IN THE MATTER OF THE LABOUR RELATIONS CODE

UNITED NURSES OF ALBERTA

Applicant

- and -

ALBERTA HEALTH SERVICES

Respondent

- and -

ALBERTA UNION OF PROVINCIAL EMPLOYEES and HEALTH SCIENCES ASSOCIATION OF ALBERTA

Intervenors

FILE: GE-08153

BOARD MEMBERS

William J. Johnson, Q.C. – Vice-Chair
Lynda Flannery – Member
Dianne Wyntjes– Member

APPEARANCES

For the Applicant: Kristan A. McLeod (Counsel)
For the Respondent: Craig W. Neumann, Q.C. (Counsel)
For the Intervenor AUPE: William Rigutto (Counsel)
For the Intervenor HSAA: Dan Scott and Karen Scott (Counsel)

REASONS FOR DECISION

[1] The United Nurses of Alberta (the "Union" or "UNA") asserts Alberta Health Services (the "Employer" or "AHS") breached sections 60(3) and 148(1)(a)(ii) of the *Labour Relations Code* (the "*Code*") when:

- On October 29, 2019 before noon, the AHS Executive Director of Labour Relations & In-Scope Classification and Compensation Dennis Holliday called the Union and spoke with Manager of Labour Relations Lee Coughlan and indicated AHS would be sending over a new proposal seeking a -3% to the wage grid.

- On October 29, 2019 at 1:54 p.m., AHS Vice President Todd Gilchrist sent an Internal Memo entitled "Update on wage reopener arbitrations" and stated that while "AHS originally tabled proposals for 0% increases for the final year of the agreements" AHS had received a revised mandate from the Government of Alberta on October 25, 2019, and "will change proposals." With respect to UNA, AHS announced its proposal will shift to "minus 3%". The memo also stated that "we have just notified the unions of these changes and that we will continue through the arbitration process". This memo was posted in various workplaces across AHS sites; it was provided to UNA by one of its members.

[2] In relation to section 60(3) of the *Code,* AHS in reply asserts:

- Section 60(3) does not apply to a wage re-opener and as such the Board does not have jurisdiction to address the conduct of AHS pursuant to section 60(3) of the *Code*;

- In the alternative, AHS did not violate section 60(3) because AHS notified UNA of its change of position in the wage re-opener proceeding promptly upon learning of new circumstances requiring the change of position. AHS changed its position in response to significant new developments affecting mandates across the public sector, emanating from the organization's primary funder. It would have been untenable in these circumstances for AHS to maintain its former position in the wage re-opener proceeding, and it would have been inappropriate for AHS to withhold information from UNA about this significant change. AHS has been candid, forthright and responsible in addressing the wage re-opener with UNA;

[3] In relation to section 148(1)(a)(ii) of the *Code,* AHS asserts:

- It notified UNA of its change of position in the wage re-opener proceeding before any public announcement occurred. AHS did not communicate information about the change directly to UNA members. The information about the change of position that was directed to managers within the AHS organization, which apparently came to the attention of some UNA members, was accurate, factual information that did not in any way denigrate or undermine UNA's representation of its members.

[4] The Alberta Union of Provincial Employees ("AUPE") and Health Sciences Association of Alberta ("HSAA") were granted intervenor status for the purpose of argument.

[5] The matter proceeded to hearing on November 22, 2019. On November 26, 2019, the Board issued a bottom line decision for the section 60(3) complaint with fulsome reasons to follow. The November 26, 2019 decision stated:

- in response to the issue of whether the Board has jurisdiction to address UNA's section 60(3) complaint, the Board concludes section 60(3) of the Code applies to the conduct of the parties in relation to the wage reopener as contained in the current collective agreement between UNA and AHS. As such, the Board has jurisdiction to address UNA's section 60(3) complaint; and

- AHS in the context of this application did not breach section 60(3) of the Code by changing its proposal from 0% to a 3% reduction on the wage grid.

[6] Having further reviewed the evidence and arguments, the Board concludes the Employer violated section 148(1)(a)(ii).

[7] The Board's reasons follow.

BACKGROUND

[8] The parties entered an Agreed Statement of Facts along with the introduction of eight exhibits. The Agreed Statement of Facts and the contents of Exhibit 2, 3 and 4 are reproduced:

1. The United Nurses of Alberta ("UNA") is a trade union within the meaning of the *Labour Relations Code*.

2. Alberta Health Services ("AHS") is an employer within the meaning of the *Labour Relations Code*. For the purpose of negotiating with UNA, AHS acts as agent for Covenant Health, Lamont Health Care Centre, and the Bethany Group.

