

**IN THE MATTER OF AN ARBITRATION**

Between

**EASTERN REGIONAL HEALTH CARE AUTHORITY**  
(hereinafter called "Eastern Health" or "the Employer")

And

**NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND  
PRIVATE EMPLOYEES**  
(hereinafter called "the Union")

**THE GRIEVANCE**

On January 22, 2001, the Union filed a policy grievance on the subject of all job postings. A violation of Article 15 and all pertinent articles of the collective agreement was alleged, and the requested adjustment was that the sentence "A satisfactory record of work performance and attendance is required for all positions," be removed from the requirements on all postings.

The dispute was heard at St. John's, Newfoundland and Labrador on November 16, 2010.

For the Union: Jerry Earle, *et al.*  
For the Employer: Jay Neville LLb, *et al.*  
Sole Arbitrator: David Alcock

The parties agreed:

- 1) to the selection of the arbitrator;
- 2) that the arbitrator had jurisdiction to deal with the dispute;

- 3) that the arbitrator would remain seized of the matter to deal with questions of clarification, if any, arising from the award;
- 4) that witnesses would remain.

The following items were admitted into evidence by consent:

- 1) Collective agreement, June 2, 1998 – March 31, 2001;
- 2) Grievance form dated January 22, 2001;
- 3) Example of a job posting predating the grievance (dated March 17, 2000);
- 4) Example of a job posting postdating the grievance (dated November 12, 2001).

The following item was introduced by a witness:

MN#1) Internal management e-mail from Valerie Butler dated November 21, 2000, referring to letters sent to the Union presidents by Marilyn Nichols advising that “**effective December 1, 2000** we will include the following wording on all our postings: ‘*A satisfactory record of work performance and attendance is required*’.

This applies to all unions. Please ensure that this gets added to the postings from Friday, Dec. 1. Let me know if you have any questions.”

Witness for the Union:

Mr. Stephen Porter, Labour Relations Officer – Association of Allied Health Professionals.

Witnesses for the Employer:

Kim Blanchard, Regional Manager of Recruitment  
Marilyn Nichols, Acting Director of Employee Relations

The relevant collective agreement articles are:

- 1.02 It is the purpose of this agreement:
  - (a) To maintain and improve harmonious relations and to settle conditions of employment among the Employer, employees, and the Union.
  - (b) To recognize the mutual value of joint discussions and negotiations.
  - (c) To encourage efficiency in operation to the end that the patients of the hospital shall be well and efficiently served.

And whereas the parties of this Agreement desire to improve the quality of patient care in the hospital and to promote the morale, well being and security of the employees. [sic]

Now, therefore, the parties agree as follows

Article 2 – Management Rights

- 2.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the hospitals under its control and to direct the

working forces is vested exclusively with the Employer except as specifically abridged or modified by the express provision 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.

....

3.08 Agreement Overrides Hospital Policy

The provisions of the Collective Agreement shall take precedence over any and all policies, rules, and regulations made by the Employer concerning wages, benefits, or working conditions affecting members of the Union covered by this Collective Agreement.

4.01 Employer Shall Not Discriminate

The Employer agrees that there shall be no discrimination with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work, or otherwise by reason of age, race, creed, colour, national origin, political or religious affiliation, sex, mental and physical disability, or marital status, nor by reason of his/her membership or activity in the Union.

....

15.01 Job Postings

When a vacancy occurs or a new position is created, either inside or outside the bargaining unit, the Employer shall post notices of the position in acceptable places on the Employer's premises for a period of not less than seven (7) calendar days. Copies of all postings are to be supplied concurrently to the local secretary.

15.02 Information on Postings

Notices of new positions or of vacancies inside the bargaining unit shall contain the following: title of position; qualifications; required knowledge and education; skills; wage or salary rate or range; and whether shift work could be involved. Such qualifications shall not be established in an arbitrary or discriminatory manner. All job postings shall state: "This position is open to male and female applicants".

15.03 Procedure for Filling Vacancies

(a) No position will be filled from outside the bargaining unit until the applications of present employees have been fully processed.

(b) Where in the Employer's opinion, a temporary position is expected to exceed a period of sixteen (16) continuous weeks, or where a position exceeds sixteen (16) weeks, such position shall be posted in accordance with clause 15.01.

15.04 Role of Seniority in Promotions and Transfers

Both parties recognize:

- (a) the principle of promotion within the service of the Employer;
- (b) that job opportunity should increase in proportion to length of service.

Therefore, when a vacancy occurs in an established position within the bargaining unit, or when a new position within the bargaining unit, employees who apply for the position on promotion or transfer shall be given preference on a total seniority basis, whether seniority is temporary or permanent, for filling such vacancy, provided that the applicant's qualifications meet the required standards for the new position. Appointments from within the bargaining unit shall be made within four (4) weeks of posting.

By way of opening statement, the Union took the position that job posting requirements were agreed to in Article 15; that the addition of the sentence in dispute over 10 years ago was an arbitrary change to those requirements, and therefore a violation of the collective agreement.

The Employer's position was that it had the right to set qualifications on job postings and to determine the weight to be given to them; that such right is not expressly limited by the collective agreement; and that jurisprudence is clear that attendance and work performance are relevant qualifications to require of job applicants. Since the Employer stated these qualifications on the job postings, candidates were fully aware of them. Therefore the arbitrator should not interfere with its decision, especially in the absence of bad faith and where the qualifications do bear a reasonable relationship to the duties to be performed.

However, in the event that the arbitrator should accept the Union's position, the Employer's view was that the arbitrator has discretion to suggest alternate wording for the sentence in dispute.

