IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE *LABOUR RELATIONS CODE,* RSBC 1996 c. 244 (the "*Code*")

BETWEEN:

PROVIDENCE HEALTH CARE

(ST. PAUL'S HOSPITAL)

(the "Employer")

AND:

HEALTH SCIENCES ASSOCIATION

(the "Union")

(UNION LEAVE GRIEVANCE)

AWARD

ARBITRATOR:	JULIE NICHOLS
COUNSEL for the EMPLOYER:	ADAM ALTEEN
COUNSEL for the UNION:	LINDSAY WADDELL & NATASHA EDGAR
DATES of WRITTEN SUBMISSIONS:	JULY 31 and AUGUST 14 & 21, 2020
DATE of AWARD:	SEPTEMBER 30, 2020

INTRODUCTION:

This Grievance raises an interpretive issue relating to a request for Union leave under Article 5.14 of the applicable Collective Agreement. The dispute arose when the Grievor's application for Union Leave was denied because the dates requested had been previously scheduled for her vacation.

The parties put the case forward by way of an Agreed Statement of Facts, a Joint Book of Documents and written submissions. No hearing or oral evidence was necessary.

AGREED STATEMENT OF FACTS:

The Agreed Statement of Facts provides the follows [document references omitted]:

1. Nancy Hay (the "Grievor") is currently, and was at the relevant time of this grievance, a full-time social worker with the Employer at St. Paul's Hospital, 1081 Burrard Street in Vancouver.
2. The Grievor sits on the Union's Board of Directors as the Region 6 Director.
3. St. Paul's Hospital is an acute care, teaching and research hospital with a staff of approximately 3400 employees.
4. The Employer's annual vacation planning for 2018 began in October of 2017.
5. Article 23 of the Collective Agreement addresses vacation leave. Article 23.09 stipulates that vacation leave must be scheduled according to seniority:

   23.09 Vacation Scheduled According to Seniority

   Vacations shall be scheduled according to seniority on the basis that the employee holding the most seniority shall have the first choice of having vacation time, or some other equitable method mutually agreed upon between the Employer and the employees if it has the unanimous consent of all regular employees affected by the schedule. Employees wishing to split their vacation shall exercise seniority rights in the choice of the first vacation period. Seniority shall prevail in the choice of the second vacation period, but only after all other "first" vacation periods have been satisfied. Seniority shall prevail in the same manner for all subsequent selections. Employees failing to exercise seniority rights within two (2) weeks of the time that the employees are asked to choose a vacation time, shall not be entitled to exercise their rights in respect to any vacation time previously selected by an employee with less seniority.

6. The Employer provides a document to all employees entitled "Vacation Leave Guidelines for Unionized Employees" in which, among other things, the vacation planning process is set out. That process was followed in 2017 in scheduling the

vacation leave relevant to this grievance. This document is not part of the Collective Agreement.

7. The Employer provides a document to all employees entitled "Vacation Leave Guidelines for Unionized Staff Questions and Answers". This document is not part of the Collective Agreement. Question 10 reads as follows:

> **10. Can an employee cancel their vacation?**
>
> NO, cancellation of vacation is not permitted. However it may occur by mutual agreement ONLY. Mutual agreement is based on a case-by-case criterion. In consultation with the HR Advisor for your program, consideration for cancellation must include:
>
> • Reason for the cancellation is compelling;
> • Rescheduling vacation is without impact to other staff and their vacation schedule;
> • Overtime is not incurred;
> • Relief staff for the vacation has not been scheduled.

8. On September 20, 2017 Rick Moyneur, Director of Human Resources with the Employer published a memo to all staff at all sites regarding 2018 Vacation Planning further reiterating and clarifying the process. This memo also set out the dates for each round of vacation planning which were subsequently followed in scheduling vacation for all unionized staff.

9. Vacation Planning is offered in three selection rounds in which employees are able to select blocks of time in the first two rounds, and then any number of days in the third round. In 2017 the first round opened on October 2 and closed on October 6.

