IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 562 (the Union)

and

HUMBER COLLEGE (the College)

RE' GRIEVANCE OF PEARLINE LUNG (the grievor) #2013-0562-0018

Appearing for the Union: Lesley Gilchrist, Counsel

Appearing for the College: William J. Hayter, Counsel

Arbitration Board: Norm Jesin, Chair

Pamela Munt-Madill, Union Nominee

Jacqueline Campbell, College Nominee

Hearing Dates: October 7, 2014; March 24, September 21 and December 18, 2015

AWARD:

The grievance in this case alleges that the College has violated Section 1 of the Job Classification Plan in the collective agreement between the parties by failing to attribute sufficient points for the grievor's two year Masters' degree. The grievance is dated December 9, 2013.

The Job Classification Plan establishes a formula by which teachers employed by the College are awarded points for experience and education. Those points then determine the salary grade that applies to a teacher, which in turn determines the salary that the teacher will receive.

The particular complaint arises from a dispute between the parties over the interpretation of the Plan insofar as it provides points for educational achievement. The relevant provision of the Plan is set out in section 1 B and provides as follows:

> Formal qualifications are those which constitute the norm in institutions of post-secondary education in the Province of Ontario. Only full years of post-secondary education at successively higher levels, and leading to a diploma, professional accreditation or degree are recognized. For example, a graduate of a three year technology program in a College would be given 1 ½ points for each of the three years, regardless of the length of time actually spent on by the individual in obtaining the diploma.

> No credit is to be given for a year of study in which there was significant duplication of other studies. Therefore only the highest qualification will be used in computation unless the subject areas are from different disciplines and all are relevant to the appointments.

The Plan then sets out the number of points awarded for each year of CAAT study, University study or integrated work study. For University Degrees the Plan expressly awards 1 ½ points "per year (level) completed … (Maximum 6 years)".

The grievor was initially employed as a professor at Lambton College from 2007 to 2010. At the time she was hired at Lambton she had completed a 4 year B. Sc. and a 1 year B. Ed. Degree. She was had also completed one year of a two year Master's program in Sciences. She was given credit for 5 years of University of Education. Together with her experience credits her total points resulted in the grievor being placed at salary grade 8.

In 2010 the grievor was hired as a professor by this College. By this time she had completed her two years' Masters program. It is the position of this College that an employee can only be awarded a maximum of 5 years credit for a Masters Degree, regardless of whether it stems from a one year or two year program. The College asserts that the six year maximum credit is reserved for employees who have completed a Ph. D degree. However, the College agreed to maintain the grievor's salary grade level at the same level she enjoyed at Lambton College. In order to justify that level and place the grievor at salary grade 8, the College inflated the credit given to her for experience. However, in accordance with the College's policy the College only awarded the grievor 5 years credit for her university education.

In or about 2013 the grievor read a Union newsletter about how the Job Classification Plan worked and concluded that she should be receiving the maximum six years credit for her education rather than 5. As a result she filed the grievance.

It is the contention of the Union that the grievor should have been awarded 6 years credit for education rather than 5. The Union contends that if she is given an extra year's credit her position on the salary grid would be higher. In fact, increasing the education credit, the Union contends that the grievor should be at salary grade 10.

The College points out that if the grievor were given six years credit for education together with the proper credit, rather than the inflated credit for experience, the grievor would still be at the same salary level – grade 8. The Employer contends that the grievor should not be able to receive both the six year credit for education together with the inflated credit for experience.

More fundamentally the College points out that it has correctly applied the Job Classification Plan by awarding only 5 years credit for a Masters degree, regardless of whether it results from a 2 year or a 1 year program. The College asserts that inserting the word "level" in indicating that a credit is awarded "per year (level) completed", the Plan clearly reserves the six year maximum credit for a level higher than Masters – that is a Ph. D. In the alternative, the College submitted that at worst, the wording of the Plan was ambiguous and that the practice of the College could be relied on to resolve the ambiguity in favour of the interpretation of the Plan urged by the College. In support of this position the College called evidence to establish that over a ten year period the College consistently awarded 5 years credit for the completion of any

Master's program. Indeed there was only one case in which 6 years credit was awarded for a Master's degree and the evidence of the College was that that award was made in error.

