

**IN THE MATTER OF AN ARBITRATION  
BETWEEN:**

**ONTARIO POWER GENERATION**

**("the Employer")**

**-and-**

**THE SOCIETY OF ENERGY PROFESSIONALS**

**(the "Union")**

**AND IN THE MATTER OF A POLICY GRIEVANCE REGARDING BASE HOURS FOR  
PROJECT SITE MANAGERS AT EASTERN OPERATIONS**

**Louisa M. Davie**

**Sole Arbitrator**

**Appearances**

**For the Society:**

**Jeff Andrew**

**For the Employer:**

**Tom Moutsatsos**

### **Award**

Ontario Power Generation ("OPG") employs Project Site Managers ("PSM"). The base hours of work of a PSM can be either 35 or 40 hours per week. Whether employed on a 35 or 40 hours per week basis the duties and responsibilities of the PSM are identical. The responsibilities of a PSM include supervisory responsibilities over other OPG employees, including those represented by the Power Workers' Union ("PWU") and the work of contractors and trades on site. PSMs may have responsibility for remote areas and often several locations. All persons employed as PSMs are represented by the Society of Energy Professionals ("the Society") and covered by a collective agreement between OPG and the Society.

### **The Issue**

OPG maintains it has the Management Right to determine whether a PSM position is a 35 hours per week or a 40 hours per week position. The issue in this case is whether OPG has fettered that right when it entered into a December 6, 2006 agreement entitled "OSPG Agreement – Change In Hours of Work – OSPG Project Site Managers" (hereafter "OSPG Agreement").

The Society asserts this is an agreement which has ongoing effect and requires that OPG employ only 40 hours per week PSMs at the Ottawa St. Lawrence Plant Group which is now called Eastern Operations (hereafter the plant group will be referred to as either "OSPG" or "Eastern Operations"). By reason of the agreement OPG is precluded from making the PSM position at Eastern Operations a 35 hours per week position. In the grievance the Society seeks to enforce the OSPG Agreement to ensure that the base hours of work for all PSMs in Eastern Operations is 40 and not 35 hours per week.

OPG asserts that the OSPG Agreement is a without prejudice and precedent agreement executed to address specific circumstances. The agreement is of limited application and does not extend beyond the circumstances which existed at the time of its execution. Those circumstances have changed. In the document the parties state specifically that their agreement is "without prejudice and precedent... to either party's position in current and future matters of similar or identical nature". This grievance deals with the hours of work of PSMs and is clearly a matter of a "similar or identical nature." Therefore, as a without prejudice or precedent agreement, the document can't be used or relied upon in the grievance filed. The OSPG Agreement also can't be used to prohibit OPG from exercising its management rights to determine that certain PSM positions are properly 35 hours per week positions and not 40 hours per week positions.

#### History of the Grievance

The grievance which gave rise to this arbitration was initially filed as an individual grievance by C. Hamel in January 2015. In that grievance the Society objected that Mr. Hamel was the only PSM in Eastern Operations who was in a 35 hours per week PSM position and states that Mr. Hamel was working 5 hours of overtime each week. As relief the Society requested that Mr. Hamel be placed in a 40 hours per week PSM position "to be consistent with all of the other Project Site Managers Eastern Ops." The evidence indicates that Mr. Hamel was the first PSM to be placed in a 35 hours per week PSM position since the December 6, 2006 agreement was signed.

By the date of the first day of hearing Mr. Hamel had vacated the PSM position and moved into a management position excluded from the bargaining unit. As a result, the Society indicated that it was no longer seeking a remedy for Mr. Hamel. The Society however noted that since 2015, as PSMs who had been in 40 hours per week positions retired or moved to other positions, OPG was replacing them with 35 hours per week PSMs. The Society therefore sought to amend the individual grievance to a policy

grievance to address the broader issue as to whether the December 6, 2006 OSPG Agreement prohibited OPG from scheduling PSMs as 35 hours per week employees. Although the amendment was initially opposed by OPG the parties were eventually able to resolve that matter and the grievance before me proceeded as a policy grievance.

### The Agreement At Issue

The terms of the agreement state as follows

#### LOCAL AGREEMENT

##### CHANGE IN HOURS OF WORK – OSPG PROJECT SITE MANAGERS

To do business efficiently at Ottawa – St. Lawrence Plant Group, management requires OSPG Project Site Managers to regularly work a 40 hours week to meet the work demands of their job duties. As a result, the parties hereby agree on a without prejudice and precedent basis to either party's position in current and future matters of similar or identical nature, the following terms and conditions specific to OSPG:

1. Effective December 7, 2006 the base hours of work for the Project Site Managers at OSPG will be changed from 35 to 40 hours per week. The incumbents will move from Salary Schedule 01 to Salary Schedule 11 at the same performance level.
2. This agreement is specific to the circumstances of OSPG.
3. The requirement for 40 hours is NOT based on supervising 40 hours workers.
4. This Agreement applies to the regular Project Site Managers at OSPG. It does not apply to regular 35 hours per week employees who may be assigned to provide relief or act in a rotation as a Project Site Manager at OSPG. Any hours assigned in excess of 35 hours in this role will be paid at appropriate overtime rates.
5. This agreement is subject to the approval of the EVP –Hydro (signature required below).

