IN THE MATTER OF AN ARBITRATION

BETWEEN

SEAFORTH MANOR NURSING HOME
- the Employer

and

SERVICE EMPLOYEES' UNION, LOCAL 210
- the Union

AND IN THE MATTER of individual grievances of Betty Bennett, Ivy Broadfoot and Rose Feeney

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Paula M. Rusak - Counsel
E. Ozimek
R. Hildebrand - Administrator

On behalf of the Union:

E. R. Durham - Union Representative
Caroline DeMers - Union Representative

Hearing held in London, Ontario on March 28, 1996.

AWARD

I. INTRODUCTION

I was appointed under Section 49 of the *Labour Relations Act, 1995* to hear three individual grievances regarding sick leave. The party which sought the appointment of an arbitrator was the Service Employees' Union, Local 210 (the Union) and the Employer was the Seaforth Manor Nursing Home.

At the beginning of the hearing the Employer raised an objection to my jurisdiction as arbitrator to hear these three grievances. The Employer submitted that while the parties were close to reaching their first collective agreement they had not yet done so. As a result the Employer submitted my appointment under Section 49 was improper or premature and I had no jurisdiction to address the substance of the employees' concerns. The Union disagreed.

The parties addressed the issue of the existence of a collective agreement, and thus the issue of my jurisdiction. The parties asked me to provide an oral decision. I did so at the hearing.

I agreed to provide the parties with written reasons for my oral ruling and I am thus issuing this award.

II. THE STATUTORY PROVISIONS

In their collective bargaining the parties are subject to the *Hospital Labour Disputes Arbitration Act* and much of the evidence and argument had to do with the actions which the parties had taken under that *Act.* It is helpful to an understanding of the issue to review the key statutory provisions in both the *Labour Relations Act, 1995* and the *Hospital Labour Disputes Arbitration Act*, before reviewing the evidence. Those statutory provisions are as

follows:

The Labour Relations Act, 1995

1. (1) In this Act,

. . .

"collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;

. . .

49. (1) Despite the arbitration provision in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement may request the Minister to refer to a single arbitrator, to be appointed by the Minister, any difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

. . .

(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him or her, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

. . .

***Hospital Labour Disputes Arbitration Act*:**

4. Where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement, the matters in dispute between the parties shall be decided by arbitration in accordance with this Act.

8. (1) Where there are matters in dispute between parties to be decided by more than one arbitration in accordance with this Act, the parties may agree in writing that the matters in dispute shall be decided by one board of arbitration.

. . .

(3) In an arbitration to which this section applies, the board may, in addition to the

powers conferred upon a board of arbitration by this Act,

(a) make a decision on matters of common dispute between all the parties; and

(b) refer matters of particular dispute to the parties concerned for further bargaining.

. . .

9. (1) The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties...

(2) The board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties.

10. . . .

(3) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties have agreed upon some matters to be included in the collective agreement and have notified the board in writing of the matters agreed upon, the decision of the board shall be confined to the matters not agreed upon by the parties and to such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(4) Where the parties have not notified the board of arbitration in writing that, during the bargaining under this Act or during the proceedings before the board of arbitration, they have agreed upon some matters to be included in the collective agreement, the board shall decide all matters in dispute and such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(5) Within five days of the date of the decision of the board of arbitration or such longer period as may be agreed upon in writing by the parties, the parties shall prepare and execute a document giving effect to the decision of the board and any agreement of the parties, and the document thereupon constitutes a collective agreement.

(6) If the parties fail to prepare and execute a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties within the period mentioned in subsection (5), the parties or either of them shall notify the chair of the board in writing forthwith and the board shall prepare a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties and submit the document to the parties for execution.

(7) If the parties or either of them fail to execute the document prepared by the

board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under the *Labour Relations Act.*

(8) Except in arbitrations under section 8, the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties.

(9) The date the board of arbitration gives its decision under section 8 upon matters of common dispute shall be deemed to be the effective date of the document that constitutes a collective agreement between the parties.

