IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *ONTARIO LABOUR RELATIONS ACT*

BETWEEN:

BLOORVIEW SCHOOL AUTHORITY
"the Employer/School"

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4400
"the Union"

- and -

HOLLAND BLOORVIEW KIDS REHABILITATION HOSPITAL
"the Intervener/Hospital"

RE: POLICY GRIEVANCE C-10050 - FLU VACCINE

PRELIMINARY AWARD - III

Paula Knopf – Arbitrator

Appearances:

For the Employer:	Melanie D. McNaught, Counsel Danny Parker, Student-at-law Michael O'Keefe, Director
For the Union:	Howard Goldblatt, Counsel Mika Imai, Counsel
For the Intervenor/Applicant:	John Field, Counsel Diane E. Jozefacki, Counsel Judy Hunter, Vice President Human Resources, Organizational Development & Business Affairs

The hearing of this matter was held in Toronto on January 19, 2016.

This Preliminary Award deals with the Union's motion to require the Employer to proceed first with the presentation of evidence.

This is the third Preliminary Award in this matter. The merits of the case involve the Union's challenge of the Employer's enforcement of an Influenza Vaccine Policy [the Policy] requiring members of the bargaining unit to be vaccinated annually against influenza or wear a mask in certain designated areas during the flu season. The Employer operates a school [the School] located within the Bloorview Kids Rehabilitation Hospital [the Hospital] premises. The first Preliminary Award granted Intervenor status to the Hospital in this hearing. It had developed the Policy and is demanding that the Employer enforce it with this bargaining unit; see *Bloorview School Authority v. Canadian Union of Public Employees, Local 4400*, 2015 CanLII 362 (ON LA).

The second Preliminary Award denied the Union's request that I accept into evidence all the expert medical evidence that was presented to Arbitrator Hayes in the *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) [the *Sault Area Hospital* case], including the transcripts of the *viva voce* testimony of the six expert medical witnesses who were called to testify, their supporting exhibits, their reports, and their "Will Say" statements; see *Bloorview School Authority v. Canadian Union of Public Employees, Local 4400*, 2015 CanLII 85031 (ON LA).

While the context of this case has been set out in the previous Preliminary Awards, it should be summarized again as follows. The Employer/School provides educational programs for students who have physical, rehabilitation, communication and/or complex medical needs. The School is located on the ground floor of the multi-level Hospital. The School has a license from the Hospital to operate within its premises. The bargaining unit consists primarily of educational workers. The Hospital is a separate legal entity. It adopted and implemented an

Influenza Policy for its own employees that had been developed by the Toronto Academic Health Science Network. The Hospital requires the School, as its licensee, to implement and enforce this Policy with its staff and this bargaining unit. The Employer indicated in the course of this hearing that it made an independent decision to apply the Policy to this bargaining unit and that it also did so as a result of its contractual obligation to abide by the licencing agreement with the Hospital.

This grievance challenges the application and enforcement of the Policy by the Employer on this bargaining unit. This is a small bargaining unit, consisting of only seven people. At the time of this hearing, five members of the bargaining unit have opted not to take the vaccine and are objecting to being made to wear a mask in certain designated areas during the flu season. A Policy grievance was filed when the Vaccine Program came into effect in late 2014.

The grievance reads as follows:

> I/We the undersigned claim that the Employer has violated the collective agreement, including but not limited to Articles D, The Human Rights Code, including but not limited to ss. 5, 11, The Canadian Charter of Rights and Freedoms including but not limited to ss. 2(b), 7, 15, the Municipal Freedom of Information and Protection of Privacy Act, the Freedom of Information and Protection of Privacy Act, the Personal Health Information Protection Act 2004, and any other relevant provision or legislation by, on October 14, 2014 the Employer announced that its new Influenza Vaccine Program ("the policy") would be applied to Employees of the bargaining unit [sic]. Among other requirements, the Policy requires employees to be vaccinated annually against influenza, or wear a mask in certain designated areas during the entire flu season.
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> The Union reserves the right to rely on any other articles of the collective agreement that may also apply in all of the circumstances.
>
> Therefore I/we request that the Board cease and desist in this practice, a declaration that the School Authority has violated the Collective Agreement and legislation set out herein, an order that

> the School Authority cease and applying the Policy to members of the bargaining unit, an order that the School Authority refrain from imposing any mandatory vaccinations or 'vaccinate or masking' policies on members of the bargaining unit, an order that the School Authority compensate members of the bargaining unit, plus full and acceptable redress [sic].

