

IN THE MATTER OF AN ARBITRATION

B e t w e e n:

TORONTO EAST GENERAL HOSPITAL

(“the Hospital”)

- and -

ONTARIO NURSES’ ASSOCIATION

(“the Association”)

and in the matter of grievance no. 22-06 dated December 7, 2006 concerning layoffs and vacancies.

Russell Goodfellow – Sole Arbitrator

APPEARANCES FOR THE HOSPITAL:

Carolyn Kay, counsel
Phillip Kotanidis
Paula Istead
Margaret Conroy

APPEARANCES FOR THE ASSOCIATION:

Kate Hughes, counsel
Rajeev Burman, counsel
Paul Marshall
Elaine Lucifora
Norma Ambe

A hearing was held in this matter in Toronto on August 22 and September 23, 2008.

AWARD

This award involves an issue under the central agreement that has been addressed on five previous occasions. The issue is whether the employer is entitled to reassign a nurse whose position on a unit has been declared surplus or whether it is required to apply the layoff provisions of the collective agreement. Two further issues are whether the affected nurses were reassigned or “transferred” and whether the Hospital breached the posting provisions of the agreement.

The history of arbitral decision-making on the principal issue was reviewed most recently in the award of Arbitrator M. Newman in *Sunnybrook Health Sciences v. Ontario Nurses’ Association*, dated November 6, 2006, unreported. In only the first of the five awards – that of Arbitrator Briggs in *Centre for Addiction and Mental Health v. Ontario Nurses’ Association*, dated May 22, 2003, unreported; application for judicial review dismissed [2004] O.J. No. 5418, October 14, 2004 – were the layoff provisions found *not* to apply. The four subsequent awards came to the opposite conclusion: see *Sunnybrook, supra*, *Windsor Regional Hospital v. Ontario Nurses’ Association*, dated July 18, 2003, unreported (Etherington); *Scarborough Hospital v. Ontario Nurses’ Association*, [2004] C.L.A.S. no. 122 (Surdykowski) and *Royal Victoria Hospital v. Ontario Nurses’ Association*, dated July 16, 2006, unreported (Stephens).

The parties made their submissions on the basis of an agreed statement of facts.

Facts

1. In 2006 TEGH had a 30 bed geriatric unit called B3 for patients with both acute and post acute conditions.
2. They also had a 22 bed Family Medicine Unit, called F3.
3. In 2006 the Hospital decided on “new directions” for B3 and F3; see Tab 29, the two page background document.
4. As a result of changes to the units the hospital sent the union letters declaring nurses “surplus”. See Tabs 3, 4, 5 and 6 - letters dated November 27, 2006 and December 4, 2006.
5. In February 2007 the hospital moved all the RNs on F3 to B3 which is where their service was relocated to. See Tab 24, page 2 for list of 7 FT RNs from F3 who moved to B3. Yvonne Dale was off sick and went on LTD subsequently. Their seniority ranged from January 2000 to February 2006. For example Chris Saulnier had a seniority date of Feb 9th 2006 and was moved to B3. These nurses were not laid off or sent any “preference letters”. See Tab 25 page 2 for the 7 part time nurses from F3 who were moved to B3. Their seniority ranged from 18,542 to 623 hours.
6. RNs on B3 were not given layoff notices or provided with the options set out in article 10.09. They were sent the letters found at tabs 7-21 with attachments which were a list of certain hospital wide vacancies (tab 22). Also attached to the options letter were full and part-time lines within Medicine Health from different units including A3 from which they could choose: Tab 28
7. It is agreed that these letters were not layoff notices. Similarly ONA was not sent any layoff notices.
8. RN Harriet Lyavala was born August 23, 1945 (see Tab 30 Spread sheet for FT surplus nurses). She was not given her options under article 10.09 including option to retire in 10.09 ii) (b) (sic.).
9. The fulltime RNs identified as “surplus” on B3 were sent letters and asked to fill in their preferences. The letters attached the documents at Tab 22 and Tab 28. Tab 27 are the completed options letters that were sent in. For example Natalie MacPherson who worked full time on B3 with a seniority date of June 20, 2005 stated her preference of staying on B3. She was placed on a different unit, A3, which was her second and third choice. She had more seniority than F3 nurse, Chris Saulnier who moved onto the

B3 unit from F3. She was not given hospital wide options to bump. Similarly Leonila Sobelino, a fulltime RN on B3 with a seniority date of November 20, 2003, was moved off B3 and placed on A3 which was her second choice. Her preference letter indicated B3 as her first choice.

