IN THE MATTER OF THE ARBITRATION OF THE POLICY GRIEVANCE OF THE UNION DATED OCTOBER 23, 2013 REGARDING THE WELLNESS POLICY PURSUANT TO THE COLLECTIVE AGREEMENT

BETWEEN:

THE SASKATCHEWAN UNION OF NURSES
(the "Union")

AND:

PRINCE ALBERT PARKLAND REGIONAL HEALTH AUTHORITY
(the "Employer")

BEFORE:	William F.J. Hood, Q.C., Chairperson Dale Markling, Nominee for the Union Eric Sarauer, Nominee for the Employer
APPEARING FOR THE UNION:	Ronni Nordal
APPEARING FOR THE EMPLOYER:	Robert Frost-Hinz
HEARING DATES:	April 5 & 6, 2016 Prince Albert, Saskatchewan

AWARD

I. INTRODUCTION:

1. The Union challenges the validity of a wellness policy introduced by the Employer into the workplace in 2013. The wellness policy introduced a two-step call-in procedure to report illness.

2. Previously the employee was required to make only one call to the manager or supervisor to report that he or she was sick and would not be at work.

3. The new wellness policy changed this. The employee was to make two calls. The first call, as before, was to report the sickness to the manager or supervisor. The second call was to the Organizational Wellness Consultant (the "Consultant") to verify the absence. In the one-call

procedure the employee could access sick leave benefits under the Collective Agreement, after making the call.

4. In the two-call procedure, the sick leave benefits could be accessed only after the Consultant spoke with the employee who was sick and verified the absence as sick time. The default in the two-call procedure was that all sick absences were unverified and not paid until the second call occurred and the reason for absence was verified.

5. The Union claims that the necessity of the second call and verification delays payment of sick leave benefits.

6. The Union submits that the wellness policy violates the Collective Agreement and is unreasonable.

7. The Union also claims that the wellness policy imposes a requirement on the employee to disclose personal health information at the initial stage of sick leave call beyond what is reasonably necessary for the Employer to determine whether the absence is legitimate.

8. The Employer disagrees with the Union's submission. The Employer claims there is no violation of the Collective Agreement. The Employer maintains that the wellness policy is within the proper exercise of management's rights to direct the workforce.

9. The Union accepts that it bears the evidentiary onus to establish the facts in support of its claim.

10. This arbitration brings into issue the interpretation and application of the relevant provisions of the Collective Agreement.

II. FACTS:

11. Barb Fisher has been a registered nurse since 1978. She has been involved with the Union for a long time, is presently the President of the Union, and is also a member of the Board of Directors of the Union. Ms. Fisher provided the history of the policy for calling in when sick. The old policy, prior to the wellness policy, required the employee to make one call to the manager or supervisor when the employee was sick and would not be at work for the shift. Occasionally,

medical notes were required. The missed shift was recorded as "sick." The shift was never marked "unverified" sick. Sick leave was paid for the shift if the employee had accumulated sick leave credits. If there was a dispute, it was resolved after the fact.

12. Brenda Felske is a Consultant. Ms. Felske briefed Ms. Fisher on the new wellness policy at a joint Union/Management meeting. The new wellness policy was posted on the Employer's Intranet.

13. Ms. Fisher testified that in her supervisory position she has far more access than most employees to a computer. She said it was difficult wading through this stuff on the Employer's Intranet.

14. The wellness policy went into effect on September 1, 2013. The two-step call-in procedure was set out in the Employer's Notice:

Organizational Wellness Plan
"Healthy, Happy, & Here"

Aug 21, 2013

Just a reminder:

The new ORGANIZATIONAL WELLNESS PLAN is set to be implemented September 2, 2013, as per PAPHR Employee Wellness Support Policy 90-10-22 and Procedures 90-10-22P1 / 90-10-22P2. This will be a 2 Step Calling Procedure as follows:

Step 1
Employee will contact Manager/Immediate Supervisor/Designate to report absence from workplace

Step 2
Employee will contact Organizational Wellness Consultant for verification of absence @306-765-6644 or toll free @ 1-855-345-6644

- If illness does not result in medical and/or behavioral restrictions or restrictions do not affect worker's ability to do their job, worker will return to work
- If illness does result in medical and/or behavioral restrictions or restrictions that may affect worker's ability to do their job, a conversation will be held with the Organizational Wellness Consultant to determine if a short term accommodation can be made and worker will return to work
- Upon the request of the Organizational Wellness Consultant, have a PAPHR HCP Abilities Form completed by a licensed health care practitioner and forward to Organizational Wellness Consultant immediately following the appointment

15. This notice also sets out the action to be taken by the manager throughout the call-in procedure:

> Manager/Designate Actions:
> Contact scheduling (if scheduling looks after your department) or whomever schedules for your department to have employees shift marked unverified and replaced if necessary.
> YA – (Unverified Sick Time 8 hour shift)
> YW – (Unverified Sick Time 12 hour shift)
> Upon confirmation from Organizational Wellness Consultant that Employees absence is verified manager/designate will Contact scheduling (if scheduling looks after your department) or whomever schedules for your department to have employees shift marked verified.
> ID – (Sick Regular 8 hour shift)
> XD – (Sick Extended 12 hour shift)
> If you require further information please contact
>
> Brenda Felske – PAPHR Organizational Wellness Consultant
> Ph – 306-765-6644 or 1-855-345-6644 or email at: bfelske@paphr.sk.ca

16. The manager who receives the "Step 1" call is to record the absence as "unverified sick time" for payroll purposes.

17. Ms. Fisher testified that it was a waste of her time to code an employee who calls in sick as "YA" for unverified sick time. If they call in sick "they are sick." Ms. Fisher has never marked a work record on a call in sick as YA.

18. Ms. Fisher testified that members of the Union are registered nurses ("RNs") who work 24/7 in acute care. The Consultants work only weekdays. Ms. Fisher provided the example of an RN calling in sick on Friday, when the second call was made to the Consultant, the RN would usually be told to leave a message. Wellness requires a need to have an "adult conversation" with the RN before the sickness can be verified. It is not good enough just to leave the message "I am sick." This results in the sick time remaining unverified until there is this conversation with the Consultant after the weekend. If a long weekend is involved, the sickness remains unverified and not paid until the Consultant is able to attend to this when he or she returns on Tuesday and has the conversation with the RN. The result is a delay in paying the sick leave.

19. Ms. Fisher testified that Ms. Felske did present some slides on the Organizational Wellness Plan. She referred to a document that appears to be a Power Point presentation of an "Employee Presentation" on June 24, 2013. Page 11 of this document contains the first two bullets in the August 21, 2013 Organizational Wellness Plan referred to in paragraph 14 above.

20. In Ms. Fisher's view, it is for the physician to determine the issue raised in the first paragraph, and the second paragraph is the "adult conversation" that needs to take place with the Consultant. Ms. Fisher did not know how the sickness could be verified over the phone. The Power Point presentation expanded upon the Health Care Practitioner's Abilities Form (the "HCP Form") referred to in the August 21, 2013 notice. Page 19 of the presentation states:

> Employee Actions:
> - If deemed necessary have a Licensed Health Care Practitioner of choice complete a HCP Abilities Form
> - Ensure the HCP Abilities Form is completed in full and reflects your current abilities or restrictions
> - Forward completed HCP abilities Form to Organizational Wellness Consultant
> - Pay the fees associated with the completion of the form if necessary

21. The Union takes no issue with the obligation of the employee, pursuant to the Collective Agreement, to provide proof of illness from a licensed medical practitioner when requested to do so. Sometimes, under the old policy, a doctor's note was requested.

22. The Union does take issue with the HCP Form.

23. Ms. Fisher testified that the employee pays an additional $10.00 or $25.00 for the physician to complete the HCP Form.

24. The HCP Form is a 2-page document. Page 1 relates to a physical illness, whereas page 2 relates to a behavioural/psychological illness. The HCP form is in Appendix I attached and made part of this Award.

25. Ms. Fisher testified the fax number on the HCP form is to Human Resources and is not confidential. The HCP Form contains confidential information.

26. Ms. Fisher testified that the other individuals who have access to and use the same fax number on their business cards where the HCP Form is sent include:

> Christine Holz, B.A.
> HR Consultant - Recruitment & Retention
> Human Resources
> 1521 – 6th Avenue West
> Prince Albert, SK S6V 5K1

Kathy Glynn, BRLS/TRO
Employee Wellness Coordinator
Occupational Health Safety & Wellness
Human Resources
1521 – 6th Avenue West
Prince Albert, SK S6V 5K1

Karin Dielhl-Ferris, B.Comm
HR Consultant - Recruitment & Retention
Human Resources Services
1521 – 6th Avenue West
Prince Albert, SK S6V 5K1

Meriam Caguin
Safety Consultant
Human Resources Services
1521 – 6th Avenue West
Prince Albert, SK S6V 5K1

27. The Union also takes issue with the Employer asking employees to consent to the disclosure of personal health information in the voluntary section of the HCP Form. Ms. Fisher testified the Union advised its members never to sign a *carte blanche* disclosure to all personal health information.

28. The Union does not agree, and takes issue with the "Employee Wellness Support (Absenteeism Notification)" Policy No. 90-10-22P(I) ("UP1") approved by the Employer's Senior Management Team on July 30, 2013, which states:

> **1. Employee Actions**
>
> 1.1 If an employee is absent from work, the employee must:
>
> **Step 1:**
>
> - Contact his/her manager/ immediate supervisor or designate as early as possible prior to the beginning of his/her shift to report. If there is no immediate response to the call, the employee must:
>   - If no answer, leave a voice message stating:
>   - Name
>   - Notification of Illness
>   - Employee #
>   - Department/Facility
>   - Phone number he/she can be reached at
>   - Scheduled shift you are calling in absent for

Step 2:

- Contact Organizational Wellness Consultant immediately after completing Step 1 and prior to scheduled shift start time at 306-765-6644 or toll free at 1-855-345-6644 for verification of absence.
  - If no answer, leave a voice message stating:
    - Name
    - Notification of Illness
    - Employee #
    - Department/Facility
    - Phone number he/she can be reached at
    - Scheduled shift you are calling in absent for

1.2 Upon the request of the Organizational Wellness Consultant, have a PAPHR HCP Abilities Form or PAPHR Behavioral/Psychological Abilities Form (reverse side of HCP) completed by a licensed health care practitioner[1] and forward to Organizational Wellness Consultant immediately following the appointment.

[1] Definition: Licensed Health Care Practitioner (Family Physician/Physician Specialist/Nurse Practitioner/Chiropractor/Physiotherapist/Registered Psychologist/Dentist)

1.3 If illness does not result in medical and/or behavioural restrictions or restrictions do not affect worker's ability to do their job, worker must return to work

1.4 If illness does result in medical and/or behavioural restrictions or restrictions that may affect worker's ability to do their job, a conversation will be held with the Organizational Wellness Consultant to determine if a short term accommodation can be made and worker will return to work.

2. Managers and Supervisors or Designate Actions

2.1 When an employee notifies his/her manager/supervisor or designate of an absence from work, the manager or immediate supervisor/designate shall:

- Document the date, time, and nature of the call.
  - Remind the employee of the following:
    - To contact Organizational Wellness Consultant for verification of absence.
    - To access the EFAP program for additional support if necessary.
    - That all ill/injured/totally disabled employees are required to participate in the Return to Work program as per policy 210-110-03.
- Contacting scheduling (if scheduling looks after your department) or whomever schedules for your department to have employees shift marked unverified and replaced if necessary.
- Upon confirmation from Organizational Wellness Consultant that employees absence is verified, manager will:
  - Correct Work Record (WRA) and mark verified

3. Organizational Wellness Consultant Actions

3.1 When an employee notifies Organizational Wellness Consultant of an absence from work, the Organizational Wellness Consultant shall:

- Document the date, time, and nature of the call.
- If a message is left, the Organizational Wellness Consultant will contact the employee, and determine if a PAPHR HCP Abilities Form/Behavioral/Psychological Abilities Form (reverse side of HCP) will need to be completed by his/her licensed health care practitioner.
- If absence does not result in medical and/or behavioral restrictions or restrictions do not affect worker's ability to do their job, worker must return to work.
  - Email manager and Scheduling (for those departments on ESP) and advise that absence is verified.
- If absence does result in medical and/or behavioral restrictions or restrictions that may affect worker's ability to do their job, a conversation will be held to determine if a short term accommodation can be made.
  - Contact manager to discuss short term accommodation options for employee in home department. If short term accommodation can be made employee will return to work. Advise manager absence is verified.
- Short term accommodations may be in worker's department, or in some circumstances where the worker's home department cannot accommodate, the worker will be accommodated with other tasks in another department.
- Email manager and Scheduling (for those departments on ESP) and advise absence is verified and worker will be accommodated short term in another department and worker will return to work
- Monitor accommodation and request updated HCP during accommodation.
- Remind worker to stay in contact with manager/immediate supervisor or designate
- Update manager/immediate supervisor or designate of worker's progress
- If worker cannot be accommodated and will remain out of the workplace, the Organizational Wellness Consultant will email manager and Scheduling (for those departments on ESP) and advise that absence is verified.
- Remind the employee of the following:
  - To access the EFAP program for additional support if necessary.
  - That all ill/injured/totally disabled employees are required to participate in the Return to Work program as per policy 210-110-03.

29. UP1 above relates to absentee notification. There is also a policy that the Union did not agree to and disputes relating to the health care practitioner's ("HCP") Abilities Form. Policy 90-10-22(P2) ("UP2") approved July 30, 2013 states as follows

> In fulfilling the Organization's commitment to provide a safe and healthy working environment a Health Care Practitioner's (HCP) Abilities Form and a Behavioral Psychological Abilities Form has been established for employees, to communicate to their employer, their abilities and restrictions relating to their illness, disability or workplace injury.
>
> **1. EMPLOYEE ACTIONS**
>
> 1.1 If deemed necessary have a Licensed Health Care Practitioner[1] of choice complete a HCP Abilities Form/Behavioral Psychological Abilities Form.
>
> 1.2 Ensure that the HCP Abilities Form/Behavioral Psychological Abilities Form is completed in full and reflects your current abilities or restrictions.

1.3 Deliver the completed HCP Abilities Form/Behavioral Psychological Abilities Form to the Organizational Wellness Consultant.

1.4 Pay the fees associated with the completion of the form if necessary.

2. ORGANIZATIONAL WELLNESS CONSULTANT ACTIONS

2.1 Receive HCP Abilities Form/Behavioral Psychological Abilities Form from the employee:
Review and verify absence if applicable.

2.2 Contact employee to discuss short term accommodation as per Employee Wellness Support (Absenteeism Notification) Policy 90-10-22 (P1).

2.3 Forward HCP Abilities Form/Behavioral Psychological Abilities Form to Disability Management Consultant if a Return to Work Program will need to be initiated as per Return to Work Policy 210-110-03.

