

Ref:

Seniority,
Staff Changes

**FINDINGS AND DECISION
IN A DISPUTE
between**

**HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND
REPRESENTED BY TREASURY BOARD AND THE
NEWFOUNDLAND AND LABRADOR HEALTH BOARDS ASSOCIATION
REPRESENTING CENTRAL HEALTH (JAMES PATON MEMORIAL
HOSPITAL)**

("the Employer")

AND

**THE NEWFOUNDLAND AND LABRADOR NURSES' UNION
(the Union)**

Grievor: Ms. Marlene Drover, RN

For the Union:

Presenter Mr. David Conway, Labour Relations Officer

Advisor Ms. Nancy Dove RN, Branch President

Witness: Ms. Marlene Drover, the Grievor

For the Employer:

Presenter Ms. Jody Saunders, Labour Relations Officer

Advisor Mr. Mark Gill, Director of Strategic Human Resources Management

Witnesses: Ms. Anne Rowsell RN, Nurse Manager

Ms. Michelle Whiteway RN, Nurse II (Incumbent)

Ms. Tonya Ryan, Nurse Manager

The Arbitrator: Dr. John A. Scott

The Hearing was held in Gander on November 3 & 4, 2010.

Statement of Grievance "Nurse II position for Dialysis Unit applied for. Nurse with less seniority than myself given the position."

Corrective Action requested "Full Redress."

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final Award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented. Michelle Whitesway RN, the incumbent, appeared as a witness for the Employer and was examined and cross examined in that capacity;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the Collective Agreement, were properly observed or are waived;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days after publication of the Award they will be referred to the Arbitrator, within the same sixty (60) calendar days, for resolution;
- the Arbitrator will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:

Consent	#1	Grievance, February 6, 2006
"	#2	Collective Agreement expiring June 30, 2004(as extended)
MD	#1	Oct. 15, 2004 Posting: Nurse II Hemodialysis Unit Permanent Part-Time
"	#2	Jan 13, 2006 Posting: Nurse II Hemodialysis Unit Permanent Full-Time
"	#3	Grievor's resumé (undated)
"	#4	Grievor's January 20, 2006 letter of application for MD #2
MW	#1	Incumbent's Oct 15, 2004 application for MD #1 & Nov 19 appointment
"	#2	Incumbent's application for MD #2
TR	#1	January 11, 2006 Requisition for MD #2 position

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

Article 4 - Management Rights

4.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the hospital under its control and to direct the working force is vested exclusively with the Employer except as specifically abridged or modified by the express provisions of this Agreement. Should a question arise as to the exercise of management's rights in conflict with the specific provisions of this Agreement, failing agreement by the parties, the matter shall be determined by the Grievance and Arbitration Procedure.

Article 16 - Arbitration

16.04 Jurisdiction of the Board

An arbitration board may not alter, modify or amend any provisions of this agreement but shall have the power to set aside or modify a decision of the Employer. No arbitration board shall make an award which would amend or change a collective agreement, a judgement or an earlier award.

Article 24 - Seniority, Layoff and Recall

24.01 Seniority Defined

- (a) Subject to clause 24.01 (b) and 25.13, seniority is defined as the length of continuous service (excluding overtime) with the Employer and shall date from the last entry into employment with the Employer.
- (b) Seniority for casual employees shall be defined as time worked after January 13, 1995, (excluding overtime) and shall apply only to clauses 25.02, 25.04 and 25.06.
 - (i) Seniority for casual employees who have worked 487.5 hours as of January 13, 1995, shall be counted from the date of signing (no retroactivity).
 - (ii) Seniority for casual employees who have not worked 487.5 hours as of January 13, 1995, shall be counted only after the casual employee has worked 487.5 hours. After the casual employee has worked 487.5 hours she/he shall be credited with seniority for time worked after the date of signing.
 - (iii) Seniority for casual employees hired after January 13, 1995, shall be counted only after the casual employee has worked 487.5 hours. After the casual employee works 487.5 hours, she/he shall be credited with 487.5 hours of seniority....

24.04 **Loss of Seniority**

Seniority shall be forfeited by an employee for any of the following reasons:

- (a) she/he resigns;
- (b) she/he is discharged for just cause;
- (c) she/he is suspended for just cause, in which event, the loss of seniority shall be for the period of suspension;
- (d) she/he is laid off for a period of two (2) years or more;
- (e) she/he fails to return to work upon recall under the provisions of Article 24.06; or
- (f) she/he is a casual employee and two (2) years have elapsed from the last date of work.

Article 25 - Promotions and Staff Changes

25.03 **Contents of Postings**

- (a) The notice posted within the hospital shall contain the following:
 - (i) classification and salary scale;
 - (ii) qualifications, including required knowledge, education and any skills necessary to perform the job; and
 - (iii) whether shift work could be involved. Such qualifications may not be established in an arbitrary or discriminatory manner.
- (b) Copies of all postings shall be forwarded to the branch president or her/his designate at the time of posting.

25.06 **Staff Changes**

In making staff changes, primary consideration shall be given to qualifications, ability and fitness to perform the required duties. When qualifications, ability and fitness are equal, seniority, as defined in Article 24, shall prevail.

25.07 **Trial Period**

- (a) (i) **Eight (8) Hour Shifts**
The employee who accepts a promotion to a higher position is entitled to a trial period of up to sixty (60) working days. During this period, the employee may return to her/his former position and salary without loss of seniority.
- (ii) **Twelve (12) Hour Shifts**
The employee who accepts a promotion to a higher position is entitled to a trial period of up to four hundred and fifty (450) working hours. During this period, the employee may return to her/his former position and salary without loss of seniority.

- (b) Casual employees who obtain a permanent position or a temporary position for more than sixty (60) working days (450 working hours), may be required to work a trial period. The length of time of the trial period will be as outlined in (a) above. No casual or temporary employee shall be required to complete a second trial period in the same unit or work area within a twelve (12) month period.

25.08 Return to Former Position

- (a) If, in the opinion of the Employer, the successful applicant proves unsatisfactory in the position during the aforementioned trial period, she/he shall be returned to her/his former position and salary without loss of seniority and any other employee promoted or transferred because of the rearrangement of the position shall be returned to her/his former position and salary without loss of seniority.
- (b) A casual employee who, is unsuccessful in her/his trial period shall return to her/his casual status.

OPENING STATEMENTS

FOR THE UNION, Mr. Conway noted the grievance relates to the Employer's denial of a Nurse II position which was posted in early 2006 where the incumbent, Ms. Michelle Whiteway was the successful applicant even though she had lower seniority. Mr. Conway made it clear the Union does not question the competency either of the incumbent or of the Grievor. Both applicants were capable of doing the job, in the Union's view. The issue is the relative ability of the two nurses.

The two nurses are not, in fact, exactly equal. The Union acknowledges that fact; but the question to be determined is whether they were "relatively equal" with respect to the posting in question. In the Union's view, the Collective Agreement does not require that the Grievor be precisely equal. The question, under Article 25.06, is whether the candidates' "qualifications, ability and fitness *to perform the required duties*" (emphasis added) were equal. In the Union's submission, any difference was not so significant that the Grievor should have been denied the position to which she was entitled by her seniority.

The Union acknowledges that it has the onus to determine: first, that the Grievor was qualified for the position; and, second, that the Grievor's qualifications were relatively equal to the incumbent's in respect of the posting in question. The Arbitrator must provide a legal analysis of the matter.

In this particular case the remedy requested is not normal since the position in question is redundant so it is not possible to award the position to the Grievor. Instead, lost wages and benefits should be awarded, and any consequences of having been denied the position, such as red circling, which may have to be determined.

In summary, although the incumbent and the Grievor are not exactly equal, they are, in the Union's submission, relatively equal in view of the posting in question. The Union requests that the grievance be allowed with full redress.

FOR EMPLOYER, Ms. Saunders pointed out that the actual posting which is at the core of this grievance was never grieved. The Employer will argue that the Grievor and the incumbent are not equal in respect of "qualifications, ability and fitness, to perform the required duties." In the Employer's view, the Grievor was not qualified for the position.

Should the Arbitrator find that the Grievor was qualified, the Employer argues that the Grievor and the incumbent were not *relatively* equal under Article 25.06. Seniority therefore, does not prevail. Seniority does not apply in this instance. The grievance should be denied.

EVIDENCE

THE FIRST UNION WITNESS was the Grievor, Ms. Marlene Drover, a Registered Nurse since March 1986, who was initially employed in the St. Anthony Emergency Unit until June 1988 and, since July 1988, at the James Paton

Memorial Hospital in Gander. She worked on the medical floor for the first six months, and subsequently has worked in the CCU/ICU Unit. In the James Paton Memorial Hospital she has served in many capacities including general patient care, and in the CCU/ICU responsible for patient assessment, attending cardiac arrest situations, and related procedures. She has also done In-Charge leadership duties in relation to other staff. On such occasions, in emergency and ambulance-related situations, she "would normally have one or two other nurses or LPNs responding" to her and be the one to deal with issues as they arise."

