IN THE MATTER OF AN ARBITRATION PURSUANT TO THE COLLECTIVE AGREEMENT BETWEEN THE ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION AND THE UNIVERSITY OF SASKATCHEWAN (VACATION ACCRUAL GRIEVANCE)

BETWEEN:

ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION

("Union")

AND:

UNIVERSITY OF SASKATCHEWAN

("Employer")

Before

Leslie Belloc-Pinder, K.C. **Chair**

Heard in Saskatoon, Saskatchewan on November 19-20, 2024

Gary Bainbridge, K.C. **For ASPA**
Jon Danyliw **For the Employer**

AWARD

I. OVERVIEW

1. This grievance involves interpretation of a Collective Agreement Article relating to vacation accrual for Administrative and Supervisory Personnel Association members on unpaid leave longer than 31 days.

2. The University of Saskatchewan's practice of pro-rating vacation entitlement for employees on unpaid leave was not formally addressed by the parties until an ASPA member raised the issue in 2023 after completing an education leave. In answering the member's initial inquiry, the Employer advised that it stopped accruing service for vacation purposes for the entire duration of her education leave. Further, the member's circumstances were not unique, since the Employer confirmed its long-standing practice of adjusting vacation accrual dates for time spent on unpaid leaves.

3. The grievance was filed challenging the Employer's interpretation of its obligations pursuant to the Collective Agreement's definition of "service" and Article 19.2, which contains a typical sliding scale for vacation entitlement. ASPA submitted that the prevailing jurisprudence supports a finding that vacation benefits are earned benefits which cannot be reduced absent express language, and that the Employer's practice does not accord with the clear language of the Collective Agreement. Thus, ASPA argued that the

Employer's practice of pro-rating vacation entitlement violates the agreement and should trigger full retroactive redress to every employee affected by the practice.

4. The Employer argued that ASPA's position regarding the Article at issue is incorrect when it is read within the context of the entire agreement. The Employer also submitted that extrinsic evidence regarding past practice, the parties' negotiating history, and defence of estoppel are obstacles to ASPA discharging its burden of proof and/or obtaining a remedy.

5. Based on the legal analysis which follows, the Board finds ASPA's interpretation of the Collective Agreement regarding vacation accrual for employees in service to the Employer is correct. However, the grievance seeking retroactive redress for any of its members who have had their vacation accrual date adjusted for unpaid leave is dismissed. The evidence supports a finding that ASPA be estopped from exercising its rights under the Collective Agreement until its expiry in April 2026.

II. PROCEDURE AND PARTIES

6. The Administrative and Supervisory Personnel Association ("ASPA") is the Certified Bargaining Agent for all administrative and professional persons and all technical officers employed by the University of Saskatchewan ("University") through a combination of Article 3.1 of the Collective Agreement and the Certification Order issued by the Saskatchewan Labour Relations Board. There are approximately 1,400 members in the bargaining unit.

7. The parties have negotiated numerous collective agreements from time to time, and the current agreement covers the period of May 1, 2022 to April 30, 2026.

8. The grievance giving rise to this arbitration was filed by ASPA in November 2023. It asserts that, because unpaid leave has not been included by the Employer when determining vacation accrual rates, the Employer has violated Article 19.2 of the Collective Agreement and improperly disregarded the definition of "service".

9. The hearing took place in person over two days. ASPA called Tara Lucyshyn ("Lucyshyn") as its sole witness. The Employer called three witnesses, namely:

    a. Colin Weimer – Director, Employee and Labour Relations ("Weimer");

    b. Val Szydlowski – Manager, HR Data Administration and Payroll Operations ("Szydlowski"); and

    c. Elaine Gunderson – Business Analyst and ASPA member ("Gunderson").

10. The Employer provided 10 exhibits, including three past collective agreements. ASPA filed 4 exhibits, including the grievance and current Collective Agreement. The parties also filed comprehensive briefs of law to supplement oral submissions at the end of the hearing.

III. COLLECTIVE AGREEMENT

11. The definition of "service" set out in the four collective agreements filed by the parties has evolved over time. From time spent performing assigned duties, later iterations (including the current definition) include a modification which connects vacation accrual to continuous employment. The parties disagree on the significance, impact, and purpose of this modification.