[1] Definition: Licensed Health Care Practitioner (Family Physician/Physician Specialist/Nurse Practitioner/Chiropractor/Physiotherapist/Registered Psychologist/Dentist)

3. DISABILITY MANAGEMENT CONSULTANT ACTIONS

3.1 Receive HCP Abilities Form/Behavioral Psychological Abilities Form from the Organizational Wellness Consultant.

3.2 Contact employee to discuss Return to Work options as per Return to Work Policy 210-110-03.

4. MANAGERS AND SUPERVISORS OR DESIGNATE ACTIONS

4.1 Prepare to participate in Employee Wellness Support (Absenteeism Notification) Policy 90-10 22 (P1)

4.2 Prepare to participate in Return to Work meetings as per Return to Work Policy 210-110-03.

30. Ms. Fisher testified that in her view, the policy does not add any clarity. There is no criteria to verify a sickness. In her experience, the verification is not applied equally among the employees. There is no consistency when an HCP Form is requested. Some employees are told to have the HCP Form completed and submitted on the day of the sickness, while others are told to submit the HCP Form when they return to work.

31. Ms. Fisher testified that employees have no way of knowing what sick leave credits have accumulated in the sick bank. Before, the sick leave credits were shown on the employee's pay stubs. They are now told by the Employer that this can no longer be done.

32. Ms. Fisher identified the "Flow Sheet", which lists the questions asked by the Consultant when he or she returns the employee's call. The Flow Sheet states:

1 – Today's Date: 2 – Employee #	8 – Employees Phone #:
3 – Time of Call:	9 – Shift Calling in Absent for: Time Left Shift:
4 – Employees Name:	10 – 2nd Day Calling in Absent for:
5 – Employees Site/Dept:	11 – Shift Length: 4 6 8 10 12
6 – Employees Position:	12 – Next Scheduled Shift:
7 – Direct Manager/Supervisor:	13 – Sick Hours Balance: Illness Type:
14 – Is the absence due to a work related injury or illness? Yes No If yes, ask if an Incident Report has been completed and faxed to HR office.	
15 – Is absence a non work related injury or illness? Yes No Ask: Are you or will you be seeking medical attention? Yes No If yes, ask for HCP to be sent to HR office If no, determine if an HCP is required. HCP requested: (circle) Yes No	
16 – Determine if the employee has an infectious illness: Ask: Is the absence due to an infectious illness or condition? Yes No If yes, determine if an HCP is required. HCP requested: (circle) Yes No	
Short Term RTW Accommodation:	Dates:
Accommodation of Employees PAPHR agrees to make every reasonable effort, short of undue hardship, to provide suitable modified or alternate employment to Employees who are temporarily or permanently unable to return to their regular duties as a consequence of an occupational or non-occupational disability.	

33. Ms. Fisher questioned how the Consultant could determine, from the call, if the employee had an infectious disease or if an HCP Form was required.

34. The qualifications for the position Manager Occupational Health, Safety & Wellness is a University degree in Commerce or other related field with a minimum of three years' experience in health care or the private sector, including at least one year in management.

35. The knowledge, skills and abilities required for the position do not include a health care background. The position description includes in its nature and scope the following statement:

> The Manager is responsible for developing and implementing programs and strategies that enhance the line manager's ability to reduce and manage sick time utilization, WCB claims and time loss claims.

36. As stated previously, Brenda Felske is a Consultant. Ms. Felske commenced employment with the Employer in 2007 and became a Consultant in June 2013 with the new Wellness Policy. She became Manager of Occupational Health, Safety & Wellness in 2015. Her background includes thirty years of business experience, twenty-three years privately.

37. In cross-examination, Ms. Fisher acknowledged there is no provision in the Collective Agreement that requires the Employer to pay the cost of the information provided by the medical practitioner to verify the illness.

38. The Union then sought to call RNs to testify as to their individual experience with the new Wellness Policy. The Employer objected on the basis that this was a policy grievance, not an individual grievance. Individual complaints should be dealt with through the individual grievance process. The objection was overruled. It was our view that the evidence sought to be adduced by the Union is relevant to the validity of the new Wellness Policy.

39. Carolyn Strom has been an RN since January 2004. She started her employment with the Employer as a student in 2003 and has been an RN with the Public Health Nursing side of the Employer since 2005.

40. Ms. Strom verified the sick call-in policy before and after 2013 much the same way as explained by Ms. Fisher above. Before 2013 she would place one call to the manager if sick. If the manager was not available a message was left. Ms. Strom testified the manager may or may not call back.

41. After 2013 Ms. Strom would make two calls. The second call was to the Wellness Office. Ms. Strom said she was never able to talk directly to the Consultant on the first call, and therefore would leave a message. She has talked to three Consultants at the Wellness Office over the years, including Ms. Felske. In her experience, the call back from the Consultant has been "all over the map" from as early as one day to as late as four days.

42. The Consultant's questions of Ms. Strom varied from time to time and sometimes the questions set out in the Flow Sheet were asked.

43. Ms. Strom recalled the first time she was asked to provide the HCP Form. It was late November 2013. She was pregnant at the time and had a migraine. The Consultant asked her to provide the HCP Form on the day she called in sick. Ms. Strom testified she was a "little panicked" when told by the Consultant the "form had to be dated that day."

44. Ms. Strom had migraines before this. As soon as she gets the symptoms she takes two liquid Advil, closes the door and turns the light off in the room. This time, because of her pregnancy, she took Tylenol and no Advil. She had no intentions of going to the doctor before the conversation with the Consultant.

45. Upon being told that HCP Form was to be completed and faxed in that day, she contacted her husband, a teacher, to arrange for him to drive her to the doctor around 5:00 p.m. She had the doctor complete the HCP Form and faxed it to the Consultant after 5:00 p.m. that day. She assumed from her conversations with the Consultant that she would be "in a lot of trouble" if she didn't get the HCP Form completed and faxed in that day to prove she was sick.

46. Ms. Strom testified the doctor wrote her off work for two days to avoid having to go through the same process the following day.

47. Ms. Strom has called in sick to the Wellness Centre since then, but has not been asked again to provide the HCP Form.

48. Terry Friesen is an RN who has worked his entire career, coming on ten years, with the Employer. Mr. Friesen testified that he has been sick on the weekend and has called and left a message with the Wellness Centre. He received the call back from the Consultant the following

week after he was already back at work. He still had to answer the questions to verify that he had been sick.

49. Mr. Friesen recalled an incident when he was sick in August 2014. On August 25 he was provided with a sick note from his doctor advising that he had attended the medical clinic that day and was unable to work from August 25 to August 27. The Wellness Centre would not accept this form of a sick note and told Mr. Friesen that the Employer's senior medical officer would be involved. Mr. Friesen was able to reconnect with the doctor who then provided the HCP Form on August 27 indicating the length of the disability as two days. The HCP Form did not provide any more information than in the original sick note provided by the doctor.

50. As matters turned out, Mr. Friesen was not paid for his sick leave on August 25 and 27 for the pay period August 24 through September 6, 2014. The senior medical officer, by letter dated September 9, 2014, confirmed the original sick note was not acceptable to the Employer notwithstanding that by this time the Employer was in possession of the HCP Form dated August 27, 2014. Only on September 21, 2014, after Mr. Friesen spoke to the Union, was he paid for the two sick days by accessing his sick leave credits.

51. Donna Benson is an RN employed with the Employer. She testified that after the introduction of the new Wellness Policy she called in sick and talked to three people: the desk nurse, the nursing unit manager and the nursing supervisor to tell them she was sick. However, she neglected to call the Wellness Centre. She was not paid for the shift she was sick, and never pursued it.

52. In another incident, following surgery in Saskatoon on January 23, 2015, Ms. Benson found herself not healing well and was too weak to return to work as scheduled for February 1, 2 and 3. She phoned her supervisor and informed her of this. The supervisor told her she would look after covering the shifts. It never occurred to Ms. Benson to phone the Wellness Centre. Ms. Benson found herself sitting in the emergency room of Victoria Hospital on February 1. She thought she had meningitis. She was not paid for the sick shifts on February 1 through 3. Ms. Benson took this issue up with her supervisor. On February 17, 2015 the supervisor provided the following letter:

> Attention: To Whom it May Concern

> This letter is to confirm that Donna Benson (DOB: May 14, 1962) did arrive at the emergency room of the Victoria Hospital on February 01, 2015 at 1157 and did leave at 1409 the same day.
>
> Attending Physician: Dr. D. Marten

53. The letter was then sent to the Wellness Centre on February 25, 2015. No further information was provided. Ms. Benson was then paid for the February sick days in June 2015.

54. Ms. Felske testified the new Wellness Policy was a result of budget directives to reduce sick time. Injured employees unable to perform their regular job would be offered modified or accommodated duties and allowed to continue work. In her view, there were "lots of employees with physical restrictions" who could perform modified work instead of remaining away sick. Ms. Felske clarified that this return to work did not apply to employees with the likes of a cold or the flu. They were not to return to work and impact others.

55. Ms. Felske said the Employee Wellness Support Policy No. 90-10-22, approved October 4, 2010, was "already in place." She referred to this as the "actual policy." P1, regarding absenteeism notification and P2, regarding the HCP Form, both implemented July 30, 2013 were viewed by Ms. Felske as the "procedures" reflected by the 2010 Policy.

56. Policy 90-10-22 states:

> 1. Prince Albert Parkland Health Region (PAPHR) is committed to providing proactive assistance to employees to optimize their potential for wellness.
>
> 2. PAPHR appreciates that most employees positively contribute to the values of our health system.
>
> 3. PAPHR has a duty and commitment to respect the privacy of all employees. Any personal health information obtained as a result of implementing this policy will be kept strictly confidential. Personal health information will only be collected, used and disclosed in accordance with *The Health Information Protection Act (Sask).*
>
> 4. <u>PAPHR Responsibilities</u>
>
> 4.1 PAPHR, in partnership with its Union affiliates, is responsible for providing a healthy and safe working environment. In addition to its Employee Health, Safety and Wellness program PAPHR offers employee support through an Employee Family Assistance Program and this Wellness Support Policy.

5. Employee Responsibilities

5.1 PAPHR employees are responsible for maintaining their own health and well-being and to regularly be at work.

5.2 As autonomous self-directed persons, employees are responsible for resolving personal and family challenges that present barriers to being at work for regularly scheduled shifts.

5.3 Employees are responsible for taking effective action including, if necessary, appropriate use of available resources, such as the Employee Family Assistance Program and/or resources in the community, to clarify barriers and to create workable personal solutions to these challenges.

6. PAPHR Approach to Wellness Support – Organizational

PAPHR, in partnership with its Union affiliates, believes that the appropriate organizational response to support wellness for all employees includes these elements.

6.1 Human Resources staff who provide:
- Education about this policy
- Support to managers as they implement this policy, including administrative tools to organize the work
- Advice to managers as they try to assist with complex challenges of individual employee's wellness
- Recognition to managers and employees for each reporting period where departmental sick time reduction targets are reached
- Opportunity for managers and stakeholders to improve this policy

6.2 Managers training will include Employee Wellness Support options.

6.3 Ongoing communication with managers and employees that includes the following information:
- Department protocol for reporting intermittent and unpredictable illness
- PAPHR's identified sick time targets per FTE
- Monthly (possible weekly) sick time usage for each department

6.4 Wellness initiatives that address topics such as dealing with stress, Shifting to Wellness, ***in motion*** programs, flu shots & immunizations & presentations and information on EFAP.

6.5 Continued provision of Staff Safety Training (WHMIS, TLR, SMART and PART training) and other required training as necessary (Crucial Conversations, Respectful Workplace, Conflict Resolution and Representative Workforce).

57. The Employer and other Regional Health Authorities in the Province maintain statistics for paid sick time hours, as well as paid for premium hours for overtime at time and a half and double time. Ms. Felske referred to the statistics for the fiscal years March 31, 2012-13 to March 31, 2014-15.

58. The Employer paid sick time hours to all of its employees per full-time equivalent employee as follows: In fiscal year 2013 - 84.64 hours; in fiscal year 2014 – 74.15 hours; and in fiscal year 2015 – 70.09 hours. The Saskatchewan average that was paid was 80.31 hours, 78.90 hours and 79.86 hours respectively.

59. The Employer paid premium hours per full-time equivalent employee as follows: In fiscal year 2013 - 40.49 hours; in fiscal year 2014 – 43.88 hours; and in fiscal year 2015 – 47.70 hours. The Saskatchewan average during this period was 40.94 hours, 40.40 hours and 43.84 hours respectively.

60. In 2015 the Employer conducted a survey of all of its employees to measure feedback for organizational wellness in the workplace. One of the questions was "Choose the items that affect the wellness of your department or facility." The choices were (i) absenteeism; (ii) workplace injuries; (iii) workload over census; (iv) bullying and harassment; (v) violence; and (vi) other.

61. Ms. Felske testified there was a "huge response." Twenty-five percent of all employees responded to the survey. Absenteeism was the highest percentage at fifty-three percent affecting wellness.

62. The Organizational Wellness Plan was presented to all of the employees on thirty-five occasions from June 24 through August 29, 2013. Each manager was left a copy of the Power Point presentation referred to earlier. Each manager was left with a copy of the Power Point to give to employees who were not in attendance when presented to their respective groups. Ms. Felske testified she prepared the August 21, 2013 reminder on the Organizational Wellness Plan referred to above. This was sent to all employees and placed on the Employer's Intranet. Ms. Felske said the Flow Sheet was used only for a few weeks. It was replaced with an electronic outline of questions for the Consultants to ask. The question regarding infectious illness was removed and Consultants no longer ask this question.

63. Ms. Felske testified the business cards referred to by Ms. Fisher with the Wellness fax number are old cards. Only the Consultants and disability management have access to this fax number.

64. In Ms. Felske's view, the purpose of the Step 2 call is to verify the sickness and initiate a short-term return to work with modified duties.

65. If the employee is injured and unable to perform regular duties, she or he is asked if modified duties can be performed.

66. Ms. Felske testified that Consultants are involved in short-term return to work of periods less than two weeks. Return to work for an absence of more than two weeks due to a disability is looked after by the Disability Management Consultant.

67. The Employer has a Return to Work Policy No. 210-110-03 to accommodate ill/injured/disabled workers, which states the Employer is committed to returning them to a safe and productive workplace. The Occupational Health Committee approved this policy on June 1, 2006. The Policy relates to disability management and return to work. The Policy states in part:

> **1. Purpose**
>
> 1.1 In fulfilling this organization's commitment to provide a safe and healthy working environment, a Return-to-Work (RTW) Program has been established for workers who have become ill, disabled or who have sustained an occupational or workplace injury.
>
> **2. Policy Statement**
>
> ...
>
> 2.2 Prince Albert Parkland Health Region's return-to-work process begins immediately after an illness/injury/disability occurs. Prince Albert Parkland Health Region will work in cooperation with the ill/injured/disabled worker to accommodate the worker with an appropriate and timely return to work, providing that such accommodation does not create undue hardship to the organization.
>
> ...