10. The part time RNs identified as “surplus” on B3 were sent letters. For example, Kate Darbyshire (seniority 3819 hours) was a regular part time on B3 with a .5 commitment. She was moved to a “casual” nurse position at her request: Tab 31. Catherine Shah (seniority 6645 hours) was a regular part time RN on B3 with a .5 commitment for a days and evening line. No .5 day/evening line was available on the option sheet given to her. She resigned by letter dated December 19, 2006. Tab 32. Laura Barrow also resigned by letter dated December 19, 2006: Tab 33.
11. None of the B3 positions were posted.
12. Four A3 positions were listed as vacancies. Only one of those positions was posted (June 06).
13. Tab 30 outlines the choices made by the nurses and the highlights identify the positions confirmed subject to the following clarifications.
14. Mary Fitzgerald, on her options form had identified a .4 line on B3 from the lines that had been attached to the options letter. As Ms. Fitzgerald was a .6, the hospital confirmed her in a .6 position. Kathy Shearman (seniority was 21,418 hours) was a part time nurse on B3 who had a .5 days/evening commitment. No .5 days evening commitment was available on the options given to her (only .4). She took the .4 and the hospital subsequently increased her to .5 by “reconfiguring” the schedule for her by giving her an additional shift. Similarly Nadine Brown (seniority 8048 hours) was a regular part time on B3 with a .5 commitment. There was no .5 available. She took the .4 option and it subsequently was increased to .6.
15. Janna Akantina was given her first choice but declined that position for a full-time position in the float pool. Although she was confirmed in the float pool position she subsequently declined and requested and was successful to a casual position in the float pool.

Submissions

Hospital

Article 10.08(a) of the collective agreement states:

10.08(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 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.

Not insensitive to the weight of arbitral authority on point, the Hospital submits that there is a fatal flaw in the analysis that runs through the four most recent awards. The flaw is in interpreting the reference to “reassignment” in the third paragraph of Article 10.08(a) as though it were simply a modified version of the word “displacement” that appeared in the corresponding provision in the immediately preceding collective agreement.

The present layoff definition was the product of an interest arbitration award by Lloyd Houlden, in *Participating Hospitals and Ontario Nurses’ Association*, dated May 5, 1998, unreported. The “Houlden award” amended the following definition

of layoff that had been introduced, for the first time, into the central agreement by the award of Arbitrator Guy Thorne in *Participating Hospitals and Ontario Nurses' Association*, dated November 11, 1994, unreported:

10.07(a) – a “Layoff” shall include a reduction in a nurse’s hours of work, a cancellation of all or part of a nurse’s scheduled shift *and a displacement of a nurse from her area of assignment.*

(emphasis added)

The Hospital notes that this definition was inserted into the collective agreement together with a series of rights and obligations that applied in the event of a layoff, one of which was for a laid off nurse to “displace” a less senior nurse whose work the laid off nurse was qualified to perform. Linking that together with what the Hospital submits is the conventional or commonly understood definition of layoff as involving an actual loss of work or severance of employment, the Hospital submits that a “displacement” under the “Thorne award” meant “an employee being uprooted from his or her position by another employee through the bumping process”. However, that is not how the former definition appears to have been understood in the four most recent cases.

The Hospital refers to the following passage from the award of Arbitrator Etherington in *Windsor Regional Hospital v. Ontario Nurses' Association*, dated July 18, 2003, unreported:

The first inclusion of a definition of layoff in the central agreement [*i.e.* by Arbitrator Thorne] codified the results in the Teplitsky and Brent awards by including cancellation of all or part of a scheduled shift. However, it went on to expressly counteract the Keller and H. D. Brown

awards by *including the italicized portion to cover reassignments to units outside of a nurse's home unit.*

(pp. 23-24)
(emphasis added)

The Hospital disagrees with the italicized portion of the quote. The Hospital points out that the former definition referred to “displacements”, not “reassignments”, and submits that Arbitrator Etherington was wrong to equate the two.

