

IN THE MATTER OF AN ARBITRATION  
BETWEEN  
**ONTARIO PUBLIC SERVICE EMPLOYEES UNION**  
("the Employer")  
- AND -  
**ONTARIO PUBLIC SERVICE STAFF UNION**  
("the Union")  
CONCERNING A UNION POLICY AND INDIVIDUAL GRIEVANCES  
REGARDING MEMBER EDUCATION PROGRAMS  
GRIEVANCES 2016-65 to -72

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Cynthia D. Watson, Counsel

Riley Palmer, Counsel

For the Employer:

Mark Mendl, Counsel

Written submissions.

Award issued on January 7, 2019.

## **AWARD**

### **The issue**

1. There are seven individual grievances and one union policy grievance, all of which were filed in late October and early November 2015. The grievances concern the use of an outside contractor to conduct a member education program. The individual grievances are by members of the Union, Staff Representatives of the Employer, who claim they ought to have been given the teaching assignment. The Union alleges that what occurred breached the collective agreement provision that such education work must be done by its members.

2. The Grievors and the Union complain that a particular member of the Employer's Board arranged an educational event without regard to the Employer's obligations under the collective agreement to make use of the Union's members to be part of the educational process and to teach the courses.

3. Article 14 of the collective agreement concerns the facilitation of educational courses by members of the Union ("the Staff Representatives"). Under that Article they should facilitate and lead a number of courses for members of OPSEU ("the Employer"). Article 30 prohibits the contracting-out of the work of the bargaining unit. Article 14.05 reads:

OPSEU Member Educational Programs  
(Applicable to permanent Pro-Tech employees only)

14.05.01 The Parties recognize the employee's [sic] responsibility to ensure the delivery of a high-quality education program to OPSEU's dues paying members. The Employer acknowledges that an effective education program requires the involvement of staff and undertakes to see that

staff is involved at all levels of the planning, co-ordination, development, delivery and evaluation of OPSEU's education program. Both Parties agree that although the President of OPSEU is responsible for all staffing decisions, the President will be guided in the selection of facilitators for regionally based education programs, by the recommendations of the Regional EBM/STAFF Committee.

- 14.05.02 The Regional Executive Board Member/Staff Committee may assign a co-facilitator to any Regional educational program. Co-facilitators may be bargaining unit employees, or members of the Union, or any other person selected by that Committee. Employees shall be given preference in the selection of facilitators.
- 14.05.03 For the purpose of Regional Membership Education, the Regional Executive Board Member/Staff Committee will be tasked with the coordination of the Regional Education Programs.

The Employer shall ensure that all staff and member facilitators who wish to facilitate are given the opportunity to learn new course material as it is developed.

- 14.05.04 OPSEU may also use qualified member facilitators where staff are not available for an assignment. Facilitators who wish to facilitate shall first have taken OPSEU's train-the-trainer program. A list of qualified member facilitators will be forwarded to each regional office. Where a member facilitator is not qualified, he/she may co-facilitate with a staff member until they become qualified to facilitate.

4. Article 30.02 reads:

The Employer agrees that work or services currently performed or hereafter assigned to the Bargaining Unit, as regular and continuing work, shall not be assigned in whole or in part to any outside contractor while a Bargaining Unit member in the Section has the qualifications or the technical ability to perform the work or service. In regional offices this provision only relates to regular and continuing work performed by regional office staff.

5. Among the courses listed to be taught by Staff Representatives are “Social Media for Union Activists” and “Train-the-Trainer”. These days of education where courses are presented to members of the Employer are known as an “educational”.

6. The parties agreed on January 8, 2018 that the grievances would proceed by way of written submissions. They further agreed that I have jurisdiction to determine the grievances on the basis only of the written submissions, those submissions being respectively their best cases.

**First preliminary issue – scope of the grievances**

7. The Employer raises a preliminary issue of the scope of the grievances. The form of the individual grievances was as follows:

I grieve the employer has violated but not limited to Article 3 [Management’s Rights] and 14 [Staff Training and Development] of the Collective Agreement and any other legislation that may be applicable in regards to Member Education Programs held in Region 3, specifically but not limited to train the trainer and social media run in 2015.

8. The Union policy grievance is similar:

The Union grieves the employer has failed to comply with Article 3 and 14 of the Collective Agreement as it relates to an education held in Region 3 – more specifically October 2015 – Social Media and Train the Trainer.

9. The Employer points out that there is no reference to the contracting-out provision of the collective agreement, Article 30, which is relied upon by the Union in its written submissions. The Employer argues, therefore, that Article 30

is beyond the scope of the grievance and the submissions regarding contracting-out should be dismissed.

