

# CONTRACT INTERPRETATION MANUAL

## Article 18 PROMOTIONS, TRANSFERS & DEMOTIONS IN THE FILLING OF VACANCIES OR NEW POSITIONS

### Interpretation Guidelines

#### Article 18.01 - First Consideration

Applicants already working for the Employer must be considered before external applicants.

Regular employees who are displaced or on layoff must be considered ahead of the internal applicants (Article 19.01 (B) (1)).

All internal applicants must be given an equal opportunity to show they are capable of doing the position either by formal interview or assessment.

Each employee who applies is entitled to a formal interview or assessment.

#### 18.01 (B)

New in 2019 all Nurse 1 or Nurse 3 non specialty positions are to be filled without an interview and based on seniority only. The exceptions to this are positions in pediatrics, Public Health, and rural nursing, where there may be an interview.

The Union's position is that non specialty includes all positions that do not qualify for Article 53.01 Special Clinical Preparation payments in a 2018 decision of the BCHOA Arbitrator Corrine Bell stated "While I accept that the qualifications for the Impugned Position are different than the qualifications in the Grievor's current position, I do not find that to be sufficient in this case to overcome the negotiated language in the Joint Interpretation. I find that in these circumstances, the different job description qualifications and detailed by [the Grievor] do not make the vacancy at issue a specialty vacancy".

#### 18.01 (D)

Allows managers to meet with the senior applicant and the Steward, to advise them of any concerns about the applicant's abilities and to describe what is necessary for the position. However, if the senior applicant still wants to try the job following the conversation, the manager must go ahead with the orientation.

#### Article 18.02 - Filling of Vacancies

1. Arbitrators have consistently described this provision as a "competitive clause", meaning applicants "compete" against other applicants for the position, limited by 18.01(B)
2. It could also be described as a "sufficient ability" clause in that it instructs the Employer that "appointments shall be made to the employee with the required qualifications, level of competency and efficiency as required by the position specifications" and goes on to state "where such requirements are equal, seniority shall be the determining factor".

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3. The Employer is required to award the vacancy to the senior applicant who meets the required qualifications, level of competency and efficiency as required by the position specifications (i.e. job description or job posting).
4. All internal applicants must be assessed and found not qualified prior to considering outside candidates (HLRA and BCNU, June 1, 1982 (Getz)) and (Royal Inland Hospital and HSA, December 7, 1984 (Nathanson)).

There have recently been some new awards through the BCHOA that have addressed various aspects of the selection process.

1. Barber (Ready) 2017: Question posed by the arbitration was the employee qualified? Award identified errors by the Employer in using qualifications not present in the job description to determine qualifications and as well erred in applying the definition of recent experience.
2. Kulak (Ready) 2017: Position awarded to the senior applicant and issues identified with the employer's reliance on the interview only.
3. Schanzenbach (Bell) 2019: Award regarding fair and balanced interviews.
4. Nadalin (Bell) 2018: Award regarding whether a position should be considered specialty or not for the purposes of Article 18.01 (B).

The following two arbitration awards each contain a comprehensive review of the application of "competitive clauses" and "relative equality" along with all the relevant jurisprudence:

1. West Coast General and BCNU, February 21, 2003 (Gordon).
2. Eagle Ridge Hospital and BCNU, September 24, 2003 (Hope, QC).

The principles to be applied in selection of applicants are:

1. The Employer is required to base their selection decisions on three factors:
  - (a) Required qualifications;
  - (b) Level of competency; and
  - (c) Level of efficiency.
2. No one factor is more important than the others.
3. Management's decision must not be arbitrary, discriminatory, and/or unreasonable or be made in bad faith.
4. Management must also demonstrate it has complied with the PCA.

The test of whether the Employer has complied with the PCA was explained by the arbitrator when they stated "the arbitration panel's task is to determine whether or not management applied the criteria set out in the agreement in making its decision and not some other criteria thereby violating the terms of the collective agreement" (HLRA Princeton General Hospital and BCNU (Hope), 1987, 32 LAC (3d) 35).

### Arbitration Awards

1. West Coast General and BCNU, February 21, 2003 (Gordon), This award contains a comprehensive review of the application of "competitive clauses" and the meaning of the term "relative ability" along with all the relevant jurisprudence.

