

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

GOVERNMENT OF ONTARIO

("the Employer")

**AND:**

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
CORRECTIONAL SERVICES BARGAINING UNIT

("the Union")

**IN THE MATTER OF:**

INTEREST ARBITRATION – RESIDUAL ISSUES  
JANUARY 1, 2015 – DECEMBER 31, 2017 COLLECTIVE AGREEMENT

**ARBITRATOR:**

Kevin M. Burkett

**APPEARANCES FOR THE EMPLOYER:**

Marc Rondeau	- Assistant Deputy Minister, Treasury Board Secretariat
Reg Pearson	- Associate Deputy Minister, Treasury Board Secretariat

**APPEARANCES FOR THE UNION:**

Anastasios Zafiriadis	- Senior Negotiator - OPSEU
Catherine Bowman	- Administrator of Local Services Division – Bargaining
Steve Crossman	- OPSEU Researcher

I have been appointed on agreement of the parties to adjudicate specific issues that were left unresolved in the negotiation of a collective agreement between the parties for the period January 1, 2015 to December 31, 2017. The parties negotiated an agreement for this term whose economic content met the provincial government's "net zero" prerequisite; in other words, various cost containments offset economic improvements that included a 1.4% lump sum payment effective January 1, 2016 and a 1.4% across-the-board wage increase effective January 1, 2017. The specific issues referred to interest arbitration on agreement of the parties are:

- Special wage adjustments for all members of the correctional bargaining unit for the term January 1, 2016 to December 31, 2016, if any.
- Special wage adjustments for all members of the correctional bargaining unit for the term January 1, 2017 to December 31, 2017, if any.
- The issue of whether there should be a progression through the ranks freeze for 2016 and 2017.

The progression through the ranks issue is tabled in the context of the "net zero" economic settlement for other than Correctional Services Ontario government

employees that froze progression through the salary grids for 2016 and 2017 as an offsetting cost containment.

There is no dispute with respect to my authority to adjudicate these issues. In conferring jurisdiction, the parties have defined the nature and scope of the proceeding as follows:

The parties agree that each party shall have a full opportunity to present its argument and make submissions pertaining to the matters listed in paragraph 6. In making a decision or award, the arbitrator shall take into consideration all factors he considers relevant, including but not limited to current working conditions, staffing levels and comparative wages for work of a similar nature in other Canadian jurisdictions, and the enumerated criteria in section 9(1.1) of the Hospital Labour Disputes Arbitration Act. The parties specifically agree that there will be no reference in their briefs or in oral argument, including rebuttal, to the tentative Correctional Category Agreement as set out in the memorandum of settlement dated November 23, 2015.

It is to be emphasized that, in addition to the specified criteria and consistent with the interest arbitration statutes, I am empowered to take into account "all factors (I) consider relevant." It is also to be noted that, in addition to the statutory criteria contained in the Hospital Labour Disputes Arbitration Act (HLDAA), specific reference is made to "current working conditions, staffing levels and comparative wages for work of a similar nature in other Canadian jurisdictions" as a factor to be taken into account.

By way of background, collective bargaining in the Ontario Public Service is governed by the Crown Employees Collective Bargaining Act (CECBA). Under CECBA, OPSEU is recognized as the bargaining agent for six bargaining units with

some 35,000 members in total. Five of the six OPSEU bargaining units (institutional and health care, operational, maintenance, administrative, technical and office administration) are combined into one "unified" entity for purposes of collective bargaining. The sixth bargaining unit represented by OPSEU is the correctional bargaining unit with some 5,500 members. The correctional bargaining unit is comprised of employees working in adult correctional services within the Ministry of Community Safety and Correctional Services and employees working in youth correctional services within the Ministry of Children and Youth Services. CECBA stipulates that there be an overarching central collective agreement covering all six bargaining units, i.e. including the correctional services bargaining unit, that deals with such matters as dispute resolution, pensions, benefits and (with consent of the parties) wages. The unified bargaining unit and the correctional bargaining unit have separate local agreements dealing with the non-central terms and conditions of employment, i.e. hours of work, schedules, premiums and wages where no consent for central negotiation.

In this round, a central agreement that met the government's "net zero" mandate (as described above) was ratified by 67% of the six bargaining unit membership, i.e. including the correctional group. A unified local agreement was ratified by 78% of the voting membership from the five unified bargaining units, i.e. excluding the correctional bargaining unit, on October 30, 2015. The parties reached a tentative correctional bargaining unit agreement that was subsequently rejected by the

correctional membership. Ultimately a correctional bargaining unit local agreement was ratified in early January 2016. It is this agreement that refers the previously identified specific issues to this arbitrator for adjudication.

