

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**CANADIAN UNION OF PUBLIC EMPLOYEES
LOCAL 3324**

(the "Union")

-and-

ISLAND EMS INC.

(the "Employer")

Re: Speed Policy Grievance

Arbitration Board:

Susan M. Ashley, Chair
Susan Robinson, Employer Nominee
Bob Crockett, Union Nominee

Heard at:

Charlottetown, Prince Edward Island

For the Union:

Bill McKinnon

For the Employer:

Ronald MacLeod

Dates of hearing:

September 17, 2010 and January 25, 2011

Date of Award:

March 13, 2011

1. This is a policy grievance brought by the Canadian Union of Public Employees Local 3324 and Island EMS. It concerns the Employer's implementation of changes to emergency response policy relating to ambulance speed in code 1 situations. The hearing was held in Charlottetown on September 17, 2010 and January 25, 2011. There were no objections to the jurisdiction of the Arbitration Board to hear the matter, and no other preliminary matters were raised.

2. The grievance dated February 17, 2010 alleges the following:

We claim that the Employer, by memo dated February 9th, 2010 (but is continuing today), has implemented "OPS Policy #123 - Vehicle Operation and Code 1 Response" which the Union alleges is an unreasonable exercise of management's rights in violation of Article 2 and any other pertinent articles of the collective agreement as well as the *Highway Traffic Act of PEI*.

Therefore, we request that the OPS Policy #123 immediately be withdrawn, or amended to delete the offending sections which the Union finds unreasonable.

3. The Employer operates the ambulance service in Prince Edward Island. The parent company is the Medavie group of companies, which also operates ambulance services in New Brunswick (with some significant differences), Nova Scotia and Muskoka, Ontario.

4. Until November 2009 a speed policy was in effect which had not been challenged.

On November 6, 2009 Craig Pierre, the General Manager, sent a memo to staff concerning the "New Responding Code 1 Policy", which stated as follows:

Today you will see the implementation of the new "Responding Code 1 (4) Policy". This is another policy that will be applied universally throughout the Medavie EMS Group of companies. This policy is a result of concerns with the number of incidents that our companies experience each year when ambulance are responding with lights and sirens. With these situations there is a tremendous amount of risk to the paramedics, patients and general public and it is our goal to minimize these risks whenever possible. This policy comes about with a wealth of research and each company certainly had a say in the creation of it. There have been several forums where this policy has been discussed and now it is time to move forward. I encourage you to have a final read of this and begin instituting the changes in our culture of safety.

5. The changes in question are found in section 1.0 and deal with the speed limitations when dealing with a code 1 call:

Purpose

To ensure patient, paramedic and public safety during the operation of ambulances travelling in Emergency Mode and to reinforce the principle that the operator of the vehicle is ultimately responsible for safe vehicle operation.

...

Definitions

...

Best Conditions - include clear visibility and a cushion of safety, dry paved road surface free of debris, moderate to low traffic presence, sparse and visible pedestrian presence.

...

Rationale

Activation of emergency warning systems on ambulances affords EMS vehicles a direct drive by notifying other drivers of their intentions and requesting the right of way. Emergency warning systems allow the driver the latitude to expedite while

not a paramedic, and the amount of information given to paramedics in responding to a call is fairly basic.

8. He testified that primary care paramedics (PCPs) cannot deliver intravenous medications or intubation, and do not do advanced life support. When two PCPs are in a vehicle and advanced care is required, they would call for an advanced paramedic (ALS) to intercept, according to protocol. If advanced life support were required and an ALS were not available on the call, the PCPs would have to get the patient to the nearest hospital as quickly as possible to receive life support.

9. Mr. Woodbury testified that the process for handling the calls is that the call is received at dispatch, and the closest available ambulance is directed to report. When they arrive on the scene, they do a preliminary assessment, determine if the patient is critical or stable, or whether they can be treated and released, or taken to the nearest health care facility.

10. He explained that prior to November 2009 a speed policy was in effect which limited speed to the posted speeds while in school zones. The new policy is a blanket one that was applied by Medavie in Nova Scotia, New Brunswick, and Muskoka,

Ontario. He testified that he received complaints from members when the new policy was first introduced in November 2009.

11. These concerns were outlined in a letter from the Union to the General Manager, Mr. Pierre, on December 3, 2009:

...The Employer, by memorandum dated November 6th, 2009, introduced a new and restrictive policy related to "Code 1" calls which negatively impacts on our members' ability to exercise proper professional judgement, with respect to speed, particularly when driving Island EMS (EMS) emergency vehicles on emergency (Code 1) calls. This policy was identified by the Employer as "OPS Policy #123 - Vehicle Operation and Code 1 Responses".

After reviewing the policy - and subsequently being made aware that the Employer is already investigating an alleged violation of this policy by a Local 3324 member in a clear emergency situation, it became clear that CUPE had to take action.