### THE EVIDENCE

The Union's evidence established that, in 2001, Stephen Porter, then a local NAPE HSS bargaining unit official, received a job posting containing an extra sentence, which had not previously been seen on job postings, namely: "A satisfactory record of work performance and attendance is required for all positions". Mr. Porter then filed the grievance dated January 22, 2001. He testified that he was not aware of any correspondence or discussion on the addition of the offending sentence until Labour Management meetings after the grievance had been filed.

Mr. Porter conceded that consultation with the Union concerning qualifications on job postings was not required by the collective agreement. However, any amendment to the collective agreement must be agreed to by both parties in accordance with Article 35.02. In his view, the offending sentence was arbitrary because it constituted a mandatory qualification for all future positions and it left open the question what the Employer would determine as being "satisfactory." He did not consider it reasonable for the Employer to require employees' work performance or attendance records for job postings. Even in cases of previous patient abuse by an LPN, he felt that any employees who had been disciplined for their actions would have been sufficiently dealt with and not be subject to further penalty in the job posting process. Nevertheless, he felt that

attendance issues for a PCA, for example, could be noted if dependability was an issue for a particular position.

Mr. Porter did agree that all employees would be better off knowing in advance on a job posting that his/her work performance and attendance record were to be considered. That way an applicant could be prepared to defend his qualifications. In any event, Mr. Porter pointed out that any employee would be free to grieve the qualifications set by the Employer.

Ms. Kim Blanchard, B. Comm., MBA, Regional Manager of Recruitment since 2007, testified to her previous experience in Recruitment and benefits since 1994 in acute care and in community health. She described Eastern Health as having some 13,000 employees and being the largest provider of health care in eastern Canada delivering tertiary programs to the whole province and also responsible for the Janeway Children's Hospital. She explained that the public generally have nowhere else to go but to Eastern Health.

Describing the Employer's primary mandate as ensuring for its clients the provision of the highest quality care possible, Ms. Blanchard testified that the primary objective of Recruitment in that context is to require the highest qualified candidates who are competent to perform the work required. The process of Recruiting is, of course, subject to various parameters contained in the collective agreements, the law and relevant pieces of legislation.

In Ms. Blanchard's view, the sentence in dispute is absolutely a reasonable requirement for job postings in the Employer's work place, and any time the Employer evaluates candidates for a position, their records of performance and attendance are

considered. Given the nature of the Employer's business, if there is documented evidence of a candidate's poor work performance or attendance, the Employer would not want such conduct to continue into another position.

After the closing date for job posting applications, the Employer first sorts candidates by seniority in accordance with article 15.04 and then an assessment is done of the person's credentials as they relate to the requirements of the posting. For example, an LPN's academic qualifications, work experience and skills would be evaluated and then the individual's work performance record would be considered. If an active disciplinary matter is on file, others would be consulted such as HR (e.g., Ms. Nichols), the position's manager, occupational health, etc., to receive input as to whether the individual is suitable for the posted position and whether some form of accommodation might be required for the person's particular physical condition. Attempts are also made to determine whether there is a reasonable prognosis that the person's illness will be expected to improve, or that it will be under control so as to ensure his/her regular attendance.

Ms. Blanchard emphasized that, in this evaluation process, each case is different. She explained that the weight to be given to attendance would depend on the nature of the position being posted. For example, if the individual will be the only one in that position on site, he/she would be the only person who could provide the work service required. Therefore, more weight would be attributed to attendance than would be the case if there will be others in same positions who might temporarily be able to assume some of the absent employee's responsibilities. Or if a candidate (e.g., a PCA) with a poor performance record perhaps for more than normal sick leave were to apply for a Lead

Hand position, such matters would be an issue and given greater weight because the candidate would be required to supervise others on a regular basis.

If a particular position necessitates standing for long periods of time and a particular employee can only stand for say 10 minutes, such a requirement will provide an opportunity for that employee to “self select himself/herself out”. Similarly, if an LPN has a record of patient abuse, the Employer will consider it in the context of patient safety, i.e., the Employer would not put patients at risk. In such circumstances, if the position is to be well supervised all the time, a different weight would apply than if the position required, for example, unsupervised night shift.

Ms. Blanchard agreed that employees need notice of changes in the requirements for jobs. The Employer accomplishes this awareness by including such requirements on job postings and other ways as well. In her view, all employers are interested in candidates’ previous work experience. For filling internal positions in Eastern Health’s workplace, it is important that this information to be available for consideration for reasons of potential risk to patients. Therefore, including one’s work performance and attendance on a job posting is reasonable.

By way of explaining the notion of employees “self-selecting themselves out, Ms. Blanchard testified that she has been made aware by Union representatives and others that some employees will choose not to apply for positions if they see the satisfactory work performance and attendance requirement on a job posting. She indicated that the Employer has never sent anything to employees encouraging them to apply notwithstanding the fact that consideration will be given to their own work performance and attendance. Since some people consider it unfair that employees do self-select

themselves out, Ms. Blanchard felt that the Employer needs to provide education so that employees will understand why “sufficient” can mean many different things, i.e., that the extent and weight of consideration given to the requirement will vary with the circumstances of each particular job posting. Indeed, she testified that even for particular positions within a single classification, these requirements might be assigned different weights.

Ms. Marilyn Nichols, Acting Director of Employee Relations, introduced MN#1, an internal e-mail dated November 21, 2000, referencing a letter she sent to managers and to the various Union Presidents at the time, advising that effective December 1, 2000, the sentence “A satisfactory record of work performance and attendance is required” will be included on all job postings. With respect to the HSS collective agreement, she thought her letter went to President Leo Puddister of NAPE (although it might have gone to Tom Hanlon, whom Mr. Earle suggested was President at that particular time). Ms. Nichols was relying on her own memory on this matter because she has been unable to locate copies of this letter due to the considerable scope of mergers, organizational restructuring and consolidations that have since occurred. Although MN#1 was the only relevant document she could find to date, she was confident that the others do exist somewhere among old electronic files.