It is important to understand the full scope of the terms of agreement applying to the correctional bargaining unit under both the central and local agreements. Firstly, the economic terms are identical to and flow from the central agreement. The "net zero" threshold is met with the 2015 wage freeze, the 2016 1.4% lump sum payment and the 2017 1.4% across-the-board increase with the negotiated cost containments relating to LTIP, termination pay and WSI benefits along with the freeze to progression through the ranks (made subject to this arbitration). In addition, the following terms are to have application to the correctional bargaining unit:

- The development of a standalone collective agreement for the correctional bargaining unit on a go-forward basis covering all negotiable terms and with interest arbitration as the final dispute resolution mechanism.
- Effective January 1, 2016 and January 1, 2017, all full-time and fixed-term correctional bargaining unit employees to receive 36 hours of compensating leave (*pro rata* for part-time) to be added to existing credits.
- The hiring of 25 probation and parole officers.

- Establishment of a joint workload committee to deal with probation and parole workload issues.
- Eligible employees can elect to receive compensating leave or pay at the overtime rate for overtime worked with compensating leave capped at 36 hours in 2016 and 100 hours in 2017.
- Joint subcommittee to make recommendations with respect to possible enhancements to and refresher training under the mental health training curriculum.
- Pre-Grievance Settlement Board alternative dispute resolution process.
- A review of the trends in occupational stress and workplace violence, etc.

The Union demand before me is as follows. For all job classifications and all steps, a 30% catch-up wage increase and a 3% across-the-board wage increase effective January 1, 2016 followed by a second 3% across-the-board wage increase effective January 1, 2017. The Union rejects the grid movement freeze for 2016 and

2017 effective from the date of the award. The Employer position is that there should be no special adjustments and that the grid freeze for 2016 and 2017 should apply.

## **SUBMISSIONS**

### **Union**

The initial rationale advanced by the Union in support of its demands focuses on correctional officer comparability to the OPP first class police constable. The Union relies upon the 1978 Report of the Royal Commission on the Toronto Jail and Custodial Services by Judge B. Barry Shapiro (the Shapiro Report). This report found that with respect to correctional officers, "Salary scales should be brought closer to those of Ontario Provincial Police officers..." The specific recommendation was that over a three- to five-year period, "the differential between the CO2 and the first-class Ontario Provincial Police officer (be reduced) to \$1,000 a year in favour of the OPP officer." It is acknowledged that a differential of \$1,000 in 1979 would be equivalent to \$3,500 in 2014 dollars. The 2014 correctional officer/OPP first class constable differential is \$22,497 on base salary (\$68,124 for the correctional officer vs. \$90,621 for the OPP officer) for a differential of 33%. The differential expands to 45% when account is taken of the retention pay provided to OPP officers. In further support of a 30% catch-up increase, the Union points out, firstly, that between 1997 and 2014 wages for the CO2 grew by 48.6% while the wages for a first class constable with 23 years of service, i.e. with 9% retention pay, grew by 87.5% and, secondly, that in the period 2012-14, while CO2 wages were frozen for 2013-14 and 2015, OPP wages

rose by 11.8%. The 2015-18 salary increases for municipal police officers (Toronto, Hamilton, London, Halton) are cited as justification for the 3% annual across-the-board increases. Reference is also made to the justice sector generally, i.e. judges, crown attorneys and justices of the peace.

Reliance is placed on the salaries paid to special constables employed by municipalities. These are civilian members of the municipal police force who are used as prisoner escorts or court security officers. It is submitted that special constables perform duties similar to a correctional officer in regard to transporting prisoners, maintaining care, custody and control of prisoners, maintaining the physical security of a building, same use of force training and responding to medical emergencies – all with the same civil and criminal liability. Specific reference is made to York Region (\$83,514), Peel Region (\$83,180) and London (\$78,921). The CO2, at \$68,124, is, it is argued, entitled to a significant catch-up increase.

The second major thrust of the Union argument relates to correctional officers in the federal service. It is submitted that Ontario correctional officers are paid approximately 10% less than their federal counterparts at \$74,936 while both are rated at 279 points under the Willis job evaluation plan (see Joint Committee Report on Federal Correctional Officers, April 2000). The Willis Job Evaluation Plan, approved by the Canadian Human Rights Commission, uses the four criteria identified in the Canadian Human Rights Act: skill, effort, responsibility and working conditions. Consistent with the foregoing, reliance is put on the fact that since 1999, opposite to

what has transpired in Ontario vis-à-vis the correctional/police relativity, at the federal level, correctional officer salaries have increased by 59.8% as compared to a 48.1% increase for RCMP salaries.

