

**FINDINGS AND AWARD  
IN A DISPUTE**

**BETWEEN:**                    **NEWFOUNDLAND AND LABRADOR ASSOCIATION OF  
PUBLIC AND PRIVATE EMPLOYEES**

(hereinafter called the "Union")

**AND:**                         **HER MAJESTY THE QUEEN IN RIGHT OF  
NEWFOUNDLAND AND LABRADOR represented by  
TREASURY BOARD**

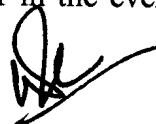
(hereinafter called the "Employer")

**GRIEVOR:**                    **GROUP GRIEVANCE**  
**FOR THE UNION:**         **FRANK PITTMAN**  
**FOR THE EMPLOYER:**   **DAVID MARTIN**  
**BEFORE:**                    **W. JOHN CLARKE, C.Arb. C.Med.**

**PRELIMINARY**

The hearing of this matter took place at St. John's on July 20, 2007 at which time the parties agreed as follows:

1.     The Arbitrator was acceptable.
2.     There were no preliminary objections going to the jurisdiction of the arbitrator to hear the grievance.
3.     The grievance procedure had been properly followed or requirements had been waived.
4.     The arbitrator would remain seized of the matter for a period of 60 days in the event the parties could not agree on the interpretation of the award or in the event there is a



question of compensation arising from the award.

5. No witnesses were called and the Parties had agreed that the matter proceed as an expedited arbitration under the provisions of the collective agreement
6. The time limits for the filing of the award were waived.
7. There were no persons who were not parties to the proceedings who were entitled to notice of the proceedings.

The following Exhibits were entered by consent and identified as follows:

- C#1 Agreed Statement of Facts.
- C#2 Collective Agreement between the Parties effective January 28, 2003 to October 31, 2003.
- C#3 Grievance form dated March 10, 2006.
- C#4 "Notification of Standby" form.
- C#5 "Warders Agreement" between the parties hereto dated August 13, 1974.

### THE FACTS

The parties submitted an Agreed Statement of Facts which reads as follows:

"The Parties have agreed to provide this statement to the Arbitrator to resolve a difference between the parties interpretation of Article 12 of the Correctional Officers' Collective Agreement subject to the following:

1. The parties agree that the hearing shall be conducted as an expedited arbitration in accordance with the conditions as outlined in Clause 9:15 of the Correctional Officers Collective Agreement (expiry date October 31, 2003).
2. The Article in dispute is Article 12 which reads as follows:

*12:01 Effective May 1, 1990, an employee required to perform standby duty shall be compensated as follows:*

- (a) *\$6.90 for each eight (8) hour shift or \$10.35 for each twelve (12) hour shift of standby;*

(b) \$9.10 for each eight hour shift on a statutory holiday or \$13.65 for each twelve (12) hour shift of standby on a statutory holiday.

12:02 All standby duty shall be authorized by the Employer and scheduled by the Superintendent and no compensation shall be granted for the total period of standby, if the employee does not report for work when required.

12:03 The provisions of this Article do not refer to the regular in residence schedule of the Salmonier Correctional Institution.

3. In instances where employees have been on standby and they have not reported to work when required, the Employer has imposed discipline on these employees in addition to not paying standby rates as outlined in Clause 12:02.
4. NAPE's position is that Article 12 prescribes the penalty to be imposed when an employee does not report for work and since a penalty is prescribed (i.e. the employee shall not be compensated for the total period of standby), the Employer cannot seek to impose further discipline or penalty.

The Employer disagrees with NAPE's position as outlined above and feels non payment of standby rates in accordance with clause 12:02 is not disciplinary and there are no fetters on the Employer's right to impose discipline on employees who are on standby and do not report to work when notified to do so despite these employees not being paid standby rates in accordance with clause 12:02.

5. The Parties submit the following question to be adjudicated:

In instances where a Correctional Officer who is on standby and does not report to work when notified to do so and the Correctional Officer does not receive payment of standby rates in accordance with clause 12:02, does the employer have the discretion to impose discipline (ie. Letter of reprimand, suspension, etc.) pursuant to the collective agreement? "

### **THE GRIEVANCE**

On October 3, 2006 the Grievor filed a grievance against the employer claiming that:

"Violation of article 12 and any other pertinent articles of the Correctional Officers Collective Agreement."

The relief the Grievor requested was:



“Full Redress.”

The employer responded to the grievance in the following terms:

“The Employer does not agree there is any violation of the collective agreement.”

### **THE COLLECTIVE AGREEMENT**

Article 12 has been set forth above. Other relevant provisions of the agreement are:

“

#### **ARTICLE 4** **MANAGEMENT RIGHTS**

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

....

9:13 An arbitration board may not alter, modify or amend any provisions of this Agreement but shall have the power to set aside a decision of the Employer and to modify disciplinary measures imposed by the Employer.”