Your policy (noted above) defines "Best Conditions" as follows:

"Include clear visibility and a cushion of safety, dry paved road surface free of debris, moderate to low traffic presence, sparse and visible pedestrian presence."

Thereafter the policy, at Section 1.0, states the following: [Sets out clauses 1.1 - 1.3]

While your policy goes on from there, it is these three particular sections of the policy which cause the greatest concern for both the members and their Union.

Emergency service employees are a unique group of people because of their duties, responsibilities, skill, training, expertise, and other, less tangible qualities.

...In virtually all 'real' emergencies, time is of the essence. This includes both the time it takes for emergency personnel to arrive at the scene of the emergency, and the time it takes, in this case, for the ambulance to get from the scene to the respective medical facility destination.

Even the legislators in our province have recognized the need to make special dispensations for "*emergency vehicles*" and the people who drive them. The

Highway Traffic Act of PEI at Section 237 (1) (copy attached) permits emergency vehicle drivers to "exceed the speed limit", subject to having due regard for safety and road conditions. Nowhere in the **Act** will you find an arbitrary or subjective limit on the actual speed emergency vehicles can travel when responding to an emergency call. There are good reasons for that, which I do not need to state here.

However, with your new policy, the Employer is taking the unprecedented (and we submit unreasonable) step of establishing subjective and arbitrary limits on our members when responding to emergency calls, with emergency equipment activated, while leaving no room for professional discretion or common sense for that matter, to play any part based on the facts of each individual call.

The Union ... takes the position that not only are these Employer imposed restrictions contrary to the intent of the authority given to emergency vehicle drivers under Section 237 of the **Highway Traffic Act of PEI**, but we believe this Employer imposed rule to be completely unreasonable in the world of EMT emergency response.

Notwithstanding the above, we do recognize that the Employer, under appropriate circumstances, has the right to impose rules on their employees. However, the right is not completely unfettered.

Under labour jurisprudence, arbitrators generally recognize the employer's right to make rules but have universally now accepted a number of principles relating to this power as summarized in **Re KVP Co.** [1965] 16 L.A.C. 73 (Robinson). ...

For all of the above-noted reasons, the Union wishes to serve notice that we do not now, nor would we ever, support a policy which unreasonably restricts our members' ability to respond as safely, quickly, and effectively as possible to the needs of the patients we serve.

Furthermore, CUPE Local 3324 will be grieving your policy on the grounds of its reasonableness (or lack thereof) and will vigorously defend our members in the event any action is taken against them, directly related to any alleged violation of this unreasonable Code 1 policy.

12. The Employer issued a revised version of the speed policy on February 9, 2010, as a result of some feedback that it had received. The relevant part of the February 9 final version is as follows:

1.1 Under "best conditions" for posted speed limits of **60 km/hr and below**, paramedics can use their judgement to travel up to 10 km/hr over the posted limit.

1.2 Under "best conditions" for posted speed limits of **60 km/hr and below** on paved **continuous four lane** roadways, paramedics can use their judgment to travel up to 20 km/hr over the posted limit.

1.3 Under "best conditions" for posted speed limits **greater than 60 km/hr**, paramedics can use their judgment to travel up to 20 km/hr over the posted limit to a maximum of 120 km/hr (or as per maximum RSI speed setting).

1.4 When "**best conditions**" are not present ambulances will be operated at the posted limit and below while exercising extreme caution.

13. The Union was still not satisfied and filed its grievance on February 17, 2010.

14. While the policy purported to apply to all Medavie EMS companies, Mr. Woodbury testified that the new policy is not universally applied, as it does not apply in New Brunswick.

15. Mr. Woodbury's concerns with the February 2010 policy were that it was confusing, and that it distracted the paramedic from focusing on the patients' care, because of constantly looking at speed zones and the speedometer. He felt the first draft was actually safer, because if the truck exceeded one hundred and twenty (120) km/hr, the "G-force would force you to slow down".

16. His primary concern was that if a patient required advanced care skills, it is crucial to get him or her to the health care facility as quickly as possible. He noted that in cases of cardiac arrest the patient requires thrombolytics, which are not currently administered by paramedics, but only at the facility. Paramedics are trained to think that "time is tissue"; that is, the quicker the patient gets the treatment, the greater the quality of life. Stroke patients may also require thrombolytic treatment, which is offered only in Summerside and Charlottetown. Trauma patients also have urgent needs. He acknowledged that a low percentage of calls involve cardiac arrest, stroke, or trauma, and that the majority of calls relate to non-emergency situations.

17. Mr. Woodbury testified that one paramedic had already been disciplined for breach of the new speed policy. The driver was dispatched to Summerside on a code 1 call to a sixteen (16) year old girl who was not breathing. The driver said he would not follow the speed policy in getting to the scene. At between 8 and 10 a.m. he drove one hundred and five (105) km/hr in a fifty (50) km/hr zone. When he arrived, the patient was a sixty (60) year old woman had been dead for some time.