10. The Employer submits that, pursuant to *Windsor v. Windsor Professional Firefighters Association*, (2009) 186 L.A.C. (4th) 225 at paras 68-79, the following standards need to be met for an arbitrator to have jurisdiction over a grievance, and that the Union and the Grievors have not met these standards:

- a. An arbitrator's jurisdiction is limited to the grievances submitted to arbitration.
- b. Where an issue, although not articulated well, is inherent within a grievance, an arbitrator ought to take jurisdiction over that issue, despite any flaws in form or articulation. A grievance should not be defeated on a technicality of form.
- c. However, an arbitrator ought not, in the guise of "liberal reading", permit a party to raise at arbitration an issue which was not in any manner raised in the grievance filed. To do that would be to defeat the purpose of the grievance and arbitration procedure.
- d. Thus, it is not open to a party to raise a new issue at arbitration that was not either stated in or flows naturally from the grievances.

11. The Employer submits further that the evidence concerning a breach of the contracting-out provision is distinct from that concerning a breach of Article 14 (as read with Article 3); further the Employer argues that any relief flowing from breach of the contracting-out provision is significantly different from the appropriate relief for a breach of Article 14.

12. The Union responds that while Article 3 (Management Rights) and Article 14 were expressly mentioned in the grievances, reference was made to other Articles of the collective agreement. The Union submits that Article 30 is

implicitly violated when the Employer does not comply with its obligations under Article 14 and the Union is entitled to relief for breach of the contracting-out provision. The Union suggests the Employer is relying on a technicality to avoid facing its breach of Article 30.

13. I must determine whether the issue in dispute, as described in the grievances, includes an allegation that the Employer contracted-out the work of the bargaining unit in violation of the collective agreement.

14. The grievances claim that non-bargaining unit persons were used to perform work that the Union believes ought to have been assigned to its members. The grievances expressed that as a violation of the Employer's obligation to "give preference [to employees] in the selection of facilitators" under Article 14.05.02.

15. Reference is made in the grievances to other provisions. Article 30 sets the following obligation: "work [of the bargaining unit] ... shall not be assigned in whole or in part to an outside contractor while a bargaining unit member ... has the qualifications or the technical ability to perform the work ..." That is a sufficiently similar obligation to that contained in Article 14.05 as a whole, and in Article 14.05.02 in particular, that it falls within the dispute that the Union has brought in the grievances.

16. In the result, I find that the contracting-out provisions (Article 30) of the collective agreement is encompassed by the grievances.

### **Second preliminary issue – quality of certain Union evidence**

17. The Employer asks that certain evidence presented by the Union be struck because it constitutes similar fact evidence. This is the evidence of a Staff Representative overhearing a conversation during 2017 by the Board Member

concerned in the grievances, in which the Board Member is said to have expressed an intention to exclude Staff Representatives from providing certain training she was planning.

18. This is a good objection by the Employer. The evidence the Union proposes to rely upon is irrelevant to the disposition of the grievances. This is because the Board Member's telephone conversation occurred nearly two years after the filing of the grievances. That call has nothing to do with what occurred during 2015, the relevant period for the arrangement of the educational courses at issue in the grievances.

19. The evidence of a Staff Representative overhearing a conversation by the Board Member is therefore struck as being irrelevant to the facts of this case: *Cargill* [1999] O.L.A.A. No. 180 at para 47.

20. There is other evidence the Employer wishes to have struck as being unreliable because it is hearsay. No order is made with respect to the hearsay evidence which the Union relies on, save to state that the reliability of that evidence is proportional to the weight to be afforded to it.

### **Third procedural objection**

21. In response to the Union's reply to the Employer's submissions, the Employer made a number of objections to the Union's reply evidence. Principally the Employer claims that the Union cannot present evidence in reply that it ought to have had in its original particulars, and that the Union cannot use the opportunity of reply to introduce new evidence to correct deficiencies in its original case.

22. Save for one aspect of this objection, which I will describe below, I am not

persuaded by this objection. The Employer introduced evidence that disputed the Union's original assertion that all educational courses are provided by Staff Representatives – i.e. members of the Union. The Employer explained what were the standard courses offered by the Staff Representatives; the Employer said that the Staff Representatives did not provide courses outside of the standard ones; the Employer made the case that the standard Social Media course differed significantly from the course actually offered in October 2015; the Employer said that many educational courses are offered outside of the context of the Regional EBM/Staff Committee. It was therefore wholly legitimate for the Union to reply to all of these allegations and to take issue with them. The new material was introduced by the Employer; the Union was entitled to reply to it.

23. I uphold one aspect of the Employer's objection to the reply evidence, as follows.

24. The educational that the Union says ought to have been taught by the Staff Representatives was a Social Media Workshop and a Train-the-Trainer course, held on October 16-17, 2015 within the Employer's Region 3. This is disputed by the Employer. The Employer says only a Social Media Workshop was given, and only on the afternoon of October 17, 2015.