## ARGUMENT

### The Union

In the Union’s view, the issue is simple: Article 1.02(a) states in part that the purpose of the collective agreement is to “... settle conditions of employment ...”

Article 2.01 permits the Employer the exclusive right to direct the work forces “except as specifically abridged or modified by the express provisions of this Agreement.” Such an express abridgement is contained in Article 15, which specifically prescribes the requirements for Promotions and Staff Changes. The parties have agreed in article 15.02 specifically what will be contained in a job posting and also that “such qualifications may not be established in an arbitrary or discriminatory manner”. Article 15.04 establishes a minimum qualifications clause.

In the Union’s view, what the Employer did here was prescribe a new policy. However, article 3.08 establishes that “the provisions of this Collective Agreement shall take precedence over any and all policies ...” Despite Ms. Nichols’ unsupported claim that the Union Presidents were sent letters in 2000 advising them of the change, neither Mr. Porter (who filed the grievance) nor Mr. Earl (who was not even aware of MN#1 until this hearing) were aware of no prior consultation or communication with the Union about any job posting information changes. Since the offending sentence was unilaterally established as a mandatory qualification, the Employer’s action was arbitrary and, therefore, in violation of article 15.02.

As the Union sees it, the Employer has arbitrarily stated a qualification, which, depending on the weight it chooses to apply to it, can have the effect of abrogating an otherwise qualified employee’s right to exercise his/her seniority for the position. Also, it should be noted that the Employer arbitrarily made the offending requirements on one posting a mandatory qualification for all postings. In the Union’s view, that constitutes a unilateral change to the list of items for inclusion in a job posting as specified by article 15.02. The subsequent net effect of the Employer’s action has caused some employees

who saw the sentence on job postings to deliberately not apply just because they might have had a mere incident report on their records.

In support of its position, the Union submitted the following authorities and jurisprudence:

Mitchnick Morton and Etherington Brian; Bohuslawsky Boris, Managing Editor: Leading Cases on Labour Arbitration, (October 2007), Vol. 3, *Contract Interpretation*, Chapter 19 -- Promotion, p. 19-1 to p. 32.

Canadian Labour Arbitration, 4<sup>th</sup> edition, Vol. 1 Commentary and Current Notes. Seniority, Para. 6:3100, The Scope of Arbitral Review; Para 6:3300, Ability and Qualifications: Criteria, (September 2010) Canada Law Book.

*Re Metropolitan Toronto (Municipality) and C.U.P.E., Loc, 79* (1990) 13 L.A.C. (4<sup>th</sup>) 155, Springate

On the basis of the foregoing, the Union requested that the grievance be fully upheld. In the alternative, the Union suggested that the arbitrator recommend alternate wording for the sentence in dispute.

### The Employer

The Employer disagreed with the Union's argument that articles 1.02, 3.08 and 35.02 apply in this case. All those articles refer to changes made to the collective agreement itself. That is not what happened here. There was no change made to the collective agreement. What the Employer did was adhere to article 2.01, the management's rights clause, which is a strongly worded provision giving management the exclusive right to manage and direct the working forces unless such right is expressly abridged or modified by the express provisions of the agreement. Article 15.02 confirms the Employer's exclusive right to determine qualifications for vacant positions and to

include them in job postings, subject only to the requirement that such qualifications not be established in an arbitrary or discriminatory manner.

The evidence is that there has never been anything arbitrary or discriminatory about the Employer setting the academic and work experience qualifications for job postings and assessing them in the first instance for each applicant. It is the Employer's right to determine what qualifications are appropriate for a particular position. The Employer's evidence, supported by jurisprudence, has established valid and reasonable reasons why a satisfactory record of work performance and attendance are appropriate qualifications for job postings in its health care workplace. Both those requirements are qualifications for the position, not separate matters of suitability. Also, both requirements were determined in good faith and are relevant considerations for the duties to be performed.

The Employer argued that the jurisprudence is clear that arbitrators should not interfere with management's right to establish qualifications unless there is evidence of arbitrariness, discrimination, bias, bad faith. In determining whether any of these matters exist, arbitrators are required to apply a standard of reasonableness in assessing the manner an employer applies its standards to job applicants. It appears that the onus is on an employee to impugn an employer's standards by establishing that they were flawed, such as where the criteria used were, for example, not contemplated by the posting or were inconsistent with the posting, the agreement, the law, or bore no relationship to the work required, or were too subjective, or were imposed retroactively, etc. It is also important that the criteria must appear in the job posting, which it did in the instant case.

In support of its position, the Employer submitted the following authorities and jurisprudence:

Brown & Beatty, Canadian Labour Arbitration, 4<sup>th</sup> edition, Canada Law Book, Aurora, 2010, particularly Para. 6:3100 – *The Scope of Arbitral Review*; Para.6:3300 – *Ability and Qualifications: Criteria*; Para. 6:3320 – *Education and Experience*; Para. 6:3330 – *Aptitude*.

*Re Newfoundland and Labrador Health Care Assn. v. Newfoundland Assn. of Public and Private Employees* (July 16, 2000), [2000] Nfld. L.A.A. No. 7 (Browne).

*Re Eastern Regional Integrated Health Authority and Newfoundland and Labrador Association of Public and Private Employees* (May 31, 2009), unreported, (Clarke).

*Re Eastern Regional Integrated Health Authority and Canadian Union of Public Employees, Local 879* (March 17, 2008), unreported (Clarke).

*Re Newfoundland Hospital Association and Newfoundland Association of Public Employees* (1988), 35 L.A.C. (3<sup>d</sup>) 430 (Thistle).

*Re Evans v. Health Care Corp. of St. John's* [2001] N.J. No. 98; 199 Nfld. & P.E.I.R. 268; 19 C.C.E.L. (3d) 111; 104 A.W.C.S. (3d) 376; Docket: 2000 St. J. No. 2942, Newfoundland Supreme Court – Trial Division, Wells J.