### **THE UNION’S POSITION**

The Union argues that Article 12:02 imposes a penalty on the employee if they fail to show up for a shift when on standby and requested to work. That penalty is the withholding of payment for the standby shift to which the employee would otherwise be entitled. That employee must then fill in on the next standby shift. The language is clear and it is therefore outside of the jurisdiction of an arbitrator to change clear language of a collective agreement.

This language has been in the collective agreement for a long time, at least since 1974, and has never been challenged by the employer and no request has ever been made at negotiations that it be changed.



The union requested that the grievance be upheld as to do otherwise would be to sanction the double discipline that would result. Arbitral authority was presented to buttress its request.

### **THE EMPLOYER'S POSITION**

The employer argues, firstly, that any comments made by the union with respect to factual situations should not be considered by the arbitrator and that the Parties are bound by the facts that are contained in the Agreed Statement of Facts and documents consented to by the Parties. Secondly, the employer's view of standby is that the employee is performing some duty and is getting compensated for it. In this case, the employee is disrupting their personal life for the employer and a compensation payment arrangement has been made for that disruption. Failure to come in to perform a shift when required means a failure on the part of the employee to make the necessary arrangement of their personal life and is therefore not compensable. If they do not perform that duty, they do not get compensated. The employer says that the union alleges this is disciplinary, which it is not; it simply means that a failure to be on standby results in a failure to be paid for same.

The collective agreement, in Article 4, provides that management retains all rights which are not specifically abridged by the collective agreement. The withholding of pay for not performing a service is not disciplinary. For example, if employees are required by the collective agreement to work 40 hours per week but only work 35 hours, they cannot expect to be paid for 40 hours, nor can it be seen as discipline if they are not. If an arbitrator were to rule otherwise, they would be re-writing the collective agreement and thereby be in breach of Article 9:13.

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The employer provided arbitral authority supporting its request that the grievance be denied.

### **FINDINGS AND CONSIDERATIONS**

Several arbitral awards were provided by both parties in this matter. The most applicable one of these is essentially “on all fours” with the instant case, answers the questions as posed by counsel and is one within this jurisdiction. The decision is one rendered by an arbitration board consisting of Barry Learmonth, Rob Kearley and chaired by James Oakley in Newfoundland and Labrador Nurses Union and Western Health Care Corporation represented by Newfoundland and Labrador Health Boards Association, (Employer Policy Grievance Re Standby-2002-unreported).

In that case the question posed was:

“Does the Employer have the discretion to apply discipline, pursuant to the Collective Agreement, to any nurse who refuses to participate in standby, or who refuses to report for duty when placed on standby?”

The second part of that question is virtually identical to that posed in the instant case. In that collective agreement, as in the one under consideration, rates were stipulated for payment to employees who were on standby. There was a clause in the Nurses’ collective agreement which stated that:

“10:03 No payment shall be granted for the total period of standby duty if the employee does not report for work when required.”

Again, this Article is similar to Article 12:02 in the agreement under consideration.

The reasoning of that board on this issue is found at pp. 24-25 of the unreported decision and reads as follows:

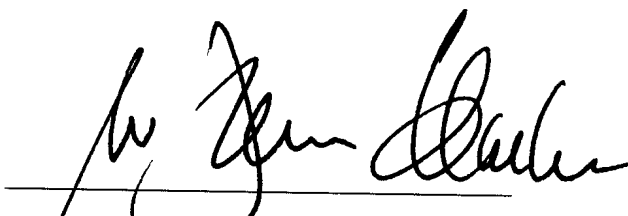
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“Article 10:03 is not a penalty in the nature of a disciplinary penalty. Disciplinary penalties may be imposed under Article 31.01. Disciplinary penalties may include a reprimand, suspension or discharge. If the Employer could not impose any disciplinary penalty, then an employee could always refuse standby duty or always refuse to report to work when called and the penalty would be restricted to the same monetary penalty under Article 10.03 regardless of the number of times the employee refused. The Employer could have difficulty enforcing the obligation of standby duty if no disciplinary penalty could be imposed. Therefore the Employer has the discretion to apply discipline pursuant to the Collective Agreement.”

That reasoning is compelling to the undersigned. Further, one could envision a situation where an employee would have no intention of ever coming in to work on a call back. If they were never called, they would receive the premium pay for the shift having been scheduled for call back. If ever they were called, they would simply refuse each time and suffer no consequence. This would have the potential to make a mockery of the call back system and soon all employees could follow the lead of the refusing employee leaving the employer with no remedy to ensure the smooth running of its institution.

It follows that the grievance is denied.

**DATED** at St. John’s, Newfoundland and Labrador this 24th day of July, 2007



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W. JOHN CLARKE – SOLE ARBITRATOR