The OSPG Agreement was signed on December 6, 2006 on behalf of OPG by Mike Gilbert, OSPG Plant Group Manager and John Murphy, EVP –Hydro and by Joe Fierro, Society Unit Director – Hydro on behalf of the Society. Although signature lines for others were not included on the document, on December 12, 2006 and December 13, 2006 the Agreement was also signed by 3 of the 4 employees who were then working as PSMs at OSPG.

### The Society's Evidence

Mr. Joe Fierro, current Vice President for the Society, testified about the origins and drafting of the OSPG Agreement.

It was his evidence that in early 2006, Mr. John Murphy, the Executive Vice President for Hydroelectric at OPG initiated Hydro/Society Partnership Meetings to improve OPG's relationship with the Society, to share information, and to enable the Society to raise issues of concern. In that context Mr. Fierro raised with Mr. Murphy a concern raised by the PSMs employed by OPG in its Northwest Plant Group ("NWPG"). Those PSMs worked in 35 hours per week positions. The PSMs in the NWPG were working significant amounts of overtime. As overtime was not pensionable earnings the PSMs wanted their base hours of work increased to 40 hours per week so that, rather than receiving overtime pay, their pensionable base pay would be increased.

Mr. Fierro discussed the matter with Mr. Murphy. In turn Mr. Murphy tasked local management and Human Resources at NWPG to reach agreement with the Society on the issue.

In due course, after several drafts were exchanged, the 2 parties signed an agreement entitled "NWPG Agreement. Change in Hours of Work – NWPG Project Site Managers" (hereafter "NWPG Agreement").

I do not propose to set out the various back-and-forth exchanges between the parties. There are material language differences in the agreement entered into with respect to the PSMs at NWPG and the OSPG Agreement at issue in this case affecting the PSMs at Eastern Operations. The portions of Mr. Fierro's evidence with respect to the NWPG Agreement relied upon by the Society can be briefly summarized.

First, Mr. Fierro testified he discussed with Mr. Murphy the rationale for having the base hours for PSMs at NWPG increased from 35 to 40 hours per week. It was Mr. Fierro's evidence that he specifically discussed with Mr. Murphy the fact that the PSMs were working significant overtime and wanted that overtime to be part of their base hours of work so that it would count as pensionable earnings. In this context Mr. Fierro testified also that the goal was to make the PSM position more attractive because in the NWPG the PSMs worked in remote locations. An increase in base hours with the corresponding effect on pensionable earnings would make the position more attractive.

Mr. Murphy did not draft the NWPG Agreement. That task fell to Ms. Joanne Fulkerson, Human Resources Manager for NWPG. Mr. Fierro testified that he recalled a specific discussion with Ms. Fulkerson about the things which needed to be in the agreement in order for it to be a Local Agreement that the NWPG Manager could sign. Mr. Fierro testified that he advised Ms. Fulkerson that it was to be a Local Agreement because the Society wanted this to be a permanent change that PSMs "working in Northwest going forward would be 40 hours workers." It was to be ongoing and therefore a Local Agreement was needed to effect a permanent change. "This is the normal process we used for permanent change as opposed to a settlement."

Neither Mr. Murphy nor Ms. Fulkerson said anything in response to Mr. Fierro's stated objectives. Ms. Fulkerson responded to Mr. Fierro to say only that the agreement had to be without prejudice and precedent so that it couldn't be used at a different Plant Group, and that OPG "wanted something only applicable to Northwest." As Mr. Fierro understood that OPG wanted the agreement to be limited to the NWPG he was not surprised and expected to see the words "without prejudice and precedent" in the agreement.

In cross examination it was put to Mr. Fierro that the NWPG Agreement clearly indicated on its face that it applied only to the NWPG so that it was unnecessary to have a "without prejudice and precedent" provision to achieve that result. Mr. Fierro responded that the without prejudice and precedent reference would also prohibit anyone from using the agreement in other circumstances such as a job challenge by an employee. The employee could not use the NWPG Agreement to say I do the same things as the PSM in the NWPG so I should be treated in a similar manner.

Mr. Fierro testified that all of his conversations about the NWPG Local Agreement were with Ms. Fulkerson. In this regard he recalled that there was also a discussion about the rationale underlying the requirement to work 40 hours and that OPG wanted it clearly understood that it was not based on the fact that the PSMs supervised some PWU workers who worked 40 hours.

When asked in examination in chief whether the agreement was time-limited or applicable only to specific PSMs Mr. Fierro testified that the agreement was not time-limited "it was a permanent change both parties agreed to." It was his further evidence that "it was intended to apply to all regular Site Managers at the time and in the future who were regulars in the Site Manager position."

An August 27, 2006 email from Mr. Art Robb, the Project Manager for the NWPG, and the Supervisor of the PSMs affected by the NWPG Agreement, suggests that in his view the NWPG Agreement was of limited application and applied only to the 3 incumbents and the positions they then held. Mr. Robb was not called as a witness and there is no evidence before me to indicate that he was involved in the negotiations or drafting of the NWPG Agreement.

The NWPG Agreement was signed late August 2006 by Mr. Gary Whitney, NWPG Plant Group Manager and Mr. John Murphy, Executive VP – Hydro on behalf of OPG, and by Mr. Fierro on behalf of the Society.