. . .

III. THE EVIDENCE

This jurisdictional issue was argued as a preliminary matter and I heard no witnesses. Instead the parties submitted copies of various letters and agreed to certain facts. The Union also tendered a document in the form of a collective agreement which had been signed by the Union but had not been signed by the Employer.

The parties had been negotiating their first collective agreement. The Union was certified in 1993 and negotiations and conciliation followed. The parties did not reach an agreement and the matter was referred to arbitration under the *Hospital Labour Disputes Arbitration Act*. An interest arbitration board was established with Anne Barrett as chair (the Barrett board). On July 19, 1995 the Barrett board issued what it termed a "Direction." In its direction the Barrett board indicated that the collective agreement which the Union had with Exeter Villa, another nursing home, was a model for the parties' agreement and that the Barrett board "would be inclined to award the Exeter language" on several items in dispute. On the issue of compensation the Barrett board stated it thought "the end result for this collective agreement should be comparability in total compensation with Exeter." The Barrett board directed the parties to meet and attempt to conclude an agreement.

Following receipt of the direction, the parties met and continued their negotiations. Many of the outstanding issues were resolved. Drafts of the collective agreement were exchanged. Those drafts were similar.

On March 5, 1996 Caroline DeMers, on behalf of the Union, wrote Anne Barrett asking that the Barrett board "exercise its authority under s. 10(6)(7) of the Hospital Labour Disputes Arbitration Act." That letter enclosed a copy of the (draft) agreement which the Union had sent to the Employer on February 21, 1996 for signature. It noted that the Employer had responded with its own version of the collective agreement on February 29, 1996 and that there were numerous areas of difference.

On March 7, 1996 Ms DeMers wrote the Director of the Office of Arbitration, Ontario Ministry of Labour, and sought the appointment of an arbitrator under Section 49 of the *Labour Relations Act, 1995*. The request stated that the parties had entered into a collective agreement. I was appointed as arbitrator in response to this request.

On March 14, 1996 Paula Rusak, Employer counsel, wrote Ms DeMers and advised that the Employer was of the view that there was no collective agreement and that the Employer would take the position that the Arbitrator appointed under Section 49 was without jurisdiction.

Also on March 14, 1996 John Barrack, another Employer counsel, wrote Anne Barrett stating that ". . . it would seem that the parties, to this point, have been unable to resolve the exact wording of their first collective agreement." Mr. Barrack made suggestions as to how the Barrett board should proceed.

On March 20, 1996 Ms DeMers wrote Mr. Barrack and advised him that the Union would

sign the Employer draft collective agreement if four (4) changes were made to the draft.

On March 26, 1996 Mr. Barrack wrote Anne Barrett and indicated that there were three (3) items outstanding between the parties.

On March 27, 1996 Ms DeMers again wrote Anne Barrett. She stated "the parties are still unable to conclude a first Collective Agreement" and agreed that three items were outstanding.

In addition to the series of letters above, I was referred to three other letters between the parties. On January 29, 1996 Ms DeMers wrote Ruth Hildebrand, Administrator of the Nursing Home, and raised a concern that the Employer had paid wage increases retroactive to the wrong day and not to "the effective date as awarded by the Board of Arbitration."

Ms Hildebrand replied on February 1, 1996 stating in part as follows:

> Our past practice has been to begin new rates at the start of the pay period beginning immediately after the stated date and we have continued this practice in the spirit of item #8 of the memorandum of agreement.
>
> The memorandum of agreement was fashioned after the Exeter Villa's agreement which starts wage increases at the beginning of pay periods.

The third letter was from Ms Hildebrand to Ms DeMers on March 6, 1996. In that letter Ms Hildebrand refers to the provisions "(i)n article 5:02 of the collective agreement" and to the management rights contained in article 4.01d. The March 6 letter also includes the following:

> Your allegation that the purpose of appointments would ensure that the Employer would circumvent the Collective Agreement is a serious one and cannot be considered lightly.
>
> If you have any instance where the collective agreement has been breached in this

> manner, please bring that instance forth in the manner prescribed in the collective agreement. If no such instance exists, your letter may have mislead the stewards who were sent copies of that letter.

