IN THE MATTER OF AN ARBITRATION

Between:

Ontario Nurses Association
Local 70

("Union")

- and -

Hamilton Health Sciences Corporation

("Employer")

Arbitrator: Nimal Dissanayake

Appearances:

Nicole Butt (Counsel)
Claudia Vicencio (Co-Counsel)
Pat MacDonald, Connie Ross, B.J. Swanson
Linda Castle and Sharon Gall
for the union

Mark Zega (Counsel)
and Beth Galama
for the Employer

Hearing: September 25, 2009 at Hamilton, Ontario

AWARD

[1] As per the agreement of the parties (See the Agreed Statement of Fact, infra para.2) this award is limited to an Association Grievance (no. 09-018). In a nut-shell, the issue is whether the employer was entitled as it did, to declare approximately 38 nursing positions surplus, and to reassign the Registered Nurses (RN's) who held those positions ("affected nurses") to available vacancies in other units within the employer's operation. ONA submits that in the circumstances the employer was required by the collective agreement to layoff the affected nurses in accordance with the collective agreement, and to allow them to exercise the rights set out therein. The employer disagrees, and takes the position that article 10.07(g) of the Central Agreement explicitly gives it the right to act as it did. The parties agree that, if a violation of the collective agreement is found I should make a declaration to that effect, and remain seized with respect to any other remedy that may flow from the award.

[2] At the commencement of the hearing the parties filed the following "Agreed Statement of Facts":

AGREED STATEMENT OF FACTS

A. THE PARTIES

Hamilton Health Sciences ("HHS" or the "Hospital") is an independently governed academic health science organization funded primarily through transfer payments from the Province. HHS is governed by one board and has one management structure.

HHS operates a number of locations including: Chedoke Hospital, Hamilton General Hospital, Henderson General Hospital, McMaster Children's Hospital, McMaster University Medical Centre, St. Peter's Hospital and the Juravinski Cancer Centre. HHS is affiliated with McMaster University's Faculty of Health Sciences. It provides tertiary, secondary and ambulatory health care services to Hamilton as well as Central South and Central West Ontario.

The Ontario Nurses' Association ("ONA" or the "Union" represents registered and graduate nurses employed in a nursing capacity in a bargaining unit covering both full-time and part-time nurses employed by HHS. ONA members at HHS are represented by ONA Local 70.

The current collective agreement governing labour relations between HHS and the Union comprises a central portion and a local portion. (Exhibits #1 and #2)

B. GRIEVANCES

There are 38 grievances (Exhibit #3) before the arbitrator:
(List of grievances omitted)

ONA Association Grievance 09-017 was also referred to Arbitrator Dissanayake, but has been withdrawn by ONA, on a without prejudice and without precedent basis.

The Parties agree that Arbitrator Dissanayake has jurisdiction to determine the above-listed grievances.

The Parties agree that Arbitrator Dissanayake will determine the merits of Association Grievance 09-018 first. The Parties reserve the right to present evidence for the individual grievances, if necessary, following the determination of Association Grievance 09-018.

MATERIAL FACTS

HHS identified a significant gap between its increasing costs and its expected funding for the 2009 fiscal year. The Hospital's expected funding shortfall for the fiscal year commencing April 1, 2009 was approximately $25 million. In accordance with directives from the Ministry of Health and Long-Term Care ("MOHLTC"), HHS is required by law to submit a balanced budget to the Local Health Integration Network ("LHIN").

1. In order to achieve the mandated balanced budget, HHS evaluated its clinical services offered at all its sites. HHS' objective was to achieve cost savings of approximately $25 million while minimizing staff affects having regard to patient care requirements. All leaders were asked to evaluate their programs for cost reduction initiatives including staffing requirements.

2. In addition, HHS consulted with its stakeholders including its bargaining agents in the fall of 2008. Commencing in October 2008, bargaining agents were advised of budgetary concerns and their input was sought. The Fiscal Advisory Committee meeting on October 28, 2008 addressed budgetary concerns. A special FAC meeting including Union representation was held on December 1, 2008 to launch processes seeking organizational efficiencies and to reduce expenditures.

3. The Hospital identified a number of non-union and unionized surplus positions given its operational needs during the process. There were surplus positions identified in both the Registered Nurse classification and the Nurse Clinician/Educator classification under the ONA local collective agreement.

4. RNs in the Nurse Clinician/Educator classification were provided with notice of layoff as a reassignment would have resulted in a loss of earnings or hours or a demotion to a position outside of their classification. Any individual grievances arising out of the Nurse Clinician layoff are not before Arbitrator Dissanayake.

5. RNs in the Registered Nurse classification were not initially provided with notice of layoff. During this time, HHS had an overall RN nursing shortage with unfilled full time and part time RN vacancies in the ONA bargaining unit.

6. On or about January 20, 2009, ONA representatives attended a meeting with some members of the HHS Executive. At this meeting, HHS informed ONA that it would eliminate surplus positions in the RN classification and reassign nurses. HHS provided ONA with a list of nurses who would have their current positions declared surplus and who would be reassigned to different units. The Hospital advised it considered staffing mix and nursing shortages and reviewed skill mix nursing requirements in an attempt to provide the right care provider for the right patient at the right time.

7. HHS informed ONA that it would consider alternative suggestions. At the January 20, 2009 meeting, ONA informed HHS that it was ONA's position that the proposed reassignments were a violation of the central collective agreement.

8. Following the January 20, 2009 meeting, ONA advised in a January 22, 2009 e-mail from Colleen Ionson, Labour Relations Officer, that it would not be participating in proposed initiatives. (Attached e-mail at Exhibit #4)

9. On or about January 26, 2009, ONA was provided with written notice that specified members in the RN classification would have their positions declared surplus and would be reassigned to

different units. (attached notice at Exhibit #5) ONA was also made aware that if, after the reassignment process, there were nurses who could not be reassigned, those nurses would be provided with their layoff rights under Article 10.08 of the Central Collective Agreement.

10. RN staff declared surplus were selected on the basis of departmental seniority. The Hospital determined surplus RNs would be reassigned within their RN classification as there was available work including vacancies in the ONA bargaining unit. It was the Hospital's expectation there would be no loss of hours and no impact upon the RN's pay rate.

11. On January 27, 2009, letters were provided to affected RNs in individual meetings. The RNs were advised that due to the financial constraints facing the Hospital, their position had been identified as surplus and that they would be reassigned to a position within their classification at a future date. The nurses were provided with a list of vacancies and requested to complete two forms. The first form would identify the RNs preferences and the second form was a skills checklist. Attached at Exhibit #6 is the template letter and the forms. Surplus nurses were requested to complete and return forms by February 6, 2009 and identify reassignment preferences. Surplus RNs were permitted to complete posted work schedules while suitable assignments and vacancies were reviewed.

