perform a governmental function. . . by or under the authority of. . . a department of the Government of New Brunswick” (section 1 “institution”). On its website, ANB identifies itself in the following terms:

Ambulance New Brunswick Inc. was incorporated on June 6, 2007 under the *Companies Act*. ANB is the organization that has been granted the license and authority by the New Brunswick Department of Health to provide ambulance services in New Brunswick as of December 16, 2007.

5. The Canadian Union of Public Employees, Local 1252 (Local 4848) is the certified bargaining for, *inter alia*, the paramedic employees of the employer, ANB.

6. ANB and its employees are dedicated to providing quality service to all New Brunswickers and in both official languages.

7. At its core, these grievances challenge official bilingualism as a required qualification for at least one half of the permanent paramedic jobs with ANB.

II. THE HEARING

8. Two witnesses testified at the hearing – Trent Piercy and Judy Astle – both of whom testified on behalf of the Union. The employer closed its case without presenting any witnesses.

9. Trent Piercy served as Union president when the Union submitted the 2014 grievance; Judy Astle served as president when the Union submitted the 2015 grievance.

10. Piercy has worked in the medical field for a number of years – first as a LPN and then as a paramedic. He presently works in Fredericton which, for ANB purposes, is located in the West Region. He has also been active in his Union having served as a shop steward, regional president, secretary, and president of Local 4848. He regularly works with another paramedic (his shift partner) to operate a two person ambulance. His shift partner’s paramedic position is designated as bilingual; both Piercy and his shift partner are unilingual Anglophones.

11. Judy Astle, at the time of the hearing, was herself another past-president of Local 4848. Before becoming a paramedic, Astle was a public school teacher for 35 years and, commencing

in 1989, a volunteer with the St. John Ambulance service. As a paramedic, she works out of the Boiestown station (in the Stanley area).

12. Both the Union and ANB submitted in evidence binders of documents or sets of documents. The Union submission consisted of twelve (12) documents or sets of documents and the Employer submission consisted of thirteen (13) documents. As the Employer did not call any witnesses, its documents did not receive much attention during the hearing.

13. The Collective Agreement governing the two grievances is between the Canadian Union of Public Employees and Board of Management as represented by the Hospital Boards of the Hospitals Listed under Part III of the First Schedule of the *Public Service Labour Relations Act – Group: Clerical, Stenographic & Office Equipment Services, Institutional Services, Patient Services* (expired 30 June 2015).

III. THE EVIDENCE

14. ANB is a corporation which, in 2007, undertook responsibility the management of ambulance service throughout the province. ANB employs approximately 1000 persons, most of whom are paramedics. Prior to its creation, the private sector provided ambulance services.

15. Though not at the time of the grievances, management of ANB is now provided by Medavie Health Services.

16. By policy, ANB assigns two paramedics to each ambulance unit for every shift. When service is needed, a dispatcher at the Medical Communications Management Centre (“MCMC”) dispatches the nearest ambulance unit available to provide service. The MCMC is located in Moncton and its staff are bilingual in both official languages.

17. It is important to note that ANB did not commence operations with its own fleet of paramedics; it absorbed employees of the former private sector service providers. Before 2013, seniority was a decisive factor in filling posted job vacancies.

18. In September 2013, the Office of the Official Languages Commissioner (NB) received a complaint that ANB failed to provide service in the French language. The situation arose in Dieppe and involved a Francophone patient. For this particular shift, a unilingual Anglophone

had substituted for a bilingual colleague when the latter could not work the shift. Thus, the ambulance crew consisted of two unilingual Anglophones instead of its usual unilingual and bilingual complement. The Francophone patient did not complain. Instead, a relative of the patient complained because of the lack of French language service by the paramedic crew and the perceived inadequate skills of firefighter, who stepped up to provide interpretation on site. Apparently, the firefighter/interpreter's scope of language did not include the French language equivalent for the word "bladder".

19. The Commissioner exercised her authority under the *Official Languages Act*, S.N.B. 2002, c. O-0.5 ("*OLA*") to investigate the complaint and to make recommendations to ANB. The provisions of the *OLA* in play were sections 27, 28, 28.1, 29 and 30 all of which address the right of "members of the public. . . to communicate with any institution and to receive its services in the official language of their choice."

20. The Commissioner's Report is dated 28 March 2014. The seven final recommendations are reproduced in Appendix A to this award. The final recommendations are not identical to the Commissioner's interim recommendations because the final recommendations take account of the "Updates" provided by ANB in response to the Commissioner's interim recommendations. Two of the interim recommendations of note, but which were not included in the final seven, are:

Recommendation #4

Given that the telephone interpretation service is not being used and that all dispatch personnel is bilingual, that the institution examine the possibility of having these employees respond to facilitate communications, if necessary. This more direct solution would help avoid any misunderstandings due to regional differences (accents, vocabulary, etc.).

Recommendation #7

That ANB and the various unions representing its employees negotiate terms to overcome the obstacles impeding the continuous delivery of bilingual service across the province.

21. It is self-evident that ANB responded positively to the Commissioner's report and recommendations. About three months later, ANB released its "Official Languages Strategic

Plan 2014-2020" (dated 3 July 2014) ("SLP" for Strategic Languages Plan).

22. The SLP modified the job positions for each two person ambulance crew throughout the province by designating one position as unilingual and other as bilingual.

23. To ease implementation, paramedic employees were originally permitted to self-assess their own language skills; this later changed to the results of language proficiency testing.

24. To illustrate implementation of this bilingualism strategy, Piercy referred to the situation in Doaktown – which has 8 full-time paramedic employees. Each position is identified as either "odd" (1, 3, 5, 7) or "even" (2, 4, 6, 8) with "odd" positions designated as unilingual and "even" positions as bilingual.