As for probation officers, reliance is put on the fact that as of 2014 federal probation officers were paid 6.9% more than Ontario probation officers (with the federal probation officers eligible for a June 21, 2014 wage increase).

The Union is opposed to freezing wage grid movement for 2016 and 2017 because, it asserts:

- The savings of \$2 million in 2011 and \$5.6 million in 2017 will have no meaningful impact on the provincial budget.
- There is no basis to tie correctional outcome to the unified settlement.
- Notwithstanding that only 19.1% of the bargaining unit is affected, the impact on the individual member is significant, i.e. for a CO2 \$28,510 over the first seven years of his/her career.
- No grid freezes among comparable bargaining units, i.e. police and federal corrections.

## **Employer**

The Employer relies on the replication principle as the cornerstone of interest arbitration decision-making. The Employer points to the 2014 AMAPCEO settlement, the recent 2015 settlements in the education sector and to the OPSEU central and unified bargaining units within the Ontario Public Service as "net zero," with compensation offsets allowing for modest lump sum payments or wage improvements. It is pointed out that the 2012-14 contracts for these groups contained wage freezes and rollbacks. Reference is also made to the "net zero" energy sector agreements covering bargaining unit employees at OPG and Hydro One for the three-year term commencing in 2015. A lengthy list of recent (post-September 2012) settlements or awards providing for wage freezes is tendered. It is argued that, given the foregoing, the application of the replication principle should produce a "net zero" outcome here.

Although opposed to the use of external comparators, the Employer, in response to the Union's reliance on the federal correctional salaries, tables graphs showing the historical relationship (from 1992) between the rates paid to Ontario correctional officers and those paid to correctional officers in British Columbia, Alberta and Quebec. The Employer submits that in considering comparable positions in other jurisdictions, the salary levels in other large provinces constitute the most logical basis for comparison. Although slightly behind Alberta, I am asked to rely on

the fact that Ontario correctional officer salaries are above the average of the salaries paid to British Columbia, Alberta, Quebec and the federal government correctional service employees.

In further support of its position that based on the replication principle the Union demand for special adjustments should be denied and the grid freeze maintained, the Employer submits that the historical bargaining outcomes between these parties demonstrate that across-the-board increases for the correctional unit and the unified group have been the same throughout. As for special adjustments, the Employer points out that in only three of the past 22 years (2002, 2005 and 2009) have correctional officers received a special adjustment. The Employer considers it significant that over these 22 years when special adjustments have been applied to correctional staff, such adjustments have been applied to the unified bargaining unit. It is the position of the Employer that, given that there were no special adjustments for the unified group in this round, the replication principle means that there should be no special adjustments for the correctional unit in this round – consistent with the "post-recession economic and fiscal environment."

The economic and fiscal environment described by the Employer is one marked by plunging oil prices, high levels of consumer debt, rising electricity prices, 6.5% unemployment and low productivity growth as supporting pessimistic economic forecasts and explaining the wage freeze-net zero bargaining outcomes. It is argued

that special adjustments have only occurred in a much more robust economy than presently permits.

Given its strong retention and recruitment record, the initiatives taken to improve working conditions and the commitment made to increase staffing levels, including the formal agreement to hire an additional 25 probation and parole officers, and the establishment of a joint workload committee, it is argued that the context is one that mitigates against providing special wage adjustments at this time.

The Employer points out that OPSEU tabled proposals for 32 special adjustments, each of which was set out in writing and in respect of which oral submissions were made. The Employer submits that, accordingly, the ultimate agreement with OPSEU to forego special adjustments for the unified group in this round supports a similar result here.

The Employer argues in favour of the application of the grid freeze to the correctional unit on the basis that the grid freeze was a critical component of the overall settlement with the unified group that allowed for the "net zero" lump sum and across-the-board increases. Absent any basis upon which to distinguish between the correctional and unified classifications in this regard, it is submitted that the replication principle dictates that the grid freeze also be applied to the correctional bargaining unit.

## **REPLY**

The main points made by the Union in reply are:

- The application of the replication principle is limited in a case where, as here, the Union is seeking catch-up special adjustments.
- The application of the criteria dealing with "comparative wages for work of a similar nature in other Canadian jurisdictions" requires the Board to consider the pay of correctional officers in the federal jurisdiction and the pay of correctional officers in other provincial jurisdictions relative to police officers in the same jurisdiction.
- As compared to the unified bargaining unit classifications, where there have been few special adjustments, correctional officers have received a number of special adjustments since 1994.
- The Ontario economy, with a 2.5% GDP growth rate, is outperforming the Canadian economy, with a GDP growth rate of less than 1.2%, that has been affected by depressed oil prices.