*Re Evans v. Health Care Corp. of St. John's* [2003] N.J. No. 61; 2003 NLCA; 223 Nfld. & P.E.I.R. 1; [2003] CLLC para.230-127; 121 A.W.C.S. (3d) 508; Docket: 01/50. Newfoundland and Labrador Supreme Court – Court of Appeal, Cameron and Welsh JJ.A. and Russell J. (ex officio).

*Re Dashwood Industries Ltd. v. United Steelworkers of America, Local 1-500 (Ellis Grievance)*, [2007] O.L.A.A. No. 253; 161 L.A.C. (4<sup>th</sup>) 124; 90 C.L.A.S. 18; File No. MPA/Y700338 (Newman).

*Re Mike Doyle's Gardner Motors Inc. and U.S.W. A.*, [1995] O.L.A.A. No.62; 48 L.A.C. (4<sup>th</sup>) 415 (Carrier).

*Re Telecommunications Workers Union v. Telus Mobility (Venn Grievance)*, [2003] C.L.A.D. No. 319 (Sigurdson).

*Re Hoyles/Escasoni Complex v. Newfoundland and Labrador Nurses' Union (Murrin Grievance)*, [1992] Nfld. L.A.C. (4<sup>th</sup>) 289 (Alcock).

*Re Northside Community Guest Home and C.U.P.E., Loc. 1876*, [1991] N.S.L.A.A. No. 16; 18 L.A.C. (4<sup>th</sup>) 353 (Outhouse).

*Re Queen Elizabeth Hospital and C.U.P.E., Loc. 1156*, [1998] O.L.A.A. No. 29; 2 L.A.C. (4<sup>th</sup>) 281 (Craven).

*Re Alcan Smelters & Chemicals Ltd. and C.A.S.A.W., Loc. 1*, [1988] B.C.C.A.A.A. No. 4; 1 L.A.C. (4<sup>th</sup>) 237 (Hope).

### Union Rebuttal

In the Union's view, the way the sentence is worded makes satisfactory work performance and attendance absolute qualifications across the board for all postings. No discretion whatsoever can apply in those circumstances. That is what makes the disputed qualifications arbitrary.

## CONSIDERATIONS

### The Issue

With the greatest of respect, on review of the evidence, I see this dispute as being somewhat more detailed and complicated than the parties have indicated. Given the long passage of time since the filing of the grievance and the fact that numerous subsequent job postings have been processed and filled subject to the same disputed sentence, I am satisfied that the parties recognize the almost insurmountable complexities that a retroactive decision would involve and they desire an award that will allow them to proceed on a go forward basis. I will accommodate the parties with such an award at the end of these considerations, drawing my jurisdiction to do so from article 12.04 of the agreement, which contains the usual restriction on the arbitrator's "power to change the

agreement or to alter, modify or amend any of its provisions,” but also states: “However, the [arbitrator] shall have the power to dispose of the grievance by any arrangement which [he/she] deems just and equitable.”

While it is tempting in these circumstances to provide the bare decision only, I am mindful that the parties are entitled to know my reasoning for the conclusions I have reached. To that end, I offer the following analysis, trusting that it will be of benefit and leaving it to the parties to agree or disagree as they so wish.

The issue to be determined is whether the Employer violated article 15.02 by expressing on a 2001 job posting the sentence “A satisfactory record of work performance and attendance is required for all positions.” More particularly, the question is whether the content of the offending sentence, which was expressed on a posting for the first time, was established in an arbitrary manner.

In this case, considerable jurisprudence and authority have been submitted by the parties to support their respective positions on the appropriate scope of arbitral review for such matters. I have reviewed the parties’ submissions and consider them relevant and helpful in the interpretation and application of the collective agreement to the facts at hand.

### Interpretation of Agreement

Article 15.02 states:

#### Information on Postings

Notices of new positions or of vacancies inside the bargaining unit shall contain the following: title of position; qualifications; required knowledge and education; skills; wage or salary rate or range; and whether shift work

could be involved. Such qualifications shall not be established in an arbitrary or discriminatory manner. All job postings shall state: “This position is open to male and female applicants”.

As a matter of interpretation, I note that this provision does not list all the items that may potentially be considered “qualifications”. It is common ground that the exclusive right to determine the appropriate qualifications for each position rests with the Employer unless that right is abridged or modified by the express provisions of the agreement.

Article 15.02 does not require negotiations or any other form of joint participation by the parties in composing lists of qualifications for job postings. That role is intended to be performed by the Employer in the first instance as a matter of management right, subject to the current scope of arbitral review. The language of 15.02 also does not require all job postings to contain the same set of qualifications. Rather, the particular group of qualifications appearing on each job posting is required to be position- specific, i.e., relevant and limited to the peculiar duties of the actual position being posted. As such then, it is not inconceivable that there may be some positions within a single classification, which may involve a somewhat different sets of duties than others because of their individual circumstances. Therefore, the requisite qualifications could differ somewhat. This, I suggest, is what underlies the parties’ dispute, i.e., the relevancy of satisfactory work performance and attendance records to all the particular jobs covered by the HSS collective agreement.

Although my own initial thought was that “A satisfactory record of work performance and attendance” might be construed as a matter of suitability rather than qualifications, I recognize that both parties have proceeded on the basis that the sentence in dispute describes qualifications. The Employer insists that “such qualifications” are

absolutely relevant because of the medical services nature of its business and that they are permitted by article 15.02. The Union insists that “such qualifications” were established in an arbitrary manner and, therefore, violate article 15.02. So I too will proceed on the basis that the items are qualifications and that I have to decide whether or not they were established in an arbitrary manner. However, before addressing the issue of arbitrariness, it is first necessary to decide whether the Employer’s action improperly added wording to the requirements listed in article 15.02.

