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Service Employees' International Union – West

SUBMISSION

Future State - Essential Services Process

Presented to:

Honourable Don Morgan
Minister of Labour Relations and Workplace Safety

September 9, 2013

Introductory Remarks

The mandate of SEIU-West (Service Employees' International Union) is to improve the lives of working people and their families, and lead the way to a more just and humane society. Our members stand together for economic and social justice, for dignity and respect, for having a voice on the job and in society, and for a secure job with the opportunity to advance.

SEIU-West is a province-wide local that represents over 12,000 members. Our members work in healthcare, education, municipalities, the retirement home sector and in the community-based sector. Labour laws are of vital importance to us, and in particular, the future state of the essential services process will have significant impact on our ability to access free collective bargaining in the public sector.

We appreciate that our members provide vital public services on a day-to-day basis that contribute positively towards the overall protection of public health and safety. As well, we recognize the need for the continued provision of necessary, essential services in the context of a job action. However, we do not agree that the process should work to undermine the bargaining power of our members and remove the 'good faith' in our collective bargaining.

Background

On March 20, 2012 the six health care unions presented to the Minister of Labour Relations and Workplace Safety, Don Morgan, the results of our collaborative work effort entitled, *Legislation Consultation Framework and Essential Services Principles*. SEIU-West continues to remain firmly committed to both the framework and the principles contained therein.

Subsequently, we met with the Minister and the other health care unions on April 19, 2012. In August of 2012, we provided an Executive Summary which highlighted what we viewed as the points of common interest between the Minister and the health care unions in our April discussion.

We now offer this submission in reply to your June 25, 2013 letter which highlights your proposed amendments to *The Public Service Essential Services Act*. We appreciate your commitment to review and amend the legislation. We believe that informing you of the experience of our health care membership in collective bargaining during the 2008 round of bargaining will serve to demonstrate the profound, chilling, harmful influence this Act has made upon the negotiation processes.

We believe you will find value and benefit from this perspective and we ask that you reconsider the *Future State – Essential Services Process* that you have set out in the flowchart provided with your June 25 correspondence.

We offer this submission on a without prejudice basis to any future or existing legal challenge as against *The Public Service Essential Services Act* and/or *The Saskatchewan Employment Act*.

SEIU-West requests the opportunity to provide further submissions if and when the draft legislation is made available.

Essential Services Negotiations

The exercise of negotiating with our four affiliated Regional Health Authorities to achieve an essential service agreement involved a vast dedication of resources for both the employer and the union in 2008. Therefore, we favour the changes proposed in the removal of the time period for the negotiation of the Essential Service s Agreement (ESA) and the proximity between this process and a bargaining impasse. We would strongly emphasize, however, that there is no need for an ESA until strike or lock-out notice is served. Our experience demonstrates this premature process acts as a barrier to the parties achieving a collective bargaining agreement (CBA).

Use of Out-of-Scope Staff to Perform Essential Services

SEIU-West supports the proposed change that requires an employer to assess all available resources prior to putting forward an initial position as to the designation of essential services, including the use of out-of-scope staff to perform functions that are deemed essential services.

While managerial and other non-union personnel should be taken into account in the provision of the work functions in support of the essential services being delivered, we do not agree that the scope of contracted out services should be enlarged. Nor should the employer hire additional persons to perform work normally performed by employees involved in the work stoppage. We would submit that volunteer usage should not be expanded except in an essential service situation and only for the duration of the job action.

In the course of the negotiations process, meaningful discussions ought to be focused on what tasks/duties need to be performed in order to satisfy the provision of the essential service. Advancing the position that all duties within a given classification must be performed on a 'business as usual' basis is unreasonable. The parties need to demonstrate a willingness to analyze those specific job functions that must be sustained during a work stoppage in compliance with the Act in a realistic, balanced and meaningful way and the essential service legislation should provide the direction and means to do so.