18. He acknowledged that there was an ambulance incident in Summerside in May 2009, though he felt it was not speed related. The driver was traveling eighty (80) km/hr in a forty (40) km/hr zone, and slowed at an intersection to forty (40). A woman was

injured in the intersection. Under the current policy, the driver would have stopped at the intersection.

19. In cross-examination, Mr. Woodbury admitted that since Island EMS took over emergency medical services, there are more paramedics, more ambulances, more training, and a significant improvement in response times.

20. Mr. Woodbury acknowledged that in Prince Edward Island, the dispatcher is not a paramedic and that the paramedics receive limited information about the nature of the patient's condition from dispatch. He was not aware of research concerning the risks of increased ambulance speed to the safety of those inside and outside the ambulance.

21. Dr. Grant Matheson is employed at the Parkdale Clinic in Charlottetown, and has experience and training in emergency medicine. He contacted the Employer with concerns about the new policy. He testified that he did a literature review on the effect of speed on safety, and found that the results were conflicting.

22. He testified as to his concerns with the February 2010 policy. The information received from dispatch is often not clear, and ambulances often do not learn what the problem is until they arrive at the scene. If it is a cardiac case, "seconds matter". Even if

the difference between travelling "hot" or at the speed limit is forty-three seconds (43), brain tissue can die in two (2) minutes. Another forty-three (43) seconds can make a big difference in outcomes. He noted that many incidents occur in the middle of the night or early morning, when there is little traffic. Removing the discretion from a trained driver could adversely affect the patient's outcome.

23. Similarly he testified that if there is unconsciousness or the airway is not cleared, "the clock is ticking" so the paramedic must get there quickly to assess the situation. Time is of the essence in cardiac and stroke cases. Also in motor vehicle accidents, if the ambulance is delayed, bystanders often do things that are not helpful. The ambulance must get there quickly to control the scene as well as to provide care. In severe trauma cases, the chances of survival dramatically improve if the patient can receive acute trauma care within one hour from the time of injury. This is referred to as "the golden hour".

24. Dr. Matheson testified that while he understood the rationale for the changes in the speed policy, he felt that ambulance drivers should be given discretion in urgent situations where it is clear that time is going to be a major factor.

25. In cross-examination Dr. Matheson agreed that the quality of dispatch can make a significant difference to response times and outcomes, and that a sophisticated dispatch system did not exist on the Island. He agreed that time was of the essence in only a small percentage of the cases, possibly two (2) or three (3) percent. He agreed that it was reasonable for the Employer to review the literature on speed and safety before changing a policy, but felt that it was still a concern that it was a blanket policy with no discretion in the paramedics.

26. Counsel for the Employer put to him that the Employer committee had done an extensive review of the literature on speed, many of them in peer-reviewed journals, and that none supported increasing speed, and also that the Employer engaged a leading researcher, and looked at information pro and con. Dr. Matheson agreed that it would be reasonable for the Employer to take that approach, and that employees' concerns about the policy may have been allayed if they had been aware of the research the Employer had considered. While he did not change his opinion, he agreed that there could be two opinions on the issue and that both could be reasonable.

27. Ralph McBride is the serving representative for CUPE New Brunswick, and is responsible for the paramedics bargaining unit. He testified that in December 2009 the Employer introduced changes to the speed policy in New Brunswick, the same as those introduced in PEI, Nova Scotia, and Muskoka. There were some revisions, similar to

those in PEI. In February 2010 a third policy was introduced following a particular incident.

28. An ambulance was dispatched to tend to a woman with a breathing problem. (Paramedics in New Brunswick receive more information from dispatch than they do in PEI.) The driver asked to go above the one hundred and twenty (120) km/hr cap on four (4) lane highways, which was denied by dispatch. The paramedic proceeded without permission. The patient did not survive.

29. Mr. McBride testified that this became a political issue in the legislature. The Minister of Health, the opposition parties, the Employer and the Union all became involved. At that time, the parties were still dealing with the second policy. Mr. McBride testified that the Minister told the parties to get together and find a solution to the problem which would address the concerns raised about this incident. This occurred about four (4) days after the incident.

30. The parties negotiated, and came up with the following speed policy for New Brunswick:

1.1 Vehicles will follow the posted speed limits of school zones between the hours of 0600 - 1800 and anytime children are present.

1.2 During all code 1 calls, paramedics shall drive with safety at all times, and are expected to not exceed posted speed limits by more than **20 km/hr**.

1.3 On highways where the posted speed is 110 km/hr. The maximum code 1 speed is **120 km/hr**. With the discretion and judgment of the attending paramedic, the paramedic may deviate from the code 1 policy; however, the speed may not exceed a **maximum of 130 km/hr**.

1.3.1 The paramedic must self-identify to the MCMC dispatcher their intention to exceed **120 km/hr**.

1.3.2 The paramedic must prepare a written incident report explaining the reason for **exceeding 120 km/hr** and submit to the Operations Manager by the end of their shift.