25. In reply, the Union changed its claim and suggested that the Train-the-Trainer course was actually held in December 2015, not October. The Union claims the course was not approved by the Regional EBM/Staff Committee and was not taught by Staff Representatives, so it was offered in violation of Article 14.05 of the collective agreement.

26. In the Union's grievance and in its particulars, the Train-the-Trainer course was described as if it occurred in October 2015. Accordingly, when the Employer responded to that allegation, the Employer explained there was no Train-the-Trainer course in October 2015.



27. A difficulty with this shift in the Union's position is that the grievances were filed in October and November 2015. No Train-the-Trainer course had been held by then. So, given that the Union and the Grievors mention this training in their grievances, they must have been aware of the Employer's intention to hold a Train-the-Trainer course and that it would not be taught by Staff Representatives.

28. The Employer has not had the opportunity to respond to this shift in the allegation. The Employer should have that opportunity. In the circumstances, this aspect of the grievances will be held over for later determination. Accordingly, in this determination, I will not address the Train-the-Trainer portion of the grievances. The focus will be on the Social Media workshop held on October 17, 2015.

### **Prior claims of a breach by the Employer**

29. The Union alleges that, not only has the Employer breached the above provisions of the collective agreement in the instance described below, but it has done so several times previously. Accordingly, the relief sought by the Union is based not only on the breach alleged, but on the history of repeated breaches.

30. There are two prior awards in which it was found that the Employer had breached Article 14.05. Firstly, on July 11, 2008, the Union filed a grievance claiming that the Employer had failed "to involve staff in all levels of the planning co-ordinating, development and delivery of the Educational in Region 1" and that the Employer had utilized "non-bargaining unit [people] to teach where there are bargaining unit employees capable and willing to teach". On April 27, 2009, Arbitrator Tims issued an award, finding that the Employer breached Article 14.05. She ordered the Employer to pay to the Union compensation of 72 hours pay.

31. Secondly, five individual grievances by Staff Representatives were filed claiming the same breach. Those grievances came before Arbitrator Brownlee on December 14, 2010. She found the Employer was in breach in each instance. She ordered that the Employer pay \$2,735.00 “as a penalty, payable to the Union ... in light of the Employer’s five separate breaches of the collective agreement in these cases and the former breaches” set out in Arbitrator Tims’ award.

32. In the period between May 1, 2009 and August 4, 2010 (prior to the Brownlee award) several grievances were filed on the same issue. All of these were resolved in “without prejudice” Minutes of Settlement. No regard can be had to them.

33. There is the settlement of a dispute between the parties of a grievance on the same issue, on April 15, 2015, some months prior to the filing of the grievances which are the subject of this award. The alleged breach occurred on May 28, 2013. The settlement was that the Employer would pay to the Union the sum of \$1,106.40 (the equivalent of 14 hours’ pay). While there is no express admission of liability by the Employer, the settlement was also not “without prejudice”.

34. In response to these prior events, the Employer points out that in only two instances was there a finding of a breach by the Employer. Also, the last successful grievance was five years prior to the October 2015 workshop. In that period the Employer has run over 250 regional educationals, and so disputes over them are rare. The Employer submits too that the Union should not be permitted to rely upon breaches that occurred so long in the past.

### **Relevant facts**

35. Each region of the Employer has a Joint Executive Board Member / Staff Committee. It is comprised jointly of Executive Members of the Employer and Staff Representatives of the Union, in equal numbers. These Committees review and determine the regional educational needs for their region for the upcoming year. Pursuant to the collective agreement, Staff Representatives are required to be involved at all levels for the planning, coordination, development, delivery and evaluation of the Employer's education programs. The President of OPSEU is to be guided by the recommendations of the Regional EBM/Staff Committee.

36. Typically, once the Regional EBM/Staff Committee has resolved what courses are to be offered in the forthcoming period, an invitation will be sent to Staff Representatives to volunteer to deliver a particular course if they are sufficiently skilled to provide that course. A selection will be made, normally of two facilitators, usually first from the Region, and if no-one locally is available, from the bargaining unit as a whole.

37. For Region 3, the region from which the dispute arises, there is one Staff Representative for each of the three offices in the Region, along with three Executive Board Members (EBMs) who together make up the Regional EBM/Staff Committee. The Committee typically recommends staff to facilitate any educational that is forthcoming. The planning of the courses ensures quality and consistency in the programs that are delivered.

38. The Employer explains that regional educational courses are usually held over a weekend at a resort, with those attending being expected to stay overnight, from Friday to Sunday. They involve the presentation of courses by Staff Representatives from 37 standard courses offerings. Among them is a Social Media for Union Activists course. The courses have prepared materials, slide decks and handouts for those OPSEU members attending.