Employer's Unilateral Designation of Essential Services following Strike Vote (if no ESA reached)

In respect to our membership within the Regional Health Authorities, in the 2008 process there was no opportunity presented by the employer for our members to provide input on how their work would be accomplished in the event of a job action. When we shared the essential service plans put forward by the employer with our members to obtain their feedback, they were hugely surprised that the staffing levels being proposed by the employer were excessively high. The essential service staffing levels are not being met on a day-to-day basis. In many

circumstances, essential service staffing levels were set at 100% of the scheduled staff complement.

If the Act contains the provision that the employer can unilaterally determine the staffing levels needed to perform essential services during a job action, then these same levels should be a prescribed requirement every other day in the health sector to ensure safe staffing and safe provision of care. Unfortunately, compromised staffing levels continue to plague the health sector everyday. SEIU-West continues to receive data, on a daily basis, from our members who work in all four RHAs evidencing the requirement to work with unsafe staffing levels – data that we share with the employers on a regular basis. Client/patient/resident safety should be a concern **always** – we would argue that safe staffing levels should be in place every day.

It is our submission that the parties should establish, through a process of good faith negotiations, the designation of essential services and if an ESA cannot be concluded through this process, the parties should be afforded an independent third party process to resolve any or all outstanding disputes regarding the provision of essential services on an expedited basis. The required duty to bargain in good faith and the access to an independent third party dispute resolution process are integral components and remain a priority for SEIU-West; it is our request that the *Future State – Essential Services Process* be amended to include both of these components.

To this end, there must be a proper sharing of information to meet the required duty to bargain in good faith, including but not limited to achieving agreement through the negotiations process as to those essential work functions specific to the service being provided. There needs to be a broad understanding that non-essential services and job duties do not need to be continued in the case of a work stoppage.

Union Involvement in the Notification and Scheduling processes

While this process is preferred over the prior naming of employees who are deemed essential, there remains a concern as to the capacity of the union to manage the notification and scheduling processes set out in the proposed flowchart across (potentially for SEIU-West) four health regions in the event of a job action. Presently the union does not possess timely and accurate employee data from the employer. It would be necessary for the union to obtain such data as full contact information (including cell phone number and email address) for all employees, as well as the schedules and rotations needed within each facility, department and classification for all affiliated health regions. The unions would need full access to the "Gateway Online" program and processes currently being implemented by 3sHealth in order to ensure patient/client/resident safety. We would submit our preferred alternative is to have the employer fairly rotate and assign all employees within a given classification through the required hours of work, save those who are exempted employees, on a day-to-day basis irrespective of whether an ESA exists or not.

Union's Methods of Challenging Employer Designation

Presently, the proposed flowchart sets out a process whereby the union can challenge the essential service levels designated by the employer in one of two ways. Either the union can apply to the Labour Relations Board (LRB) for review or it can refer its dispute to an arbitrator appointed by the government.

Neither of these processes meets the needs of our members to have access to a fair, independent decision-making process with a level of expertise within their sector. As proposed previously, it remains our contention that the employers and unions within a specific sector provide an 'agreed to' list of arbitrators that the government might select from. Alternatively, a panel (union/employer nominee) should be utilized. It is our understanding that for a process to be independent and fair, it needs to be seen to be independent and fair.

Application to Labour Relations Board – Determination of Minimal Impairment

This application process is afforded either where an ESA is in place, or alternatively, following the union's challenge of the employer designation (either by the LRB or via binding arbitration) as detailed above.

In order for the parties to obtain third party assistance (through the proposed final offer selection process), there must first be a decision from the LRB that the number of employees required to work through the job action exceeds the threshold of minimal impairment. The union may apply for such a ruling after having reached an ESA or on the heels of either an arbitration or LRB decision based on the union's challenge of employer designation. This application process for a determination of minimal impairment appears to build in a procedural conflict of interest anomaly. Is the LRB really expected to review its own prior order with respect to the level of staffing previously determined as being sufficient to fulfill essential services, and on what basis – correctness, reasonableness, balance of interests? We suspect not, nor is there any real clarity as to what is intended by the standard itself. It is not apparent whether the LRB will look to the necessary components of an effective job action or, alternatively, whether they will analyze (once again) the labour needs of the employer to perform the essential service. This hurdle actually appears to be quite an obstacle in gaining objective third party intervention for the resolve of the collective bargaining impasse issues.