25. The SLP 2014-20120 states that ANB will change from a system of "19 linguistic administrative areas to one single provincial linguistic level of competency" – which it identifies as a minimum level of 2+ in both official languages" (page 5 of the 3 July 2014 version and p. 7 of the 20 May 2015 version). The SLP includes a statistical table identifying staff levels, bilingual capacity, and the language needs for each of the four administrative regions, the MCMC, and the air ambulance service. The statistics indicate that some 34% of ANB staff are bilingual at the tested 2+ level. A note to the statistical table states that ANB's goal is to have 60% of its staff be bilingual.

26. Applicants for posted positions designated as bilingual are required to meet the 2+ standard of language proficiency in their other official language to gain a permanent full-time position. This language proficiency is a required qualification ("necessary job qualification") for the position.

27. In these circumstances, seniority is a factor only when two or more applicants meet the required 2+ standard in both official languages. The most senior applicant who does not satisfy the 2+ language standard is rejected as unqualified. The language standard and its numerical graduations of proficiency are the same standard and graduations applied to other positions in the provincial civil service.

28. If and when no applicant satisfies the required language qualification, ANB selects the

applicant who is considered closest to satisfying the 2+ language standard (referred to by the witnesses as the “near language qualification”). But, that applicant is not appointed to a permanent position, the appointment is temporary. The position is reposted repeatedly until a 2+ applicant applies and is selected. Until 2017, this reposting took place every 8 weeks. This result is consistent with the SLP (2014 version) which, at p. 10, details the 8 weeks temporary assignments under the heading “E. Staffing Process”.

29. The SLP includes statistics. According to Piercy, only 25-30% of ANB paramedic employees satisfied the 2+ language standard in 2013-2014 (as reported in the SLP). The Union’s position is that reposting bilingual positions temporarily filled by unilingual employees causes hardship for these employees – by creating the stigma that they are not “qualified” to do their jobs and by not respecting their seniority rights – in addition to the stress of not having the benefit and certainty of permanent employment.

30. Piercy recalled that, in 2013, ANB and Local 4848 entered into a “side agreement” which provided that, after 3 failed postings – that is, without a fully qualified applicant who satisfied the 2+ language standard – the applicant with the most seniority would be appointed. This agreement did not survive introduction of the 2014 SLP – which effectively overruled it. As a result, the existing pattern continued such that casual employees could lose and, presumably did lose, full-time jobs and benefits when a fully qualified applicant appeared.

31. The first grievance, dated 29 August 2014, lists 20 articles and 3 Appendices of the Collective Agreement claimed to be breached by the above practices. The articles identified in breach include:

Article 6.09 – establishes an order in which offers of casual employment are to be made “as equitably as possible” to 1) part-time employees for that type of work in the department; 2) available casual employees employed for that type of work in the department; and 3) qualified part-time and casual employees for that type of work outside the department

– the Union and ANB made a nine point agreement in April 2013 which is in the document entitled Ambulance New Brunswick Scheduling Procedure & Definitions v.5.0 on a “Process for Offering Paramedic Shifts” on an “equitable” basis;

- the “Process” was revised in March 2015 in the version 6.4 of the same document (re-titled ANB Scheduling Guidelines & Definitions) into a two column multi-point process relating in the left column to “Standard” call-outs and in the right column to “Short Notice” call-outs (meaning within 4 hours of a scheduled shift) which further address various scenarios re language proficiency stations, administrative areas, and nature of employment status.
- the 2015 version followed implementation of the SLP.

Article 20 - Layoff and Recall - the SLP impacts the bumping rights of employees who are laid-off from work because the 2+ language standard limits the bumping options available to unilingual employees.

Article 22.10 - permits employees to “exchange shifts” but this is limited by the SLP which would not permit an employee in a unilingual position to exchange shifts with an employee in a bilingual position; for example, day to night shifts. It is understood that this change is not yet in effect.

Article 23.03 - provides for offers of overtime to be made “equitably as possible” among available employees for that type of work - impacted by the SLP language standard of 2+ which limits the options re overtime shifts. A further impact of the SLP is that overtime offers are made to casual employees (who may work such hours anywhere in the Province) up to the limit of 150 hours before being offered to unilingual employees.

Article 25 - Holidays - the Union concern is that employees may not be getting holiday leave in order to fill-in for staff absences or vacancies.

Article 26 - Vacations - the Union concern is that ANB may restrict vacation hours of bilingual employees in order to maintain its bilingual service capabilities; in other words, language proficiency may become a new factor in ANB giving approval to vacation requests.

Article 30 - Temporary Assignments - temporary assignments may be made for six months or more, or for less than six months – for bilingual assignments, the

employer had not been making assignments for the full period but for periods of eight weeks.

Article 31 - Vacant Positions - if no applicant satisfies the 2+ standard for bilingual language proficiency, ANB uses a “sliding scale” to select the applicant with the best proficiency to fill the position on a temporary basis rather than selecting the applicant with the most seniority and the “necessary job requirements as posted”.

Article 32 - Seniority Rights - the union concern is that seniority rights are “trumped” by language proficiency at the 2+ level.

32. After the date of the 2014 grievance, the 20 May 2015 version of the SLP modified the “sliding scale”. At p. 10 of this version, under the heading “E. Staffing Process (Actions Commissioner’s Recommendations A and D)”, ANB states its approach to posted competitions for bilingual paramedic positions:

In an effort to minimize the risk of service interruptions, if no one meets the minimum level of bilingualism, the position will be awarded temporarily to the individual who most closely meets the minimum level of bilingualism on a temporary basis until the next round of postings, approximately an eight weeks cycle, where the position should be offered again. The position will continue to be awarded temporarily and reoffered until such time as a person meeting the required level of bilingualism is found.

This continued to be the process for selection until the new Collective Agreement.

33. In November 2017, the parties completed collective bargaining for a renewed Collective Agreement which expires in 30 June 2019. That process included negotiation and agreement on a new MOU “with respect to ambulance services” which replaces previous MOUs. At Appendix D to this MOU, the parties agreed to modify “the 8 week posting cycle of temporary assignments due to language requirements as identified in Section E of ANB’s language plan” to a 24 week posting cycle.