Viewed in its entirety, in her March 6 letter Ms Hildebrand clearly writes as though there was a collective agreement between these two parties.

I was also advised that the Employer had implemented the wage increase which had been agreed upon in collective bargaining and that the Employer was deducting Union dues from employees in the bargaining unit.

Finally, two of the three items identified by Ms DeMers as being unresolved as of March 27, 1996 were items on which the Barrett board had indicated it "would be inclined to award the Exeter language."

IV. POSITION OF THE EMPLOYER

The Employer submitted that an appointment of an arbitrator under Section 49 of the *Labour Relations Act, 1995* presupposed a collective agreement and that these parties did not yet have an agreement. The parties were in the midst of concluding an agreement using the processes available under the *Hospital Labour Disputes Arbitration Act* (HLDA) but an agreement had not yet been achieved.

The Employer submitted that the parties' arbitration before the Barrett board was one conducted pursuant to Section 9 of the HLDA. In the absence of the parties signing an agreement, the effective date of an agreement was specified in Section 10(8) as the date of the (Barrett board's) award. The parties had not signed an agreement and the Barrett board has not yet issued an award. The Barrett board gave a direction and indicated provisions which it would be "inclined" to award, but it had not yet made an award.

While the parties had begun to operate on the basis of the provisions which had been agreed upon for inclusion in a collective agreement, this did not mean there was a collective agreement. The Employer should not be disadvantaged by its efforts to facilitate the change to a collective bargaining regime.

V. POSITION OF THE UNION

The Union submitted that the areas of direct comparison with the Exeter agreement had been awarded by the Barrett board. On other matters the parties had been directed to continue negotiations. Under Section 10(9) of the HLDA the date of an award made under Section 8 is the effective date of the agreement. Under Section 8(3) the board can make a decision and refer matters back to the parties for further bargaining.

Various letters between the parties referred to the parties' collective agreement. Monetary changes had been implemented and the Employer had begun to deduct union dues. The Union submitted that this evidence indicated the parties had a collective agreement.

The Union initially made an alternative argument that I had jurisdiction under the terms and conditions of employment. The Union submitted the terms and conditions had been changed during the period of bargaining to include a grievance arbitration provision and that I had jurisdiction under that arbitration provision. However, the Union abandoned this alternative submission.

VI. CONCLUSIONS

I was appointed under Section 49 of the *Labour Relations Act, 1995*. Under that Section "a party to a collective agreement" can request the appointment of an arbitrator to deal with a

"difference between the parties to a collective agreement arising from . . . the agreement." My appointment and my jurisdiction were premised on the existence of a collective agreement and I therefore had to decide whether the parties had an agreement.

Under the definition in the *Labour Relations Act, 1995* a "collective agreement" is an agreement in writing between the parties. At a basic level, in order to have a collective agreement the parties must be in agreement. Ordinarily, the parties must have reached a common understanding as to all of the terms of their agreement for it to qualify as a collective agreement. Alternatively, in this situation where the parties are subject to the HLDA, any remaining unresolved terms of the collective agreement could have been imposed by the Barrett board. I thus deal with each possibility in turn.

First, did the parties reach a common understanding of the terms of an agreement? Did they agree on all the terms? They did not. It is clear from the correspondence that both parties acknowledged some items remained in dispute as of the time of the hearing. Even one unresolved item prevents an agreement and the parties had three items which they had not yet resolved. Thus they had not reached agreement in the usual manner, that is by voluntarily reaching a consensus on the terms, on all of the terms, of the agreement.