In my view, since article 15.02 requires that job postings contain qualifications, and since it is common ground that satisfactory records of work performance and attendance fall into the category of qualifications, it logically follows that the inclusion of these two new (albeit disputed) qualifications on the 2001 job posting did not alter, modify or add to the requirements listed in article 15.02. That said, I reiterate that, as far as a violation of article 15.02 is concerned, the issue is whether the new qualifications were established in an arbitrary manner.

Applying the Evidence and Jurisprudence to the Agreement: The Issue of Arbitrary Action

*Why the Expression Appeared in 2001 and not Before*

The evidence is that, prior to the 2001 job posting, HSS job postings did not contain the sentence in dispute. It is unclear, however, the extent to which, if at all, the Employer previously may have considered applicants’ work performance and attendance records as unstated qualifications. In any event, there was no evidence presented of any previous grievances on the subject. Except for its position that consideration of such qualifications is entirely reasonable and relevant for all positions given the nature of its

acute and tertiary health care work environment, the Employer advanced no specific reasons to explain why those requirements needed to appear on all job postings from late 2000 forward, but not before.

As a general premise, I am satisfied that, over time, it may not be unusual for changes to occur in some job duties as well in other factors that may legitimately necessitate changes to requisite qualifications. While there is no evidence of specific changes in all job duties that would have triggered the appearance of the disputed sentence in 2001, it is apparent to me that the jurisprudence and authorities submitted here indicate the emergence and ongoing development of arbitral review of job posting matters, including some indications of acceptance for considering work performance and attendance as qualifications -- as long as applicants are made aware of such requirements so they won't be blindsided by them, and as long they are relevant to the duties to be performed. On balance, I am inclined to believe that the Employer, in the process of observing the trend of this jurisprudence, and desiring its practices to be current and consistent with it, decided to begin expressing such requirements on job postings so as to reduce the potential for disagreement by an arbitration board. I see no arbitrariness in such qualifications being expressed on individual postings, where they are relevant to the particular medical service duties of those positions, but as will be indicated later in these considerations, I consider the universal application of these requirements to all positions in the NAPE HS collective agreement to be arbitrary because their relevance to many job classifications is, at best, extremely doubtful.

### *Unilateral Action not Necessarily Arbitrary*

Leaving aside for a moment the issue of the validity and relevance of the requirements, I also find no arbitrary action associated with the mere fact that the Employer acted unilaterally in deciding to express the requirements on the 2001 job posting. Unilateral action does not necessarily mean arbitrary action. The Employer has the right to unilaterally set the qualifications, and employees have the right to grieve them if their applications are denied for particular postings.

### *The Matter of Awareness*

The evidence is unclear whether Ms. Nichols' letter in 2000 was actually sent to and received by the various Union Presidents, as it was to management personnel. As such her evidence is not sufficiently supported. In the meantime, I accept Mr. Porter's evidence that, as the NAPE HSS representative who processed and followed the grievance, he had never been made aware of the Employer's pending action. It is also not disputed that Mr. Earle was unaware of such a letter until MN#1 was introduced at the hearing. On balance, I am satisfied that this awareness issue is of considerable import in this case because of factors to follow later in my considerations. For the moment, it is appropriate to say that, while some communication to the Union of the type described by Ms. Nichols certainly would have been desirable, there was no contractual requirement for consultation with the Union on the determination of qualifications for any particular position being posted. It is the Employer's right to determine and alter qualifications as circumstances change.

At first blush the inclusion of the expression on the job posting at the time may seem to have satisfied the requirement that interested employees must be made aware of the qualifications being sought on a particular posting so as not to be blindsided by them, but the situation is much more complicated than that. There is also a question yet to be addressed whether the Union itself was entitled to notice of the Employer's new requirements before they appeared on the 2001 posting.

#### The Issue of Expressing on a Job Posting Mandatory Qualifications for all Positions

The evidence presented to me was that the sentence expressed in the very first job posting in dispute stated, "A satisfactory record ... is required *for all positions*." [Emphasis mine]. I am led to understand that this same sentence has appeared subsequently on every posting. In my view, when that sentence first appeared, it did two things at the same time.

First, it communicated the new qualifications for the particular position being posted, subject of course to the grievance procedure and the current scope of arbitral review on such matters, which, I submit, individual employees would have known very little about and would have valued the advice of their Union on their options. Since the actual posting, which was the basis for the January 22, 2001 grievance, was not introduced into evidence, I have no job specific information on which to base a ruling on that particular posting. The only two postings submitted were one on March 17, 2000 for a Paramedic Instructor (an example of a pre grievance posting) and one on November 12, 2010 for a Sterile Supply Technician (a post grievance posting) – neither of which appear in Schedule A of the agreement expiring March 31, 2001. In my view, this reinforces my

conclusion that the dispute is not solely about determining the validity of the sentence for the single job posting involved at the time, but it is about an objection to the sentence being expressed in such a manner that it affects all subsequent postings.

Second, as indicated above, the sentence also notified employees what to expect “for all positions,” i.e., every future job posting – the clear implication being that no postings of any kind would be exempted. As I see it, that part of the sentence was used by the Employer as a convenient means to begin promulgating what was essentially a new policy based on its belief that the nature of its business justified it. By the Employer’s own evidence in MN#1, the sentence Ms. Nichols instructed Hospital Staff to include on all postings was that “**effective December 1, 2000**, we will include the following wording on all our postings: ‘*A satisfactory record of work performance and attendance is required.*’” This was not the sentence that was expressed on the 2001 posting. For some reason, somebody later added the words “for all positions,” and the evidence is that this expanded wording is the way the sentence has been expressed ever since. In my view, this is not an inconsequential addition because it extended the scope of the stated qualifications beyond the specific 2001 job posting. It effectively announced that they also applied to all future postings, thereby making it a Policy.