In the ICU/CCU, in addition to general patient care and continual patient assessment, Ms. Drover monitors heart rate and rhythm, maintains the cart, and while "in charge", would organise and administer the LPNs and other nurses, and would also alert physicians if required. In such circumstances, there are others subject to her charge, and, if any issue were to arise, she would be the one to report to a nursing supervisor, if available. Ms. Drover estimated that, between 1988 and 2006, she had served in the "In-Charge" role "approximately every second shift" of her night duty, which is her normal shift.

Ms. Drover confirmed that ICU/CCU is usually populated by "the sickest of the patients in the hospital": those who "have had heart attacks or congestive heart failure, or are recovering from either complications of surgery, or from large surgeries."

MD #1 was the posting for the permanent part-time position, dated October 15, 2004. She had not applied in response to this posting, "since it was part-time", and she was not at the time looking for a part-time position. "I was full time at that time." She testified, however, that she felt qualified for the part-time position.

I felt that I had the qualifications and could perform the position. Michelle Whiteway was the successful candidate, and moved to the position from having been a nurse on the obstetrical floor.

MD #2 was the posting for the permanent full time position which she ...

first saw in January 2006... I applied on the posting. I felt I could do it. I'd have loved to do it. I felt I was qualified to do it.

At the time of her application she was, as required by MD #2, a graduate from an approved school of nursing and held registration with the ARNNL.

Asked whether, as required by MD #2, she also had a "Demonstrated ability to direct and motivate staff; good organisational skills and (was) able to coordinate the work of others", Ms. Drover testified that her frequent experience as an In-Charge nurse demonstrates these skills, in her view. Throughout her career...

Many nurses called to ask for my opinion and frequently I've been asked to show newer nurses around. I have also been a troubleshooter to nip problems in the bud and to call doctors when necessary. I have always thought that I've been a leader... As far as organisational skills are concerned, I've been In-Charge often enough to show that I've good organisation over twelve-hour night shifts where patient and staff safety are uppermost, and can coordinate others' work. That's what you do in the In-Charge position: you assign duties to others, and do the duties yourself.

Asked how the In-Charge position is assigned, Ms. Drover answered:

The supervisor chooses per shift. Normally, it's assigned by the supervisor when you come on. Sometimes it is because of a sick call.

Ms. Drover testified that she had not completed a "Nursing Management distance education program" (MD #2) at the time of her application, but "was willing to complete it." She also acknowledged that she did not have "hemodialysis experience" (MD #2) at the time of her 2006 application or prior to 2004.

We did not have the machine, and I never worked in a hospital that did have the machine; so I had no opportunity for such experience.

Ms. Drover also testified that MD #3, her resumé, is accurate as to her background as of early 2006, but does not know the exact date on which she created it, or recall whether she submitted MD #3 with her application. Ms. Drover said that the Employer would have had the resumé. "I've submitted it with applications, but I'm not sure that I put it in for this position."

Asked whether she had any other education beyond that noted in her CV prior to the application in 2006, she said: "No, I don't think so. That would probably have been it." Ms. Drover testified about her various skills and course work documented in MD #3, and as to her experience in medivac cases where, "I was in charge unless a doctor was present". The Grievor also testified that she has provided "cardiac teaching for new staff or for any new patients in advance of a pace-maker operation."

Ms. Drover applied in response to the MD #2 posting, but was not awarded an interview, and did not hear who actually was awarded the position "except through the grapevine... There was no followup to explain why I had not got it." She had no meeting with the Employer after her failure to secure the position. Asked what she understands was the basis for the denial, Ms. Drover answered: "I had idea. I was given no reason." Asked why the grievance was filed, she said:

I'd had 20 years of experience. I felt I truly could have performed that post. The majority of my experience was in critical care in the ICU.

Her pay level at the time of her application was at the NS 28 (\$28.28 hourly) level, and remains at the same level today. The pay level for the MD #2 the posting was at NS 30 (\$30.15 hourly).

Ms. Drover concluded her testimony by saying that she felt that she "had the experience in ICU/CCU and in the emergency position to perform the position."

She also confirmed that, in her view, this was proven by ...

the many, many times that I'd served in the In-Charge position. I can make decisions. I have clear leadership skills. I could not understand why I was not given the chance to try this position.

ON CROSS EXAMINATION, Ms. Drover was asked to describe any formal roles she held in teaching new nurses as described in direct testimony. She said:

On occasion, people have asked that I take a new nurse and mentor her for various procedures. But normally you'd take a new person and show them the dos and don'ts.

She had never participated in the mentorship program "because I've worked all nights. I've never had the opportunity to be in it; but I have done so informally."

Asked whether there had ever been "any official capacity" in which she had instructed others, Ms. Drover answered: "Only as In-Charge, and even when I was not in charge, when it would benefit a new nurse." Asked whether there are any specific grounds for taking on the role of In-Charge nurse, Ms. Drover answered: "Seniority and sufficient knowledge." She was not aware of any posting or application process involved in securing an In-Charge position. She acknowledged that there is a ...

Team Leader, a Nurse II, for ICU/CCU, who is the go-to person for staff on duty, including myself if I did days; but I do nights by choice... In the morning, when she comes in, I go to her with issues or problems that have come up. I touch base with her.

Ms. Drover confirmed that the Nurse II is her...

first point of contact, but usually we tape report and they'll call me at home if they need to, or I pass on information as I'm leaving. I've been told many, many times that my report is 'excellent, very concise, very pertinent.'

Asked if she is aware of any experience qualification for the In-Charge position, or whether there are any tests or courses required, Ms. Drover answered, "Not that I'm aware of."

Asked whether she believes that her undated resumé (MD #3) is actually on file with the Employer, Ms. Drover answered: "Perhaps not for this application, but it would certainly be on file." Asked whether she can identify which file it might be in, or whether it might be in her personnel file, Ms. Drover answered:

I'm not sure what file. I'm not sure if it's on the personnel file. I have looked at my personnel file. I don't recall exactly when. I don't recall seeing the resumé there. It is now my normal procedure to submit the resumé, but I'm not sure if it was in 2006. I know a lot of postings now require a resume to be submitted.

Asked whether it was that more recent requirement that prompted her to do so, Ms. Drover said, "Yes I think so." She also pointed out that MD #2 does not specifically call for a resumé.

It just says, 'stating qualifications'. I think that the ones last week asked for a resumé . There were several postings last week.

Asked whether MD #2 is similar to the postings that she saw "last week", she said:

Similar I suppose. I don't know what difference there would be. I don't recall when the resumé would have occurred.

Asked when the skills listed on her resumé (MD #3) require recertification, Ms. Drover identified the ACLS and VCLS and venipuncture courses and confirmed that she had done the venipuncture course ...

in 1988 or '89, but had not recertified. We don't usually draw blood these days, because of the full-time lab established for more than ten years. Occasionally we will draw blood if they are having trouble, but not usually.

Ms. Drover understands recertification is required for the defibrillator. "I believe I did one, but I don't know when." Asked whether she considers herself currently certified for the defibrillator she said:

I do but I am not sure whether I received a card certifying the recertification. I last completed the BCLS course in August of this year, and completed the ACLS course a few times. I've applied several times but not been successful in getting sent. It's been four or five years since I did that course. I think it's four years: 2006 I think.

Asked how long the certification lasts, Ms. Drover said, it was "three years", and confirmed that, while she is not certified at the moment, "I was at the 2006 posting." She had completed the medivac course "while working in St. Anthony in 1986 to 1987." She had not attended any courses or presentations in hemodialysis and is not aware of any having been available. Asked whether she had been aware of any hemodialysis presentations Ms. Tonya Ryan had provided at the hospital, Ms. Drover answered: "No, I'm not aware of any hemodialysis courses." She becomes aware of the availability of such courses ...

through postings and on the computer. They alert us to that, but I can't always attend if they are given during the day while I'm sleeping. I have worked all nights, probably since 1992; the courses and seminars take place usually during the day... I can not recall attending any at night. I could cite staff meetings at night and drug presentations at night but not often...

Ms. Drover confirmed that the resumé (MD #3) and the letter (MD #4) likely constituted the whole of her application.

It probably was. I have no idea. I don't know if the resumé was submitted. They may have come back and asked for that. I don't know.

Ms. Drover confirmed she has no experience in hemodialysis, but was willing to learn. Noting that there is no specific skill listed in MD #3, Ms. Drover added:

At that time, all that was required was a short note stating interest. I believe that was just the accepted practise at that time.