34. Piercy testified that, though not bilingual himself, he and his paramedic partner were recently posted to Dieppe, an essentially Francophone area of the province. They were able to

serve Francophone patients by use of the “language line” or because the patient was bilingual and communicated in the English language. He noted that Francophone patients were also serviced by a bilingual crew, if nearby and available.

35. The “language line” system provides service in a number of languages – not just the two official language of New Brunswick and is continuously staffed.

36. When Union president, Piercy attended meetings to address concerns re official languages and attended a meeting with a representative of the Office of the Official Languages Commissioner. He understands the Commissioner’s position to be that a language qualification is the same as a degree or educational / training qualification. Piercy agrees in theory but finds the reality to be quite different – not as simple. He rejects the Commissioner’s apparent view that an ambulance is analogous to a hospital for purposes of language services; that is, it is merely an extension of a hospital.

37. According to Piercy, ANB has sought to recruit bilingual applicants from other provinces and offers on-line language training to existing employees through an agreement with the Université de Moncton. That agreement provides for live training sessions one night per week.

38. In relation to language training, Piercy acknowledged the continuing efforts of ANB to encourage and promote language training – its message has been consistent. At this point, the Union stipulated ANB’s efforts to encourage its employees to engage in second language training and testing.

39. He observed that, during his term as Union president, the number of vacant positions regularly stood at 40-50 but now that number has increased to approximately 110. Referring to a report on job posting results, he noted that 90-94 positions were filled on a temporary basis; including a bilingual position in Doaktown.

40. Piercy noted that the number of bilingual applicants for posted positions is higher in the eastern and northern parts of the province. He is now of the opinion that the odd/even crew language designations is not required by the *Official Languages Act*. When first implemented, however, he understood and accepted that bilingual designation of 50% of paramedic positions was required if ANB was to conform to the Act.

41 Piercy asserted that ANB does not, at present, provide full bilingual service – and, at the hearing, ANB acknowledged this point. Piercy also accepted that each shift is different and unpredictable in terms of the people and the medical issues to be addressed – every service call presents unique circumstances. The responsibility on each service call is to arrive at the scene in a timely way, to instill calm at the scene, and to collaborate with other services - be they medical or police.

42. Piercy stated, in no uncertain terms, that bilingualism at the 2+ standard is not a necessary or required qualification for all positions and in all circumstances; there are areas of the province where unilingual Francophone and unilingual Anglophone paramedics can serve without concern re official language policies.

43. Piercy acknowledged that, through negotiation between ANB and the Union, the 8 weeks cycle of repostings has been replaced by a longer period of 24 weeks. As noted above, at para. 33, the parties instituted this change through a Memorandum of Agreement dated 28 November 2017 – thus, post-grievance.

44. Referring to the latest job postings results, Piercy noted that 67 of 117 job postings were made on the basis of the 24 weeks cycle limitation. The other postings (50) resulted in permanent positions. Piercy interpreted these results as indicating that none of the 67 postings attracted a fully qualified applicant due to the language qualification / requirement.

45. Recognizing the reality that unilingual ambulance units currently exist and function in the system, Piercy favours a change in approach by ANB – rather than designating all ambulance units as bilingual, ANB should designate a number of units as bilingual in each region so that unilingual employees (Anglophone or Francophone) can gain permanent employee status in positions not designated as bilingual.

46. In redirect, Piercy was asked what he expects to happen with his unilingual position upon his retirement. His response was that ANB would move a unilingual English employee (who holds a designated bilingual position) into his vacant position and thus free up the bilingual position for a truly bilingual employee.

47. Astle explained the genesis of the second policy grievance, dated 15 April 2015.

48. This second grievance expressly refers to four articles of the Collective Agreement: 6 “Part-time, Casual, and Temporary Employees”, 9 “Management Rights”, 31 “Vacant Positions”, and 32 “Seniority”.

49. This grievance relates to the agreement that vacant bilingual positions would be reposted only twice before a unilingual employee would be selected on a permanent basis – as expressed by Astle, “temp/ temp / permanent”. But then, contrary to this agreement, ANB informed the Union – during a 17 March 2015 Labour Management Meeting – that positions would be reposted and “only be awarded when the medic meets the qualifications”. As reflected in the Minutes of that meeting, ANB introduced its “sliding scale” approach.

50. Astle described ANB’s approach as placing applicants in bilingual positions even though they have less than the 2+ standard in both official languages and less seniority and experience than other applicants. The applicants so selected receive only a temporary assignment and use the “language line” to communicate with patients using the other official language. As explained by Astle, a key concern is the denigration of seniority rights.

51. Astle referred to the 11 January 2018 list of competition results for posted positions. Five positions as primary care paramedics are listed for Doaktown and all five require written and spoken competence in one official language and spoken competence in the other. Four of the positions are permanent full-time and are listed with the name of the successful applicant. The results indicate that the fifth position is part-time and that it attracted no applicants. Of the four named successful full-time applicants, Astle testified that, to her knowledge, none of them have 2+ competence in a second official language, their appointments are not permanent but temporary, and these positions have been posted and reposted since 2014.

52. As Union president, Astle is well aware of the concerns of her members because ANB’s “sliding scale” approach prevents them from gaining permanent employee status and leaves them with the stressors associated with temporary employee status. She favours doing away with the “sliding scale” in favour of respecting seniority rights and reducing the 2+ standard to 2.

53. Astle acknowledged that she has not been tested for her second language proficiency; notwithstanding, she is confident that she knows that score.

54. In cross-examination, Astle recalled receiving an email dated 6 August 2014 with the subject line “ANB Launches Official Languages Strategic Plan” and identified a copy of that email. A second email provided a “Q & A” document which informed employees about the 2+ language proficiency standard and that “seniority is important” but then justified the changes as required by the *OLA* which “mandates us to provide service in both official languages at all times. It’s the law.” The Q & A also advised employees that ANB would not pay a wage premium for bilingualism but that it would pay for language training from approved service providers.