- The correctional bargaining unit has taken three consecutive years of 0% wage increases, had their starting rates reduced by 3%, i.e. new step at bottom of the grid, lost termination pay accrual and had retiree benefit premiums increased while inflation increased by 4.6% over these three years and is projected to run at or close to 2% per year.

The main points made by the Employer in reply are:

- The historical bargaining actions between the parties establish:
  - The unified and correctional units have been treated in a consistent manner with respect to across-the-board increases.
  - Special adjustments for correctional unit classifications only occurred in rounds where such adjustments also applied to the unified unit.
  - Special adjustments did not occur in poor economic environments.

On the basis of the foregoing, the Employer argues that no special adjustments are warranted at this time.

- The Union's complaint about 2012-14 wage freeze and subsequent "net zero" ignores the bargaining outcomes within the broader public service, including education and energy, during the same period. It is submitted that the "net zero"

bargaining outcome is equitable in the context of OPSEU unified bargaining and the poor fiscal and economic environment.

- Since the release of the 1978 Shapiro Report, these parties have repeatedly negotiated settlements that bear no compensation relationship to the OPP, even subsequent to 1993 when the Union acquired the right to strike.
- The Employer asserts that Ontario correctional officers are generously paid when compared to other provinces. The Employer argues that there is no basis to focus on only the federal sector.
- The Employer disputes that there is a salary relationship between federal corrections officers and the RCMP (until recently non-union) as shown by the narrowing differential since 1999 during which time the federal correctional officers have received larger salary increases than the RCMP.
- Identifying one classification in Ontario as the highest paid (OPP) is not a valid argument that all other Ontario classifications, i.e. correctional officer, should also be the highest paid.

- Special constables in municipalities, although referenced by OPSEU in past bargaining, have never formed the basis of correctional wage determination.
- The grid freeze is necessary to achieve the net zero result and is warranted on an application of the replication principle.

## ANALYSIS

There are certain principles that apply in fashioning an interest arbitration award that approximates what the parties themselves would have achieved if left to pursue their competing objectives to a two party resolution. These are summarized in *re: Air Canada and CAW-Canada, June 16, 2011 (Burkett)*. This award, as here, deals with a residual issue, pension arrangements for new hires, that was referred to "final offer" interest arbitration as part of a collective bargaining settlement between the parties. In providing an overview of the guiding interest arbitration principles, the Board in that case stated:

The terms replication, gradualism and demonstrated need are used to describe the guiding principles of boards of interest arbitration. Replication refers to the objective of fashioning an award that, to the extent possible, replicates the settlement the parties would have reached had the dispute been allowed to run its full course. In this regard, interest

arbitrators look to benchmarks in the community (in our case to other major Canadian corporations and to the airline industry) and to the bargaining history between the parties.

The principle of gradualism reflects the reality that collective bargaining between mature bargaining parties, as these are, is a continuum that most often accomplishes gradual change as distinct from drastic change. It follows that absent compelling evidence, an interest arbitrator will be loath to award "breakthrough" items.

The principle of demonstrated need, as applied to a major economic item, provides a counterbalance to the principle of gradualism. It does so by establishing the basis upon which a board of interest arbitration will award a "breakthrough" item. A party seeking a major or even a radical change must convincingly establish the need for such change; hence the term demonstrated need.

It is understood that in the application of the governing criteria, as distinct from the afore-identified principles, an interest arbitrator has a broad discretion as to the relative importance of each criterion and, as is expressly provided for here and under the interest arbitration statutes, the discretion to apply whatever other criteria the arbitrator decides are relevant. The purpose of this broad unfettered discretion is to ensure that the process is fair and impartial (see *re: Corporation of the City of Toronto and Toronto Professional Fire Fighters Association, Local 3888, June 26, 2013 (Burkett)*).

In considering the facts in this case in light of the criteria and the respective submissions, I conclude as follows:

- The results of free collective bargaining govern public sector interest arbitration as it applies to across-the-board economic determination. This is the replication principle. However, special adjustment determination, as here, requires a comparative salary analysis as between the classification(s) that is at issue and relevant comparator classifications (that may be either internal or external). The purpose is to determine if the classification at issue is underpaid relative to the comparator classifications such that a special adjustment, distinct and apart from any across-the-board salary increase, is warranted. While the replication principle drives the across-the-board analysis, it is of little assistance in determining whether a specific classification warrants special treatment distinct and apart from the salary treatment accorded the bargaining unit generally or in this case the Ontario Public Service generally.
- In that the grid freeze forms part of the current "net zero" public service and broader public service across-the-board bargaining outcome, the application of the replication principle supports the same outcome here.
- Given that the 1.4% lump sum payment effective January 1, 2016 and the 1.4% across-the-board increase effective January 1, 2017 were freely negotiated as part of the "net zero" settlement covering the remainder of the Ontario Public Service and given that the broader public service collective bargaining

outcomes are comparable, the application of the replication principle dictates that the same across-the-board outcome prevail here. Accordingly, the request for additional 3% per annum across-the-board salary increases in each of 2016 and 2017 must be rejected in favour of a determination as to whether, on the required comparative analysis, a special catch-up adjustment(s) is warranted.