12. ONA filed policy grievances on January 30, February 3 and February 13, 2009. On or about the first week of February 2009, the Union filed multiple grievances on behalf of individual employees in response to the reassignments proposed by HHS. Each grievance alleged that the proposed reassignments were contrary to Articles 10.08 and 10.09 of the Central Collective Agreement.

13. Surplus nurses in the RN classification remain employed by the Hospital with no change to their wage or benefit entitlement under the collective agreement. No full-time surplus nurse in the RN classification has suffered a reduction in hours or pay as a result of the Hospital's decision. Grievances have been filed on the issue of part-time nurses in the RN classification alleging a reduction in hours or pay. Some of those grievances are before Arbitrator Dissanayake, and will be determined, if necessary, following the determination of Association grievance 09-018.

14. The Hospital has and continues to face, a shortage of RNs. The Hospital continues to seek RNs as unfilled vacancies remain in the ONA bargaining unit.

15. Surplus RNs who were reassigned were not given access to their layoff rights under Article 10.08 of the Central Collective Agreement. The process reviewed above was not treated as a layoff by the Hospital. Accordingly, neither the Union, nor any of the affected nurses were initially given notices of layoff or offered the options under Article 10.09(b)(ii). Early retirement was not offered to eligible nurses under Article 10 of the collective agreement.

16. The parties agree to leave any factual issues regarding grievors' eligibility to remedy if necessary.

(Note: Not all attachments are reproduced in this award)

[3] Association grievance no. 09-018 reads:

> The union is grieving that the Hospital has violated the Collective Agreement particularly Articles 1, 7, 10, 19, Appendix 3, 5C and any other relevant provisions by failing to recognize the elimination of positions as a layoff; not giving the Union and the affected members notice of layoff as required; not providing options as required per layoff language and procedures eg: early retirement packages, bumping rights etc. and re-assigning affected members to an incomplete list of vacancies etc.

[4] The Central Collective Agreement includes the following provisions:

Article 1 - <u>PURPOSE</u>

1.02 It is recognized that nurses wish to work together with the Hospital to secure the best possible nursing care and health protection for patients. Appropriate committees have been created under this Agreement to work towards this objective.

10.07 <u>Job Posting</u>

. . .

(g) Where nurses are reassigned to meet patient care needs at the hospital, they will be reassigned to units or areas where they are qualified to perform the available work.

10.08 <u>Layoff - Definition and Notice</u>

a. A "Layoff" shall include a reduction in a nurse's hours of work and cancellation of all or part of a nurse's scheduled shift.

Cancellation of single or partial shifts will be on the basis of seniority of the nurses on the unit on that shift unless agreed otherwise by the Hospital and the Union in local negotiations.

A partial or single shift reassignment of a nurse from her or his area of assignment will not be considered a layoff. The parties agree that the manner in which such reassignments are made will determined by local negotiations.

b. A "short-term layoff" shall mean
i) a layoff resulting from a planned temporary closure of any part of the Hospital's facilities during all or part of the months of July and August (a "summer shutdown") or during the period between December 15th and January 15th inclusive (a "Christmas shutdown"); or
ii) a layoff resulting from a planned temporary closure, not anticipated to exceed six months in length, of any part of the Hospital's facilities for the purpose of construction or renovation; or
~~iii) Any other temporary layoff which is not anticipated to exceed three months in length.~~

c. A "long-term layoff" shall mean any layoff which is not a short-term layoff.

d. The Hospital shall provide the Local Union with no less than 30 calendar days' notice of a short term layoff. Notice shall not be required in the case of a cancellation of all or part of a single scheduled shift, provided that Article 14.12 has been complied with. In giving such notice, the Hospital will indicate to the Local Union the reasons causing the layoff and the anticipated duration of the layoff, and will identify the nurses likely to be affected. If requested, the Hospital will meet with the Local Union to review the effect on nurses in the bargaining unit.

e. <u>Notice</u>

In the event of a proposed layoff at the Hospital of a permanent or long-term nature or the elimination of a position within the bargaining unit, the Hospital shall:

i) provide the Union with no less than five (5) months written notice of the proposed layoff or elimination of position; and

ii) provide to the affected employee(s), if any, no less than four (4) months written notice of layoff, or pay in lieu thereof.

NOTE: Where a proposed layoff results in the subsequent displacement of any member(s) of the bargaining unit, the original notice to the Union provided in (i) above shall be considered notice to the Union of any subsequent layoff.

The Hospital shall meet with the Local Union to review the following:

i) the reasons causing the layoff;

ii) the service which the Hospital will undertake after the layoff;

iii) the method of implementation including the areas of cut-back and the nurses to be laid off; and

iv) any limits which the parties may agree on the number of nurses who may be newly assigned to a unit or area.

10.09 <u>Layoff - Process and Options</u>

a. In the event of a layoff, nurses shall be laid off in the reverse order of seniority provided that the nurses who are entitled to remain on the basis of seniority are qualified to perform the available work. Subject to the foregoing, probationary nurses shall be first laid off.

b. Nurses shall have the following entitlements in the event of a layoff;

Prior to implementing a short-term layoff on a unit, nurses will first be offered, in order of seniority, the opportunity to take vacation day(s), utilize any compensating/lieu time credits or to take unpaid leaves in order to minimize the impact of a short-term layoff.

i) A nurse who has been notified of a short-term layoff may:

A. accept the layoff; or

~~B. opt to retire if eligible under the terms of the Hospital's pension plan as outlined in Article~~ 17.04; or

C. elect to transfer to a vacant position provided that she or he is qualified to perform the available work; or

D. displace another nurse in any classification who has lesser bargaining unit seniority and who is the least senior nurse on a unit or area whose work the nurse subject to layoff is qualified to perform.

ii) A nurse who has been notified of a long-term layoff may

a. accept the layoff; or

b. opt to retire if eligible under the terms of the Hospital's pension plan as outlined in Article 17.04; or

c. elect to transfer to a vacant position provided that she or he is qualified to perform the available work;

d. displace another nurse in any classification who has lesser bargaining unit seniority and who is the least senior nurse on a unit or area whose work the nurse subject to layoff is qualified to perform.

iii) In all cases of layoff:

A. Any agreement between the Hospital and the Union concerning the method of implementation of a layoff shall take precedence over the terms of this article. The unavailability of a representative of the Union shall not delay any meeting regarding layoffs or staff reductions.

B. Where a vacancy occurs in a position following a layoff hereunder as a result of which a nurse has been transferred to another position, the affected nurse will be offered the opportunity to return to her or his former position providing such vacancy occurs within six (6) months of the date of layoff. Where the nurse returns to her or his former position there shall be no obligation to consider the vacancy under Article 10.07. Where the nurse refuses the opportunity to return to her or his former position the nurse shall advise the Hospital in writing.