The Hospital submits that the same misunderstanding appears to have informed the reasoning in the next award – that of Arbitrator Surdykowski in *Scarborough Hospital v. Ontario Nurses' Association*, [2004] C.L.A.S. No. 122. In that case, Arbitrator Surdykowski who, unlike Arbitrator Etherington, had the benefit of the award in *C.A.M.H.*, observed the following about the relevant aspect of the Thorne definition:

The emphasized portion of that provision is (sic) describes a reassignment or transfer.

(page 19)

The Hospital submits that that statement is in error: the relevant portion of the former definition did not refer to a “reassignment or transfer” but to a “displacement”. The same misconception, the Hospital submits, is revealed in the following passage concerning the introduction of the third paragraph of Article 10.08(a):

Everything else remains as it was under the previous agreement; that is *any other reassignment remains a layoff*.

(page 21)
(emphasis added)

Once again, the Hospital submits, that statement is false: “reassignments” were not dealt with under the previous agreement – being exclusively a creation of the Houlden award – and Article 10.08(a) says nothing at all about reassignments that last longer than one shift. In the latter respect, the Hospital submits, it is not unreasonable to conclude that longer term reassignments were seen as *less* disruptive to nurses’ lives than short term reassignments and, therefore, as *less* in need the kind of protections afforded by Article 10.08(a).

The next award was that of Arbitrator Stephens in *Royal Victoria Hospital v. Ontario Nurses’ Association*, dated July 16, 2006, unreported. In concluding that reassignments of greater than one shift are layoffs, Arbitrator Stephens commented as follows about an earlier rights arbitration award of Arbitrator Devlin (on which, see below) in *Participating Hospitals v. Ontario Nurses’ Association*, dated June 30, 1997, unreported:

The language inserted in the collective agreement by Arbitrator Thorne was interpreted by Arbitrator Devlin to mean that reassignments of a shift or more were included in the definition of layoff.

(page 19)

The Hospital disputes the foregoing interpretation of the Devlin award. The Devlin panel was dealing with a number of issues arising out of the Thorne award – under the language of displacement, not reassignment – and, in the view of the Hospital, the relevant portion of the Devlin award cannot be so interpreted. The Hospital submits that the “confusion” experienced by Arbitrator Stephens may have been contributed to by the following submission, as recorded by Arbitrator Stephens, from employer counsel concerning the effect of the Houlden changes:

Employer counsel points out that reassignment was removed from the first sentence, and short term reassignments are excluded in a separate sentence.

(page 19)

Again, the Hospital reiterates, “reassignment” was never a feature of the Thorne award; rather, it is a term that was introduced by Arbitrator Houlden, without accompanying reasons, and only in the negative.

Lastly, the Hospital refers to the following passage from the award of Arbitrator M. Newman in *Sunnybrook, supra*:

The parties knew that the *Thorne award* language and the *Devlin award* interpretation included reassignments within the definition of layoff and that all the *Houlden award* did was to remove partial and single shift reassignments from the existing definition.

(page 24)

The Hospital disagrees: there is no evidence that that is what the parties knew, nor is it what the Houlden award did; rather, in the submission of the Hospital, it is “just an interpretation given to those awards by some arbitrators”.

In sum, the Hospital submits, it was the incorrect conflation of the concept of “reassignment” in the present definition with the misreading of the word “displacement” in the former definition that led the four arbitrators, post-*C.A.M.H.*, to conclude, incorrectly, that reassignments that last longer than one shift are layoffs. In fact, what the Houlden award did was delete the explicit reference to “displacement” and, for the first time, include the concept of “reassignment” but only in the negative and only insofar as it involved one shift or less.

In furtherance of the argument that longer-term reassignments are not layoffs, the Hospital points to the various process and notice obligations that apply under Articles 10.08 and 10.09 and submits that many of these only make sense where there is a lack of work requiring a reduction in staffing levels (*eg.* the obligation to provide five and four months notice to the Association and affected employees, respectively). The animating concern is the amelioration of negative changes to the employment relationship – something that did not occur here. In this case, the Hospital was able to find work for the affected nurses without the need for any layoffs.

