

**In the Matter of an Arbitration**

**Between:**

**North Bay General Hospital**

**and**

**Ontario Nurses' Association**

**In the Matter of the Grievance re: RN and RPN Scheduling**

**AWARD**

**Before:** Dana Randall

**For the Employer:** Shane Smith, Counsel  
Kelly Hanselman  
Leslie Bethune  
Marlaine Hibbard  
Theresa Bethune

**For the Union:** John D'Orsay, LRO  
Sue Linklater

**For the Intervenor:** Emma Phillips, Counsel  
Diane Corriveau  
Fran Ludwick

**A hearing in this matter was held in North Bay on June 15, 2009.**

## AWARD

I

ONA

grieves that the Employer has violated the Collective Agreement including Article 1, 10.12(a) and (b) and any other relevant provisions by allowing RPNs excluded from the bargaining unit to perform bargaining unit work. This is a violation of the RHPA and other applicable statutes and regulations.

CUPE, Local 139, which represents the RPNs, was made a party.

II

The Central collective agreement language relied upon by ONA provides:

### 10.12 Work of the Bargaining Unit / Agency Nurses

- (a) Nurses who are in supervisory positions excluded from the bargaining unit shall not perform duties normally performed by nurses in the bargaining unit which shall directly cause or result in the layoff, loss of seniority or service or reduction in benefits to nurses in the bargaining unit.

Nurses will be assigned duties and responsibilities in accordance with the *Regulated Health Professions Act* and other applicable statutes and regulations thereto. Hospitals will not assign such duties and responsibilities to employees not covered by this agreement unless those duties and responsibilities are appropriate to the position occupied by the person to whom the duties and responsibilities are being assigned and are consistent with the quality patient care.

Unless otherwise agreed by the Union and the Hospital, work performed by full-time nurses will not be assigned to part-time nurses for the purpose of eliminating full-time positions.

- (b) The Hospital shall not contract out the work of a bargaining unit nurse if, as a result of such contracting out, any bargaining unit nurse other than a casual part-time nurse is laid off, displaced or loses hours of work or pay. Prior to contracting out any available work, the Hospital will first offer the work on the basis of seniority to regular part-time nurses in the bargaining unit. Contracting out to an employer who is organized and who will employ the employees of the bargaining unit who would otherwise be laid off, with similar

terms and conditions of employment, is not a breach of this provision. This clause will not apply to the ad hoc use of agency or registry nurses for single shift coverage of vacancies due to illness or leaves of absence.

III

The parties proceeded by way of the following Agreed Statement of Fact:

1. The Hospital prepares its schedules in two (2) or four (4) week blocks.
2. The schedules are posted such that there is a minimum of six (6) weeks of posted schedules at any one time.
3. In preparing the RN schedules, FT RNs in a unit are scheduled for full-time hours and PT RNs are scheduled up to their commitment or availability. The Hospital *cannot* schedule RN staff beyond these limits or in contravention of other collective agreement restrictions (for example, consecutive weekend restrictions).
4. In some units, the Hospital is not able to schedule RN staff so that the base complement of RN staffing is completely met.
5. This is due to a shortage of RN staff.
6. The tours which are left unfilled after the FT and PT staff on the unit have been scheduled up to these limits are identified as 'needs' on the posted schedule.
7. The RN schedule for '3W Scollard' is attached as Appendix 1 as an example of a completed, posted schedule.
8. Some needs are listed with a strike through them. These needs are ones that the Staffing Officer has been advised that she does not need to try to staff with an RN as an additional tour.
9. Some needs are listed without a strike through. These needs are ones that the staffing office is to try and staff with an RN as an additional tool.
10. The Staffing Office is a department with five (5) total employees which is charged, *inter alia*, with filling needs in clinical areas. The majority of the day it is staffed by 2 people.
11. Needs to be filled can arise in a number of ways, including needs in schedules as outlined above and needs that arise after the schedule is posted as a result of

illness and other absences that occur.

