

ARBITRATION AWARD

BETWEEN:

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

AND:

EASTERN REGIONAL INTEGRATED HEALTH AUTHORITY
(hereinafter called the "Employer")

GRIEVOR: Gail Rogers

COUNSEL: For the Union

Jerry Earle

For the Employer

D. Jay Neville

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on November 9 and 10, 2010 and January 26 and 27, 2011. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for sixty (60) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
5. Witnesses were excluded from the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Grievance form dated June 17, 2010
- Consent 2 - Letter of termination dated June 17, 2010 from Gerard Kenny, Central Staffing, Eastern Health to Gail Rogers
- Consent 3 - Letter dated April 27, 2010 from David Hammond, Human Resources Consultant, Eastern Health to Gail Rogers
- Consent 4 - Shift Schedule - May and June, 2010
- Consent 5 - General orientation employee orientation check list, Gail Rogers, May 17, 2010
- Consent 6 - Site orientation check list, General Hospital site, Gail Rogers, May 18, 2010
- Consent 7 - Competency assessment of Gail Rogers by Gloria Earle, Clinical Educator Surgery Program, dated June 4, 2009
- Consent 8 - Hospital Support Staff Collective Agreement between Her Majesty the Queen in Right of Newfoundland (represented herein by Treasury Board) and the Newfoundland and Labrador Health Boards Association and the Newfoundland and Labrador Association of Public and Private Employees (Hospital Support Staff), effective February 12, 2009, expires March 31, 2012

- GK - 1 Notes of Gerard Kenny dated May 26, 2010
- GK - 2 Notes of Gerard Kenny dated May 28, 2010
- GK - 3 Notes of Gerard Kenny of meeting with Gail Rogers, May 28, 2010
- GK - 4 Notes of Gerard Kenny of meeting with Gail Rogers, June 17, 2010
- GE - 1 Notes of Gloria Earle dated May 25 and May 26, 2010
- JG - 1 Eastern Health Policy on Occurrence Reporting
- GR - 1 Calendar - May, 2010
- GR - 2 Calendar - June, 2010
- GR - 3 Notes of Gail Rogers

Nature of the Grievance

The Union grieves the termination of the Grievor, Gail Rogers, from her employment as a probationary employee in the position of Personal Care Attendant. The Employer submits that it terminated the employment of the Grievor as a probationary employee for reasons of unsuitability or incompetence, as assessed by the Employer, and that it did not violate the Collective Agreement.

Collective Agreement

The relevant Articles of the Collective Agreement are 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 facilities under the Employer's control and to direct the working forces 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.

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Article 12 Arbitration

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12.04 Decision of the Board

The decision of the majority shall be the decision of the Board. Where there is no majority decision, the decision of the chairperson shall be the decision of the Board. The decision of the Board of Arbitration shall be final, binding, and enforceable on all parties, and may not be changed. The Board of Arbitration shall not have the power to change this agreement or to alter, modify or amend any of its provisions. However, the Board shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

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Article 13 Probation, Discharge, Suspension and Discipline

13.01 (a) Probationary Period

The probationary period, for all employees, shall be an accumulation of 487.5 working hours from the date of employment. For the purpose of this clause, time off with pay, approved by the Employer shall be considered as time worked.

(b) Suspension or Discharge

An employee who has completed his/her probationary period may be suspended or discharged but only for just cause. The Employer shall notify an employee in writing of his/her discharge or suspension within seven (7) calendar days of the Employer being made aware of the event giving rise to such discharge or suspension. If such procedure is not followed, then such action shall be deemed null and void.

(c) Termination of Probationary Employee

The termination of probationary employees for reasons of unsuitability or incompetence, as assessed by the Employer, is not subject to the grievance or arbitration procedure.

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13.03 Unjust Suspension or Discharge

Should it be found upon investigation that an employee has been unjustly suspended or discharged, the employee shall be immediately reinstated in his/her former position, without loss of seniority and shall be compensated for all time lost in an amount equal to his/her normal earnings during the pay period next preceding such discharge or suspension, or by any other arrangement as to compensation which is just and equitable in the opinion of the parties or in the opinion of a Board of Arbitration if the matter is referred to such a Board.

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13.05 Adverse Report

The Employer shall notify an employee in writing of any dissatisfaction concerning his/her work within ten (10) calendar days of the event of a complaint. This notifications shall include particulars of work performance which led to such dissatisfaction. If this procedure is not followed, such expression of dissatisfaction shall not become a part of his/her record for use against him/her at any time.

The report of an employee shall not be used against him/her after eighteen (18) months have elapsed, providing another warning or reprimand relating to the same or similar offence has not been given within that period. The employee's written reply to such notification of dissatisfaction shall become part of his/her record.

This article shall apply in respect of any expression of dissatisfaction relating to his/her work or otherwise which may be detrimental to an employee's advancement or standing with the Employer. All correspondence pertaining to the adverse report, including the report itself, shall be disregarded and subsequently removed from the personal file after eighteen (18) months. The employee shall be responsible to see that any such documents are removed.

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Article 25 General Interpretation

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*25.02 For the purpose of this Agreement:

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* (v) "Temporary Employee" means a person who is employed on a full-time basis for a specific period or for the purpose of performing specific work and who may be laid off at the end of such period or following the completion of such work.

Evidence

The witnesses called by the Employer were Gerard Kenny, Human Resources Consultant, Gloria Earle, Nursing Clinical Educator, Jamie Meadus, Personal Care Attendant, Winston Stockley, Licensed Practical Nurse, Tammy Herridge, Registered Nurse and Joan Ivany, Licensed Practical Nurse. The witnesses called by the Union were Joe Goulding, Shop Steward and Gail Rogers, the Grievor.

The Grievor was terminated from her employment by Eastern Health by letter to her dated June 17, 2010 from Gerard Kenny, Central Staffing. The letter stated, in part, as follows:

This letter is in follow up to our meetings on May 28, 2010 and June 17, 2010 with you, Joe Goulding (NAPE Representative), Kim Ghaney (Division Manager - 4SA, HSC) and the undersigned.

At the May 28th meeting we discussed in detail concerns that were raised about your ability to perform the required duties of a Personal Care Attendant (PCA), based on shifts you worked on May 20th, 21st, 25th, 2010. As a result of this meeting, the Employer then proceeded to have you scheduled to undergo a competency assessment as completed by a Clinical Educator on June 2nd and June 3rd, 2010. The findings of this assessment have determined that you are not competent to perform the required duties as a PCA with Eastern Health.

Given that you are still within your probationary period your employment with Eastern Health is terminated effective immediately for unsuitability and incompetence under Article 13.01 (c) of the NAPE-HS Collective Agreement.