Support for the idea that a “layoff” involves a reduction in staffing levels can be found, according to the Hospital, in: (i) the reference in Article 10.09(a) to “nurses who are entitled to remain”; (ii) the options accorded nurses by Article 10.09(b) (*eg.* to

accept the layoff or retirement); (iii) the steps available to nurses to remain employed (*eg.* transfer and bumping); and (iv) the restrictions imposed on the Hospital when nurses are on layoff (*eg.* with respect to the use of casuals and the hiring of new nurses). According to the Hospital, all of these presuppose nurses *leaving* the Hospital rather than simply being *reassigned* from one unit to another. As an operational matter, treating any and all reassignments of nurses that last longer than one shift as layoffs will, in the Hospital's submission, necessarily curtail its ability to respond to changing needs – something that, the Hospital asserts, is inconsistent with Article 10.07(g) of the central agreement.

Should I be unable to accept the foregoing argument, however, the Hospital submits that what occurred here may be properly viewed as involving *transfers* rather than reassignments. In the submission of the Hospital, reassignments and transfers are two different things, with the former being driven by day-to-day or week-to-week operational needs and the latter being of an indefinite or permanent nature. Reassignments presuppose the existence of a “home assignment” to which the nurse may at some point return and involve a nurse being redirected to a different set of duties or a different location for a finite period of time. Transfers, by contrast, are more permanent and may occur in one of four ways: (i) by an employee posting into a position under Article 10.07(a); (ii) through an employee request to transfer under Article 10.07(b); (iii) by an employee electing to transfer under Article 10.09 following receipt of a notice of layoff; and (iv) as a result of an employer-initiated transfer for disciplinary or non-disciplinary reasons.

Referring to Article B.-1 of the Local Appendix, the Hospital notes that the management rights provision uses the terms “assign”, “transfer”, “layoff” and “work assignments” separately and that “transfers” and “reassignments” appear as distinct terms throughout the collective agreement (see *eg.* Articles 10.01(b) and (c), 10.03, 10.07(b) and (c), 10.09(b), 10.11, 19.07 in respect of transfers, and Articles 10.07(g), 10.12(a), 14.11, 19.04(b) and (d) in respect of reassignments). Finally, the Hospital notes that in this case, unlike the earlier cases, nurses were not advised that they were being “reassigned”.

Should *neither* of its arguments be accepted, the Hospital asks that it *not* be required to issue notices of layoff at this point. The events in question occurred some time ago – at the end of 2006 and the beginning of 2007 – and, the Hospital submits, it would now be too disruptive to attempt to re-write history. The Hospital asks that, for the time being, any remedy be limited to a declaration and that I remain seized while the parties attempt to agree upon what, if any, further steps may be required or what, if any, further remedies may be needed.

Association

The Association, which proceeded first in this case, based its initial submissions on a careful review of the facts and the post-*C.A.M.H.* case law, drawing my attention to the similarity between the two and urging me to come to the same conclusion as was arrived at in those cases.

(I should point out, however, that the Association drew my attention to another award – that of Arbitrator Kaplan in *Hamilton Health Sciences Corporation and O.N.A.*, dated July 4, 2003. In that case, prior to the release of the other post-*C.A.M.H.* awards, the Arbitrator dismissed a layoff grievance by a nurse on the footing that her position had “evolved” rather than been eliminated. Although Arbitrator Kaplan went on to draw some brief support for his conclusion from *C.A.M.H.*, he did so only by “analogy”. The *Hamilton* award was treated as distinguishable by Arbitrator Newman in *Sunnybrook, supra.* and by Arbitrator Stephens in *Royal Victoria, supra.* but as wrong by Arbitrator Surdykowski in *Scarborough, supra.* I prefer the former characterization and note that the Hospital, appropriately in my view, did not place substantial reliance on the award in any event.)

In its reply argument, the Association submitted that, while interesting, the Hospital’s assertion concerning the alleged flaw in the reasoning in the post-*C.A.M.H.* cases is fundamentally irrelevant. The Association noted that all that the arbitrators were doing in those cases was responding to creative employer arguments that nurses whose positions on units were eliminated could simply be moved to different areas of the Hospital without regard to the layoff provisions by calling those movements “reassignments”. In the view of the Association, however, such events have always been, and continue to be, layoffs.

The Association submits that what the Hospital has done, in effect, is set up a “straw man”. The idea that the nurses were not laid off *because* they were “reassigned” and “reassignments” are not layoffs is simply an argument that was

constructed by the employers in those cases in an attempt to get around the open-ended definition of layoff under the central agreement. As noted by the four post-*C.A.M.H* arbitrators, the *express exclusion* of *particularly short* “reassignments” from the layoff definition supports exactly the opposite conclusion to that which is asserted by the Hospital.