12. In conjunction with the needs that exist in the posted RN schedule, the Hospital schedules an extra RPN on the RPN schedule that matches up with the need on the RN schedule.
13. Attached as Appendix 2 is the RPN schedule for '3W Scollard'.
14. Where the Staffing Office is able to fill a RN need from the posted schedule, the extra RPN is still maintained [on shift].
15. Needs on the RN Schedule that have been listed with a strikethrough may still be attempted to be filled with an RN from time to time. This can occur where it is determined that an RN is required due to the particular circumstance on the unit as the date of the need approaches - including such things as patient population and acuity.
16. Assessments on whether an RN is needed to fill a need are made by the Manager for the unit, the Unit Leader for the unit (an ONA position) or some combination thereof.
17. The Hospital estimates that it is unable to fill 20-25% of additional tours it tries to fill with RNs.
18. Attached as Appendix 3 is a copy of the College of Nurses of Ontario document on the utilization of RNs and RPNs.
19. In preparing the RN schedule, the RN needs that cannot be filled with scheduled RN's are positioned on the schedule at such times that, based on past experience, are least likely to require an RN.
20. For example, on 3W Scollard (acute medicine floor) the needs are left primarily to the third RN on nights.
21. At present, the staffing office has approximately 300 RN needs from June 15 to August 31. These are needs related to needs in posted schedules and do not include all the needs that will arise after the schedule has been posted [ie. Sick calls and other unanticipated absences). The needs that arise after the schedule has been posted are greater than the posted needs.
22. The Hospital schedules extra RPNs to correspond with the posted needs in RN schedules to ensure there is a registered nursing staff on the unit to ensure base staffing is maintained and due to the risk of being unable to fill the tour at all with an RN or RPN when the time comes.

23. The Hospital has been and is continuing to try and recruit RNs for all units. There are 25 posted vacancies for RN positions.

#### IV

For our purposes, the facts are these. The Hospital is short of RNs. This leads to "needs" on the RN schedule. These needs are either filled with RNs on additional tours or by RPNs. Prior to filling with the latter, an assessment is made as to whether an RN is required on a particular shift, based on patient population and acuity. What seems to animate the dispute is the Association's concern that the Hospital has an administrative system and scheduling practice which anticipates 9 weeks in advance that some RN needs will be filled with RPNs.

ONA seeks a declaration that the practice of the Hospital is a breach of article 10.12 of the collective agreement. The Association acknowledges that the Hospital has met all its scheduling obligations in the "Scheduling Regulations" in Article H of the Local agreement and, in particular, H-20 (a) and (b) with respect to part-time nurses. For instance, as paragraph 3 of the Agreed Facts notes, the Hospital is scheduling part-time nurses "up to their commitment or availability". ONA submits, nonetheless, that the Hospital has an additional obligation to part-time nurses prior to assigning their work outside the bargaining unit to RPNs and that obligation, put simply, is first offering the work to said part-time nurses.

#### V

The Association makes 2 alternative arguments in support of this position.

First, it submits that scheduling RPNs to do "needs" shifts is the contracting out of bargaining unit work and is caught by the language of 10.12(b) of the Central Agreement. Prior to that work being contracted out, the Hospital is required to "first offer the work...to regular part-time nurses in the bargaining unit". ONA submits that, unlike the language in H-20, these 'offers' are not subject to whether they place the part-time RNs in an overtime position or not. ONA submits that the agreed facts meet the requirements of the clause because the "needs" on the schedule are part of the base staffing of RNs and is therefore, by definition, "the work of a bargaining unit nurse". The harm done - part-time RNs 'lose hours of work or pay' - is also obvious. ONA relies on *Little's Nursing Home (Tecumseh)* and *ONA*, unreported, May 10, 1983 (Roberts, Chair) and *Beacon Hill Lodges (1984) Limited* and *ONA*, unreported, May 20, 1987 (H.D. Brown, Chair).

Secondly, the Association relies on the language of 10.12(a). ONA's argument is predicated on the *Regulated Health Professions Act*. The submission is that the Hospital's base staffing is designed to ensure an assignment of duties as between RNs and RPNs in accordance with that Act. The College has standards and guidelines regarding the scope of their respective practices and they are not interchangeable. If

the base staffing of RNs is designed to meet College requirements, then it is clearly inappropriate to, in effect, assign that work at the point of scheduling (9 weeks in advance) to RPNs. While acknowledging that the Hospital is permitted to move away from base RN staffing or "the norm" after making specific assessments of resident population and acuity closer to the particular shift in question, it is unreasonable and the Hospital should not be allowed to schedule these changes and replace an RN with an RPN as many as 9 weeks in advance.