55. Astle explained that every ambulance unit has assigned to it 8 full-time and 2 part-time employees and that 50% of the positions are designated as bilingual.

56. ANB counsel referred Astle to, and Astle acknowledged, an email dated 6 November 2015 with the subject line “ANB Scheduling Changes (Short Term Leave Requests)”. The revised policy is official languages sensitive and is addressed to “All ANB Land Staff”. It informs employees that, when TeleStaff recognizes an ambulance unit is not proficient at the 2+ level in both official languages and a vacancy arises in that unit (short term leave), TeleStaff will first identify employees who have the required 2+ language proficiency and sort them “based on their last offer”. If that does not fill the vacancy, a second sort will take place on TeleStaff to identify employees by last offer “who qualify for the position excluding the language requirements.” The revised policy also informs employees that shift exchanges are subject to the approval of the operations manager based on language proficiency and the Collective Agreement.

57. The policy further details that Telestaff will identify employees’ language abilities; that is, by the provincial test score if available for the secondary language and that henceforth self-assessed employees will be recorded as proficient in their first language and at zero in the second.

58. ANB counsel then referred Astle to what purports to be a “job posting” for the “Primary Care Paramedic” / “Travailleur(se) paramédical(e) des soins primaires” classification (Employer Exhibit 8) and a six page list of job postings from an internal website accessible by employees (Employer Exhibit 9). The “job posting” is generic and does not mention language proficiency in the list of “Required Qualifications” nor, indeed, at any point in the document; nor does it

identify the location of the posting. [Logically, the job posting list of qualifications should match the class specification.] The six page list of job postings identifies the required language qualification in the last column of each posting (there are 8 columns of information for each posting).

III. COLLECTIVE AGREEMENT

59. ARTICLE 9 - MANAGEMENT RIGHTS:

9.01 All the functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer.

ARTICLE 31 - VACANT POSITIONS:

31.01 When any vacancy occurs or a new position is created within the bargaining unit, the Employer shall post notice of the vacancy for a minimum of seven (7) calendar days. Such notice shall be forwarded electronically by the hospital to the Local.

31.02 Such notices shall contain the following information:

- (a) duties of the position;
- (b) essential qualifications as per the class specifications;
- (c) other job requirements;
- (d) hours of work;
- (e) salary; and
- (f) date of posting.

The job requirements must be relevant to the position.

31.03 Appointment to the position shall be made of the applicant with the greatest seniority from among those who meet the necessary job requirements as posted.

IV. POSITIONS OF THE PARTIES

a) Union

60 The Union respects the provisions of the *Official Languages Act* and the authority of the

Official Languages Commissioner to make recommendations regarding compliance with the *OLA*. The Union also accepts the legal significance of the duty to make an “active offer” of service in both official languages. It argues, however, that the *OLA* does not expressly provide a basis to ignore the Collective Agreement.

61. It is also to be noted that, notwithstanding the Commissioner’s report and the Union’s acceptance of “active offer” as a legal requirement, the Commissioner’s authority is limited to making recommendations; she has no authority to pronounce the authoritative interpretation of the *OLA*.

62. The Union recognizes the reality that ANB is not even close to being in a position to be fully compliant with the Commissioner’s recommendations; it is highly improbable that ANB will have sufficient bilingual paramedics in the reasonably foreseeable future to implement its SLP fully – even though it is ANB that provides paramedic course training and can devote resources to that goal.

63. It is true that the Collective Agreement provides for temporary assignments but it does not contemplate what are, in reality, continuing temporary assignments – as in Doaktown and other locations in the Province where posted bilingual positions have been repeatedly filled by unilingual temporary employees for many years. Given the record of applications for posted positions, there is only a slight possibility that a bilingual applicant will emerge in response to a posted 2+ bilingual position for such locations as Doaktown (Anglophone) or Saint Quentin (Francophone). The Collective Agreement cannot be interpreted to have envisioned such “permanent” temporary positions / assignments.

64. Notwithstanding the negotiation of a 24 weeks term for temporary assignments, employees face a number of serious disadvantages and resulting frustrations. As holders of temporary assignments, such employees are not compensated at full-time wage rates nor, *inter alia*, entitled to vacation leave, sick leave, bereavement leave, holidays, and certain elements of the health care plan. Employees with temporary assignments must hold such positions for six months to qualify for “all inclusive” wage rates. It is noted that ANB pays full rates to casual employees but does not provide other benefits.

65. In essence, ANB is converting posted permanent positions into temporary assignments

notwithstanding that it has not formally changed a posted permanent position into a temporary assignment. This has serious implication for provisions of the Collective Agreement such as bumping rights and the status of both full-time and part-time employees.

66. A number of arbitral awards have addressed bilingualism as a required qualification and have resulted in confirmation of the selection of a bilingual applicant notwithstanding a unilingual applicant with more seniority. Here, positions arbitrarily designated as bilingual have been filled by unilingual employees. In essence, ANB is “shuffling” employees around.

67. The reality is simple. The goal of a bilingual paramedic in each ambulance is not realistic in the foreseeable future. A reasonable alternative, in such circumstances, is use of the “language line” to communicate in the other official language. .

66. In reality, it must be recognized that the policies put in place by ANB are not reasonable and cannot reasonably be expected to “fix the problem”.

69. In closing argument, the Union abandoned its position in relation to a claimed breach of Collective Agreement article 26 “vacations”.

70.. The real “culprit” is the substitution by ANB of the “sliding scale” of language proficiency as the rationale for selecting a successful “unqualified” applicant in lieu of seniority as mandated by the Collective Agreement, Article 31.03. The “sliding scale” is an arbitrary method to select the preferred unqualified applicant.

71. It is not without significance that almost a year passed between the date of the Official Language Commissioner’s report (28 March 2014) and the Labour-Management Meeting at which ANB informed the Union of its present language policy and its requirement that each ambulance unit have a bilingual paramedic for each shift. Yet, such a requirement is not found in the Commissioner’s report. ANB decided to scrap its cooperative effort with the Union in favour of its own unilateral policy initiative.