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2. Eagle Ridge Hospital and BCNU, September 24, 2003 (Hope, QC). This is another useful award in that it also contains a comprehensive review of the application of “competitive clauses” and the meaning of the term “relative ability” along with all the relevant jurisprudence.
3. HLRA and BCNU, June 1, 1982 (Getz). An early award that set the foundation for the subsequent arbitral interpretations on these selection provisions.
4. Lillooet District Hospital and BCNU, July 26, 1985 (Greyall). An early award, describing the criteria to determine “relative equality” and the application of seniority in selections.
5. Princeton Hospital and BCNU, December 22, 1987, (Hope). Built on the Greyall award in the determination of “relative equality” and the application of seniority in selections.
6. HEABC [Simon Fraser Health Board (Royal Columbian Hospital) and BCNU, January 5, 1998, (Kinzie)]. The scoring of the candidates must be related to the objective answers given to those questions and not to how they presented themselves in the interview.
7. Vancouver Hospital and Health Sciences Centre and BCNU, March 4, 1999 (McPhillips). Sets out criteria to ensure the selection process “is fair and seen to be fair”.
8. Northwood Pulp & Timber Ltd. and Canadian Paperworkers Union, July 15, 1976 (Hope). This award sets out the criteria used by arbitrators to define “competency” as it is applied in selection issues.
9. Tidewater Oil Co. Canada Ltd. (1963) 14 LAC 233 (Reville). Deals with management rights in determining whether vacancies are filled.
10. Royal Inland Hospital and HSA, December 7, 1984 (Nathanson). First consideration. All internal candidates have to be assessed before an external candidate can be considered.

### Article 18.03 - Qualifying Period (renumbered in 2006 from 18.04)

Allows regular employees a 90 day qualifying period in a new position.

The employee can be returned to their previous position if found “unsatisfactory” by the Employer during the 90 days.

Where the Employer determines the employee to be “unsatisfactory” it must relate to job performance. This decision is grievable. The Employer needs to meet a higher standard of proof than the standard applied during a probationary period.

Only a promoted employee has the right to choose to return to their previous position if the employee finds the position unsatisfactory.

The employee has no right to choose to return to their previous position if the transfer was within their existing classification (eg. Level 1 to Level 1 or Level 3 to Level 3).

### Article 18.04 - Orientation and Training

The Employer is required to provide a proper orientation to all new, transferred, promoted, and redeployed employees as set out in the collective agreement (Articles 11,19 and 60).

Employers are required to pay employees at the applicable rate of pay, which means they receive any premiums including: shift differential, stat pay, or overtime rates that may be applicable for the time spent at orientation.

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Employers are also required to pay for travel time and other related expenses such as parking, where the orientation session is held at a location other than the employee's home worksite. In Simon Fraser Health Region and BCNU (GAD), November 3, 2000 (McPhillips), the arbitrator ruled that the Employer was required to pay differential travel time and any additional expenses incurred by employees to attend orientation other than at their regular worksite.

## Article 18.05 - Returning to a Formerly Held Position

A returning employee, who was promoted or transferred, inside or outside the union certification and returns to the bargaining unit or their formerly held position, retains seniority and accrued benefits and is slotted at the same increment step as though the promotion or transfer never occurred. This applies for 90 calendar days from the start date in the new position.

Any employee who was promoted or transferred as a result of a promotion or transfer will be returned to their formerly held position.

All employees returning to a formerly held position do not lose seniority or benefits.

## Article 18.06 - Salary on Promotion (renumbered in 2006 from 18.07)

The promoted employee is placed at the lowest step of the increment structure in the new level that gives them a minimum monthly increase of \$200.00, prorated to a FTE. For example, a Level 3 nurse at ninth year on the wage grid who receives a promotion to a Level 4 position would be placed on the wage grid at Level 4 seventh year.

The importance of this was confirmed by HEABC and NBA (IWAD), February 23, 2004 (Kinzie). The situation was:

1. Three more increment steps were added as a result of the legislated agreement in 2001. The 7th and 8th steps were added October 1, 2001 and the 9th step was added April 1, 2002.
2. Before October 2001, nurses with 10 years were at the top of the increment scale at Step 6.
3. The grievors were nurses who went into promoted positions before either October 1, 2001 or April 1, 2002. As a result, their placement on the increment scale was based on the 6<sup>th</sup> increment step rather than the 7th, 8th or 9th step.

The Arbitration Board dismissed the grievance, ruling:

1. The promotions which occurred before October 1, 2001 are completed transactions and there is nothing in the collective agreement requiring the Employer to re-open those transactions.
2. The effective dates for the additional steps are October 1, 2001 and April 1, 2002 and if they acceded to the Union's request, this would remove the effective dates and make them retroactive to a date further back.

Between 2019 and 2021 the LPN wage grid increased to 9 steps.

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## Article 18.07 - Increment Anniversary Date

The employee's anniversary date does not change on promotion. For example, an employee with an October 3rd anniversary date who starts in a promoted position on September 5th, will receive their next increment increase on October 3rd as usual (Article 11).

## Article 18.08 -- Relieving in Higher or Lower Position

Following a 2016 arbitration decision, it was agreed that an employee who relieves in a higher rated position is paid the rate of pay of the higher rated position for all hours worked in the position. The Employer will apply the promotion language in Article 18.06 (HEABC (FHA) v. BCNU (Wage Rate Grievance) – (Lanyon) 2016).

The Union takes the position that should a Level 4 employee normally be scheduled for a particular shift then this Article should apply.