By letter dated April 27, 2010, Eastern Health offered the Grievor the position of temporary full time Personal Care Attendant (“PCA”) with Central Staffing (LPN/PCA Clinical List) located at the Health Sciences Centre. The position was stated to commence on May 17, 2010 with a tentative end date of March 31, 2011, and the possibility of extension. The letter stated that Gerard Kenny would be her Manager. The Grievor signed the letter accepting the offer. As a PCA in Central Staffing the Grievor could be assigned to any unit at the Health Sciences Centre. Some units had a PCA assigned on a regular basis, while other units had a PCA assigned as needed.

The Health Sciences Centre is a tertiary care level acute care facility. It is the major trauma centre for the Province. Gerard Kenny, Manager of Central Staffing, testified that the role of a PCA in

acute care is to assist with personal care for patients, including observation of patients at risk of falling or wandering, bathing and feeding patients, transporting specimens to the laboratory, portering patients, and taking directions from a Registered Nurse (“RN”) or a Licensed Practical Nurse (“LPN”). He said that PCA’s work independently. Gloria Earle has been employed as a Clinical Educator since 1990. She estimated that over the past 10 years she has provided orientation to about 14 RNs, 20 LPNs and 70 PCAs. She testified that a PCA has a narrower scope of practice than an LPN or RN. Ms. Earle said that part of the PCA’s role is direct care of patients, such as repositioning patients in the bed, chair or stretcher. She described the role of the PCA as bathing, feeding, turning, ambulating, observing and incontinent care of patients. She said it is important for a PCA to work as part of a team, and to provide care in a timely manner. Winston Stockley, an LPN since 1966, has been employed at the Health Sciences Centre since 2003. He stated that an LPN does the same tasks as a PCA, such as feeding, washing and shaving patients. In addition, an LPN also takes vital signs, takes glucometer readings and changes dressings. He said an RN has an additional scope of practice, including giving medications to patients. He said that a PCA or LPN would be alone with a patient frequently. Two staff persons might need to be present at the same time when lifting a patient. Tammy Herridge, an RN who has been employed at the Health Sciences Centre since 2003, testified that a PCA’s role included answering a patient’s call bell, regularly turning and positioning patients and carrying a pager.

New PCAs hired to work at the Health Sciences Centre have a one day corporate orientation, a one day site orientation, and three orientation shifts prior to commencing regular shift assignments. Mr. Kenny testified that the Employer decided to add the three orientation shifts about a year prior to hiring the Grievor. The three orientation shifts were added as a result of concerns of Clinical Managers about the suitability of PCAs who had completed a training course. During the orientation shifts a PCA co-signs with an RN or LPN. Gloria Earle said the purpose of the orientation shifts is to show how the workplace is organized, not to show the basic tasks of the job.

The Grievor had a corporate orientation on May 17th and a site orientation at the Health Sciences Centre on May 18th. She attended the Back Injury Prevention Program (“BIPP”), which was part of the site orientation, on May 20th. She then had three orientation shifts, which were held on May 21 with Jamie Meadus, PCA, on May 22 with Winston Stockley, LPN, and on May 25 with Tammy Herridge, RN.

Following the three orientation shifts, the Employer decided to assign the Grievor to two additional orientation shifts on June 2 and 3, 2010 and to complete a clinical competency assessment of the Grievor. The Employer decided to terminate the Grievor's employment following completion of the additional orientation shifts and review of the competency assessment.

Gloria Earle testified that she was one of the instructors at the site orientation attended by the Grievor on May 18, 2010. She said the PCA site orientation was completed that day with the exception of the back injury prevention program and suicide patient handling. Ms. Earle testified that the Grievor kept asking to be fitted for an N95 mask. She told the Grievor that the fitting could be done at a later time and that, in the meantime, she would not have to go into any area where such a mask was required. Ms. Earle and another instructor presented the back injury prevention program ("BIPP") to the Grievor and two other PCAs on May 20, 2010. Ms. Earle testified that the BIPP training lasted three hours. For three PCAs it should have taken about 1.5 hours. Ms. Earle said that she had to demonstrate the techniques several times for the Grievor. Eventually, the other instructor had to get in the bed and direct the Grievor to mimic her actions.

On May 18, 2010, the Grievor completed a generic competency self assessment form. She identified her level for various tasks as either independent, requires indirect supervision or requires direct supervision. In her comments on the form she stated that she may need direct supervision temporarily as she had not worked "at these procedures" since she completed on-the-job training in September, 2008. Gloria Earle testified that she was not concerned about the level of direction indicated on the self assessment form, since many new hires often underrate their abilities. She was concerned about the reference to "procedures" in the Grievor's comment, as PCAs do not perform the procedures in acute care that are performed by RNs or LPNs, such as taking vital signs.

Gloria Earle testified that she was off work on May 21 and 22, the first two days of orientation shifts for the Grievor. She returned to work on May 25, the day of the Grievor's third orientation shift. She was told by another Clinical Educator that Jamie Meadus had concerns about the Grievor and wanted to talk to her. On the same day, the Division Manager, Kim Ghaney, asked her whether the Grievor should be able to work shifts without further orientation. Kim Ghaney had spoken to Tammy Herridge, to whom the Grievor was assigned for the orientation shift that day. Ms. Earle testified that Tammy Herridge expressed concerns to her about the Grievor's level of skill and her ability to function independently. Ms. Earle testified that she also met with Winston Stockley on May 25, 2010. Mr. Stockley voiced concerns to her regarding the Grievor, in particular, that she did

not ask questions or show initiative, and that he had to give the Grievor step by step direction. Ms. Earle had a call from the Grievor about her shift schedule. She told the Grievor to call Central Staffing to obtain information about her shifts, and that this procedure had been explained to her at the orientation on May 18th. Ms. Earle testified that on May 25th she was unable to contact the Grievor's Manager, Gerard Kenny. She did not have authority at that time to extend the Grievor's orientation shifts. The Grievor had been given a regular shift schedule with shifts starting on May 26th. Ms. Earle testified that she called the unit to speak to the Grievor. When the Grievor answered the phone she did not identify herself or identify the unit. Ms. Earle later met with the Grievor, and told her that her shifts were cancelled until she talked to the Manager. She told the Grievor that she would be informed later about the plan for further orientation. The Grievor told Ms. Earle that she felt she needed more direction about procedures. Ms. Earle told the Grievor that her role was personal care and not performing procedures.