72. In terms of remedy, the Union seeks acknowledgment that ANB’s “sliding scale” approach is contrary to the Collective Agreement as a response to permanent full-time job postings which do not result in a fully qualified applicant. Appropriate vacant permanent

positions should be posted and the successful applicant selected in accordance with the Collective Agreement – for such positions, bilingualism may not always be recognized as a “required” qualification. It is clear that the Collective Agreement does not contemplate nor promote a workforce of temporary employees. It is also clear that bilingualism in 100% of ambulance units is not a reasonable requirement to serve the ambulance needs of the people of New Brunswick.

73. M. Roy referred to the following authorities to support the Union’s position: Brown & Beatty, *Canadian Labour Arbitration* (4th Ed) (on-line) at para. 4:2310 “Management Rights”, para. 4:2100 “The Object of Construction: Intention of the Parties”, para. 4:1520 “Rule-making as an exercise of management’s prerogative”; *Lumber & Sawmill Workers’ Union, Local 2537 and KVP Co. Ltd.* (1965), 16 L.A.C. 73, [1965] O.L.A.A. No. 2; and *C.U.P.E., Local 1252 (Local 833) and Regional Health Authority 5* (28 September 2004) (Pierre Arsenault).

b) ANB

74. ANB’s position is that it has not breached the Collective Agreement.

75. Article 31.03, under the heading “Vacant Positions”, expressly provides that appointments “shall be made [to] the applicant with the greatest seniority from among those who meet the necessary job requirements as posted.” Here, the challenged positions are those for which bilingualism (at least at the 2+ level) is one of the “necessary job requirements as posted”. Due to the lack of applicants “who meet the necessary job requirements as posted”, ANB is fully entitled to make temporary assignments for a limited time. This is because Article 30.01 - Temporary Assignment expressly mandates that such appointments be made “in accordance with Article 31.01, 31.02, 31.03”.

76. ANB’s exercise of its management rights to make temporary assignments is reasonable in the circumstances and conforms to the needs of the service it provides. Counsel noted that most arbitral awards concern a challenge made by one employee in relation to a single posted vacancy. Here, the challenge is program-wide in all regions of the Province.

77. ANB’s exercise of management rights is not arbitrary but conforms to the standards set by the *Official Languages Act* which ANB is positioning itself to implement pursuant to its SLP.

The present situation is such that ANB concedes that it is in daily breach of the *OLA* and is committed to achieve its obligations in this regard.

78. Mr. Mullin referred to the following authorities in support of ANB's position: *Brown & Beatty*, Canadian Labour Arbitration (4th Ed) (on-line) at para. 6:3000 "The Skill and Ability Requirement", para. 6:3350 "Language facility"; *A.O. Smith Enterprise Ltd. v. U.S.W.A., Local 8773* (1990), 11 L.A.C. (4th) 126, 1990 CarswellOnt 4162; *C.U.P.E., Local 227 v. Halifax Regional Water Commission* (1999), 75 L.A.C. (4th) 35, 1999 CarswellNS 286; *New Brunswick Union of Public and Private Employees v. Horizon Health (Zone 1) (Carey Grievance)* (2015), 257 L.A.C. (4th) 231, [2015] N.B.L.A.A. No 4; *Canadian Union of Public Employees, Local 1190 v. New Brunswick (Department of Transportation and Infrastructure) (Deleavey Grievance)*, [2015] N.B.L.A.A. No. 2; and *Canadian Union of Public Employees, Local 1252 (Local 1199) v. Regional Health Authority No. 2 (Policy Grievance)*, [2007] N.B.L.A.A. No. 7

c) Reply

79. In reply, M. Roy argued that repeated postings for the same positions simply confirm the existence of sufficient work for the appointment of a permanent employee as mandated by the Collective Agreement. ANB is required to respect the Collective Agreement.

V. ANALYSIS

i) ANB's Strategic Languages Plan and the *OLA*

80. As noted in para. 54, above, ANB justified its SLP on the basis that the *OLA* "mandates us to provide service in both official languages at all times. It's the law." While that is true, it does not necessarily follow that the same can be said for the approach ANB has implemented through its SLP; that is, the designation of every second position as bilingual so that each paramedic team and each ambulance unit is staffed by at least one bilingual paramedic.

81. It is of some importance that the Office of the Official Languages Commissioner is not a tribunal which authoritatively interprets the *OLA* and adjudicates complaints. Its role is to advocate for official languages services and, by means of recommendations, to promote the equality of the two official languages and communities in New Brunswick.

82. It is also some significance that nowhere in the Commissioner's 2014 report and recommendations is there a clear statement on which ANB could characterize its SLP of bilingual paramedic teams as "the law".

83. At p. 7 of her 2014 report, under the heading "Phone System", the Commissioner refers to the decision in *Doucet v. Canada*, 2004 FC 1444 and quotes the late and highly respected Edmond Blanchard J.:

[A witness] testified with respect to the protocol established by the RCMP for meeting the needs of Francophone travellers. I would like to point out that, however well intentioned it may be, the service is limited. [The witness] testified that, on occasion, a unilingual English officer meets someone who speaks only French. Arrangements are made for such individuals to communicate via radio to a bilingual member who is on the air. In my view, such an arrangement is by no means sufficient for the RCMP to fulfill its obligations under the *Charter* and the *OLA* so that any member of the public is entitled to communicate with a federal institution in the official language of his or her choice.

[Emphasis added by Commissioner in her Report]

[Witness identity omitted].

and then adds her own comment: "A radio or phone system is therefore not an acceptable means of ensuring that ANB fulfills its language obligations in only one official language."

84. First, the Commissioner did not identify the factual context addressed by Blanchard J.; it was not the provision of actual service to the public but of "active offer".

