

***In the Matter of the Teachers' Collective
Bargaining Act***

***And in the Matter of a Grievance of the Union
Regarding Special Certificates under the
Teacher Certification Regulations***

B E T W E E N:

THE NOVA SCOTIA TEACHERS UNION

("the Union")

- and -

THE MINISTER OF EDUCATION AND EARLY CHILDHOOD
DEVELOPMENT OF THE PROVINCE OF NOVA SCOTIA

("the Employer")

SUPPLEMENTARY AWARD

BEFORE

Eric K. Slone, sole arbitrator

APPEARANCES

On behalf of the Union: Gail Gatchalian
 Counsel
 Pink Larkin

On behalf of the Employer: Kevin Kindred
 Counsel
 Nova Scotia Department of Justice

Heard by Conference Call (with preceding written communication) on December 10, 2019

Supplementary award released at Halifax, Nova Scotia on December 10, 2019

SUPPLEMENTARY AWARD

[1] My arbitration Award in this matter (“the Award”) was issued on November 25, 2019. This Supplementary Award can only be understood with reference to that entire Award, and is deemed to incorporate it in full.

[2] The remedial aspects of the Award were (at paragraphs 147 and 148):

[147] ... A. I declare that the actions of the Employer in discontinuing the granting of special certificates, in failing to process applications for special certificates, in ceasing to require specialists to have special certificates, and in the hiring of specialists (whether they possessed certificates or not) into non-union contracts of employment, were in breach of the Teachers' Provincial Agreement as well as the statutes and regulations recited in this decision.

B. I declare that it was a breach of the Employer's obligations in failing to include specialist jobs awarded after June 2018 in the NSTU bargaining unit, with all of the rights and obligations that such membership implies including, without limitation, membership in the NSTU pension plan and the accrual of seniority and the responsibility to pay union dues.

[148] More difficult is the question of how to turn back the clock, for those people affected by the Employer's actions. The Employer argued that, in the event I was allowing the grievance, the parties should be left to work out the actions that need to be taken. I think there is some merit to that suggestion, though I will specify that the remedial blueprint should have the following features:

A. The issuing of special certificates should resume, and any specialists without certificates who have been hired, should be required to apply for certificates within a reasonable time frame. I would leave open (for the time being) the implications should any specialist currently employed as such, be unable to secure a certificate.

B. All specialists hired since June 2018, who possess special certificates (or who later acquire them) shall be considered part of the NSTU bargaining unit retroactive to the date they became employed in their non-union positions. In the case of those who were NSTU members before accepting non-union jobs, their

seniority (if lost) shall be reinstated and added to the time they have worked in the non-union jobs.

C. A process should be created to transition such employees to bargaining unit status, including retroactive membership in the pension plan and adjustment to any other benefits, including seniority. The Union has stipulated, and it is only fair, that no specialist should be worse off financially after all such adjustments are made. However, if any employee would have earned more in the bargaining unit equivalent job, they should be made whole.

[3] Near the end of the Award I stated:

[153] The parties should have a reasonable amount of time to plan for these changes. I will leave it to them to determine what is feasible, but I believe that all necessary steps should have been completed well before the start of the 2020-21 school year.

[154] Recognizing that there are a lot of uncertainties and details to be considered, I will retain jurisdiction to resolve any questions that may arise concerning the implementation of this award, including jurisdiction to make any further awards and give any further directions.

[4] The Union has asked that some aspects of the Award be implemented immediately.

[5] The Employer has made known that it intends to seek judicial review of the Award, which would be accompanied by a motion for a stay of the Award. It is possible that the stay motion may be heard as soon as early January 2020, though even if that is the case no one can predict when a decision on the stay might be forthcoming. It could be immediate, or the court might reserve its decision.

[6] The Employer resists taking any immediate steps to implement the Award on the basis that it would be better to await the court's decision on whether or not to grant a stay.