Gerard Kenny testified that on May 26, 2010 Gloria Earle reported concerns about the Grievor. Ms. Earle advised him about her experience when instructing BIPP and about the concerns of other staff persons. Mr. Kenny understood that Tammy Herridge reported to Ms. Earle that the Grievor asked her if she could give Tylenol to a patient, but she had told the Grievor numerous times that a PCA cannot give medication. Mr. Kenny obtained further details from Ms. Earle on May 28, 2010. Ms. Earle told him that during site orientation the Grievor repeatedly requested to be fit for the N95 mask even though Ms. Earle had told her it could be done later. Ms. Earle reported that Jamie Meadus told her that the Grievor came out of a room where a patient was in isolation, and she was wearing the gown and gloves that she was supposed to dispose of in the room. Mr. Meadus also reported to Ms. Earle that the Grievor did not continue the process of making a bed on her own when he left the room. Ms. Earle also reported that Winston Stockley told her that he did not want the Grievor assigned to work with him again. Mr. Kenny requested Ms. Earle to do a clinical assessment of the Grievor to determine if she had the basic competencies required for the PCA position. Ms. Earle agreed to do the assessment.

Gerard Kenny and Kim Ghaney met with the Grievor and Joe Goulding, shop steward, on May 28, 2010. Mr. Kenny informed the Grievor that she would have two additional orientation shifts and a clinical assessment, and that she would not work the shift schedule that had been previously assigned. At that meeting, the Grievor said she did not think it was fair to be asked to complete additional orientation shifts. She stated that she felt her orientation shifts should have been with PCAs and not with LPNs or RNs. She stated that she knew she could not give medications.

Jamie Meadus, Winston Stockley and Tammy Herridge testified about their observations during the orientation shifts. Jamie Meadus testified that he completed his training as a PCA in 1995 and has been employed as a Clinical PCA at Eastern Health since 1999. He currently works in Unit 4SB Orthopaedics. He has oriented about 50 PCAs and about 20 Medical Service Aids. In that period, he observed only two PCAs, the Grievor and one other, who were not competent to be working at the Health Sciences Centre, in his opinion. His observation of the Grievor on May 21, 2010 was that she could not perform the basic duties of a PCA. He said she appeared to be nervous. She did not know where to start to wash a patient. He said the total amount of time to wash a patient should be 10 to 15 minutes and she was taking 20 minutes. He observed that the Grievor was not covering the exposed areas of the patient's extremities during the washing procedure. Her technique was fine when she was told what to do. Mr. Meadus said they started making a bed and he was called out of the room. When he returned to the room the Grievor was standing in the same position with the sheets in her hand and had not continued to make the bed. He said it was frustrating to work that day, as the Grievor kept asking the same questions over and over. He said the Grievor lacked initiative and wanted to stay beside him. If a patient's call bell lit up at the desk, she would look for him and not check on the patient herself. The Grievor told Mr. Meadus she did not want to go in the room of a contact isolation patient, because she had not been fitted for the N95 mask. Mr. Meadus told her that she did not need an N95 mask for that type of isolation. He observed that when the Grievor came out of the isolation room, she was still wearing the gown and gloves she wore in the room, and had not left them in the room, as required. Mr. Meadus said that he sometimes gave the Grievor the "thumbs up" and told her she was doing a good job. He said he tried to positively reinforce anything she did right. Mr. Meadus said that orientation is intended to show a new employee the tools to do the job and not to show how the job is done.

Winston Stockley described the Grievor's orientation shift on May 22, 2010. He said that they both started to wash a patient and the Grievor stood there not appearing to know what to do. He said the Grievor did not show initiative. As he was going down the corridor, the Grievor came out of a patient's room and asked for Tylenol to give to a visitor. He told Gloria Earle that the Grievor was not ready to do patient care and that she might need more orientation. He feared for patient safety if the Grievor was left alone with a patient. He told Ms. Earle he did not want the Grievor to be looking after anyone under his care. He said it was not his role to teach the basics of the job in an orientation. He said the orientation shift was causing him stress. He asked the Grievor to leave about 45 minutes before the end of the shift.

Tammy Herridge described the orientation shift when the Grievor worked with her on May 25, 2010. She was not informed about the orientation before the shift started. She said that when assisting a patient with a bed bath, the Grievor seemed unsure what to do, especially with respect to the position of the patient. The Grievor did not seem familiar with BIPP procedures. During the shift, the Grievor asked her “if there was a visitor asking for a Tylenol, is it OK to give it to them”. She told the Grievor that it was absolutely not acceptable for her to give a Tylenol to a visitor. Ms. Herridge testified that Tylenol may only be given to a patient where it is in the doctor’s orders. When asked about the note taken by Ms. Earle stating the Grievor asked to administer Tylenol to a patient, Ms. Herridge said the Grievor asked about giving Tylenol to a visitor, not a patient. At the time of the request about Tylenol, Ms. Herridge was getting medication ready for patients. She said it was possible the Grievor told her during the shift that a patient needed something for pain. That would be an acceptable role for a PCA. She observed the Grievor at the desk when the call bell light came on for a patient’s room. She asked the Grievor if she had checked on the room. The Grievor replied she did not check because the light went off. Ms. Herridge felt the Grievor should still check on the room because no one knew why the light went off. She asked the Grievor about a call from another room. The Grievor said she went to the door and it was closed and there was no patient there. On another occasion she asked the Grievor to check on a patient who had a risk of falling. The Grievor said she went to the door and it was locked. Ms. Herridge said that patients’ room doors do not lock, but that door sticks a bit when closed. She said the Grievor should have checked further into the patient because the patient could have fallen down behind the door. Ms. Herridge informed Ms. Earle that she had safety concerns about the Grievor and that the Grievor needed more orientation. In her view, the Grievor did not know a lot of the basics that PCAs should know.

The Grievor was assigned to work on Unit 5NA - Neurology for the two additional orientation shifts on June 2 and 3, 2010. Gloria Earle said that patients on that unit required a lot of personal care. There was no PCA assigned to the unit on a permanent basis, but a PCA was frequently assigned to the unit by Central Staffing. During those two shifts, Ms. Earle was present, or in her absence, the Grievor was assigned to Joan Ivany, LPN.

Ms. Earle testified that on June 2, 2010, she observed the Grievor doing a bed bath. The Grievor was constantly asking if her work was acceptable, and appeared to be looking for reassurance. Ms. Earle observed that the Grievor was not following safe patient handling techniques, which included not bending the back and using a draw sheet to move the patient. Ms. Earle described an incident concerning a patient in droplet isolation for suspected tuberculosis, a highly contagious disease. This

was a type of patient the Grievor could expect to encounter in her work as a PCA. Ms. Earle said there was a sign on the door outside the patient's room indicating the isolation. The Grievor asked Ms. Earle about the sign. She told the Grievor to wear a mask when she went in the room. Ms. Earle left the area. When she returned, the Grievor told her that she had gone into the room, but did not wear a mask. Ms. Earle said she could not believe that the Grievor had gone into the room right after their discussion about the sign. Ms. Earle told the Grievor that she had potentially exposed herself, the staff and other patients to tuberculosis. Ms. Earle said that a short time later the laboratory reported that the test was negative for tuberculosis. Ms. Earle said that if there had been a positive test report, she would have reported the incident to Occupational Health.