Asked whether she is aware of the duties and responsibilities of a Nurse II in the Hemodialysis Unit, Ms. Drover answered, "No I am not." Asked to explain how she could claim to believe herself qualified when she acknowledges not being aware of the duties involved, Ms. Drover answered:

I can only assume that they are the same as on other floors: the goto person. They are constantly on the unit. As for the rest of the skills, I could have learned the skills to the hemodialysis portion of the job.

Asked whether she normally takes up clinical issues in the ICU/CCU with the Nurse II, she answered:

There is not necessarily a Nurse II there at night; but, as needed, in the AM I'll review – or with the site coordinator at night. But certainly I'll let them know in the morning.

Ms. Drover confirmed that the Nurse II "Certainly provides clinical leadership. Yes, certainly."

Asked if there is evidence in her resumé or application letter of ability to motivate staff, Ms. Drover answered:

No. But again, these things were not required for an application at that time. And I think that, if it was wanted, they would have got back to me and asked.

When it was noted that the final line under "qualifications" in the 2006 full-time posting (MD #2) reads "Applicants with hemodialysis nursing experience will be given preference" Ms. Drover said:

I guess your work experience now you would do in the form of a resumé, but back then you just needed to scribble down a note. That was the first time that I had ever applied for a position.

Asked why she is sure that her resume is on file, Ms. Drover said: "For a second position I applied for after this position." Asked how she could expect the Employer to have access to a resumé that was only submitted later, she said:

I don't know if it was on file. I can't think of any reason... But this was the first position I ever applied for.

There were no further questions, and there was no redirect examination.

THE FIRST EMPLOYER WITNESS was Ms. Anne Rowsell, Nurse Manager with the Regional Renal Program since February 2009, when she started in management. Her nursing career began in 1995. Ms. Rowsell described her own experience in hemodialysis. Initially, she was a "floating nurse in the 1998 period and then full time in 2005." In 2005 she worked in professional development as an educational consultant until February 2009, when she took up her current position. She developed the hemodialysis program in 2006, and delivered it in February 2006. She was involved in orienting three nurses for the Gander unit up until February 2006. In her current position she is responsible, as Manager, for the Gander dialysis unit.

In that program there are five permanent RNs and two LPNs, as well as two floating nurses and LPNs, with one additional RN. We have a Regional Nurse II for the renal program as well as a Nurse Partitioner working with the program and a Renal Pharmacist, a Dietician and a Social Worker. Both of these work part-time for the program. Leadership positions are held by the Nurse II and by the Pharmacist, the Nurse Practitioner, and myself, of course.

The James Paton Memorial Hospital nursing staff in dialysis have various reporting structures. The Unit is actually a satellite of Eastern Health, so for client services, nursing staff reports to Eastern Health. I report, however, to the Central Region in Grand Falls, and I also report to Steve Burns in Gander as far as budget is concerned. It's a mix of East and Central, and it's not yet integrated. The same structure was in place in 2006.

The leadership in the Paton Unit is handled by one Nurse II, responsible for leadership in the clinical aspects, and also for the physical well being of the patients and, in that she acts as a Nurse I concerning the stability of the patient, for setting up of the machines and needling and the like. The leadership on the unit is provided by the Nurse II, who has the overall whole knowledge of the unit's operation, and carries the main responsibility for the interpretation of the blood work as it relates to the dialysis.

She is responsible for any adjustments to be made to the patient care and for liaison with the doctor in St. John's; and also for assembling of the data which must be maintained and analysed. The Nurse II also handles the computer management of the patient's data and troubleshooting as required, including uploading the data to the hospital's meditech computer. The Nurse II also reviews the daily run sheets that the nurses prepare, and also cares for individual patients to ensure that all nursing interventions were done in a timely manner and outcomes were as desired, or provides notations as to why not. The Nurse II is directly involved in the stability of the patient.

The Nurse II role has evolved. Formerly the expertise concerning dialysis was the Nurse II's responsibility, but that has evolved. The RN has become very involved in the machines. But the Nurse II keeps the perspective on everything. She intervenes in any instability. There are cautions concerning side affects, particularly hypertensive events. Frontline nurses depend on the Nurse II. She coordinates with all other nurses and departments. She's the hub.

Ms. Rowsell described the particular importance of the ...

needling, since dialysis patients have a fistula to accommodate a needle. It's a very precise skill to manage this, and nurses require both confidence and competence. It is the patient's lifeline.

Ms. Rowsell also described differences involved between needling in dialysis AND IN other areas of clinical practice. In dialysis, it is necessary to regulate the flow very precisely to achieve the required 70% clearance of toxins. The Nurse II's leadership role ensuring unit confidence and competence is key.

It is particularly important in this situation in the absence of a nephrologist on site. There is no nephrologist in the Gander unit, and the Nurse II is the only one on whom all rely. She is the goto person for all, including pharmacy, social work and dietary as well as for trouble shooting.

She also described her own oversight role, assuring that

the units run properly and in maintaining and analysing data. At the moment the Gander unit processes 29 patients and has a capacity for 32 determined by the number of machines and the staff available to manage the process. As Regional Manager, I'm in Gander two days a week, and more if needed.

ON CROSS EXAMINATION, Ms. Rowsell testified that, prior to her involvement with dialysis in 1998, she'd had no exposure to the procedures...

other than a lecture in her nursing schedule concerning chronic renal failure; nothing else... Between 1998 and 2005 there was no dialysis available in Gander until the Gander unit opened in 2006. The unit in Grand Falls opened in 1997 to 1998... I started with a Nurse II in Grand Falls who taught me all they could in a classroom setting and then we were assigned to frontline nurses in the unit. She monitored us, and taught the needling component.

Asked how other nurses who lack experience got training, Ms. Rowsell testified:

As each unit opened, the orientation was different. I'd give the theory units, and then they'd go into the unit and be trained. There is a 6 week orientation program ... The training is different from when I completed it... When you speak of Gander as a "satellite", the nurses here have to be thoroughly trained. There had to be an extensive training.

Ms. Rowsell confirmed that she recognises MD #2 and is "a little familiar with it", but she was not part of the hiring process to which it refers, and was not involved in the process relating to MD #1. She also described why the current position is being made redundant:

We are moving to the "Ottawa model" of nursing. It's all in the Nurse II's head now, and we want to ensure that the frontline nurses are more confident, competent, and independent. I would say that the role is evolving into a new pattern. The Nurse II role will be different – more a clinical facilitator.

ON REDIRECT EXAMINATION, Ms. Rowsell confirmed that there is no clinical facilitator currently in dialysis work at the James Paton Memorial Hospital, nor did that role exist in 2006. Currently the role of Nurse II remains as it was when she came to the position in 2009. The only difference we have is there is more system in place: more practitioners, social workers, dieticians and pharmacists have been added since 2006. Ms. Rowsell also confirmed that there are now opportunities for nurses to become more knowledgeable.

There is certification available in nephrology from the Canadian body: a two year program with a comprehensive examination. It would take that long.... I am a Nephrology Nurse under that program.

Asked how nurses might learn about the program and procedures in a general hospital setting, Ms. Rowsell said:

In my role as a nurse educator I have done some 90 minute orientations for nurses in the hospital. I was the educational consultant from 2005 until 2009... I really can't say how often, but it was more than once and fewer than ten times.

THE SECOND EMPLOYER WITNESS was Ms. Michelle Whiteway, R.N., the incumbent Nurse II in the dialysis unit at the James Paton Memorial Hospital where she has worked since January 2005. Prior to taking up that position, she was a Staff Nurse for 17 years in obstetrics. She is familiar with NB #2 as the posting to the full-time dialysis position, which she now holds. Her duties and responsibilities are...

to oversee the whole running of the unit, including nursing and the patients. In particular, as far as clinical work is concerned, I have to be the expert on needling and opening new fistulas. Since there is no physician support, we have to use our judgement to clear the blood, but each patient has individual tolerance levels. I'm the goto person for questions from both patients and staff.

In the beginning I did all the patient training. Not so much now, since we have dietary and pharmacy support. Medications have to be regulated since they are excreted and dosages have to be readjusted. Also, patients preparing for transplant need special attention. Patients also have to be informed of their options.

I also do day to day work on the unit; not so much now as in the beginning, when staff numbers were lower. I set up the machines, *etc.* I have to know the computer program in the machines, and communicate with meditech, and also ensure the supplies are available and that the stats and data are submitted to St. John's for analysis.