Early on in these proceedings, before the issuance of the first Preliminary Award, the Union was ordered to provide particulars of the allegations it intended to make in support of its case. The Union provided the following particulars on a "without prejudice" basis, with the caveat that its case could be modified or amended depending on the outcome of the Intervenor Application.

> 1. There has been no valid basis for establishing a "blanket policy" at Holland Bloorview Hospital or in the Authority. The Hospital is simply relying upon a position adopted by the Toronto Academic Health Sciences Network. There is no history of influenza outbreak at the Hospital or the Authority and no evidence that the health of the patient population at the Hospital or the students at the Authority "cannot be managed" in the absence of the universal requirement set out in the vaccination policy.
>
> 2. Without prejudice to the foregoing, there is no evidence that the voluntary immunization of the employees of both the Hospital and the Authority has not been or would not be sufficient to provide "herd immunity" in respect of influenza and in the absence of an outbreak which is referenced above.
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> 3. Without prejudice to the foregoing, even if the policy has been properly adopted and implemented in the Hospital, the members of the bargaining unit represented by Local 4400 cannot be bound by a policy implemented by a stranger to that relationship particularly where, as here, and for the reasons set out above, there is no objective evidence of any reasonable basis for the implementation of this policy.
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> 4. In the alternative, and without prejudice to the foregoing, the policy imposed by the Hospital on the Authority is unreasonable and contrary to the provisions of the collective agreement. There is no evidence that the Employer considered in any way the need for such a policy with the student population served by the employees in the bargaining unit, many of whom come from outside of the Hospital and in respect of whose attendees, parents, bus drivers, other transportation providers, etc. there is no requirement for immunization.

5. In the further alternative, and without prejudice to the foregoing, the definition of patient care area as set out in the policy is unreasonably broad and would essentially require that the employees either be vaccinated or wear masks in all areas of the Authority and the Hospital, including those areas where there is a reasonable prospect of a mix of "outsiders", who may not have been vaccinated and who are not required to wear masks, and employees.

6. The students attending the Authority, while requiring rehabilitation, are not necessarily medically fragile and are, in many cases, less medically fragile than students served by other members of Local 4400 employed at various facilities run directly by the Toronto District School Board. There is no evidence that the student population at the Authority requires, by its nature, the "protection" afforded by the immunization policy, particularly where, as mentioned above, there is no history of outbreak or an inability of the Hospital or the Authority to provide appropriate infection control.

In the early stages of this case, the Employer provided the Union with some "pre-hearing production", such as the background information regarding the development of the Policy by the Toronto Academic Health Science Network, the Policy itself, the Hospital's correspondence with the Employer and copies of the information provided to the bargaining unit about the Policy. There were no further requests for production or information from the Union other than the questions raised in this proceeding that will be addressed below.

With that background, we can turn to the issue at hand, which is the Union's request that the Employer be made to proceed first with the presentation of evidence.

