

SUMMARY OF ARBITRATOR DECISIONS

DECISION #1:

Bunge Hamilton ('Company') and United Food and Commercial Workers Canada, Local 175 ('Union')

January 4, 2022

The Union filed a policy grievance alleging that a new COVID-19 vaccination policy issued by the Company "violates employee personal privacy/personal information and employee privacy rights".

BACKGROUND:

The Company operates an oilseed processing facility with different but coordinated operations in two adjacent properties, known as the North Property and the South Property.

The Bunge office, training and primary operations are located on the North Property. The South Property is largely dedicated to shipping and pre-shipping/storage operations.

Employees are regularly scheduled to perform jobs that are located on one side or the other, but employees may be reassigned to any jobs on either side of the Company's operations at any time as the Company may deem necessary.

The North Property is located on land leased from the Hamilton Oshawa Port Authority ('HOPA'), which is a federally-regulated organization. The South Property is owned by Bunge.

On November 2, 2021, the Company received an email from HOPA which advised Bunge of a HOPA vaccination policy issued pursuant to new Transport Canada directions, that required, "all employees of companies located at the port are required to be fully vaccinated by January 24, 2022, with exception for those that are unable to get vaccinated based on a Certified Medical Contraindication".

Under “Consequences for Non-Compliance” the HOPA Policy States:

1. HOPA contractor and tenant employees who do not attest that they are Fully Vaccinated by January 24, 2022 and in accordance with this policy will not be permitted on HOPA property until such time as they can attest that they are Fully Vaccinated.
2. HOPA contractor and tenant employees who make false attestations related to vaccination status will be subject to a six (6) month trespass period from HOPA Property”

The HOPA Policy included provisions for protection of, “Personal information in a manner that respects the provisions of the Privacy Act and other applicable legislation.”

Subsequent to this notice from HOPA, Bunge issued a revised version of its COVID-19 Vaccination Policy that it previously implemented, explaining that, “all employees of companies located at the HOPA port will be required to be fully vaccinated by January 24, 2022. As a HOPA tenant, Bunge is required to comply with this mandate.”

The stated purpose was; "To comply with federal requirements and HOPA’s mandate, and to also provide for a safe work environment during the COVID-19 pandemic and safeguard the health and safety of employees, contractors, visitors and vendors."

The revised “ New Policy” included an additional provision for protection of privacy beyond the HOPA policy:

- If the Company elects to store proof of vaccination, it will be stored in a confidential medical file which is separate and apart from the employee’s or other person’s personnel file and will be kept secured and confidential.
 - Vaccination status information will be destroyed when the pandemic is declared over by public health officials or when vaccine verification measures are determined not to be a necessary, effective or proportionate response to address the public health purposes.

The Company also allowed for additional exemptions beyond the Certified Medical Contraindications in the HOPA policy, including consideration of exemptions for Religion/Creed.

The Union filed a policy grievance alleging that Bunge’s November 22, 2021 Policy violates

employee personal privacy/personal information and employee privacy rights.

SUBMISSIONS:

Union Submission:

The Union submitted that the Policy infringed upon employees' rights to keep their confidential medical information private through the requirement that employees disclose their vaccination status, which it asserted was in breach of the Personal Health Information Protection Act, 2004 ("PHIPA"), specifically section 19.

The Union also submitted that the HOPA Policy only applies to the North Property, as it is only that property that is leased from HOPA, so the Employer cannot justify the application of the New Policy to the South Property on the basis that HOPA requires that it do so.

It requested that:

- employees not be required to disclose their vaccine status,
- mandatory testing be included as an option as part of the Policy, and
- unpaid leaves, suspensions, or terminations not be allowed as part of the Policy.

Company Submission:

The Company submitted that the disclosure of vaccine status is not information protected by PHIPA, and in the circumstances of the pandemic and the HOPA Policy, it is reasonable to demand this information of employees.

The Employer argued that the HOPA Policy applied to both North and South Properties, and that it would be impractical to distinguish between the two locations, as they are integrated in operation: isolating unvaccinated employees to work only in the South Property would materially interfere with the production of its product.

The Employer submitted that it is premature to consider the Union's objection to unpaid leaves, discipline and termination, as no employee has yet been put on unpaid leave, been disciplined, or been terminated.

DECISION:

I: The Arbitrator dismissed the grievance. He ruled that the Vaccine Policy was introduced because the Employer was bound to comply with the HOPA Policy.

Non-compliance would render the continued operation of the Company's business potentially unfeasible, since it would then be barred from access to the North Property.

2: He found that the requirement to disclose vaccine status was reasonable and “It is not clear that PHIPA would prevent the disclosure of an individual’s vaccination status in the circumstances at hand.”