39. The Union adds that not all educationals are held at resorts on the

weekends. Many are scheduled during the week or on weekday nights. Also, only those who live more than 60km from the venue stay overnight, while those living closer attend only for the course each day.

40. The Regional EBM/STAFF Committee for Region 3 met on October 20, 2014 to plan the courses to be given within the Region by Region 3 Staff Representatives during 2015. Several courses were agreed upon, for two days each in February, September and November 2015. Among the 12 courses planned for the year was a “Social Media for Union Activists” course that was given on November 21-22, 2015. All of the courses, including this last described, were facilitated by Staff Representatives.

41. A Social Media Workshop was given on the afternoon of October 17, 2015 in Toronto. No Staff Representative was engaged to coordinate and teach the course. There was no involvement of the Regional EBM/Staff Committee in the planning of this course, although its cost came out of the Committee’s budget.

42. Social Media is one of the roster of educational courses that the Staff Representatives are equipped to provide. The Union says they ought therefore to have been requested to provide the course. They were not. Instead the Employer used an outside contractor, Social Movement Technologies, a consultancy that specializes in effective use of social media for union activists.

43. The October 2015 Social Media program was arranged unilaterally by a Region 3 Board Member. The Employer did not discuss the proposed course with the Regional EBM/Staff Committee.

44. The Union learned of the Employer’s intention not to use Staff Representatives to provide the course in October 2015, prior to the date on which the course was to take place. In early October 2015 the Union told the Employer that it knew of the plan to run a course, but not to use Staff Representatives. The

Union suggested that the Employer correct the situation in good time and make use of the Staff Representatives, rather than an outside contractor. The Employer did not avail itself of this opportunity. It made clear that it would proceed as planned with the educational courses, using an external consultant, as it did.

45. The Employer says that the content of the Social Media Workshop given in the afternoon of October 17, 2015 in downtown Toronto, not at a resort, was different from the Social Media course given as part of the regional educational courses in November 2015 that had been planned by the Regional EBM/Staff Committee. That is why there were two separate courses on the use of social media.

46. The Employer's evidence is that the standard social media course, which forms part of the regional educationals, is focussed largely on the risks inherent in using social media. It is a primer about permissible speech on social media platforms, the "do's and don't's" of appropriate use of social media. In contrast, the Workshop was focussed on how social media platforms could be used effectively to advance workers' organization; strategies for writing effectively on social media to encourage union activism. That, the Employer witnesses say, is not a standard regional educational course. There was no prepared presentation, like those in the regular regional educationals.

47. The Union strongly contests that its Staff Representatives did not have the expertise to present the social media workshop.

48. The Union claims that the effective use of social media to advance trade union organization and effectiveness is also part of the training that the Staff Representatives provide in the regular social media course. OPSEU's Editors, a course offering, is a two-part skills-based workshop which provides information on what makes a good social media strategy. It provides hands-on experience with various social media platforms. Participants in the workshop explore various

social media tools, including Facebook, Twitter, Instagram, and Blogs. Most importantly, participants need a smartphone or tablet to fully participate in this workshop.

49. The Union also claims that a standard educational course, OPSEU Editor, has suitable materials on communicating for mobilization and activism.

50. The Employer says that the technology used by the presenters of the Social Media workshop was provided by them and was not otherwise available to the Employer. The technology was used interactively throughout the workshop, permitting the participants to provide feedback on the effectiveness of media communications. The Union replies that the Staff Representatives have courses that use the same technology as was used in the workshop and they are capable of providing it.

51. The Employer claims that two members of the Union were present during the Workshop (a member of the Pro-Tech Staff and a member of the Support Staff) and they were compensated. So, the Employer submits, there is no loss of bargaining unit work.

### **Submissions**

52. The Union points out that, in the selection of facilitators for educational courses, Staff Representatives are to be given preference. The Union claims that did not occur for the October 2015 Social Media workshop. Nor was the Regional EBM/Staff Committee involved at all in the arrangements for it. The Union submits this shows a breach of Article 14.05. The Union says that that Article requires the Employer to engage Staff Representatives to facilitate the courses; and it requires that the Regional EBM/Staff Committee coordinates the regional education programs. Neither of these obligations was fulfilled.

53. In response to the Union's allegation that the Social Media Workshop was not vetted in advance by the Regional EBM/Staff Committee, the Employer says there was no need to do so. The Employer accepts that courses that form part of the Employer's education programs must be approved by the Committee, but that does not restrict the Employer from holding other educational events at its own initiative.

54. The Employer argues that, because the Social Media Workshop in October 2015, with its focus on effective social media writing, did not form part of the standard courses offered as an educational by the Regional EBM/Staff Committee, the Employer was entitled to run it without approval by the Committee. The Employer argues that its management rights entitle it to hold educational functions outside of those that form part of the education programs dealt with by the Regional Committee.