The Submissions of the Union

The Union submitted that "fairness and efficiency" would be achieved if the Employer and the Hospital were required to proceed first with the presentation of evidence. Acknowledging that it will carry the ultimate burden of proof in this case, the Union stressed that there is a difference between the onus of proof and the order of proceedings. The Union asserted that the circumstances of this case are unique and call for a reversal of the normal order of proceedings because the

Policy that is being enforced is not the Employer's, but instead has been developed and is being imposed by the Hospital, which has no contractual relationship with this bargaining unit. Drawing from the first Preliminary Award dealing with the Hospital's request for Intervenor status in this case, the Union put great emphasis on the following statements in that Award:

> On October 20, 2014, the Hospital sent a formal notice to the School advising that as part of the Hospital's commitment to keep its patients safe and reduce the spread of influenza, the Hospital would be implementing the Policy at the Hospital during the upcoming 2014-2015 influenza season. It also advised the School that as an organization operating in the Hospital with patients of the Hospital, the School was required to ensure that its organization followed the Hospital's Policy as well. On October 22, 2014, the School sent a written memorandum to students' parents and/or guardians, advising them that the Hospital's Policy would be implemented at the School. . . . .
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> The case at hand is somewhat unique in that it involves a third party to the Collective Agreement under which I have been appointed, where that third party and the Employer are seeking to enforce the third party's policy [on] the bargaining unit.
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> The Union's particulars indicate that part of its case will include the allegation that the definition of 'patient care area' as set out in the Policy is "unreasonably broad." If that allegation succeeds, the Hospital will be unable to have its Policy enforced in the part of the physical building where the School is located and/or where some of its personnel may be providing care to its patients. The Hospital is seeking to defend the application of its Policy to this area and maintains that it will be only able to provide the unique perspective of its concerns if it is accorded Intervenor status. The Hospital also asserts that the rationale for the Policy is rooted in concern for the health and safety of all its patients. Whether or not this is a reasonable position is yet to be determined by a consideration of the merits of the case.
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> . . . . as an exercise of my broad discretion over the conduct of this proceeding, I grant the Hospital Intervenor status in this matter. However, for the sake of all the parties, it is imperative that the scope of this hearing be limited to the issues that affect this bargaining unit. Accordingly, the Hospital is granted status for the limited purpose of explaining and defending the rationale for insisting upon the application of its Influenza Policy to the members of this bargaining unit. As a consequence of this ruling, the Hospital will be bound by the results of this hearing.

> Before concluding, it should be said that I do not intend to allow this hearing to evolve into an examination of the Policy beyond that scope of its application to members of the School's bargaining unit.

These statements from my first Preliminary Award are the basis for the Union's argument that the fundamental issue in this case is the rationale behind the Hospital's application of its Policy on this bargaining unit which is within the particular knowledge of the Employer and the Hospital. The Union submitted that the reason why the Policy is being enforced is not something that it can "remotely know". Therefore the Union stressed that the Employer and the Hospital should be required to proceed first, not to defend the policy in general, but to explain why it is being imposed on this bargaining unit.

Further, the Union sought clarification from the Employer as to whether it adopted and implemented the Policy with respect to this bargaining unit simply because of the School's contractual obligations with the Hospital. If that is the case, the Union suggested that there will be no requirement for expert evidence regarding the scientific rationale for an Influenza Vaccine Policy. The Union suggests that this case could then be presented and argued on the basis of contractual principles alone. Alternatively, if the Employer also made its own determination to apply this Policy, the Union argued that it would be appropriate for the Employer to lead that evidence before the Union was called upon to refute it.

Recognizing that the information that the Union seeks about how or why the Employer decided to impose the Policy on this bargaining unit could be obtained either by way of particulars or by having the Employer and the Hospital proceed first, the Union argued that given the fact that we have several days scheduled for hearing in the next few months, it would be "more efficient" to simply have the Employer and the Hospital proceed first so that the Union could then respond to the rationales and evidence presented.

The Union also suggested that the Hospital is unlikely to concede that any decision made by this Arbitrator would be binding on the Hospital with regard to its own employees. Therefore, it was argued that this hearing should not be about the Policy itself or its application in the Hospital.

The Union also pointed out that if any member of this bargaining unit were to be subjected to disciplinary sanctions for refusing to comply with this Policy, such an employee would file a grievance resulting in a hearing where the Employer would be required to proceed first and justify the reasonableness of the discipline based on the Policy. Therefore, drawing upon the principles from the case law about "work now, grieve later", the Union argued that it is appropriate for the Employer and the Hospital to proceed first in this hearing where the applicability of the Policy is central to the issues in this grievance; see *Re Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43* (1990) 69 D.L.R. (4th) 268 Ont. C.A.; and *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.* 2013 SCC 34 (CanLII).