A few months later, at a Partnership Meeting in November 2006, Mr. Fierro raised the same issue on behalf of PSMs employed by the OSPG with Mr. Murphy and Mr. Scott Martin, VP Hydro Human Resources and Employee Safety. By this time Mr. Fierro had spoken to the PSMs at OSPG and they had indicated to him that they also wanted to have their base hours increased to 40 hours per week and wanted the same type of agreement as the PSMs at NWPG.

Mr. Fierro testified that he explained to Mr. Murphy the reasons for his proposal to have the PSMs at the OSPG become 40 hours per week workers and that the PSMs wanted to have the same Local Agreement. He advised Mr. Murphy that he, Mr. Fierro, had spoken to the Supervisor of the PSMs at OSPG and that both the Supervisor and the employees supported the change in base hours.

Following that conversation Scott Martin circulated a draft agreement to Mr. Fierro and Mike Gilbert the OSPG Plant Manager. That initial draft was modeled on the NWPG Agreement. Ultimately certain changes were made and the OSPG Agreement



referenced above was signed by Mr. Fierro, Mr. Gilbert, Mr. Murphy and 3 of the 4 PSMs then working at OSPG.

For purposes of this award it is relevant to note the differences between the NWPG and OSPG Agreements, and the evidence of how those changes came about, because that evidence relates to the respective positions of the parties regarding the interpretation, duration and applicability of the OSPG Agreement.

First, whereas the NWPG Agreement specifies that "effective August 31, 2006 the base hours of work for the three Project Site Managers at NWPG will be changed from 35 to 40 hours per week" the OSPG Agreement at issue in this case does not specify the number of PSMs whose hours of work will be changed.

The evidence before me indicates that in the first draft of the OSPG Agreement the number "5" was specified before the words "Project Site Managers" in paragraph 1. Ultimately the parties agreed not to include any number when referring to the PSMs whose hours were to be changed. Mr. Fierro testified that the issue of whether to include a number was discussed after Scott Martin circulated the first draft of the OSPG agreement. It was Mr. Fierro's evidence that both parties agreed not to include a specific number of PSMs whose hours would be changed. However, Mr. Fierro's evidence suggests that the reasons for not specifying a number appeared to be different for the 2 parties. On behalf of the Society Mr. Fierro testified "we wanted to make it more generic because it was not going to apply just to those 5, but to those 5 and future hires." He stated that his concern was the number of PSMs could be "greater or less and it would still apply to whoever was a Site Manager in Ottawa." It was his further evidence that the OPG representatives with whom he discussed the OSPG Agreement were concerned that if the number "5" was included OPG would always have to have 5 PSMs at OSPG.

Another difference between the NWPG and OSPG Agreements is that in the body of the former the parties list certain reasons outlining why it was a requirement for PSMs to work 40 hours per week. The OSPG agreement at issue in this case does not list any reasons in the body of the Agreement. Mr. Fierro testified that the OPG representatives didn't want to include reasons for the PSMs to work 40 hours per week in the OSPG Agreement in order "to avoid future issues around why do it and why not do it. If we created reasons others might say I want it for that reason." It was his evidence that the initiative not to include reasons came from OPG and in the end both parties agreed not to include specific reasons for the change in the body of the Agreement.

With respect to the negotiations Mr. Fierro also testified that the OSPG Agreement was not time-limited stating "it was a permanent change. Project Site Managers would be 40 hours going forward." It was his un-contradicted evidence that matter was discussed with Scott Martin and John Murphy. Mr. Fierro testified "I specifically told them I wanted to make the same permanent change in Ottawa that we made in Northwest... The reason we did it that way was so both parties signed off on that permanent change as opposed to some gracious management action for specific individuals."

Mr. Fierro therefore testified that he did not know why some of the PSMs at Eastern Operations signed the Agreement. It was his evidence that he signed the OSPG Agreement first and left it for Scott Martin to have the OPG representatives sign. He was unaware that anyone other than OPG management would be signing the OSPG Agreement, or that OPG wanted the PSMs to sign it. From his perspective the signatures of the PSMs were not required. When he signed the Agreement he bound the Society.

Finally, I refer to Mr. Fierro's evidence that following the execution of the NWPG and OSPG Agreements OPG created a new job document for 40 hours per week PSMs.

Prior to the execution of these two Local Agreements there was only one job document for PSMs and it referred only to a 35 hours per week position. As there would now be 40 hours per week PSMs a new job document was created so that for such purposes as the pay system, job postings etc. the 40 hours per week job document, with its separate job code, could be used.

The job document created indicates it was created for "Hydro/NWPG; Hydro/OSPG" and that it was "created from, but does not replace" the job document for the 35 hours per week PSM position. As noted at the outset there are no differences in the job functions or job descriptions in the 35 or 40 hours per week PSMs job documents.

