

**Updated March 2014**

Explanatory Notes on the application of the OPSEU Collective Agreement were developed by the Employer in consultation with OPSEU. They have been written to provide information to OPS managers and employees represented by OPSEU. Explanatory Notes are not intended as a substitute for the language of the Collective Agreement. Reliance should only be placed on the actual text of the OPSEU Collective Agreement.

Managers who have questions about the information in this Explanatory Note should contact their Human Resources Advisor.

Employees who have questions about the information in this Explanatory Note should contact their manager, the Human Resource Service Delivery Centre in their region or an OPSEU representative.

### **Issue:**

The purpose of this Explanatory Note is to explain Article 31A.15 and ensure its consistent application.

### **Application**

Article 31A.15 applies to fixed-term employees in OPSEU where:

- the same work has been performed by the fixed-term employee for at least eighteen (18) consecutive months; and
- the fixed-term employee is not replacing a regular employee on an authorized leave of absence; and
- the ministry has determined that there is a continuing need for that work to be performed on a full-time basis; and
- corporate authorization has been granted to fill the position (i.e., cleared through surplus).

### **Eighteen Month Qualifying Period**

The eighteen (18) months must be consecutive. For the purpose of Article 31A.15.2, an incumbent's authorized leave (for example: vacation) will not constitute a break in the consecutive eighteen (18) month qualifying period and the period of time absent will be

counted toward the consecutive eighteen (18) month period [refer to GSB decision number 1571/97 (Briggs, 1997)].

Time spent while backfilling a regular vacancy caused by a secondment will count toward the eighteen (18) months. [Refer to GSB decision number 1234/93 (Kaplan, 1995)].

## **Same Work**

In considering whether an employee has performed the “same work” the following criteria should be taken into consideration:

- Whether the employee has been in the same fixed-term position at the same classification level for the 18 month duration;
- Whether the work has been in the same organizational or administrative unit and work location; and whether the employee was performing the full scope of duties required by the position claimed for conversion;
- Whether the scope of the work duties has essentially remained the same throughout the 18 month duration.

Note: If minor elements of the duties or responsibilities within the same position have been gradually added, removed or otherwise altered over the 18 months or if reporting relationships or work location have changed and these have not impacted duties of the position, the work would likely be considered the same. If however, the changes introduced were significant and the work performed by the employee has changed as a consequence, it would likely not be treated as the same work.

## **Full Time Basis**

In order to meet the conditions of conversion under this Article, the work has to have been performed on a full-time basis and the Employer must determine there is a continuing need for the work to be performed on a full-time basis.

A fixed-term employee who is employed on an as-needed basis would likely not meet these conditions. However, if the fixed-term employee did perform the same work on a full time basis for at least eighteen (18) consecutive months in a position where they were not replacing another employee on an authorized leave, they could be converted. The form of the employee’s contract alone is not determinative on the issue.

For the purposes of determining a “full-time” basis, the employee must have worked the hours of work scheduled for the appropriate classification. That is, if the classification is scheduled as a forty (40) hour work week, then the fixed-term employee must have worked forty (40) hours per week. That calculation is based on regular hours and is exclusive of any overtime hours. A reduction from a regular scheduled work week (from 40 to less than 40 where the full time equivalency remains unchanged) would result in

the employee not receiving credit for that week, therefore the calculation for the eighteen (18) month period would be adjusted (see GSB decision number 2564/91)

Absence due to sick leave or other authorized leaves of absence will not break the calculation for the purposes of the eighteen (18) month accumulation (see GSB decisions number 3084/91 and number 1571/97).

### **Fixed-Term Employees Working in Regular Vacancies**

A fixed-term employee who has been working in the same vacancy in the regular service for eighteen (18) consecutive months can be converted from the fixed-term service to the regular service if a ministry determines that there is a continuing need for the work to be performed on a full-time basis and provided that the position has received clearance. The position itself does not need to be converted since it is already part of the regular service.

A fixed-term employee who has been working in the same regular position for eighteen (18) consecutive months whose incumbent is on an authorized leave of absence would not be eligible for conversion. Incumbents on secondment are not considered to be on an authorized leave of absence.

### **Posting**

Where a ministry has decided to convert a fixed-term position to a position in the regular service under Article 31A.15, posting will be restricted to OPSEU-represented employees on notice of layoff for the sole purpose of targeted direct assignment consideration. The conversion can proceed after corporate authorization is granted to fill the vacancy.

### **Impact of Conversion on Probationary Period**

Employees eligible for conversion will not serve a probationary period.

### **Establishing a Position in the Regular Service**

Factors to consider when making the decision to establish a position in the regular service would include whether:

- There is a continuing demand/need for this work to be done on a full-time basis; and
- This work will be an ongoing internal business of the government.

Where a fixed-term contract continues to be extended in the face of funding uncertainty, an arbitration panel may nonetheless order establishment of the position in the regular service, giving the incumbent access to employment stability measures available to regular employees if the work or funding later end.

Vice Chair Brown dealt with the issue of continuing demand/need and privatization of services in GSB number 0211/02. The arbitrator ruled that that the ministry plan to provide services for at least six months before the services would be privatized amounted to a determination of continuing need.

In cases where work will continue for less than six months after an employee's 18 month mark, Vice Chair Briggs in GSB number 1237/98, determined that continuing need is not established if the employer has given the employee notice that their work was temporary in nature and would be ending or leaving the public service.