10. Changes to pre-approved vacation are only permitted by the Employer in exceptional circumstances and by mutual agreement with Human Resources. This is expressly stated in the policies of the Employer.

11. Article 5.14 permits members of the Union executive to apply for leave to attend Union business. It reads as follows:

> **5.14 Executive Council Member**
>
> Members of the Union executive may apply in writing to the Employer for leave of absence to attend to Union business. The employee will give reasonable notice to minimize disruption of the department. The Employer will make every reasonable effort to grant such leave and, except where the employee's absence will significantly limit the operational capabilities of the department, the leave will be granted.

12. On October 4, 2017 at 1:23 pm the Grievor wrote to her manager, Teresa Robitaille, inquiring about the prospects of cancelling vacation in August of 2018--should the Grievor request it--if she is accepted into a union related leadership course which was to take place on those dates. Robitaille responded on October 4, 2017 at 1:42 pm advising that the Professional Practice Leader did not think it

was very likely that the Grievor would be able to cancel her vacation; the email indicates the Grievor could apply to cancel and, if denied, attend the course during her vacation.

13. Following the email exchange on October 4, the Grievor requested part of her vacation for 2018 to take place in the period of August 17-24, 2018. This request was granted by the Employer.

14. On April 28, 2018, at the Union's board meeting, the Grievor was informed that she was chosen to attend a NUPGE union leadership course in Ontario. The course ran from August 18 to 24, 2018.

15. On May 7, 2018, the Grievor requested Article 5.14 Union leave for the dates of August 17 to 24, 2018. On or about this date the Grievor requested other Union leave days as well.

16. On or about May 11, 2018 the Employer granted the Grievor's Union leave request for the following dates:
    a. May 16, 2018 (partial shift)
    b. May 17, 2018
    c. May 29, 2018
    d. June 12, 2018

17. The Employer denied the Grievor's request for Union leave that fell on dates between August 17 to 24 and indicated the reason was that the Grievor was scheduled to be on vacation on those dates.

18. Article 23.10 sets out the circumstances wherein an employee is entitled to have her vacation days reinstated in the event the employee is sick or injured prior to the commencement of the vacation:

> **23.10 Reinstatement of Vacation Days – Sick Leave**
>
> In the event an employee is sick or injured prior to the commencement of her/his vacation, such employee shall be granted sick leave and the vacation period so displaced shall be added to the vacation period if requested by the employee and by mutual agreement, or shall be reinstated for use at a later date.

19. The Grievor attended the NUPGE course on her scheduled vacation.

20. The Union grieved the Employer's refusal to permit the change of vacation leave to Union leave.

POSITIONS OF THE PARTIES:

THE UNION:

The Union submits that the Employer has breached Article 5.14 in denying the Grievor's request for Union leave. It says the strong, clear language of the provision was bargained to provide unique protection for Union representation rights. As such, it should be interpreted liberally and cannot be ignored or overridden by a vacation scheduling policy (which is not part of and cannot be inconsistent with the Collective Agreement). It submits that the Employer has little discretion to deny a request for Union leave, given the mandatory language. That is, Union leave can only be denied where: the Employer has demonstrated the steps it has taken to make every reasonable effort to grant the leave (i.e., it has exhausted all reasonable alternatives); and, the employee's absence would significantly limit the operational capabilities of the department. The Union maintains there is no evidence that either threshold was met in this case.

The Union further argues that a request for Union leave cannot simply be denied, even when the employee is booked to be on vacation. Here, the Employer ignored the request and "skipped ahead" in applying its scheduling policy. Instead, the Employer should have first considered the requirements of Article 5.14 because it is required to make every reasonable effort to grant Union leave, including determining whether vacation could be rescheduled without impacting operational capabilities. Given the operational requirements were considered when the Grievor's vacation was granted, the department would not have been impacted by the requested leave.