[7] However, it is important to recognize that in the meantime, the Award is in effect. No stay is yet in place. It would be inappropriate to act as if the Employer's mere announcement that it plans to seek such a stay sometime in the near future is sufficient to create a *de facto* stay.

[8] On the other hand, as mentioned, I contemplated that implementation of the award would be complicated and take some time.

[9] In light of the intended judicial review, I am hesitant to order steps to be taken that are not easily reversed. I am also hesitant to jump the gun and put a rush on steps that need to be properly thought through in their implementation. However, I believe a balance can be struck.

[10] The Union in its letter to me of December 5, 2019 specifically asks for the following Orders:

- that the Minister of Education and Early Childhood Development and/or Jeremy Brown, the Registrar of Teacher Certification, must immediately reinstate the information about special certificates and the application material for special certificates on the website of the Office of Teacher Certification;
- that the Minister of Education and Early Childhood Development and/or Jeremy Brown, the Registrar of Teacher Certification, must provide information about special certificates and the application material for special certificates to any specialist (speech language pathologist, school psychologist, or social worker) who requests that information or material;

- that the Minister of Education and Early Childhood Development and/or Jeremy Brown, the Registrar of Teacher Certification, must immediately process any applications for a special certificate;
- that the Minister of Education and Early Childhood Development and/or Angela Kidney, the Director of School Board Labour Relations for the Department of Education and Early Childhood Development, must forthwith, and no later than one business day following the hearing of this matter, communicate to all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity who do not possess a special certificate that they must, without delay, apply for a special certificate;
- that all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity, determined to have been wrongfully excluded from the NSTU bargaining in the Award, are immediately entitled to the benefits of Article 34 - Insurance, Article 58 - Long Term Disability, 62 - School Day, and the sick leave provisions of the regional agreements.
- that the Employer shall immediately comply with Article 34— Insurance, Article 58— Long Term Disability, 62 - School Day, and the sick leave provisions of the regional agreements in relation to all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity who were determined to have been wrongfully excluded from the NSTU bargaining in the Award;
- that the Minister of Education and Early Childhood Development and/or Angela Kidney, the Director of School Board Labour Relations for the Department of Education and Early Childhood Development immediately direct the Education Entities to apply Article 34 - Insurance, Article 58— Long Term Disability, 62—School Day, and the sick leave provisions of the regional agreements to all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity who were determined to have been wrongfully excluded from the NSTU bargaining in the Award

[11] The requests can be loosely treated as two distinct requests. One concerns the resumption of special certificates, and the other concerns certain employee benefits.

[12] I will deal with each of them in turn.

- that the Minister of Education and Early Childhood Development and/or Jeremy Brown, the Registrar of Teacher Certification, must immediately reinstate the information about special certificates and the application material for special certificates on the website of the Office of Teacher Certification.

- that the Minister of Education and Early Childhood Development and/or Jeremy Brown, the Registrar of Teacher Certification, must provide information about special certificates and the application material for special certificates to any specialist (speech language pathologist, school psychologist, or social worker) who requests that information or material;

- that the Minister of Education and Early Childhood Development and/or Jeremy Brown, the Registrar of Teacher Certification, must immediately process any applications for a special certificate;

- that the Minister of Education and Early Childhood Development and/or Angela Kidney, the Director of School Board Labour Relations for the Department of Education and Early Childhood Development, must forthwith, and no later than one business day following the hearing of this matter, communicate to all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity who do not possess a special certificate that they must, without delay, apply for a special certificate.

[13] These steps are all related, and I see them as the easiest and most logical steps to implement. There is little to be lost, and much to be gained, by getting on with this process. Potential applicants for special certificates will require the information and should be able to begin the process of applying for certificates as

soon as possible. Such certificates will be a necessary component of applying for jobs for the 2020-21 school year. Under the *Teacher Certification Regulations* the Registrar is given a reasonable amount of time to respond to the applications. By the time applications are received and considered, it may be known whether there is a judicial stay on the Award. If no stay is granted, then the time will have been well used to get the system (back) up and running. If a stay is granted, then matters may rest where they are at that time, awaiting the final decision on judicial review.