A. The Grievance

68. The Union filed a policy grievance on October 23, 2013. It states as follows:

Circumstances of Grievance:

The Employer has unilaterally implemented Employee Wellness Support Policies. This is and continues to be violations of the Collective Agreement, in that they impose new conditions, restrict or take away rights guaranteed by the Collective Agreement. It is an unreasonable application of management rights.

Articles Violated:

Including, but not limited to Articles 1, 2, 3, 4, 6, 7, 8, 12, 14, 17, 18, 19, 25, 37, 54, 62, and 63 of the SUN/SAHO Collective Agreement, April 1, 2012 to March 31, 2014.

Redress Sought:

1. That the Employer immediately ceases application of these policies against members of the Saskatchewan Union of Nurses.

2. That any member of Saskatchewan Union of Nurses, who has had or continues to have, these policies applied to them have their personnel file expunged of any reference to meetings and sick leave usage as identified under these policies and the Employer's processes.

3. That the Employer reimburse all Employees for medical verifications.

4. That all affected nurses be made whole in all respects, including but not limited to interest on all money owing.

5. That the Employer adheres to all terms and conditions of the SUN/SAHO Collective Agreement, April 1, 2012 to March 31, 2014.

B. Collective Agreement

69. The provisions of the Collective Agreement relevant to this grievance are as follows:

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 Subject to the terms of this Agreement, it is the function of the Employer to:

(a) Direct the working force;

(b) Operate and manage its business in all respects;

(c) Hire, select, transfer and lay-off because of lack of work;

(d) Maintain order, discipline, efficiency and to establish and enforce reasonable rules and regulations governing the conduct of Employee(s), such rules and regulations shall primarily be designated to safeguard the interest of the clients and the efficiency in Employer operations;

(e) Promote, demote, discipline, suspend and discharge any Employee provided, however, that any such action may be subject to the grievance procedure provided herein.

...

ARTICLE 6 – UNION RECOGNITION & SECURITY

6.07 The Employer agrees to advise each Employee of those employment practices and procedures, and changes thereto, which may not be set forth in this Agreement. Policies, rules and regulations made by the Employer affecting Employee(s) within the scope of this Agreement must be consistent with the terms of this Agreement. A copy of each Human Resource policy affecting SUN members shall be sent to the Local President.

...

ARTICLE 18 – SICK LEAVE

18.01 Definition of Sick Leave

Sick leave means the period of time an Employee is absent from work because of:

(a) being sick or disabled; or

(b) a disability resulting from an occupational sickness/accident for which compensation is not being paid by the Workers' Compensation Board or for which Income Replacement Benefits are not paid under *The Automobile Insurance Act.* Any difference between benefits received under the [*T*]*he Automobile Insurance Act* and the Employee's regular net pay shall be paid to the Employee from the Employee's accumulated sick leave credits.

18.02 Accumulation of Sick Leave Credits

(a) After one (1) month of service, each Employee on regular staff shall be entitled to cumulative sick leave credits computed from the day of commencement of employment at the rate of one and one-half (1 1/2) working days (twelve (12) working hours) for each month of employment up to a maximum sick leave credit of one hundred and ninety (190) working days (one thousand five hundred and twenty (1520) working hours).

(b) Employees on OTFT status shall earn sick leave credits on a pro rata basis in direct relation to their paid hours as compared with that of a full-time Employee. An OTFT employee shall accumulate sick leave credits to a maximum of one hundred and ninety (190) working days (one thousand five hundred and twenty (1520) working hours).

(c) An Employee who has in excess of one hundred and ninety (190) working days sick leave credits will maintain those days. She will no longer accrue sick leave credits until such time as her credits fall below one hundred and ninety (190) working days at which time Articles 18.02(a) and (b) shall become applicable.

18.03 Accessing Sick Leave Credits

(a) Full-time Employees shall have access to their accumulated sick leave credits to maintain their regular income when they are on sick leave.

(b) An Employee on OTFT status shall have access to utilize accrued sick leave credits for any shifts scheduled in advance. An Employee on OTFT status who becomes unavailable for duty due to illness or injury for any time period in excess of the schedule as posted and confirmed shall have access to accrued sick leave credits based on the average number of paid hours in the previous fifty-two (52) weeks until such time as either her sick leave credits expire or she is available for work. In no case shall an OTFT – RPT or OTFT – JS access less than their regularly scheduled shifts.

...

18.06 Sick Leave Absence Without Pay

In the event an Employee is on sick leave and such sick leave credits have expired, the Employee shall be placed on "sick leave without pay" for up to one (1) year commencing from the date of going on such leave.

The Employer agrees to give one (1) month notice to the affected Employee and the Local of the Union when an Employee on sick leave without pay or Long Term Disability is to be reassessed by the Employer or Long Term Disability.

...

18.08 Certificate of Proof of Illness

The Employer may require an Employee to submit a certificate of proof of illness from a licensed medical practitioner.

18.09 Notification of Sick Leave

An Employee who may be absent from duty by virtue of being sick or disabled or because of an accident shall notify their immediate supervisor, nursing office or designated area of the Facility/Agency of such and the anticipated duration of such illness as soon as possible, preferably no less than (1) hour prior to the commencement of her scheduled shift unless the lack of giving notification can be shown to have been unavoidable. Employees upon resuming duties will report to the Employee's immediate supervisor and/or designated area within the Facility/Agency.

18.10 Sick Leave and Pregnancy

An Employee shall have access to sick leave credits for illness which may arise during pregnancy while the Employee continues active duty with the Employer. In addition, sick leave for valid health reasons related to the pregnancy and substantiated by a medical certificate, shall be granted for the actual period of illness during the maternity leave.

...

18.12 Graduated Return to Work

When an Employee is able to return to the work place on any type of a graduated return to work program, rehabilitation program or work hardening program, the Employer, Local and the Employee shall, prior to the Employee returning to work, meet to identify the details surrounding the Employee's return to work.

ARTICLE 19 – DUTY TO ACCOMMODATE

19.01 Duty To Accommodate

The Employer, the Union and the Employees acknowledge their duty to accommodate Employee(s) with disabilities regardless of status (Full time, OTFT – Part time, OTFT – JS, and OTFT –Casual) up to the point of undue hardship. Where an Employee notifies the Employer she is able to return to work, verified by a physician's certificate, the Employer, the Union and Employee shall meet, within 14 days of receipt of notification (or as mutually agreed otherwise) to review the physician's certificate and identify the accommodations required for that Employee, prior to the Employee returning to work. The parties shall meet as needed thereafter and will identify further information or processes such as work trials needed to enable a satisfactory return to work for the Employee.

Any party who is unable to agree to an accommodation must provide written rationale for such disagreement.

The parties recognize the requirement to accommodate an OTFT – Casual Employee. Subject to the Employee's restrictions and limitations and the Union's and Employer's ability to accommodate up to the point of undue hardship, the Employee shall be offered casual work based on the developed procedures as per Article 37.13.

...

ARTICLE 62 – EMPLOYEE WELLNESS

62.01 The Union and Employer endorse the concept of Employee wellness programs and encourage Employees to participate in programs to enhance their well-being and facilitate a healthy lifestyle.

The Employer shall provide access to designated in-house exercise facilities. Where in-house facilities are unable to be accessed, the Employer will identify fitness programs in the community and pursue corporate rates for Employees.

The Employer will endeavour to provide a wide range of health and lifestyle educational opportunities such as weight control, nutrition and smoking cessation for Employees who choose to attend.

III. THE ISSUES:

70. The grievance has raised several issues. The issues, from the Employer's perspective, are as follows:

(a) Who bears the onus of proof in these proceedings?

(b) What principles of interpretation should be applied to the Collective Agreement?

(c) Do Policies #90-10-22 (P1), #90-10-22 (P2) and #90-10-22 (the "Policies") violate the Collective Agreement?

(d) Are the Policies reasonable?

71. The Union accepts it bears the onus of proving the Policies breach the Collective Agreement. While accepting this evidentiary burden, the Union does not accept that it bears any onus when it comes to the interpretation of the Collective Agreement. Interpretation of the Collective Agreement is a question of law to which no party bears an onus. It is a matter of correctness.

72. Also, there is no dispute on the principles of interpretation that should be applied to the Collective Agreement. The Union agrees with the principles put forward by the Employer. Although the parties agree on the methodology, they differ on what is the correct interpretation.

73. The real issues in contention remain as follows:

(a) Are the Policies and/or the Employer's implementation of the Policies in violation of the Collective Agreement?

(b) If not, are the Policies reasonable?

IV. POSITION OF THE PARTIES:

A. Access to Sick Leave

74. The Employer submits that an employee's right to sick leave benefits does not crystallize until the employee has provided notice of his or her illness in accordance with the procedures set out within the Collective Agreement, and the Employer has been provided with the opportunity to determine whether or not further medical information is reasonably required, and, if reasonably required, has been provided with such medical information.

75. The Employer submits that Article 18 of the Collective Agreement provides the conditions that must be met in order only to trigger an entitlement to sick leave pay. The Employer describes these conditions as follows:

- Article 18.01 – Employee must actually be sick or disabled;
- Article 18.08 – Employee may be required to submit a certificate of proof of illness from a licensed medical practitioner; and
- Article 18.09 – Employee must provide at least one hour's notice of both the fact of and anticipated length of the illness prior to the affected shift.

76. The Employer's position is that an employee must comply with the Policies before sick leave entitlements are crystallized.

77. The Employer submits Article 18 forms the basis of the process implemented by the Employer with respect to sick leave. Within that process, the Policies have been implemented as a means to ensure employees are able to access their sick leave entitlements while also permitting the Employer to ensure that it and the employees fulfill their mutual obligations with respect to the verification of absences when reasonably necessary to do so and early, safe returns to work when possible.

78. The Employer submits there are a number of pre-conditions attached to an employee's entitlement to sick leave, one of which includes the fact the employee must be legitimately ill and unable to attend work. The Employer submits that until such time as the Employer is reasonably satisfied that the employee qualifies for sick leave, the employee's entitlement to sick leave does not crystallize and any such sick leave compensation is not due.

79. The Union does not see it this way. The Union submits that an employee's right to access sick leave is not only triggered, but is crystallized when the provisions of Articles 18.08 and 18.09 are met. The Union's view of these Articles is:

> 18.08 – if the Employer has reasonable grounds to require proof of that illness, it may request a certificate of proof of illness.

18.09 – the employee notifies his or her immediate supervisor, or nursing office or designated area of the fact he/she is ill and of the anticipated duration of that illness.

80. The Union points out sick leave with pay (Article 18.03) or without pay (Article 18.06) is not relevant to the question of whether the employee is entitled to sick leave.

B. Personal Health Information

81. The Union submits that the only medical information the Employer is entitled to obtain is that set out in Article 18.08: "a certificate of proof of illness." The Union accepts that the level of medical information that may be appropriate in the circumstances may increase with the length of the sick leave. At all times, the information to which the Employer is entitled is only the amount to satisfy a reasonably objective employer and that the employee was in fact absent from work due to illness or injury. The Union's position is the medical information should be of the least intrusive nature possible. The Union submits that with a short-term absence, there is usually no reason to request a certificate of proof of illness and, if there was, the only "proof" required is a medical professional's advice that the employee was unable to attend work on the given day(s) due to illness or injury. The Union argues that the medical information required by the Employer in the HCP Form goes beyond that required to establish at the initial sick leave call stage that the absence is a *bona fide* illness.

82. The Employer submits that Article 18 allows it to request both an initial certificate as proof of illness from an employee so as to substantiate a claim for sick leave and additional medical information in order to allow it to determine whether the employee can be brought back to the work place in a modified position and/or perform modified duties. In support of this argument, the Employer submits there are no restrictions in Article 18 that conflict with such an interpretation.

83. The Employer submits the Collective Agreement is silent on the procedures surrounding the Employer's request for further information. Therefore, the Employer is permitted to formulate its own procedures subject to such procedures being reasonable, that are not in direct conflict with other provisions of the Collective Agreement, and are otherwise in compliance with the KVP Principles.

C. "Two-Call System" and "Unverified" Sick Leave

84. The Union submits the two-call system and the requirement of a Consultant to call back to verify the sickness in each and every circumstance before sick leave entitlements are accessed by the employee amounts to a denial of a negotiated right and is an unreasonable policy in the circumstances.

85. The Union submits that it is a violation of the Collective Agreement to deny sick leave after the employee has called in sick. The condition for sick leave is verified with the first call. If there are reasonable grounds to dispute to legitimacy of the illness, the Employer may request a "certificate of proof of illness" from a licensed medical practitioner. This request and the provision of the certificate of proof of illness is not a condition under the Collective Agreement for the employee to access sick leave credits or a sick leave absence. Any adjustment required if the proof, when requested, is not forthcoming can be done after the fact. Unless there are continuing attendance problems and a reasonable suspicion that a particular employee is wrongfully claiming absence due to sickness, other employees should be accepted at his/her word and sick leave entitlements automatically verified.

86. The Union submits the Policies, as implemented, are unreasonable.

87. The blanket policy of requiring the call back verification is arbitrary and nonsensical. It is unclear what the Consultant can verify over the phone or if the Consultant has the necessary health background to medically verify the sickness. It is unreasonable that verification before sick leave entitlements is required in every case; for example, when the employee has left work ill or the call back is days after the illness and the employee is back at work.

88. The Employer submits it is not violating the Collective Agreement. Rather, it is giving effect to sick leave entitlements, while at the same time ensuring the employees are given the opportunity to return to the workplace whenever appropriate.

89. In addition, the Employer submits there is no sick leave entitlement until it is satisfied the absence is legitimate. As previously discussed, the Employer maintains it is not in violation of the Collective Agreement by requiring the second call.

90. The telephone call from the employee contemplated within Article 18.09 is for a specific purpose (notifying the Employer of illness or injury), which is separate from Articles 18.01 and 18.08. The Employer again submits there is no part of the Collective Agreement that explicitly limits the Employer from requiring an employee to make a second call in order for the employee to satisfy his or her commonly accepted obligations to demonstrate the legitimacy of the absence to the Employer's reasonable satisfaction and/or to discuss with the Employer the potential for modified duties and an early return to the workplace.

D. Sick Leave versus Accommodation/Return to Work

91. The Union submits the Employer is violating the Collective Agreement by requiring employees to provide more personal health information than necessary to comply with Article 18.08.

92. The Union submits the personal health information required in the HCP Form and the requirement of completing this information on the HCP Form itself is unreasonable and an improper intrusion into the employee's right of privacy and confidentiality of personal health information.

93. The Union submits the Employer is entitled only to a certificate from a medical practitioner that proves the employee is ill. There is no requirement in the Collective Agreement for such a certificate to provide medical evidence regarding workplace accommodations or modifications that would allow an employee to continue to work when sick.

94. The Union submits the Employer, at the initial sick leave stage, is intermingling issues of accommodation under Article 19 and short-term sick leave entitlements in Article 18.

95. The Employer submits it is not attempting to commence the accommodation process within the context of a short-term sick claim.