C. No reduction in the hours of work shall take place to prevent or reduce the impact of a layoff without the consent of the Union.

D. All regular part-time and full-time nurses represented by the Union who are on layoff will be given a job opportunity in the full-time and regular part-time categories before any new nurse is hired into either category.

E. Full-time and part-time layoff and recall rights shall be separate.

F. Casual part-time nurses shall not be utilized while full-time or regular part-time nurses remain on layoff, unless the provisions of Article 10.10 have been complied with or unless the matter is covered by local scheduling.

G. No new nurses shall be hired until all those nurses who retain the right to be recalled have been given an opportunity to return to work.

H. In this Article (10.09), a "vacant position" shall mean a position for which the positing process has been completed and no successful applicant has been appointed.

I. The option to "accept a layoff" as provided in this Article includes the right of an employee to absent her or himself from the workplace.

c. i) Where there are vacant positions available under Article 10, but the nurse is not qualified to perform the available work, and if such nurse is not able to displace another nurse under Article 10, the nurse will be provided with the necessary training up to sixteen (16) weeks' training to enable the nurse to become qualified for one of the vacant positions. In determining the position for which training will be provided the Hospital shall take account of the nurse's stated preference.

ii) When nurses would otherwise be recalled pursuant to Article 10 but none of the nurses on the recall list are qualified to perform the available work the Hospital will provide necessary training up to sixteen (16) weeks to nurses, in order of seniority, to enable them to become qualified to perform the available work.

iii) Where a nurse receives training under its provision, she or he need not be considered for any further vacancies for a period of six (6) months from the date she or he is placed in the position.

Article 10.10 provides for the recall of laid-off nurses in order of seniority, subject to certain exceptions not relevant here. Article 10.14(b) provides that before issuing notice of long-term layoff pursuant to article 10.08(e)(ii) and following notice pursuant to article 10.08(e)(i) the hospital will make offers of early retirement allowance, in accordance with certain listed conditions, which are also not relevant here.

[5] The Local Collective Agreement between these parties includes the following:

ARTICLE C - MANAGEMENT RIGHTS

C-1 Except as specifically abridged, delegated, granted or modified by this Agreement, all the rights, powers and authority of management are retained by the management and remain exclusively and without limitation within the rights of management.

C-2 Without limiting the generality of the foregoing, management's rights include:

a. The right to maintain order, discipline and efficiency, and in connection therewith to make, alter and enforce from time to time, reasonable rules and regulations, policies and practices, to be observed by its' employees, and the right to discipline or dismiss employees for just cause.

b. The direction of the working forces; the right to plan, direct and control the operation of the Hospital, the right to introduce new and improved methods, facilities and equipment, the right to determine: the amount of supervision necessary, combining or splitting up departments, work schedules, establishment of standards and quality of care, the determination of the extent to which the Hospital will be operated and the increase or decrease in employment.

c. The right to select, hire, discipline, dismiss, transfer, assign to shift, promote, demote, classify, lay-off, recall, suspend employees and select employees for positions not covered by this Agreement.

d. The sole and exclusive jurisdiction over all operations, buildings, machinery and equipment vested in the Hospital.

C-3 The exercise of any of these rights will not be inconsistent with the provision of this Agreement.

[6] This grievance is about the proper interpretation of the collective agreement. The very language that needs to interpreted here has been the subject of a number of prior arbitration awards. Not surprisingly, therefore, those awards received much attention from the parties. The employer submitted

a number of authorities on other related issues such as the proper cannons of interpretation, and the duty to post vacancies. I do not consider it necessary to review or even list those.

[7] The authorities relevant to the interpretation issue before me which the parties addressed are as follows:

Re York-Finch General Hospital v. O.N.A. (1993), 32 L.A.C. (4th) 326. (Brown) ("Brown award");

Re Centre for addiction and Mental Health v. O.N.A. (2003), 73 C.L.A.S. 154. (Briggs) ("Briggs award") application for judicial review dismissed [2004] O.J. No. 5418 (October 14, 2004) Ont. Div. Ct.;

Re Hamilton Health Sciences Corp v. O.N.A. (2003), 73 C.L.A.S. 424. (Kaplan) ("Kaplan award");

Re Windsor Regional Hospital v. O.N.A. (2003), 74 C.L.A.S. 352 (Etherington) ("Etherington award");

Re Scarborough Hospital v. O.N.A. (2004), 76 C.L.A.S. 391. (Surdykowski) ("Surdykowski award");

Re Royal Victoria Hospital v. O.N.A. (2006), 86 C.L.A..S. 169. (Stephens) ("Stephens award");

Re Sunnybrook Health Sciences Centre v. O.N.A. (2006), 87 C.L.A.S. 257. (Newman) ("Newman award");

Re Participating Hospitals v. O.N.A., June 30, 1997, (Devlin) ("Devlin award");

Re St. Joseph's General Hospital, Elliot Lake v. V.O.N.A., (unreported) February 8, 2008 (Rose) ("Rose award");

Re Sunnybrook & Women's College Health Sciences v. O.N.A., (unreported) June 23, 2008 (Albertyn) ("Albertyn award");

Re Toronto East General Hospital v. O.N.A., (2009), 96 C.L.A.S. 444 (Goodfellow) ("Goodfellow award");

Re St. Joseph's Health Care Hamilton v. O.N.A. (2009), July 28 (Burkett) ("Burkett award").

In addition, the parties referred to the following interest arbitration awards:

Re Participating Hospitals v. O.N.A., November 11, 1994 (Thorn (Chair), Filion Mayne) ("Thorn Interest award");

Re Participating Hospitals v. O.N.A., May 5, 1998 (Houlden (Chair), Filion Mayne) ("Houlden Interest award");

Re Participating Hospitals v. O.N.A., September 8, 2005 (Keller (Chair), Filion, Mayne); ("Keller Interest award");

Re Participating Hospitals v. O.N.A., March 5, 2007 (Albertyn (Chair), Filion, McIntyre) (Albertyn Interest award").

[8] The language in question has its origin in the Houlden Interest award dated May 5, 1998. The issue to be determined is whether, under that language, the reassignment of the affected nurses constituted a layoff as O.N.A. asserts, or whether the re-assignments were a legitimate exercise of a right conferred upon the employer. This issue must be determined by interpreting the collective agreement language to ascertain the intention of the Houlden Board of arbitration when it crafted the language.