> **Past Agreement – 2002 to 2005 – Employer Exhibit 1, Tab 1**
> "Service refers to the time spent by a member performing the duties assigned by the Employer."
>
> **Past Agreement – 2008 to 2011 – Employer Exhibit 1, Tab 2**
> "Service refers to the time spent by a member performing the duties assigned by the employer except when calculating the vacation accrual rate, where service refers to all employment of the individual with the employer."
>
> **Past Agreement – 2011 to 2014 – Employer Exhibit 1, Tab 3**
> "Service refers to the time spent by a member performing the duties assigned by the employer except when calculating the vacation accrual rate, where service refers to all continuous employment of the individual with the employer."
>
> **Present Agreement – 2022 to 2026 – Union Exhibit U-1**
> "Service refers to the time spent by a member performing the duties assigned by the employer except when calculating the vacation accrual rate, where service refers to all continuous employment of the individual with the employer. For purposes of calculating notice and severance, service will include prior continuous employment in-scope of any university bargaining unit and in Exempt positions."

12. The parties also disagree about how or whether Article 20.7.7 impacts interpretation of Article 19.2.

> **Article 19 – Holidays and Vacation**
> …
> **19.2 Annual Vacation**
>
> **19.2.1 Vacation Accumulation (20 working days)**
> During the first six (6) years of service, a member will earn vacation at the rate of twenty (20) working days per year with the monthly

accumulation rate depending on the number of working days in the month. Part-time members will earn vacation on a pro rata basis.

19.2.2 Vacation Accumulation (25 working days)
After six (6) years of service until sixteen (16) years of service, the member will earn vacation at the rate of twenty-five (25) working days per year with the monthly accumulation rate depending on the number of working days in the month. Part-time members will earn vacation on a pro rata basis.

19.2.3 Vacation Accumulation (30 working days)
After sixteen (16) years of service, the member will earn vacation at the rate of thirty (30) working days per year with the monthly accumulation rate depending on the number of working days in the month. Part-time members will earn vacation on a pro rata basis.

Article 20 – Leaves

…

20.7 Leaves, Maternity, Adoption and Parental

…

20.7.7 Vacation

Annual vacation may be taken as an extension of any Article 20.7 leave.

The member's vacation accumulation date will not be adjusted for the length of any Article 20.7 leave. A member eligible for the Supplemental Benefits Plan (Article 20.7.5) is also eligible to accrue annual paid vacation, as per Article 19.2, at their full appointment rate (FTE) for the period during which they collect the Supplemental Benefits Plan.

Unpaid annual vacation will accumulate at the rate defined in Article 19.2 for the portion of any Article 20.7 leave that is not covered by the Supplemental Benefits Plan, or for the entire leave for members who do not qualify for the Supplemental Benefits Plan.

IV. THE EVIDENCE

13. The facts giving rise to this grievance are largely undisputed. ASPA member Lucyshyn began employment at the University in August 2017. Two years later she requested a 1-year unpaid educational leave to enter a MSc. Program. The leave was approved and taken from September 1, 2019 to August 31, 2020.

14. In August 2023, Lucyshyn calculated that she would be in entitled to an additional 1 week of vacation, having accumulated 6 years of service. However, when she inquired about her vacation entitlement in September of that year, she was advised she would not be eligible for the additional week until the end of July 2024. This was when Lucyshyn became aware

that the University had not counted her year of unpaid educational leave toward her vacation accrual.

15. In a series of electronic messages, the University confirmed that Lucyshyn's educational leave affected her service date, and recalculation of her vacation accrual was identified on her paystubs after she completed her leave in 2020.

16. Much of the Employer's evidence focused on its long-standing practice of adjusting or pro-rating vacation accrual dates for voluntary unpaid leaves greater than 31 days. Szydlowski testified that ASPA members' vacation accrual dates had been adjusted this way since online tracking of vacation for ASPA began in 2012. Prior to that, ASPA members' vacation was tracked by individual departments.

17. Gunderson testified that the University has adjusted vacation accrual dates for unpaid leaves of absence greater than 31 calendar days since at least 1998, when she began working on implementation of the University's HR Information Management System. Gunderson speculated that the adjustment might even have predated 1998.