96. The Employer refers to the graduated return-to-work provision in Article 18.12 and submits the Employer's actions through Article 18 of the Collective Agreement and the Policies do not amount to a full-blown accommodation process as contemplated by Article 19 of the Collective Agreement. The Employer submits, in the present case, short-term returns to work with modified

duties engaged through the Policies and Article 18 are aimed at providing modified or alternative employment to employees who are temporarily unable to return to their regular duties as a consequence of limitations incurred as a result of injury or illness. This is separate and apart from the duty to accommodate.

E. Reasonableness

97. The Employer submits it has a legitimate business interest in managing absenteeism that includes encouraging and facilitating the employee's safe and timely return to work.

98. The Employer acknowledges that one of the objectives of the Policies is to reduce sick leave time. However, the Employer maintains this goal is not at the expense of compromising the employee's right to utilize sick leave benefits.

99. The Employer claims it is reasonable to utilize a process that assists in ensuring employees do not needlessly stay off work if they are able to perform modified duties. It is the Employer's position that as determined by the relevant medical information and what that information says about the physical limitation and restrictions of an employee, there is an obligation on the employee to participate in modified duties. The Employer submits authority for this proposition is found in the decision of *Re West Vancouver (District) and West Vancouver Fire Fighters' Union, Local 1525 (Sick Leave)* (2012), 113 CLAS 338 (Hall).

100. The Employer submits that the Policies requesting medical information regarding modified work or duties that the employee is able to perform while sick or injured is a significant benefit to the sick or injured employee in a safe and speedy return to work. The process implemented by the Employer provides the opportunity for injured staff to continue to come to the Employer's facilities and be paid wages even if working at a reduced capacity. An additional benefit for the employees is the opportunity to save their accumulated sick leave credits for a situation where they may need them in the future.

101. The Employer's position is that it is entitled to the medical information pursuant to Article 18.08 and therefore the request is reasonable. The Employer submits Article 18.08 provides authority to request medical information both in order to substantiate an employee's claim that he

or she is indeed ill or injured as well as in order to obtain information clarifying whether or not modified duties may be available to facilitate the employee's return to the workplace.

102. The Union submits the primary purpose of the Policies is to reduce sick time usage. Any policy that dissuades employees from exercising a negotiated right is unreasonable.

V. LAW AND ARBITRAL JURISPRUDENCE:

A. Onus of Proof

103. The Employer submits that the onus rests upon the Union to prove, on a balance of probabilities, that the Employer breached its obligations with respect to the process for administration of sick leave as a result of its implementation of the Policies. There is no onus on the Employer to prove the contrary, or indeed to prove anything at all. The Employer submits the law is correctly stated in *Re International Nickel Co. of Canada Ltd. and USW* (1969), 20 LAC 51 (Brown) at para 6 as follows:

> When the employee files a grievance for any matter whether discipline or not he actually alleges that the company is in broach *(sic)* of the contract existing between them and in all but discipline matters (discharge or penalty) there is no question of on whom the conduct of the action and burden lies, the grievor or the union as the case may be. This type of grievance is then conducted in what might be termed normal court procedure for breach of contract actions with the union leading and with the right of reply after the company's defence.

104. There is no dispute with this position, provided the onus is limited to the evidentiary burden.

105. The problem is, the Employer goes one step further and argues the Union's onus is not limited to proving the facts upon which the grievance is based, but also extends to the interpretation of the Collective Agreement.

106. The Employer submits that if there is any doubt about the proper interpretation of the Collective Agreement the doubt must be resolved in the Employer's favour.

107. The Employer refers to the following decisions in support of its position.

- *Consolidated Aviation Fueling & Services (Pacific) Ltd. v Teamsters, Local 213* (1987), 30 LAC (3d) 130 (Greyell);

- *British Columbia Hydro & Power Authority v I.B.E.W., Local 258* (1987), 6 CLAS 44 (Hope);
- *Re Saskatoon (City) and CUPE, Local 859* (1999), 55 CLAS 190 (Priel);
- *Re Federated Co-operatives Assn. Ltd. and UFCW, Local 649 (2011 H0-08)* (2014), 121 CLAS 349 (Wallace);
- *Re Keller Foundations Ltd. and IUOE, Local 870* (2014), 249 LAC (4th) 283 (Wallace);
- *Peterborough Utilities Commission v I.B.E.W., Local 1964* (1973), 4 LAC (2d) 383 (Palmer).

108. With respect, I do not agree that the onus on the Union in this case extends beyond the evidentiary burden. The interpretation of sick leave and related provisions of the Collective Agreement are questions of law to be determined by ascertaining the intention of the parties at the time the Collective Agreement was made using the rules of contractual interpretation.

109. The Employer's argument in some of the decisions referred to by the Employer were considered before me as sole arbitrator in *Re RRR SAS Capital Facilities Inc., supra.* At paragraph 39 I stated:

> This argument and these decisions were considered by the board I chaired in *Board of Education of the Regina School Division No. 4 of Saskatchewan and Canadian Union of Public Employees, Local 3766,* [2014] SLAA No 26. The argument was rejected. The board stated at paras 37 – 39:
>
> > 37. While there is no dispute that he who asserts (in this case the Union) carries the evidentiary burden to prove on a balance of probabilities the facts to support the alleged breach of the Collective Agreement, it is our view that this onus is an evidentiary burden only and does not extend to questions or law. On questions of law neither party carries an onus. It is simply a matter of correctness.
> >
> > 38. In this case the interpretation of the Collective Agreement, and in particular "pressing personal matters" referred to in Article 9.08.01, is a question of law. The provision in the Collective Agreement has a meaning and it is the arbitrator's task to determine the correct meaning using principles of contract interpretation.
> >
> > 39. Brown and Beatty comment on the evidentiary burden of proof in their text, *Canadian Labour Arbitration*, looseleaf (Rel 39, September 2014) 4th ed, vol 1 (Toronto: Canada Law Book, 2014) noting at para 3:2400:
> >
> > > The obligation of having the onus or burden of proof means that the party bearing it will not succeed when, on the basis of the evidence adduced and argument presented, the result has not been pointed to one way or the other in the mind of the arbitrator. That is, for the party with the onus of proof to succeed, the scales must tip in its favour. However, where there are two conflicting versions of what occurred, the arbitrator must first resolve which one is correct before applying the foregoing principle.

> **The question of onus of proof arises only where a conflict respecting facts as found has occurred; it has not bearing in situations involving questions of law, which includes the interpretation of a term in a collective agreement. Rather, in resolving such issues arbitrators must determine the true meaning intended by the parties to the agreement, using generally accepted canons of construction.**
>
> In the allocation of the burden of proof, the general principle is that "the onus of proof in all cases rests primarily on him who asserts a claim to establish and prove it and not on the other side to disprove the claim". And in grievance arbitrations, it is generally accepted that the grievor has the ultimate burden to make out a breach of the collective agreement except in cases of discharge where the initial burden to prove a *prima facie* case is met by proving the collective agreement, the fact of employment and the dismissal.

[Emphasis in original]

B. Interpretation

110. The Employer submits the principles to be applied in the interpretation of collective agreements was canvassed in *Re RRR SAS Capital Facilities Inc., supra,* at paras 40-41:

> 40. The objective in interpreting a collective agreement is to ascertain the intention of the parties at the time the agreement was made. In *Saskatchewan Telecommunications v Communications, Energy and Paperworkers Union of Canada, Locals 1-S and 2-S (Hague Grievance)*, [2009] SLAA No 4, the principles to be followed were stated at para 36:
>
> > The objective of the interpretation of a collective agreement is to determine the mutual intentions of the parties at the time the agreement is made. There are rules that are followed to determine this intention, such rules are generally consistent with the interpretation of ordinary contracts and include:
> >
> > - The presumption is that the parties' intentions are manifest in the words that are used. Had the parties intended something different, they would have said so.
> >
> > - The words used are to be construed in their ordinary and grammatical sense, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. The words are to be given their plain, literal and ordinary meaning unless the context otherwise requires. If competing interpretations are possible, deference is given to reasonableness; absurdity is to be avoided.
> >
> > - Words and phrases should not be interpreted in isolation, but rather in the context of the agreement in its entirety. The agreement should be read as a whole to reconcile all terms but yet, to the extent possible, provide meaning to all words and without unnecessarily rendering words superfluous.

- If the operative part of the agreement is unclear, recitals (unless otherwise stated) may be used to control, cut down or modify the operative part. Headings in the agreement (unless otherwise stated) may be used to explain the meanings of the paragraphs that follow.

See generally Brown and Beatty, *supra* at para. 4:2000 and 4-37 – 4-46; *De Beers Canada Inc. v. Shore Gold Inc.*, 2006 SKQB 154, aff'd, 2006 SKCA 58; and Kim Lewison, Q.C., *The Interpretation of Contracts*, 2d ed. (London: Sweet and Maxwell, 1997).

41. Arbitrator Elliott, in *Communication, Energy and Paperworkers Union, Local 777 v Imperial Oil Strathcona Refinery (Policy Grievance)*, [2004] AGAA No 44; 130 LAC (4th) 239, at paras 39-47, had this to say about the interpretation of the collective agreements:

> **39.** I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in Halsbury's Laws of England to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.
>
> **40.** The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:
>
> > In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.
>
> **41.** Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.
>
> **42.** Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:
>
> 1 to consider the entire context of the collective agreement
>
> 2 to read the words of the collective agreement
>
> - in their entire context
>
> - in their grammatical and ordinary meaning
>
> 3 to read the words of a collective agreement harmoniously

- with the scheme of the agreement

- with the object of the agreement, and

- with the intention of the parties.

1 What is the "entire context of a collective agreement"

43. The "entire context" includes

- the collective agreement as a whole document. One provision of a collective agreement cannot be understood before the whole document has been read because what is said in one place will often be qualified, modified or excepted in some fashion, directly or indirectly, in another

- reading one provision of the collective agreement keeping in mind what is contained in other provisions. In the first instance it must be assumed negotiators knew not only the provisions specifically bargained but all the others contained in the collective agreement. An example is the use of words that have defined meanings. Those meanings must be applied whenever the defined word is used in the collective agreement

- keeping in mind the legislative framework within which collective agreements exist and keeping that framework in mind as part of the entire context.

2 Reading the words

44. Words in a collective agreement are to be read

(a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,

(b) in their grammatical and ordinary meaning. Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by common usage of the parties or by the context in which the word is used, and

(c) harmoniously with

- the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or a particular part of the agreement)

- its object

- the intention of the parties, assuming an intention can be discerned. The intention is to be found in the words used, but evidence of intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.

> 3 The meaning of "context"
>
> **45** The word "context" itself means
>
> > the circumstances that form the setting...for [a] statement...and in terms of which it can be fully understood Concise Oxford Dictionary (10th)
> >
> > and the Merriam-Webster Dictionary includes in its definition of context:
> >
> > > the weaving together of words; the parts of a discourse that surround a word or passage and can throw light on its meaning; the interrelated conditions in which something exists or occurs.
>
> **46** And so, entire context in terms of a collective agreement and the interpretation of the words used in it includes considering
>
> - how the words have been weaved together
> - how those words connect with other words
> - the discourse (other information) that can throw light on the text to uncover the meaning
> - any conditions that exist or may occur that might affect the meaning to be given to the text.
>
> Testing the interpretation
>
> **47** Once an interpretation is settled upon, it should be tested by asking these questions:
>
> - is the interpretation plausible – is it reasonable?
> - is the interpretation effective – does it answer the question within the bounds of the collective agreement?
> - is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

111. The Union does not take issue with this, and I agree these principles should be applied to the interpretation of this Collective Agreement.

C. Sick Leave Benefits

112. Sick leave and sick leave benefits in collective agreements are negotiated union rights. Employees are entitled to take advantage of these rights if they satisfy the conditions set out in the collective agreement.

113. In *Re Five Hills Regional Health Authority and SEIU, Local 299* (2009), 97 CLAS 208 (Denysiuk), the health region unilaterally, without prior consultation with the unions, introduced a sick leave program into the workplace in 2007. The health region contracted with an out-of-province disability management company to administer the new policy.

114. Prior to this there was no formal sick leave policy in place. Employees absent due to sickness or injury would notify the immediate supervisor and provide medical verification when requested to do so. The request for medical information was *ad hoc*; there was no consistency or guidelines to advise supervisors when to request verification or when requested a prescribed form. A doctor's note, at the employee's expense, would suffice.

115. Most of this changed with the new program manual and attending physician's questionnaire. The policy was triggered following an absence for sickness of three consecutive days.

116. Arbitrator Denysiuk identified the general principles dealing with grievances involving sick leave and attendance management policies.

117. The employee has the right to the sick leave benefits negotiated. Arbitrator Denysiuk stated at para 143:

> Most collective agreements contain sick leave benefit provisions. These provisions modify the rule that typically requires an employee to regularly attend work in order to be paid. Sick leave provisions allow the employee to stay away from work if they are unable to attend because of illness or injury. Sick leave is not a gift bestowed by the employer upon employees; rather it is a right which has been bargained. Employees are entitled to coverage provided they meet the requirements in the collective agreement.

118. Policies implemented by management that unreasonably impede the exercise of sick leave rights are not permitted. Arbitrator Denysiuk stated at para 144:

> Any policy implemented by an employer that serves to dissuade an employee from exercising his or her legitimate right to sick leave benefits will generally not be permitted.

119. The employee must satisfy the grounds for entitlement, such as proof of illness, under the collective agreement. Arbitrator Denysiuk stated at para 147:

The onus is on an employee to establish entitlement to paid sick leave benefits under a collective agreement. Typically this requires an employee establish that their absence is legitimate, that is, they are genuinely unable to report for work due to illness or injury. The employer is entitled to sufficient "proof of the illness or injury. What is sufficient "proof might be set out in the collective agreement, otherwise, there has been significant arbitral analysis of the type of information an employer is entitled to in order to assess the employee's request for sick leave entitlement. Arbitrator Surdykowski at page 134 in *Re Hamilton Health Sciences* [*Re Hamilton Health Sciences Corp. v O.N.A.* (2007), 167 LAC 4th 122], puts it this way:

> As a matter of general principle in that latter respect, what is required is sufficient reliable information to satisfy a reasonable objective employer that the employee was in fact absent from work due to illness or injury, and to any benefits claimed (see, Arbitrator Swan's comments in *Re St. Jean de Brebeuf Hospital and C.U.P.E., Loc. 1101* (1977) 16 L.A.C. (2d) 199 at pp. 204-206). As a general matter, the least intrusive non-punitive interpretive approach that balances the legitimate business interests of the employer and the privacy interests of the employee is appropriate. But what the employer is entitled to, and concomitantly what the employee is required to provide, will first and foremost depend on what the collective agreement or legislation provide in that respect.