The Association rejects the idea that many of the process and notice obligations do not make sense unless there is a reduction in staffing levels or the proverbial layoff “to the street”. Layoffs under this collective agreement may be of either a short or long term nature and the obligations vary. For example, short term layoffs, lasting up to three months, require only 30 days notice, not five months: see Article 10.08(b)(iii) and (d). Similarly, the Association submits, the Hospital’s reference to Article 10.07(g) is misplaced. That provision simply addresses the need for nurses who are reassigned to be “qualified” to do the available work. It is a requirement that applies to any and all reassignments, regardless of duration, and it is intended to protect *nurses*. So also, the reference in Article 10.09(a) to nurses “entitled to remain” is as readily interpreted as entitled to remain “*in her or his area of assignment*” or “*on the unit*” as “*in employment*”. The fact that layoffs under this collective agreement do not fit the “traditional” model is plain, moreover, from the first part of Article 10.08(a) and from the recent award in *Sunnybrook and Women’s College*, dated June 23, 2008, unreported (Albertyn) – a case involving changes to the master schedule for part-time nurses. The Association also disputes the idea that a reassignment is necessarily temporary and, for that reason, different from a layoff.

As for the argument, more specifically, that the events in question constitute “transfers”, the Association submits that it is wrong on both the facts and the law. The Hospital is not free to simply move a nurse from one unit to another without regard to the seniority and posting obligations of the collective agreement by calling it a “transfer” any more than a “reassignment”. If vacancies exist, they must be posted and filled pursuant to the posting provisions or as an option accorded *nurses* under the layoff provisions; the Hospital is not entitled to transfer nurses from one position to another or from one unit to another without regard to its seniority and posting obligations. And, on the facts, while the Hospital may not, in its letters to employees, have described the events in question as “reassignments”, it certainly did so in response to questions from the Association and, more importantly, referred to nurses and/or their positions as being “surplus” – something that, the Association submits, is classic layoff terminology.

By way of remedy, the Association requests a declaration that the Hospital breached both the layoff and posting provisions of the central agreement and an order that it now be required to follow the correct procedures and accord the affected nurses the rights specified by those provisions. The Association, too, asks that I remain seized in the event that the parties encounter any difficulties in implementing the award.

Decision

The principal issue in this case has been considered – carefully and in detail – in four recent arbitration awards and, with the greatest of respect for the efforts of

Hospital counsel to overcome those awards, I find myself in complete agreement with them.

The fact that the legal issue exists at all can, in my opinion, be ascribed to somewhat infelicitous drafting. Prior to the award of Arbitrator Houlden there could be no doubt that events of the kind that occurred here – the substantial reconfiguration of units and the resulting dislocation of nurses – fell within the layoff provisions of the collective agreement. As explained in the four post-*C.A.M.H.* awards to which the Association refers, this was the product of the Thorne award, as clearly interpreted by Arbitrator Devlin, and as apparently understood by the Participating Hospitals leading up to the Houlden changes.

In so stating, I agree with the interpretation of the award of Arbitrator Devlin set out in the earlier cases. A fair reading of that award reveals that the Arbitrator Devlin saw no distinction whatsoever between the concepts of “displacement”, “assignment” or “reassignment” – all of which appeared either in the question that she was asked or in the answer that she gave. (Indeed, the dissent of the Participating Hospitals’ nominee in that case, with which the Association’s position here is consistent, also used the terms “move” and “*transfer*” to describe the subject matter.) The fact that it was being dealt with under “displacement” language, therefore, appears to have been of no moment. The only “qualification” offered by Arbitrator Devlin was in her stated understanding that the circumstances giving rise to the need for the reassignment involved a lack of work on the nurse’s home unit and a greater need elsewhere.

That this was clear to all concerned is evident, moreover, from the submissions of the Participating Hospitals to Arbitrator Houlden. (Here, I pause to note that although both counsel in this case asserted that the language of the collective agreement was clear and unambiguous, albeit in opposite directions, I respectfully disagree. Like arbitrators Newman and Stephens, and unlike Arbitrator Surdykowski, who, nevertheless, went on to refer to extrinsic evidence – as did Arbitrator Etherington – I find that there is sufficient ambiguity in the language to support those references.) As described by arbitrators Etherington and Stephens in their awards, those submissions, too, leave no doubt as to the parties' own understanding of the operation of the agreement prior to the Houlden award.