Acknowledging that there is no case directly on point on this issue, the Union relied on the following cases by way of analogies where arbitrators required employers to proceed first, regardless of the onus of proof, when the issues in question were within the unique or exclusive knowledge of the employer; see *London Free Press, a division of Sun Media Corporation v. Communications, Energy and Paperworkers' Union of Canada Local 87-M* (2006) unreported decision of Louisa Davie; *Association of Management, Administrative and Professional Crown Employees of Ontario v. Crown in Right of Ontario,* GSB #2013-3291, 2015-1003 (2015) (Dissanayake); *Re Unilever HPC NA and Teamsters, Chemical Energy and Allied Workers, Local 132* (2002), 106 L.A.C. (4th) 360 (Springate); *Re York University and Canadian Union of Public Employees, Local 3903* (2010), 194 L.A.C. (4th) 438 (Albertyn); and *Re Spar Aerospace Ltd. and Spar Professional and Allied Technical Employees Assn. (Metropolitan Toronto)* (1994) 40 L.A.C. (4th) 215 (Brown).

The Submissions of the Hospital

The Hospital took the position that there are no exceptional circumstances in this case that would warrant this Arbitrator making an order departing from the established evidentiary principle that the party with the onus of proof must proceed first. It was also suggested that the Union's motion was premature because the parties have not yet exchanged "fulsome production." It was pointed out that although counsel for all parties have exchanged a series of correspondence in respect of preliminary matters, the Union has not requested that the Hospital provide any further production or particulars.

Further, it was stressed that the grieving party must prove a *prima facie* case that support the allegations before there is any evidentiary requirement on the responding party to provide any evidence in response; see *Canada Packers Inc. v. U.F.C.W., Local 114P,* [1992] O.L.A.A. No. 308 (Solomatenko) at para 8 and *Central Park Lodges v. S.E.I.U., Local 210,* (2000) 60 C.L.A.S. 26 (Etherington) at para 19. The Hospital submitted that it would be unfair to deprive it of the procedural right to await the establishment of a *prima facie* case before it decides whether to produce any evidence in response. See Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2014) at 5.3 to 5.14; *Durham Regional Police Assn. v. Durham Regional Police Service (Turpin Grievance),* [2010] O.L.A.A. No. 157 (Albertyn) at para 15-16; *O.S.S.T.F., District 9 v. Greater Essex County District School Board*, [2008] O.L.A.A. No. 161 (Watters) at para 17(iii); *Hamilton-Wentworth Community Care Access Centre v. O.P.S.E.U.,* Local 274, (2002) 113 L.A.C. (4th) 424 (Brent) at para 14.

It was also argued that this proceeding might be needlessly prolonged if the Employer or the Hospital were required to anticipate the case that the Union might decide to present. The Hospital argued that a party ought not to be required to disprove a case that it does not fully know.

The Hospital acknowledged that the exception to normal order of proceedings occurs when the subject matter of most relevance to the claim lies particularly within the respondent's knowledge because it would be unfair to the other party to have to anticipate that subject matter and attempt to disprove it in advance. However, it was stressed that the party relying on this exception has to provide a "persuasive rationale" for departing from the general rule, see *International Nickel Co. of Canada v. U.S.W.A., Local 6500*, (1975) 9 L.A.C. (2d) 173 (Gorsky) at para 18; *Ottawa Hospital v. C.U.P.E., Local 4000*, (2011) 08 C.L.A.S. 267 (Brown) at para 14. Relying on these cases, the Hospital stressed that the Union has not even identified the particular aspects of the Policy or its implementation that are alleged to lie solely within the knowledge of the Employer or the Hospital.