31. Mr. McBride admitted that no research or documentation was considered to justify the decision to move the maximum speed from one hundred and twenty (120) to one hundred and thirty (130) km/hr. He admitted that in New Brunswick, the Province owns Ambulance New Brunswick including the business and the vehicles. The Province pays the employees, and Medavie is under contract to manage the operation. In PEI, Medavie owns and operates the service.

32. Craig Pierre is General Manager of Island EMS and testified for the Employer. He has been in that position since Medavie took over the service four years ago. He is part of the patient safety committee for the company, which reviews all operating policies. This committee was the catalyst for changes in the speed policy. The committee contains about sixteen members from all three provinces and with input from Muskoka. The policy was to apply to all Medavie EMS companies.

33. He testified that in looking at the speed policies, the committee relied on research which showed that the time difference between travelling with lights and sirens, and not, is forty-three (43) seconds. He noted also that there are no one hundred (100) series highways in PEI, and that the highest speed limit is ninety (90) km/hr. He referred to the 'policy assumptions' behind the speed policy changes (Ex. 5 T4):

Policy Assumptions:

1. This policy was designed to place boundaries around how ambulances are operated when in emergency mode.
2. Patient care and response times are better facilitated by a smooth and direct trip than by a trip travelled at excessive speeds.
3. As the Operator, we are ultimately responsible for the safety of the staff, patients and public and the assets entrusted for our use.
4. We know that as speed increases, reaction time decreases as does our ability to ensure collision avoidance.
5. We know that as speed increases so does stopping distance.
6. We know that less than 2% of the patients we respond to have true time related emergencies that may affect outcome.
7. We know that the research states that the arrival time in terms of response time for emergency mode response versus non emergency mode response is not significant.
8. We know that we are obligated to respond as quickly and safely as possible.

34. He also referred to the 'supporting data conclusions', based on data from the

Medavie companies:

Supporting Data Conclusions:

1. 55% of all collisions occur while the vehicle is travelling forward.
2. 25% of all our collisions occur when we have a patient on board (and a paramedic in back).
3. Collisions while travelling Code 1 at speeds of 80 km/hr or less (urban or secondary series highways) occur 5 times more frequently than collisions while travelling greater than 80 km/hr (100 series highways).

4. Collisions while travelling Code 2 at speeds of 80 km/hr or less (urban or secondary series highways) occur 6 times more frequently than collisions while travelling greater than 80 km/hr (100 series highways).
5. Based on 7 years of collision data.

35. He testified that the Employer was working to enhance strategies for dealing with the two (2) percent of true emergency cases, by working to increase resources in more strategic locations, and delivering driver safety courses. He noted that they had tracked response times before and after the implementation of the first policy in November 2009, and that after the policy, a minute was taken off response time in the province and in Charlottetown. (Sixty (60) percent of the calls are in Charlottetown.)

36. The committee was particularly influenced by the research of Dr. Nadine Levick who specializes in this field and is head of a non-profit EMS Safety Foundation in the United States. Medavie joined her safety foundation, which meets regularly to review safety topics. The committee received her feedback on the policy.

37. Mr. Pierre testified as to the impact of the Summerside collision. Apart from the injuries to the bystander, that ambulance was then out of commission; another had to be dispatched to assist the bystander, and another to go to the scene for which the call was originally made.

38. In cross-examination he agreed that the changes made to the policy in New Brunswick were not consistent with the conclusions reached by the safety committee, and that as a result the policy was not being applied universally by all Medavie companies. He agreed that there were no discussions with staff in PEI about the policy changes prior to November 2009.

39. Matthew Crossman has been employed by Medavie EMS (the parent company of Island EMS) since 2007 and has been in the industry for over ten years. He is currently Manager of Safety Operations, and is a trained paramedic in New Brunswick. He testified for the Employer.

40. He was involved with the committee in devising the policy. He testified that the policy came from a company-wide survey in early 2008. One of the top ten concerns for working paramedics was speeding with no speed cap. The committee engaged people in each company to research the topic and to look at best practices, standards and data. A researcher in New Brunswick and in Nova Scotia were engaged to do a literature search, and they reached out as well to several experts, include Dr. Levick and Blair Bingham, a paramedic from Ontario who works from the University of Toronto. Both endorsed the new policy.

41. Mr. Crossman testified that all the research led to the conclusion that there was a higher risk of collision with a higher rate of speed, and a higher risk of injury/death. They concluded that there was no significant change in patient outcomes from having a speed cap.

42. He testified that in the course of its review the committee consulted with colleagues, staff, the collision review committee, some OHS committees and some paramedics in PEI. These paramedics were asked not to share the draft policy with co-workers until it was approved.

43. He agreed in cross-examination that much of the research the committee relied upon dealt with the risk of vehicle collision and vehicle safety, and patient safety in the ambulance, rather than patient outcomes related to response times. He concluded that the research rarely supported the theory that getting to the hospital quicker effects outcomes.