Counsel for the College asserted that even if I were to interpret the Plan in the manner urged by the Union, and conclude that the Plan entitles an employee to six years credit for a 4 year Bachelor's degree and a 2 year Master's degree, that I should conclude that the Union is estopped from asserting that interpretation as a result of the past practice.

In response, the Union asserted that the wording of the Plan is clear and unambiguous and that the wording favours its interpretation – that is, that an employee with a two year Master's Degree and four years of Bachelor's degree is entitled to 6 years credit under the Plan. The Union further asserts that the practice does not reflect a shared understanding that the College's interpretation of the Plan is in effect. Rather the practice simply reflects that the Union has not received a grievance over the issue at hand. There is no evidence establishing that that the Union was aware of the College's practice or its interpretation. There is no evidence that it had abandoned a grievance filed claim a six year credit for a 2 year Master's. Therefore, according to the Union, the practice cannot be relied on either to resolve an ambiguity or establish an estoppel.

The parties have provided the panel with a number of authorities particularly on the issue on the use of past practice evidence. In cases cited by the Union such as *Agropur Division Natrel,* [2013] CarswellOnt 12612, (G. Surdykowski), the arbitrator determined that in order for past practice to be relied on to resolve an ambiguity, the evidence must establish that there is a shared understanding accepting the interpretation asserted. According to the Union, no such

understanding is established simply because employees have not filed a grievances challenging a practice that the Union was not aware of. On the other hand, in *John Bertram & Sons (1967),* 18 L.A.C. 362, (P. C. Weiler), the arbitrator concluded that where a longstanding practice by one side goes unchallenged by the other, acceptance of the practice may be inferred.

Still, it is clear, and both parties agree, that the panel may only consider the past practice as an aid to interpretation if the panel determines that the language of the Plan is ambiguous. We find no such ambiguity for the point at issue. We have determined that wording of the Plan is indeed clear and unambiguous and that past practice cannot therefore be relied on as an aid to interpret the Plan. In our view the wording is clear that an employee is entitled to receive 1 ½ points for each year of education. The example in the first paragraph makes it clear that the normal length of the program is considered to determine the years of credit to be awarded. That means that a 4 year bachelor's program entitles an employee to receive 4 years credit. A two year Master's program entitles an employee to an additional two years credit for a maximum of six years. In our view, the use of the word level simply confirms the point made in the first paragraph that points are awarded for each completed year at successively higher levels. Thus if one year of a bachelor's program is completed and then another year in a different bachelor's program at the same level is completed, that would not attract a second credit. But as long as one progresses through programs at successively higher levels, the employee is entitled to credit for each year of the programs completed to a maximum of six.

We are also unable to find that the College has established sufficient grounds to find that the Union is estopped from asserting its interpretation of the Plan. In that regard we note that the collective agreement before us is a Provincial one covering employees employed at colleges

throughout the Province. We are reluctant to find an estoppel based on the practice of one College. In order to find an the criteria for estoppel we must find that the Union has made a representation by its conduct that it would not rely on its strict rights and further, that the College has relied on this representation to its prejudice. In this case, the Union argues that the evidence does not establish that the Union was aware of the Employer's interpretation and that therefore, it could not have made a representation that that practice was accepted.

But regardless of whether that is the case we do not see how the College was prejudiced by the Union's failure to grieve in the face of this practice. In that regard we again note that this is a Provincial agreement and the College is, on its own, unable to negotiate amendments to the collective agreement. Amendments are negotiated at a provincial level. Indeed, since the grievance a new collective agreement has been negotiated with no amendment to the wording the Plan at issue in this grievance. In fact there is no evidence that the Colleges collectively had attempted to negotiate an amendment to the Plan to clarify that one could not receive maximum educational credit for a 2 year Master's program. As a result we do not see how the College was prejudiced by any failure on the part of the Union to grieve its practice. Instead, as the Union asserts, the College has simply reaped the benefit of crediting less than educational credit for 2 year Master's program than the language of the Plan obliges it to.