120. The employer's request for personal medical information is to be the least intrusive in the circumstances. Arbitrator Denysiuk stated at paras 141, 142 and 148:

> 141 The confidentiality of personal medical information is universally recognized as one of the most important privacy rights in this country. The right to privacy of medical information is enshrined in legislation. Privacy legislation emphasizes the individual employee right to keep medical information private except where it is absolute necessary to disclose it.
>
> 142 An employer does not have an inherent right to compel employees to produce confidential medical information. An employer only has a right to confidential medical information to the extent that legislation or a collective agreement so provides or in circumstances where the production of such information is demonstrably required. Concurrent with this, a doctor cannot disclose patient medical information unless the patient has given consent. The consent must be freely given.
>
> ...
>
> 148 Greater intrusion into private and confidential matters requires clear authority under the collective agreement. This is in keeping with the principle that the medical information required in the first instance should be minimal. Arbitrators have typically interpreted disclosure requirements on a conservative basis. On this point, at page 138 Arbitrator Surdykowski says:
>
> > Further, the intensely personal nature of confidential medical information, the individual, societal and institutional interests in preserving the confidentiality of such information, and the protections that have been legislated to protect its privacy and use, suggest a conservative approach. Accordingly, collective agreement provisions that speak to the information that an employee must provide to the employer in order to satisfy the employee's obligation to justify an absence or to obtain STD benefits in that respect should be strictly construed.

121. The employer does not have an absolute right to request medical information to support the sick leave. In addition to the scope of the request, the request must be reasonable in the circumstances. Arbitrator Denysiuk stated at para 145:

> The within case, like most of those referred to by the parties, involves a balancing of an employee's right to privacy against the employer's right to manage sick leave and ultimately prevent or address abuse of sick leave. Both are legitimate interests and entitled to protection. In limited circumstances an employer may refuse to grant sick leave with pay until it is satisfied that the employee is unable to perform duties because of illness or injury. The employer must act reasonably if it decides to withhold entitlement and must act reasonably with respect to the information requested from the employee to satisfy the requirement.

122. The foundation of the reasonable basis for the request for medical information is emphasized in Brown and Beatty, *Canadian Labour Arbitration*, looseleaf (Rel 51, July 2016) 4th ed, vol 1 (Toronto: Thomson Reuters Canada Limited, 2016) at para 8:3320:

> **8:3320 Qualifying for sickness and disability benefits**
>
> Arbitral jurisprudence in general, and collective agreements in particular, invariably require that an employee affirmatively prove the fact of the injury or illness which caused him or her to remain off work, in order to claim benefits under an indemnity or sick pay scheme. The exception is if it was the employer who required the employee to book off sick. The nature of proof that can properly be required by an employer is usually described in the agreement, and medical certificates of one form or another are the standard vehicle in most, but not all, cases. As a general rule, arbitrators have said that an employer can only demand medical verification of an illness or incapacity of a kind, in a form and at a time that is consistent with the terms of the agreement, and where there is a reasonable basis for so requiring...

123. The Employer has referred to *Re Victoria Times-Colonist and Victoria Newspaper Guild, Local 223,* 1986 CarswellBC 2711 (WeC) at paras 40-41 (Hope) where Arbitrator Hope commented as follows regarding employee's obligations to establish the legitimacy of claims for sick leave entitlements:

> 40 Here, then, the question is whether the information sought by the Employer in the two forms and the medical authorization represents a reasonable intrusion into the privacy of employees and whether the enquiries are otherwise in accord with the collective agreement. Dealing first with the collective agreement, it can be seen that it contains no provisions of a procedural nature which sets out what information, if any, an employee will be required to provide in order to qualify for either sick leave or sick pay.
>
> 41 The absence of such procedural requirements does not mean that the Employer must grant sick leave or sick pay to employees on demand, however. In the context of the arbitral authorities it means that any information required of employees must be reasonable....

124. The starting point for entitlement to sick leave and the related benefits is an examination of the requirements in the collective agreement. Workplace policies must not only be consistent with collective agreements, they must be reasonable. Conversely, even the most reasonable policy cannot subsist if it is contrary to the collective agreement.

125. In *Five Hills, supra,* the new sick leave policy, referred to as the "Sibley Program", radically changed the way the employer administered sick leave and the process the employee followed to access sick leave benefits. The sick leave provisions in that collective agreement, which covered the period April 1, 2005 to March 31, 2008, provided:

> **ARTICLE 24 – SICK LEAVE**
>
> ***24.03 Notice of Illness***
>
> **Employees** who may be absent from duty **due to illness or injury**, shall notify the immediate Supervisor or **designate** as soon as possible, prior to the commencement of the scheduled shift.
>
> **The employee shall inform the Supervisor of the anticipated date of return to work and any limitation or restrictions.**
>
> No employee shall be entitled to benefits for time previous to such notification unless the delay shall be shown to have been unavoidable. Employees will report to their Supervisor or designate upon resuming duties.
>
> ***24.06 Verification of Illness***
>
> Medical verification may be requested from the employer requesting sick leave. Where such is required, the employee shall be notified during the illness that such verification is required upon the employee's return to work.
>
> [Emphasis in original indicating new provisions]

126. The Sibley Program for sick leave was implemented in August/September 2007 midway into the collective agreement. The Sibley Program was activated when an employee was absent for more than three consecutive days. At that time a Sibley case manager was to make contact with the employee by telephone and send the employee an Attending Physician Statement ("APS") to be completed by the employee's doctor. The employee had to provide a completed APS to access sick leave benefits.

127. The mandatory APS replaced the traditional *ad hoc* doctor's note as part of the procedure to verify the illness.

128. The APS asked for more extensive information than a doctor would normally provide in a medical note. Arbitrator Denysiuk summarized what was asked for at para 34:

> The physician is asked to give the diagnosis, clinical findings and diagnostic testing pertaining to the diagnosis, identify limitations and restrictions, describe the treatment plan and prognosis for recovery and return to work, indicate whether the employee has been referred to a specialist and, if so, give the name of the specialist and specialty involved. SEIU objects to requiring the physician to disclose the diagnosis and also objects to the physician providing any additional information that would likely lead to disclosure of the diagnosis in any event.

129. Arbitrator Denysiuk held that the medical information required of the employee was far more intrusive and demanding than one would expect of an employee accessing sick leave in the short term. Arbitrator Denysiuk stated at paras 156 and 158:

> 156 At first glance, the Sibley Program documents resemble those typically required when applying for long term disability. The same is true on closer inspection. An employee could easily think that he or she is applying for a more significant or complicated benefit than sick pay. The APS in particular requires information that is typically provided by a doctor for use in assessing a disability claim and/or for use in assessing an employee's request for accommodation. Paragraph 8 in the APS requires that the doctor outline the employee's abilities so that accommodation can be considered. This is far beyond the information usually requested from doctors when asked to provide a note excusing absence for illness or injury. The medical information required by Five Hills and Sibley is more in the nature of what one would expect for a prolonged absence, not what one would expect for "simple illness" as that term was used and understood by the parties in the hearing.
>
> ...
>
> 158 In my view, the original Sibley Program is exactly the kind of blanket policy the bargaining teams had in mind when they reached agreement on Article 24. The Sibley Program was triggered when an employee was absent for three or more consecutive business days. All employees in Five Hills fell within the policy irrespective of their individual circumstances. This is precisely what SEIU sought to avoid at bargaining. As such, the original Sibley Program cannot stand.

130. Arbitrator Denysiuk found the Sibley Program to be both unreasonable and a violation of the collective agreement. Arbitrator Denysiuk stated at paras 163-165 and para 167:

> 163 **Employees at Five Hills are entitled to access sick leave provided they meet the requirements of Article 24. Medical verification is contemplated, however it is clear to me that the medical information required under the Sibley Program overreaches and is an unnecessary and intrusive violation of privacy, one that is not contemplated by Article 24.06.** It is not the existence of a new form or set of forms that is the issue; rather, it is the intrusive nature of the information being requested by Sibley and Five Hills in the first instance. The content of a medical certificate, or the APS in this case, must be reasonable having regard to the nature of the benefit sought by the employee. An employer might be

entitled to more extensive medical information when extended leaves are being requested and when accommodation issues are being addressed. Those requests are different from situations where the employee seeks coverage for short periods of absence due to illness and injury.

164 **Creating a form to replace what Five Hills may have considered to be "the less than satisfactory and unduly cursory 'doctor's prescription pad note'", to use Arbitrator Sims' words, is a reasonable and legitimate exercise of management rights. It is however quite a different matter when the form created overreaches beyond what is reasonably considered to be the first line of inquiry in assessing a short absence from work for illness or injury. As Arbitrator Surdykowski put it at pgs. 143 and 144 of *Hamilton Health Sciences:***

> **The fact that additional information may subsequently be required does not mean that the employer is entitled to it in the first instance.**
>
> ...
>
> But the real world also includes a society mandated legislated right to privacy, and the fact that narrow disclosure of medical information may have unfortunate or unintended consequences in an individual case, or that broad disclosure of medical information may be appropriate or required in preparation for or during a grievance arbitration (or other legal) proceedings does not alter the analysis. Either an employee has privacy rights or she does not. A right that cannot be exercised is no right at all. Although early broad disclosure might prove to have been useful in a particular case, this does not mean that such broad disclosure is necessary or appropriate in the first instance in every case as a matter of general policy. There are many business or other matters on both sides of the labour relations divide that are "confidential" outside of the grievance litigation process which are no longer confidential for litigation purposes once the grievance arbitration process is invoked. That does not suggest that they should not remain confidential outside of the litigation process. Indeed, the legislative scheme treats litigation disclosure requirements or obligations as an exception to the general rule of voluntary consent restricted to the purpose disclosure of personal health information.

165 **Further, it is my view that the forms required by Sibley encroach upon the return to work procedure negotiated by SEIU in the last round of bargaining.** A form was specifically created by SAHO, and another form created by Five Hills, for use in assessing accommodation requests. The Work Capacity Assessment form serves a useful purpose and is precisely what the parties negotiated. It is difficult to understand why the APS, created for use in accessing sick leave, asks for similar information.

...

167 I find that the sick leave policy, known as the Sibley Program, implemented by Five Hills is unreasonable and not authorized by the Collective Agreement....

[Emphasis added]

131. There are many similarities in the present case with the facts and issues in *Cypress Health Region and SEIU-West (CHESS)* 2014, 119 CLAS 277 (Ish). In 2010 the Cypress Health Region

initiated a process to reduce sick time in response to directives issued by the Ministry of Health for Saskatchewan. The program was the Cypress Health Employee Staffing Strategies referred to as "CHESS".

132. The union challenged several steps in the CHESS document having regard to the sick leave policy. One challenge related to the "pending" code or "unpaid LOA" code. The CHESS program provided that when an employee reported in sick, the absence would be coded as "unpaid" until the manager verified the sick leave. Arbitrator Ish commented at paras 94-96 as follows:

> 94 The current practice pursuant to the CHESS program is that the scheduler routinely uses the "unpaid LOA" code or "pending" code when an employee calls in sick. The employee's manager is intended to make the ultimate decision with respect to the proper code to be used. In some cases it may be appropriate to characterize the leave as one of the other leaves, such as compassionate or bereavement leave. The evidence was that the manager is the person authorized to make the coding decision. However, at least in one instance, personnel from the Ability Management Unit directed a change in code made by a manager.
>
> 95 The evidence also disclosed that the pending code was used when there was no question about the verification of illness but discussions were ongoing with respect to whether the employee could return to work with modified duties. Perhaps the best example was the situation of Wanda Malone who had shoulder surgery on a Tuesday yet was not coded as sick leave until sometime later even though there was no question at all as to whether she had a verified illness. Similarly, Phyllis Lenuik was never paid for a sick day even though she cut her thumb which prevented her from going to work on a Monday but did return to work on Tuesday. She could not conduct her regular duties and required medical treatment for her thumb at the health care facility at which she was working. Clearly there was no question about whether the injury occurred and there should have been no question about entitlement to one day sick leave, yet Ms. Lenuik testified that she was never paid for the sick day.
>
> 96 The evidence also disclosed that coding all sick leave as "pending" caused pay to be delayed for some employees. If the pending code was not changed in sufficient time to be processed within the current pay period, pay for the time away would not be reflected in the employee's salary. Even though ultimately sick leave for the time off may be authorized, the delay in receipt of salary could be significant and cause hardship.

133. The sick leave provisions in the collective agreement in that case stated:

> **4.05 Return to Work and Duty to Accommodate**
>
> a) The Employer agrees to make every reasonable effort, short of undue hardship, to provide suitable modified or alternate employment to Employees who are temporarily or permanently unable to return to their regular duties as a consequence of an occupational or non-occupational disability, or as a consequence of limitations as a result of illness or injury or who otherwise require accommodation as set out in the Saskatchewan Human Rights Code, the Saskatchewan Human Rights Code-Regulations, *The Saskatchewan Labour Standards Act* and *The Saskatchewan Occupational*

Health and Safety Act. **It is recognised that employees may be supernumerary dependant on the terms of their Return to Work/Duty to Accommodate.**

Accommodation of employees within the workplace is a shared responsibility between the Employer, the Union and the employee. All parties shall work cooperatively to foster an atmosphere conducive to accommodate.

...

c) Medical Information

It will be the responsibility of the employee returning to work to provide the Employer with initial medical evidence of the limitations **or restrictions** associated with the disability, injury or illness. Further information, if required, shall be provided through the use of the SAHO Work Capacity Assessment form, or another form approved by the Employer. The Employer shall not contact the employee's physician **and/or medical practitioner(s)** without the employee's written consent.

...

24.01 Definition of Sick Leave

"Sick Leave" means the period of time an employee is absent from work by virtue of being sick or disabled or because of an accident not covered by Workers' Compensation.

24.03 Notice of Illness

Employees who may be absent from duty due to illness or injury, shall notify the immediate Supervisor or designate as soon as possible, prior to the commencement of the scheduled shift **indicating the expected duration of such illness.**

In accordance with Article 4.04 Return to Work/Duty to Accommodate provisions, the employee shall inform the Supervisor of the anticipated date of return to work and any limitations or restrictions **as specified by their physician and/or medical practitioner.**

No employee shall be entitled to benefits for time previous to such notification unless the delay shall be shown to have been unavoidable. Employees will report to their Supervisor or designate upon resuming duties.

24.06 Verification of Illness

Medical verification may be requested from the employee requesting sick leave. Where such is required, the employee shall be notified during the illness that such verification is required upon the employee's return to work.

[Emphasis in original]

134. Although Arbitrator Ish did not come out and directly say as much, he found the "pending" code to be a violation of the collective agreement. He had this to say about the negotiated entitlement to sick leave benefits at paras 97-98:

> 97 The entitlement to sick leave benefits is a negotiated right under the collective agreement. In a very real sense, sick leave is different from other leaves of absence. The fact that there is pay for sick leave and it is a negotiated benefit in the collective agreement means that there was an economic bargain struck between the Employer and the Union. Thus, while there is no absolute entitlement to sick leave and there is an obligation on an employee to justify sick leave, it must not be unreasonably withheld.
>
> 98 It is clear that the Employer has a right to seek verification under Article 24.06 of the collective agreement but that clause does not expressly authorize withholding sick leave pay until verification is requested and received....