3. UNA is the certified bargaining agent representing employees of AHS employed in "direct nursing care or nursing instruction" in a bargaining unit described in Board Certificate No. 163-2012.

4. UNA is party to a collective agreement with AHS governing terms of employment of employees in the bargaining unit described above. The current collective agreement had a stated expiry date of March 31, 2020.

5. UNA served notice to commence bargaining on AHS for the renewal and amendment of the collective agreement by letter dated December 14, 2016. The parties bargained and reached a three-year agreement in November, 2018 (the "Agreement"). The term of the Agreement is from April 1, 2017 to March 31, 2020. The parties agreed to zero percent change to the wage grid for Years 1 and 2 of the Agreement.

6. The Agreement included a wage re-opener provision solely for the wages in Year 3, which stated as follows:

WAGE RE-OPENER

Year 3 - The Parties shall commence negotiations to reach agreement on the wages payable in Year 3 (April 1, 2019 to March 31, 2020) of the Collective Agreement on February 15, 2019.

The Parties agree that the only item open for negotiations shall be the wages in the Salary Appendix of the Collective Agreement. This re-opener shall not be construed in any way as "opening the agreement" for negotiations on any other issues by either side.

If the Parties have not been able to agree upon the wage adjustment, at any time after March 31, 2019, either Party may give written notice to the other Party of its desire to submit resolution of the wage adjustment to interest arbitration before a three-member panel comprised of a nominee of both parties and a chair chosen by the parties from among the following arbitrators: David Phillip Jones, Andrew C. L. Sims, or W. D. McFetridge.

If the parties are unable to agree upon the chair, the Director of Mediation Services shall choose the chair from among the arbitrators named above.

The arbitration hearing shall be held by no later June 30, 2019. In reaching its decision, the arbitration panel shall consider the matters identified in section 101 of the Alberta Labour Relations Code.

7. The parties exchanged proposals on wages on February 15, 2019, with UNA proposing a 3% increase to the wage grid, and AHS proposing a 0% change to the wage grid.

8. On May 9, 2019, UNA proposed that the parties delete the first step of the wage grid and add a new step at the top of the wage grid that would be 3% above the preceding step. AHS did not accept this proposal (Exhibit 1).

9. The interest arbitration was set to proceed on May 13 and 17, 2019. AHS requested an adjournment of the interest arbitration after the election of a new provincial government, and UNA opposed the request. The Arbitrator granted the adjournment, and scheduled new interest arbitration dates on July 2, 3, and 8, 2019.

10. On June 13, 2019, Bill 9 was introduced into the Legislature of Alberta, and on June 28, 2019 Bill 9 received Royal Assent and became law. Bill 9 postponed the wage reopener interest arbitration between these and other public sector parties until after October 31, 2019.

11. On Tuesday, October 29, 2019 before noon, the AHS Executive Director of Labour Relations & In-Scope Classification and Compensation, Dennis Holliday, called UNA and spoke with Manager of Labour Relations, Lee Coughlan, and indicated AHS would be sending over a new proposal seeking a -3% change to the wage grid at the interest arbitration.

12. On October 29, 2019 at 1:54 pm, AHS Vice President Todd Gilchrist sent an Internal Memo to AHS "Leaders" entitled "Update on wage reopener arbitrations" (the Internal Memo). Exhibit 2 states:

> With the release of the Government of Alberta's budget last week, we received notification that wage reopener arbitrations will be proceeding and AHS will be required to change our position with our unions.
>
> AHS agreements with all of our unions included a 0% wage increase for the first two years and a requirement to reopen wage negotiations in the third year, effective April 1, 2019.
>
> During wage reopener negotiations, AHS originally tabled proposals for 0% increases for the final year of the agreements, which all unions rejected and moved to arbitration.

However, under the revised mandate received on October 25, we will change our position as follows:

- AUPE – General Support Services minus 2%
- AUPE – Auxiliary Nursing minus 2%
- UNA minus 3%
- HSAA minus 5%

The changes reflect information collected by government during the temporary suspension required by the *Public Sector Wage Arbitration Deferral Act* including the MacKinnon Report on Alberta's Finances. The report identified significant spending problems and the need for Alberta to bring public sector compensation rates in line with other comparable provinces.

We have just notified the unions of these changes and that we will continue through the arbitration process. The final outcome of the arbitration will be determined by an independent third party arbitrator

Additional background information on the wage reopener process is attached.

We recognize that this will be difficult news for most of your staff.