44. He agreed that some of the research results were ambiguous, but that the volume of research supported the policy changes. He was shown a 2008 study (Wilde) which concluded that incidents that occur farther from the agencies were more likely to result

in death, and that the impact of response time increase of one minute represented an approximately thirteen (13) percent increase in mortality. The committee had not reviewed that study. Mr. Crossman agreed that the time taken to get a patient who needs thrombolytics to hospital can be critical, and can have a significant impact on outcomes, and that the chance of a negative outcome significantly increased outside the first hour.

45. Regarding the changes in the New Brunswick speed policy, Mr. Crossman noted that because of the political pressure, a trial using a different speed cap was implemented, which the company agreed to. He noted that there are differences in the manner in which EMS are supplied in New Brunswick and PEI. In New Brunswick, the employees are employees of the government, rather than the company. In New Brunswick the government assumes the risk, and not the company.

46. In redirect he noted that some paramedics in Nova Scotia were administering thrombolytics, and the Employer was planning to look at those results with an eye to doing the same in PEI. The Employer is also trying to increase the number of ambulances, which was the core conclusion of the Wilde study. This will have an impact on response times.

Related provisions of the collective agreement and statute

47. Article 2 of the collective agreement deals with management rights, and states as follows:

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The Union acknowledges that it is the exclusive function of the Employer to operate and manage its business and direct the workforce in accordance with its commitments and responsibilities. These rights include but are not limited to the following:

(a) to maintain efficiency and to make, alter, enforce, rules and regulations to be observed by employees;

(b) to direct, hire, promote, demote, transfer, suspend, discipline or dismiss employees and to assign employees to shifts;

(c) evaluate jobs, classify positions and specify the employee's duties;

(d) to manage and operate the Company in all respects and without restricting the generality of the foregoing, to determine the number and location of establishments, the services to be rendered, the methods, the work procedures, the kinds and locations of instruments and equipment to be used; to require suitable dress, to schedule the work; to make, alter and enforce regulations governing the use of materials, equipment and services as may be deemed necessary in the interests of the safety and well being of the public; and

(e) to maintain the competence of employees, management reserves the right to rotate staff at each base, except for Montague/Souris where they will rotate within the Area.

2.02 These rights shall not be exercised in a manner inconsistent with the expressed provision of this Agreement.

48. The grievance also refers to the PEI ***Highway Traffic Act***, s. 237, which states as follows:

237. (1) Notwithstanding any other provision of this Act, the driver of an emergency vehicle when responding to, but not when returning from, an emergency call or alarm, or when in pursuit of an actual or suspected violation of the law, may

(a) subject to subsections (2) and (3), exceed the speed limit, and

(b) stop or stand.

(2) The driver of an emergency vehicle shall not exceed the speed limit unless he is sounding an audible signal by bell, horn, siren or exhaust whistle and is showing a flashing red light if the vehicle is so equipped.

(3) The driver of an emergency vehicle who is exceeding the speed limit shall drive with due regard for safety having regard to all the circumstances of the case, including

(a) the nature, condition and use of the highway;

(b) the amount of traffic that is on or might reasonably be expected to be on the highway; and

(c) the nature of the use being made of the emergency vehicle at the time.

(4) The driver of an ambulance is deemed to be responding to an emergency call from the time he receives the call until he arrives at the destination of the patient.

49. The Union also referred in argument to the PEI **Public Health Act**, s. 44 (1) (p):

The Board may refuse to issue or renew a permit, or suspend, revoke or attach conditions to a permit if, in the opinion of the Board, the applicant or permittee ...

(p) has officers or employees who are in conflict of interest as determined by the regulations.

50. Section 13 (1) and (2) of the Emergency Medical Services Regulations under the **Public Health Act** state as follows:

13 (1) A permittee shall not act, nor permit its officers or employees to act, in conflict of interest.

(2) For the purposes of clause 44 (1) (p) of the Act, conflict of interest occurs in any situation where a permittee, or an officer or employee of a permittee, attempts to promote private or personal interests that actually or apparently (a) interfere with the objective exercise of the duties of the permittee or its officers or employees; or

(b) interfere with patient or public safety,

whether or not the promotion is done on the permittee's behalf or on behalf of another person.

Argument

51. The Union argued that the policy violates the law of PEI, and that it does not meet the **KVP** rules in that it is inconsistent with the collective agreement, is itself unreasonable, and is inconsistently applied.

52. He argued the Employer's policy violates Article 2 of the collective agreement in that it was not made in the interests of patients, but rather focusses on the safety of the public in relation to the risk of motor vehicle accidents.