#### OPG's Evidence

OPG did not call any evidence from any witness directly involved in the negotiation or drafting of either the August 2006 NWPG Agreement or the December 2006 OSPG Agreement at issue in this case. Instead, consistent with its position that the OSPG Agreement is not an agreement with ongoing effect, but a a without prejudice and precedent agreement with respect to certain issues dependent on local circumstances existing at the time it was entered into, OPG called evidence dealing with the context or circumstances which existed, and evidence which addressed whether those circumstances continue to apply. In this regard I heard the evidence of Mr. David Baker, Mr. Bruce Burwell and Mr. Jason Spencer.

In the circumstances of this case I do not propose to set out their evidence in detail. It is enough to note the main aspects of their evidence. First, the current circumstances at Eastern Operations are such that there is no business requirement for PSMs to regularly work 40 hours per week. This is due in part to the on-site presence of PWU represented Contract Monitors who work 40 hours per week. Therefore, the PSM is not necessarily required to be on-site when other contractors are working on site.

Secondly, the evidence of the OPG witnesses also confirmed that in the past 3 years the Eastern Operations PSMs (whether they are in a 35 hours per week or a 40 hours per week position) have not worked excessive amounts of overtime. Given the nature of the job overtime for these positions varies from time to time and is dependent on specific circumstances.

The evidence confirmed also that overtime hours worked are not pensionable earnings. Therefore, for OPG, because base hours paid and worked are pensionable, it is less costly to compensate employees by paying overtime for hours in excess of 35 hours per week rather than utilizing employees who work 40 base hours per week.

### Submissions

Counsel for both parties agreed that the context surrounding the OSPG Agreement was important in interpreting the agreement and determining its application. However, each had a different perspective of which aspects of the context were significant or relevant to interpretation of the OSPG Agreement.

### The Society's Submissions

The Society submitted that on its face the OSPG Agreement is not time-limited. Neither is its application restricted to certain individuals or incumbents. There is nothing in the language of the OSPG Agreement to suggest that it does not continue to apply to the PSMs in Eastern Operations. The evidence indicated, the "without prejudice and precedent" reference is only a geographic or Plant Group limitation which prohibits the Society from using the OSPG Agreement in other areas of the province or with other Plant Groups.

Counsel referred to the context which gave rise to the OSPG Agreement. As Mr. Fierro testified the agreement arose out of an initiative by OPG to improve relations with the Society. That initiative first triggered the Society to request that the base hours for NWPG PSMs be increased to 40 hours per week so that more hours would be pensionable. A Local Agreement for the PSMs in the NWPG was reached following discussion by the parties about the reasons why an increase in base hours was desirable. The NWPG Agreement gave rise to the OSPG Agreement at issue in these proceedings. In negotiating the OSPG Agreement Mr. Fierro again indicated to OPG representatives that the reason for an increase in base hours was because the PSMs wanted an increase to their pensionable hours.

Society counsel maintained that it was significant that a representative for OPG involved in the negotiations or drafting of the OSPG Agreement was not called to testify. Counsel argued that an adverse inference should be drawn from that fact. Mr. Fierro's evidence about the context which surrounded the NWPG and OSPG Agreements, and the stated reasons for entering into the OSPG Agreement, remained un-contradicted. The agreement was entered into to ensure an increase in pensionable hours for the PSMs. Although OPG could have denied the request of the PSMs, OPG agreed to an increase in base hours as part of its initiative to improve relations between the parties.

Given this context, and in the absence of any evidence to the contrary from any OPG witness involved in the negotiations of the NWPG or OSPG Agreements, and in the absence of any language in the OSPG Agreement suggesting otherwise, the only reasonable interpretation of the OSPG Agreement is that it was to have permanent effect. Base hours for the PSMs in Eastern Operations were to increase to 40 hours per week.

That the OSPG Agreement was to have ongoing effect and was not time-limited in its application, nor limited to specific individuals, was evident also from the conduct of OPG following execution of the OSPG Agreement. OPG drafted a new job document for 40 hours per week PSMs. For 7 years following its execution all PSMs hired or placed into PSM positions in Eastern Operations were 40 hours per week PSMs. That changed with the placement of Mr. Hamel into a 35 hours per week PSM position and the Society immediately filed a grievance about that.

Counsel referred to article 70 of the collective agreement which is entitled "Alternate Hours of Work Arrangements" in support of the Society's position that the collective agreement contemplates the type of Local Agreement at issue in this case.

Article 70 includes definitions of standard hours of work and normal hours of work. Article 70.3 defines standard hours of work as 35, 37.5 or 40 hours per week and specifically states that "in the absence of any other agreed upon arrangements these are the hours which will be worked." The "normal hours of work" are defined to be "either the standard hours of work or another arrangement as agreed-upon using this process." Counsel for the Society therefore argued that the collective agreement provides for the parties to negotiate specific arrangements regarding hours of work. That is what the parties did in this case. The provisions relied upon by the Society were as follows:

## **70 Alternate Hours of Work Arrangements**

### **70.1 Principles**

...

70.1.3 That processes for negotiating and establishing hours of work arrangements will be uniform across OPG, and accessible to all. The processes will be designed to ensure equitable treatment. However the

results of applying the processes may differ from location to location and unit to unit.

70.1.4 That decisions should be made at the most appropriate level that is closest to the work being done.

...

## **70.5 Process**

### **70.5.1 Identify Need for Change**

Identification of the desire for change can come from Management, an individual or a group. A request to change business hours would normally come from Management whereas a request to change working hours would normally come from an individual or group. Where a change to the hours of work for a group is being considered, the Society will be informed and involved in the discussions.