55. The Union explains that any course that is paid for out of the Regional Education budget must be approved by the Regional EBM/Staff Committee. The Social Media Workshop was such a course. It ought therefore to have been approved of by the Regional Committee. The Union provides several examples of courses that do not form part of the standard list of OPSEU courses that are routinely approved of by the Regional Committee.

56. The Employer says that not all educational opportunities go through the Regional Committee. For example, Stewards 1 and Stewards 2 training, though standard courses, is not arranged through the Regional Committee. Also, individual OPSEU members are sent to courses run by the CLC or the OFL. These arrangements are also not approved by the Regional Committee. So, the Employer submits, the Committee's educational oversight does not extend beyond the standard course offerings.

57. Further, the Employer points out that the Workshop did not have any of the traditional hallmarks associated with a regional educational. It was held on a single Saturday afternoon in downtown Toronto, not over the course of a weekend at a conference centre or resort. Only a single course was offered, not three or four. There were no social events planned around the Workshop, while there are usually two social events planned at a regional educational.

58. The Union claims also a breach of Article 30.02, the contracting-out provision. Regular work may be contracted-out only if there is no bargaining unit member who has the required qualifications and technical ability to facilitate the courses. That condition did not apply for the October 2015 courses, so the contracting-out was not justified. The Union refers to a number of authorities: *New Brunswick (Board of Management) and C.U.P.E., Local 1190* (1997), 63 L.A.C. (4th) 56 (McAllister); *Abitibi Consolidated Co. of Canada and C.E.P., Local 88*, [2007] N.L.L.A.A. No. 1 (QL) (Oakley); *15930 Fraser Highway Ltd. (c.o.b. Fresh Street Farms) and U.F.C.W., Local 1518*, 2014 CanLII 83888 (Nichols); *University of British Columbia and C.U.P.E., Local 116*, [2009] B.C.C.A.A.A. No. 55 (QL) (Sullivan); *St. Joseph's General Hospital and S.E.I.U., Local 478*, [1999] O.L.A.A. No. 782 (QL); *Wilkinson Steel & Metals and U.S.W., Local 1-207*, 2013 CanLII 61601, [2013] A.G.A.A. No. 9 (QL) (Sims); *Ivaco Rolling Mills and U.S.W.A., Local 8794* (1997), 67 L.A.C. (4th) 66 (Adell).

59. Without prejudice to its contention that the Union's contracting-out allegations should be struck, the Employer disputes that Article 30 was breached. It submits that the Social Media Workshop was not work that was customarily performed by staff, and the Staff Representatives did not have the technical ability to perform the work. In any event, the Employer submits, two members of the Union attended at the Workshop, hence there was no loss of any bargaining unit work. Also, the Employer says, the Staff Representatives would not have had the



technology to deliver the interactive portion of the Workshop.

60. The Union submits that if the prohibition against contracting-out bargaining unit work is an implied term, it remains enforceable: *Re Grande Prairie General and Axillary Nursing Home District No. 14 and United Nurses of Alberta, Loc. 37* (1996), 57 L.A.C. (4th) 173 (Christian); *Re Hinton General Hospital and U.N.A., Loc. 84* (1995), 41 C.L.A.S. 527 (Jones); *Hammer Bus Lines Inc. v. Canadian Union of Public Employees, Local 895 (O'Gorman Grievance)*, [1998] O.L.A.A. No. 604 (Hammer).

61. The Union seeks special damages for the loss of earnings of the Staff Representatives who ought to have worked and presented the workshop.

62. Given that the Social Media course was run on only October 17, 2015, only one day's damages would be due. Being Saturday work, it would amount to \$1,008.98.

63. The Union also seeks exemplary damages for both what it sees as the repeated breach of the educational bargaining unit work provisions of the collective agreement and because, in this case, the Employer knowingly planned to breach the relevant provisions, when it was conscious of its obligation that the work ought to have been given to members of the Union. It points out it has incurred considerable legal costs of approximately \$40,000 for the arbitration of the repeated breaches of the collective agreement described above. The Union says that, over the years, it has filed 19 grievances on the same issue. In light of the apparent disregard of the Employer's obligations in the collective agreement, the Union asks for damages of \$25,000. The Union submits this would put it closer to the position it would have been in had there not been the repeated breaches.

64. The Union arrives at the above amount by taking into account the

following: the Employer has been ordered to pay damages previously for the same breach; the Employer has agreed to pay damages in previous Minutes of Settlement for the same breach; there have been eight previous instances where the Employer has committed the same breach; and the Staff Representatives were available and willing to perform the educational work. The Union submits also that the Employer's repeated breaches of its obligations to submit education courses to the Regional EBM/Staff Committee and to have competent Staff Representatives facilitate the courses has undermined the Union in the eyes of its members. It appears to them that the Employer breaches these obligations with impunity.