We do agree with the College however that our determination with regard to the interpretation of the Plan does not mean that the grievor's salary grade should be increased. The evidence in this case established that when the College hired the grievor it promised to maintain her at the salary level she had at Lambton College. In fulfilling that promise the College did not provide sufficient credit for education, but did inflate the grievor's experience credit. Both parties

agreed that if the grievor's education credit was increased to 6 years, her salary grade would not increase if she was awarded the correct experience rating. We do not think it is appropriate in these circumstances to grant the grievor a windfall by awarding a salary grade that she would not be entitled to under the language collective agreement. We therefore decline the Union's request to award the grievor with an increase in her salary grade.

Finally, we wish to note that the parties had indicated that they wanted panel to provide them with an interpretation of the disputed wording of the Plan as there are other grievance that either exist or may be filed. We have provided that interpretation. Furthermore, we have concluded that the Union is not estopped from asserting that interpretation. As a matter of equity, we do note however that it would be inequitable declare our interpretation to be effective any more than 15 days prior to the grievance in this case. We therefore declare that our interpretation of the Plan as outlined herein is effective commencing 15 days prior to the grievance filed in this case. Although this part of the ruling may seem moot given our denial of an increase to the grievor's salary, hope this conclusion give the some parties some guidance in dealing with the other outstanding grievances on this issue.

Dated at Toronto this 5th day of February, 2016.

Norm Jesin, Chair

"P. Munt-Madill"

I concur - Pamela Munt-Madill

"J. Campbell" – see below

I dissent - Jacqueline Campbell

D I S S ENT OF EMPLOYER NOMINEE

I respectfully disagree with the Chair's decision relating to the awarding of points under the collective agreement's Job Classification Plan.

The Chair has concluded that the interpretation of the language would give no meaning to the word "level" in circumstances where the language chosen – "per year (level) – makes it clear that the word "year" and the word "level" are not synonymous. Rather, the use of the word "level" modifies the word "year". Thus, the reference to "successively higher levels" in Part B of the Classification Plan has some meaning by differentiating a Masters degree from a PhD. Degree.

I also do not agree that the use of a past practice as an aid to interpretation or to establish an estoppel must be system wide. The collective agreement contemplates its administration at the local, or individual College level as per Article 7 which provides for the establishment of a Union/College Committee . There is no reason in principle that a local practice which is clear and unequivocal cannot constitute a binding practice for that individual College. There have been several examples over the past 30 years where estoppels have been applied at individual Colleges.

The evidence indicated 10 years of a consistent practice (more than a hundred calculations) treating a Masters degree of any duration as meriting a maximum of 5 years of education, not 6. Every salary calculation done during this period was provided to the local Union as mandated by Article 14.01B. The Union did nothing with this information except to retain it in its files. The purpose of Article 14.01B

is to provide the Union with the ability to check the College's calculations. Yet, over a period of 10 years, the Union did nothing to ensure that such calculations were correctly done in accordance with the Classification Plan. Thus, the failure of the Union to fulfill its obligations with respect to monitoring the assignment of salary levels cannot now assist the Union in negating its effect.

In my view, this clear and unequivocal practice over a 10 year period clearly indicates acceptance that a two year Masters degree would be given 5 years of education credit. On that basis, the grievance should be dismissed.

With respect to remedy, I concur with the reasons for denying same. The grievor's placement on the salary grid which was higher than that warranted by her education and experience and was the product of the College's decision to achieve a salary level which was consistent with her salary at time of hire. Even if she had been afforded 6 years of education for her 2 year Masters degree, her initial placement on the salary grid would not have changed.

I also agree that a remedy can only extend back 15 days from the filing of the grievance on the basis that this is a continuing grievance.

I offer no comment on any grievances where the issue of placement on the grid had been raised previously under the grievance procedure but not pursued and therefore deemed to have been abandoned under Article 32.05A.

Respectfully Submitted,

Jacqueline Campbell – Employer Nominee