Ms. Whiteway described her training in Grand Falls and extra training that she underwent since then, including with nurses who work with the surgeon who creates the fistula. Her own training in Grand Falls began in January in 2005 with a six week program. "I was team leader 60% of the time in 2005." Ms. Whiteway confirmed that she had applied for the position as posted in MD #1, which she started on January 2, 2005. She also described in some detail the training completed in Grand Falls, which included "two weeks with a very experienced dialysis nurse." Following this there was an experienced nurse from British Columbia, employed by the machine manufacturer, who came to Newfoundland and spent two weeks giving her extra teaching through the whole process. Ms. Whiteway also went to St. John's for training and also attended a national conference on nephology in 2005 which she found "most useful". In late 2006, she also spent some time with a transplant nurse in St. John's to go over what is

required for a workup in preparing a patient for transplant. She completed a health assessment course, "and read, observed, and talked to doctors, and asked doctors to listen, particularly in relation to blood work, which is key." This was not part of the Grand Falls training, but extra training she undertook herself for three months.

Ms. Whiteway described the assessment preparatory to patient intake, and the whole process of the removal of fluid which is involved in dialysis. She also described her involvement in patient education prior to the availability of a pre-renal nurse. She is, herself, now involved more with education for patients once they are admitted to dialysis.

Asked whether the machine manufacturer provided the independent person for training in 2006 when she took on the program full time, she said:

No that was my job then. There was no additional support from Grand Falls after 2006... and we doubled our patients. In 2005 we started with nine, and then it went up to ten or eleven. When we expanded in 2006, we jumped to 20 or 22. Prior to the 2006 expansion the intake was of more stable patients. Once we expanded we took all patients, and the acuity of our patients went up. The doctors now had a level of confidence based on our experience.

Ms. Whiteway also said that patients on dialysis normally get sicker...

due to the co-morbidities involved in their condition. But, nonetheless, they remain patients as their condition progresses.

Ms. Whiteway's role is...

hopefully to solve problems that develop in the clinical area, or to find out from the doctor or nurse practitioner. But a lot of it we reason out and solve ourselves. We have to be more autonomous, but not overstep our scope, even if the scope increases. As that occurred, I had more to ask. It certainly applies to Gander as a satellite.

Asked who reports to the Nurse II, Ms. Whiteway said:

No one reports to me. We are all equal. They certainly would report to me on other disciplines, coming to me with issues. Pharmacy is a bit more independent, but we still talk. My direct report was to Tonya Ryan, Regional Director for Dialysis. That's not really frequent, but she is available by phone; and when she's not there, Stan Burns is available for most issues.

She confirmed that Ms. Ryan has a dialysis background, but Mr. Burns does not...

other than what he has learned from us. Stan was our acting manager. He relied on me a lot for clinical issues. He was Acting Manager from the spring of 2008 until February 2009 when Anne Rowsell took the position... Tonya Ryan was manager in Grand Falls when we went to Grand Falls for training, so she became our Manager right from the very beginning until 2008 – in the spring I think – when she took on additional roles and remained manager in Grand Falls... Tonya Ryan was the Manager when the position was first posted in 2006.

Ms. Whiteway confirmed that MW #1 is her January 13, 2006 application for the full time position. The required qualifications were as set out in MD #2. She was a graduate of the School of Nursing and was registered with the ARNNL.

We started the unit from zero. The day we came out of training, the unit was empty, no supplies or anything, and the nurse was there from the manufacturer. I was responsible for ordering and getting supplies, and directing procedures on a daily basis. We were all nervous and unsure. That was a big part of my work.

Scheduling of patients was also my responsibility. Each patient has different times and durations on the machine. You don't want them all coming off at the same time. Scheduling is key to the whole process, so nurses can assess and care for post-dialysis procedures. Many people are not feeling good with their blood pressure down, perhaps and extra attention is needed. Some patients are still at work, and have preferences as to the times of dialysis. It requires five hours per day, three times a week, so it is important to get the times right. Patients can be in wheel chairs, and many are very large: perhaps around 400 pounds, in some cases. And a lot are amputees. The Nurse II is involved in weighing patients, and their transport from the

chair to the scale. The dialysis treatment is usually conducted in chairs that recline, but the chairs are not easy to handle. Some physical strength is required but even more, manoeuvrability is the key.

Ms. Whiteway confirmed that MW #1 was her complete application. At the time she applied (under MD #2) she was

... prepared to complete the certificate. I applied to do so. At the time of my application I did not have dialysis experience... The learning curve was straight up for twelve months or more, and involved a lot of self learning through my own reading of books and articles on leadership and conflict issues. I'd sit with various drug reps and get information from them. I sat with the nephrologist on every visit. That was a huge piece of the drugs management. I had to explain that to the doctors about changes in meds.

Asked whether she had discretion concerning medications, Ms. Whiteway answered: "No, but I'd explain why they were changing the drugs." Ms. Whiteway also described the importance of blood work analysis to a dialysis patient's management. Asked whether she considers herself fully qualified for the MD #2 position, Ms. Whiteway answered, "Absolutely." Asked whether she has any other qualifications, Ms. Whiteway answered:

No, other than I enjoy learning new things. That's just me. I've since done the nephrology certification. You need two years to do that.

ON CROSS EXAMINATION, Ms. Whiteway testified she had not been interviewed for the full time position for which she applied in 2006. Asked if the Employer had asked any questions in followup on her application, Ms. Whiteway said:

There was a conversation, but not formal. Tonya asked if I was interested... I was notified by a phone call from Kelly Ann Kindon, the one who wrote the letter of appointment... When I applied for the part-time position in 2004, I was qualified except for hemodialysis; but for all of the leadership, *etc.*, issues, I certainly was.

It was noted that in MD #1 hemodialysis experience was described as an "asset". Ms. Whiteway said:

I did not have hemodialysis at that time. No one who applied had hemodialysis. I knew that there was only one other applicant... I had worked in obstetrics and in the case room and on gynecological surgery. Also on the obstetrical floor we took patients from other services... My work involved delivery, and I had completed numerous courses on advanced life support in obstetrical contexts. I'd been there for years. I knew I was the goto person.

Asked whether she was a Nurse II prior to her dialysis work, Ms. Whiteway answered: "No. There is no Nurse II on obstetrics."

Speaking to the issue of her "organisational skills" – as required in the 2004 application – Ms. Whiteway testified that:

In obstetrics you have to manage emergency situations. Often patients are coming straight into the unit, and reaction has to be quick. A lot of organisation is needed. There are also prenatal briefings required. I worked twelve hour shifts, and there was no Nurse II. We had a Nurse Manager.

Asked whether she had the distance education course required under MD #1, Ms. Whiteway said: "I applied for it, but the dollars went elsewhere."

She agreed that based on her own experience of being accepted for the position without hemodialysis experience, she acknowledged that people without experience could be awarded the post.

At startup, yes we could. We had the support of Grand Falls for six weeks, and extra training, and the BC nurse. All of that was available at the startup. But in 2006 we were expanding. There were no supports in place. A nurse can be hired without experience, but we were training three other nurses.

Noting that MD #2 provides that "Applicants with hemodialysis nursing experience will be given preference", Ms. Whiteway was asked whether she had

filed a Grievance about the wording of the posting. She answered: "No. Why would I?" Union Counsel asked whether she had challenged the use of the word "preference" rather than "requirement". She responded, "Experience would have been preferred in 2004 as well; but we had supports in place." Ms. Whiteway said she was not formally interviewed for the 2004 application, but had...

spoken with Frances Dwyer... before being awarded the position. I had one-on-one conversation with her in her office concerning the startup work and how training and other supports would play out... Frances Dwyer knew my background and qualifications. It was a smaller organisation then than it is now.

MW #2 is all she had submitted.

The practice then was just to sent a note. I did not sent a resumé... No, I was not asked for it. Similarly, in 2006 I was not asked for a resumé in connection with the posting... The Employer was able to assess me, both in 2004 and certainly in 2006, as I had worked with management very closely.

ON REDIRECT EXAMINATION, Ms. Whiteway described a "Praeceptor" as a

Nurse who is asked to take on a student nurse who mirrors your shift. It's for students, and also for nurses who are new to the area. Once they used to approach you, and ask you to do it. They still do, but you can also provide your name. It is an official application through the School of Nursing, and there is also a mentoring program. I did not participate in the mentoring. We don't have any new grads coming into dialysis.

Ms. Whiteway also described her experience with various committees.