In my view, a job posting is an improper vehicle for policy promulgation, even when its subject is the setting of qualifications in accordance with article 15.02. The list of items which article 15.02 requires to be contained on a job posting is position-specific, including the mutually agreed sentence: “This position is open to male and female applicants”. Clearly, the parties recognized at negotiations that only position-specific items were to appear on any job posting. This sentence does not say, “All positions are

open to male and female applicants,” which would make it a policy statement. Its mention in article 15.02 ensures that all future postings would contain the same sentence. Clearly the parties did not also see fit to include in article 15.02 the promulgation of a policy on one job posting that would affect every other position in the future.

What is contained in a job posting should be subject to an individual grievance. An individual employee cannot grieve a job posting matter that extends beyond the context of his/her own application for a particular position. Only the Union would be able to challenge that type of issue by filing a policy grievance -- as it has done here, but only because it had no other choice. A new Employer policy, in my view, should be promulgated by an entirely separate mechanism, which the Union could properly grieve independently under article 3.08 as a policy “... made by the Employer concerning ... benefits ... affecting members of the Union covered by this Collective Agreement.”

In my view, aside from an allegation claiming that the policy’s content is contrary to the provisions of the agreement, valid and reasonable promulgation of the policy would be governed by the components of the familiar and oft-quoted *K.V.P.* case, including the requirement of reasonable notice. To be enforceable at arbitration, any rule or policy determined by the Employer must be adequately promulgated so as to make all those affected by it completely aware of it. In the instant case such awareness applies to the Union as well as to the employees. From the job posting examples provided to me, it appears that both the employees and the Union had a maximum of one week to come to grips with this policy before the 2001 posting expired, i.e., the contractual minimum per article 15.01. In my opinion, that did not constitute reasonable notice for a policy implementation. I submit that, once this policy was created, it should have been

processed as a policy independent of the job posting process and communicated to the Union in timely fashion before being implemented on a job posting. Implementation of a policy should not occur prior to or concurrent with its initial promulgation. Had reasonable promulgation occurred in this case, the big difference would have been the advance notice that the Union would have had so it could attempt discussion with or seek clarification from the Employer on the wide scope of the policy, including the relevance of an employee's record of satisfactory work performance and attendance to a number of positions which would require little or no direct risk to patient safety. Those matters and others would have enabled the Union to decide whether to launch an article 3.08 grievance before the disputed requirements appeared on a job posting. The potential outcome of such a grievance is not relevant. What is relevant is that, although employees were made aware of the Employer's new requirements on the 2001 job posting, both they and their Union were deprived of the opportunity for the Union to challenge the Employer's policy, which affected all employees, before it was implemented.

Although Ms. Nichols' testimony alludes to the various Union Presidents having been sent the letter referenced in MN#1, she was unable to provide proof that any of them actually received it. It is perhaps unfortunate that sufficient supporting evidence was not available on that subject because the outcome might have been quite different here. However, as the matter stands, the best evidence I have is that the Union was not aware of this policy. Therefore, I conclude that the Union did not have the opportunity to assess and possibly grieve the Employer's new policy before it was implemented. To the extent that the Union was deprived of sufficient notice of the Employer's policy, employees were also deprived of the Union's ability to formally challenge the policy and reasonably

advise them on deciding how to deal with the 2001 posting as well as any future job postings.

In the meantime, given the fact that the Employer's policy previously had never been expressed on a posting, I am satisfied from the evidence that, when it did appear for the first time in 2001, some employees had good reason to believe that their work performance and attendance records would now and henceforth be considered at a higher level than they had previously experienced in the Employer's workplace. Where job postings are concerned, Ms. Blanchard's testimony indicates that the new requirements were intended to convince some employees to screen themselves out, i.e., to decide not to apply because they would consider their work performance and/or attendance records to be unsatisfactory. But the question is how they could rationally or reasonably arrive at that conclusion with their inadequate understanding of how the Employer would determine what constitutes a satisfactory record for the position being posted. I note that it was also Ms. Blanchard's evidence that the meaning of "satisfactory" and the weight to be assigned to records of work performance and attendance would vary depending on the nature and scope of the duties of each job being posted. Indeed, she fully recognized that the determination of how much weight to assign is an issue that would benefit from a reasonable measure of education. On balance, I couldn't agree more. However, I am convinced that the need for such education might well have had a better genesis in the Union's lost opportunity to be made aware of the Employer's policy before it was implemented rather than at arbitration a decade later.

*Was the Content of the New Sentence Established in an Arbitrary Manner?*

### The Two New Qualifications

For the allegation of arbitrary to stand for the 2001 posting, the Union would have to demonstrate that the two requirements in the sentence were not relevant to the position being posted. The absence of information about that position makes such a determination impossible. But again, the parties' interest is not a finding on the 2001 posting but an award that tells them how to deal with job postings in the future.

In my view, establishing relevance of the qualifications for each individual position is the *sine qua non* for justifying their expression on any job posting. On this point I do have some discomfort with the Employer deciding that the nature of the Employer's business as an acute and tertiary care health provider automatically establishes such relevance and justifies a greater level of consideration for a satisfactory record of work performance and attendance for every position in the HSS bargaining unit.