### **70.5.2 Communicate Need for Change**

A request for a change should be communicated to the other party in order that deliberations can begin. Requests will be actively considered by the other party within a reasonable period of time. The process will be joined (Society and Management) and will use a collaborative approach in which the needs and interests of the parties are discussed in an open and honest manner and decisions are made by consensus.

...

### **70.5.5 Decision**

All decisions will be reached by consensus. If consensus is not achieved then the existing "normal" hours remain in effect.

...

### **70.5.6 Negotiations/Approvals**

Negotiations and/or approvals should occur at the appropriate level closest to the situation. The line Director will determine the appropriate level of Management approval and in all cases the Management approval must be outside of the bargaining unit. If necessary, Letters of Understanding will be established between Management and the Society to document normal hours of work or normal business hours.

All parties to negotiations under Article 70 should negotiate with the support of principals who will ultimately approve negotiated conditions.

**70.5.7 Implementation**

Implementation will be on a trial basis initially for an agreed-upon length of time and with appropriate cancellation provisions. Criteria for success or/failure must be established.

Society counsel asserted that 70.1.3 and 70.1.4 clearly indicate that alternate hours of work should be negotiated at the Plant Group level. That was done in this case. Article 70.5.1 specifies the process to be followed. It acknowledges that a request for an arrangement can come from an individual or group as was the case with both the NWPG and OSPG Agreements. As required by 70.5.1 the Society was involved. As outlined in 70.5 .1 the need for the change was communicated by Mr. Fierro and the Society. The objectives of the Society were discussed and were met with favour when Mr. Murphy directed local OPG Management representatives to reach agreement with the Society. Pursuant to 70.5.5 a consensus decision was achieved. Most importantly, in keeping with 70.5.6, approval was granted and the OSPG Agreement was signed by Mr. Murphy. Under 70.5.6 and 70.5.7 the agreement was documented and implemented. Counsel submitted that the parties did not do this on a "trial basis" under 70.5.7. Instead they agreed to a permanent arrangement which OPG can't unilaterally change. In the result, if OPG wants to alter the documented arrangement with respect to the hours of work for the PSMs at Eastern Operations, it must do so in collective bargaining.

Society counsel submitted in the alternative that the Employer was estopped from altering the weekly hours of work of PSMs in Eastern Operations.

It was Mr. Fierro's un-contradicted evidence that the parties agreed to enter into the OSPG Agreement to effect a permanent change in the PSMs hours of work. The negotiations which led to the OSPG Agreement, and the terms of the OSPG Agreement itself, were representations that OPG would exercise its right to schedule the hours of



work of PSMs in a particular manner. For 7 years following the execution of the OSPG Agreement OPG acted in a manner consistent with those representations. It did not raise the issue during collective bargaining. In detrimental reliance on those representations the Society also did not seek changes at the bargaining table and was denied the opportunity to bargain about the matter. In the circumstances, and until the expiration of the current collective agreement, OPG was estopped from exercising any management prerogative to make the PSM positions at Eastern Operations 35 hours per week positions.

In support of these various submissions the Society relied upon ***Ontario Power Generation Inc. and The Society of Energy Professionals – Policy Grievance OPGN– 2006 – 5077*** (unreported decision of arbitrator Surdykowski dated January 20, 2011); ***Ontario Power Generation and The Society of Energy Professionals – Policy Grievance OPGN-2010 – 5706/1538***, reported at 2013 Can LII 87655 (Surdykowski); ***Ontario (Ministry of Government and Consumer Services) and Ontario Public Service Employees Union*** (2016), 269 L. A. C. (4th) 111 (Dissanayake); ***Sault Ste. Marie (City) and Amalgamated Transit Union, Local 1767***, 2014 CarswellOnt 17774, 121 C. L. A. S. 162 (Hayes); ***Family and Children's Services of Lanark, Leeds & Grenville and Canadian Union of Public Employees, Local 2577***, 2016 CarswellOnt 18170, 129 C. L. A. S. 118 (Goodfellow); ***Weyerhaeuser Chapleau v. IWA - Canada, Local 2995*** (2001) 98 L. A. C. (4TH) 150 (Tacon); ***Creston Moly Corp v. Sattva Capital Corp.***, 2014 SCC 53, (SCC).

### **The Employer's Submissions**

Counsel for the Employer agreed that the context surrounding the execution of the OSPG Agreement was relevant. He asserted however that the relevant context was not to be determined having regard to Mr. Fierro's evidence. Rather, the context was to be determined having regard to the surrounding circumstances and the language in the

OSPG Agreement which was used by the parties. That context indicated that the OSPG Agreement was only to apply to specific circumstances which existed at the time of its execution and was not to continue indefinitely or in perpetuity. In this regard counsel submitted that little weight should be given to Mr. Fierro's evidence because that evidence did not disclose a shared or common intent or understanding between the parties that the OSPG Agreement would continue indefinitely unless changed by the parties in negotiations.