THE THIRD EMPLOYER WITNESS was Ms. Tonya Ryan, Nurse Manager of the ICU and Medicine, Emergency, and other services as well, at the Grand Falls Hospital since 2008. She was previously manager of the Regional Renal Service in dialysis units both in Grand Falls and in Gander. Ms. Ryan started as Manager of the Dialysis Unit in Grand Falls in 2004. Before that, she was a Continuing

Education Consultant for three years with the Professional Development Unit. She trained as a Staff Nurse in dialysis in Grand Falls and St. John's in 1998, and worked as a "floater" nurse after that time. "There were not a lot of patients then. I was sent to St. John's for experience." She has been a Nurse since 1994. She spent a year at McMaster's Intensive Care Unit. In the Fall of 2004 she received a call from Frances Dwyer concerning the opening of ...

a unit in Gander at the James Paton Hospital. We were asked if we could help train nursing staff in Grand Falls. The start date was to be in November, for a Christmas opening, but we could not do that. We were at 72 patients then. We simply couldn't accommodate the training. It was going to be in January. Then there was later discussion with my bosses right before the Central Hospital amalgamation in 2005. That was when I got more involved in clinical arrangements of what the training should be. I was asked to advise clinically on what they needed. Ms. Dwyer had no background in hemodialysis.

Ms. Ryan said she had no hand in hiring. Her only role in opening Gander was:

By January 2005, the 6 nurses came to us for a 6 week orientation with a couple of weeks in class, and then they were assigned to mentors in the unit. Dialysis is complex, and there's lots of morbidities involved. They were not the most stable patients. We were going to have 6 newly trained nurses. I was worried so many other things can happen, and you might not get to see it all in the 6 weeks. There was no on-site physician. This was only available in St. John's. Dr. Bennett was Chief Nephrologist, and we developed an admission criterion, that the most stable patients would be taken first. It was hard to find nine stable patients, so I was still not comfortable opening the unit with no experience. So the only way was to have some experience there. So two of my most experienced nurses went to the James Paton Memorial Hospital for a two week period for backup to the nurses there, and to help develop what was to be developed. They started with Michelle as the team leader, and developed clinical guidelines. It was all new, including our online documentation. She was going to be the clinical expert.

Asked whether the training for Ms. Whiteway as Nurse II was different from other Nurse II training, Ms. Ryan said:

Oh, definitely. She did all the basics, but the Nurse II role is different in hemodialysis from other services. We had no Site Manager or Doctor or clinical expertise, so we had to build up Michelle's expertise. The profiles for each patient had to be set up, and data collection as well. Michelle was the one to do the consults on the patients, and she had to be able to identify issues for staff advising or contact with the Nephrologist. She was sent to St. John's for leadership training and for issues relating to transplants. She was the only one who did that as well; and she sat with the Nephrologist for eight hours each month. Other staff did not get that.

Asked whether these other supports were available when the unit was expanded in Gander a year later, Ms. Ryan answered:

No. The Gander unit expanded 220% in a six year period. Gander had nine to start with, with seventeen on a wait list. Access is the biggest problem: getting to the blood. So those with difficult access did not get selected first.

Asked whose decision it was to expand the dialysis unit in Gander, Ms. Ryan said she had put in the proposal. Ms. Ryan identified, as TR #1, the January 11, 2006 requisition for a new employee, which then resulted in MD #2. Ms. Ryan also testified that she recognises Consent #1 as the grievance, which she signed as Manager of the Dialysis Unit on the reverse page. She also testified that she would have been familiar with the competition relating to MD #2, and had input in drafting it; but she ...

would not have signed off on that. If it was solely up to me, it would have been a little different. The most important is qualifications. The word "preference" would have been "requirement". The leadership would also have been under qualifications, some demonstrated leadership experience.

Asked whether, as Manager, she had final authority on the posting or the hiring, Ms. Ryan said: "It would have had to be approved by Stan; but yes, it would have been my decision, yes." Ms. Ryan confirmed that MD #1 specifies that hemodialysis experience is an "asset", whereas MD #2 speaks of it as a "preference... That's the biggest difference to me." Asked to explain what she understands MD #2 to say, Ms. Ryan said:

'Preference' obviously says what a minimal qualification would be. I'd have made it stronger. In terms of MD #1, there was no one at James Paton that had hemodialysis experience. But in MD #2 we'd already built our capacity in hemodialysis. We would not rule out anyone in MD #1, of course, but patient and nursing safety required the supports we put in place.

Asked about her role in accessing applicants in MD #1 and MD #2, Ms. Ryan said:

I would have been notified from HR who had applied, and what their qualifications were. No one applied who had qualifications except Michelle Whiteway.

Asked if seniority was a factor, and if she recalls others who applied, she said:

Only when qualifications, fitness and ability are equal. Here, clearly, qualifications were not equal. Michelle was far above the other applicants. We only assessed that when qualifications are equal... I recall one other with dialysis experience – one of my nurses – but I can't recall how many applied, but only one other with dialysis experience.

Asked if in-charge nurses direct and motivate staff or assign work, she said, "No." Asked who fills the in-charge nurse role, she said: "Any nurse. It is shared equally on the unit." Asked who assigns the in-charge nurse, Ms. Ryan answered:

Sometimes it's the Ward Clerk. There is money involved, so we try to do it evenly. Or they decide among themselves; or the Nurse II does the assigning.

Ms. Ryan was asked to describe the duties of a Nurse II at the time of the posting in 2006. She testified that:

At that point, patient assignment and direct patient care were her responsibilities. She would also handle the run sheets at the end of the day with an overview for the patients' treatment and any difficulties relating to access or patient referrals; also liaison with other members of the multi-disciplinary team, data collection, rounds with the physicians, consulting daily with the physicians. The biggest job is the expert role: staff motivation. The Nurse II reports to me daily. I would not be able to run both units without a Nurse II. I'm an hour away. She is the goto for staffing, and there is no Site Manager. We have to rely on them to keep me informed. Nurses would report on clinical issues to Michelle, and the Managers and Directors would contact her, as well as the Nurse I.

Asked if there were any opportunities for nurses at the James Paton Hospital to learn about hemodialysis if they didn't have that training, Ms. Ryan said:

It is not covered in general nursing training. Access is huge, and experience in access is limited. So I saw education of the general nursing population on this would be important when dealing with dialysis patients once the unit was open. I did a lot of training for the general nursing population to let them know what to expect and do. We notified nurses through the Professional Development Office and I imagine it went out through meditech. Remember, if they did not know it, they could harm patients: and not only nurses, but also those gathering blood, *etc.* The sessions were open to anyone and they were held in education rooms at the James Paton Hospital.

ON CROSS EXAMINATION Ms. Ryan was asked about her dialysis experience as of 1998. She testified that she was trained as a relief already, and ...

we had brought in an expert from St. John's. When I was Nurse Manager of the Dialysis Unit in Gander in 2005 I had trained in hemodialysis. I trained in a dialysis unit when I left in 2001.

She had not drafted the 2004 posting (MD #1), but was involved in the hiring for

the full-time position (MD #2). Asked if Ms. Drover was qualified, she said:

I'd requested the position and would have been called for HR to review the applicants and to advise about the clinical perception on who was qualified for the position... No she had no hemodialysis, nor any proven leadership experience or courses.

Asked how well she knew Ms. Drover in 2006, Ms. Ryan said, "Not at all." She had not interviewed Ms. Drover. Asked how she had acquired her knowledge of Ms. Drover's qualifications, Ms. Ryan said:

It was stated on the application where it says, "state qualifications". I saw from what she provided, or from what HR told me, that she was not qualified.

Ms. Ryan did not recognise Ms. Drover's Jan 20, 2006 letter of application (MD #4), but noted, "That does not mean I did not have it." Asked what further information she did have about Ms. Drover, she said "Only what HR told me." Asked whether she or HR had made the hiring decision, Ms. Ryan said, "I did." Asked why she did not follow up on Ms. Drover's application, she said, "Because she had no experience or demonstrated leadership." Asked how she concluded that Ms. Drover lacked demonstrated leadership, in view of the Grievor's evidence that she had frequently filled the in-charge nurse position, and why she had not gone back to Ms. Drover for more information, Ms. Ryan said:

She told me what she had. Every nurse does in-charge duty... In my view the description of her skills that Ms. Drover gave were qualities that I would expect any nurse to have... It is interesting to note that all have different strengths and abilities, but to have demonstrated ability for a Nurse II position is very different.

Asked whether Ms. Whiteway had Nurse II experience prior to her appointment as Nurse II, Ms. Ryan said:

I don't know... If Ms. Drover had met all the qualifications, including leadership based on experience, I would have... If at any level she were comparable ... I'd have interviewed.

Ms. Ryan was asked if she would have interviewed or considered Ms. Drover if she had met the "organizational skills" requirement, and showed she was "able to co-ordinate the work of others" (MD #2, 3rd bullet), but lacked the hemodialysis experience. Ms. Ryan said, "No." Asked whether it was fair to conclude that it was her lack of hemodialysis experience that eliminated her, Ms. Ryan said:

No. It was a combination of all plus training and proven leadership ability. Ms Whiteway had been in a Nurse II position for over a year. There was another applicant with hemodialysis experience, but not extensive leadership experience.