135. Arbitrator Ish held that the "pending" code, if used, must result in no denial of pay within the pay period unless the employer had grounds to challenge the appropriateness of the sick leave. Preferably, the "pending" code was not to be used but rather a "sick leave" code indicating absence because of illness or injury.

136. The provisions in the Collective Agreement govern entitlement to sick leave and sick leave benefits.

137. In *Re Providence Care, Mental Health Services and OPSEU, Local 431 (Winton)* (2011), 204 LAC (4th) 345 (Surdykowski), Arbitrator Surdykowski referred to his earlier decision in *Hamilton Health Sciences, supra,* by stating at para 22:

> It is also important to be clear about what I did and did not say in *Hamilton Health Sciences Corp. v O.N.A., supra*:
>
> ...
>
> - I observed that employees are obliged to attend work as scheduled and to provide notice of and a legitimate excuse for any absence from work in accordance with the collective agreement. **Sick leave benefits are available only to the extent that a collective agreement so provides, and an employee who seeks such benefits is obliged to produce objectively satisfactory proof of entitlement in that respect (paragraphs 23-24).** An employee who fails to do so may not be entitled to benefits, and although I did not mention it in *Re Hamilton Health Sciences, supra,* in appropriate circumstances runs the risk of discipline or even discharge.
>
> [Emphasis added]

138. In *Providence Care, supra,* the collective agreement provided for the accumulation of credits used for pay when the employee was absent from work due to sickness or injury, but did not set out any procedure to establish proof of entitlement.

139. Arbitrator Hope, in *Victoria Times-Colonist, supra,* went on to confirm that when the sick leave was address in the collective agreement, the inquiry must follow the negotiated procedure. Arbitrator Hope stated at paras 37-39 as follows:

> In *City of Windsor* [*Re Corporation of the City of Windsor and Ontario Nurses Association* (1985), 19 LAC (3d) 1 (McLaren)] the arbitrator identified that a demand for medical information by an employer raises in issue a conflict between the right of the employer to address the problem of absenteeism and the right of employees to maintain their privacy. In that context the arbitrator said en p. 6; "Absenteeism is one of the most intransigent problems for modern day employers. Its cost is high." The arbitrator concluded that an employer is entitled to take initiatives aimed at reducing absenteeism, including a right to respond to particular absences with more persistent and searching enquiries than in others.
>
> But in that context it is important to recognize that there is nothing inherent in the employer-employee relationship which vests in an employer a discretionary right to compel employees to compromise their right of privacy through the disclosure of personal medical information. In particular, that is not a discretion which falls within the retained rights concept which vests in an employer those rights coincidental with the management and direction of the enterprise and the work force which have not been bargained away. An employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer-employee relationship which justifies the intrusion.
>
> In the context of the benefits of sick leave and sick pay, an employer is entitled to require the employee to provide sufficient information to permit it to satisfy itself that a particular absence was for a *bona fide* sickness or disability. How searching that enquiry can become is a function of the particular facts. **The enquiry must be reasonable. Where sick leave and sick pay are addressed in the collective agreement, the enquiry must be in accordance with the provisions of the agreement.**
>
> [Emphasis added]

140. The seminal decision on the validity of rules that have been created and implemented unilaterally by the employer in the workplace is *Lumber & Sawmill Workers' Union v KVP Co.* (1965), 16 LAC 73 (Robinson) ("KVP"). The arbitration board held at para 34:

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.

5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.

6. Such rule should have been consistently enforced by the company from the time it was introduced.

141. The backdrop for the ruling in *KVP* was the discharge of an eight-year employee whose wages had been garnisheed three times in a seven-month period contrary to the company policy to garnishees. The policy stated that an employee on whose behalf the company was obligated to process more than one garnishee will be discharged. According to the ruling in *KVP*, the breach of a rule introduced without the union's consent will give rise to just cause for discipline only if the rule meets the requirements set out above.

142. The KVP Principles have been applied by courts as well as by arbitrators.

143. In *C.E.P., Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC, Abella J., on behalf of the majority of Supreme Court, stated at paras 22-26:

> [22] When employers in a unionized workplace unilaterally enact workplace rules and policies, they are not permitted to "promulgate unreasonable rules and then punish employees who infringe them" (*Re United Steelworkers, Local 4487 & John Inglis Co. Ltd.* (1957), 7 L.A.C. 240 (Laskin), at p. 247; see also *Re United Brewery Workers, Local 232, & Carling Breweries Ltd.* (1959), 10 L.A.C. 25 (Cross)).
>
> [23] This constraint arises because an employer may only discharge or discipline an employee for "just cause" or "reasonable cause" — a central protection for employees. As a result, rules enacted by an employer as a vehicle for discipline must meet the requirement of reasonable cause (*Re Public Utilities Commission of the Borough of Scarborough and International Brotherhood of Electrical Workers, Local 636* (1974), 5 L.A.C. (2d) 285 (Rayner), at pp. 288-89; see also *United Electrical, Radio, and Machine Workers of America, Local 524, in re Canadian General Electric Co. Ltd. (Peterborough)* (1951), 2 L.A.C. 688 (Laskin), at p. 690; *Re Hamilton Street Railway Co. and Amalgamated Transit Union, Division 107* (1977), 16 L.A.C. (2d) 402 (Burkett), at paras. 9-10; Ronald M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at paras. 10.1 and 10.96).
>
> [24] The scope of management's unilateral rule-making authority under a collective agreement is persuasively set out in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The heart of the "*KVP* test", which is generally applied by arbitrators, is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable (Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), vol. 1, at topic 4:1520).
>
> [25] The *KVP* test has also been applied by the courts. Tarnopolsky J.A. launched the judicial endorsement of *KVP* in *Metropolitan Toronto (Municipality) v. C.U.P.E.* (1990), 1990 CanLII 6974 (ON CA), 74 O.R. (2d) 239 (C.A.), leave to appeal refused, [1990] 2 S.C.R. ix,

concluding that the "weight of authority and common sense" supported the principle that "*all* company rules with disciplinary consequences must be reasonable" (pp. 257-58 (emphasis in original)). In other words:

> The Employer cannot, by exercising its management functions, issue unreasonable rules and then discipline employees for failure to follow them. Such discipline would simply be without reasonable cause. To permit such action would be to invite subversion of the reasonable cause clause. [p. 257]

[26] Subsequent appellate decisions have accepted that rules unilaterally made in the exercise of management discretion under a collective agreement must not only be consistent with the agreement, but must also be reasonable if the breach of the rule results in disciplinary action (*Charlottetown (City) v. Charlottetown Police Association* (1997), 1997 CanLII 4577 (PE SCAD), 151 Nfld. & P.E.I.R. 69 (P.E.I.S.C. (App. Div.)), at para. 17; see also *N.A.P.E. v. Western Avalon Roman Catholic School Board*, 2000 NFCA 39 (CanLII), 2000 NFCA 39, 190 D.L.R. (4th) 146, at para. 34; *St. James-Assiniboia Teachers' Assn. No. 2 v. St. James-Assiniboia School Division No. 2*, 2002 MBCA 158 (CanLII), 222 D.L.R. (4th) 636, at paras. 19-28).

144. In *C.E.P., Local 30, supra,* the company, which operated a craft paper mill unilaterally imposed random drug and alcohol testing for employees designated by the company as holding safety-sensitive positions. The majority of the Supreme Court of Canada held that the company did not show reasonable cause the random testing policy was justified. The Supreme Court of Canada stated at para 53:

> But where, as here, the employer proceeds unilaterally without negotiating with the union, it must comply with the time-honoured requirement of showing reasonable cause before subjecting employees to potential disciplinary consequences. Given the arbitral consensus, an employer would be justifiably pessimistic that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny.

145. The KVP Principles, while initially founded to deal with unilateral policies subjecting employees to discipline, has found its way in arbitral jurisprudence to unilateral policies in general.

146. In *British Columbia Teachers' Federation v British Columbia Public School Employers' Assn.* (2004), 79 CLAS 14 (Taylor), the union objected to certain forms used by the employer for applications for extended and partial medical leave. The union argued that certain parts of the forms were not reasonable or legitimate and invaded the privacy of the applicants for sick leave.

147. Arbitrator Taylor was attuned to the KVP Principles and stated at para 10:

> Absent contrary language in a collective agreement, it is open to an employer to make policies and rules governing its employees subject to certain generally recognized standards. Those standards, best articulated in *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.*,

> (1965) 16 L.A.C. 73 (Robinson), include the requirement that a unilaterally imposed policy or rule must be related to the legitimate business interests of the employer and must be reasonable.

D. Personal Health Information

148. Intermingled with the issue of whether the sick leave policy is a violation of the Collective Agreement and, whether the policy and its administration are reasonable, is the issue of the employee's right to maintain the confidentiality of personal health information. There is also the issue of the Employer's right to access such information for its business purpose of administering the sick leave program, preventing an abuse of sick leave, and returning the employee to the workplace in the regular or a modified position.

149. Arbitration Ish, in *Cypress Health Region, supra,* described the confidentiality of personal health information and the employer's need to access such information for legitimate business purposes as a careful balancing of interests. Arbitrator Ish stated at paras 83-84:

> The important determinations we are asked to make involve a careful balancing of interests. Arbitrators have attempted to balance the interests of an employee's right to privacy with respect to medical information against an Employer's legitimate business interests, including prevention of abuse of sick leave benefits. This is an area of arbitral law that has received considerable attention and has evolved considerably in recent years largely as a result of Canadian society's heightened awareness of privacy rights of individuals. This awareness has manifested itself in court cases, legislation and arbitral jurisprudence. In addition, while trustees of sensitive information commit to confidentiality and spend significant resources to protect confidential information, modern technology has allowed many very public breaches that have compromised the privacy of individuals. Thus, there is a concern about the very information itself being collected.
>
> In *Re Canada Bank Note, supra,* [*Canadian Bank Note Co. and IUOE, Local 772* (2012), 222 LAC (4th) 293], Arbitrator Surdykowski recognized the balancing of interests that occur when medical information is sought. He said at para 29 and para 31:
>
> > The sensitivity of confidential medical information is such that a conservative approach to require disclosure is appropriate. The least intrusive non-punitive approach which balances the employer's legitimate business interest and the employee's privacy interests is required. ...the employer is entitled to no more than the reasonably necessary information to establish that the employee was or is unable to work because he was or is ill or injured.
> >
> > ...but even if the collective agreement is silent the employer may be entitled in the first instance of every case to require sufficient medical evidence reasonably necessary for the purpose (ie. to justify the absence, or access sick leave benefits).

150. The amount of medical information an employer is entitled to access from an employee absent from work due to sickness or injury is not predetermined or fixed. One shoe does not fit all. It varies depending on the nature of the illness or injury and the duration of the absence from the workplace.

151. Generally speaking, the shorter the absence, the less medical information and *vice versa*. Arbitrator Ish in *Cypress Health Region, supra,* stated at para 84:

> We would add to the above that arbitrators have consistently found that the amount of medical information an employer may request for an extended leave or where accommodation issues are raised is different from short periods of absence due to illness and injury. Generally an employer's right to information increases the longer the leave (see for example the *Sibley* decision, *supra*). It is against the backdrop of numerous years of consideration of these important issues by various tribunals, in addition to the specific provisions of the collective agreement, that we approach [our] task in this case.

152. Arbitrator Ish, in *Cypress Health Region, supra,* preferred that the administration of sick leave policy and the disclosure of medical information be tailor-fitted to the employee on a stand-alone, case-by-case basis. Arbitrator Ish stated at paras 87-91 as follows:

> 87 The CHESS document on page two contains the following paragraph:
>
> When reporting an absence your manager will phone/follow up with you; on your next scheduled shift together you will determine what you are able to do and how you will be able to remain at work.
>
> 88 This paragraph says that a manager "will phone/follow up". As stated, it mandates a follow-up call and appears to remove from the manager any discretion with respect to contacting an employee. On its face, because it removes managerial discretion, the paragraph conflicts with established arbitral authority.
>
> 89 The evidence of the two managers who were called as witnesses for the Employer, Ms. Shelly Dawson Briere and Mr. Swanson, was that they contact employees on sick leave less than 50 percent of the time. The reason is that as managers they have direct and first-hand knowledge of employees, which often would include knowledge gained at the workplace of an illness. Also Mr. Swanson said that if his experience with an employee was that sick leave was rarely used he would be less inclined to phone an employee for an anticipated short leave.
>
> 90 **The arbitral authorities make clear that seeking medical information, whether it is a doctor's certificate or more information from an employee, must be determined on an individual case-by-case basis. For instance, even where there is a provision expressly stating that a medical certificate can be sought, an Employer "must still, on a case-by-case basis, determine whether, in light of the information it has available, the individual request is justified".** (*Peace Country Health v. U.N.A.* (2007), 89 C.L.A.S. 107 (Alta Arb.) [2007 CarswellAlta 2612 (Alta. Arb.)]. **Similarly, if an employee's manager**

> **knows, without a follow-up call to the employee, that a sick leave is justified, there should not be a blanket policy requiring such a call.**
>
> 91 It is our conclusion that the statement in the CHESS document that an employee's manager will phone or follow up should at least be modified to use the word "may" rather than "will". Also the latter part of the paragraph seems to suffer from the same deficiency as the sentence we address in the next section with respect to the "next day" return to work philosophy. It suggests that after an injury or illness an employee must attend at the next scheduled shift and discuss modified duties. As stated in such a blank fashion as being of universal application it is misleading. Clearly, there will be instances where employees because of injury or illness cannot attend at the next scheduled shift and, depending upon the particular situation of the employee, it would be improper for an employer to require such attendance. Thus, the paragraph as written at least must be revisited and reworded or removed completely. Similarly, the corresponding chart on page two must be revised.
>
> [Emphasis added]

E. Return to Work

153. There is nothing inherently wrong or unreasonable for an employer to explore the ability of the sick or injured employee to return to work with modified duties.

154. In this process, the employer is required to respect the employee's right to maintain personal health information in confidence. The employer may only request medical information that is reasonably necessary to establish the absence from work is due to sickness or injury. If it is reasonably necessary to request medical information, the employer must then proceed conservatively and require only the least amount of medical information reasonably necessary in the circumstances. The disclosure of an employee's personal health information in sickness and/or return to work is to be the least intrusive.