13. On October 29, 2019, shortly after 2 pm, the Government of Alberta issued a press release about the change of mandates for public sector employers engaged in wage re-opener negotiations. Exhibit 3 states:

> As promised, 2019 public-sector wage arbitrations will continue after October 31 with an updated monetary mandate that reflects the reality of Alberta's growing debt and the unacceptable deficit this government inherited.
>
> The revised position comes after government took the time to fully assess Alberta's economic situation, including findings of the MacKinnon panel report, which recommended public-sector wages be brought in line with comparable provinces to correct overspending and sustain high-quality services for Albertans.
>
> We cannot ask Alberta taxpayers to fund public-sector pay raises during a time when far too many workers in the private sector have

> lost their jobs and many others have seen significant pay cuts in recent years.
>
> We are all in this together as Albertans. We all have to do our part to live within our means, and that includes government. Our MLAs have rolled back their salaries by five per cent and the Premier has cut his salary by 10 per cent. This is on top of five per cent cuts to MLA salaries a few years ago.
>
> Public-sector pay accounts for over half of government expenses, and compensation for public-sector workers in Alberta is, in most cases, significantly higher than in other comparable provinces. During better times, public-sector wages rose rapidly – far faster than inflation and population growth.
>
> The revision moves from the previous position of no increase for 2019 to an average two per cent reduction for collective agreements that include a 2019 wage reopener.
>
> We have the highest respect and admiration for Alberta's public-sector workers, whose dedication helps deliver so many of the vital services Albertans rely on. But we were elected to be responsible stewards of the public's tax dollars and to get our province's finances under control.
>
> Each one per cent increase of the $26.9 billion spent annually on wages means an additional $270 million cost to taxpayers, forcing a choice between higher taxes for Albertans at a time when they are facing economic uncertainty or cuts to government programs.
>
> The pause provided by Bill 9 gave us the clarity and information we needed to make prudent financial decisions that are in the best interests of all Albertans without continuing to pile up unnecessary and destabilizing debt. The updated arbitration mandates are based on that reality.

14. On October 29, 2019 at 3:49 pm, Mr. Holliday emailed Mr. Coughlan with AHS's formal change in position for the 2019 wage reopener from 0% to a reduction of 3%, and confirmed AHS would submit that revised position to the interest arbitrator (Exhibit 4). Exhibit 4 states:

> Further to our conversation earlier today, this letter summarizes the AHS change in position for the 2019 wage-reopener from 0% to a reduction of 3 percent (-3.0%).
>
> This change in position is required due to a change in the AHS mandate set by the Government of Alberta.

> The 2019 provincial budget tabled on October 24, 2019, identified the serious financial situation that faces the province. As an organization receiving the vast majority of our funding from the provincial government we need to ensure our wages are not significantly higher than comparable provinces.
>
> The MacKinnon Report provided insights into broad public sector compensation challenges and calls on the government to make changes to bring broad public sector spending in line with other provinces. AHS Registered Nurses wages, as an example, are the highest when compared to similar healthcare collective agreements in the Ontario-West comparator groups.
>
> Therefore, at the interest arbitration in November, AHS intends on submitting our revised position to Arbitrator David Jones for participating Employers (AHS, Covenant, Lamont and Bethany). These changes do not change the value we place on our employee's dedication and hard work.

15. On November 1, 2019 and November 4, 2019, the parties exchanged emails regarding the specifics of the mandate and bargaining position (Exhibits 5, 6, 7, 8).

[9] The only witness was David Harrigan, UNA's Director of Labour Relations.

[10] Along with the Internal Memo, there had also been a one page Leader Background (Exhibit 9) which provided further particulars. The Leader Background stated at the bottom "Confidential – For Leader information". In contrast, the Internal Memo had no indication of being a confidential document and ended with the words "we recognize that this will be difficult news for most of your staff."

[11] In response to the October 29, 2019 Internal Memo of AHS Vice-President, the Union received emails from members indicating the Internal Memo had been posted and distributed. The emails to UNA were one from a northern Alberta site and two from southern Alberta sites.

[12] The Union members' communications of the Internal Memo were pursuant to UNA's internal email system and UNA's Facebook page which UNA utilizes for member communications. The reaction of the members was one of anger and questions to UNA as to what was going on.

[13] The October 31 to and November 4, 2019 (Exhibits 5 - 8) emails between David Harrigan and Dennis Holliday (Executive Director- Negotiations and Labour Relations for AHS), discussed AHS's change in position. One issue that UNA sought clarification on was whether AHS's proposal of a 3 % reduction was to be retroactive to April 1, 2019 or the date of the Arbitration Award. On November 1, 2019 AHS advised UNA the proposed effective date of AHS's proposed reduction is to be the date of the Arbitration Award and not April 1, 2019.