Asked how many candidates she had interviewed for the position grieved, she answered, "None." Asked whether she had ruled applicants out based on experience, Ms. Ryan answered: "Based on qualifications." When pressed that, in fact, "qualifications" included experience in hemodialysis, Ms. Ryan said: "It was based on lack of qualifications." Asked who drafted the job posting, she said:

I don't know. I assume it was Stan and me and HR... I already testified I would think that "preference" should have been stronger.

Asked, therefore, why she had not made the wording stronger, Ms. Ryan said:

I don't recall. In my experience with postings, I'd have said "required". I was consulted, yes. And I did not change it... I think this posting does cover the expectation with the word "preference". The word "preference" means we're not ruling out those lacking in experience. However, when comparing those with and those without experience, then it is those with experience who will be the more qualified.

Ms. Ryan also testified that the information sessions she had provided were not... training sessions in dialysis, but provided information on how to treat the dialysis patient in situations within the patient population other

than dialysis itself.. The time for these sessions varied from late AM after the coffee break, to late PM. In 2005, I'd estimate I did ten of these sessions in Gander.

When asked whether, if Ms. Drover had attended one such session, she would have been regarded as "experienced" for the purposes of the full-time posting, she said: "No. It had nothing to do with the treatment process."

ON REDIRECT EXAMINATION, Ms. Ryan again emphasised that the information sessions she had provided were ...

to benefit the general nurse population. Its purpose was a brief overview of the patient and the importance of access. The session latest for 45 minutes, was for multi-disciplinary groups, not just for nurses. It was not training in dialysis.

Ms. Ryan again reviewed the clinical and administrative requirements for the full-time Nurse II position.

She confirmed there is no assessment of qualifications involved in selecting someone for the in-charge position. "It is not posted... No, it's an expectation."

ARGUMENT

FOR THE UNION, Mr. Conway pointed out that the Union is not impugning the competency of either of the two nurses involved here. The issue is relative ability of the two nurses in relation to the posting in question.

The Employer raised the issue of experience by making it a "preference" rather than a requirement in the Job Posting (MD #2). The Employer has argued that the Grievor lacked the demonstrated ability called for in the same posting. These are both red herrings. The Grievor met the posted qualifications. The issue, therefore, is whether the two candidates are relatively equal vis-à-vis the posting. The Grievor's "Demonstrated ability to direct and motivate staff; good organisational skills and able to co-ordinate the work of others" has been established. The

Union therefore has met its onus. The Grievor described her professional background up to 2006. In the Union's submission, she has clearly demonstrated her ability to direct and to motivate staff. Her good organisational skills and her ability to coordinate the work of others are also not in doubt. It is obvious, of course, that in 2006 Ms. Drover did not have the hemodialysis experience that the incumbent had acquired by that time.

Ms. Rowsell testified that she did not make the 2006 or the 2004 decision, but did give valuable information concerning the dialysis unit and various roles played there. We also heard Ms. Whiteway testify as to her qualifications and experience as of 2006 and also back in 2004 when she got the part-time position.

The two postings are different, but Ms. Whiteway did not have hemodialysis experience when she was initially awarded the part-time position in 2004. In 2004 she also had the demonstrated ability to direct and motivate staff, and the organisational skills to coordinate others. Her previous experience as a Nurse I paralleled and was comparable with the Grievor's in 2006, even though, clearly, they were not exactly the same. Neither was a Nurse II prior to their 2004 postings, but both had what was needed to become a Nurse II. They were not exactly the same, but were equal in that they both could do what was required by the posting.

Ms. Tonya Ryan also provided valuable information, specifically with reference to the assessment that she made of the Grievor's skills. It was perfunctory at best. Ms. Ryan overlooked, or chose not to consider fully, the Grievor's background experience for the job. She determined that even if the Grievor had that demonstrated ability and fitness, *etc.*, she would not be considered since she lacked the hemodialysis experience. The Employer took a stated "preference" and make it into a requirement. Experience in hemodialysis became a requirement. But

the posting itself stated only that it was a "preference". Ms. Ryan said as much. She said the word was not as strong as she would, herself, have liked. There is no doubt this was why the Employer ignored the qualifications as stated.

But the posting was set by the Employer. It was approved by the Employer. It was, however, misapplied by the Employer. That changed expectation is significant. If the 2004 posting (MD #1) had stated "preference" and the full-time 2006 job posting (MD #2) had also stated "preference", one would ask if the Employer had turned its mind to it. But the change in wording provides clear evidence that the Employer had turned its mind to the issue, and had decided to replace the word "asset" with "preference". This shows the Employer made a deliberate choice. The fact that hemodialysis experience is now a "preference" makes it inappropriate for the Employer to raise the importance of that experience to make it a requirement, or to screen out a job applicant who lacked that "preference".

So the issue turns on the relative ability of the two candidates as measured against the job posting (MD #2). The determination is not made by deciding whom the Employer wants to do the job. It is not a matter of who is the easiest candidate to appoint. It is not who, abstractly, is the "best person" to have in the position. The Collective Agreement clearly requires that the judgement has to be made in relation to the stated qualifications. In terms of those stated qualifications there were two relatively equal people here.

There is no doubt that, as of 2006, Ms. Whiteway's year of experience as a Nurse II is a consideration. But an employee who meets the stated preference does not eliminate an employee who lacks that stated preference but who is otherwise "relatively equal". The Employer wants to turn hemodialysis experience into a requirement, after the fact.

It is analogous to a situation where a nurse exceeds the B.N. qualifications stated for a position. If, for instance, one candidate holds the Bachelor of Nursing, and another has a Ph.D, the Employer is not permitted to go beyond the posted requirement and exercise its preference for the Ph.D-qualified candidate after the fact. The Employer set the posting, and could have revised it. It is not open to the Employer to ignore the relative qualifications of the two candidates insofar as they are being adjudicated specifically in terms of what the Employer has asked for. It is, of course, true that, under the relative equality assessment, the Employer can ignore the seniority if there is a substantial discrepancy relative to the posting. But a "preference" can not turn experience into a "requirement".

Mr. Conway introduced cases drawn from the Arbitral Jurisprudence, in particular: *re Northern Electric Co. Ltd. And United Automobile Workers, Local 1839, 14 L.A.C. (2d) 167*, Ontario, C. G. Simmons, 1977; *re Mount Sinai Hospital and Ontario Nurses' Association*, 13 L.A.C. (4th) 230, Ontario, P. Haefling, D. Green, B. Bass, 1990; *re Toronto Public Library and Canadian Union of Public Employees, Local 1996*, 5 L.A.C. (4th) 192, Ontario, K.M. Burkett, J. Solberg, S. McCormack, 1989; *re Sunbeam Home and London and District Service Workers' Union, Local 220*, 13 L.A.C. (3d) 183, Ontario, W. B. Rayner, S. Lewis, J. D. Carrier, 1983; *re Elisabeth Bruyere Health Centre and Ontario Nurses' Association*, 6 L.A.C. (3d) 119, M. K. Saltman, B. Symes, R. Rivet, 1982; *re Sudbury General Hospital of Immaculate Heart of Mary and Canadian Union of Public Employees, Local 1023*, 16 L.A.C. (4th) 172, Ontario, P. Craven, 1990.

Mr. Conway concluded by noting that the information sessions provided by Ms. Ryan are also a red herring. It is clear, on Ms. Ryan's own testimony, that even if the Grievor had attended such sessions, it would not have constituted

experience on which her entitlement in terms of qualifications would have been improved. Whether she did, or did not, attend a 45 minute session is not relevant to the Arbitrator's determination of the matter.

He also noted that the position is now being made redundant, so the Grievor cannot go into that post. The fact does give the Arbitrator an opportunity to right a wrong without adverse consequences. The process clearly has resulted in a loss of wages. There is now an opportunity to make the Grievor whole. That is all, in fact, that she can rescue from this experience. It is important, therefore, to make the Grievor whole. The Arbitrator should look carefully at Article 16.04 and allow the grievance, and making the Grievor whole including red circling.

FOR THE EMPLOYER, Ms. Saunders agreed that Management Rights as set out in Article 4.01 are limited by Article 25.03. The Agreement specifies items that must be contained in a posting. It does not say, however, that those items are the only things that shall be contained in a posting.

In considering Article 25.06 the Arbitrator should note that "qualifications, ability and fitness to do the required duties" are specified in the posting (MD #2). The Arbitrator must stay focussed on this in seeking to understand what is required of the position of a Nurse II in the dialysis unit. It is a very specialised unit.