Faced, then, with a definition of layoff that was understood to embrace the assignment/reassignment/displacement of a nurse from one area of the hospital to another, at least in the circumstances considered by Arbitrator Devlin, Arbitrator Houlden was asked by the Participating Hospitals to provide some relief – both in the form of the cause (*i.e.* what constitutes a layoff) and some of the consequences (*i.e.* bumping). The product, in part, was Article 10.08(a) – the proverbial camel constructed by the committee that set out to design a horse. Starting from the not inelegantly worded definition that had been fashioned by Arbitrator Thorne, the result was a three-part provision with definitional, substantive and procedural elements – and with the definitional elements being expressed in both positive and negative terms (but not of the same thing).

Article 10.08(a) continues to provide only a partial definition of layoff: it is still said to “include” certain things. And, while the two things that are expressly identified can both be seen as having economic consequences for nurses (*i.e.* a reduction in hours and cancellation of all or part of a scheduled shift), neither involves any sort of short or long-term separation from employment or layoff “to the street”. Layoffs under this collective agreement, therefore, continue to have a different, and more expansive, meaning from that which they have in most.

What has now gone missing from Article 10.08(a), however, is the term “displacement”. Thus, had the provision ended with the new first paragraph there *might* be some basis for suggesting that the Participating Hospitals had made considerable progress before Arbitrator Houlden in respect of the first of its two objectives. Indeed, even without knowledge of the parties’ submissions, and simply comparing the language of the former provision with the new first paragraph of Article 10.08(a), one might have been required to consider whether the intention was to reverse the Thorne/Devlin approach. Unfortunately, however, from the perspective of the Hospital, Article 10.08(a) does not end with that paragraph but, rather, continues on in terms that strongly support the Association’s position in these cases.

After addressing, in a new second paragraph, how a segment of one of the two things (shift cancellations) expressly identified in the first paragraph are to be handled, the provision continues, in a third paragraph, to introduce a previously unidentified concept – “a partial or single shift *reassignment* of a nurse from her or his area of assignment”. It does so by stating that *that* form of reassignment “will *not* be

considered a layoff” (my emphasis) and by prescribing, in mandatory terms, a process for the handling of such events that is the same as that which is given as an option in the second paragraph for dealing with the previously identified concept of shift cancellations: local negotiations.

What a curious structure – certain things are said to be included, a segment of one of those things is required to be treated in a particular way, and a similar segment of a previously *unidentified* thing is said not to be included but is required to be dealt with in a way similar to that which is presented as an option for the second thing. Leaving aside its structural complexities (or, perhaps, mere oddities), it is not possible to read Article 10.08(a) – even without recourse to history – without asking why it would be necessary to *expressly exclude* a limited version of something from the scope of a definition if the other version of that same thing were not understood to be included. Indeed, as more than one of the other post-*C.A.M.H.* arbitrators have observed, this is more than a question, it is an interpretative conclusion that is supported by the *inclusio unius* rule of construction.

By stating that a partial or single shift version of something (a reassignment) will not be considered a layoff, the clear implication is that the alternative version of that same thing (a longer reassignment) is a layoff. Not only is that implication clear from the terms of the third paragraph alone, it would appear to be supported by the placement of that paragraph within the provision as a whole. The Article begins with a definition that is inclusive, not exclusive, before adding two paragraphs that appear to be intended to provide relief to the Participating Hospitals from the consequences of that

open-ended and inclusive definition in the case of *short-term* events. Although the second such thing (reassignments), unlike the first (cancellation of shifts), is not previously identified, the clear implication is that it is included.

It is impossible to know what was intended by the deletion of the term “displacement”, from the first paragraph, alongside the addition of a term, “reassignment”, in the third paragraph, which might best be thought of as describing an action that hospitals might wish to take in dealing with displacements. Unlike the parties’ nominees, Arbitrator Houlden provided no reasons for his award. (And, I pause to note the reasons of the nominees have also been seen as providing no assistance to the hospitals in these cases – see *e.g. Royal Victoria Hospital, supra.*) However, I share the view expressed by Arbitrator Stephens in *Royal Victoria* that had it been the intention of Arbitrator Houlden to “turn back the clock” to the position that it had been in prior to the Thorne and Devlin awards, one would have expected clear language to that effect. And, of course, not only is such language not present, the contrary appears to be true. As a result, the single advancement for the Hospitals on the definitional side would appear to be that the line around *permissible* reassignments (*i.e.* those that do not attract the layoff language) is now drawn at an entire shift or less rather than at less than one shift as had been the case following the Devlin award.