65. The Union submits that it is also entitled to aggravated and punitive damages because of the flagrant nature of the breach in this case. The Union submits that the amount of the general damages should act as a deterrent to encourage the Employer to take appropriate preventive steps to ensure that no future breaches of the same provisions occur.

66. For these submissions, the Union relies on the following: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595; *Toronto Transit Commission v. Amalgamated Transit Union (Stina Grievance)*, [2004] O.L.A.A. No. 565, (Shime); *Hamilton (City) and ATU, Local 107 (B. (A.))*, Re 2013 CarswellOnt 13296 (Waddingham); *OPSEU (Ranger) v. Ontario (Ministry of Corrections)* 2013 CanLII 50479 (Leighton); *Polymer Corp. Ltd. and Oil, Chemical & Atomic Workers* (1959), 10 L.A.C. 51 (Laskin), affirmed (1962), 33 D.L.R. (2d) 124 (S.C.C.); *Heustis v. New Brunswick Electric Power Commission*, 1979 CanLII 26 (S.C.C.); *International Union of Elevator Constructors, Local 50 v. Beckett Elevator Company Limited*, 1983 CanLII 960 (ON LRB); *Firestone Steel Products of Canada and U.A.W., Local 27* (1974), 6 L.A.C. (2d) 18); *Radio Shack* [1979] OLRB Rep. Dec. 1220); *Ontario Public Service Employees Union v. Ontario (Ministry of Correctional Services)*, 2002 CanLII 45808 (ON GSB);

*Essar Steel Algoma Inc. and U.S.W.A., Local 2251* (2009), 186 L.A.C. (4th) 206 (Stout); *Cheni Gold Mines Inc. and Tunnel & Rock Workers, Local 168* (1991), 22 L.A.C. (4th) 1 (Ladner); *Howe Sound Pulp & Paper Ltd. and Unifor, Local 1119*, 2014 CanLII 10746 (Hall); *Re Toronto Hydro – Electric System and C.U.P.E., Local 1* (1994), 43 L.A.C. (4th) 378 (Brunner), para. 3); *Canadian Airlines Int’l Ltd. and I.A.M.* (1999), 82 L.A.C. (4th) 81); *West Park Healthcare Centre and S.E.I.U., Local 1.ON* (2005), 138 L.A.C. (4th) 213); *Greater Toronto Airports Authority and Public Service Alliance Canada Local 0004*, 2011 ONSC 487 (CanLII) (DivCt); *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), at para 62.

67. The Employer argues that punitive or aggravated damages are extremely rare and ought not to be awarded if any breach is found. The Employer submits that there must be a separate actionable wrong. There must be maliciousness or some outrageous wrong to warrant denunciation, deterrence and retribution. The Employer submits that none of these conditions apply.

### **Decision**

68. The issues to be decided are the following: was the Social Media workshop given on October 17, 2015 substantially the same or substantially different from the Social Media course regularly provided by the Staff Representatives; if substantially similar, was the workshop a “regional education program”; also, if substantially similar, were there Staff Representatives capable of delivering the workshop; if so, then the Employer was in breach of Article 14.05 and Article 30.02. If that finding is made, the issue is then what damages are to be awarded to the Union. That issue involves a decision on whether the past record of arbitrations and settlements of regional education grievances requires a special order of damages, and if so, in what amount.

*Was the Social Media Workshop given on October 17, 2015 substantially the same as the Social Media courses given by the Staff Representatives?*

69. There is a different focus between the standard Social Media course and what was given at the October Workshop. The main thrust of the standard course is on how to avoid pitfalls in one's use of social media. The workshop was focused more on how social media can be best used to enhance OPSEU's organizational and other initiatives. However, the difference in emphasis does not mean that the standard course did not include what was covered in the workshop. As the Union points out, the standard Social Media course specifies that "participants will explore what makes a successful social media campaign and develop some practical applications for social media within Locals". That was exactly what the workshop set out to teach.

70. Also, to the extent that the standard course did not exactly match the workshop course, the standard course could likely have been adjusted to incorporate elements from the OPSEU Editors course to make the focus more on mobilization and activism through social media. That adjustment could apparently have been made, had the proposed Workshop course been submitted to the Regional EBM/Staff Committee where the Board Member who arranged the workshop could have discussed her vision of the workshop with the Staff Representatives on the Committee.

71. As to the technology that was used at workshop, the Union's evidence is that the Staff Representatives who had taught the regular Social Media for Union Activists course have used the technology necessary for immediate on-screen responses from those attending the course so as to familiarize them in practice with the impact of using social media.