18. The University pointed to internal training information regarding the vacation tracking system to support its long-standing practice and related submission that ASPA and its members were aware of the practice. It filed external communication documents sent to ASPA members and the ASPA executive in 2012 notifying them of the new (electronic/online) vacation tracking process.

19. The University also filed an Agreed Statement of Facts endorsed by the parties in an unrelated arbitration in 2021. Within the document, the parties acknowledged that another employee had her vacation accrual date adjusted due to breaks in service arising from casual employment, seasonal layoffs, and unpaid leaves of absence. The Employer submitted this document as evidence of ASPA's awareness and acceptance of its practice. ASPA disagreed that its endorsement on the Statement of Facts supports that conclusion or inference. Instead, ASPA noted that this document merely reflects a particular grievor's actual wage package and does not signify ASPA's agreement with the University's practice regarding vacation accrual in principle.

20. Citing the impossibility of "proving a negative", ASPA did not present any evidence regarding its knowledge of the Employer's practice to which it now objects.

V. ANALYSIS

Onus

21. ASPA bears the onus to prove, on a balance of probabilities, that the Employer breached the Collective Agreement. That said, the concept of onus applies only to proving facts, not law, and interpreting the meaning and effect of words in a collective agreement is a legal exercise. Thus, in resolving questions of law in this arbitration, the Board must "determine the true meaning intended by the parties to the agreement, using generally accepted canons of construction".[1] Nonetheless, to succeed in this grievance ASPA must satisfy the Board that the disputed provision should be interpreted in the way it suggests.

Interpretive Principles

22. Both parties cited *Saskatchewan Telecommunications v C.E.P., Locals 1-S & 2-S*[2] (Hood) as guidance to follow in this case:

> **36** The objective of the interpretation of a Collective Agreement is to determine the mutual intentions of the parties at the time the agreement is made. There are rules that are followed to determine this intention, such rules are generally consistent with the interpretation of ordinary contracts and include:
>
> • The presumption is that the parties' intentions are manifest in the words that are used. Had the parties intended something different, they would have said so.
>
> • The words used are to be construed in their ordinary and grammatical sense, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. The words are to be given their plain, literal and ordinary meaning unless the context otherwise requires. If competing interpretations are possible, deference is given to reasonableness; absurdity is to be avoided.
>
> • Words and phrases should not be interpreted in isolation, but rather in the context of the agreement in its entirety. The agreement should be read as a whole to reconcile all terms but yet, to the extent possible, provide meaning to all words and without unnecessarily rendering words superfluous.
>
> • If the operative part of the agreement is unclear, recitals (unless otherwise stated) may be used to control, cut down or modify the operative part. Headings in the agreement (unless otherwise stated) may be used to explain the meanings of the paragraphs that follow.

23. Thus, the Board must consider the entire context of the Collective Agreement and read its words in their ordinary meaning, harmoniously with the intention of the parties and scheme and object of the contract. Discerning the parties' intention may involve reviewing their bargaining history, past Collective agreements, and past practice while implementing the

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[1] *Regina School Division No 4 of Saskatchewan and CUPE, Local 3766* (M (J)), Re, 2014 CarswellSask 717.
[2] *Saskatchewan Telecommunications v C.E.P., Locals 1-S & 2-S*, [2009] SLAA No 4 (Hood) (QL).

agreement(s), among other things. Finally, once the Board settles on an interpretation, it should be tested by asking whether the interpretation is reasonable, effective, fair, and within the bounds of acceptability for the parties.

24. With these principles in mind, the Board will analyze the Collective Agreement provisions at issue.

What is the meaning and scope of the "service" definition?

25. As detailed in paragraph 11 above, the parties have expanded their description of "service" in the Collective Agreement over time. Initially, "service" was simply described the actual performance of work for the Employer. Next, an exception was added to the definition which related specifically to the vacation accrual rate. Then, the word "continuous" was added to the vacation accrual rate exception. Finally, in the current agreement, clarification about how service will be calculated for the purposes of notice and severance was added as a second sentence in the definition.