I realize that the parties had begun to operate as though the collective agreement was in place. They had implemented the salary increase and begun dues deduction. The March 6 letter of Ms Hildebrand made several references to a collective agreement, and to the parties' rights and duties under that agreement. As I noted earlier, in that letter Ms Hildebrand wrote as if there was a collective agreement. However, when all the documents and agreed facts are reviewed, it is my view that in anticipation of achieving an agreement the parties had begun to order their affairs *as though* the collective agreement was already in effect.

That was how the recipient of the March 6 letter, Ms DeMers, the Union representative, seems to have viewed the situation. During March, 1996 Ms DeMers expressed the Union view several times in letters to Anne Barrett and to Employer counsel that there was no collective agreement. On behalf of the Union Ms DeMers asked the Barrett board to exercise its authority under Section 10(6) and (7) of the HLDA to prepare a document for the parties to sign as their collective agreement or, failing signature, a document which would have the effect of a collective agreement, and acknowledged that the parties had not concluded an agreement. The Employer, through its counsel, took a similar position on the existence of an agreement and indicated there were a number of outstanding or unresolved items. In reviewing the various letters regarding the reconvening of the Barrett board it is apparent that both parties expressed the opinion that they had not yet resolved all the items for an agreement.

Thus, the parties were close to reaching an agreement but merely being close or having similar proposed collective agreements is not enough. The parties must reach the same position on all items before there can be an agreement. I have concluded, therefore, that the references in various letters to a collective agreement between the parties were references to a collective agreement which the parties thought would soon be concluded and, in anticipation of its conclusion, the parties had begun to order their affairs as though it was in effect. However, the parties were not yet in agreement on all items and thus had not voluntarily reached a collective agreement.

Secondly, did the Barrett board impose the terms of an agreement so that under the HLDA the parties' agreement had effect from the date of the award? The parties' interest arbitration before the Barrett board was one in which the only matters in dispute were between these two parties. Under Section 8 of the HLDA disputes between different parties - that is, disputes which would otherwise be heard by more than one arbitration board - may be

resolved by one board of arbitration. In this case there were two parties and one dispute and the arbitration before the Barrett board was one conducted under Section 9 of the HLDA, as opposed to Section 8 as the Union had submitted. Section 10(9) of the HLDA, which specifies the effective date of an agreement in those arbitrations to which Section 8 applies, therefore does not apply here, even assuming the Barrett board made an award.

But did the Barrett board make an award? I read the Barrett board's "Direction" as only an indication of what the board would award if it was necessary to make an award. I do not believe the Barrett board awarded any provisions.

Following the Barrett board's direction the parties resolved many items. At the hearing in this arbitration some of the remaining items in dispute were matters on which the Barrett board had indicated it would be "inclined" to award the Exeter language. The parties' actions in continuing to negotiate those items on which the Barrett board would order the Exeter language are thus consistent with my own conclusion that the Barrett board did not award any items and the parties' actions are inconsistent with a belief that the Barrett board had actually made an award on those items.

Under Section 9 of the HLDA the Barrett board still had jurisdiction to decide the remaining unresolved items, as the Union asked it to do. If the Barrett board did so, then the preparation of a collective agreement would follow in the manner provided in the various subsections of Section 10.

To summarize, I conclude that the parties had not yet reached a consensus in their negotiations as to all the terms of a collective agreement and that the Barrett board had not awarded any terms. In order to have a collective agreement more is required than the parties to be near a resolution of all the terms, or for the two bargaining positions to be very similar,

or for the Barrett board to indicate what it is inclined to award. On the basis of the documents and the agreed facts the only conclusion I can reach is that the parties did not have a collective agreement as of the time of the hearing.

My appointment under section 49 of the *Labour Relations Act, 1995* is premised on the existence of a collective agreement. I was appointed to arbitrate a difference under a collective agreement. In light of my conclusion that there was no collective agreement it follows that I accept the Employer's preliminary objection and I conclude that I have no jurisdiction to deal with these three grievances.

Dated in London, Ontario, this ______ day of April, 1996.

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Howard Snow, Arbitrator