A regular employee who is reassigned to a lower rated position for a shift, will have no loss of pay. A regular employee who voluntarily picks up an extra shift at a lower rated position, will be paid the rate of pay of that position for the extra shift.

The following joint interpretations of this language have been signed between the NBA and the HEABC:

### HEABC-NBA Provincial Collective Agreement - Joint Interpretation

#### ARTICLE 18.08 – RELIEVING IN HIGHER OR LOWER RATED POSITIONS (E&OE)

On February 23, 2017, the parties executed a revised green sheet for Article 18.08.

Both regular and casual employees relieving in a higher-rated position will received the rate of pay attracted by the position. The Employer will apply the promotional language of Article 18.06 and the employee will receive the higher rate of pay starting the first day worked in the position.

Where an Employer temporarily assigns a regular employee to a lower rated position, that employee will not incur a reduction to wages/benefits. This language does not apply to casual employees, or regular part-time employees picking up casual shifts.

## Article 18.08 – Relieving in Higher or Lower rated Position - Contract Language

(D) An employee who voluntarily accepts a shift will be paid the appropriate rate of pay for that position.

### HEABC-NBA Provincial Collective Agreement - Joint Interpretation

#### (D) VOLUNTARY ACCEPTANCE

Employees are under no obligation to accept lower-rated shifts offered by the Employer. Where an employee voluntarily accepts a shift, whether at overtime or straight-time, in a lower-rated position, they will be paid the rate of pay attracted by the position. Where the Employer reassigns a regular employee to work in a lower-rated position, the employee will be paid at their regular rate of pay. Article 18.08 (C) applies to

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casuals. This language does not apply to RNs/RPNs who fill a vacant LPN shift, unless they are dual registered. As per Appendix EE employees who are dual registered as an LPN and RN/RPN are paid the rate of the pay for the position except where the RN/RPN does not actively work as an LPN (i.e., doesn't have a regular LPN position and/or is not on an LPN casual list).

Examples:

1. A regular-status Level 2 nurse is offered and accepts a shift as a Level 1 nurse three days before it is scheduled to start. The nurse is paid the Level 1 rate of pay.
2. A regular-status Level 4 nurse is reassigned at the start of or during their shift to fill a Level 3 vacancy. The nurse will be paid their Level 4 rate of pay.
3. A regular-status Level 3 nurse is offered and accepts a vacant Level 1 shift as no Level 1 nurses were available. The nurse will be paid their current Level 3 rate of pay.
4. A dual-registered employee who actively works as both an LPN and an RN/RPN but owns a regular position as a Level 3 RN/RPN is offered and accepts a Level 1 LPN shift. This employee will be paid as a Level 1 LPN.

## Article 18.09 Voluntary Demotion

This is a demotion initiated by the employee and as a result they will be paid at the lower classification level.

The employee will be placed at the appropriate increment step based on their continuous service with the Employer. This seems to mean that an employee who has worked only a few years for the Employer may not be able to use previous experience from other Employers (Articles 45 and 51).

This article does not apply to:

1. Employees who are promoted and subsequently decide to return to their previous position within the 90 day qualification period. In this situation, employees resume their previous position and wage rate.
2. Employees who are displaced and either choose a vacancy or choose to bump into a lower-rated position pursuant to Article 19. The displacement process is caused by an Employer action, therefore it is considered to be an involuntary demotion. In this situation, the employee's current wage rate is protected by a process called "red- circling". BCNU filed an IWAD on June 7, 2002 that was resolved prior to the arbitration hearing based on arbitration awards on the same issue in favour of the BCGEU and HSA (Article 19).

## Arbitration Awards

1. Simon Fraser Health Region and BCNU (GAD), November 3, 2000 (McPhillips). The Employer was required to pay differential travel time and any additional expenses incurred by employees to attend orientation other than at their regular worksite.
2. HEABC and NBA (IWAD), February 23, 2004 (Kinzie). The grievance seeking re-calculation of increment steps in promoted positions that preceded the addition of the 7th, 8th, and 9th increment steps was dismissed. The arbitrator ruled:
  - (a) The promotions which occurred before October 1, 2001 are completed transactions and there is nothing in the collective agreement requiring the employer to re-open those transactions.

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The interpretations in this manual are provided on a *without prejudice, errors and omissions basis* to any position Unions in the Nurses' Association of Bargaining Agents may take in any arbitral proceeding or any other forum.

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- (b) The effective dates for the additional steps are October 1, 2001 and April 1, 2002 and if they acceded to the Union's request, this would remove the effective dates and make them retroactive to a date further back.

## Footnotes

<b>Article</b>	18
<b>Sub-Article</b>	18.01, 18.02, 18.03, 18.04, 18.05, 18.06, 18.07, 18.08, 18.09
<b>Last Update</b>	31-03-2021
<b>Related Articles</b>	3, 6, 11, 12, 13, 14, 16, 17, 19, 20, 23, 53, 62, 63 Appendix DD