> Service refers to the time spent by a member performing the duties assigned by the employer except when calculating the **vacation accrual rate**, where service refers to all **continuous employment** of the individual with the employer.
> For purposes of calculating **notice and severance**, service will include prior continuous employment **in-scope of any university bargaining unit** and in Exempt positions (emphasis added).

26. On a plain reading of the definition as it now exists, compared to the first agreement the Employer presented, it is apparent that the parties' understanding of "service" has expanded to include modifications and clarifications for specific purposes. Therefore, it is reasonable to conclude that each new sentence or phrase was intended to have its own meaning while also being read in connection with the others.

27. Notably, there is a distinction between the first part of the definition which defines service as time spent performing employment duties and the second part of the sentence which is framed as an exception to the general statement. Solely for "calculating the vacation accrual rate", service is defined as "continuous employment". This is an entirely different way of measuring service – connected to the state of being employed rather than performing the duties of employment.

28. This distinction makes sense within the context of the entire agreement and is not unclear or confusing. It leads logically to the conclusion that the parties intended vacation accrual would continue during times when an employee is not performing duties, and that the event which would interrupt such accrual would be cessation of employment.

29. ASPA's written submissions summarize the arbitral jurisprudence which provides the rationale for such a provision, amplified by the following *Brown & Beatty*[3] summary:

> In most agreements, the parties include specific provisions to deal with the issue of which periods that an employee remains off work can be counted in computing his or her vacation entitlement. It is very common, for example, for the amount of vacation pay or duration of vacation to be calculated on the period of time a person has been "continuously employed" or "in service". ***In the absence of some clear expression of intention to the contrary, most arbitrators have interpreted such words to mean that employees who were off work on a lawful strike or because of illness, disability, leave of absence, parental or pregnancy leave, or layoff during the course of the year, were entitled to count such periods when they were not actively working in calculating their vacation entitlement***. Indeed, where vacation entitlement is based on employment status rather than performance of work the recognition of full vacation entitlement of employees who are on a parental or disability leave may be required by employment standards and human rights legislation. [emphasis added]

30. While, in this case, Lucyshyn received a Record of Employment effective on the date she began her educational leave, the evidence does not demonstrate she was no longer employed by the University during the year she was studying. Indeed, the University did not argue that Lucyshyn's unpaid educational leave broke or interrupted her continuous employment.

31. Thus, the evidence supports a finding that the parties intended the unambiguous words "continuous employment" would relate to Lucyshyn's employment status, rather than her actual working time ("on the tools" as ASPA referred to it). The University did not seriously challenge this interpretation but argued that the second part of the definition's first sentence had a narrower purpose.

32. The University submitted that the second part of the first sentence referring to service was added so that time spent by an ASPA member performing assigned duties for the University in another bargaining unit or employee group before joining ASPA would also be included when calculating their vacation accrual date. To support this argument, the University pointed to a "highlight sheet" regarding the 2008 to 2011 Collective Agreement, wherein the vacation accrual augmentation to the definition of service was explained as follows:

> Definition of Service:
> **Service** refers to the time spent by a member performing the duties assigned by the Employer except when calculating the vacation accrual rate where service refers to

[3] *Brown & Beatty*, 3:79.

> all employment of the individual with the University. This change provides vacation credit to employees who have worked in other university employee groups.[4]

33. The problem with this argument is that it is based on words used in a Collective Agreement that has been subsequently amended (twice). First, in the 2011 to 2014 agreement, the word "continuous" was added before the word "service" in the phrase relating to the vacation accrual rate. Then, in the current 2022 to 2026 agreement, an additional sentence was added which directly deals with continuous employment "in-scope of any bargaining unit and Exempt positions", but only for the purposes of calculating notice and severance. A plain reading of the definition includes recognition that this second sentence is distinct from the first one and has a different purpose.

34. ASPA argued that when the parties wished to include service outside ASPA for notice and severance calculations, they said so directly. That the same words were not used respecting continuous service and vacation accrual rates is noteworthy. ASPA submitted it is neither logical nor a necessary implication that the same specific provision would apply to the vacation accrual rate referenced in the previous sentence.

35. The definition of "service" in the current Collective Agreement is multi-faceted in that it serves more than one purpose. Together, the two sentences constitute the definition, but they each stand on their own without contradicting or repeating the other. The Board is satisfied the introduction of a second sentence in 2014 serves a different purpose than the first sentence and agrees with ASPA's analysis in this regard.