- Whether or not there have been special adjustments for this group in the past is irrelevant to the question as to whether or not there should be a special adjustment now. Taken to its logical conclusion to hold that under the replication principle there can be no special adjustment now if there have been none or the past means that absent a history of special adjustments there can never be special adjustments going forward.
- Given the general nature of the work, the salary differential vis-à-vis Ontario police officers constitutes a valid point of comparison. However, reliance upon the 1978 Shapiro Report recommending that correctional officer salaries be brought to within \$1,000 of OPP salaries (\$3,500 adjusted for inflation) is of no assistance in determining the tie-point in circumstances where, in the 38 years since, the parties have ignored the 1978 specific tie-point recommendation in their salary negotiations.

- A comparison of correctional salaries to those paid to the special constables employed by municipalities, who perform a range of comparable duties, also supports the conclusion that Ontario correctional salaries have fallen behind relative to the police comparator. Again, there is nothing to establish a specific tie-point.
- The expanding differential between Ontario police salaries and Ontario correctional salaries (in favour of police salaries) compared to the police vs. correctional salary differential in other jurisdictions, including the federal jurisdiction, supports the conclusion that Ontario correctional salaries have fallen behind relative to the police vs. correctional salary differential in other jurisdictions.
- The federal correctional officer comparator is a valid one. Federal correctional officers work in Ontario performing essentially the same function as Ontario correctional officers. The 2000 Joint Committee Report on Federal Correctional Officers recorded that under the Willis Job Evaluation Plan, both the federal and Ontario correctional officers were rated at an identical 279 points. Accordingly, whereas the salaries for the federal and Ontario correctional officers were at essential parity between 1998 and 2000, the current approximate 10% salary differential in favour of the federal correctional

officers over their Ontario counterparts (6.9% for probation officers) establishes a specific catch-up objective for Ontario correctional employees.

- On the face Ontario correctional salaries, as asserted by the Employer, are above the average of British Columbia, Alberta and Quebec. However, given the differential between the Quebec Provincial Police annual salary and that of the OPP (- \$20,000) and between the Quebec Provincial Police annual salary and the RCMP, who service Western Canada, (-\$12,000) and given that police salaries within a jurisdiction establish a ceiling, Quebec must be treated as an outlier. Further, the annual British Columbia correctional salary must be adjusted upward to account for the 35 hour work week. In the result, the Ontario correctional salary, in addition to being about 10% behind the Federal salary, is about 1.7% behind the Alberta-British Columbia average.
- Given the deterioration of Ontario correctional salaries relative to Ontario police salaries, given the deterioration of the differential between Ontario Correctional salaries and Ontario Police salaries relative to this differential in other jurisdictions, and given the deterioration of Ontario correctional salaries relative to federal correctional salaries, a catch-up increase is warranted. However, because the deterioration of correctional salaries has occurred over a number of rounds of bargaining the replication and gradualism principles

support an incremental approach to dealing with the catch-up issue. Further, the demonstrated need test does not override the principles of replication and gradualism in a “net zero” world where, in addition to the normative settlement pattern, a number of additional improvements have already been negotiated for this bargaining unit in this round.

- Even with an incremental catch-up award the objective must nevertheless be to maximize the impact on the end rates. This commends backend-loading at the expense of retroactivity.

Having regard to the foregoing, this award will impose the 2016-17 grid freeze consistent with that under the Unified Collective Agreement and provide a special catch-up adjustment of 3% for correctional staff and 2% for probation staff effective January 1, 2017.

# A W A R D

The parties are hereby directed to incorporate into their collective agreement the following:

1. Language imposing a progression through the ranks grid freeze effective for 2016 and 2017.
2. Special wage adjustments as follows:  
Effective January 1, 2017 – 3% for correctional staff, 2% for probation staff

I remain seized to deal with any implementation issues.

Dated this 26<sup>th</sup> day of May 2016 in the City of Toronto.

*Kevin Burkett*