Further, the Hospital stressed that in the other arbitral cases where unions have challenged the implementation of an Influenza policy, there have been no discussions, or reversals, of the general evidentiary rule that the party bringing the grievance bears the onus of establishing its case and proceeding. In all of the following cases, the unions proceeded first with their challenges to the policies: *Trillium Ridge Retirement Home v. S.E.I.U., Local 183*, [1998] O.L.A.A. No. 1046 (Emrich); *Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*, (2013) 237 L.A.C. (4th) 1 (Diebolt); *Chinook Health Region and U.N.A., Loc. 120*, (2002), 113 L.A.C. (4th) 289; *Interior Health Authority and B.C.N.U.,* (2006) 155 L.A.C. (4th) 252 (Burke); *North Bay General Hospital v. Ontario Nurses Assn. (Influenza Policy Grievance)*, [2008] O.L.A.A. No. 669 (Chauvin); *Sault Area Hospital and Ontario Nurses' Association*, *supra*. It was pointed out that in all these cases the arbitrators were able to assess the Influenza policies according to the test set out in *"KVP"* [1] without requiring the Employer to proceed first. Further, it was noted that the particulars provided by the Union in this case are virtually the same as those provided by the union in the *Sault Area Hospital* case where the union seemed able and content to proceed first with the presentation of evidence. The Hospital also pointed to other examples where policy grievances have been arbitrated without imposing a requirement that the responding party that imposed or developed the policy

proceed first, see *Toronto (City) Board of Education v. C.U.P.E., Local 1325*, (1988) 33 L.A.C. (3d) 149 (Knopf); and *Toronto Hospital v. O.N.A.,* (1994) 35 C.L.A.S. 292 (Knopf).

Responding to the Union's contention that it does not have knowledge of how and why the Policy was implemented, the Hospital emphasized that the Union has not requested any disclosure of arguably relevant documents from the Hospital which may address those very issues and that this can be properly dealt with by way of production and particulars.

The Submissions of the Employer

Counsel for the Employer stated that the evolution of these proceedings have left the parties with uncertainty regarding what this case is about, resulting in a situation that makes it inappropriate to require the Employer to proceed first with the presentation of evidence. The Employer described this grievance as "a fairly broad, but ordinary" policy grievance that covers not only allegations of violations of the Collective Agreement, but also statutory provisions. It was submitted that it would be "unfair" to require the Employer to proceed first and try to anticipate what the Union would be alleging to be the basis for the unreasonability or illegality of the Policy. Further, it was stressed that this is not a case where any expert evidence is in the exclusive control or knowledge of only one party. The Employer pointed out that all of these parties have access to the experts in the field of Influenza Vaccine policies. Therefore, it was said that this is not a case that should be viewed as an exception to the standard rule that requires the party with the onus of proof to proceed first. It was also said that the Union bears the onus of establishing that this case falls within the exception to the usual rules with regard to order of proceedings. Reliance was placed on *Loblaws Supermarkets v. UFCW, Local 1000a (Policy Grievance),* [2013] O.L.A.A. No. 300 (Brownlee); and *Ottawa Carleton District School Board and OSSTF, District 25 (Vethanany Grievance),* [2012] O.L.A.A. 61 (Baxter).

As to the Union's request to be advised whether the Employer is applying the Policy because of a contractual requirement and/or because of its own independent assessment, counsel for the Employer advised that she could not give a response to that question on the day of this motion because the person with that knowledge no longer works for the Employer. However, counsel undertook to provide that information within ten days of this motion. Counsel also undertook to provide any further available documentation and production that the Union seeks. However, it was stressed that there had been no other requests for such information from the Union until this hearing. The Employer suggested that the "normal" and more efficient way for this hearing to have evolved would have been if requests for particulars and production had been made and fulfilled in the early stages, rather than to require the Employer to proceed first. It was also suggested that this motion is directly linked to the Union's failure to succeed in its motion to have this case argued solely on the basis of the evidence presented in the *Sault Area Hospital* case.