The Union says the Employer has incorrectly characterized the issue by focussing on scheduled vacation. It submits the Collective Agreement must prevail and the Employer's interpretative arguments are unreliable when analyzing the meaning of the parties' bargain.

In support of its position, the Union relies on the following authorities: *Canada -and- Babcock* (1989), 5 LAC (4th) 15 (Young) ("*Babcock*"); *HEABC and BCNU*, [2016] BCCAAA No. 153 (Hodges) ("*BCNU*"); *Lumber and Sawmill Workers' Union, Local 2537 -and- KVP Co. Ltd.* (1965), 16 LAC 53 (Wren).

THE EMPLOYER:

The Employer frames the dispute differently. Given the Grievor was already booked on vacation, it did not consider this as a request for Union Leave where Article 5.14 would apply. In its view, the provision was not applicable given there was no need to seek leave or to consider operational limitations because the Grievor was not scheduled to work. Rather, it says the Grievor made a request to: cancel her pre-approved vacation; reinstate six days to her vacation bank; and, convert those dates to Union leave.

The Employer submits there is no express Collective Agreement right to convert vacation to Union leave (or to cancel vacation and substitute Union leave). Where the parties have negotiated the right to convert vacation to another leave, they have done so clearly and unequivocally (see: Article 23.10). It maintains that the Union is seeking to read in a similar right into the Collective Agreement. However, that entitlement should not be implied or extended where there is no evidence of a mutual intention to provide for it. Further, Article 23.10 would be rendered meaningless if employees could simply supplant vacation with other types of leave.

The Employer says vacation scheduling is a management right. The process is complex, lengthy and involves scheduling a significant number of unionized employees in a manner that complies with various collective agreement and operational requirements. It notes the purpose of Article 23.04 is to ensure that all staff have at least two consecutive weeks of vacation in the sought-after summer months, even in light of Article 23.09 which requires scheduling by seniority. Further to these obligations, staff were advised that pre-approved vacation can only be changed in exceptional circumstances. The Grievor was advised that her ability to cancel her pre-scheduled vacation was unlikely. It submits the Grievor's subsequent request for vacation, essentially, "held" the dates based on her relative seniority. Had other employees been able to book vacation on the dates in question, there may have been operational requirements preventing the Grievor from taking Union leave.

The Employer agrees that Union representational rights are important, but maintains those rights were not at risk here as the Grievor attended the Union course. It says Article 5.14 cannot be used to provide a negotiated benefit (similar to that bargained in Article 23.10) under the guise of Union representational rights.

The Employer relies on the following authorities in support of its position: *Pacific Press and GCIU – Local 25-C*, [1995] BCCAAA No. 637 (Bird); *HEABC and HEU*, [2002] BCCAAA No. 130 (Gordon) ("*HEU*"); *Toronto (City) -and- CUPE, Local 43* (1981), 2 LAC (3d) 61 (Beatty).

DECISION:

The interpretive issue relates to Article 5.14 and the potential interplay with vacation scheduling requirements under Article 23 as well as the Employer's approach to vacation scheduling.

Article 5.14 of the Collective Agreement provides:

> **5.14 Executive Council Member**
>
> Members of the Union executive may apply in writing to the Employer for leave of absence to attend to Union business. The employee will give reasonable notice to minimize disruption of the department. The Employer will make every reasonable effort to grant such leave and, except where the employee's absence will significantly limit the operational capabilities of the department, the leave will be granted.