Decision

Does Section 60(3) of the Code apply to the April 29, 2019 Internal Memo of AHS

[14] Relevant sections of the *Code* are:

> *60(1) When a notice to commence collective bargaining has been served under this Division, the bargaining agent and the employer or employers' organization, not more than 30 days after notice is served, shall*
>
> > *(a) meet and commence, or cause authorized representatives to meet and commence, to bargain collectively in good faith, and*
> > *(b) make every reasonable effort to enter into a collective agreement.*
>
> *…*
>
> *(3) No employer, employers' organization or bargaining agent and no authorized representative acting on behalf of any of them, after having served or having been served with a notice to commence collective bargaining pursuant to this Division, shall refuse or fail to comply with subsections (1) and (2).*
>
> *1(1) In this Act,*
> *…*

> *(j) "dispute" means a difference or apprehended difference arising in connection with the entering into, renewing or revising of a collective agreement;*
>
> *…*
>
> *93(1) The parties to a dispute may agree in writing to refer the matters in dispute to a one-member or 3-member voluntary arbitration board, whose decision will be binding.*
>
> *95(2) The award of a voluntary arbitration board is binding on the parties to the dispute and shall be included in the terms of a collective agreement.*

[15] In addressing whether section 60(3) of the *Code* applies to negotiations of the wage grid as contemplated in the wage reopener of the UNA/AHS collective agreement, the Board notes the notice to bargain was issued in January 2016. As such, the obligation to bargain in good faith and make every reasonable effort to enter into a collective agreement commenced in January 2016. The wage re-opener is a continuation of the dispute between the parties arising from those earlier negotiations.

[16] Parties to a dispute are entitled to utilize voluntary interest arbitration to resolve a dispute. Sections 93(1) and 95(2) of the Code, reinforce the right of the parties to use voluntary interest arbitration.

[17] In the context of this case, the Board concludes:

- the current UNA/AHS collective agreement contains a wage reopener for year 3 of the collective agreement which is a continuation of the dispute arising out of the January 2016 notice to bargain with respect to one topic – the wage grid for year 3;
- the section 60 obligation to bargain in good faith concerning that dispute continues through the wage re-opener;
- by agreeing to voluntary interest arbitration in the wage reopener the parties selected a section 93(1) and 95(2) process to resolve that dispute; and

- as such, the obligation to bargain in good faith pursuant to section 60(1) and 60(3) of the *Code* applies to the October 29, 2019 decision of AHS to change its proposal from a 0% change to the wage grid to a 3% reduction to the wage grid.

[18] AHS argued the Board had previously resolved this issue in the decision of *Dillingham Construction Ltd.*, [1987] A.L.R.B. 476. In *Dillingham*, the Board concluded the obligation to bargain in good faith did not apply to the negotiations of a project agreement which were occcurring while the registered employer's organizations and the unions were in the process of negotiating registration collective agreements. In finding the obligation to bargain in good faith did not apply to negotiations of a project agreement, the Board noted the negotiations were outside the scope of the registration negotiations and were entirely voluntary.

[19] In contrast the wage grid for year 3 of the AHS/UNA collective agreement is part of the dispute that commenced with the January 2016 notice. By agreeing to the utilization of voluntary interest arbitration, the parties agreed to a process that binds the parties. The Board finds the *Dillingham* analysis is not applicable to UNA's section 60(3) application.

[20] Three decisions in support of the Board's conclusion are:

- *United Nurses of Alberta v. Provincial Health Authorities of Alberta,* [2003] Alta. L.R.B.R. 376;
- *International Association of Fire Fighters, IAFF Local 4794 v. Rocky View County,* [2013] Alta. L.R.B.R. 64; and
- *Professional Association of Foreign Service Officers, Complainant and Treasury Board,* [2013] PSLRB 110

[21] In the *UNA v. Provincial Health Authorities* decision, the issue was whether the duty to bargain in good faith was applicable when a collective bargaining dispute had been submitted to a Compulsory Arbitration Board. At paragraph 12 the Board stated:

> We do not take the Board's discussion relating to the crystallization of items in dispute to mean the bargaining process itself is frozen pending the award of the C.A.B. What the Board said was that the issues are defined at the point the Minister appoints a C.A.B. This is to enable the parties to know, address, and answer the case they have to meet in the event it proceeds before a C.A.B. It does not stop the parties from reducing the items in dispute to be heard by the C.A.B. Indeed, the Board made reference to this in *CUPE* when it provided "the parties may subtract from those issues through the ongoing efforts to settle the matter …"

[22] In the *IAFF Local 4794* decision, the Employer disclosed layoffs after the parties had completed the compulsory arbitration hearing but before the arbitration panel had issued its decision. The Union filed a complaint asserting the Employer violated the duty to bargain in good faith by failing to make timely disclosure. In finding the Employer had violated the obligation to bargain in good faith, the Board stated at paragraph 40:

> We begin by noting that the duty to bargain in good faith continues to apply during the compulsory arbitration process. The duty begins when a notice to commence bargaining is served and it continues during the compulsory arbitration process until a collective agreement is achieved: see *UNA* v. *Provincial Health Authorities of Alberta*, [2003] Alta. L.R.B.R 376 at para. 13.