Ms. Earle testified that during the shift on June 3, 2010, she observed the Grievor doing a bed bath with a patient who needed a lot of assistance. The bath was taking a long time and the patient was getting tired and short of breath. Ms. Earle noted that the Grievor was feeding a patient and using an incontinent pack as a bib, which was an acceptable practice. However, the Grievor did not know that she needed to have the white absorbent side facing out and the blue plastic side next to the patient's skin, in order to avoid a spill being absorbed in the patient's clothes. Ms. Earle noted a positive incident, where the Grievor identified an item on a patient's food tray that needed to be removed, having regard to the patient's allergy. She told the Grievor that she had performed better that day, but there were still concerns.

Ms. Earle testified that her conclusion after five orientation shifts was that the Grievor was lacking in basic competencies. She believed that five shifts was a fair length of time to complete the assessment. She took into account the observations reported to her by Joan Ivany. Ms. Ivany reported that she had to keep telling the Grievor what to do and the Grievor was not able to work independently. Ms. Earle felt the Grievor could not function in an independent role to provide care on the units.

Joan Ivany testified that she has worked as an LPN for 28 years and has worked at the Health Sciences Centre for 14 years. She provides orientation to an LPN or PCA about once per year. Gloria Earle asked her on the morning of June 2, 2010 to observe the work skills of a PCA to be assigned to her unit. Ms. Ivany testified that her observation was that the Grievor's nursing skills were "a little incompetent". She said the Grievor was nervous doing personal care, she needed a lot of guidance, and her performance of a total body wash was incompetent. The Grievor had no problem doing 15 minute bed checks and appeared to be energetic. Ms. Ivany reported that she had

to help the Grievor to make an occupied bed. She said the unit is extremely busy and regularly has five RNs and one LPN. She reported to Ms. Earle that the Grievor was not ready to be assigned to a busy unit on her own.

Ms. Earle prepared a competency assessment which stated as follows:

Competency Assessment
Gail Rogers PCA
June 2 & 3, 2010

This competency assessment was conducted on 5NA Neurology, Health Science Center from 0730 - 1530 June 2 & 3, 2010. I was present from 0730 - 1200, June 2 and from 1200 - 1530, June 3. During my absence, Ms. Rogers was assigned to Joan Ivany LPN. At the time of her assessment, Ms. Rogers had previously completed 4 hours of classroom clinical orientation, Safe Patient Handling Education session and (3) 12-hour clinical orientation shifts.

During the June 2 time period, Ms. Rogers:

- required step by step instructions for the completion of tasks.
- was not self-directed and constantly asked for instructions and reassurance when asked to complete tasks (e.g. bed bath, perineal care, brushing dentures, and mouth care) that were previously shown to her.
- did not follow safe patient handling techniques.
- did not initiate interventions.
- failed to comply with droplet isolation precautions.

During the June 3 time period, Ms. Rogers:

- did initiate the performance of a bed bath but the length of time required to complete the bath caused the patient to become fatigued.
- in preparing a patient for a meal, asked what side of the incontinent pad should be facing away from the patient (e.g. white side or blue side).
- did identify that a patient was allergic to a food item and removed it from the patient's tray.
- did ask if there was anything that she could help with.

It is my opinion that Ms. Rogers is unable to function independently and requires step by step instructions in her role as a PCA.

Attached is the completed Generic Competencies for Personal Care Attendants which was tool I used to complete the competency assessment. I have also attached the competency list completed by Ms. Rogers during her clinical orientation on May 18, 2010.

Gloria Earle
Clinical Educator, Surgery Program

Ms. Earle attached to the competency assessment a check list using the form "Generic Competencies for Personal Care Attendants (Clinical)". For most of the items observed by Ms. Earle, she noted that the Grievor required direct supervision. She noted independent functioning for some items. Requiring direct supervision meant there would need to be someone with the Grievor when she performed those tasks. She noted that a PCA was expected to be independent to complete a bed bath, but the Grievor needed direct supervision. She noted that the Grievor required direct supervision with respect to patient reports. She testified that the Grievor had written a report saying that she "raised the bed". Such a report did not explain whether the entire bed was raised or the head of the bed was raised. This was an important distinction because a patient with a risk of aspirating would need the head of the bed to be raised. Ms. Earle said it was necessary to be clear and concise in report writing.

Gerard Kenny testified that the Employer decided to terminate the employment of the Grievor based on the information received. The Grievor actually worked 66.5 hours out of the total probation period of 487.5 hours. He said the Grievor was paid for the shifts for which she had been scheduled, but did not work, up to the date of termination. Mr. Kenny met with the Grievor on June 17, 2010 at which time the Grievor was terminated. The meeting was also attended by Kim Ghaney and Joe Goulding. Mr. Kenny testified that the Grievor said she did not agree with the assessment, and that Gloria Earle "just wanted to get rid of her". Mr. Kenny said the Employer did not agree with the option presented at the meeting of having the Grievor work in long term care, as PCAs in that setting often have more autonomy and fewer resources. Mr. Kenny testified that he felt the Employer acted in good faith and the assessment was fair. He testified that the purpose of probation is to determine if an employee is competent and suitable to work in the position. A PCA is expected to have basic competencies when they are hired.

Joe Goulding testified that he attended the meetings on May 28 and June 17, 2010. He said that at the May 28th meeting, the main issue raised by the Employer was that the Grievor attempted to administer Tylenol to a patient and it was not the role of a PCA to administer medication. He said the Employer representatives stated that the Grievor had trouble doing patient care and stated that she would receive further training. Mr. Goulding said it was better to have orientation of a PCA done by a PCA, rather than an RN or LPN, because the jobs of RN and LPN are different from PCA. Mr. Goulding testified that, at the June 17th meeting, the report prepared by Gloria Earle was presented and the Grievor's employment was terminated. He said the process was not fair and five shifts were not enough time for an assessment. He said that any incident that would raise alarms should be reported in an Occurrence Report. He referred to the Eastern Health policy on "Occurrence Reporting".