85. Second, the action for a declaration under consideration in *Doucet* was, in effect, a collateral attack on the decision of the Supreme Court of Nova Scotia in *R. v. Doucet* (2003), 222 N.S.R. (2d) 1 which dismissed Doucet's appeal of his conviction for speeding. Before the Nova Scotia courts, Doucet argued that his language rights per section 20(1) of the *Canadian Charter of Rights and Freedoms* had been breached because the RCMP officer who stopped his vehicle did not make an "active offer". The Provincial Court and the Supreme Court of Nova Scotia rejected this argument. The specific point in issue was whether, within the meaning of section 20, there was "significant demand" or it was reasonable to expect communication and service in

both official languages. On the evidence before it, the Nova Scotia Courts held in the negative. Doucet then proceeded to the Federal Court with better statistical evidence and argument about the official languages served by Highway 104 West near Amherst, N.S. (TransCanada Highway).

86. The issue before Blanchard J. concerned “active offer”, not official language of actual service. Blanchard J.’s “view” is a statement of *obiter* not *ratio*.

87. Third, reliance by the Commissioner on *Doucet* is inconsistent with the Treasury Board and Human Resources, Official Languages - Language of Service Policy and Guidelines placed in evidence at the hearing by ANB. At page 2 of the Policy and Guidelines, under “Definitions” is found:

Service of equal quality is service which is actively offered in both official languages and which is available in the language chosen by the member of the public without undue delay. [emphasis added to last phrase]

88. Fourth, there is nothing in the *OLA*, sections 27 to 30 “Communication with the public”, which expressly addresses, after an active offer, the immediacy of the provision of health services in the official language chosen by a member of the public. It may be tempting to interpret the specific obligations imposed on a peace officer in *OLA*, section 32, as an exception to the general rule of immediacy but it appears, in context, to target the seriousness of the interaction of a member of the public with a peace officer (loss of liberty).

89. Undoubtedly, the interaction of a member of the public with an ambulance paramedic is equally, if not more, serious than an interaction with a peace officer. Yet, the *OLA*, section 33, does not expressly impose on health care sector employees the obligation expressly imposed on a peace officer, by section 31(2), to “take whatever measures are necessary, within a reasonable time, to ensure compliance with the choice made”.

90. I recognize that an interpretation of immediacy is possible but find the assumption countered by the provision in the Official Languages - Language of Service Policy and Guidelines in relation to “without undue delay” – which must be understood as the government’s own interpretation of its *OLA* obligations.

91. A brief review of *Hansard (N.B.)* at the time of the 2013 revision of the *OLA* makes clear

that the approaches taken by both government and the official opposition recognized the positive contribution of official bilingualism to the Province and that the amendments under consideration were steps in a continuing path of progress: “une approche équilibrée et réaliste” per Premier David Alward on behalf of the government and “un pas vers l’avant” per Hédard Albert on behalf of the official opposition. See: *Hansard (NB)*, 57th Assembly, 3rd Session, 19 June 2013 at 49 (Alward) and at 51 (Albert). This tends to support recognition that a right to “immediacy” of service is a goal rather than a legal reality.

92. At the same time, it must be noted that the Office of the Commissioner for Official Languages has considered the use of a “language line” for interpretation purposes “an acceptable solution as long as it remains provisional” and that full bilingual service with full immediacy is the “ideal”. See: *Aim Higher, Go Further! 2012-2013 Annual Report*, Office of the Commissioner of Official Languages for New Brunswick at 47 wherein then Commissioner Michel Carrier, Q.C./c.r. stated:

As for the use of a telephone interpretation service, the Commissioner sees it as an acceptable solution as long as it remains provisional. Indeed, he believes that reliance on this service cannot represent a permanent measure, since as an intermediate means, interpretation constitutes an extra step in communication. However, to say intermediate is to say waste of time, as time is precious when it comes to saving a life. ANB should aspire to serve all New Brunswickers fairly and without reliance on go-betweens, regardless of which official language community they belong to or where they live. Thus, the ideal would be for an Anglophone on the Acadian Peninsula to receive a service of equal quality to that of a Francophone in St. Stephen, for example, without the paramedics relying on the telephone interpretation service. The situations described by the complainants are even more bewildering and distressing since they both occurred in Dieppe, a city with a high concentration of Francophones.

Notice once again that Commissioner Carrier wrote in terms of an aspiration and ideal rather than a legal requirement. There has been no amendment to the *OLA* since Commissioner Carrier issued the statement just quoted which would impact on the validity of that statement.

93. It must also be noted that the Commissioner’s interim Recommendation 4, at para. 20, above, commences with the phrase “Given that the telephone interpretation service is not being used and that all dispatch personnel is bilingual” which certainly implies, at the very least, that

the “language line” is not without merit.

94. I conclude that the *OLA* does not require that service in the official language of choice be immediate; that is, without any delay.

ii) ANB’s Strategic Languages Plan and Management Rights

95. With respect, a strategic plan is normally perceived as a specific realistic plan to achieve set goals within the context of known limitations and expectations. The SLP is more a public relations document than a realistic plan with ascertainable goals. To declare each two person paramedic team as immediately bilingual (one designated position per team) is hardly realistic. Instead, the evidence strongly supports its characterization as a recipe for employee discontent. Year after year of un-achieved goals is hardly a plan.

96. The Collective Agreement, article 9, respects and maintains the authority of management rights. But this authority is not without limits. Those limits are found in the express wording of the Collective Agreement, applicable statutory requirements, and general principles such as the duty to act fairly. See Brown & Beatty, *Canadian Labour Arbitration (4th Ed)* (on-line) at para. 4:2310.

97. Though not referenced by counsel, Brown & Beatty, at para. 4:2320 *et seq.*, introduce the subject of “Management’s duty to act fairly” and then state at para. 4:2322 “The genesis of arbitral review of management decisions for reasonableness”:

A contextual or purposeful approach to the interpretation of collective agreements has led some arbitrators to require employers to act fairly and reasonably in the exercise of their management prerogatives.