[14] I am prepared to order that these steps be taken, however I make the order against the Minister and/or the Department, not against any named individuals. Although the request is that the communication to all specialists occur within one business day, I would simply order that such steps be taken “forthwith.”

[15] The second group of requests are these:

- that all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity, determined to have been wrongfully excluded from the NSTU bargaining in the Award, are immediately entitled to the benefits of Article 34 - Insurance, Article 58 - Long Term Disability, 62 - School Day, and the sick leave provisions of the regional agreements.
- that the Employer shall immediately comply with Article 34— Insurance, Article 58— Long Term Disability, 62 - School Day, and the sick leave provisions of the regional agreements in relation to all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity who were determined to have been wrongfully excluded from the NSTU bargaining in the Award;
- that the Minister of Education and Early Childhood Development and/or Angela Kidney, the Director of School Board Labour Relations for the Department of Education and Early Childhood Development

immediately direct the Education Entities to apply Article 34 - Insurance, Article 58— Long Term Disability, 62—School Day, and the sick leave provisions of the regional agreements to all specialists (speech language pathologists, school psychologists, and social workers) employed by an education entity who were determined to have been wrongfully excluded from the NSTU bargaining in the Award

[16] Although the letter did not mention pensions, counsel has also asked that specialists be moved to the NSTU pension plan without delay.

[17] Some aspects of this set of requests are easier to implement than others. I think it is reasonable (and most urgent) to extend to the specialists the immediate, day to day, benefits of the collective agreement(s) that have been ordered in their favour, but I contemplate that it will take some additional time (and likely negotiation) to extricate such specialists from the pension and insurance plans that they have been employed under.

[18] I understand that the Employer has already voluntarily brought Christmas Holiday schedules for the specialists into harmony with the collective agreement regime, so this does not need to be addressed by me.

[19] Along those same lines, I am directing the Employer to advise all non-union specialists that they are entitled immediately (at such specialists' option) to adjust their daily schedules to conform to the terms of the applicable collective agreement(s), and that their sick leave entitlement will also be adjusted to conform to the provisions in the said collective agreements, should any claims for sick leave entitlement arise where the extent of such entitlement needs to be considered. Such communication to the specialists shall advise them of the practical differences between the levels of entitlement under the collective

agreements and those otherwise available to them, and that they are at liberty to contact the Union to confirm their entitlement. The Union shall, if feasible, supply the Employer with at least one name, phone number and/or email address that specialists may contact in order to obtain information about their daily schedules or sick leave entitlement, or to confirm the information that the Employer has otherwise provided. This Union contact information should be included in the communication to the affected specialists.

[20] I do not believe there is any urgency to sorting out the pension and insurance coverages. Assuming the Award is eventually implemented in full, all specialists will be entitled to be “made whole” as per paragraph 149 (c) of the Award:

.... A process should be created to transition such employees to bargaining unit status, including retroactive membership in the pension plan and adjustment to any other benefits, including seniority. The Union has stipulated, and it is only fair, that no specialist should be worse off financially after all such adjustments are made.

[21] Again, I would emphasize, that if a stay is not granted by the court, then further steps to implement all of the terms of the Award will have to be started, including those that deal with pension and benefits.

[22] I am concerned that if some or all of the specialists are switched from one set of coverages to another, the effect of a subsequent court-ordered stay will create chaos and confusion. I believe it is not in the employees’ interests that they face being potentially removed from the Union pension and benefit plans and reverted to the insurance or pension plans under which they are currently covered.

[23] I hope I have made myself clear, but once again if there is anything arising from this Supplementary Award upon which the parties require clarification, then I retain jurisdiction to do so. I am also prepared to give further directions on implementation should the court decline to stay the Award, and in the event that the judicial review is unsuccessful.



Eric K. Slone, Arbitrator