36. Finally, if the parties had wished or agreed to exclude time spent on authorized leave from credit for vacation entitlement, they should have stated this explicitly in the agreement. Like the arbitral jurisprudence regarding the term "continuous employment" discussed above, the law is clear that vacation entitlement is an earned benefit and, as such, cannot be eliminated or reduced except by express provision.[5] Therefore, if the parties wanted to exclude members on leave from vacation accrual, they could have included language to that effect. "But absent such specific terms in a Collective Agreement which cut down or reduce the entitlement to vacation pay, such terms will not be read in or interpreted out of a Collective Agreement that provides for vacation pay based on service."[6]

Other Language in the Collective Agreement

37. Turning now to the other specific articles of the Collective Agreement relevant to this arbitration, Article 19 sets out the rate of vacation accumulation in 19.2. The parties do not

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[4] Exhibit E-2, pg. 3.
[5] *Sola Basic Ltd v IAM, Local 1168*, 1976 CarswellOnt 1393 (Ont Arb, Beck), paras. 10, 14.
[6] Ibid, para. 10.

disagree about any language in this Article. Article 20 relates to Leaves, and 20.7.7 deals specifically with vacation accumulation during maternity, adoption, or parental leave.

38. The Employer submitted that much of the language in Article 20.7.7 would be meaningless and rendered superfluous if ASPA's interpretation of the service definition is correct. ASPA countered that Article 20.7.7 is irrelevant to the argument(s) at the heart of this case, since it relates solely to employees who are receiving Employment Insurance and topped-up benefits. Thus, employees to whom Article 20.7.7 applies are taking leaves which are partly paid (through the top-up) and partly unpaid (but otherwise supplemented by EI). This is an important factual distinction that separates Lucyshyn's situation from employees on so-called "hybrid" leaves.

39. The Board agrees with ASPA's submission that leaves specifically described in Article 20.7 are a distinct circumstance which do not prove, by their existence, that the parties agreed to abandon, contradict, or dilute the general principle that vacation accrual occurs during other or all leaves.

40. A plain reading of Article 20.7.7 is that it is a specific provision intended to address a somewhat complicated leave, which not only arises due to the Collective Agreement, but also via provincial and federal legislation. The Article is clear and unambiguous, and explicitly describes the process for calculating vacation accrual for certain employees in specific situations. A plain reading of this Article does not lead to a conclusion that the parties intended it to influence the vacation accrual rate in other circumstances or generally.

Operational or Policy Decisions Regarding Vacation Accrual

41. There is no dispute that the University has a long-standing practice of excluding time on unpaid leaves of greater than 31 calendar days when determining vacation accrual rates. Moving from a paper-based to an electronic record keeping system centralized and streamlined the vacation accrual rate calculation process, and the Employer's witnesses reasonably explained the operational rationale. Thus, the University submitted that its past practice supports its interpretation of the relevant Articles. It cited a 2023 decision wherein the arbitrator took note of an Employer's "common practice" over a lengthy period, of which the Union was aware or ought reasonably to have been aware. The arbitrator found this long-standing practice supported the Employer's interpretation of a contractual provision.[7]

42. It is significant that the internal or operational decisions the Employer made to track vacation accrual dates and leave, and to digitize their system, are not set out in or required by the Collective Agreement. ASPA acknowledged that the Employer's practice over time may even be seen to have benefitted some of its members. For example, the Employer's

[7] *Saskatchewan Health Authority v Health Sciences Association of Saskatchewan*, 2023 CanLII 62985 (SK LA).

decision not to "count" or reduce vacation accrual for employees on leave for periods less than 31 days has resulted in employees are getting credit they would not otherwise receive during longer leaves. That said, ASPA also submitted that distinguishing between paid and unpaid leaves, with the former continuing to accrue vacation entitlement and the latter not, appears arbitrary.

43. Further, ASPA pointed out that the Collective Agreement makes no reference to treating short or long leaves differently and is completely silent on the Employer's operational decision to continue vacation accrual for employees on paid leaves, but not for those on unpaid leaves. The absence of rationale or consensus in the Collective Agreement for such operational decisions does not assist the Employer in its argument.