53. He argued that the speed caps in the new policy are inconsistent with the **Highway Traffic Act** which gives discretion to ambulance drivers to exceed speed limits in certain situations. Further, he argued that the speed caps put the drivers in a conflict in

relation to patient safety, contrary to the Ambulance regulations under the **Public Health Act**. Arbitrators have the authority to interpret and apply public legislation: **Re Parry Sound (District) Social Services Administration Board and Ontario Public Service Employees Union Local 324** [2003] 2 S.C.R.157; **Re Ottawa Police Services Board and Ottawa Police Association (Carriere)** [2007] 160 L.A.C. (4th) 118 (Lynk); **Re Fleet Industries and I.A.M. Local 171** [1992] 30 L.A.C. (4th) 368 (Briggs).

54. He argued that the Employer's rule-making ability is not unfettered, and is governed by the **KVP** principles: **Re Lumber and Sawmill Workers' Union Local 2537 and KVP Co. Ltd.** [1965] 16 L.A.C. 73 (Robinson). Here, the policy is not consistently applied in that New Brunswick has discretion as to speeds while Prince Edward Island does not. Further, it is inconsistent with the law and the collective agreement, and is unreasonable.

55. He argued as well that the Employer was restricted in its policy-making discretion by Article 11, the just cause provision. The Employer cannot use its authority to issue unreasonable policies, and then discipline employees for failure to follow them. Discipline has already been imposed for failure to follow the policy.

56. He referred to Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees Local 43 (Langille, chair), upheld on appeal [1990] 69 D.L.R. (4th) 268 (Ont. C.A.). The court found that the arbitration board did not err in imposing a duty on the employer to exercise its discretion to make rules with a disciplinary consequence in a reasonable fashion, even though no discipline had yet been imposed.

57. He argued that the new speed policy was unreasonable in that it was based on research that focussed not on outcomes but on mortality, and on the risk of accidents rather than speed in responding to the client and/or getting him or her to the facility. He argued that if this new policy had a potential impact on one Islander, it was unreasonable.

58. Counsel for the Employer argued that the 'reasonableness' requirement in KVP required that a balance be struck between the impact of the rule on the employees' interests and the employer's interests. Here, there is no evidence of any harm to the employees' interests. This fact differentiates this situation from the Metro Toronto case (*supra*). He argued that in that case, there was a finding of fact that the policy increased the risk to employees, which is not the case here.

59. He argued that KVP does not apply here. There was no management rights clause in KVP; here there is a very specific one in the collective agreement. Article 2 gives to the Employer exclusively the right to make rules in the interests of the safety and well-being of the public. The Employer's rule-making capacity is fettered only by other provisions in the collective agreement, and it is now accepted that it is fettered also by public legislation. He argued that despite KVP, the basic question for an arbitrator in considering a challenge to a unilaterally imposed rule is whether it is contrary to the collective agreement or the law: Re Central Park Lodge Ltd. and S.E.I.U. Local 268 [2000] 91 L.A.C. (4th) 403 (Ellis). In the alternative, he argued that the KVP requirements have been met.

60. Counsel for the Employer argued that there was no evidence that the policy was not applied consistently. The changes in New Brunswick were negotiated as a result of political pressure and were not evidence-based.

61. While the Union was not involved in drafting the policy, it was party to the collective agreement which gave the Employer the right to make such rules. He argued also that the *Highway Traffic Act* is not inconsistent with the policy, as it is permissive only,

63. Counsel for the Employer noted that while the Employer agrees that response times are important, there are a number of factors which have an impact on response time. Since introduction of the policy, response time has not been negatively impacted. The Employer is taking other measures to improve response times which do not affect public safety. There was evidence before the Employer which suggested that speed did not have a significant impact on outcomes, but that increased speed increases risk to occupants of the ambulance and the public,

Award

64. In this case the Union challenges the new speed policy imposed by the Employer, Island EMS. The policy removes discretion from ambulance operators in regulating their speed, and caps the speeds permitted in particular situations. The Employer's justification for the changes is increased safety to the public, employees and clients.

65. There is no question but that the changes to the policy were imposed unilaterally by the Employer, or that the Employer has the power to make rules. Article 2 states that it is the Employer's "exclusive function ... to operate and manage its business... including...to make, alter and enforce regulations governing the use of materials, equipment and services as may be deemed necessary in the interests of the safety and well being of the public ...". Article 2.02 circumscribes that discretion somewhat in saying that such rules cannot be inconsistent with the collective agreement.

66. Both parties referred us to Brown and Beatty, *Canadian Labour Arbitration*. At 4:1520 the authors summarize the employer's rule-making authority, in particular the

KVP test:

Reformulated, these criteria may be said to require that any plant rules which are unilaterally promulgated must not be inconsistent with the terms of the collective agreement, their enforcement not be unreasonable, and they must be brought to the attention of those intended to be regulated by them.

Both parties are also agreed that an additional qualifier must be added to this list, that is, that employer rules and policies cannot be contrary to the general law: Re Parry Sound (*supra*).

67. The Union argues that the speed policy is contrary to both the collective agreement and the general law, and violates the KVP principles in several respects, most importantly in that it is unreasonable. We will first consider whether the speed policy violates the general law.