Gail Rogers testified that she has been employed by a home care agency since July, 2010 to provide care in clients' homes. She described her PCA training in 2008 and additional courses that she completed. She completed a self assessment form at the half day orientation session on May 18, 2010. She said her reference to "procedures" on the form meant items that she had to sign for. She described her first orientation shift on May 21, 2010 with Jamie Meadus. Mr. Meadus would often slap her on the back and say that she was doing a good job. She felt this behaviour was humiliating, although she did not file a complaint. With respect to bathing a patient, Mr. Meadus said it was "all about speed". Ms. Rogers said this was not what she was taught, as she was taught to teach patients with respect. She said that Mr. Meadus left her in the room after they had started making a bed and did not tell her what to do next. For that reason she did not continue to make the bed. She described her orientation shift with Winston Stockley. She felt that orientation should involve someone working side by side with her at all times. She said Mr. Stockley gave her the impression that "he was hiding something" as he would often go to another room and he did not show her much of anything. She said there was no incident with Tylenol during her shift with Mr. Stockley. She referred to the orientation shift with Tammy Herridge on May 25th. Ms. Herridge told her that she was not getting paid to orient her. She described her activities of bathing patients, checking on patients and responding to requests from Ms. Herridge. At one point she said that Ms. Herridge pointed to the desk and asked her to "go there and wait until I tell you to move". She said that she responded to a call bell. The patient was in pain and asked if she could get a Tylenol. She told her she was not qualified, but she would get the nurse. She told Ms. Herridge that the lady in the room wanted a Tylenol and Ms. Herridge said she would take care of it. She said the note made by Ms. Earle about the Tylenol was not correct. Ms. Rogers referred to notes that she made around June 7

or 8, 2010. The notes stated that Joan Ivany was more helpful than the others. She said Joan Ivany did fire alarm training. The Grievor testified that she felt she should have had fire alarm training on the first day. With respect to the isolation room on Unit 5NA, she said there was no sign on the door when she went into the room, although there had been a sign on the door earlier in the day. She denied that she needed step by step instruction for completion of tasks. She agreed that one patient said to her that he was feeling tired during bathing. She said she was nervous because she had no prior work experience in an acute care setting.

The Grievor testified that at the meeting with Mr. Kenny and Ms. Ghaney on May 28th, she denied that she had asked to give a patient a Tylenol. She stated at the meeting that she knew giving medication was out of the scope of her practice. At the meeting on June 17th, she said that a lot of items in the competency assessment by Ms. Earle were not true. The Grievor testified that some of the witnesses who said she was not competent or suitable were not telling the truth in some cases. She did not feel that she had been given a fair chance. She felt that she should have been allowed to work the full 487.5 hours of probation, and not terminated after five shifts.

Employer Submission

The Employer submitted that, as a probationary employee, the termination of the Grievor's employment was subject to Article 13.01 (c) of the Collective Agreement. The Employer did not object to the arbitrability of the grievance. The termination of employment of a probationary employee was not subject to review on a "just cause" standard. The standard of review as established by arbitral case authority, was that an arbitrator could review the employer's assessment of unsuitability or incompetence, to determine if it was reasonable and not arbitrary, discriminatory or made in bad faith. The arbitrator could also review the employer's actions generally to determine if those actions were arbitrary, discriminatory or made in bad faith (*NAPE v. Grace Sparkes House (Fewer)*, August 16, 2006 (Oakley) (the "*Fewer*" award), *NAPE v. Her Majesty the Queen in Right of Newfoundland and Labrador (Singaravelu)*, May 21, 2010 (Clarke) (the "*Singaravelu*" award)). The Arbitrator did not have the authority to substitute his opinion for the opinion of the Employer regarding the assessment of unsuitability or incompetence. In the *Fewer* award, the same collective agreement language was considered. The grievor had worked 39 hours of the probation period and was then terminated from employment. When considering the issue of reasonableness, the arbitration board considered in *Fewer* that the employer had taken into consideration relevant factors and had not made a decision based on irrelevant factors. In the *Singaravelu* award, the arbitrator

considered that the grievor had been given a fair opportunity to explain his actions. The Employer also referred to *Brantwood Residential Development Centre v. ONA* (1992) 31 L.A.C. (4th) 18 (Starkman) where it was found appropriate for the employer to have considered a number of concerns about a probationary employee, including poor attitude and the inability to fit into the team. The Employer submitted that it was important to consider the context of the workplace as an acute care facility with a vulnerable patient population. A PCA was often left alone with a patient, and was expected to function as part of an interdisciplinary team. The purpose of orientation was not meant to be skills training in the basics of the job. Concerns were expressed by a PCA, two LPNs, an RN and a Clinical Educator about the Grievor. The observations by staff were made independent of each other and were reported to the Clinical Educator and then to the Manager. The clinical witnesses established that the Grievor lacked the basic skills of a PCA. Mr. Meadus and Mr. Stockley said that it was a potentially dangerous situation to have the Grievor in the workplace. The Employer had a proactive orientation process. The Employer provided a corporate and site orientation and three 12 hour orientation shifts. It was fair to assign the Grievor to work in different units, because a PCA could expect to be assigned to any unit by Central Staffing. The information was gathered in a fair and reasonable manner. As a member of an interdisciplinary team, the Grievor would be expected to work with employees in various positions. The Grievor was made aware of the concerns and was given an opportunity to address them in two additional orientation shifts. Ms. Earle testified about how long it took to explain back injury prevention to the Grievor. She was concerned that the Grievor not be allowed to work any regular shifts that were not part of an orientation shift. The witnesses established that the Grievor did not act independently, and was not competent to give a bath to a patient. The Grievor did not check on a patient because she thought the door was locked, but the doors do not lock and this was not an acceptable reason. The Grievor went into a room without a mask just after it was explained to her by Ms. Earle that the sign on the door meant the patient was in isolation. The Grievor's actions could have placed staff and patients at risk. The fact that no occurrence report was filed does not mean the event did not happen. There was no reason for the Employer to have any animosity towards the Grievor. The Grievor testified that she felt Ms. Earle was trying to "get rid of her", but there was no basis for such a statement. Any conflict in the evidence should be resolved in favour of the Employer's witnesses. The Grievor, as a witness, had an interest in the outcome of the case. Her evidence should be weighed against the preponderance of the evidence. The Grievor suggested that the Employer's witnesses gave testimony that was either false or misleading. There was no basis to say there was any conspiracy to dismiss the Grievor. The Grievor did not have notes from the meetings. The Grievor said she took notes sometime between June 3, 2010, the last orientation shift, and June 17, 2010, the day of the

dismissal, but she did not know exactly which day. The notes taken by Mr. Kenny and Ms. Earle were consistent with the testimony of witnesses. There was no proof of delay contrary to the Collective Agreement. There were no questions asked of witnesses about the delay. The parties could have agreed to the length of the delay. The Employer requested that the grievance be denied.