[9] In examining the key provisions, particularly articularly 10.07(g) and article 10.08(a), I find, as did arbitrators Etherington, Stephens, Newman, Goodfellow and Burkett, that the language is ambiguous. Therefore, I am entitled to have recourse to extrinsic evidence as an aid to interpretation of that language. (See, Leitch Gold Mines Ltd. V. Texas Gulf Sulphur Co. (1968) 3 D.L.R. (3d) 161 (Ont.H.C.J.) And Noranda Metal Industries Ltd v. I.B.E.W. Local 2345(1983) 44 O.R. (2d) 529 (C.A.).

[10] The history of the current language provides a useful and informative context as to how the current language evolved. Several arbitrators have traced this history. It is convenient to reproduce the following excerpt from the Stephens award at paragraphs 2 to 22:

History of the ONA Layoff Language

2 It is necessary to review the history in order to understand the issue. The paper trail begins with a rights arbitration dated July 13, 1983, between ONA and The Participating Hospitals, issued by a board chaired by Arbitrator Martin Teplitsky, along with Chris Paliare, and Warren Winkler. One of the questions before the Teplitsky board was:

> Does the cancellation of a scheduled tour for a regular part-time nurse constitute a lay-off under Article 10.06 (part-time)?

3 The relevant language in Article 10.06 read as follows:

> A layoff of regular part-time nurses shall be made on the basis of seniority provided that the regular part-time nurses who are entitled to remain on the basis of seniority are qualified to perform the available work. Subject to the foregoing, probationary nurses shall be first laid off.

4 Mr. Oram characterized this as a "traditional", l ay-off clause, and the parties before Teplitsky agreed that the answer to the question was 'yes', the cancellation of a scheduled tour fit within the definition of a layoff.

5 That is where the matter stood until the rights arbitration decision in York-Finch General Hospital and ONA (H.D. Brown, unreported, February 23, 1993.) In the York-Finch case, ONA alleged that the employer had engaged in a layoff of 34 nurses when it announced an indefinite extension of bed closures on two wards. There were sufficient position vacancies in other areas of the hospital to accommodate all of the affected nurses. The nurses were offered the chance to choose one of the vacant positions, but they were not permitted to bump other employees in the hospital. The Board applied the definition reflected in arbitral jurisprudence,

that a layoff involved a loss of employment. Given the fact that none of the nurses experienced a loss of working hours, the Board ruled that there had been no layoff.

6 Shortly thereafter, on March 3, 1993, another rights arbitration decision was issued by a board chaired by Arbitrator Brian Keller in Toronto Hospital and ONA. The Toronto Hospital case also dealt with the Article 10.06 language, and reached a similar decision to the York-Finch case. In Toronto Hospital, the hospital had maintained a 'pool' of nurses who were assigned, as needed, to fill short term vacancies in the hospital. There were a number of permanent vacancies posted in 1990 that the hospital had been unable to fill. As a result, the hospital decided to disband the relief pool, and the nurses in the pool were reassigned to fill the permanent vacancies. The Board found that there had been no layoff, as, again, the affected nurses had not suffered any loss of employment, nor had there been any reduction of the bargaining unit.

7 Arbitrator Keller issued another decision on November 6, 1993, reaching the same conclusion, in a case involving St. Joseph's Health Centre and ONA.

8 Again, Arbitrator Keller found that the transfer of a number of nurses from a closed unit to fill permanent vacancies was not a layoff under the Article 10.06 language, as the nurses were not subjected to any loss of work.

9 In apparent response to these arbitrations, Arbitrator Thorne awarded new language on the definition of layoff in the interest arbitration award covering the 1993-96 term. The language awarded by Arbitrator Thorne, which became Article 10.07(a), defined layoff to include the "... cancellation of all or part of a nurse's scheduled shift." This new language, as was pointed out by Arbitrator Richard Brown in Participating Hospitals and ONA (unreported, September 12, 1996), in effect, codified the outcomes in the Teplitsky, Keller, Brent, and other awards. Arbitrator Thorne's language also introduced the concept of 'displacement' from a nurse's area of assignment, in a manner that clearly distinguished 'displacement' from loss of work, as follows:

> 10.07(a) A "Layoff" shall include a reduction in a nurse's hours of work, cancellation of all or part of a nurse's scheduled shift, and a displacement of a nurse from her or his area of assignment."

10 A board chaired by Arbitrator Jane Devlin issued a rights arbitration decision dealing with a number of questions about the Thorne language, in The Participating Hospitals and ONA (unreported, June 30, 1997). One of the questions before that board was:

> When the hospital moves a nurse to another unit for one shift or less, is it a layoff within the meaning of Article 10.07(a) requiring the hospital to apply the provisions of Article 10.08(2)(a)?

11 Article 10.08(2)(a) set out the rights a nurse can exercise when subject to a short term layoff, which are: to accept the layoff, accept a transfer to a vacant position, or bump a junior nurse if there are no vacant positions. The Devlin board found that the language of Article 10.07(a) made it clear that the displacement of a nurse from her area of assignment constitutes a layoff, "... regardless of whether there is a reduction in hours or cancellation of a scheduled shift resulting in a loss of work." The Board concluded, however, that a displacement for less than one shift did not constitute a lay-off. The Board went on to make a finding that is key to the issue before me. Having concluded that displacement for less than one shift was not a layoff, the Board clearly held that displacement for a full shift or more would trigger the layoff rights under the collective agreement, stating at page 26:

> "Nevertheless, different considerations apply where there is insufficient work in a nurse's area of assignment and additional nurses are required on another unit for a full shift. In such circumstances, we find that, as a general rule, the Hospital is required to apply the layoff provisions contained in Article

10.08(2)(a). In this regard, we note that there is nothing to indicate that the displacement of a nurse from her area of assignment constitutes a layoff only in cases where the displacement occurs for an extended period. There is also nothing to indicate that this aspect of the definition of layoff has no application in the case of a short-term layoff which may be measured in days."

It is useful to note that the other members of the Devlin Board were Don Mayne and Roy Filion, both of whom were also members of the board of interest arbitration chaired by Justice Houlden, the very Board that drafted the current language.

12 That brings the narrative up to the interest arbitration award from the panel chaired by Justice Houlden, covering the 1996-98 collective agreement. The history demonstrates that the reassignment issue predated the Thorne award, and that there had been considerable litigation about reassignment, both before and after it was included in the definition of layoff.

13 The Participating Hospitals' brief to the Houlden board contained a proposal to amend the definition of layoff awarded by Arbitrator Thorne. For ease of reference, the Thorne language read as follows:

> 10.07(a) A "Layoff" shall include a reduction in a nurse's hours of work, cancellation of all or part of a nurse's scheduled shift, and a displacement of a nurse from her or his area of assignment."