(In commenting, in the preceding paragraph, on the position that the “clock” was in prior to the Thorne/Devlin awards, I would also mention, at least parenthetically, that *even at that time* some hospitals appear to have been taking a different view of what constituted a “layoff”. In the last of the three “Keller and H.D.

Brown awards” referred to earlier – *St. Joseph’s Hospital and Ontario Nurses’ Association*, dated November 6, 1993 unreported – Arbitrator Keller, in order to come to the conclusion that the “traditional” approach to layoff applied under the then undefined collective agreement language, was required to distinguish a number of cases that appeared to reflect a contrary understanding in certain hospitals.)

All of the foregoing, of course, is to say nothing at all about the *appropriate* balancing of interests that underlie the positions of the parties in these cases – between the Hospital’s desire for operational efficiency on the one hand and nurses’ desire for workplace continuity and the benefits of seniority on the other. In so stating, I am not unmindful of the Hospital’s arguments concerning the extensive rights that attach to layoffs under the central agreement and whether the nature of those rights suggests a different approach to the definition than that which has been adopted in the cases. However, without wishing to take anything away from the very thorough and able submissions of Hospital counsel before me, I would note that similar submissions were made in the previous cases and were found insufficient to overcome the clarity of the language. I agree with those awards. Further, it is important to keep in mind that what has been dealt with in these cases are underlying events (closures, consolidations, reorganizations, *etc.*) that result in the elimination or “surplusing” of nurses’ existing positions on units. While it may be unnecessary for any nurse to “go out the door”, lose shifts, or have his or her hours reduced – because, on the facts, there may be more jobs than nurses – these are the same kinds of events that typically underlie the traditional approach. The choice that appears to have been made by or for these parties, and that is reflected in the cases, is that the seniority-based layoff provisions will apply to regulate

the resulting dislocations even though some of the prescribed rights may exceed those that are needed in any given case.

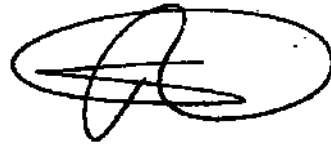
Implicit in the foregoing, of course, is that I am also unable to find merit in the Hospital's further argument that the events in question constituted permissible "transfers" (rather than impermissible "reassignments".) What happened here, as set out in the agreed facts and accompanying documents, is that nurses were declared surplus on their unit and given a series of choices unilaterally developed by the Hospital as to where they might go next. All were displaced, some (because of their particular choices) were reassigned but none was "transferred". Indeed, as pointed out by the Association, the Hospital, at the time, did not even attempt to characterize the changes as "transfers". To accept the Hospital's argument here would mean that it is free to move nurses, albeit for legitimate operational reasons, from one position to another or from one unit to another without regard to how their original positions or assignments were acquired in the first place or how their new positions might otherwise be acquired in the normal course (*eg.* by way of posting). To do so, in my opinion, conflicts not only with the layoff provisions but with the Hospital's posting obligations. This possibility is not one that was available under the Thorne award and it is not one that was created by Arbitrator Houlden.

Finally, there appears to be no dispute that at least some of the positions into which the affected nurses were placed were *not* posted and *none* were placed into those positions through the usual posting procedures. It follows, therefore, that the posting provisions, too, were breached.

On the basis of the foregoing, I find and declare that the Hospital breached the layoff and posting provisions in this case. For the time being, I will limit my remedy to the foregoing declaration and leave it to the parties to attempt to agree upon what, if any, further remedies should flow or what, if any, further steps should be taken. In the event that they are unable to do so, the matter may be referred back to me for resolution.

The grievance is upheld.

DATED at Toronto this 16th day of February, 2009.

A handwritten signature in black ink, consisting of a large, stylized 'R' and 'G' intertwined, enclosed within an oval shape.

Russell Goodfellow - Sole Arbitrator