It was OPG's position that Mr. Fierro's evidence did not address the core issue in dispute between the parties in this case, namely, whether the parties had a mutual understanding that the OSPG Agreement would continue indefinitely unless the parties negotiated a different agreement or negotiated the expiry of the OSPG Agreement. Instead, Mr. Fierro's evidence addressed only the objectives or goals which the Society sought to achieve in negotiating the OSPG Agreement. Mr. Fierro testified that the Society wanted a permanent change in hours for the PSMs but did not testify that OPG representatives agreed that the change in hours would be permanent or ongoing. No doubt it was Mr. Fierro's belief and understanding that the OSPG Agreement would apply to the incumbent PSMs and future PSMs, but his evidence did not go so far as to indicate that OPG shared that understanding. (With respect to the need for a shared or common understanding for evidence to be relevant OPG counsel referred to and relied upon ***Ontario Power Generation and the Society of Energy Professionals -Policy Grievance 2010-5705/1538*** supra; and ***Ontario Power Generation Inc. and the Society of Energy Professionals, Grievance of Susan Sloan OPGI-2016-6502/2251*** unreported decision of arbitrator Stout dated October 30, 2017)

It was OPG counsel's submissions that an adverse inference should not be drawn from the fact that an OPG representative was not called to give evidence about the negotiations or the drafting of the OSPG Agreement. Those who were involved in drafting the OSPG Agreement had retired and were no longer employed by OPG. More

importantly it was the Society's burden to prove that the parties intended the OSPG Agreement to apply indefinitely or until it was renegotiated. Mr. Fierro's evidence did not meet that burden of proof as he detailed only the Society's goals and objectives in entering into the agreement, or his belief with respect to the effect of the agreement. Mr. Fierro's evidence did not go to the issue as to whether the OSPG Agreement was intended to have ongoing effect. He did not, for example, testify that either John Murphy or Scott Martin agreed with him, or stated to him that the OSPG Agreement would be permanent or have ongoing effect on all PSMs in Eastern Operations, including those to be hired in the future. An adverse inference should not be drawn when the evidence led by the Society did not meet the burden of proof imposed on the Society and did not establish a common or mutual understanding with respect to the duration of the OSPG Agreement.

It was OPG's position therefore that the primary source for assessing the terms of the OSPG Agreement, particularly its duration and whether it was intended to have ongoing effect, was the language of the OSPG Agreement. In this regard counsel submitted that it would take clear language both to limit OPG's right to manage its enterprise and determine the hours of work of employees at Eastern Operations, and to conclude that such a fetter on management's right to do so was ongoing until a different agreement was negotiated. It was asserted that the OSPG Agreement did not contain such clear language. Neither did the surrounding context lead to the conclusion that OPG had fettered its rights or foregone the right to place PSMs in Eastern Operations in 35 hours per week roles.

Counsel argued that the first sentence of the OSPG Agreement set out the intention of the parties. It sets out the overriding consideration from which the remainder of the agreement flows. The intent of the parties, and the basis for the OSPG Agreement, was for OPG "to do business efficiently." The sentence references the fact that management "requires" the PSMs to work 40 hours per week "to meet the work demands of their job."

Counsel submitted that this language is inconsistent with any notion that the OSPG Agreement goes on indefinitely unless changed by negotiations between the parties. Instead the language indicates the Agreement does not apply where OPG determines it is more efficient to conduct its business differently and no longer requires PSMs to work 40 hours.

OPG counsel referenced the second sentence which commences with the words "as a result." Those words indicate that the second sentence flows from the first. Thus, it was the OPG's position that because of the matters set out in the first sentence, the parties entered into a without prejudice or precedent agreement. Where those matters no longer apply, where Management does not "require" the PSMs to work 40 hours "to do business efficiently", the agreement can no longer be applied. The OSPG Agreement clearly states it is without prejudice and precedent to other matters of "similar or identical nature." The nature of this grievance clearly falls within that description.

Counsel disputed the Society's position that the "without prejudice and precedent" reference was to prevent the Society from using the OSPG Agreement in another Plant Group. On its face the OSPG Agreement clearly states it applies only to OSPG (the title refers to OSPG Project Site Managers and recites that it is "specific to OSPG" and the PSMs "at" OSPG) so that the without prejudice and precedent language was not necessary to restrict the agreement only to OSPG.

It was OPG's position also that the language of paragraph 2 of the OSPG Agreement was indicative of the fact that it applied only to the circumstances which existed at the time. That paragraph also suggests that if circumstances change the agreement is no longer applicable.

In this regard counsel referred also to an email exchange between Scott Martin and Joe Fierro in which Mr. Martin, in context of referring to the first draft of the agreement, indicates he has highlighted the number of PSMs as "... I was not certain of the exact number of incumbents this applies to." Counsel submitted that from this it is evident that it was not Mr. Martin's intention and understanding that the OSPG Agreement would continue indefinitely unless the parties negotiated a change. Rather the email suggests that the Agreement applied only to the incumbent PSMs.

Finally counsel noted the fact that a number of the PSMs then working at OSPG also signed the agreement. It was highly unusual for incumbents to sign off on a document intended to apply not only to them, but also to future PSMs.