14 The Participating Hospitals proposed changing the definition to read as follows:

> 10.07(a) A layoff is defined as:
> i. a nurse being terminated from employment at the hospital as the result of the reduction in available work and being placed on a recall list for a period of 24 months; or
> ii. a planned reduction in the hours of work of a full time nurse on a regular basis over the nursing schedule to less than the regular hours of work provided for in Article 13.01.

15 The Participating Hospitals argued that the proposed change would bring the ONA language within a more "commonly accepted" definition of layoff, and justified its proposal, in part, on the outcome of the Devlin award, discussed above. Significantly, the Participating Hospitals described the meaning of the Devlin decision as follows:

> "A July 1997 rights arbitration award involving several hospitals found that, in the context of the present Article 10.07(a), nurses could be assigned during the course of their shift without it being a layoff; however, reassignments for a full shift or more do constitute a layoff. We do not believe that these sorts of reassignments should trigger the layoff and displacement process. "(Emphasis added)

17 The submission makes it clear that the employer accepted that the result of the jurisprudence reviewed above was that the reassignment of a nurse for more than one shift fell within the definition of layoff. The Participating Hospitals found this interpretation difficult to work with, and they asked Justice Houlden to change the language to relieve them of the burden. In fact, the language proposed by the Participating Hospitals would have eliminated the concept of reassignment entirely from the layoff definition.

18 This somewhat lengthy narrative about the history of the language leads to the question before this board, that is, did the new language awarded by the Houlden board change the definition of layoff by completely removing the concept of 'reassignment'?

19 After considering the submissions of the parties, Justice Houlden awarded the new language without comment. Again, for ease of reference, the new language, now Article 10.08(a), reads as follows:

> 10.08(a) A "Layoff" shall include a reduction in nurse's hours of work and cancellation of all or part of a nurse's scheduled shift.
>
> Cancellation of single or partial shifts will be on the basis of seniority of the nurses on the unit on that shift unless agreed otherwise by the Hospital and the Association in local negotiations.
>
> A partial or single shift reassignment of a nurse from her or his area of assignment will not be considered a layoff. The parties agree that the manner in which such reassignments are made will be determined by local negotiations.

20 Both of the other panel members commented on this new language. Mr. Filion's statement appears to support the union's position:

> "It must be acknowledged that the Hospitals did achieve significant gains in this area particularly in the streamlining of the lay-off process by reducing multiple bumping and the removal of single or partial shift reassignments from the definition of lay-off."

21 Mr. Mayne, at first blush, appears to offer support to the employer's position. He lists the changes introduced to the collective agreement by the Houlden board, and describes the change to the layoff definition at page 6 of his addendum as follows:

> "Changing the definition of layoff to exclude reassignments and that the parties agree that the manner in which such reassignments are made will be determined by local negotiations ..."

22 However, Mr. Mayne also states that his summary of the collective agreement changes is intended "... simply to assist readers in understanding what was changed from the old collective agreement ...", and that the actual language should be "...resorted to for the exact decision."

[11] The language handed down by the Houlden board has continued to exist in the collective agreement. The language was interpreted in the Briggs award in 2003. Arbitrator Briggs concluded that the Houlden language had completely eliminated reassignments from the definition of layoff, and refused to draw a contrary inference from article 10.08(a). An application for judicial review was dismissed in a brief endorsement by the Divisional Court, which held that it was not persuaded that the interpretation was patently unreasonable.

[12] In the Kaplan award, the facts were significantly different in that the board had concluded that what had taken place was an evolution of the grievor's position, and that no reassignment had occurred. Nevertheless, he expressed his agreement with the Briggs award.

[13] Since the Briggs and Kaplan awards, however, there has been a line of successive awards, in which the arbitrators interpreted the language as excluding only reassignment of a nurse for part of a shift

or a single shift, from the definition of a layoff. In other words, any reassignment for longer than a single shift was held to be a layoff, notwithstanding the fact that there was no loss of work or earnings involved. This interpretation was adopted in the Etherington, Surdykowski, Stephens, Newman, Rose awards, and the very recent July 2009 Burkett award.

[14] The employer submitted that there were two opposing lines of cases, and that the Briggs interpretation was the more reasonable and sensible one. O.N.A. counsel, urged me to accept the "majority view" as representing the proper interpretation.

[15] It is trite to say that I am not bound by any prior arbitration award. Nor am I bound to accept the Briggs interpretation because the Divisional Court concluded that it was not patently unreasonable. Neither party disagreed with that. It is up to me to interpret the language at issue, having regard to the evidence and the submissions of the parties. In doing so, I am entitled to, and will consider the reasoning in the prior awards interpreting the language in question.

<u>Submissions of the Parties</u>

<u>O.N.A. submissions</u>

[16] O.N.A. took the primary position that the provisions in question were clear and unambiguous, and that the language must lead to the conclusion that a reassignment that is in excess of a partial or single shift constitutes a layoff. In the alternative, counsel submits that if I find the language to be ambiguous, a consideration of extrinsic evidence relating to the evolution of the present language would lead to the same conclusion.

[17] Central to O.N.A.'s argument is the well established rule of interpretation expressed in the Latin maxim "Expression unius, exclusio ulterius". Counsel points to the third paragraph of article 10.08, which provides that "a partial or single shift reassignment of a nurse from her or his area of assignment will not be considered a layoff". Counsel submits that the explicit exclusion of partial or single shift reassignments from the definition of a layoff, necessarily means that a reassignment that is longer is included in the definition of layoff.

[18] O.N.A. counsel pointed out that article 10.09(b)(i) extends four options to a nurse in the event of a layoff. One option is to transfer to a vacant position for which he or she is qualified. Counsel submits that it makes no sense to provide this option to nurses after a layoff is declared, if the employer is entitled to unilaterally transfer a nurse to a vacant position without declaring a layoff.

[19] Counsel submitted that article 10.09 confers on nurses significant rights based on seniority, including the four options on being laid-off. Citing case law emphasizing the importance of negotiated seniority rights, counsel urged me not to negate seniority rights in the absence of clear language that leads to that result.

Employer submissions

[20] Counsel for the employer also took the position that the collective agreement language is clear and unambiguous. However, in his view, that clear language is to the effect that a reassignment of a nurse not involving any loss of work or earnings does not constitute a layoff. He submitted that article 10.07(g) clearly grants the employer the right to reassign nurses to units or areas where they are qualified to perform the available work. Counsel submitted that this clear right ought not be fettered by making unreasonable implications from the ambiguous language in article 10.08(a). To do so would be to create rights and obligations out of "thin air" contrary to an express provision of the collective agreement. Counsel submitted that the arbitrators who found in favour of O.N.A. had done exactly that, and urged me not to make that same error.