The Employer agreed with the Union that it is desirable to find ways to conduct this case without putting the parties to great expense. However, the Employer stressed that if the Union wants to challenge the application of the Policy on this bargaining unit, the Union should be required to present evidence to support the allegations in the grievance and in the particulars of the case it wishes to present.

Further, it was pointed out that even if the Employer is ordered to proceed first, efficiencies will not be achieved because the next scheduled hearing dates are too proximate for the Employer to be able to organize and present the evidence that might be required.

The Union's Reply Submissions

The Union stressed that it does not want a repeat of the *Sault Area Hospital* case, with all its expenses involving expert witnesses and complex litigation. It was

stressed that the terms of the Preliminary Award in this matter dictate that this should be a much more limited hearing. Further, the Union indicated that the particulars it initially provided may no longer be applicable, given how these proceedings have evolved with the granting of Intervenor status to the Hospital. The Union reiterated that the focus of this case will depend upon whether the Employer imposed the Policy because it was required to do so by the terms of its contractual relationship with the Hospital or whether the Employer independently determined that it was reasonable and appropriate to impose the Policy on this bargaining unit. The Union argued that once those questions are answered, the Union will be able to respond to the rationale(s) that is/are given and that the case should proceed on that basis. The Union suggested that simply providing particulars is not preferable at this stage of these proceedings when there are scheduled dates of hearing awaiting the parties in the immediate future.

Responding to the Hospital's case law, it was stressed that none of the other Influenza Vaccine challenges were situations where a third party's Policy was being enforced. That factor was said to make the order of proceedings in those cases irrelevant.

The Union argued that until and unless the Employer provides answers to the question of why it is imposing the Policy on this bargaining unit, no party nor this Arbitrator will be in a position to determine the order of proceedings or be able to properly case manage this hearing.

Further Proceedings

After these submissions were received at the hearing on January 19, 2016, the following procedures were ordered and agreed upon:

> 1. On or before January 29th, Counsel for the Employer shall provide the parties and myself with an answer to the Union's question of whether the Employer is applying the policy because of a contractual/licensing

> obligation imposed by the Hospital and/or whether the Employer made an independent decision to apply the Policy to this bargaining unit.
> It is clear that if the latter is the case, the Union would want to know the basis upon which the Employer reached that conclusion. However, that basis is not one that is required to be disclosed by January 29th. However, if particulars of that matter are available, it would be preferable to have them at this point.
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> 2. I ordered counsel for the parties to discuss the Employer's responses to these questions to see if those responses pave the way to any agreement with regard to the order of proceedings or ways to expedite and/or focus the presentation of evidence in this case. Counsel agreed that they would discuss those issues in a conference call on Monday, February 1, 2016.

On Thursday, February 4, 2016, I held a conference call with counsel for the parties to consider the outcome of their exchange of information. At that time the Employer clarified and advised that it is applying the Policy because of the contractual/licensing obligation imposed by the Hospital and that the Employer made its own independent decision to do so as well.

The Decision

There is no disagreement about the general principles that apply to the order of proceedings in a labour arbitration hearing. They are ably summarized in the *Loblaws Supermarkets v. UFCW, Local 1000a* decision, *supra:*

> The usual rule for order of proceeding is that the party who has the onus proceeds first. It is only in exceptional cases, for reasons of fairness or expediency, that the party not bearing the onus is required to proceed first.

However, it has also been recognized that given arbitrators' discretion over the conduct of a hearing, "considerations of efficiency, practicality, and most importantly fairness, may make it appropriate for the responding party to proceed first", regardless of the onus of proof; see *Association of Management, Administrative and Professional Crown Employees of Ontario and The Crown in Right of Ontario (Treasury Board Secretariat), supra.* Accordingly, the recognized exceptions to the normal rule of having the party with the onus proceed first are where "the information is not otherwise reasonably attainable" by the party with the

onus of proof or where that party would have to "speculate about why the employer acted as it did"; see *London Free Press, supra.*

Given the arbitral case law and the ultimate onus on the Union that is challenging the Policy, the immediate issue in this case is why should the Union not go first? Or, to reverse the question, does the Employer or the Intervenor Hospital have unique knowledge that would warrant them being required to proceed first?