Article 23 addresses Vacation Leave. It contains a number of provisions that deal with vacation entitlements, scheduling, etc. For the purposes of this case, the relevant portions are:

> **23.04 Vacation During Summer Months**
>
> Scheduling of vacations shall be determined by the Employer in accordance with operational requirements. Two (2) consecutive weeks vacation shall be granted to every employee so desiring within the months of June to September inclusive, unless this would unduly interrupt Employer services. Vacation exceeding two (2) weeks duration may be granted within this period by mutual consent of the Employer and the employee.
>
> …
>
> **23.09 Vacation Scheduled According to Seniority**
>
> Vacations shall be scheduled according to seniority on the basis that the employee holding the most seniority shall have the first choice of having vacation time, or some other equitable method mutually agreed upon between the Employer and the employees if it has the unanimous consent of all regular employees affected by the schedule. Employees wishing to split their vacation shall exercise seniority rights in the choice of the first vacation period. Seniority shall prevail in the choice of the second vacation period, but only after all other "first" vacation periods have been satisfied. Seniority shall prevail in the same manner for all subsequent selections. Employees failing to exercise seniority rights within two (2) weeks of the time that the employees are asked to choose a vacation time, shall not be entitled to exercise their rights in respect to any vacation time previously selected by an employee with less seniority.
>
> **23.10 Reinstatement of Vacation Days – Sick Leave**
>
> In the event an employee is sick or injured prior to the commencement of her/his vacation, such employee shall be granted sick leave and the vacation period so displaced shall be added to the vacation period if requested by the employee and by mutual agreement, or shall be reinstated for use at a later date.

The principles that apply to collective agreement interpretation are well-established (see: *Pacific Press, supra* at para. 27; *HEU, supra* at paras. 13-14). The arbitral task is to determine the mutual intention of the parties, using the collective agreement as the primary resource. All words should be given meaning. A harmonious interpretation is preferred over one that places provisions in conflict. Inconsistencies and absurd results should be avoided. Ordinarily words should be given their plain meaning, unless there is some indication that a special meaning was intended. It is important to consider the purpose and the context of the provision(s) in issue. The bargained terms should not to be read in isolation; rather, the terms, provisions, articles and collective agreement should be considered as a whole. When deciding between two possible interpretations, reasonableness and/or the practical labour relations implications can provide assistance.

With these principles in mind, I turn to Article 5.14. The Union maintains that the requirements and thresholds of the provision must be applied, particularly since its purpose is to protect Union representation rights. The Employer argues that because the Grievor was scheduled to be on vacation, a request for leave was unnecessary and Article 5.14 was not triggered. It also notes that since Article 23.10 specifically addresses the use of sick leave instead of vacation in certain circumstances, the parties could not have intended the same right with respect to other leaves. I find there are several difficulties with the Employer's position.

There is clear support in the arbitral jurisprudence for the proposition that Union leave provisions should be interpreted broadly and purposively (see: *Babcock, supra* at para. 23; *BCNU, supra* at paras. 10-11). I note that the Employer has agreed that Union representation rights are important and deserve protection.

On its face, Article 5.14 applies when a Union Executive member is seeking leave to attend Union business. They must give reasonable notice to minimize disruption. The language provides that the Employer "will make every reasonable effort to grant" the leave and confirms the leave "will" be granted, except where the absence "will significantly limit the operational capabilities of the department". In my view, the importance of Union representation rights is reflected in the terms the parties negotiated. The agreed upon language of Article 5.14 provides a strong indication that the parties intended that Union leave would be granted, subject to the narrowly described exception.

An obligation to "make every reasonable effort" in the context of negotiated Union leave provisions has attracted some arbitral analysis. In *BCNU, supra*, Arbitrator Hodges noted the following (at paras. 34, 39-40):

> I accept the BCNU's position that by using the adjective "all" in the phrase "all reasonable efforts", the parties agreed that something more than just "reasonable efforts" would be required of the Employer to meet its obligations. I find that the requirement to "make all reasonable efforts to grant the leave" imposes a positive obligation upon the Employer that is more onerous than simply balancing competing interests and demonstrating a reasonable basis for refusing to grant a leave.
>
> …
>
> …There is no material distinction between taking "every reasonable step" and making "all reasonable efforts." I find that by agreeing that the Employer "will make all reasonable efforts to grant the leave" the parties have mutually agreed that the Employer will only deny union leaves subject to operational requirements (e.g. leaves under Article 44.01(F)) where the Employer has exhausted all reasonable alternatives.
>
> I also find that in assessing whether the Employer has in fact exhausted all reasonable alternatives, the onus is properly on the employer to lead evidence regarding the steps it took in its efforts to grant the union leave. I agree with the BCNU's submission that such an assessment properly includes an examination not only of what was done, but also what was not done…