[21] Counsel made reference to article 1.02, the "purpose clause", and noted that nurses have recognized that they "wish to work together with the hospital to secure the best possible nursing care and health protection for patients". Counsel submitted that if the employer action is held to be a layoff, it will result in loss of more nurses at a time when there is a shortage of nurses already. That result runs counter to the purpose clause.

[22] Employer counsel further relied on the Management Rights Clause, Article C, in the local agreement. The management rights specified include the right to direct the workforce, and most importantly, the right to assign nurses to shifts. He submitted that article 10.08(a) does not take away those management rights. Nor does article 10.08(a) alter the well established law (Re Canada Bread Co. Ltd., (1965), 16 L.A.C. 202 (Reville)), to the effect that an employee has no proprietary interest in any particular job or in any particular bundle of job duties.

[23] Counsel argued that all three paragraphs of article 10.08(a) are designed to address circumstances where employer action is taken after shifts are scheduled. While only the first paragraph explicitly refers to "scheduled" shifts, a reading of the whole of article 10.08(a) together indicates that all of the references to "shifts", are references to scheduled shifts. This makes sense, because cancellation or reassignment of shifts already scheduled impacts on nurses adversely. They may lose work time and

earnings, and will have their personal plans upset. Therefore, the parties provided nurses with some rights to compensate for the adverse impact of the employer action. However, as here, where the employer's action takes place after the scheduled shifts are completed, there is no adverse impact on nurses. They do not lose any work time or earnings. They would still be performing nursing duties for which they were qualified, albeit in different areas or units of the hospital. Counsel urged me to conclude that a layoff only occurs, where there is a reassignment of a nurse for two or more scheduled shifts. He submitted that this argument had not been adequately addressed in any of the prior awards relied upon by O.N.A..

O.N.A. reply submissions

[24] In reply, ONA counsel acknowledged the general legal concepts the employer counsel had referred to, including the traditional definition of a layoff. However, she submitted that these parties have provided their own definition of a layoff and submitted that it is that definition that must determine this grievance.

[25] Counsel disagreed that article 10.07(g) creates any employer right to re-assign nurses at will. In fact, it does not create any right to re-assign at all. To the contrary, it is a protection provided to nurses. All it does, according to counsel, is provide that where the employer makes a re-assignment which is otherwise permitted by the collective agreement, that reassignment must be to a unit or area, where the nurse is qualified to perform the available work.

[26] Counsel submitted that the employer's position that for a layoff to occur there must be a reassignment for two or more scheduled shifts is not supportable by the language, since the third paragraph of article 10.08(a) makes no reference to scheduled shifts at all.

DECISION

[27] The outcome of this grievance depends on whether the reassignment of the affected nurses constituted a layoff. If it did, the employer was in breach of the collective agreement in that it did not declare a layoff, and thereby denied the affected nurses the rights accorded by the collective agreement to laid-off employees. Whether or not a layoff occurred is governed by the provisions of the collective agreement. Although not in language that is clear, the instant collective agreement does attempt to define what a layoff is. Therefore, it is that language that governs this grievance. Arbitration awards that determined what a layoff is under general principles, in the absence of a collective agreement definition of a layoff, therefore, are not helpful nor relevant. The focus should be on what is intended by the language

they used in the collective agreement. As I have noted, that language is ambiguous, and therefore it is appropriate to have resort to extrinsic evidence to determine the intention of the parties.

[28] The arguments adduced by the employer before me, except for the argument based on article 10.07(g) and the "scheduled shifts" argument, were all made before arbitrators Etherington, Stephens, Newman and Goodfellow. The article 10.07(g) argument was considered by arbitrators Surdykowski and Burkett. Employer counsel suggests that his argument based on the "scheduled shifts" interpretation has not been made to any of the previous arbitrators. I will return to that issue later. As far as the awards that had interpreted article 10.08(a) as including a reassignment of more than part or a single shift within the definition of a layoff, employer counsel submits that those awards are incorrect. The employer's position is that the Briggs award, to the effect that the language in article 10.08(a) removed all reassignments from the definition of layoff, is the correct one.

[29] Arbitrator Burkett in Re St. Josephs Health Care, Hamilton (supra), did a comprehensive review of the arbitral jurisprudence interpreting the very language before me. In that award arbitrator Burkett, also addressed the effect of article 10.07(g) on the issue.

[30] The facts in that case were that the employer had decided to reassign nine nurses, whose positions had been found to be redundant, to positions that were already vacant. The reassignments were done without regard to either the layoff or job posting provisions of the collective agreement. Thus, the facts were very similar to those before me, and the governing collective agreement language was identical.

[31] At p. 25 the award sets out the O.N.A. position:

> The essence of the position advanced by the Union is that the third paragraph of article 10.08(a), definition of layoff, contemplates that the reassignment of a nurse from her area of assignment for more than a single shift constitutes a layoff under this agreement such that the permanent reassignment of these nurses was a layoff within the meaning of article 10.08(a) that triggered the notice of layoff provisions and the options available to an affected nurse under article 10.09(b)(ii). The Union submits as well that the article 10.07 job posting provisions were violated when these nurses were reassigned to vacant positions that should have been posted.

[32] The employer's position is set out at p. 26:

> The essence of the Employer position is that under article 10.07(g), it has the right to reassign nurses to meet patient care needs so long as the reassignments are to areas where the reassigned nurse is qualified to perform the work. The Employer submits that there is no layoff within the meaning of article 10.08(a) when it reassigns in accord with article 10.07(g) and, given its right to decide whether or not to fill a vacancy, implicit in a decision to reassign is the decision not to fill the vacancy into which the nurse is to be reassigned, thereby obviating the

need to post. In any event, the Employer asserts that a substantive right, i.e. the right to access the article 10.09(b)(ii) layoff options, cannot be found by implication, as that right would have to be on the language of the third paragraph of article 10.08(a) and as it was in the awards relied upon by the Union.

[33] As in this case, O.N.A. relied on the Etherington, Surdykowski, Stephens, Newman and Goodfellow awards, while the employer relied on the Briggs and Kaplan awards.

[34] Arbitrator Burkett set out the issue before him at p. 27:

> The issue to be determined, as correctly identified in the Employer's submissions, is whether the reassignment of these nurses constituted a layoff within the meaning of article 10.08(a) of the collective agreement or whether these were validly effected reassignments in accordance with article 10.07(g) of the collective agreement and, as such, did not constitute a layoff. In normal labour relations parlance, a layoff involves a reduction in hours or an involuntary removal from the active workforce of either definite or indefinite duration. Clearly, the reassignment of these nurses, with no loss of hours, would not fall within the commonly understood meaning of a layoff. However, where, as here, the term "layoff" is defined in the collective agreement, effect must be given to that definition in deciding whether what occurred constituted a layoff within the meaning of the collective agreement.