Further, SEIU-West has a real concern that there is a huge disincentive for the employer to reach an ESA with the union, given that such agreement may well be more harshly criticized by the LRB. It is our contention that this will lend to an overall increase in the number of challenges that have to be put to an arbitrator.

Final Offer Selection Interest Arbitration if Right to Strike Impaired

SEIU-West is agreeable to the model of providing a fair, reasonable adjudicative forum to manage outstanding impasse issues at collective bargaining tables. It is our submission that

'interest arbitration' is the most appropriate mechanism. This process allows the arbitrator to have much-needed flexibility to create a fair, well-reasoned binding resolve; it is up to each of the parties to make a clear submission as to their preferred, potential resolve and the arbitrator is able to fashion a collective agreement with proper consideration of all submissions. Every effort can be made to bridge the gap between the positions of the parties.

The alternative final offer selection does not provide this kind of flexibility. There is no ability to construct a compromise or to re-fashion the final offers submitted to create a collective agreement. Rather, only one stark position is selected – there are only winners and losers in this model. Final offer selection is like tossing dice; and that is no way to decide a complex and significant labour relations issue. There is an absolute abandonment of the goal to attempt to replicate the settlement that would have been reached at the bargaining table. Nor does this option enable a stronger partnership between the parties at the end of the process.

In support of our position, one might look to the models that exist in other jurisdictions. In Alberta, there are a number of sectors (including health care) that fall within no strike/lock-out legislation. These are afforded a compulsory and binding interest arbitration process. Similar provisions exist in Newfoundland, Prince Edward Island and Ontario in respect to specific sectors. The *Future State – Essential Services Process* does not provide access to binding arbitration, on either a voluntary or compulsory basis. It simply does not appear as an option. This continues to colour this legislation as having no balance in respect to the parties.

Further, and in contrast, it is concerning that the final offer selection process outlined in the framework allows for parties to make changes to prior positions before submitting a final offer proposal to the third party. We would argue that this does not support either the integrity of the parties or the good faith within the collective bargaining process.

The final offer selection mechanism becomes even more problematic when the issues separating the parties involve radical changes to collective agreement provisions that relate to hours of work, rules that govern work, seniority, job security or similar matters. We cannot understate the complexity of attempting to utilize this mechanism in common table bargaining with 12 employers and 3 unions with different collective agreements unless the final offer selection process is confined only to monetary issues.

SEIU-West respectfully requests that the government reconsider the *Future State – Essential Services Process* to ensure the designed dispute resolution strategy includes a number of options with a view to creating a fair, reasonable resolve specific to each particular situation. We would submit that this is not possible if the parties do not have access to binding arbitration.

Conclusion

SEIU-West continues to advance the position that the suggested parameters put forward by the health care unions ought to be fully implemented to the design of future essential services legislation.

As for the *Future State – Essential Services Process*, it is our submission that this design does not optimize our goal to provide a safe health care experience for our patients and families, while agreeing on a collective agreement that is fair, reasonable and that our public sector members will accept. The tools for resolve are neither readily available nor intended to produce a fair, reasonable result when there is an impasse at a public sector collective bargaining table. The experience of SEIU-West members employed in the health care sector, since the passing of essential services legislation, has included delayed bargaining outcomes with rollbacks and pressures of lost retroactive pay. Ratification of the last provincial collective agreement was tenuous at best and labour relations were significantly impaired as a result.

It is our desire to build a legislative framework that captures a process of collective bargaining where collective agreements are reached between employers and unions by way of good faith negotiations and where they deal with each other with open and fair minds and sincerely endeavour to overcome obstacles existing between them. This would serve to stabilize labour relations and SEIU-West proposes this outcome as a common goal for all parties.

All of which is respectfully submitted,

Barbara Cape
President
SEIU-West