155. Arbitrator Ish, in *Cypress Health Region, supra,* stated at paras 103-104:

> **It is our view that there is nothing in the collective agreement that prevents the Employer from exploring with an employee who is on sick leave whether they may return to work if their regular duties are modified. If, for instance, a manager contacted an employee who suffered a sprained injury and was off work it would not be improper for the manager to discuss with the employee when they may return to work and what duties they might perform. While a sprain or even broken ankle may justify an employee being off work for a period of time for rest and recovery, it does not follow that they would have to be away from work for the entire period of time it took for the ankle to heal. Depending on an employee's normal duties, there may be a number of those duties that could easily be carried out with a sprained ankle. On the other hand, an employee's particular job may almost totally preclude their returning to work if they had a sprained ankle. In short, it is our view that a "full blown" accommodation**

> **situation as contemplated in Article 4.05 of the collective agreement need not exist before such an exploratory conversation may occur and medical restrictions information sought from an employee's physician or other health care provider.** However, we see a clear distinction between one-on-one conversations between a manager or a staff member from the Ability Management Unit and meetings that involve two, three or more management personnel meeting with the employee without Union representation. Clearly, the latter meetings are more formal which, in our view, require that an employee have in attendance a Union representative unless one is declined. The evidence of Ms. Wanda Malone was very compelling. She testified that in the meeting that she had with management personnel she cried throughout because she felt she was not being believed about her medical condition. There is no doubt that it was a very intimidating situation and one that should not have occurred without Ms. Malone having the opportunity to have a Union representative with her in the formal meeting.
>
> **It is very difficult for a board of arbitration to provide a blueprint for administration of sick leave policies, including return to work and accommodation matters. There is a continuum of three situations that flows from short term sick leave, to returning to work on modified duties to workplace accommodation often associated with long term disability. While the boundaries from one category to another are difficult to define, an employer's response to each situation should be different for practical reasons.** Some employers and unions have negotiated time periods which take a more relaxed attitude toward very short sick leave and an increasingly rigorous one as the leave becomes longer (see for instance *SaskTel and Unifor* (March 10, 2014, unreported, Ish). When an employee has suffered a serious injury or illness, or as in the case when Ms. Malone had surgery, it is reasonable to expect a short period of rest and recovery before even modified duties can be explored. It is likely that the underpinning that motivated the current grievance is the rigorous effort to get employees back into the workplace with modified duties within a very short period of time. While an employer is entitled to monitor sick leave and to minimize absences, the business case for an overly zealous approach falls away particularly when, as the evidence disclosed, there is no cost saving to the Employer because sick employee's duties had to be backfilled on a super-numery basis. It is true that often a sick employee was at work doing minimal duties but at no cost saving. This reduced sick leave hours but without a cost saving it is merely a journal entry. **The research shows that the sooner an employee returns to work the better they are able to readjust, but there must be some *de minimus* aspect to this. It is doubtful that it has much application when very short absences are involved.**
>
> [Emphasis added]

F. Cost of the HCP Form

156. The Collective Agreement is silent on who bears the cost of the medical certificate.

157. The Employer refers this Board to two cases in support of its position that in such circumstances it is the employee who bears the cost.

158. In *British Columbia Teachers' Federation, supra,* Arbitrator Taylor held in such circumstances the cost falls on the employee. Arbitrator Taylor stated at paras105-107:

> 105 In *Richmond Lions Manor and BC Nurses Union,* (1977) 61 L.A.C. (4th) 427 (Kelleher), the collective agreement allowed the employer to require a doctor's certificate for certain leaves. The union argued that the employer should bear the cost. At p. 430, the Arbitrator said:
>
> > When an employee is absent from work, the employee has an onus to establish specification for the absence. Thus, if there is a dispute the employee bears the onus of establishing illness as a reason for not being at work ...
>
> 106 The arbitrator went on to reject the claim that the employer should bear the cost of the medical certificate:
>
> > The Collective Agreement does not expressly state, and I am not able to infer, that it is the Employer who is responsible for paying for such a certificate. (p.432)
>
> > See to the same effect: H.J. Heinz Co. of Canada and UFCW, (1982) 4 L.A.C. (3d) 1 (Burkett); Brandon General Hospital and Manitoba Nurses' Union, Local 4, (1996) 56 L.A.C. (4th) 174 (Chapman); Vancouver (City) v. Vancouver Firefighters Union, Local 18, unreported, 2002 (Korbin).
>
> 107 Absent collective agreement provisions to the contrary, I conclude that the cost associated with the provision of the forms falls to the teacher claimant.

159. In *Richmond Lions Manor and BC Nurses Union* (1977), 61 LAC (4th) 427 (Kelleher), the employer exercised its right to require the employee who had been absent from work for more than three days because of sickness to provide a doctor's certificate. The cost of the certificate was $5.00 and the grievance claimed reimbursement for such costs. Article 35.06 of the collective agreement stated:

> 35.06 – Proof of Sickness
>
> Sick leave with pay is only payable because of sickness and employees who are absent from duty because of sickness may be required by the Employer to prove sickness. Failure to meet this requirement can be cause for disciplinary action. Repeated failure to meet this requirement can lead to dismissal. A doctor's certificate may be requested for each leave of more than three (3) consecutive work days.

160. Arbitrator Kelleher held the cost of a doctor's certificate in such circumstances was the responsibility of the employee, stating at para 28:

> An employee who has been absent for more than three days is required to provide a doctor's certificate if the Employer requests it. The Collective Agreement does not expressly state, and I am not able to infer, that it is the Employer who is responsible for paying for such a certificate.

VI. ANALYSIS

A. Sick Leave and Sick Leave Benefits

1. *Collective Agreement*

(a) Interpretation

161. Perhaps it is easiest to pose the questions first and then look to the words used by the parties themselves in the Collective Agreement and see if there is an unequivocal answer or any ambiguity.

162. In our view, for the reasons which follow, there is no ambiguity.

What is Sick Leave?

163. Article 18.01 unequivocally answers the question. Sick leave is the period an employee is absent from work because of being sick and disabled. This is the plain, literal and ordinary meaning of the words used and we see no reason to find any ambiguity or other meaning in such words. If there was a competing interpretation (which, in our view, there is not), the interpretation that gives way to reasonableness and avoids absurdity yields the same answer.

When is an Employee Sick or Disabled?

164. There is no definition of sick or disabled in the Collective Agreement. This comes as no surprise. The parties have recognized this and provided a mechanism to initiate the settlement of a dispute of whether there is an illness in Article 18.08. The Employer may dispute or question the claim that the employee is sick or disabled, and does so by requesting from the employee a "certificate of proof of illness from a licensed medical practitioner." The corollary is that if the employee says he or she is sick, he or she is sick unless challenged by the Employer and is unable to provide proof of illness from a licensed medical practitioner. We are satisfied from the review of arbitral jurisprudence that the employer cannot arbitrarily demand proof of the illness. There must be a basis for the demand, which must be reasonable in the circumstances. The extent of the disclosure of medical information in support of the illness must be the least intrusive to the personal

health information of the employee and only that which is reasonably necessary in the circumstances.

165. The parties have agreed upon the words "may require" not the words "shall require." Furthermore, the parties have not agreed that the medical certificate, even if required, is a condition precedent to sick leave and accessing sick leave credits at first instance. In other words, sick leave and the entitlement to access sick leave credits, to use the words of the Employer in this case, crystallize when the employee notifies the Employer pursuant to Article 18.09 that he or she is sick.

166. If the circumstances are such that there is a reasonable basis for the Employer to require a medical certificate under Article 18.08 and the proof is not forthcoming, or for that matter is successfully challenged and proven otherwise, then this may be a basis to deny the sick leave, and if sick leave credits have been used by the employee to maintain the regular income, the amount can be clawed back from the employee's subsequent pay. In summary, in this Collective Agreement, an employee is sick or disabled when they say so, until established otherwise.

When can an Employee Access Sick Leave Credits?

167. This question has been partially answered above. Article 18.03, in our view, is a complete answer to this question. Full-time employees "shall have access" to their sick leave credits "to maintain their regular income" when they are on "sick leave." First, consider the case of a short-term illness, which, in cases like that of the cold, flu or migraine, may be typically less than three days, or exceptionally five days or less. Unless there are suspicious circumstances that justify an employer to reasonably believe the employee is abusing the sick leave, there is likely no reasonable basis to require *ad hoc* medical proof of such illness and the access to sick leave credits to maintain their regular income is immediate. This is enshrined in the Collective Agreement. This changes the longer the employee is absent from work due to sickness.

Is Sick Leave Conditional?

168. In this Collective Agreement there is an obligation in Article 18.09 for the employee who will be absent from work by virtue of being sick or because of accident to notify his or her immediate supervisor of such illness as soon as possible, preferably no less than one hour prior to

the shift in question, unless the lack of giving notification can be shown to be unavoidable. In our view, this notification can be considered a condition of accessing sick leave and sick leave credits. Arguably, and sensibly so, the Employer needs to know the employee is sick and unable to attend work; otherwise, failing to provide such notification would entitle the Employer to record this as AWOL and absence without leave at first instance.

Is Sick Leave or Sick Leave Benefits Impacted by Article 18.12 entitled Graduated Return to Work?

169. Article 18.12 does not address accommodation or modified duties while on sick leave. In our view, it is a red herring to the issue of the duty to accommodate and the obligation of the Union, the Employer and the employee in getting the disabled or sick employee back to work during a short-term absence or sick leave or a long-term absence. What the Article is all about is what it says: "prior to returning to work" the employee is to meet with the Employer to identify the details surrounding the employee's return to work. In our opinion, it has no impact at all on the entitlement to sick leave and sick leave benefits. It has more to do with Article 19.01 than it has to do with sick leave and sick leave benefits. In most cases, in a short-term sick leave, the employee returns to his or her regular duties without any fanfare, except the chatter in the workplace that it was the worst cold or worst bout of the flu they have ever had. There is no need, nor for that matter any desire by either party, to "meet to identify the details surrounding" the return to work after the typical short-term sick leave.

170. In our view, the interpretation of the provisions in the Collective Agreement referred to above answers the questions posed effectively within the bounds of the Collective Agreement and in particular, Article 18. The interpretation is, in our view, fair and reasonable to the parties based on the parties' intentions as manifested in the words used in the Collective Agreement.

171. The words are given their plain, literal and ordinary meaning, and the result is, in our view, reasonable. There is no ambiguity. The words in the Collective Agreement and, in particular Article 18, weave and connect together in this interpretation.

(b) Application of this Interpretation to the Wellness Support Policies

172. In our view the Wellness Policies implemented on September 1, 2013 and the manner in which the Employer is administering the Policies is a violation of the Collective Agreement. The Wellness Support Policies are at complete odds with the Collective Agreement. We conclude this in two material respects.

173. The two-step calling procedure exceeds the obligation of the employee as set out in the Collective Agreement. Article 18.09 provides for only one call to the supervisor/nursing office/designate to notify the absence from work due to being sick or disabled.

174. There is no requirement in the Collective Agreement for the sick employee to make a second call before he/she can access the sick leave benefits. One call suffices.

175. The violation in the Collective Agreement is not a policy that requires a second call to a central location, but making the requirement of the second call a condition of accessing sick leave credits.

176. Article 18.03 provides full-time employees shall have access to sick leave credits to maintain their income on sick leave. It could have said "may" or words of less import, but it does not. In our view, there is nothing equivocal in "shall". The employee is on sick leave as defined in Article 18.01 when absent from work because of being sick and disabled. The only remaining condition is to make the one call referred to in Article 18.09 to give notice that he or she is sick or disabled.

177. In this case the two-step calling procedure goes even further than just requiring a second call. Based on the evidence heard, the second call is seldom answered by a live person. The message the caller leaves notifying of the absence from work due to illness/disability is not sufficient to complete the second call. The second call is not considered complete until the Wellness Centre responds to the employee at a later date "in person" and has the so called "adult conversation" surrounding the sickness/disability.

178. The second violation is somewhat intertwined with the Step 2 call. In our view, it is a violation of Article 18.03 to implement arbitrarily a policy coding or treating sick leave as

"unverified" until approved and verified by the Wellness Consultant. Until the sick leave is verified, the employee is denied access to accumulated sick credits and is denied the right to use these credits to maintain their regular income. In our view, the regular income is the income the employee would have received had the sick leave credits been accessed and paid in that same pay period. It is of no consolation that the Employer subsequently verifies the sick leave, and payment is made at a later date. From the evidence heard, it is often only at a much later date, after much effort, that the employee gets paid. The obligation of the Employer and the right of the employee is "to maintain their regular income when they are on sick leave." The Collective Agreement is breached when the employee is denied her or his right to be paid regular income during the same pay period and when on sick leave. The subsequent payment does not cure the violation

179. The entitlement to access the sick leave credits occurs when the employee notifies the supervisor/nursing office/designate that he/she will be absent from duty due to being sick or disabled. The Employer has the right to require the employee to submit proof of illness from a licensed medical practitioner if there is a reasonable basis for this request. The Employer has no right, by policy or otherwise, to code the sick leave as unverified and withhold access to earned sick leave credits. Sick leave credits are fully accessible to the employee when on sick leave. The Employer in this Collective Agreement cannot withhold access until such time as it "verifies" the sick leave in accordance with its own policy.

180. Put simply, the Employer cannot, by a policy, circumvent the sick leave and sick leave benefits the parties have negotiated and agreed to in the Collective Agreement without the further agreement of the Union. If it were able to do this it would render meaningless and make a mockery of the bargaining process and the agreement struck.

B. *Reasonableness*

181. Should we be wrong in our interpretation and application of the Collective Agreement to the Policies, we also find that the Policies and the administration of the Policies is unreasonable in the circumstances and is inconsistent with the Collective Agreement.

182. The inconsistencies are mostly in respect to Articles 18.01-18.03 and 18.08-18.09. Following the same reasoning concerning the Policies violating the Collective Agreement, these

Articles provide an agreed process for employees to access earned sick leave credits easily to maintain regular income when they are off work sick. In our view, the Policies are inconsistent with this process and appear both on the face of the Policies and its administration to frustrate access to the sick leave credits. This is especially so in the case of a short-term absence due to the likes of a cold, the flu or a migraine, where often the employee is back to work before getting the return call from the Consultant.

183. While in certain circumstances the Policies may be reasonable (for example, where the sick leave is for a longer duration), the blanket application of the Policies is unreasonable. The Policies are administered to each and every employee without discretion and without regard to the duration or nature of the sick leave.

184. While it is understandable from the Employer's perspective to comply with budget directives to reduce sick time, it cannot do this at the expense of unreasonably interfering with the employee's access to sick leave benefits as enshrined in the Collective Agreement.

185. We side with Arbitrator Denysiuk in *Five Hills Regional Health Authority, supra*, at para 144: an employer policy serving to dissuade an employee from exercising the agreed right to sick leave benefits is generally not permitted. In our view, this is what the application of the Polices is doing. In the Collective Agreement sick employees are entitled to a leave of absence and access to sick leave credits accumulated pursuant to Article 18.02 to maintain regular income while on sick leave. The Policies, in particular the Step 2 Call and marking the missed shift as unverified notwithstanding the employee has made the Step 1 Call required in the Collective Agreement, are designed to impede access to sick leave benefits and dissuade an employee from exercising such right. The Policies unreasonably set up hurdles not envisioned in the Collective Agreement to access sick leave benefits. In our view, this likely was the cause of Ms. Benson not pursuing the matter when she was not paid when she called in sick but had neglected to call the Wellness Centre. This is unreasonable in the circumstances.