[35] Arbitrator Burkett was of the view that the collective agreement language was ambiguous both as to its meaning and its application, and that, therefore, he was entitled to consider extrinsic evidence.

[36] Following a review of the history of the collective agreement language, at p. 30-33, he wrote:

> Having regard to the historical development of the language, it is clear that the interpretation of the Houlden language advanced by the Union would result in what can best be described as incremental change in favour of the Employer, i.e. the triggering of a layoff on the basis of a displacement of at least one shift instead of on the basis of any displacement that would include a displacement of less than a shift. On the other hand, the interpretation of this language advanced by the Employer would result in fundamental change, i.e. the ability of the Employer to reassign nurses to vacant positions for reasons of patient care (a broad overreaching rationale) without regard to the job posting provisions of the collective agreement and without triggering the layoff provisions of the collective agreement when previously any reassignment, even for less than a shift, triggered a layoff. While the position advanced by each party, if intended, could have been more clearly expressed in the collective agreement, it seems to me that if arbitrator Houlden had been intent on making the fundamental change sought by the Employer, he would have done so unequivocally. It would have been a simple matter to have said that, notwithstanding the job posting provisions, henceforth the hospital would have the right to permanently reassign a nurse to a vacant position without triggering a layoff and thereby to have brought the definition more into line with the commonly understood meaning of layoff. Having failed to use unequivocal language in this regard, it is difficult to conceive that fundamental change of this type was intended.
>
> Instead of the unequivocal language that could reasonably have been expected if the intent of arbitrator Houlden had been to effect the fundamental change described, article 10.08(a) was amended by deleting the reference in the first paragraph to reassignment as a triggering event for a layoff but, at the same time, by adding a third paragraph to the definition of layoff that stipulates that "a partial or single shift reassignment of a nurse from his or her area of assignment will not considered a layoff" and by also adding article 10.07(g). Article

10.07(g) provides that "where nurses are reassigned to meet patient care needs at the hospital they will be reassigned to units or areas where they are qualified to perform the available work." It can easily be derived from these language changes that although the reference to reassignment as a triggering event for a layoff was removed from the first paragraph of article 10.08(a), the intent was not to remove reassignment as a triggering event altogether. If that had been the intention, there would have been no need to incorporate the new third paragraph. If all reassignments were to be removed as triggering a layoff, there would have been no need to expressly exclude reassignments of a single shift or less. On its face, therefore, the third paragraph of article 10.08(a) suggests that a reassignment of more than one shift is a triggering event. This interpretation of the third paragraph of 10.08(a) can be read in harmony with the first paragraph of article 10.08(a) because the first paragraph is not exhaustive but rather inclusive of the triggering events for a layoff. This has been adopted as the correct interpretation of the third paragraph of article 10.08(a) by arbitrators Etherington, Surdykowski, Stephens, Newman and Goodfellow in the awards relied upon by the Union. The Employer asks me to follow the Briggs award instead.

Article 10.07(g), in contrast to article 10.07(e) that states that "The Hospital shall have the right to fill any permanent vacancy on a temporary basis until the posting procedure has been completed" (emphasis added), does not, on its face, create an independent right but rather qualifies the reassignments that are otherwise permitted under the collective agreement, i.e. "Where nurses are reassigned ..." as they could be for one shift or less or even where a nurse who is subject to layoff opts to transfer to a vacant position. Indeed, this was the interpretation of article 10.07(g) adopted by arbitrator Surdykowski.

[37] The employer had argued before arbitrator Burkett that the awards favouring O.N.A. were in error in two respects. The first argument, which was also made before me, was to the effect that a substantive right cannot be created by implication alone, and that by doing just that, those arbitrators had created substantive rights out of "thin air". At pp. 36-37, arbitrator Burkett commented as follows on the authorities relied upon by the employer:

> These arbitrators refused to draw inferences that could not reasonably be derived from the language. These awards, however, do not stand for the proposition that it is impermissible for an arbitrator to draw an inference that is supported on a fair reading of the collective agreement language.
>
> It is permissible for an arbitrator to draw an inference that is supported on a fair reading of the collective agreement language. Arbitrators do this all the time. Indeed, this is what was done by arbitrators Etherington, Surdykowski, Stephens, Newman and Goodfellow when considering the collective agreement language in question here. They did not invent a provision out of "thin air". Rather, they drew an inference from the language of article 10.08(a). The question, therefore, is whether the inference drawn was reasonably supported by the language of article 10.08(a). The same exercise must also be undertaken in respect of the inference drawn by arbitrator Briggs as endorsed by arbitrator Kaplan. In answering these questions, consideration must be given to the meaning of both article 10.08(a) and article 10.07(g) and to the interrelationship between the two articles.

[38] Arbitrator Burkett recognized that in the awards relied upon by O.N.A. (except the Surdykowski award), the arbitrators were not called upon to consider the article 10.07(g) argument. However, following a review of the reasoning in those awards, at pp. 38-39 he concludes:

If article 10.07(g) had been relied upon as it has been here, one can reasonably speculate that in the face of two competing interpretations, these arbitrators would have come to the same conclusion as arbitrator Surdykowski; that is, that without the unequivocal granting of a right to the Employer under article 10.07(g) to override both the job posting and the layoff provisions of the collective agreement through the mechanism of a reassignment, the better interpretation, and the one that gives meaning to the third paragraph or article 10.08(a), instead of rendering that paragraph superfluous, is that article 10.07(g) establishes the conditions governing the reassignments that are already permitted under the collective agreement.

[39] In disagreeing with the Briggs award, at pp. 39-40, he stated:

Although both parties to the Briggs award made reference to the changes to the definition of layoff that had occurred over time, arbitrator Briggs did not import into her analysis the historical development of the language. Her starting point was not the express inclusion of any reassignment as a triggering event for a layoff in the predecessor language but rather the commonly understood prerequisite of a reduction in hours or a reduction in the workforce. Indeed, she relies on the York-Finch Hospital award of arbitrator Brown that dealt with an earlier central hospital agreement that did not contain a definition of layoff. Instead of attempting to measure the extent of the change from the predecessor collective agreement, therefore, she started from first principles and in doing so was easily, but incorrectly, brought to the conclusion that if she found that a reassignment of greater than a shift triggered a layoff, she would be creating a substantive right by implication. It is clear from her analysis that she thought that she would have been ordering a fundamental change if she accepted the union interpretation when, in fact, the union interpretation represented incremental change. Arbitrator Kaplan, without benefit of the Etherington or subsequent awards and again without reference or apparent understanding of the historical context, endorsed the Briggs reasoning. The better analysis is that undertaken by arbitrators Etherington, Surdykowski, Stephens, Newman and Goodfellow that begins with the historical development of the language so as to create the necessary interpretative context, that correctly recognizes the impacts that flow from the competing interpretations and that provides a rational harmonization to the language.