68. The *Highway Traffic Act* permits ambulance drivers to exceed the speed limit with lights and sirens in certain situations, having due regard for safety given the conditions and the requirements of the situation. The *Act* does not specify a maximum rate of speed, but leaves discretion in the operator. The Employer's policy also allows

ambulance operators to exceed the speed limit, but places a cap on those speeds depending on the normal speed limit and the conditions at the time.

69. The **Act** does not *require* that ambulance operators exceed the speed limit, but protects them when they do if all of the requirements of Section 237 are met. That section will still continue to operate with the new policy in effect. For example, if an ambulance operator were exceeding the speed limit as permitted by the policy, he or she would have to also follow the requirements of Section 237 (2) by "sounding an audible signal by bell, horn, siren or exhaust whistle and ... showing a flashing red light ...". He or she would also have to "drive with due regard for safety having regard to all the circumstances of the case ...".

70. The new speed policy still allows ambulance operators to exceed the posted speed limits, but caps the upper limit. The **Act** will continue to protect them when they do so. The fact that the **Act** does not contain a similar cap does not affect its continuing application to ambulance operators. We conclude that there is no conflict between the **Act** and the policy, and find that the policy does not violate the **Highway Traffic Act**.

71. The Union also referred briefly to the Emergency Medical Services Regulations under the **Public Health Act**, though it is not specifically mentioned in the grievance.

These regulations give the licensing authority the right to refuse to issue, renew, revoke, suspend or attach conditions to a license to run a EMS operation if its officers or employees are in a conflict of interest, the definition of which includes "where a permittee ... attempts to promote private or personal interests that actually or apparently ... interfere with patient or public safety".

72. There has been no suggestion that the new speed policy interferes with public safety. The Union, in asserting that the policy is unreasonable - largely because it may negatively impact some patients because of alleged increase in response time or in time to get the patient to the health care facility - has not suggested that the Employer implemented the policy "to promote private or personal interests". Having said that, the question of whether the policy interferes with "patient or public safety" is subsumed by the question of whether the policy itself is reasonable, which we will consider later.

73. The Union argues that the rule is inconsistent with the just cause provisions (Article 11) of the collective agreement, and must fall by virtue of Article 2.02, that is to say, if an employee is disciplined pursuant to an unreasonable policy, the discipline will not be for just cause: **Re Metropolitan Toronto (Municipality and CUPE 43** (*supra*).

74. In Metro Toronto the Union challenged a unilaterally imposed employer rule requiring ambulance drivers/attendants to use certain emergency warning lights and sirens while responding to all calls designated "emergency". The rule was a change from past practice where drivers could exercise discretion about the use of lights in certain types of emergencies. The arbitration board found, on the evidence, that there was no valid reason or employer interest in implementing the rule, that the rule was unreasonable, and that any discipline imposed for breach of such rule would be unjust. No discipline had been imposed.

75. The Ontario Court of Appeal upheld the decision of the arbitration board to impose a duty on the employer to exercise its discretion reasonably in making rules with disciplinary consequences.

76. In Metro Toronto, the essence of the objection to the new rule was that it was counterproductive and that it increased the risks of driving. The arbitration board began by looking at the business interests behind the implementation of the rule. The board found as a fact that the new system "far from creating an improvement, results in significant increases in the risk associated with the job and the efficient running of the call". It found that there was no valid business interest in implementing the changes. The evidence was quite clear that the policy change in question would result in more unsafe conditions for the ambulance operators and the public.

77. Since the rule was held to be unreasonable, it followed that it could not be the basis of discipline for just cause. The fact that there had been no discipline imposed when the grievance was filed was not significant. Since the collective agreement required that the management rights clause be enforced consistently with the collective agreement, to enforce an unreasonable rule would be *prima facie* a violation of the just cause provisions.

78. This conclusion is reflected in Brown and Beatty at section 4.2322:

4:2322 The genesis of arbitral review of management decisions for reasonableness.

A contextual or purposeful approach to the interpretation of collective agreements has led some arbitrators to require employers to act fairly and reasonably in the exercise of their management prerogatives. In one early award the "reasonableness" requirement was described as an aspect of interpretation of collective agreements ...

Of course, this requirement of a "fair" or "reasonable" exercise of management rights has parallel application in connection with the unilateral promulgation of rules and regulations by an employer. In such circumstances, where breach of the policy or rule can result in discipline, the "justness" or reasonableness of the rule or policy can be challenged in advance on the basis of the "obey now, grieve later" principle. Moreover, it has been assumed by most arbitrators that where management expressly reserves a discretion to itself, the exercise of that discretion will not be unfettered or immune from arbitral review.

79. Both parties also referred to section 4:1554 - 'the reasonableness requirement' as follows:

4:1554 The reasonableness requirement

In applying the standard of reasonableness, arbitrators assess the extent to which the rule is necessary to protect the employer's interests in operating the plant, in preserving its property, and generally in carrying out its operations in a reasonably safe, efficient and orderly manner. At the same time, the impact of the rule upon the employees' interests must be assessed and a balance struck that gives an appropriate effect or proportional regard to each interest.