98. Of course this requirement of a “fair” or “reasonable” exercise of management rights has parallel application in connection with the unilateral promulgation of rules and regulations by an employer. For this reason, the Union’s included, in its closing argument, reference to the now classic award in *Lumber & Sawmill Workers’ Union, Local 2537 and KVP Co. Ltd.* (1965), 16 L.A.C. 73, [1965] O.L.A.A. No. 2. The reasons for decision in *KVP Co. Ltd.*, at para. 34, identify the second analytical criteria applicable to a rule introduced unilaterally by an employer

as “it must not be unreasonable”. The essential facts in *KVP Co. Ltd.* were that the employer implemented a policy that employees whose wages were garnished more than once would be dismissed; the grievor was dismissed after his wages were garnished three times.

99. There is no reason in logic why the same approach re reasonableness should not apply to the policy rule unilaterally applied by the employer in the present matter – the designation of one position in a two person paramedic team as bilingual. The impact on some employees is loss of an opportunity for what was on offer in the job posting notice – permanent full-time employment and at stake in *KVP Co. Ltd.*

100. Mitchnick & Etherington, *Labour Arbitration in Canada (2nd Ed.)*, at part 17.2, commence discussion on “Limitations on Management Rights” by noting the approaches to such rights by reference to the “Laskin School” – that collective bargaining “changed all prior assumptions about the employer-employee relationship” (at 394) and thus limitations on the exercise of management rights exist even if not expressed in the collective agreement – and the “Residual Rights School” – that management rights are presumed to be maintained “except to the extent of any restrictions specifically negotiated by the parties” (*ibid.*)

101. The authors then conclude that the two “schools” have melded into a single approach that management discretion is to be exercised fairly and reasonably and, at 396, citing *L/3 Communications / Spar Aerospace Ltd. And I.A.M. Northgate Lodge 1579 (2004)*, 127 L.A.C.(4th) 225, for the proposition that:

“principled, rational decision-making” must be taken to underlie collective agreement administration in Canada and that “arbitrary, capricious or discriminatory” decision-making is permissible only where the language of the agreement expressly countenances it.

102. I agree with the Union’s position, at para. 63 above, that the Collective Agreement does not contemplate the concept of “permanent” temporary assignments. In other words, ANB’s SLP has, in a sense, created a temporary workers program for New Brunswick paramedics – akin in spirit, at least – to the foreign temporary workers program established by the federal government.

103. The award of adjudicator Arsenault (as he then was) (later Chief Judge of the Provincial Court and now a supernumerary judge of that Court) in *C.U.P.E., Local 1252 (Local 833) and*

Regional Health Authority 5 (28 September 2004) is illustrative of this obvious statement. In general terms, the facts were that the employer Health Authority used part-time pharmacist assistants to perform certain tasks of a pharmacist during a two year period from 2002 to 2004 but limited their tenure to repeated temporary full-time assignments of six months. The learned adjudicator held that the employer could not properly make repeated temporary assignments:

25. The Employer. . . may have a discretion to post temporary positions that have become vacant for a short period of time, such as a sick leave for a few days or weeks, but, when a vacancy is for a long period of time, [the Employer] has an obligation to post the vacancies in the department. . . The Employer is in violation of Article 31 by failing to post the vacant positions and by filling them with temporary full-time assignments. The three part-time assistant pharmacists offered full-time assignments. . . were in fact, during those assignments, full-time employees and should have enjoyed the rights and benefits of full-time employees under Article 2.02(a).

26. The Employer maintains that [it] has acted reasonably and in good faith when [it] offered temporary full-time assignments to the three part-time assistant pharmacists. While it is true that [the Employer] had good management reasons to do so under Article 9, such as the shortage of pharmacists in the department, [it] in fact created full-time positions in the department when [it] offered temporary full-time assignments to the part-time assistant pharmacists. The creation of such temporary full-time positions would not trigger the application of Article 31 if those positions were created for a reasonably short period of time. It would not seem reasonable however to continue this practice over a long period of time, such as temporary full-time assignments for a period of six months with possible extensions. In the present case, the temporary full-time assignments were for a period of six months with possible extensions and they, in fact, lasted for more than two years. Such a practice would be a violation of the provisions of Article 31.

27. For those reasons, the Union policy grievance is granted. The Employer was in breach of Article 31 of the Collective Agreement when [it] offered temporary full-time assignments to the part-time assistant pharmacists for a period of six months with possible extensions. . . and extended those assignments for more than two years without posting the vacancies.

It should be noted that the governing collective agreement in *C.U.P.E., Local 1252 (Local 833) and Regional Health Authority 5* is a prior iteration of the Collective Agreement in the present matter.

104. In the present matter, ANB reposts the positions. That is the only real factual difference between the present matter and that in *C.U.P.E., Local 1252 (Local 833) and Regional Health Authority 5*. It seems to me that this is a distinction without a difference. ANB repeatedly reposts full-time permanent paramedic positions which it then converts to temporary assignments when no applicant satisfies the bilingualism qualification. After several years of such repostings, ANB has a mere hope that a bilingual applicant will step forward.

105. Pulling these strands together, it is clear that ANB's decision to designate a bilingual position for each two person paramedic team and to include bilingual competence as a required qualification on a job posting is subject to an express limitation in the Collective Agreement. That limitation is expressed in Article 31.02, that "job requirements must be relevant to the position."

106. When this point is addressed, it can then be determined whether the SLP is a reason and fair exercise of management rights.

iii) "job requirements must be relevant to the position"

107. The thrust of the Union's evidence is that bilingualism in both official languages is not relevant to one position in every paramedic team.

108. The provision which limits ANB's discretion to require qualifications to a job posting notice is Article 31.02 which, for ease of reference, is now repeated:

31.02 Such notices shall contain the following information:

- (a) duties of the position;
- (b) essential qualifications as per the class specifications;
- (c) other job requirements;
- (d) hours of work;
- (e) salary; and
- (f) date of posting.

The job requirements must be relevant to the position.