[40] Arbitrator Burkett concluded that a review of the Houlden interest award itself supported the interpretation advanced by O.N.A.. He held, citing with approval Re St. Joseph's Health Care, London, unreported, August 5, 2008 (Davie), that it was permissible and useful to consider the evidence that arose in the course of that interest arbitration process in ascertaining the intended meaning of the language. At pp. 41-42 he stated:

The language at issue in this case was awarded, without reasons, by arbitrator Houlden, in an interest award dated May 5, 1998. As already noted, the predecessor language, awarded by arbitrator Thorne in an interest award dated November 11, 1994, included within the definition of a layoff "a displacement of a nurse from her area of assignment". The Union submits that the Houlden amendments, which have been explained in detail in this award, resulted in an incremental change, i.e. the line defining permissible reassignments that do not attract a layoff was drawn at an entire shift or less rather than at less than one shift, as had been the case. The Employer, on the other hand, submits that the Houlden amendments brought about a fundamental change under which it would henceforth be permitted to permanently or temporarily reassign for reasons of patient care without regard to the job posting provision and without triggering a layoff. While arbitrator Houlden did not give reasons, the other two members of the board did express themselves in writing. I can say with absolute certainty that if the intention of the Houlden Board had been to effect fundamental change of the type that the Employer maintains that it did, both of the parties' nominees would have confirmed this to

have been the case. Neither one did. Arbitrator Mayne, appointed by the union, made no reference in his addendum to the board having given to each and every one of the 175 participating hospitals covered by the award the right to reassign without regard to the job posting provisions and without triggering a layoff, when previously any reassignment, even for less than one shift, triggered a layoff. Indeed, if this type of change had been intended, it is safe to assume that arbitrator Mayne would have written a strong dissent, not just an addendum. Arbitrator Filion, appointed by the hospitals, in his partial dissent, does address the changes to the layoff language. He states:

> It must be acknowledged that the Hospitals did achieve significant gains in this area particularly in the streamlining of the lay-off process by reducing multiple bumping and the removal of single or partial shift reassignments from the definition of layoff. (emphasis added)

It is clear from the foregoing that the intention was to make the operationally significant, yet incremental change acknowledged by the union, and not the fundamental change sought by the hospital in this case.

[41] I find arbitrator Burkett's reasoning in endorsing the awards relied upon by O.N.A. very compelling. I adopt that reasoning. This is notwithstanding the fact that this interpretation results in a definition of "layoff" which is different from how that term is generally understood in labour relations parlance. That is the result that flows from the language in the collective agreement. An arbitrator is not entitled to change that language to bring it into line with the traditional meaning of layoff.

[42] Given my agreement with the reasoning and the interpretation in the awards relied upon by O.N.A., I turn to briefly address the employer's reliance on the "purpose clause" and the "management rights" clause. The latter certainly confers certain rights on the employer. The former does not. It is titled "purpose". It is simply a general statement of purpose and creates no rights or obligations. In any event, both the purpose and management rights clauses, are subject to provisions contained in the collective agreement. The management right to "assign to shifts" cannot, and does not, override the definition of layoff provided for in the collective agreement.

[43] Finally, I turn to the employer's submission that all references to shifts in article 10.08(a) should be read as referring to shifts already scheduled. It was suggested that this argument had not been made in the previous cases relied on by O.N.A.. However, counsel relied on the Etherington award as supporting its position. Arbitrator Etherington refers to "scheduled" shifts on two occasions in the concluding paragraphs of his award which consisted of 45 paragraphs. At the end of para. 39 he concludes with, "This condition was met when a nurse was reassigned outside of the unit for two or more consecutive scheduled shifts," and again concludes the penultimate paragraph of his award with the statement, "For greater clarity, I declare that this condition for layoff within the meaning of article 10.08(a) was met whenever a nurse was reassigned outside of the Burn Unit for two or more consecutive scheduled shifts."

[44] The Etherington award does not include anywhere, a discussion of whether or not shifts for which nurses are reassigned must be scheduled shifts, for the third paragraph of article 10.08(a) to have application. There is no indication that the parties raised any issue of scheduled shifts vs. other shifts. Nor does the arbitrator discuss such a distinction. However, it is clear that the facts arbitrator Etherington was faced with involved scheduled shifts. Thus in the very first paragraph of his award he notes that "the association asserts that the employer either cancelled all scheduled shifts in the Burn Unit or reassigned all nurses <u>scheduled to work</u> in the Burn Unit during this period ..." (Emphasis added).

[45] In that context, it not surprising that the arbitrator, in referring to the employer conduct which he found constituted a layoff, described the shifts reassigned as "scheduled" shifts. Of course, he held that re-assignment during scheduled shifts, i.e. the employer action he was faced with, amounted to a layoff within the meaning of article 10.08(a). However, he made no finding that shifts must be "scheduled shifts" as a pre-condition of coming within the definition of layoff in article 10.08(a).

[46] In any event, a reasonable interpretation of article 10.08(a) does not support the result advocated by the employer. Under the collective agreement language, a layoff can result in three distinct ways. Under the first paragraph of article 10.08(a) a layoff can arise from (1) "a reduction in a nurse's hours of work", and (2) from the "cancellation of all or part of a nurse's scheduled shift". That paragraph, however, is not an exhaustive definition of layoff. It uses "inclusive" language. Consistent with that inclusive language, the third paragraph of article 10.08(a), provides that certain reassignments of shifts would also constitute a layoff. Thus, there are three different ways in which a layoff may occur, i.e. reduction of hours, cancellation of shifts and reassignment of shifts. Significantly, in the "cancellation" language, it is explicitly provided that the cancelled shifts must be "scheduled" shifts. Therefore, if the drafters had intended that for reassignment to result in a layoff, the shifts must be scheduled shifts, it is reasonable to expect that they would have used the same phrase "scheduled shifts" as they had done in the "cancellation of shift" part of the definition. They have not done so. Instead they used the term "shift", without qualification. It is in my view, not reasonable to import the qualification contained in the "cancellation" definition in paragraph one of article 10.08(a) into the reassignment language in the third paragraph.

[47] Having regard to all of the foregoing reasons, it follows that the reassignment of the nurses at issue here constituted a layoff within the meaning of article 10.08(a) of the collective agreement. Therefore, I declare that the employer contravened the collective agreement by not complying with the layoff provisions of the collective agreement. As requested by the parties, I remain seized with respect to

any other remedies that may flow from this award, and with respect to any outstanding grievances referred to me including all of the individual grievances.

Dated this 2nd day of November, 2009 at Hamilton, Ontario

Nimal Dissanayake
Arbitrator