The Employer argues that a trial period (under Article 25.07) applies only after a successful candidate has been chosen. It is not a trial run for those holding the top seniority. It is only when a successful candidate has been chosen that a trial period is relevant.

The Employer provided a series of extracts drawn from the authorities & the Arbitral Jurisprudence, specifically: *Dr. Charles A. Janeway Child Health Care Centre and Newfoundland and Labrador Nurses' Union*, M. Cooper, 1995;

Newfoundland and Labrador Nurses' Union (NLNU) and Labrador-Grenfell Regional Integrated Health Authority Represented by the Newfoundland and Labrador Health Boards Association (NLHBA), W. Wayne Thistle, Q.C., C.Arb, 2007; *Newfoundland and Labrador Nurses Union and the Newfoundland Hospital and Nursing Home Association*, Grievor: Ms Elizabeth Jackson, W. John Clarke, 1994; *Grand Falls and District Health Care Board and the Newfoundland and Labrador Nurses' Union*, Gerry Saunders Grievor, 1991, James Oakley, et al.

The Collective Agreement contains a relative ability clause. However, in this case, the Grievor was not qualified. Even if she is somehow found to have the required qualifications, Ms. Whiteway's is demonstratively higher than the Grievor's in respect of the duties of a Nurse II in the hemodialysis unit. *Browne & Beatty* at para. 6:3200 deal with "proof of ability", and at 6:3210 make it clear that the duties of the job are the core issue. Para. 6:5700 is of also special importance.

In this case, Ms. Drover claims to have had the qualifications and ability, but admitted in testimony that she was not aware of the duties or qualifications of a Nurse II in the hemodialysis unit. The incumbent, however, had already been in the position for approximately one year.

The Employer is concerned that the Grievor would assume the Employer would have known her qualifications. She is certain that the Employer would have been aware of them, but it is not able to suggest how the Employer would have had such an awareness if she had not submitted a resumé with the application. The posting (MD #3) specifies applications are to be "IN WRITING, STATING QUALIFICATIONS" .

It is also very important that the Arbitrator not be led astray by the Union's suggestion that this is an opportunity to right an alleged wrong without adverse

consequences. The Employer insists that the appointment of Ms. Whiteway was the correct decision, and the fact of the current redundancy should not impact the decision in any way.

The Union has suggested that the Employer wanted to hire Ms. Whiteway. The Employer submits that it wanted to hire the best candidate in accordance with the terms and conditions of the Collective Agreement. In hiring Ms. Whiteway, it did precisely and exactly that. She had the experience in the area, the noted preference, and she also had the qualifications. When compared with all of the qualifications submitted by the Grievor, her skill and ability and fitness were not relatively equal to the Grievor's but demonstratively higher. The evidence of Ms. Whiteway, Ms. Tonya Ryan, and Ms. Rowsell all confirm the superior ability, qualifications, skill and fitness of Marlene Whiteway. Ms. Tonya Ryan, who was responsible for training involved in preparation for the job competition, made that clear.

The evidence provided by Employer witnesses was consistent and detailed. The Grievor's testimony was that she was certain she could do the job, but didn't know what the job was.

IN REBUTTAL ARGUMENT, Mr. Conway pointed out that Article 4.01 is abridged, not only by Article 25.06, but also by Article 16.04, which sets out the Arbitrator's Jurisdiction. The Parties disagree, obviously, about the qualifications. The Arbitrator must actually to look at the posting. The onus is on the Union to establish the Grievor's qualifications for the position, and that has been done. The preferred experience is the only thing separating the Grievor and Ms. Whiteway.

The Grievor's lack of knowledge of the particular requirements of a Nurse II in hemodialysis, does not eliminate her eligibility for consideration. Neither the Agreement nor the posting require her to have that particular knowledge in 2004

or in 2006. If the Employer wanted that, it should have listed it in its posting. Making a decision based on unstated qualifications is not appropriate. Saying that she could not demonstrate knowledge of the duties for the job is not relevant.

Similarly, it is obvious that no resumé was required. That is in evidence from the incumbent and the Grievor. Therefore it is not relevant in this context. The Grievor did, however, detail her abilities as of 2006, but the Employer did not follow up on the issue. This does not permit the Employer to turn a preference into a requirement.

What is in question is whether the Employer has, in fact, complied with what is required by the Collective Agreement. That is what the grievance is about. Having hired the best candidate is not what it is about. It is about the posting and the Grievor's eligibility under the relative ability clause.

Mr. Conway also reviewed the Employer's arbitral jurisdiction noting that, in the cases advanced, the Collective Agreement and/or fact situations are different from those in the instant matter.

CONSIDERATIONS

At Issue Between the Parties is the Union's claim that the Employer violated the Collective Agreement in awarding the "Nurse II position for Dialysis Unit" to a "Nurse with less seniority than" the Grievor.

Facts not in dispute are that on October 15, 2004 the Employer posted (MD #1) the "NURSE II HEMODIALYSIS UNIT PERMANENT PART-TIME" position. Ms. Whiteway applied for and was awarded the position at that time. The Grievor, Ms. Drover, did not apply for the position.

Among the "qualifications" posted were:

"...Experience in hemodialysis nursing experience would be an asset

Demonstrated ability to direct and motivate staff; good organisational skills and able to co-ordinate the work of others..."

The Posting concludes with the following direction, in upper case letters:

"APPLICATIONS IN WRITING, STATING QUALIFICATIONS, SHOULD BE ADDRESSED TO: ... "

On January 13, 2006 the Employer posted (MD #2) the "NURSE II HEMODIALYSIS UNIT PERMANENT FULL-TIME" position.

Among the "qualifications" posted were:

"... Demonstrated ability to direct and motivate staff; good organisational skills and able to co-ordinate the work of others....

...Applicants with hemodialysis nursing experience will be given preference ..."

The Posting concludes with the following direction, in upper case letters:

"APPLICATIONS IN WRITING, STATING QUALIFICATIONS, SHOULD BE ADDRESSED TO: ... "

Both the Grievor, Ms. Drover, and Ms. Whiteway, applied for this position.

Ms. Whiteway, though junior to the Grievor, was the successful candidate.

The Positions of the Parties:

The Union argues that the Employer violated the Grievor's seniority rights in awarding the position as it did, since the Grievor's "qualifications, ability and fitness to perform the required duties" were "equal" to those of the successful candidate and therefore, under Article 25.06, she should have been awarded the position as the senior candidate.

In the Union's view, the Grievor met the posted qualifications. The evidence shows that, at the time of the posting, the Grievor had a "demonstrated ability to direct and motivate staff; good organisational skills and able to co-ordinate the

work of others". The Union argued strongly that the Employer's change of terminology from the MD #1 posting, which refers to "hemodialysis nursing experience" as an "asset" (emphasis added), to the MD #2 posting which says that "Applicants with hemodialysis nursing experience will be given preference" (emphasis added) signifies that this experience is not decisive, and must not be allowed to ground the exclusion of a senior candidate. The Union argued that the evidence shows the Employer illicitly converted what the posting describes as a mere "preference" into a requirement.

The Employer argued that was no violation of the Collective Agreement, since the evidence shows that the Grievor's "qualifications, ability and fitness" were not "equal" to those of the successful candidate relative to her capacity to "perform the required duties", and the seniority requirement was not, therefore, violated. The Employer argued that the evidence shows that, in addition to her acknowledged lack of hemodialysis nursing experience, the Grievor's "Demonstrated ability to direct and motivate staff; good organisational skills and able to co-ordinate the work of others" were clearly not equal to the incumbent's who had spent the intervening year as Nurse II in the unit exercising those leadership functions.

The Employer rejects the Union's interpretation of events, and denies that its decision was based on an improper description of the role of the hemodialysis nursing experience as a "preference." Rather, that term properly indicated that the position was a highly specialised one, both clinically and in the variety and level of leadership skills required, and the specialised experience was, therefore, a preferable qualification.

The Arbitral Authorities:

Brown & Beatty *Canadian Labour Arbitration* (4th ed.) provide the following

commentaries (in part) on issues relating to the instant matter.

3:2413 Skill and ability

Where an agreement provides that jobs are to be allocated, at least in part, on the basis of skill and ability, an employee who claims that he was improperly denied a job or tenure normally bears the onus of establishing that he has the requisite qualifications. For example, in a case where an agreement provided that seniority was to be the governing factor if qualifications were approximately equal, arbitrators have held that the onus rested with the grievor to establish that his qualifications were approximately equal to those of the employee chosen. And where promotion is based on seniority and ability, and the employee with greater seniority is not promoted, usually the grievor must establish that he had ability as great as, or greater than, the employee promoted. However, once the grievor has established his ability to do the work in question, management will bear the onus of challenging the measure of ability that has been established or otherwise justifying its decision not to promote the employee with greater seniority.