In this Article, it is obvious that "such notices" refers to the "notice of the vacancy" in Article

31.01; that is, the notice of a vacant position which is to be posted for “a minimum of seven calendar days”.

109. The phrase “other job requirements” in Article 31.02(c) bears an obvious relationship to the phrase “job requirements” in the closing sentence of Article 31.02; that is, to job requirements not identified in the class specifications. As mentioned above, the specifications for the paramedic class are generic in nature and do not express an official languages requirement.

110. Whether bilingual competence is “relevant to the position” must, in turn, depend on the actual position. On the evidence in this matter, the reality is clear that not every two person paramedic team serves the public in two official languages and that such occasions do not necessarily arise for each and every paramedic unit / team. It is also clear, on the evidence, that unilingual paramedic teams can access the “language line” to provide service to a member of the public in the other official language. See paras. 34 (Piercy) and 49 (Astle), above.

111. The evidence is that there are areas of the Province where unilingual paramedic teams can serve the public without having bilingual competence because the public served communicate in that same official language.

112. I conclude that ANB’s policy choice to require bilingual competence in its paramedic teams, by designating one position as bilingual in each paramedic teams, is not relevant to the position if that position does not service a population which cannot be adequately served by use of the “language line”. The realistic question is not the possibility but the probability of relevance to each paramedic team.

113. Such relevance should be readily identifiable from the statistics that ANB must have available to it on the number of service calls and the corresponding official language of service in each of its service regions and service areas. In addition, ANB has the benefit of a fully bilingual capacity at its MCMC dispatch centre which receives calls for service and selects the available crew to dispatch. The MCMC will know the official language of the caller and can inquire as to the official language of the persons in need of assistance before selecting the ambulance unit and its paramedic team. The MCMC will also know if the “language line” is likely to be needed and that line should be on stand-by to provide service without delay once the unit arrives on site – it should not be necessary, in most instances, for the paramedic crew to

have to contact the MCMC or the “language line” for language service. Afterall, in most instances, the MCMC will be dealing with known facts regarding language of service. The default position should be that bilingual service is needed to provide service in the language of choice..

114. I conclude on the evidence that ANB’s SLP is not a reasonable exercise of management’s rights nor is it a fair exercise of management’s rights.

115. It is not reasonable and is arbitrary because it is based on the designation of one paramedic position as bilingual in each two person paramedic unit regardless of the public served in each region and area of the Province. This is the modern age of communication, communication devices, and statistics. Factors of probability rather than possibility can be determined to guide service delivery and to respond to unusual circumstances as they arise without undue delay.

116. The negative impact on employee rights under the Collective Agreement results in unfairness. On the evidence, ANB has invoked a required qualification to deny full-time permanent employment to applicants for posted paramedic positions in situations where that qualification is not relevant to the position. Consistent with the Collective Agreement, Article 31.03, such posted positions are to be decided on the basis of seniority. The “sliding-scale” approach of next best language proficiency is inconsistent with the Collective Agreement, Article 31.03 because the ANB selects not on the basis of seniority but the on the basis of closest to the posted qualifications among those considered unqualified. ANB might address this by including on a job posting that bilingual competence is “an asset” though not a required qualification.

117. The principal concern raised in the evidence by the Union is with seniority. The other concerns need not be addressed this award but can be reserved for concrete situations as they arise. The argued negative impacts appear logical and obvious.

VI CONCLUSION

118. Having considered the evidence and the arguments of the parties, whether or not

expressly addressed in this award, I conclude that the grievance is well founded and must be upheld.

119. ANB is Ordered to review the level of demand for official language services for each of its paramedic positions which are subject to reposting because of the lack of a qualified bilingual applicant. Positions for which bilingual competence is not “relevant”, when assessed consistent with the award, are to be reposted and the successful applicant selected on the basis of seniority consistent with Article 31.03 of the Collective Agreement. As such, ANB is Ordered to cease use of the “sliding scale” approach to official language competence when awarding a posted permanent full-time position as a temporary assignment.

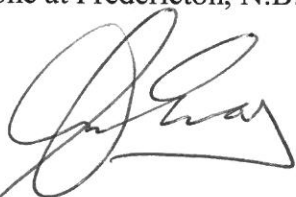
120. ANB is Ordered to halt its reposting competitions for such positions (para. 119) and to continue the employment of the incumbent to each such position pending the review of reposted positions. In other words, ANB is ordered to freeze the reposting of paramedic positions and competitions for which bilingual competence is not “relevant”, when assessed consistent with the Award, pending its review per para. 119.

121. The parties are invited to provide comment or feedback in relation to the remedy if they have concerns which should be addressed by the undersigned.

122. I take this opportunity to express appreciation to the Union representative, M. Roy, and counsel, Mr. Mullin, for their professionalism at the hearing and for their patience.

123. I retain jurisdiction to address any issues or concerns that the parties may have in terms of remedy and to assist the parties in the implementation of this award.

Done at Fredericton, N.B. this 10th day of April 2018.



John P. McEvoy, Q.C.
Adjudicator

Appendix A

Recommendation:

We recommend that the Department of Health fulfill its own obligation under the OLA by requiring ANB to”

- a. Fulfill its role with conviction, clarify its policy on official languages, and demonstrate leadership throughout the entire organization so that ANB staff fully comply with the provisions of the OLA.
- b. Establish the level of language proficiency required in order for paramedics to be considered bilingual and make this level applicable throughout the province.
- c. Determine the exact number of bilingual paramedics lacking and develop a detailed plan to meet its needs for bilingual employees.
- d. Include language requirements in the ‘Requirements’ section of job postings for paramedics.
- e. Offer information and awareness sessions on specific rights and obligations under the OLA to all its staff on a regular basis.
- f. Develop mechanisms to evaluate the effectiveness of its employee training and awareness program regarding OLA requirements and take any corrective measures required so that its employees comply with the OLA at all times.
- g. Follow up with its patients regarding the active offer and services in both official languages to verify that various corrective measures, particularly awareness efforts and policy development, are not only understood by employees, but implements daily.