## VI

For the reasons which follow, which track closely the submissions of both the Hospital and Intervenor, I am dismissing this grievance. I will begin with ONA's 10.12(a) argument first.

I disagree with ONA's basic assertion that the Hospital's scheduling outside of base RN staffing is *prima facie* a violation of 10.12(a). That is not what the provision says; it does not guarantee a level of RN staffing; and, as importantly, ONA's assertion is built on facts that are not in evidence. There is nothing before me which would allow me to conclude that the Hospital's base staffing is designed to meet the minimum RHPA and College guidelines or the accompanying one that any changes to those staffing levels are, by necessary implication, a breach of those guidelines. I am in no position to engage in that analysis. As the Hospital points out, there are undoubtedly many rationales for how base staffing is arrived at, including flexibility, recruitment, and retention. The Hospital asserts, in any case, that it is not a minimum and there is nothing before me to suggest otherwise.

As importantly, I agree with both the Hospital and the Intervenor that 10.12(a) is unique in that it does not restrict the Hospital from assigning bargaining unit work to non-bargaining unit staff. Rather, the Hospital is free to do that subject to two provisos: 1) that the duties and responsibilities assigned are appropriate to the assignee's scope of practice and 2) that the assignment is "consistent with quality patient care". As work assignment clauses go, this is broad and permissive.

In my view, it is not possible for me to assess whether there has been a breach of the article on the basis of the mere assertion of early scheduling of an RPN. Before being able to determine if the duties assigned to an RPN were consistent with 10.12(a), I would need to know what duties were assigned and carried out and, presumably, assess those duties in light of the acuity of the patients involved, the experience and expertise of the particular RPN, whether under the supervision of an RN, and sundry other circumstances specific to the shift in question. To engage in this analysis, without all of those facts, would be pure speculation. I agree with the Hospital that an assessment as to whether the clause has been breached cannot be undertaken based on schedules alone and I so find. Arbitrator Levinson in *Sioux Lookout District Health Centre and ONA (Jansson Grievance)*, [2002] O.L.A.A. No.623, who had more evidence before him, came to a similar conclusion.

I now turn to the Association's contracting out argument. On the basis of both general arbitral principles and the specific language used in both article 10.12 of the central agreement and in H-20 of the Local, I am simply not persuaded by ONA's submission. In my view, 10.12(a), while not breached on the evidence before me, is the applicable clause; 10.12(b) is, on the other hand, not relevant to the issue in dispute.

10.12(a) and (b) are two distinct clauses. a) deals with the distribution of work amongst the employees of the Hospital; b) deals with the 'contracting out' of bargaining unit work to employees of another employer. The distinct application of the two clauses is clear and unambiguous on the face of each. Moreover, the distinction reflects a lengthy arbitral history, dating back to *Russelsteel Ltd.* (1966), 17 L.A.C. 253 (Arthurs). Unions need both a 'work of the bargaining unit' clause and a 'no contracting out' clause to address the distinctly different incursions on bargaining unit work occasioned by each. In this case, Mr. Dorsey seeks to characterize the RPN incursion, which is clearly a 10.12(a) issue, as a contracting out issue or, as Hospital counsel suggests, he is seeking to use the no contracting out clause to inform the argument respecting the distribution of work amongst the employees of the Hospital. In either case, I am not persuaded. The argument is not supported by the clear language of the two provisions, by the arbitral history, or by the language of the Local agreement. With respect to the last, it seems obvious to me that if ONA is right about the applicability of (b), much of the language of H-20 would be rendered superfluous, if not a nullity. The no contracting out language would 'occupy the field'. For instance H-20 (b)iii provides:

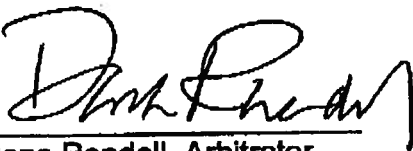
It is understood that the Hospital will not be required to offer tours which would result in overtime premium pay;

If 10.12(b) applies, the Hospital, as a matter of course, 'would be required to offer tours which would result in overtime premium pay'. In my view, that outcome was not contemplated by the parties and I so find.

## VII

For these reasons, the grievance is dismissed.

DATED AT BARRIE, ONTARIO THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2009.

  
Dana Randall, Arbitrator