[23] In the *Professional Association of Foreign Service Officers*, the Canada Public Service Labour Relations Board addressed whether conduct pursuant to section 182 of the *Public Service Labour Relations Act* ("*PSLA*") was subject to the obligation to bargain in good faith as contained in section 160 of the *PSLA*. Section 182 of the *PSLA* contained an alternate dispute resolution process and the issue was whether the Employer's preconditions to it agreeing to a section 182 process violated the duty to bargain in good faith. At paragraphs 44, 49, 50 and 52, the Canada Public Service Labour Relations Board stated:

> 44 Despite the respondent's argument and regardless of the fact that the process under section 182 of the *Act* is identified by a header identifying it as *Alternative Dispute Resolution*, I find that it is not independent of the negotiation process. For example, section 182 dealing with final and binding determination and section 183 dealing with a minister's direction to hold a vote on the employer's last offer received by the bargaining agent are both included under separate headings. Each provides an alternative to the traditional collective bargaining impasses. Section 182 is one of the many tools available to the parties to resolve issues or conflicts which arise along the continuum between notice to

> bargain collectively and signing of a new collective agreement. In the current situation, it is a tool available to the parties to break the impasse in which they find themselves, given the ongoing strike and their current inability to conclude negotiations. This interpretation is consistent with the principles outlined in the preamble of the *Act.*
>
> 49 I therefore reject the respondent's argument that its obligations under section 182 are similar to its obligations when negotiating a settlement of a termination grievance. In addition, having found that the duty to bargain in good faith attaches to the parties' obligations under section 182, I also reject the respondent's argument as there is no statutory requirement through which the duty to bargain in good faith would attach in the respondent's analogy.
>
> 50 Having concluded that section 182 is part of the negotiation process and it is not a separate process to be "hived off" from the rest of the bargaining process, I must now answer question 2.
>
> 52 Given that section 182 can be accessed by the parties at any point during the negotiation process, and that its intent is to assist the parties to conclude a collective agreement and resolve any outstanding issues between the parties that prevent the conclusion of the collective agreement, clearly the obligations attach and continue until such time as an agreement has been reached. The respondent was not obligated to agree to participate in final and biding determination under section 182, but once it entered into negotiating the conditions under which the determination would occur, it was under the obligation to bargain these conditions in good faith and to make every reasonable effort to conclude a collective agreement as per section 106. Section 182, its use and the negotiation of the conditions for its use are all part of the negotiation process.

[24] The Board concludes the jurisprudence supports its conclusion the duty to bargain in good faith is applicable to the October 29, 2019 decision of the *AHS* to change its proposal from a 0% change to the wage grid to a 3% reduction of the wage grid.

Did AHS Violate 60(1) and (3) of the Code?

[25] In addressing AHS's change to its proposal, the Board first references *ATA v. Board of Trustees of Rocky View School Division No. 41 et al.,* [2012] Alta. L.R.B.R. 136 where the Board stated at paragraph 23:

> [23] The objectives of the duty to bargain in good faith are to compel recognition of the trade union as the legitimate representative of employees and to require that parties engage in full, honest and rational discussion of their bargaining differences.

> The Board determines what constitutes bad faith bargaining on a case-by-case basis. As noted in *GCIU, Local 34-M* v. *Southam Inc.*, [2000] Alta. L.R.B.R. 177 at page 196:
>
> > While concepts like receding horizon bargaining and negotiating improper demands to impasse are useful indicia of bad faith bargaining, the question for labour boards is always the larger one of whether the accused party is making reasonable efforts to reach a collective agreement, or instead attempting to avoid entering an agreement. To answer that question, labour boards look at the totality of the parties' bargaining conduct. Depending upon their context, many facts can support an inference that one party does not really intend to reach a collective agreement…
> >
> > (Emphasis added)

[26] The jurisprudence indicates that in some contexts a material change in circumstances supports the ability of a party to change its bargaining position. Three decisions that found a change in government funding for public sector agencies was such a material change are:

- *OPEIU Local 577 and Hamilton (City) (Board of Education)* (1993) OLRB Report 308;
- *OPSEU v. Municipal Property Assessment Corp.,* (2010) OLRB Report 475; and
- *University of Manitoba (Re),* 2019 MLBD 3.