6:3000 THE SKILL AND ABILITY REQUIREMENT

... rarely do collective agreements provide that seniority is the sole criterion to be utilized by an employer in determining entitlement to a particular job. Seniority rights are almost always circumscribed... In addition, virtually all seniority clauses contain the proviso that, before an employee can claim a position on the basis of his or her seniority, the employee must first show that he or she has the necessary ability, qualifications, *etc.*, to do the job...

Two alternative themes are generally found in seniority articles. Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to do the required work. In such case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal.

Under the first type, where the senior employee is entitled to a position if he or she is able to perform it, seniority is typically the most important factor in determining who gets a job. In such a regime, a junior employee who was demonstrably more able than a senior colleague would not be entitled to the job if the senior employee were competent to perform the core duties and responsibilities. By contrast, under the second type, involving an evaluation of the abilities of the competing employees, the junior and more able employee would be entitled to the job, and seniority would not be the material or determinative consideration....

6:3200 Proof of Ability

Regardless of which ... type of seniority clause is included in an agreement, employees have the onus of proving that they have the requisite ability for the job. If the agreement calls for "sufficient" ability, this means adducing evidence showing that they are able to do the job. If the requirement is 'relative' ability, the employee must demonstrate that his or her skills more or less match the person who was given the job. Once an employee has made out a *prima facie* case, the onus will shift to the employer to establish the basis for its decision.... In the usual case, in the face of an employee's demonstrated ability, failure to adduce such evidence would result in the employer's determination being held to be arbitrary, discriminatory or unreasonable... However, even though the burden of proof may shift to the employer to explain why it passed over a grievor, arbitrators are agreed that the employee ultimately bears the burden of proving that the employer's decision was flawed, either in the standards... used or in the way... they were applied.

6:3220 Senior employee if relatively equal

Seniority plays a less decisive role in determining which employees will fill what jobs where the operative clause in an agreement measures skills and qualifications competitively, and stipulates that seniority will govern only when the abilities of two or more of the competing employees are relatively equal. In workplaces covered by agreements of this kind, junior employees who are more able or qualified may claim jobs over more senior candidates. As well, the burden of proof that must be satisfied by an employee to successfully challenge an employer's choice is more onerous.

6:3300 Ability and Qualifications: Criteria

In reviewing an employer's determination as to whether a particular employee has the requisite ability to perform the job for which he or she applied, arbitrators are often called on to assess the propriety and reasonableness of the standards the employer used to make its choice. With respect to this aspect of the employer's decision, most arbitrators start from the premise that, in the absence of some specific clause in the collective agreement to the contrary, management has the prerogative to determine initially what skills and qualifications are required in any job. To impugn the employer's standards, an employee must prove that they were flawed in some way. Employees have succeeded in having an employer's decision reversed where it was established that the criteria that were used: were not contemplated by and/or were inconsistent with the job posting, the collective

agreement or some statute; did not bear any reasonable relationship to the work to be done; lacked clarity or were too subjective; were arbitrary, discriminatory and/or in violation of human rights legislation; were not established in good faith; were imposed retroactively; and/or were not fairly or uniformly applied.

Although every job demands its own unique combination of skills and abilities, there are a number of overarching qualities and competencies that are relevant to many different kinds of work. Aptitude, personal integrity, physical capability, linguistic facility, and formal and professional qualifications are necessary attributes in many positions and have been the subject of numerous awards...

Findings:

I note that the Union concentrated on what it argued was the Employer's treatment of a posted "preference" as a decisive requirement. With respect, I am not persuaded that the Employer violated the Agreement by its action.

The Union also argued strongly that in terms just of the posting itself, (MD #2), Ms. Drover's "qualifications, ability and fitness" were "equal" to, albeit not identical with, those of Ms. Whiteway. The Union pointed to the Grievor's long and successful career in a complex and demanding position where she, too, displayed the leadership, motivational, and organisational skills required for the promotion that the posting represented. Her frequent "In-Charge" duties provide evidence, in the Union's view, of the qualifications stated in the posting (MD #2).

With respect, I am not persuaded that, by the time of the 2006 competition, the Union's argument had the weight it might possibly have had in 2004. By 2006, the incumbent's year of part-time work in the field, her developing leadership insights as a Nurse II, and her training clearly are to be considered as having equipped Ms, Whiteway with superior qualifications to the Grievor's "to perform the required duties" set out in the posting (MD #2).

The Employer argued, persuasively in my view, that the specialised nature of the job meant that hemodialysis nursing experience was highly desirable, and

therefore preferable in that sense. The evidence also shows, however, that specialist clinical experience did not function as an absolute, or only, qualification on which the Employer based its decision.

I note that Ms. Whiteway was not the only nurse who went to Grand Falls for hemodialysis training. Others also received training, and returned to work in the Gander Unit when it opened. I also note that at least one of the Managers involved with hemodialysis, Mr. Burns, was not himself clinically trained in the speciality "other than what he has learned from us". The Employer witnesses testified that, in addition to clinical experience and skills, leadership was critically important, as is also clearly indicated in the posting.

I find nothing sinister or misleading in the Employer choosing to use "preference", rather than the weaker word "asset", or the more limiting word "required", which, I note, was the word Ms. Ryan said she would have liked. I note that, in 2004 the Employer had also looked for hemodialysis nursing experience, terming it as an "asset". However, not having found any applicants with that experience, it proceeded to put "supports in place", as Ms. Whiteway and Ms Ryan testified. By using "preference" in the 2006 posting, the Employer, aware of its resource development in the area, signalled that such experience was now more critical to its needs than in the previous competition. But it also left itself some management latitude to act if, for some reason, the fully suitable candidates did not apply, and to consider some alternative supports again if it proved necessary.

I also note that in using the term "preference" in the instant matter, the Employer acted in accordance with the findings of the Board in *Grand Falls and District Health Care Board and the Newfoundland and Labrador Nurses' Union, Gerry Saunders Grievor*, 1991, James Oakley, Chair (p. 24 - 25) which found that

the posting in that case was flawed precisely because it had treated hemodialysis nursing experience as a requirement.

I also note that when Ms. Ryan was asked if it was fair to conclude that it was her lack of hemodialysis experience that eliminated the Grievor, she said:

No, it was a combination of all plus training and proven leadership ability. Ms. Whiteway had been in a Nurse II position for over a year. There was another applicant with hemodialysis experience, but not extensive leadership experience.

I find this evidence persuasive. I find nothing in the evidence that persuades me to sustain the view that the Employer treated a posted "preference" as a "requirement" when it denied the Grievor the position. I note that Employer witnesses provided persuasive evidence both on the clinical expertise that the Nurse II in hemodialysis needs, and on the complex and versatile leadership and educational/ motivational roles she/he plays in the unit.

The evidence demonstrated that leadership issues were vital, and also demonstrated that, as of 2006 the incumbent, having served successfully in the Unit as a Nurse II for a year, had superior leadership qualifications to those of the Grievor by a substantial and demonstrable margin. (*cf.*, Arbitrator Owens in *Illinois Glass Co 1962 2 CCH Arb 8660* as quoted in *re Northern Electric Co. Ltd. And United Automobile Workers, Local 1839*, 14 L.A.C.. (2d) 167, Ontario, C. G. Simmons, 1977 at p. 4)

Finally, I note some credible arbitral authority suggesting that the Employer was, in fact, required to act as it did in regard to the Grievor's application. I refer to *re Mount Sinai Hospital and Ontario Nurses' Association*, 13 L.A.C. (4th) 230, Ontario, P. Haefling, D. Green, B. Bass, 1990 p 13-14 which reads, in part, as follows:

"... after posting the notice .. The hospital was bound to follow and apply the stated requirements for that post. That is so... whether or not the stated qualifications are described as "preferred" ones, which is simply one possible way to list alternative qualifications... The underlying reasons are obvious. In a labour relations context, the posting notice operates as a two-way screening mechanism through which, on the one hand, employees are able to decide ... whether or not to apply ... and, on the other hand, an employer is able to decide whether to accept or reject applicants... (W)hen the hospital accepted and gave consideration to the application of (a candidate) who clearly lacked the required three to five years' ... experience, the practical outcome was that the stated position requirements were thereby altered as a result, since that standard was then relaxed or ignored. In that event, when consideration was given to one candidate who failed to meet the originally specified experience requirement... other potential candidates who might have been in a position to apply for the post on the basis of the more relaxed standard were effectively denied that opportunity...

DECISION

In light of the foregoing considerations, therefore, I find that

THE GRIEVANCE IS DENIED.

Respectfully submitted as the decision of the arbitrator.

John A. Scott, Ph.D.
Arbitrator

December 20, 2010