Union Submission

The Union submitted that the Collective Agreement gave substantive rights to probationary employees to grieve termination. The Union referred to arbitral authorities with respect to review of an employer's decision to dismiss a probationary employee, including Mitchnick and Etherington, *Leading Cases on Labour Arbitration*, and Christie and Barnacle, *Employment Law in Canada*, 4th edition. The appropriate test was set out in the *Fewer* award. The Union also referred to *Her Majesty the Queen in Right of Newfoundland v. NAPE (Byrne)*, May 12, 2001 (Fagan) (the "Byrne" award), which was upheld by the Newfoundland and Labrador Court of Appeal in *NLAPPE v. Newfoundland Treasury Board* (2003) 227 Nfld. & P.E.I.R. 37 (NLCA). In the *Fewer* award, the arbitration board applied the standard of reasonableness. In that case there was a serious incident with videotape evidence to support the findings. In the *Byrne* award, the employer was unable to prove the basis for the decision, and the Grievor was reinstated. The standard of review of dismissal of a probationary employee, as described in the *Fewer* award, was followed in subsequent arbitration awards and is widely accepted. The Union asked the Arbitrator to give weight to the Grievor's testimony. The Grievor had no more self interest than the Employer's witnesses. The Grievor had taken notes while most of the Employer's witnesses did not have notes. There was no serious event proven. There was no incident report or occurrence report filed at any time, as would have been required if there was a serious incident. The Grievor was entitled to a fair and reasonable chance to meet the criteria for the position. She was not given enough time, considering the total length of the probation period. The Grievor did not receive a *bona fide* trial period. Joan Ivany said that the Grievor was not ready at that point in time to be assigned to work independently on the day that Ms. Ivany observed her, but she did not say she would never be ready. On June 3, 2010, Ms. Ivany felt comfortable assigning the Grievor to a patient, which indicated improvement. Ms. Ivany did not sign for any of the competencies listed on the form completed by Gloria Earle. However, Ms. Earle did not observe some of the items for which she signed the form. The Manager, Gerard Kenny was not a clinician, and he had to rely on hearsay information provided to him. At the May 28th meeting, Mr. Kenny understood that the Grievor had asked to give Tylenol to a patient. The allegation regarding Tylenol was the focal point of the meeting. However, Tammy Herridge testified that the Grievor

requested to give Tylenol to a visitor, not a patient. The Grievor testified that she told Ms. Herridge that there was a patient in pain. She denied asking to give Tylenol to a patient. There was no evidence that Tylenol was administered to a patient by the Grievor. Mr. Meadus, Mr. Stockley and Ms. Herridge agreed that the Grievor needed further orientation. Mr. Stockley did not make any complaint about the Grievor until Ms. Earle approached him, indicating he did not have serious concerns. Mr. Stockley testified that the Grievor asked to give Tylenol to a patient. However, there was nothing documented by him about this allegation and he did not tell Ms. Earle about it. This could mean that his testimony was based on a discussion he had with Ms. Herridge about Tylenol. RNs and LPNs had a different scope of practice than a PCA. The Grievor should have been assigned to a unit where there were other PCAs. The witnesses confirmed that the Grievor was nervous. She had never worked in acute care before. If a patient was suspected to have tuberculosis, and the Grievor's actions could have infected others, then it would be expected that such a serious event would have been documented. The more plausible explanation of the event is that the test result came back negative and the sign was taken off the door. The Employer violated the mandatory ten day time limit in Article 13.05 to give notice of dissatisfaction concerning the Grievor's work. Ms. Earle's assessment report was dated June 3, 2010. The Employer's action to dismiss the Grievor on June 17, 2010 exceeded the ten day time limit. Under Article 12.04, the Arbitrator could impose fair and equitable redress. The Union requested that the Grievor be reinstated to employment in a position at another facility with a *bona fide* probation period and credit for loss of seniority.

Considerations

The Union grieves the termination of employment of the Grievor, Gail Rogers, as a probationary employee. Article 13.01 (c) of the Collective Agreement states that "the termination of probationary employees for reasons of unsuitability or incompetence, as assessed by the Employer, is not subject to the grievance or arbitration procedure".

The Employer does not object to the arbitrability of the grievance. Both the Union and the Employer referred to the principles applied by arbitrators when considering the dismissal of a probationary employee under similar collective agreement language.

The parties agreed that the principles applied in *NAPE v. Grace Sparkes House (Fewer)*, August 16, 2006 (Oakley) (the "*Fewer*" award) were applicable in this case. In the *Fewer* award, the arbitration board stated, in part, as follows, commencing at page 23:

In the Preliminary Award dated September 14, 2005, the Board determined that the grievance was arbitrable and that the Board had the jurisdiction to review the Employer's decision to terminate the employment of the Grievor.

...

The Board stated, commencing at page 43, as follows:

The Board finds that consideration must be given to the language used by the parties in Article 11.01 (c), in particular, the use of the phrase "as assessed by the Employer". The language used by the parties indicates that they did not intend an arbitration board to review the employer's assessment of unsuitability or incompetence and to substitute the arbitration board's decision for the decision of the employer. Therefore a review of the finding of unsuitability itself is not the correct standard of review by the Board. The Employer is not required to prove that the Grievor was unsuitable. However, the Board finds that it may review the assessment made by the Employer, including the reasons for the Employer's decision and the procedure followed by the Employer when it made its assessment.

...

In summary, the Board finds as follows: (1) the dispute concerning the termination of a probationary employee is arbitrable on the basis of the express terms of Article 11.01 (c) and on the basis of the implied term that arbitrators may review the decision to dismiss a probationary employee where the decision was arbitrary, discriminatory or made in bad faith; (2) the standard of review of the Employer's decision to terminate the employment of a probationary employee, is that (a) the Arbitration Board may review the Employer's assessment of the Grievor as to unsuitability or incompetence under Article 11.01 (c) to determine whether the Employer's decision was reasonable and not arbitrary, discriminatory or made in bad faith; and (b) the Arbitration Board may review the Employer's actions generally, under the term of the Collective Agreement implied by arbitral principle, to determine if those actions were arbitrary, discriminatory or made in bad faith.

The *Fewer* award also stated, at page 26, as follows:

The Arbitration Board will review the assessment made by the Employer that the Grievor was unsuitable. In doing so, the Board will consider the process that was followed by the Employer and the factors that were taken into consideration when the assessment was made. It is not the role of the Arbitration Board to substitute its own

opinion as to whether the Grievor was suitable to continue in her employment. As stated, the Board will review the Employer's assessment and determine whether it was reasonable, and not arbitrary, discriminatory or made in bad faith. When reviewing whether the decision was reasonable, the Board will consider the reasons given by the Employer for the termination of employment and whether the Employer took into consideration the relevant factors and did not make a decision based on irrelevant factors.