I accept that a reasonable case for greater consideration has been made for the particular examples of Licensed Practical Nurse and Personal Care Attendant positions referenced by the Employer's witnesses. A promotion to a position such as Lead Hand involves the additional responsibility of some supervision and the expectation that the incumbent would lead by example. In such cases, I quite agree that a PCA or LPN who possesses an unacceptable record of patient abuse (or something of a similar serious nature) or attendance, may reasonably be considered to be an unqualified candidate. Such an individual's effectiveness in requiring others to perform to a level which he/she has been incapable of achieving would be compromised by his/her lack of credibility. And an individual wishing to transfer from a position of full supervision to a position of considerably less supervision in the same classification (perhaps as might be the case in

moving from mostly day shift to mostly night shift), or where there are far fewer employees available to spread the workload around in his/her absence, may also find his/her record of work performance and attendance justly considered at a higher level for patient safety reasons. I agree also that some positions in quite a few other classifications arguably might be worthy of a higher level of consideration because of significant potential implications such qualifications may have on patient care. However, it would be impossible for me to specify all the various positions for which the two qualifications would be relevant. That responsibility would rest with the Employer as each job posting arises, based upon its experience and knowledge of its workplace.

I note that, for attendance at least, there are a number of other classifications listed in Schedule A of the collective agreement for which the nature of the Employer's business may arguably be significantly less relevant or not relevant at all because attendance issues might have little, if any, potential impact on patient safety. The same might be said of work performance issues where some classifications might involve minimal, if any, exposure to patients and, therefore minimum or no risk to patient safety. Some examples of jobs in these categories might be (the list is by no means exhaustive): Accountant, Auto Mechanic, Buyer, Carpenter, Cook, Electrician, Farming/Maintenance Worker, Gardener, Labourer, Painter, and Barber and Beautician (the latter two would be exposed to patients, but would not provide medical care).

Unfortunately the list in Schedule A was not debated at arbitration. Perhaps the Employer's concern was that a large majority of job postings would occur in LPN, PCA and some other obvious medical service positions. But numerous non-medical service classifications have also been captured by the bargaining unit wide net cast by the

Employer. Therefore, the medical service nature of the Employer's business is largely irrelevant to them. On balance, I am satisfied that a reasonable person reading Schedule A, would question why many of the job categories listed there should be subject to the two requirements. While satisfactory work performance and attendance should be reasonable expectations of all positions, similar or not, I am not convinced that they all should necessarily be subject to greater consideration as qualifications on a job posting simply because they exist in a hospital environment. The true relevance of a position must be determined by the context of its particular duties, and the particular conditions of work in that workplace environment.

I am satisfied that the record of work performance and attendance of an employee applying for a generally generic position, which will require no greater responsibility or no greater risk to patient safety than exists in his/her current position, should not be subject to greater consideration as part of a job posting. The Employer should surely know when a generic position needs posting. In those circumstances, such a qualification would effectively be irrelevant. Indeed this situation could apply to an LPN or PCA who, for his/her own personal reasons, wishes to transfer to another posted LPN or PCA generic position elsewhere in the system that is, for all practical purposes, substantially similar to his/her current position. Basically I would consider it illogical and unreasonable to hold an applicant for another similar generic position to a different standard in such circumstances. That would effectively mean that such an employee would be qualified to hold his/her existing position notwithstanding the status of his/her work performance and attendance record, but would be deemed unqualified to hold another position just like it. In my view, a mandatory qualification on a job posting

capable of being interpreted as requiring a greater level of consideration than before for all positions would be arbitrary. That is what the offending sentence does in the instant case.

I reiterate here that the Employer does have a reasonable and legitimate interest in requiring a satisfactory record of work performance and attendance greater than some applicants may possess where those qualifications clearly will be relevant for those positions. The Employer should be quite capable of identifying those positions. In such circumstances, the Employer should be entitled to advise prospective applicants on the particular job posting that a satisfactory record of work performance and attendance will be required. It would be the Employer's responsibility to state among the listed duties on the posting those factors that make the qualifications relevant, such as (but not limited to) greater-than-normal responsibilities, less than full supervision provided, significantly greater potential risk to patients, etc.

In such circumstances, if a rejected applicant grieves that his/her record should have received no greater consideration for the posted position, it would be the Employer's ultimate responsibility to establish that the duties, conditions and work environment for the posted position was so demonstrably different from that of the grievor's current position that it justified the requirement.

#### *The Weighting Issue – A Matter of Education*

Notwithstanding the foregoing, where it is necessary and appropriate to express such requirements, the ongoing problem for the parties and employees will always be in the weighting that should be assigned to them by the Employer for each position. In

other words, the word “satisfactory” will be open to interpretation and the weighting determined will be open to challenge via the grievance procedure and arbitration. For each posting, great care needs to be exercised by the Employer to ensure that its weighting decision does not unduly nullify an otherwise qualified employee’s right to be given preference for a position on promotion or transfer on the basis of his/her seniority. In such cases, each employee rejected for promotion on the grounds of those two qualifications will have the right to grieve and to argue at arbitration that the Employer’s weighting was not justified and was, therefore, arbitrary, an area which is clearly recognized in current jurisprudence as being within an arbitrator’s jurisdiction to review. Each case of that nature would have to be decided on its own merits. Among the possible many factors underlying such merits could be duty to accommodate and an assortment of other human rights challenges; unjustified or unsupported determinations of “satisfactory”; allegations of double jeopardy or attempts to discipline via the job posting process; etc. It is impossible for me to predict how many grievances might be filed in response to job postings, but in the absence of better education on the subject, and perhaps a body of experience to assist employees’ understanding how weightings are determined, I would expect increased activity on that front. This is not a matter of the Employer carelessly opening its own “Pandora’s Box”. Rather it is a matter of everybody recognizing an unavoidable consequence of establishing qualifications expressed in such a way that will always be open to interpretation and challenge.