[27] The Manitoba Labour Relations Board in its *University of Manitoba* decision referenced both the *Hamilton Board of Education* and the *Municipal Property Assessment* decisions of the Ontario Labour Relations Board in concluding the University of Manitoba was within its rights to withdraw its financial offer in response to a new mandate of fiscal restraint issued by the Government of Manitoba. Paragraphs 159, 161, and 164 of the *University of Manitoba* decision state:

> 159 For example, both parties relied upon the Ontario Labour Relations Board's decision in *O.P.S.E.U. v. Municipal Property Assessment Corp.*, [2010] O.L.R.B. Rep. 425. That case concerned the decision of an employer to withdraw an offer of wage and benefit increases as a consequence of the introduction of the provincial budget and legislation respecting public sector compensation restraint applicable to non-union employees. Commencing at paragraph 10, the Ontario Board commented that a party is entitled to resile from a position as a result of a changed assessment of what constitutes its self-interest; however, the duty to

bargain in good faith requires that any such changed assessment must be *bona fide* and, further, that even a *bona fide* decision may undermine the basis for negotiations and thereby violate the legislation. Rejecting the union's argument that the withdrawal of the wage proposal destroyed the framework for decision-making at the bargaining table, the Ontario Board commented at paragraphs 12 and 19 as follows:

> 12 This argument is devoid of the contextual analysis which has been the hallmark of the Board's jurisprudence with respect to the section. Withdrawal of agreed upon wage increases, let alone proposals such as in the case at hand, has, in certain circumstances, been found not to breach the section: *Hamilton Board of Education and City of Thunder Bay*…
>
> 19 In terms of whether any weight may be given to non-legislative statements, we note that in *Hamilton Board of Education* a public statement by the Premier that the Province was going to significantly reduce funding to public agencies was found by the Board to warrant reconsideration by the employer of its position with the result that the decision of the Board of Education to not ratify a memorandum of agreement concluded by its bargaining committee with the union was not a breach of what is now section 17.

…

161 In the case of *O.P.E.I.U., Local 527 v. Hamilton (City) Board of Education*, [1993] O.L.R.B. Rep. 308, referred to in the above quotation, the Ontario Board reflected on the reality of collective bargaining in the broader public sector. That case concerned an allegation that the employer breached the duty to bargain in good faith when its elected trustees failed to approve a proposed settlement placed before them for ratification on the basis of "new economic realities which had not crystallized when the original deal was struck". At paragraphs 64 to 67 the Ontario Board concluded as follows:

> 64 This is not a case which there was a sudden, unexplained change of heart, nor was the Board's decision to reopen bargaining just a matter of "politics" or shifting alliances among the Board's members. The situation really was different in February from what it has been before, and that new reality was underlined by the Premier's grim message of January 21, which confirmed and heightened concerns that were already emerging.
>
> 65 In our opinion, the circumstances faced by the Board on February 20 had shifted sufficiently and generated sufficient economic uncertainty, to warrant reconsideration of the Board's

> earlier collective bargaining stance, without breaching its statutory obligation to "bargain in good faith and make every reasonable effort to make a collective agreement". There was no failure to recognize or intent to undermine the union (as there was, for example, in Wilson Automotive). Nor was the Board's decision a pretence or subterfuge. … It did not seize on the Premier's speech as a device to avoid a collective agreement with OPEIU. The change in circumstances was real and compelling.
>
> 66 In the broader public sector, the Provincial Government funding agency is always a "ghost at the bargaining table" which influences, to a greater or lesser degree, what subordinate bodies are willing or able to pay (see for example: St. Joseph's Hospital, 76 CLLC para. 16,026). But in this case, the "ghost" had rattled its chains and begun to speak. And the message was clear: the earlier warnings were warranted, the economic situation was serious, and the Province intended to impose several financial restraints upon itself and its dependencies. Agencies receiving transfer payments were expected to do the same; and in light of the Board's existing financial woes, we find that it was entitled to rethink its financial commitments, including those associated with collective bargaining.
>
> (Emphasis added)
>
> 67 We do not say that the Board was entitled to REFUSE to bargain [emphasis added in upper case text]. On the contrary. It was obliged to bargain with the union, inter alia, about the new economic parameters, and inform itself about those matters so it could bargain meaningfully. (See: C.I.L. [1976] OLRB Rep. May 199). But it was also entitled to reconsider its previous bargaining position, and assess whether, given the change in funding, the teachers' bargaining pattern should be extended to the rest of its employees – including those represented by OPEIU.