44. There may, of course, be valid practical or policy reasons for the Employer to make the distinctions it has for various business reasons, but these practices or "rules" as Gunderson referred to them do not become galvanized into the Collective Agreement absent clear language to that effect. In this regard, a gap or vacuum exists in the current and past Collective Agreements which the University has filled with a long-standing operational decision now brought into focus by this grievance.

45. While there is some evidence ASPA "ought reasonably to have been aware" of this past practice, this inference is insufficient to support a conclusion that the parties addressed their minds to the issue and agreed that the status quo operationalized by the Employer is what they intended to describe in the Collective Agreement. For this reason, the University's past practice is, in and of itself, insufficient to support its interpretation of the Collective Agreement.

46. That said, the Employer's past practice is certainly relevant in this matter, as it figures prominently in the estoppel defence discussed below.

Conclusion Regarding Interpretation

47. The Board finds that the phrase "continuous employment" (within the context of the definition of service and the entire agreement read as a whole) is distinct from "service" that is characterized as actual working time. Further, the Board finds that the second sentence in service definition is distinct from the first, in that it relates to the circumstance of assessing service and continuous employment for the specific purpose of calculating notice and severance. As a result, this second sentence augments and diversifies the definition but does otherwise change the meaning, intent, or operation of the first sentence.

48. Second, the definition of "service" at the beginning of the Collective Agreement unambiguously states that the vacation accrual rate for all members must be calculated based on continuous employment. No leave of any kind is mentioned in the definition, as a limiting term or otherwise.

49. While Articles 19 and 20 contain various provisions related to holidays, vacations and leaves, only Article 20.7.7 mentions a member's vacation accumulation date being affected by a leave - specifically for "Maternity, Adoption, and Parental" leave. Such circumstances are specific and factually distinct from the ones present in this case, but the agreed process for dealing with vacation accrual during such leaves is not inconsistent with the general definition which connects vacation accrual with continuous employment.

50. The Employer offers its long-standing past practice of adjusting vacation accrual rates differently based on a leave's nature and duration as evidence its interpretation is correct. However, reading guidelines, policies, or operational rules into the general definition section is an invitation to ignore the plain wording of the general definition section. Moreover, the specific constraint being suggested may erode the value of an earned benefit which requires explicit contractual language to accomplish – not inference or implication.

51. Thus, the Board concludes that the interpretation proposed by ASPA in this matter is correct. In so doing, the Board has considered whether the interpretation is reasonable, effective, fair, and within the bounds of acceptability for the parties, and finds that it meets these marks. It is doubtless frustrating for many reasons that a practice presumed acceptable for many years has now been scrutinized and challenged. But in the same way that past practice does not lead inevitably to support the Employer's interpretation, the passage of considerable time does not disqualify ASPA from successfully advancing its legal argument now.

Employer's Defence - Estoppel

52. Both parties addressed the Employer's defence of estoppel in their oral and written arguments, referring also to various exhibits.

53. The University presented documentary evidence that ASPA was or ought to have been aware of the Employer's practice of adjusting vacation accrual dates. These documents include written communication to the ASPA executive and its members (E-9, E-Aa) and a Memorandum of Agreement from 2012 regarding Employee Vacation Accumulation which was incorporated into the Collective Agreement. Based on committee meeting minutes, it appears the only issue raised by ASPA at that time related to the transition from a flat-rate monthly vacation accrual to vacation accrual based on the number of working days in the month.

54. The Employer also filed an Agreed Statement of Facts from a different arbitration which, although it related to a different issue, included the following statement:

> [ASPA Member] has been employed with the University in varying capacities since 2003, and the Employer uses July 25, 2007 as the vacation accrual date for the purposes of accruing her vacation. The adjustment to July 25, 2007 was due to breaks

> in employment such as casual employment, seasonal layoffs, and unpaid leaves of absence. [8]

55. ASPA argued that the above joint statement simply reflects a fact, as agreed, but does not constitute a concession or admission that the Employer's practice was correct. This argument has merit. However, it is not necessary for the Board to find that the document proves such a concession. The document supports the Employer's position even if it simply demonstrates that ASPA was aware of the Employer's practice.