To reiterate, I have no difficulty accepting the notion of an express requirement for satisfactory record of work performance and attendance for any position, if it is relevant to that position. Clearly it must be used cautiously so as to not have the effect of

universally usurping otherwise qualified employees' contractual seniority rights to promotion or transfer. In the instant case, the Employer has taken pains to explain that the weight to be assigned to work performance and attendance would depend on a variety of factors. I accept that explanation, for it recognizes that not every position is the same, and that there might be good and valid reasons to deny a particular employee's application for promotion on the basis of a poor record of work performance and/or attendance. The Employer's LPN and PCA examples clearly demonstrate why this might be justified. But the opposite is also possible, i.e., a particular position may justify that significantly less weight be given to those qualifications. The Employer's examples and explanations show to a greater or lesser extent what the word "satisfactory" might mean. Unfortunately, the sentence in dispute does not make it clear how an applicant should interpret "sufficient" for any particular job posting and decide whether his own record would meet the requirement. In other words, an applicant might have considerable difficulty reasonably determining what the required job standard is and whether his/her record is good enough. Some employees might misjudge the standard and to their detriment decide not to apply because their record is not perfect. Since an important objective of a job posting is to provide employees with reasonably clear and complete information on which to base one's decision to apply, in my view a posting's requirements should be capable of being reasonably understood by all employees.

The foregoing indicates the need for a reasonable education initiative by the Employer, one that would explain to members of the bargaining unit and the Union using examples to show why the two qualifications may be required for some positions being posted, but not for others; why the weighting on the word satisfactory may vary

depending on the particular circumstances of the position being posted; and that all job posting decisions will be subject to the grievance procedure .

### SYNOPSIS

The sentence in dispute was a mandatory Policy governing all bargaining unit positions, which was improperly expressed, implemented and promulgated in the 2001 job posting. The Union was not given sufficient notice of this Policy so as to seek clarification of its scope and application as it might affect the rights of all employees. It was deprived of the opportunity to grieve the Employer's Policy and to provide reasonable informed advice to employees before the Policy was implemented.

While a valid case has been made for the Employer to require a satisfactory record of work performance and attendance for some positions where factors such as increased responsibility, patient risk and particular job conditions are associated with the positions' duties, no satisfactory case has been made for those qualifications to apply to all positions in the various classifications listed in Schedule A, particularly those in which no medical service is provided and there is no exposure to patients,. To that end, the Employer's action was made in an arbitrary manner and was in violation of article 15.02.

I further find that it is arbitrary to hold employees applying for substantially the same type of generic position and duties as their current generic position to a greater level of consideration of their records of performance and attendance merely on the grounds of the medical nature of the Employer's business. The determination of relevance must be

position-specific. If the Employer fails to establish sufficient supporting evidence for requiring such qualifications for any posted position, it will also fail the test of relevancy.

The Employer is entitled to require a satisfactory record of work performance and attendance as qualifications where the particular duties of a posted position establish its relevancy. Such qualifications should be position-specific and should not be expressed in such a manner that they will apply to any other position.

Where the two qualifications are legitimately required on a job posting, the Employer's decision on weighting will always be open to interpretation and challenge by way of grievance and arbitration. An education initiative by the Employer on such matters would be of considerable benefit.

### *Observation*

Had the 2001 job posting stated, "A satisfactory record of work performance and attendance is required for this position," the issue at arbitration would have been the relevance of those qualifications to that particular position only. And each subsequent posting with that sentence would have been subject to the same process of independent determination. Clearly, the potential would have existed for numerous individual grievances until most positions had been examined and ruled upon -- an inefficient and costly process. In retrospect, it might have been more appropriate to have the universal application of the requirement, i.e., the Policy, initially tested by arbitration.

At the conclusion of evidence at the hearing, the parties were asked whether they would prefer to settle the grievance instead of having an award rendered. The offer was respectfully declined. Frankly, given the benefit of hindsight on the scope of current

arbitral review, I think that, if there had been greater mutual trust at that time, it would have been in the parties' best interest to agree on an education initiative on the issue of weighting and also to agree that, in future, only positions involving the direct provision of medical care services would be posted with the sentence, "This position requires a satisfactory record of work performance and/or attendance." This would relieve the Employer of having to make independent determinations of relevance for each position on an ad hoc basis. But if a rejected employee so desired, he/she could still grieve the Employer's determination on such a posting. My sense is that such grievances would be relatively few and would soon taper off as outcomes became known. Meanwhile since positions involving no direct provision of medical care would not be subject to the requirement, I believe that grievances on those postings would be minimal.

At this juncture, I am sure that the parties would be able to reach a much more mutually beneficial arrangement than I have suggested above, and certainly a better one than I am compelled to make in the decision below. If there is a will to make such an attempt, I urge the parties not to let this award deter them.

### DECISION

On the basis of the evidence, the parties' submissions and the foregoing considerations, I invoke the right conferred by the last sentence of article 12.04 to dispose of the grievance by the following arrangement:

Following the foregoing considerations as a guide, the Employer shall:

1. ON ALL JOB POSTINGS: Eliminate the sentence "A satisfactory record of work performance and attendance is required for all positions."

2. ONLY ON EACH JOB POSTING WHERE THE TWO QUALIFICATIONS ARE DETERMINED BY THE EMPLOYER TO BE “RELEVANT”: Use the statement “A satisfactory record of work performance and attendance is required for this position.”
3. ON EACH JOB POSTING WHERE THE TWO QUALIFICATIONS ARE DETERMINED BY THE EMPLOYER NOT TO BE RELEVANT: Do not include the two qualifications at all.
4. WITHIN 30 CALENDAR DAYS DEVELOP, POST AND DISSEMINATE AN EDUCATION BROCHURE TO ALL BARGAINING UNIT MEMBERS AND THE UNION: Explaining to all members of the bargaining unit and the Union using examples why the two qualifications may be required for some positions being posted, but not for others; why the weighting on the word satisfactory may vary depending on the particular circumstances of the position being posted; and that all job posting decisions will be subject to the grievance procedure.

Respectfully submitted as the decision of the arbitrator.

Dated at Mount Pearl, Newfoundland and Labrador, this 3<sup>rd</sup> day of January 2011.

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David L. Alcock  
Sole Arbitrator