In all the cases cited above involving union challenges of the imposition of Influenza policies that require bargaining unit members to be vaccinated or wear protective masks, the other unions or bargaining units have all proceeded first, presenting evidence, via experts and others, to try to demonstrate the invalidity or unreasonability of the policy and/or the unreasonability of its application on the particular bargaining unit. In those cases, the particulars were much the same as those provided to date by this Union. The fact that others were able or willing to proceed first does not mean that it is inappropriate for this Union to attempt a different strategy or litigation approach. However, the fact that the other unions were willing and able to marshal their evidence and proceed first indicates that policy grievances such as this one are capable of being presented by a union making similar challenges to this type of policy.

It is recognized that this proceeding is somewhat unique and different from the cited cases because it involves a Policy that was not designed by the Employer. Further, the clarification of the reasons why this Policy is being imposed by the Employer on this bargaining unit have revealed that while this may be a Policy that the Employer chose to adopt, it is not a Policy that it designed for itself. So there is both a contractual and an independent rationale for the Employer's decision in this case.

With this clarification known to the Union, the focus of the case must now be on the basis for the Union's challenge. Although the Union has already provided

particulars, it has indicated in this hearing that those particulars may be subject to change and amendment, given the Employer's position and the passage of time. It has the right to do so.

Under these circumstances where the basis of the Union's challenge of the Vaccine Policy has not been particularized with finality, where the allegations in the grievance go beyond the Collective Agreement into statutory challenges and where the available evidence about the reasonability or validity of an Influenza Vaccine are accessible to the parties equally, this does not amount to an "exceptional" situation that warrants a reverse of the usual order of proceedings.

I am mindful of the Union's argument that if this were a situation where a member of the bargaining unit had been subjected to discipline for non-compliance with the Policy, the Employer would be required to proceed first to justify the discipline by establishing the reasonability of applying the Policy to the bargaining unit member. However, this is not a disciplinary case. This is a Policy grievance, challenging the unilateral imposition of a rule on this bargaining unit. Having been filed as such, the usual order of proceedings would be to assess the policy according to the tests set out in *KVP, supra,* by evaluating the Union's allegations and evidence against the rationale and evidence called in response. The fact that this Policy was designed and is being imposed partially as a result of a contractual relationship with the Intervenor adds a wrinkle to the analysis, but does not change the fundamental requirement that the Union must establish a *prima facie* case before there is a requirement to respond.

For all these reasons, the Union's request to require that the Employer and/or the Hospital proceed first with the presentation of evidence is denied.

However, to expedite the hearing on the merits, I order as follows:

1. Within ten days of the issuance of this Preliminary Award, the Union shall deliver particulars, setting out the basis upon which it intends to challenge the imposition of the Policy on this bargaining unit.
2. Within ten days of the receipt of the Union's particulars, the Employer and the Hospital shall respond to the Union with particulars, including their rationale for the imposition of this Policy on this bargaining unit.
3. Within five days after receipt of the Employer's and Hospital's particulars, the Union shall deliver any supplementary particulars if warranted.
4. Each party shall deliver all the documentation that it intends to rely upon at the hearing no later than 15 days prior to the resumption of proceedings. Upon receipt of the delivery of such materials, each party shall have the right to amend their particulars, upon reasonable notice to the other parties prior to the resumption of the proceedings.
5. Each party must indicate to the other whether it intends to rely upon any expert witnesses in support of its case. If an expert witness is to be called, the Report(s) of the expert(s) must be delivered to the other parties sufficiently in advance of the scheduled hearing dates to allow for proper consideration. The details of such delivery shall depend upon the dates for proceeding that are agreed upon by the parties or ordered by me.

6. Any of these time lines may be altered by consent or after receiving submissions for the parties.

Dated at Toronto this 5th day of February, 2016

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Paula Knopf - Arbitrator