56. The Record is clear that the grievance which launched this arbitration was the first time ASPA formally took issue with the Employer's practice. According to a spreadsheet generated for this hearing (E-10), over 200 ASPA members have had their vacation accrual dates adjusted after taking an unpaid leave since 2000. Paragraph 63 below reviews some evidence presented by the Employer about some conversations about the practice with members and one ASPA representative over the years, and ASPA did not call any evidence in this regard.

57. In *Viterra Inc. v Grain Services Union (ILWU-Canada)*,[9] Arbitrator Hood thoroughly reviewed the law of estoppel, noting at paragraph 88 that "Estoppel is available to prevent a party from dishonoring the underlying assumptions in collective agreements, where it would be unfair to do so."

58. At paragraph 56 of the award in that case, he wrote:

> Evidence of past practice, while an aid to interpretation to resolve an ambiguity, is also admissible to establish an estoppel. In Mitchnick and Etherington, Labour Arbitration in Canada, (Toronto: Lancaster House, 2006) the learned authors note at para. 16.4.5:
>
> > Another form of extrinsic evidence commonly sought to be introduced is the parties' "past practice" at the workplace. To be admissible or of value as an aid to interpretation, such evidence must meet the following conditions, set out by Arbitrator Weiler in John Bertram & Sons Co. Ltd. and I.A.M., Local 1740 (1967), 18 L.A.C. 362, at p. 368:
> >
> > > (1) there is no clear preponderance in favour of one meaning stemming from the words and structure of the Collective Agreement, as seen in their labour relations context;
> > >
> > > (2) one party has engaged in conduct which unambiguously is based on one meaning attributed to the relevant provision;

[8] Agreed Statement of Facts, Exhibit E-6, para. 21.
[9] *Viterra Inc. v Grain Services Union (ILWU-Canada)*, 2011 CanLII 41068 (CA LA).

> (3) the other party has acquiesced in this conduct, a fact which is either quite clearly expressed or can be inferred from the continuance of the practice for a long period without objection; and
>
> (4) there is evidence that members of the Union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.
>
> While, as with estoppel, a practice or representation can arise through silence or passive condonation, Arbitrator Richard Brown has emphasized that, to support either ground, the pattern of acquiescence must be long-standing and substantial: Drug Trading Co. Ltd. and U.S.W.A., Local 3313 (1998), 71 L.A.C. (4th) 231. (emphasis added)

59. The Saskatchewan Court of Appeal (SCA) and Supreme Court of Canada (SCC) have both endorsed the ability of a labour arbitrator to dismiss a grievance based on an estoppel where a grievance is filed challenging a long-standing practice of an employer. In *Sherwood Co-operative Association Limited v Retail, Wholesale and Department Store Union, Local 539*, 2013 SKCA 119, the SCA cited the decision of the SCC in *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, 2011 SCC 59 [*Nor-Man*].

60. The SCA summarized the circumstances in *Nor-Man* at paragraph 17 of its decision, and at paragraphs 18-20 summarized the principles of estoppel in the labour arbitration context as noted by the SCC (Fish, J.). At paragraph 20 of its decision, the SCA wrote:

> [20] With that, [Justice Fish] drew attention, in para. 50 of his reasons for judgment, to something of 'particular relevance here', namely the following observations of Paul C. Weiler, the then Chairman of the British Columbia Labour Relations Board, explaining the place of estoppel in the context of grievance arbitration:
>
> > ... a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the Collective Agreement. If the Union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the Union later on takes a second look and feels that it might have a good argument under the Collective Agreement, and the Union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its

> face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23, [1978] 2 C.L.R.B.R. 99, at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship -- all contrary to the objectives of the Labour Code"....
>
> (emphasis in original)

61. In addition to other principles, this jurisprudence emphasizes that it is inherently inequitable and potentially destructive to the ongoing relationship of the parties over the term of a Collective Agreement to permit a party to draw back from a long-standing practice midway through the term by filing a grievance contesting the correctness of the practice.