…

164 Although the Faculty Association is correct in asserting that the University had a choice about whether or not to comply with the government's new mandate, the Board concurs with the University's position that merely because it was theoretically possible for the University to disobey the government's order, it was not, as a result, legally obliged to do so regardless of the potentially severe consequences that could result. Moreover, the fact that the Provincial government did not pass legislation compelling the University to comply or make a public statement that it was directing compliance with the new mandate, does not alter the Board's conclusion that the government's direct order respecting the mandate

> constituted a material change in circumstances which the employer was entitled to take into account in recalibrating its negotiating position and withdrawing its financial offer. The Board is, therefore, satisfied that, in the circumstances, the University's decision to resile from its offer does not offend section 63(1) of the *Act*.
>
> (Emphasis added)

[28] In the context of this case, the Board concludes the change in proposal by AHS was in response to the change in the government mandate, which was a material change in circumstances. Further, the Board concludes that AHS is not trying to avoid a collective agreement. In fact if anything, at the current time AHS is seeking to obtain a change to the wage grid pursuant to the wage reopener arbitration process.

[29] Accordingly, the Board concludes the change in the AHS wage proposal was not a violation of section 60(3) of the *Code.*

[30] The Board wishes to note its conclusion and reasons are not indicative as to whether the Board agrees or disagrees with the government's rationale for the change in mandate. The analysis of the rationale for the proposed change is an issue for the interest arbitrator's judgement.

Section 148(1)(a)(ii)

[31] Section 148(1)(a)(ii) of the *Code* states:

> *148(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall*
>
> *(a) participate in or interfere with*
>
> *...*
>
> *(ii) the representation of employees by a trade union,*
>
> *...*

[32] The focus of UNA's section 148(1)(a)(ii) complaint is the distribution of the October 29, 2019 Internal Memo to UNA members.

[33] AHS's October 29, 2019 communications with UNA had consisted of:

- before noon the telephone call from AHS advising UNA that AHS was changing its wage grid proposal from 0% to a 3% reduction on the wage grid; and
- the letter from AHS to UNA at 3:49 p.m. confirming AHS's change to its proposal for the wage grid.

[34] The communication of the Internal Memo by Union members to UNA and other Union members indicates that somehow the Internal Memo was shared by AHS with some Union members. The Board concludes that with three postings of the Internal Memo by Union members on UNA's internal communications system that some AHS "Leaders" shared the Internal Memo with nurses who the "Leaders" supervised.

[35] Two concerns the Board has with respect to the Internal Memo are:

- the Internal Memo fails to indicate the proposed effective date for a wage reduction as proposed by AHS; and
- the timing of the Internal Memo and its disclosure limited the ability of the Union to analyze and respond to the AHS change to its proposal prior to the dissemination of the Internal Memo to UNA's members.

[36] Neither the Internal Memo or the Government of Alberta Press Release indicated an effective date for the proposed reductions. The wage reopener is aimed at determining the wage grid for April 1, 2019 to March 31, 2020. AHS's original proposal was for a 0% change to the wage grid for the entire year. From reading the Internal Memo and the October 29, 2019 letter from AHS to UNA, there is no indication whether the proposed 3% reduction is being proposed for April 1, 2019 or the date of the Arbitration Award.

[37] It is self-evident that a 3% wage reduction retroactive to April 1, 2019, creates a claw back of monies already paid to the employees. The reaction to a retroactive wage reduction would be more severe than a wage reduction effective the date of the Award.

[38] UNA's inquiries to AHS resulted in the November 1, 2019 clarification from AHS that the proposed effective date of its proposal is to be the date of the Award and it is not be retroactive to April 1, 2019.

[39] Employer communications to employees during collective bargaining is an important consideration. In *UNA et al v. AHS et al*, [1995] Alta. L.R.B.R. 373, the Board stated at page 389:

> Several cases emphasize the heightened sensitivity needed if employers communicate directly with employees during bargaining. See for example, *Union of Calgary Co-op Employees v. Calgary Co-op Association* [1993] Alta. L.R.B.R. 335 at 35. It is not the existence of the bargaining period itself that is important, but the overall circumstances. …
>
> (Emphasis added)

[40] Although the Internal Memo was not directly sent to the nurses, the sharing of the Internal Memo with some nurses was an Employer communication to employees during collective bargaining.