72. The Executive Board member who initiated the October 17, 2015 Social

Media workshop plainly thought that the course the contractors could provide was superior to the regular OPSEU Social Media course. She also clearly thought that the Staff Representatives could not provide the expertise that was required. In those circumstances, the correct course of action was to bring the considerations that informed her opinion to the Regional EBM/Staff Committee so that her reasons could be fully discussed and considered.

73. Nonetheless, that process was not followed. On the information provided by the parties, I am not persuaded that the divergence between the two courses was such that it did not form part of the repertoire of content available in the standard OPSEU courses.

*Was the October Workshop a “Regionally-based Education Program”?*

74. I accept the Union’s evidence that all regional education programs pass through the Regional EBM/Staff Committee for consideration and approval. All regionally-based educationals paid for from the Regional Committee’s budget are what the parties intend to refer to under Article 14.05. The workshop was such an educational.

75. The examples the Employer gives of shop steward training and OFL and CLC training not being approved by the Regional EBM/Staff Committee do not assist its argument. Those are not regional education courses and one would not expect them to have to be approved by the Regional EBM/Staff Committee.

76. There is no particular format for a regional education program. Most are, as the Employer explains, over weekends at a resort venue. But that is not a requirement for an educational to be a regional education program. Courses provided outside of that context are also regional education programs, so long as they are subject to the overall coordination of the Regional EBM/Staff Committee, they are regionally-based, and their costs come out of the Regional

EBM/Staff Committee budget.

77. The critical consideration is this: was the purpose of the workshop for regional membership education (see Article 14.05.03)? That was plainly the purpose of the workshop. The educational therefore fell under the coordination of the Regional EBM/Staff Committee. This conclusion is supported by the fact that the budget for the workshop came from that of the Committee.

78. In the circumstances, and for the purposes of Article 14.05, the workshop was a regionally-based education program. The provisions of Article 14.05 therefore applied to the workshop.

*Were there Staff Representatives capable of presenting the workshop?*

79. The evidence is that there were several Staff Representatives, among them some of the Grievors, who had experience in presenting the standard Social Media OPSEU course, and who had experience in delivering the OPSEU Editors course.

80. I am satisfied that, had the Employer sought to find Staff Representatives who could have presented the workshop effectively, it would likely have done so. The process for determining this outcome was eliminated when the Employer made the decision not to avail itself of the Regional EBM/Staff Committee.

81. The Regional EBM/Staff Committee was the forum for exploring whether the Staff Representatives had the necessary skills, and whether or not the outside contractors ought to have been used (perhaps in conjunction with one or more Staff Representatives). By circumventing that Committee, the opportunities to explore the capabilities of the staff to provide the workshop, and to find the optimal solution, were lost. Instead the Employer pre-judged the issue, did not discuss it in the Committee, and concluded there was no Staff Representative who

could suitably deliver the course, and then made a unilateral decision to exclude the staff from managing and supervising the program. That decision was not in accordance with Article 14.05, which is designed to have the Employer's Board Members and the Staff Representatives on the Committee work together, in productive discussion, to find the optimal solution, and then to recommend that to the OPSEU President. By excluding the Committee, the Employer lost that opportunity. The Social Media Workshop was a subject that was particularly conducive to a full discussion on the Committee. To the extent the course content was new or unfamiliar to the Staff Representative trainers, they might have had the opportunity to learn the new course material so that it could subsequently have been given in-house, as is contemplated by Article 14.05.

82. In light of this, and of the lost opportunity, I am not persuaded by the Employer that there were no Staff Representatives who could likely have provided the Workshop. The Union's evidence is that there were such staff available, and the Employer's evidence does not sufficiently counter it.

*Was the Employer in breach of Article 14.05?*

83. From the above, I find that the Employer was in breach. There was no acknowledgement, as is required in Article 14.05.01 by the Employer that "an effective education program requires the involvement of staff".

84. Despite the Employer's undertaking in Article 14.05.01 "to see that staff is involved at all levels in the planning, coordination, development, delivery and evaluation of OPSEU's education program", there was no involvement in any single aspect of that list. The Staff Representatives were not involved in the planning, nor the coordination, nor the development, nor the delivery, and nor the evaluation.

85. The Employer mentions two members of the Union's bargaining unit

being present at the Workshop. One of them was a Pro-Tech, so covered by the provisions of Article 14.05. There is no evidence, though, that that person was involved in any activity contemplated in Article 14.05.01, as described above.

86. The parties agreed in Article 14.04.01 that the President of OPSEU would be guided in the selection of facilitators for regionally-based education programs by the recommendations of the Regional EBM/Staff Committee. The Committee was not given the opportunity to make a recommendation. That also is a breach of the provision.

87. The Regional EBM/Staff Committee was not given an opportunity to assign a co-facilitator to the workshop. That is a breach of Article 14.05.02. Employees “shall be given preference in the selection of facilitators”. That did not occur; a further breach of the provision.