## **Monitoring of Conversion**

While Ministries are required to keep accurate statistics on numbers and types of positions converted, it is no longer necessary for potential conversions to be reviewed with the Ministry of Government Services (MGS) Employee Relations Division. Ministries with questions about whether particular situations meet the conversion criteria should consult with their Human Resources Advisor.

Ministries are to copy their OPSEU Ministry Employee Relations Committee (MERC) Co-Chair on all letters to fixed-term employees informing them of their conversion to regular status. Managers are responsible for issuing the letters to their staff with support from Human Resource Service Delivery Centres (See memo dated February 4, 2010 from Union Management Relations to MERC Co-Chairs)

## **Continuous Service**

The method of calculation of seniority/continuous service for employees moving from fixed-term to regular service is unchanged.

For fixed-term employees, including former Go Temp employees, converting to the regular service, a break in employment of up to thirteen (13) weeks between contracts will be deemed to be continuous (Article 18.1). Service prior to a break between contracts which is greater than thirteen (13) weeks will not be considered part of an employee's continuous service.

## **Group Insurance Coverage/Vacation Accrual/Severance Accrual**

Regular employees are eligible for group insurance coverage effective the first of the month immediately following two (2) months of continuous service (Article 64.1). Vacation and severance accrual are also based on the calculation of continuous service as above.

## **Pension Buy Back**

Membership in the OPSEU Pension Plan is optional for fixed-term employees and mandatory for regular employees. Fixed-term employees affected by the conversion who did not participate in the OPSEU Pension Plan will have the opportunity to

purchase credit in the OPSEU Pension Plan in accordance with the terms of the plan. Affected employees should be advised to immediately contact the Ontario Shared Services Contact Centre to ensure they do not miss the timelines or other procedural steps to purchase credit in the pension plan. Fixed-term employees who already opted to join the OPSEU pension plan will continue to participate in the plan upon conversion to regular status.

## **Questions & Answers:**

### **Question 1. How is full time under the eighteen (18) month period calculated?**

Answer. Under the Collective Agreement and as modified by the parties through a Central Employee Relations Committee (CERC) Agreement on November 3, 2010, "full time" is defined as 1725.5 or 1904 straight-time hours (as applicable in accordance with a 36.25 or 40 hour work week) in a year. These figures reflect full time hours for a year adjusted downwards to take into account 12 statutory holidays and 10 days of vacation, for a total of 22 days.

For the additional half-year, total full time hours for six (6) months are adjusted downwards by half the amount of statutory holidays and vacation, or 11 days. The equivalent of 18 months of full-time work would therefore be 2588.25 straight time hours (36.25 hour work week) or 2856 straight-time hours (40 hour work week).

### **Question 2. Are employees employed on an as-needed basis covered by this provision?**

Answer. In order to meet the conditions of conversion under this Article, the work has to have been performed **on a full time basis**, with a continuing need for the work to be performed on a full time basis as defined above in Question 2. A fixed-term employee who is called in "as-needed" would not likely meet these conditions. However, if they did perform the same work on a full-time basis for at least eighteen (18) consecutive months in a situation where they were not replacing other employees on approved leave then, subject to meeting the other criteria, they would be converted to the regular service.

### **Question 3. What if you have a fixed-term employee who meets all the conditions but has been working in a vacancy within the regular service for the past eighteen (18) months?**

Answer. If it is determined that there is a continuing need for the work to be performed on a full-time basis, the employee can be converted from fixed-term to regular but, since the vacancy is already within the regular service, a new position does not have to be created.

### **Question 4. Does the conversion override Article 20 (Employment Stability)?**

Answer. No. Corporate authorization to fill the vacancy must be granted before the conversion can occur. (See information under Posting.) If an employee on notice-of-layoff is directly assigned to the position, corporate authorization will

not be granted. The fixed-term employee who would otherwise have been converted will be given appropriate notice (i.e., 16 weeks notice).

**Question 5. Once converted to the regular service, is the employee on probation?**

Answer. No. The employee would be appointed to regular staff.

**Question 6. If the fixed-term employee has taken an approved leave of absence during that eighteen (18) month period, does this constitute a break in the eighteen (18) months?**

Answer. No. The period of time away would count towards the eighteen (18) months.

**Question 7. Under Article 31A.15, what happens if there has or will be a significant change in the employee's work?**

Answer. Article 31A.15 applies only when the **same work** has been performed by an employee for a period of at least eighteen (18) consecutive months and the ministry has determined that there will be a continuing need for that same work to be performed on a full-time basis.

**Question 8. A fixed-term employee is reaching the 18 month mark while backfilling a permanent employee who is on a secondment elsewhere in the OPS. We are now at the point where we must convert the fixed-term employee. What happens next?**

Answer. The ministry must establish a (permanent) position in the regular (classified) service when the same work has been performed by a fixed-term employee for a period of 18 consecutive months (except for periods of authorized Leave of Absences) and the ministry has determined that there is a continuing need for that work to be performed on a full-time basis. Time spent backfilling a secondment needs to be counted in the 18 months (see GSB decision number 1234/93, Kaplan).

Once a permanent position has been established in the regular (classified) service in accordance with that first step of the process (Article 31A.15.1.1), the fixed-term incumbent would be converted.