A standard of reasonableness was applied to an employer's decision to terminate a probationary employee in *Her Majesty the Queen in Right of Newfoundland v. NAPE (Byrne)*, May 12, 2001 (Fagan) (the "Byrne" award). In the *Byrne* award the grievor was reinstated when the employer could not substantiate the reason for its assessment. The *Byrne* award was upheld by the Newfoundland and Labrador Court of Appeal in *NLAPPE v. Newfoundland Treasury Board* (2003) 227 Nfld. & P.E.I.R. 37 (NLCA). In that decision, the Court of Appeal stated as follows, at page 46:

As to the requirement that the standard against which the probationary employee is to be assessed must be reasonable, the majority cites, in further support the *Haynes Catering* decision of arbitrator Easton. While it cannot be said that these principles are universally accepted, it is fair to say that they represent widely espoused views. Certainly it cannot be said that these are a patently unreasonable interpretation of the applicable principles. See: Brown & Beatty, *Canadian Labour Arbitration* (3rd Ed.) Canada Law Book Inc., looseleaf, paragraph 7:5020 for a discussion of the views taken of the standard of review of disciplinary action against a probationary employee.

The principles set out in the *Fewer* award have been followed in subsequent arbitration awards including *Newfoundland and Labrador and NAPE (Pijogge)*, 2007 (Alcock) and *NAPE v. Her Majesty the Queen in Right of Newfoundland and Labrador (Singaravelu)*, May 21, 2010 (Clarke). It is noted that the language of the current Collective Agreement is similar to the collective agreement language under consideration in the *Fewer* award and the two awards cited that followed *Fewer*. It is therefore appropriate to apply these principles.

The Arbitrator will first consider whether the assessment made by the Employer as to suitability and competence of the Grievor, was reasonable and not arbitrary, discriminatory or made in bad faith. It is not the role of the Arbitrator to substitute his opinion for the Employer's opinion as to suitability or competence. The Arbitrator may review the information available to the Employer at the time the

decision was made, and the reasons given by the Employer for the decision. The Arbitrator will also consider whether the decision was motivated by any malice or ill will towards the Grievor, or by any discriminatory or irrelevant factor. The Arbitrator will then review the Employer's actions generally to determine if those actions were arbitrary, discriminatory or in bad faith.

The Arbitrator has considered how the issue of the suitability of a probationary employee was applied in *Brantwood Residential Development Centre v. ONA* (1992) 31 L.A.C. (4th) 18 (Starkman) ("*Brantwood*"). In the *Brantwood* case, the arbitrator considered that the purpose of a probationary period is to allow the employer time to assess the suitability of an employee. Suitability was found to include professional competence and attitude. In that case the grievor was a probationary employee employed as a nurse in a facility for mentally and physically disabled residents. The employer had a reasonable basis to believe that the grievor was not suitable, based on the opinion of the grievor's co-workers, who were part of a multi-disciplinary team. The opinion of the co-workers was that the grievor's attitude and behaviour indicated that she would not fit in to the workplace.

The Grievor's testimony conflicted with the testimony of other witnesses with respect to certain incidents. In this regard, there are issues of credibility for the Arbitrator to consider. One of the issues related to credibility is the interest a witness has in the outcome of the case. Another issue is the most likely probability of what occurred. With respect to credibility, the Arbitrator refers to the British Columbia Court of Appeal decision in *Faryna v. Chorny* [1952] 2 D.L.R. 354 at 357 which states, in part, as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must be to reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Grievor testified that Gloria Earle, Nursing Educator, was "out to get her", implying that her competency assessment of the Grievor was motivated by bad faith or ill will towards the Grievor. Having considered the testimony of Ms. Earle and the other witnesses, the evidence does not

establish that Ms. Earle had any malice or ill will towards the Grievor. The evidence indicates that Ms. Earle exercised her professional judgment as a Nursing Clinical Educator. She observed the Grievor and considered comments made by co-workers, when preparing the competency assessment. Ms. Earle's observations and recommendations were based on the competency and suitability required for the position of PCA. She followed the PCA generic competency checklist. It was not established that Ms. Earle considered irrelevant factors. Ms. Earle was not a management employee, and had no authority to make a decision with respect to the continuation of the Grievor's employment. Management consulted with Ms. Earle in her professional capacity, and she gave her opinion in that capacity.

The evidence does not establish malice or ill will towards the Grievor by any of the other witnesses who testified as to their observations or opinions with respect to the Grievor's competency or suitability. None of the witnesses knew the Grievor prior to meeting her in the workplace. The Grievor expressed concerns about the other workers. For example, the Grievor objected to Mr. Meadus frequently giving her a pat on the back and telling her she was doing a good job, objected to Mr. Stockley for appearing to be "hiding something" and objected to Ms. Herridge because Ms. Herridge told her that providing orientation to a PCA was not part of her job. Having regard to the nature of the Grievor's concerns and the testimony of Mr. Meadus, Mr. Stockley and Ms. Herridge that their observations of the Grievor were based on their experience and expertise, I do not find that any one of them had any malice or ill will towards the Grievor.

There were several specific incidents that were considered by the Employer. Tammy Herridge testified that the Grievor asked if she could give Tylenol to a visitor in a patient's room. Ms. Herridge said she told the Grievor that she was not permitted to give any medication, and that medication could only be given by a Nurse to a patient when there was a Doctor's order. Ms. Herridge felt that this was basic knowledge the Grievor should have known. The Grievor testified that she told Ms. Herridge that a patient was in pain and wanted a Tylenol. There was a discrepancy between the testimony of Ms. Herridge and the report by Ms. Earle that the Grievor asked to give Tylenol to a patient. However, both the testimony of Ms. Herridge and the report of Ms. Earle raised the question of whether a PCA could give a Tylenol. Ms. Herridge had a detailed recollection of the events of the day and had no personal interest in the outcome of this case. She recalled her response to the Grievor when she asked about giving a Tylenol. It is most likely that the events occurred as described by Ms. Herridge. The Grievor asked whether or not she could give a Tylenol to a visitor. The Grievor did not attempt to administer a Tylenol. However, she asked a question that caused Ms.

Herridge to be concerned, because she felt that it showed lack of basic knowledge that a PCA should know.