88. The workshop was intended for regional membership education. For such education, the Regional EBM/Staff Committee “will be tasked with the coordination of the Regional Education Programs” (Article 14.05.03). That did not happen. In this respect also, the Employer breached the provision.

*Was the Employer in breach of Article 30.02*

89. Following the conclusions with respect to Article 14.05, the work of presenting the workshop appears to have fallen within the scope of the work that was currently performed by members of the bargaining unit. However, I cannot say that the work of the course was definitely within that currently performed by members of the bargaining unit. The issue was such that it ought to have been considered by the Regional EBM/Staff Committee, and that likely some part, if not all, of the work would have been assigned to members of the bargaining unit, as I have said, even for the purpose of having the opportunity to learn the new course material, but I cannot draw the further conclusion that the contracting-out



provision was breached. In the circumstances, I do not find a breach of Article 30.02.

*What damages are to be awarded to the Union?*

90. There are two parts to this question. The first is the special damages the Union's members were entitled to for the loss of the opportunity to present the workshop, arising from the breach of Articles 14.05. That is the loss of income for working on that day, being, as mentioned above, \$1,008.98 for two Staff Representatives.

91. As mentioned, the Employer makes the point that two members of staff were present at the workshop. From this the Employer suggests that no special damages apply because there were already two members of staff at the workshop. Only one of the two was a Pro-Tech employee and that Pro-Tech employee played no role in presenting the workshop. The loss of work was the work of presenting the workshop, not some other function that the two staff members presumably fulfilled by their presence that day. The work of presenting the workshop was lost to the bargaining unit, and that work is to be compensated, as explained.

92. The question of whether there ought to be punitive or aggravated damages rests on an assessment of whether the earlier breaches of Article 14.05 lead to the conclusion that the Employer manifestly refuses to be bound and that some a clear warning must be conveyed to the Employer that further breaches will result in more and more punitive damages awards.

93. Barring the settlement in 2015 (of a grievance filed in 2013), the two arbitration awards were issued in the period up to 2010. Then there were the circumstances in late 2015 that led to the current grievances. In my view, that does not show the kind of persistent breach that warrant extraordinary damages.

Accordingly, I am not satisfied that the breaches have been so flagrant or so frequent, particularly in the period since 2010, as to warrant an extraordinary award of damages.

### **Outcome**

94. The Union's claim regarding the Train-the-Trainer course is not addressed in this decision for the reason explained. If the Union still wishes to pursue this aspect of the grievances, it should inform me and the Employer of this intention within 30 days of the date of this award, failing which this aspect will be deemed to have been sufficiently addressed by this award.

95. If the Union gives notice of its intention to pursue the Train-the-Trainer aspect of the grievances, it will be left for later determination. The Employer will be given an opportunity to respond to the Union's allegation that the Employer conducted a Train-the-Trainer course in breach of Article 14.05 (because the course did not go through the Regional EBM/Staff Committee and because Staff Representatives – members of the Union – were not used to conduct the course) in December 2015. The Union will then be able to reply, and I will then determine that aspect of the grievances. The timetable for the submissions is referred to the parties' counsel. If counsel are unable to agree on the timetable for the submissions, I will provide it. I remain seized with respect to this aspect of the grievances, if the Union chooses to pursue it.

96. There are seven individual grievances. In light of the above result, I make the following declarations and issue the following orders and directions with respect to the Social Media workshop ("the workshop") held on October 17, 2015:

- a. The grievances are upheld in part;

- b. Staff Representatives ought to have been considered by the Regional EBM/Staff Committee to be engaged in the workshop;
- c. the Employer breached Article 14.05.01, in that:
  - i. there was no involvement of staff in the planning, coordination, development, delivery or evaluation of the workshop;
  - ii. there was no involvement of the Regional EBM/Staff Committee in the selection of facilitators for the workshop;
- d. the Employer breached Article 14.05.02, in that employees were not given preference in the selection of facilitators for the workshop;
- e. the Employer breached Article 14.05.03, in that the Regional EBM/Staff Committee was not tasked with the coordination of the workshop;
- f. For failing to use two Staff Representatives to teach the workshop (or to be present to learn the new course material of the workshop), the Employer is directed to pay forthwith to the Union the sum of \$1,008.98, being the amount that Staff Representatives would have earned in that capacity.

97. No award is made with respect to the contracting-out provision (Article 30.02), nor are aggravated or punitive damages awarded.

98. I remain seized of the interpretation and implementation of this award.

DATED at TORONTO on January 7, 2019.

A handwritten signature in blue ink, appearing to read "C. Albertyn", with a horizontal line extending to the right from the end of the signature.

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Christopher J. Albertyn  
Arbitrator