62. ASPA submitted there is insufficient evidence to establish it was formally aware of the Employer's vacation accrual practice, although it does not dispute the authenticity of any of the Employer's exhibits. ASPA is not required to explain its decisions around how it chose to present its case, nor is the Board prepared to draw an adverse inference from the fact that ASPA did not call any of its representatives who might have been able to testify about their knowledge of the practice or lack thereof. That said, silence on an issue can amount to a representation even if such since silence lacks the requisite formality to prove that ASPA intended it to be relied upon.

63. The preponderance of evidence establishes ASPA did more than remain silent about the Employer's practice. Szydlowski recalled that "sometimes employees asked questions" about their vacation accrual dates because they "might have forgotten about a leave". She also testified she may have answered one or two questions from a former union representative about the practice, but "nothing came of it". Szydolowsi implied that these employees were satisfied with the Employer's response regarding its calculations. Gunderson testified she was not aware if ASPA had any concerns about the limitations the University set in its vacation accrual "rule".

64. ASPA is not required to negate the elements of estoppel, but it also chose to call no evidence regarding its knowledge, or lack thereof, of the Employer's practice. While permissible, and perhaps confounded by the difficulty of proving a negative, there is nothing to counter the Employer's evidence which could support any or all of the following assertions: (1) that ASPA knew or ought to have known about the practice for many years, (2) and/or ASPA had not addressed its mind to the issue, (3) and/or ASPA had not carefully examined the Collective Agreement provisions which now figure prominently in this arbitration.

65. The totality of the evidence establishes, on a balance of probabilities, that while ASPA never made a "clear and unequivocal representation that it would not rely upon its contractual rights"[10], its silence amounts to a representation. The evidence also supports a conclusion, on the civil standard, that ASPA knew about the Employer's practice, at least by 2021. The Agreed Statement of Facts (E-6) filed in an arbitration that year makes this plain.

66. The evidence supports a finding that all four elements of estoppel based on past practice as described in Adjudicator Hood's *Viterra v. GSU* award exist on the facts of this case. First, before this grievance was advanced, there was neither clear communication between the parties nor a "clear preponderance" in favour of one meaning or another for the now contentious words and their context. Second, the University engaged in a practice based on its interpretation of the agreement (and previous agreements) for many years. Third, ASPA's silence is not only a representation but may also reasonably be considered acquiescence to the practice given its continuance for a long period of time without objection. Fourth, in addition to such historical acquiescence, the evidence establishes that ASPA representatives acknowledged the practice in a legal document filed in an unrelated proceeding commenced by grievance in August 2021 (Exhibit E-6 Agreed Statement of Facts). No objection was made to the Employer's practice regarding vacation accrual during unpaid leaves at the time that document was tendered or thereafter until this grievance was filed in 2024. ASPA's signature on E-6 is evidence which reasonably demonstrates acquiescence for at least the past three years.

67. For clarity, the Board does not find that the Agreed Statement of Facts signed by the parties in January 2023 stands for the proposition that the Employer's practice regarding vacation accrual is correct, that ASPA agreed with the practice, or that *res judicata* arises from the award in the unrelated matter.

Conclusion Regarding Estoppel

68. Although the Board supports ASPA's interpretation of the Collective Agreement in this award, its substantial acquiescence to the University's operational practices regarding vacation accrual for members on leave is an insurmountable obstacle to obtaining the remedy it now seeks. It would be unfair and inequitable to permit such a sudden reversal to the University's detriment, especially since the University's long-standing vacation accrual practice has endured over the course of several collective agreements.

69. Thus, considering the totality of the evidence, the defence of estoppel as plead by the University is made out.

[10] Union's Brief of Law, pg. 49.

VI. CONCLUSION

70. On the interpretation question, for the reasons set out above, the Board finds that the true meaning of the disputed provision(s) accords with ASPA's position. However, ASPA may not exercise its rights which arise from this interpretation until after expiration of the current Collective Agreement.

71. The University's defence of estoppel is supported by the evidence. As a result, the University is not required to resile from its practice regarding vacation accrual rates and leaves during the term of the current Collective Agreement.

VII. DECISION

72. ASPA's request for redress set out in Grievance No. 2023-003 is dismissed.

Dated at Saskatoon, Saskatchewan this 3rd day of January, 2025.

Leslie Belloc-Pinder, K.C.
Sole Arbitrator