Another incident concerned the Grievor entering an isolation room without a mask. Ms. Earle testified that there was a sign outside the door of the room and that she explained to the Grievor that the sign meant the patient was in isolation and she was required to wear a mask to go in the room. Ms. Earle testified that she left the area, and when she returned, the Grievor told her she had gone in the room without a mask. Ms. Earle could not believe that the Grievor had entered the room just after she explained the sign. The Grievor testified that there had been a sign on the door earlier in the day, but the sign was not on the door when she went in the room. However, the Grievor did not deny her conversation with Ms. Earle about the room. The patient was suspected of having tuberculosis, and the Grievor potentially exposed other patients and staff to tuberculosis by entering the room without a mask. A short time later the test result came back negative. Ms. Earle did not report the incident as an occurrence. She explained that the test result came back soon after she learned that the Grievor entered the room without a mask. Having regard to the evidence about this incident, it is most likely that the sign was on the door at the time the Grievor entered the room, and that the Grievor did not follow the direction she was given by Ms. Earle. The Grievor's actions caused a potentially serious situation. This was an incident that the Employer was entitled to take into account when assessing competence and suitability.

Other incidents concerned basic skills and attitude. Several witnesses testified with respect to the Grievor's skills at bathing a patient, which is one of the basic competencies of a PCA. Ms. Ivany testified that the Grievor was a "little incompetent" with bathing a patient. Mr. Meadus testified that the Grievor was too slow. Ms. Earle testified that the Grievor needed direct supervision in the task. A concern was also expressed regarding the Grievor's failure to check on patients and follow up on incidents related to patient safety. For example, when the Grievor found that a patient's room door was closed and she believed that it was locked, she did not make any further inquiry of her supervisor or of the patient. Ms. Herridge testified that the patient could have fallen down behind the door and that patient room doors do not lock in any event. On another occasion, instead of answering a patient's call bell herself, the Grievor went looking for her supervisor to answer the call bell. Mr. Meadus testified that the Grievor did not show initiative. On one occasion, he left her in the room after they started to make the bed. When he returned, the Grievor had not done anything further to make the bed.

The Employer was entitled to take into account the concerns of staff that were relevant to competence and suitability. The Employer was entitled to consider the detailed competency assessment completed by Ms. Earle following her observation of the two additional orientation shifts on June 2 and 3, 2010. The competency assessment had attached to it a check list completed by Ms. Earle showing generic competencies for a PCA. Ms. Earle concluded that the Grievor was unable to be assigned to work independently in the role of a PCA.

The Employer acted on reports from five persons who were independent of each other, including a Nursing Educator, Registered Nurse, two LPNs and one PCA. Ms. Earle, Clinical Nursing Educator, stated in her competency assessment that the Grievor was unable to function independently and required step by step instruction in her role as a PCA. Joan Ivany, LPN, testified that the Grievor was not ready to be assigned to a unit on her own. Tammy Herridge, RN, testified that the Grievor did not know the basic procedures that a PCA should know and she had safety concerns about the Grievor. Winston Stockley, LPN, testified that he feared for patient safety if the Grievor was left alone with a patient. Jamie Meadus, PCA, observed that the Grievor could not perform the basic duties of a PCA. The Grievor was assigned to these persons during five different orientation shifts. They all expressed concerns about the Grievor.

It was reasonable for the Employer to consider the nature of the job and the skill level required having regard to the context of the workplace. In the context of the acute care facility at the Health Sciences Centre, patients are vulnerable and may require a high level of care. A PCA is required to work independently and to be part of a professional team. As a PCA with Central Staffing, the Grievor could be assigned to any unit in the Health Sciences Centre as required. The Employer was also entitled to expect the basic skill level for a PCA. The Employer's decision was reasonable and was not arbitrary, discriminatory or made in bad faith when it assessed the Grievor as unsuitable and incompetent.

The Arbitrator has considered the actions by the Employer generally. In this regard, it is submitted by the Union that the Grievor did not have a fair opportunity to demonstrate suitability and competence, because she worked 66.5 hours out of a total probation period of 487.5 hours, with five orientation shifts. The Union submitted that the Grievor should have had a better opportunity to establish her suitability and competence. The normal orientation provided by the Employer included a corporate orientation, site orientation and three orientation shifts. Each of the orientation shifts was on a unit under the supervision of a PCA, LPN or RN. Following the three orientation shifts, each

of the staff persons who supervised the Grievor expressed concerns to the Nursing Clinical Educator, Ms. Earle. Ms. Earle told the Grievor that she could not assign her to work a regular shift schedule, and that management would be consulted regarding further orientation. Ms. Earle reported her concerns to the Grievor's Manager, Gerard Kenny. Based on Ms. Earle's recommendation and Mr. Kenny's investigation, it was decided to provide the Grievor with two additional orientation shifts. Mr. Kenny met with the Grievor and a shop steward to explain that she would have the opportunity for two additional orientation shifts and that there would be a competency assessment. The Grievor was familiar with the basic competencies set out on the generic competency form, as she had completed the form as a self assessment during her site orientation. The process was explained to the Grievor by Mr. Kenny. The Grievor had an opportunity to demonstrate her competence and suitability during the two additional orientation shifts. The Employer's actions generally do not indicate that the Employer acted in a manner that was arbitrary, discriminatory or in bad faith.

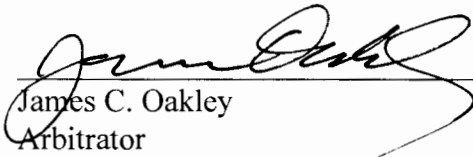
The Union also raised the issue of time limits under Article 13.05. Article 13.05 states that an expression of dissatisfaction shall be communicated to the Grievor within ten days of the event of a complaint. In this case, the Employer made an assessment of the Grievor which was the basis for the termination of her employment as a probationary employee. The Employer's assessment was based on information provided to the Employer from various sources, including the statements by witnesses and the written competency assessment completed by Gloria Earle. The Employer made its assessment under Article 13.01 (c) some time between the report of Ms. Earle dated June 4, 2010, and the termination of the Grievor's employment on June 17, 2010. The Employer submits that there was no evidence that the parties did not agree to an extension of the time limits. However, the Arbitrator is unable to conclude from the evidence that there was an agreement to extend the time limits. This issue may be resolved by the fact it was not established from the evidence that the termination of the Grievor's employment did not occur within ten days of the event of a complaint. Therefore a violation of Article 13.05 has not been proven.

The Employer did not violate the Collective Agreement. The Employer's assessment of the Grievor as to unsuitability and incompetence was reasonable and was not arbitrary, discriminatory or made in bad faith. The Employer's actions generally, having regard to the procedure followed by the Employer, and the circumstances of the case, were not arbitrary, discriminatory or in bad faith.

Decision

For the reasons stated in the Award, the grievance is denied.

DATED this 14th day of April, 2011.


James C. Oakley
Arbitrator