[41] The purpose of communicating first with the Union has been commented on in other cases. In *United Food and Commercial Workers, Local 401 v. Canada Safeway Ltd.,* [1997] Alta. L.R.B.R. 137 the Board stated at page 140:

> … An Employer in circumstances such as this Employer found itself in (because there is no reason to believe that the timing of all of the events including the labour dispute were entirely the Employer's making) must take care to allow the Union a reasonable time to react before using its "heads up," as one Employer witness candidly put it, position to overwhelm the employees with its side of the story. Not to allow a reasonable reaction time is to fail to give the Union's role as exclusive bargaining agent its due. Counsel for the Union referred us to *I.B.E.W.*,

> *Local #348 v. A.G.T.*, [1986] Alta. L.R.B.R. 64 (at P. 65) which clearly states that it is acceptable for the Employer to communicate with employees regarding an offer, but before it can do so, it must allow the Union time to prepare their response and interpretation of the offer.
>
> 11 It is obvious here that the Employer was operating under time constraints imposed by the impending strike. Once the employees were on the picket lines, the Employer would be unable to effectively communicate its views to them. However, this is the nature of labour relations and to some extent a function of the Employer's desire to obtain a tactical advantage through its late tendering of the offer. This will not allow the Employer to avoid its obligation to allow time to the Union to study the offer before communicating directly with the employees.
>
> (Emphasis added)

[42] Analysis of section 148(1)(a)(ii) is conducted from the perspective of intentional communications and nonintentional communications. In *PPF Local 488 and IBEW v. Firestone Energy Corporation et al,* [2009] Alta. L.R.B.R. 134, the Board stated at paragraph 282:

> We earlier noted that s. 148(1)(a)(ii) prohibits both intentional and unintentional interference with union representational efforts. The presence or absence of intent, however, affects the scope of employer conduct caught by the prohibition. Where interference is unintentional, labour boards will examine the employer's legitimate interests advanced by the conduct complained of, balance those interests against the union's, and find breaches of the prohibition only where the damage to the union's representational interests is seriously disproportionate to the employer interests advanced: see Adams, *Canadian Labour Law, 2d ed.* (Looseleaf: Canada Law Book: 2008) at 10:130-1-10:140.
>
> (Emphasis added)

[43] Based upon the only evidence before the Board, the Board concludes that some "Leaders" shared the Internal Memo despite the Backgrounder page stating "Confidential – For Leader Information". While the original intent of AHS was to keep the Internal Memo confidential, the sharing of the Internal Memo had to have been intentional by some of the leaders. Such sharing of the Internal Memo circumvented the ability of the Union to address the issues in a timely fashion.

[44] The Board concludes that:

- The omission of a proposed effective date caused confusion within UNA; and
- UNA was not provided with sufficient time to do an analysis of AHS's change to its proposal, to seek clarifications before its members were provided with copies of the Internal Memo and to be provided with the opportunity to communicate the AHS change of proposal to its members.

[45] AHS relies on section 148(2)(c) of the *Code*:

> *148(2) An employer does not contravene subsection (1) by reason only that the employer*
>
> *…*
>
> *(c) expresses the employer's views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.*

[46] AHS referenced the wording of the Internal Memo and submitted the Internal Memo did not use coercion, intimidation, threats, promises or undue influence.

[47] The Board interprets the Internal Memo to be a disclosure of a change to the AHS proposal and not an expression of AHS views. Section 148(2)(c) is focused on the expression of the Employer's views. Accordingly the Board concludes section 148(2) is not a defence available to AHS.

[48] The Board concludes the October 29, 2019 distribution of the Internal Memo to the Union members by the Leaders was a violation of section 148(1)(a)(ii) of the *Code*.

[49] For a remedy, UNA sought to have the Board post a notice at the various AHS facilities advising of the Board's decision and of the need for the Employer to not interfere with the representational rights of the Union.

[50] The Board concludes that its declaration in this decision that AHS violated section 148(1)(a)(ii) of the *Code* is sufficient. Normally a remedy should be proportionate to the breach. The confusion over the proposed date for the proposed 3% reduction was corrected relatively quickly. While the employees may be concerned about the AHS's interfering with the Union's representational rights, such interference will not affect the wage reopener arbitration. AHS and UNA have a long standing mature relationship which is being tested by the government's policies on fiscal restraint. The Board does not want to elevate the tensions between AHS and UNA at this time with a Board Notice posted at the AHS facilities. Accordingly UNA's request for a posting is denied

ISSUED and DATED at the City of Edmonton in the province of Alberta this 18th day of December 2019 by the Labour Relations Board and signed by its Chair.

William J. Johnson, Q.C., Chair