80. Likely all would agree that the risk of collision is a significant factor in ambulance services. A collision may impact on the ability to respond to the patient or to get them the necessary care, and may endanger the safety of the paramedics and the public. It would be difficult to conclude that the Employer does not have a legitimate business interest in reducing the risk of collision. We find that it does. The Union has not really argued otherwise. The gist of the Union's issue with the policy is that imposing a cap on the speed the ambulance may travel may have a negative impact on response times in those situations where time is of the essence.

81. The Employer does not disagree with that general proposition, There are approximately two (2) percent of cases where it is crucial that the ambulance arrive at the scene and/or that the patient get to the health care facility, urgently. However, there are other factors besides the speed of the ambulance which will impact on response time.

82. For example, a patient living in one of the Island's two cities would likely have greater access to emergency medical care than someone living in a remote rural area. The distance between the ambulance at rest and the patient is obviously an important factor. Also, the number of ambulances available for calls is important. If there are only two ambulances available in a certain area and both are on calls, the ability to respond quickly to a third call may be compromised. The quality of dispatch information given to the paramedics may also have an effect on response time.

83. The Union acknowledged that the number of ambulances has increased in recent years, and that response times have decreased. Response times are monitored and it appears that the parties work together to constantly improve them.

84. Leaving aside the question of response time for a moment, we must consider whether it was reasonable for the Employer to conclude, as it did, that the risk of collision increases with increased ambulance speed.

85. In coming to that conclusion, the Employer did not make a decision based on impressionistic evidence, but conducted a fairly rigorous literature review in the context of its policy making mandate. It sought advice from experts in the field. That it did not

focus solely on the issue of response times is not surprising, since that was not the primary question being considered.

86. One could say of almost any research pursuit that there are articles that might have been considered or researchers who might have been consulted, but were not. However, we find that the Employer's methodology was appropriate in the circumstances and that the conclusions it reached, and the changes it made to the policy, were consistent with the research.

87. We find that both interests - decreasing the risk of collision and decreasing response times - are legitimate and significant and worthy of protection. Having said that, was it appropriate or reasonable for the Employer to focus on safety rather than lowering response times? That is the essence of the Union's position here.

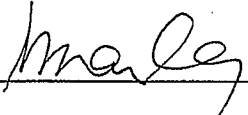
88. If there were evidence that the effect of the new policy aimed at increased safety led to an actual increase in response times, which might put that two (2) percent of 'at risk' clients even further at risk, it would be easier to find that the speed policy was unreasonable. But we do not have such evidence. In fact, response times have improved since implementation of the policy, for a variety of reasons. This conclusion reflects the bulk of the research considered by the committee.

92. Having said that, it follows that the policy change does not violate the Emergency Medical Services Regulations.

93. We will briefly address the final factor from KVP that was the focus of evidence and argument, that is, that the policy was not consistently applied. It was the intention of the Employer that the changes to the Emergency Response Policy be enforced across all Medavie companies, and it is currently being followed in Prince Edward Island, Nova Scotia, and Muskoka. The fact that changes were made to the policy in New Brunswick does not mean that the policy is not consistently applied, vis-a-vis the KVP rules. There is no evidence that the policy is not consistently applied by this Employer, Island EMS. In any event, the changes in New Brunswick were necessitated as a result of political pressure in a unique situation.

For all of these reasons, we find that there has been no breach of the collective agreement, and dismiss the grievance.

Dated this 18th day of March, 2011



Susan M. Ashley, Chair, Arbitration Board

Dated this day of , 2011

Susan Robinson, Employer Nominee

Dated this day of , 2011

Bob Crockett, Union Nominee

89. Commentators and arbitrators suggest that in considering whether a particular rule or policy is reasonable, one must balance the legitimate needs of the Employer with those of the affected employees. This situation is somewhat unusual, in that the Union is not suggesting any particular negative impact for the ambulance operators, other than the bother of having to check the speedometer and speed limits while driving on calls. Surely ambulance drivers would have done that even before the policy change, simply as part of paying attention to the conditions of the road. What the Union really argues is that the potentially negative impact on the two (2) percent of the patients also constitutes a negative effect on them.

90. We accept that paramedics are highly motivated, highly skilled and highly professional workers, and that they have a real interest in doing their job to the highest standards. However, this policy change was not imposed to "benefit" the Employer, (except to diminish the possibility of accidents and the consequential liability and other costs), or to somehow restrict the rights of the affected workers. The Employer has determined, legitimately in our view, that the two (2) percent of patients will not be significantly affected by the change, and that the change will improve the safety of all concerned. While ambulance operators have lost the discretion to drive at whatever speed they deem appropriate in the circumstances, when considering the risk of injury to themselves, the clients as well as the public, the balance, in our view, weighs in favour of the policy being found to be reasonable.