3: In regard to the application of the policy across both properties, the Arbitrator ruled:

“Even assuming that the HOPA Policy does not require that it be applied to the South Property, given the significant disruption to the ability of the Employer to conduct its business if different vaccine policies or practices applied to the two locations, it is reasonable for the Vaccine Policy to apply to all employees regardless of their work location.”

4: With respect to the Union’s request that mandatory testing be included as an option as part of the Policy, the Arbitrator ruled that “using testing as an alternative to a mandatory vaccination requirement would put the Employer in breach of its lease obligations with HOPA.”

5: With respect to the references in the Vaccine Policy to discipline and termination, the Arbitrator noted that the union had the option to file a grievance if an employee was disciplined or discharged.

DECISION #2:

Hydro One Inc. and Power Workers' Union January 31, 2022

In the case of Hydro One and the Power Workers' Union, Grievances were filed by the PWU on behalf of 12 employees ('Grievors') who were placed on a leave of absence unpaid ('LAU') for failing to comply with the COVID-19 Vaccination Policy of Hydro One (Company).

BACKGROUND:

On September 22, 2021, Hydro One introduced a COVID-19 Vaccination Policy which it communicated to all employees by email.

On November 2, 2021, after consultation with the PWU, the Policy was revised.

The revised Policy stated that "effective October 22, 2021, all employees are required to provide Hydro One with proof of vaccination status or confirmation of a medical exemption, exemption under the Ontario Human Rights Code, or that the employee declines to disclose their vaccination status."

"Those employees who decline to disclose their vaccination status and those who are unvaccinated are required to undergo regular COVID-19 rapid antigen testing (RAT) prior to reporting to work effective November 8, 2021."

The Grievors, for various reasons, all failed to comply with the Policy's requirements to either provide proof of vaccination or provide a negative "rapid antigen test" ("RAT").

Hydro One placed each of the Grievors on a "leave of absence unpaid" ("LAU") until they complied with the Policy. One of the Grievors subsequently retired, while the other Grievors eventually complied with the Policy, resulting in their return to work.

SUBMISSIONS:

Union Submission:

The PWU took the position that the Grievors had legitimate concerns about the Policy and that Hydro One did not address such concerns in a timely manner and violated the Collective Agreement by acting unreasonably in addressing concerns raised with respect to the testing and reporting protocols found in the Policy.

As a result, the Grievors were unable to comply with the November 5, 2021, deadline, leading to their LAU.

The PWU maintained that the Grievors should not have lost wages for their “early non-compliance” and instead should have been able to work from home, where possible.

The PWU sought payment to all the Grievors for the period of time they were on a LAU.

Company Submission:

Hydro One asserted that they acted reasonably in the circumstances and the Policy is a reasonable response to the current COVID-19 global pandemic

Hydro One maintained that the Policy was carefully crafted to balance employee rights, while addressing the threat of infection in the workplace.

Hydro One notes that COVID-9 infections in the workplace would not only adversely affect operations, but may also place employee health and safety in jeopardy.

Hydro One argues that it was reasonable in placing the Grievors on a LAU when they failed to comply with the reasonable terms of the Policy.

DECISION:

The Arbitrator dismissed all of the grievances, ruling that:

- the Policy is reasonable and is necessary to address the on-going health and safety issues arising from the current COVID-19 global pandemic
- Hydro One is complying with their obligations under the Occupational Health & Safety Act, to take reasonable precautions to protect the health and safety of their employees and the public that they serve.

- with the revised Policy of November 2, 2021, Hydro One had addressed PWU concerns in good faith and within a reasonable period of time by providing fair and adequate responses.
- the Policy applies the precautionary principle to address legitimate workplace concerns in a fair and balanced approach and is a reasonable compromise that respects employee rights and balances the various important interests
- it is fair and reasonable in the circumstances of this pandemic to prohibit employees from attending work if they do not provide proof of vaccination or a negative COVID-19 RAT
- it is not necessary to provide remote work where a reasonable alternative has already been provided to those employees who refuse to disclose their vaccinated status (i.e., RAT)
- it is the free choice of employees to refuse the reasonable alternative, but Hydro One has no further obligation to accommodate such individuals
- accommodation of the Grievors with remote work is not necessary or required in these circumstances
- most of the Grievors could not perform their work remotely in any event

He acknowledged that some of the concerns raised by the Grievors may have been legitimate, but ruled that most, if not all, of those concerns ought to have been raised in a timelier manner.

The Grievors all had reasonable advance notice about the requirements of the Policy but had waited until the very last minute to raise their concerns about the Policy.