OPG counsel responded also to the Society's position that OPG's conduct following execution of the OSPG Agreement was past practice evidence which could assist in the interpretation of the OSPG Agreement and was evidence upon which the Society based its claim of estoppel. The fact that the Employer hired 3 individuals into 40 hours per week PSM roles in the years following the OSPG Agreement was not evidence of a clear and consistent practice that the Employer had foregone its rights under the collective agreement to schedule PSMs to either 35 or 40 hours per week positions. The mere fact OPG exercised its right in a specific manner which was not inconsistent with the collective agreement did not constitute a representation that it will always exercise its rights in that manner. It did not freeze any practice of hiring PSMs only into 40 hours per week positions. (***Ontario Power Generation and the Society of Energy Professionals -Policy Grievance-OPGN-2010-5640*** (unreported decision of arbitrator Surdykowski dated December 13, 2012))

Counsel emphasized also the evidence of the Employer witnesses which indicated that there had been substantial change to the context and surrounding circumstances under

which the OSPG Agreement was signed so that it could no longer be said to be applicable to the current circumstances. Mr. Baker testified the business no longer requires PSMs to work 40 hours per week. Both Mr. Baker and Mr. Burwell provided consistent evidence about PSM staffing in Eastern Operations and the overtime worked over the past few years by the PSMs. It was the Employer's position that OPG no longer requires PSMs to regularly work 40 hours per week to meet the work demands of their job duties. As that was context and the premise of the OPSG Agreement the Agreement was no longer applicable.

In response to the Society's reliance on article 70 of the collective agreement, it was OPG's position that 70.5.7 speaks of a trial basis and establishing criteria for success/failure. That was not done in this case. Counsel referred also to article 70.5.8 which states:

**70.5.8 Monitor**

The trial will be monitored and evaluated against the criteria. The accountable manager is responsible for monitoring the arrangement.

Following a successful trial. The hours (business hours of work) used in the trial period will become the new normal hours.

Monitoring of key indicators will continue to ensure that the arrangement remains viable.

In the event that the viability ceases to be realized, as determined by either party, the hours of work will revert to the previous "normal" hours unless the parties can jointly find another mutually acceptable alternative. When either party is making a determination about viability it must consider the previously established criteria for success/failure.

Here there had been no monitoring or evaluation against established criteria. More significantly, if the OSPG Agreement was negotiated under article 70, then the entire article 70 should apply. The final paragraph of article 70.5.8 clearly indicates that where, as here, OPG no longer views an Alternate Hours of Work Arrangements to be viable, it

can revert to the previous "normal" hours. As the arrangement ceases to be viable because OPG doesn't require PSMs to work 40 hours per week, the default is a reversion to the base 35 hours per week that the PSMs worked prior to the OSPG Agreement

In reply to this last submission it was the submission of Society counsel that in this instance the parties negotiated an Agreement which did not include either a trial period or ongoing monitoring. The parties were free to negotiate such an arrangement as neither a trial basis nor the monitoring are compulsory or mandatory. Having chosen not to provide for a trial or monitoring OPG can't now rely on 70.5.8 to deviate from the OSPG Agreement.

### **Decision**

I accept OPG's submissions that it has the right to assign and reassign employees to meet its business needs provided that it does so in a manner consistent with the collective agreement (see ***New Horizons Systems Solutions and The Society of Energy Professionals*** – Grievance Regarding Article 102, unreported award of arbitrator Trachuk dated April 11, 2010.) That right includes the right to determine whether an employee is placed in a 35 hours per week or a 40 hours per week position.

The issue in this case is whether OPG has circumscribed that right when it comes to the assignment of PSMs in its Eastern Operations. The Society maintains that in its Eastern Operations the December 6, 2006 OSPG Agreement restricts OPG from assigning PSMs to 35 hours per week positions. OPG maintains it does not because the OSPG Agreement is a without prejudice or precedent document, limited to specific circumstances and incumbents, and is not applicable to current circumstances in Eastern Operations.

I am unable to accept OPG's position that Mr. Fierro's evidence should not be given any weight because he did not offer evidence of a mutual understanding about the application or duration of the OSPG Agreement. There is some evidence of mutuality as in his examination in chief Mr. Fierro testified that he discussed with Scott Martin and John Murphy that it was to be a permanent change and there is no evidence before me to suggest that OPG rejected or disagreed with that request for a permanent change. However, given my view of the language of the OSPG Agreement, I do not propose to address the submissions of the parties as to whether an adverse inference should be drawn from the fact that neither Mr. Murphy nor Mr. Martin testified.

I do not accept counsel's submissions that the email exchange between Mr. Martin and Mr. Fierro is evidence that there was not a mutual understanding between the parties about the applicability of the OSPG Agreement and that the email is evidence the Agreement was intended to apply only to the PSM incumbents working at OSPG at the time. I have come to this conclusion for two reasons. First the email relied upon by OPG is Mr. Martin's email concerning the very first draft of the OSPG Agreement which was, as he says in his email, a "straw dog" to facilitate discussion. The final OSPG Agreement signed by the parties does not specify the number of incumbents. Even if Mr. Fierro's evidence with respect to the reasons why there is no reference to the number of incumbents affected is interpreted to only relate to the Society's views and beliefs on this issue, there is no evidence before me to indicate why OPG omitted the number of incumbents from the final agreement signed. Secondly, I note that in the same email Mr. Martin also says "This is specific to the OSPG situation and does not have bearing on any other Project Site Manager positions with Hydro." That statement is equally consistent with Mr. Fierro's evidence that the without prejudice and precedent reference was intended to preclude the parties from relying upon the OSPG Agreement in other areas of the province or with other PSMs or other Plant Groups.