Thus, the plain language of Article 5.14 supports the conclusion that the parties agreed the Employer would assess these requests and exhaust reasonable alternatives before denying them. Yet, on the Employer's characterization, it could refuse to consider a request, depending on the employee's anticipated schedule. For example, on the Employer's interpretation, it would not be obligated to consider the request if the leave fell on any scheduled days off. Such an approach does not appear to be consistent with the nature and purpose of the provision and the mandatory language chosen by the parties.

Further, given Article 5.14 is an important entitlement that attracts liberal interpretation, care should be exercised before entitlements negotiated elsewhere in the Collective Agreement are used to dilute its protections. While the parties have agreed to substitute sick leave for vacation in certain circumstances within the context of Article 23, separate and mandatory obligations exist under Article 5.14. Given the unique nature and purpose of Union leave, I find the fact that Article 23.10 exists is insufficient to defeat the agreed upon entitlements in Article 5.14.

Next, I turn to the Employer's response to the Grievor's request. I accept that vacation scheduling can be a lengthy and complicated affair. It involves scheduling the requests of many employees (particularly during the summer months) further to the applicable collective agreements, while managing operational requirements. The Vacation Scheduling Guidelines and the Q&A document describe the details of the Employer's process for scheduling. Both note that changes to pre-approved vacation are not permitted and will only be considered in exceptional circumstances. The

Q&A document explains that employees cannot cancel vacation, but also notes cancellation may occur by mutual agreement on a case-by-case basis. It indicates that cancellation of vacation "must" include consideration of whether: the reason is compelling; rescheduling will impact other staff and their vacation schedule; overtime is incurred; and, relief staff have been scheduled.

I note that the Grievor first raised the possibility of attending the Union course (on specified dates) during the vacation scheduling process. She inquired whether she should book vacation and, if so, whether she could cancel it to attend the course. At that point, the Employer indicated it could not approve her request in advance without securing coverage. She was told her ability to cancel was unlikely. However, she was also advised that, to ensure she could get the time off, she could request vacation and then apply to change it. The Grievor did so. When her application for Union leave was later submitted, the Employer did not consider it because she was already booked on vacation.

In my view, this is problematic. While the request may have caused some additional complexity in the course of the vacation scheduling process, the Grievor was entitled to have her application for Union leave addressed further to the requirements of Article 5.14. On the facts, her application was never truly considered; first, because the Employer took the position that it could not be approved in advance; and, later, because she was then scheduled to be on vacation (despite being told she could request a change). Thus, there is no evidence that the Employer made every reasonable effort to accommodate the request. As an aside, I note that the Employer's Q&A document indicates that a number of factors must be considered on a case-by-case basis for cancellation requests; yet, there is no evidence any of those factors were assessed either.

In its argument, the Employer submits that had the Grievor not requested vacation, others could have booked off and there may have been operational reasons that would have prevented the leave. I do not believe this assists the Employer, not only because it requires speculation but also given the Employer's refusal to consider the request when it was raised in advance while vacation scheduling was underway. In any event, it is difficult to imagine the Grievor's absence would have significantly limited the operational capabilities of the department, given her vacation had been approved for the same period.

Accordingly, I conclude the Employer has failed to comply with Article 5.14 of the Collective Agreement. As a result, the Grievance succeeds. I leave it to the parties to address remedy, but retain jurisdiction if they are unable to agree.

DATED in Vancouver, BC this 30th day of September, 2020.

JULIE NICHOLS, ARBITRATOR