186. We question whether these hurdles placed in all cases of sick leave reduce sick time or save the Employer the expense related to sick time in short-term absences. Consider an absence from work for three days or less due to the likes of a cold, the flu or a migraine, and there is no reasonable basis to suspect an abuse of sick leave. What possible saving is there to the Employer

by adding the extra layer of the Wellness Centre and the cost of the Consultants returning the second call to have a live conversation with the employee before the sick leave is verified? The Consultant, who does not need to have a medical background in health care, is to verify that an RN truly has the cold she says she has and it is for that reason she is unable or should not report to work. If there is any cost saving, it can only be at the expense of avoiding paying the employees that which they are entitled to be paid pursuant to the Collective Agreement. If this is the intent, or the result of the application of the Polices, it is unreasonable to do this through a unilateral implementation of a policy. This is a matter for the bargaining table.

187. If management wants to channel all sick leave absences and administer sick leave through the Wellness Centre, it can do so, but not at the expense of interfering with the negotiated rights of the employees, and not unreasonably.

C. Personal Health Information

188. The Employer has the right to require that the employee provide a certificate of proof of illness from a licensed medical practitioner. In this case, Article 18.08 speaks to this and states the Employer "may" require this certificate. However, this is not an absolute or arbitrary right to require such proof in each and every instance of a sick leave. There must be a reasonable basis to request the employee provide personal health information to prove the illness.

189. The other condition is that if the personal health information is reasonably required, the Employer is entitled to no greater disclosure of personal health information than the information reasonably necessary to establish the employee is sick or injured. The scope of the medical information increases with the length of the absence. The longer the absence, the greater the disclosure of information, but still it needs to be the least intrusive to the employee to establish medically that the employee is ill or injured and unable to attend regular or modified work.

190. Seldom, and unlikely universally, can the disclosure of personal health information be fitted to the requirement to complete and provide the medical form like HCP forms used by the Employer. We agree with Arbitrator Ish in *Cypress Health Region, supra*, that the medical information sought "must be determined on a individual case-by-case basis." It should be tailor-fitted to information reasonably necessary for the sick leave in question.

191. We agree with the position of the Union in that the medical information required by the Employer on the HCP forms would in most cases go far beyond what is reasonably required at the initial call stage to establish the illness is *bona fide*.

192. While we agree with Arbitrator Ish's statement in *Cypress Health Region, supra*, that "it is very difficult for a board of arbitration to provide a blueprint for administration of sick leave policies", we are of the view that as a general rule, unless there is a reasonable basis to suspect an abuse of sick leave, short-term absences of three days or less should not require completion of the HCP Forms.

193. In the case of Ms. Strom and her migraine, we are of the view there was no evidence that it was reasonably necessary to establish independently by way of a certificate or doctor's note that Ms. Strom was is sick, let alone to have it completed and returned, by no later than the end of the day. It was unreasonable for the Employer to make Ms. Strom jump through the hoops in this manner and provide the personal health information sought.

194. In the case of Mr. Friesen, we are of the view the Policy requiring him to have completed and delivered the HCP Form before verifying his sick leave for a two-day absence was unreasonable in the circumstances. The note from the doctor stating he was unable to return to work for the two days due to medical illness/ injury should suffice.

195. The Policy that the personal health information on the HCP Form is required to support the absence from work due to sickness/injury is not sensitive to the discretionary nature of the individual circumstances and the length of the absence. The Policy requiring the medical information in the form of the HCP is unreasonable. This is not to say the information sought in the HCP will always be unreasonable, rather that it is unreasonable to apply such policy rigidly to every request for medical information.

D. Sick leave and Return to Work

196. There is nothing inherently wrong or unreasonable for an employer to explore with the employee on sick leave the ability to return to work on regular or modified duties.

197. To the extent this exploration necessarily involves disclosure of personal health information, the same rules apply. There must be a reasonable basis to request the employee to provide the information and no greater information be requested than reasonably necessary when the sick or injured employee may return to work and what duties he/she is able to perform.

198. As a general rule, the accommodation process and the return to work to perform modified duties has less to do with short-term absences due to sickness or injury, and more to do with longer absences from work.

199. In our view, the accommodation process and return to work generally has nothing to do with the initial sick leave notification and the proof required to support the sick leave.

200. In our view, there is no reasonable basis for the Employer to request from the employee who calls in sick and will be absent from duty for a short period, medical information that relates to whether they perform modified duties while sick.

201. The HCP Forms and having the Consultant discuss short-term accommodation and initiating a return to work are unreasonable. The Policies mandate the Consultant have the conversation to determine if a short-term accommodation can be made. There is no discretion.

202. In the case of a sick leave of three days or less, it is unreasonable to talk about return to work modified duties in this period. In many cases the sick employee will already be back at work before there is the conversation with the Consultant.

203. The sick employee is entitled to sick leave and to access sick leave credits when on sick leave. We question what right the Employer has to deny the employee the right to sick leave credits when sick and unable to perform regular duties to explore and/or compel the sick employee to perform modified duties or work in a modified or another position.

204. In our view this would run counter to the provisions of this Collective Agreement. Article 18.03 gives a sick employee the right to access sick leave credits and maintain regular income while on sick leave. There is no obligation to return to work if sick. Article 18.06 addresses the difference between sick leave and accessing sick leave credits and sick leave when the credits have expired. In our view, the accommodation and return to work in this Collective Agreement is better

suited to the Article 18.06 situation of the employee on sick leave where sick leave credits have expired.

E. Cost of HCP Forms

205. We accept the general rule is the employee bears the cost of the medical certificate to establish the illness unless the collective agreement provides otherwise.

206. The Collective Agreement provides the employee, when required, is to "submit proof of illness from a licensed medical practitioner."

207. This is the only proof required by the Collective Agreement. We see no reason this proof need be anything more than a doctor's note setting out that the employee is sick and unable to attend work and perform regular duties due to illness. The employee bears the cost of the providing this doctor's note.

208. In our view, in the circumstances of this case, the cost of providing the completed HCP Forms is a different issue. The HCP Forms were not necessary to establish the employees' access to sick leave credits. The medical information sought in the HCP Forms went far beyond the certificate of proof of illness prescribed by the Collective Agreement. The employees should not have to bear the cost of obtaining unnecessary information. That said, there was not enough evidence before us to establish that the employees actually suffered a loss in this regard. We are not prepared in these circumstances to make a blanket order that the Employer reimburse all employees for medical verifications.

VII. CONCLUSION:

209. For the foregoing reasons the grievance is sustained. The Policies are a violation of the Collective Agreement and are unreasonable. The Employer is ordered to cease administering the Policies. We are not prepared to make any order to make whole the monetary loss sustained by any employees resulting from the Employer's administration of the Policies. The evidence, while satisfying us the Policies are unreasonable and a violation of the Collective Agreement, falls short of establishing actual monetary loss other than the delay in payment. We are also of the same view

regarding the claim to reimburse all employees for the cost for medical verifications. No order is made regarding this.

DATED this 23rd day of September, 2016.

William F.J. Hood, Q.C., Chairman

Dale Markling, Union Nominee

Eric Sarauer, Employer Nominee
Eric Sarauer does not concur in this Award

APPENDIX I

PRINCE ALBERT PARKLAND HEALTH REGION

Employee Health, Safety and Wellness
1521 – 6th Avenue West, Prince Albert, Saskatchewan S6V 5K1
Phone: 306-765-6644 Fax: 306-765-6446

HEALTH CARE PRACTITIONERS (HCP) ABILITIES FORM

Definition: Health Care Provider (Family Physician / Physician Specialist / Nurse Practitioner / Chiropractor / Physiotherapist / Registered Psychologist / Dentist)
Employee please forward completed form to the Organizational Wellness Consultant
Fax: 306-765-6446

**NOTE: This is the only form Prince Albert Parkland Health Region recognizes and accepts for absences from work due to injury/illness. This form can be obtained from your employer or Health Care Provider. Prince Albert Parkland Health Region is not requesting diagnosis, but will request prognosis to ensure the return to work is completed in a safe, healthy and timely manner.*

First Name: _____ Last Name: _____ Occupation: _____ PAPHR Facility: _____

Date assessed by Health Care Provider: _____

Nature of Illness: (A general statement of a person's illness or injury in plain language without any reference to diagnosis and symptoms)

_____

IS THE ILLNESS OR INJURY: ☐ **WORK RELATED** ☐ **NON WORK RELATED**

PLEASE HAVE THE WORKER CONTACT THE PAPHR ORGANIZATIONAL WELLNESS CONSULTANT AT 306-765-6644 or toll free at 1-855-345-6644

WORKER CAN WORK WITH RESTRICTIONS:

Prince Albert Parkland Health Region is willing to provide temporary accommodations for all workers based on objective medical findings from a Health Care Provider. **IN YOUR OPINION, ARE THERE WORKPLACE ACCOMMODATIONS OR MODIFICATIONS THAT WOULD ALLOW YOUR PATIENT TO CONTINUE TO WORK?** ☐ YES ☐ NO

TYPE OF DUTIES YOUR PATIENT COULD PERFORM: ☐ Administrative ☐ Light Duties ☐ Sedentary

PLEASE IDENTIFY PHYSICAL RESTRICTIONS BASED ON WORKER'S JOB AND YOUR OBJECTIVE MEDICAL ASSESSMENT:

****** If there are no restrictions indicated we will assume that the worker is able to return to work without any job modifications ******

☐ Standing (prolonged > 45min without opportunity for break)	☐ Lifting (# of lb/kg)	☐ Stooping/Bending
☐ Sitting	☐ Push/pull	☐ Squatting/Kneeling
☐ Reaching	☐ Stair climbing	☐ Environmental/Infectious

☐ Reduction in hrs/shift (*specify*): _____

☐ **Refer to Occupational Therapist/Physiotherapist for Assessment:** _____

☐ Other (*If behavioral/psychological, please refer to appropriate health care provider*) _____

*** Employee if behavioral/psychological, please have Health Care Provider complete (Behavioral/Psychological Working Abilities Form) on reverse ***

Reminder: PAPHR offers free services through its Employee Family Assistance Plan (EFAP) at 1-800-663-1142

ESTIMATED DATE OF RETURN TO FULL DUTIES: _____

WORKER UNABLE TO WORK AT ALL:

Is it your medical opinion that the worker is too ill to perform any tasks related to his/her job? ☐ YES ☐ NO

LENGTH OF TOTAL DISABILITY TIME: Number of days _____ **OR** Number of shifts _____

ADDITIONAL COMMENTS: _____

NAME OF HEALTH CARE PROVIDER: _____ SIGNATURE : _____ DATE: _____

NAME OF MANAGER: _____ SIGNATURE: _____ DATE: _____

VOLUNTARY SECTION:

This release applies only to the current medical condition. I authorize all physicians and medical practitioners involved in the assessment, investigation and treatment of the medical condition(s) affecting absence from work to provide the Prince Albert Parkland Health Region with the information required for them to ensure my safe and timely return to work. I hereby permit and authorize my employer to receive a summary of my functional status, including all restrictions, limitations and/or modifications necessary to implement my safe return to work. I agree to remain available for work and will perform modified work that is within my limitations and restrictions, provided my work is approved by a licensed medical practitioner.

WORKER SIGNATURE: _____ DATE: _____

PRINCE ALBERT PARKLAND HEALTH REGION IS NOT RESPONSIBLE FOR ANY COSTS RELATED TO OBTAINING AND COMPLETING OF MEDICAL CERTIFICATE(S)

Revised: Sept 9., 2014

PRINCE ALBERT PARKLAND HEALTH REGION

Employee Health, Safety and Wellness
1521 – 6th Avenue West, Prince Albert, Saskatchewan S6V 5K1
Phone: 306-765-6644 Fax: 306-765-6446

BEHAVIORAL / PSYCHOLOGICAL ABILITIES FORM

Definition: Health Care Provider (Family Physician / Physician Specialist / Nurse Practitioner / Chiropractor / Physiotherapist / Registered Psychologist / Dentist)
Employee please forward completed form to the Organizational Wellness Consultant
Fax: 306-765-6446

**NOTE: This is the only form Prince Albert Parkland Health Region recognizes and accepts for absences from work due to injury/illness. This form can be obtained from your employer or Health Care Provider. Prince Albert Parkland Health Region is not requesting diagnosis, but will request prognosis to ensure the return to*

First Name: _____ Last Name: _____ Occupation: _____ PAPHR Facility: _____

Date assessed by Health Care Provider: _____

Nature of Illness: (A general statement of a person's behavioral/psychological illness in plain language without any reference to diagnosis and symptoms)

_____

*****PLEASE IDENTIFY BEHAVIORAL/PSYCHOLOGICAL RESTRICTIONS BASED ON WORKER'S JOB AND YOUR OBJECTIVE MEDICAL ASSESSMENT*****

****** If there are no restrictions indicated we will assume that the worker is able to return to work without any job modifications ******

Does the employee have a behavioral/psychological illness impacting their ability to attend work? ☐ Yes ☐ No
***** If Yes, please indicate the LENGTH of time Employee is unable to attend work ***** _____

Is the employee on medications that would impact their ability to attend work? ☐ Yes ☐ No
***** If Yes, please indicate the LENGTH of time Employee is unable to attend work ***** _____

Is the employee participating in an ongoing treatment plan? ☐ Yes ☐ No
***** If Yes, please indicate the LENGTH of treatment plan***** _____

Reminder: PAPHR offers free services through its Employee Family Assistance Plan (EFAP) at 1-800-663-1142

ESTIMATED DATE OF RETURN TO FULL DUTIES: _____

WORKER CAN WORK WITH RESTRICTIONS:

Prince Albert Parkland Health Region is willing to provide temporary accommodations for all workers based on objective medical findings from a Health Care Provider. **IN YOUR OPINION, ARE THERE WORKPLACE ACCOMMODATIONS OR MODIFICATIONS THAT WOULD ALLOW YOUR PATIENT TO CONTINUE TO WORK?** ☐ YES ☐ NO

TYPE OF DUTIES YOUR PATIENT COULD PERFORM: ☐ Administrative ☐ Light Duties ☐ Sedentary

ADDITIONAL COMMENTS: _____

NAME OF HEALTH CARE PROVIDER: _____ SIGNATURE : _____ DATE: _____

NAME OF MANAGER: _____ SIGNATURE: _____ DATE: _____

VOLUNTARY SECTION:
This release applies only to the current medical condition. I authorize all physicians and medical practitioners involved in the assessment, investigation and treatment of the medical condition(s) affecting absence from work to provide the Prince Albert Parkland Health Region with the information required for them to ensure my safe and timely return to work. I hereby permit and authorize my employer to receive a summary of my functional status, including all restrictions, limitations and/or modifications necessary to implement my safe return to work. I agree to remain available for work and will perform modified work that is within my limitations and restrictions, provided my work is approved by a licensed medical practitioner.

WORKER SIGNATURE: _____ DATE: _____

PRINCE ALBERT PARKLAND HEALTH REGION IS NOT RESPONSIBLE FOR ANY COSTS RELATED TO OBTAINING AND COMPLETING OF MEDICAL CERTIFICATE(S)

Revised: Aug 27, 2014