I have concluded that the issue raised in this case can be determined having regard only to the language used by the parties in the OSPG Agreement. I have also determined that the OSPG Agreement restricts OPG from placing PSMs in Eastern Operations in 35 hours per week roles. The OSPG Agreement requires instead that the base hours of work for PSMs at Eastern Operations be 40 hours per week. I have arrived at this conclusion for a number of reasons.

First, there is no expiry date for the OSPG Agreement. There is nothing in the language used to suggest the agreement is of limited duration. There is no provision to indicate the OSPG Agreement will cease to have effect at any time, or if circumstances change, or if a certain event or circumstance exists. Simply put, with respect to duration, the language of the OSPG Agreement is open-ended. The parties did not provide for a trial period. They did not provide for periodic review. There is nothing in the OSPG Agreement to say it will be reviewed if circumstances change, in a specified timeframe, or at specified intervals. In my view the language does not limit application of the OSPG Agreement to a specific point in time.

I do not accept OPG's submissions that the OSPG Agreement is predicated solely on OPG's business needs so that the agreement can be changed when those business needs change. The preamble upon which OPG relies in support of this position can equally be read to say that the OSPG Agreement is being entered into because it is doing business efficiently to change the PSMs base hours to 40 hours per week.

Moreover, if it thought it necessary to do so for business efficiency, OPG did not need to enter into a Local Agreement with respect to the base hours of work for PSMs in order to affect the change in hours. OPG has the Management Right to determine whether a position is a 35 or 40 hours per week position in any event. The rationale for the two parties to agree to the OSPG Agreement therefore can't simply be limited to OPG's

business needs. It must also be, at least in part, and as the Society maintains, that at the time the parties agreed that it was desirable to increase the base hours so that the employees' pensionable hours were also increased.

Second, the language of the OSPG Agreement does not indicate its application is limited to specific individuals. Although paragraph 1 refers to "Project Site Managers at OSPG" and "incumbents" the entirety of that paragraph can equally be read as indicating only that the parties have agreed to change the base hours of the PSM's ("will be changed") and because of that agreement those currently in the position will be moved from the salary schedule applicable to 35 hours per week employees to the salary schedule applicable to 40 hours per week employees ("will move").

In this regard it is important to note also that the OSPG Agreement is not a Memorandum of Settlement agreed upon to resolve a grievance. The genesis for the OSPG Agreement was not a grievance filed by or on behalf of an individual PSM, or as a group or policy grievance filed by the Society. The Agreement was entered into because of OPG's initiative, through its Partnership Meetings, to improve its relationship with the Society. That context suggests that the OSPG Agreement was intended to create a binding legal obligation of some duration and not just a short-term solution to a particular problem affecting only particular individuals. This is also the conclusion to be drawn from the fact that the Executive Vice President – Hydro was required to sign the agreement. That type of requirement is not typical in a Memorandum of Settlement intended to affect only certain individuals or certain grievors.

As the genesis for the OSPG agreement was not a grievance filed by some or all of the PSMs I have also not attributed much weight to the fact that some of the PSMs signed the Agreement. I note also that not all PSMs at OSPG at the time signed the agreement. Those who did signed some time after the representatives for OPG and the

Society signed. Provision for signature lines for the PSMs was not on the document signed by OPG and the Society representatives when they signed. In the circumstances of this case the addition of the signatures of some of the PSMs did not add anything to the OSPG Agreement. A binding agreement was in place when the OPG and the Society representatives signed.

Finally, it is my view that paragraph 4 of the OSPG Agreement suggests also that the change in base hours is not restricted to the incumbents at OSPG at the time the Agreement was entered into. That paragraph states that those providing relief or doing a rotation in the PSM role, who would otherwise be 35 hours per week employees, remain as 35 hours per week employees while acting in a relief role or on a rotation. Consistent with the first paragraph that provision also suggests that the base hours for the PSM positions at OSPG, and not merely the base hours of incumbents, have been changed. In paragraph 4 the parties in effect have specifically agreed that persons providing relief or on rotation will not assume the base hours of the position.

In the result I have concluded that the December 6, 2006 OSPG Agreement continues to apply. It requires that the base hours of work for the Project Site Managers at Eastern Operations be 40 hours per week. I do not consider it necessary to determine whether the OSPG Agreement was entered into pursuant to the provisions of article 70 of the collective agreement, or merely in furtherance of the respective rights of OPG to manage its business and the Society to represent bargaining unit members. The only finding that is necessary is that an Agreement with ongoing effect was entered into by OPG and the Society. The Agreement remains in effect until the parties have an opportunity to again negotiate its terms. Given my determination with respect to the language of the OSPG Agreement I also need not specifically determine the Society's alternative estoppel argument.

I will remain seized in the usual manner in the event the parties experience any issues with respect to the implementation of this award.

Dated at Mississauga this 19th day of November, 2018.

*Louisa Davie*  
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Louisa M. Davie