

IN THE MATTER OF AN ARBITRATION

BETWEEN

**CORNWALL COMMUNITY HOSPITAL**  
("the Hospital" / "the Employer")

- AND -

**CANADIAN UNION OF PUBLIC EMPLOYEES**  
**LOCAL 7811**  
("the Union")

CONCERNING A UNION POLICY GRIEVANCE (#23-12-2015) AND A GROUP  
GRIEVANCE (#15-1-2016)

**BOARD OF ARBITRATION:**

Christopher Albertyn, Chair  
Joe Herbert, Union Nominee  
Tor Veltheim, Employer Nominee

**APPEARANCES**

For the Union:

Mark Wright, Counsel  
Diane Pecore, Local President  
Shawn Alguire, Local Vice-President  
Nick Autine, First Vice-President  
Allen Renwick, Recording Secretary  
Louis Rodriques, Vice-President, OCHU  
Paul Boileau, CUPE National Representative

For the Employer:

J.D. Sharp, Counsel  
Tara Hristov, Student-at-Law  
Lennie Lejasisaks, Manager, Labour Relations  
Courtney Maruno, Human Resources Business Partner

Hearings held in CORNWALL on September 13, 2017 and May 10, 2018  
Executive Session held in OTTAWA on June 12 and September 18, 2018.  
Further written submissions received in November and December 2018.  
Award issued on March 5, 2019.

**AWARD**

1. This award concerns two grievances: a Union grievance and a group grievance. The grievances are over changes to the master schedule and shift assignments of employee in the Hospital's housekeeping department. The Union submits that these changes amounted to the elimination of the employees' positions and the layoff of the employees.

2. The consequence of the changes in the master schedule were that the employees had their shift times changed, on the basis of employee choice, by seniority. The Hospital says what occurred were changes to the shift schedule, not a layoff, nor the elimination of a position.

**Facts**

3. The parties have an Agreed Statement of Facts, which reads:

1. In or around November 2015, the Hospital advised the Union that a new Chemotherapy/Systemic Therapy unit would be opening in February or March of 2016.
2. On November 18, 2015, the Hospital advised the Union that it would be making changes to the Master Rotation in the Housekeeping Department to coincide with the opening of the new unit (Tabs 3 and 4).
3. At a Housekeeping Staff Meeting held on December 1, 2015, the Hospital advised Housekeeping staff that it would be making changes to the Master Rotation, including changing Randy Fraser's day shift into an evening shift. The Hospital further advised that, in light of the schedule changes, it would be providing employees with an opportunity to select shifts and work locations based on seniority (Tabs 5, 6 and 7).

4. The Hospital did not provide notice in accordance with Article 9.08(A).
5. The Hospital provided the Union and employees with information related to the shifts and associated duties to assist with their selection of a shift and/or location. The Hospital gave employees approximately 30 days to make their selection (Tab 8).
6. In an email dated January 29, 2016, the Hospital formally notified the Union of the changes to the Master Rotation. The Hospital advised that the “reason for the change in the master [rotation] is because the Hospital has moved a 7-3 line to a 3-11 line due to the opening of our new Systemic Therapy Unit” (Tab 9).
7. The new Master Rotation took effect on March 2, 2016.
8. There was no change to the total full-time hours worked by cleaners before and after the new rotation.
9. Of the total full-time shifts in Housekeeping, one shift was changed from a day shift to an evening shift (this was Randy Fraser’s shift).
10. The following employees in the Housekeeping Department had their hours changed as a result of the employer’s changes to the Master Rotation and the subsequent employee selection process:
  - Shirley Bougie’s shift changed from 7 a.m. – 3 p.m. to 8 a.m. – 4 p.m.
  - Sharon Poirier’s shift changed from 7 a.m. – 3 p.m. to 8 a.m. – 4 p.m.
  - Randy Fraser’s shift changed from 7 a.m. – 3 p.m. to 8 a.m. – 4 p.m.
  - Rita Forgues’ shift changed from 7 a.m. – 3 p.m. to 8 a.m. – 4 p.m.
  - Patty Bergeron’s shift changed from 8 a.m. – 4 p.m. to 7 a.m. – 3 p.m.
  - Sandra Roderick’s shift changed from 6 a.m. – 2 p.m. to 7 a.m. – 3 p.m.
  - Bruce King’s shift changed from 3 p.m. – 11 p.m. to 2 p.m. – 10 p.m.
  - Dave Pettem’s shift changed from 8 a.m. – 4 p.m. to 11 p.m. – 7 a.m.
  - Sue Racine’s shift changed from 2 p.m. – 10 p.m. to 3 p.m. – 11 p.m.
11. The job posting for Dave Pettem’s housekeeping position listed the “Hours” as “Scheduled – all shifts.”
12. Mr. Pettem utilized his seniority to change his shift from days to nights.

4. Article 9.08(A), referred to in the Agreed Statement of Facts is part of the central hospitals collective agreement between the parties. Article 9 deals with Seniority. Article 9.08 reads as follows:

9.08(A) - NOTICE AND REDEPLOYMENT COMMITTEE

(a) Notice

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

- (i) provide the Union with no less than five (5) months' written notice of the proposed layoff or elimination of position; and
- (ii) provide to the affected employee(s), if any, who will be laid off with no less than five (5) months' written notice of layoff, or pay in lieu thereof.

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

(b) A layoff shall not include a reassignment of an employee from her or his classification or area of assignment who would otherwise be entitled to notice of layoff provided:

- (I) reassignments will occur in reverse order of seniority;
- (II) the reassignment of the employee is to an appropriate permanent position with the employer having regard to the employees skills, abilities, qualifications and training or training requirements;
- (III) the reassignment of the employee does not result in a reduction of the employees wage rate or hours of work;
- (IV) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;

- (V) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and
- (VI) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

The Hospital bears the onus of demonstrating that the foregoing conditions have been met in the event of a dispute. The Hospital shall also reasonably accommodate any reassigned employee who may experience a personal hardship arising from being reassigned in accordance with this provision.

- (c) Any vacancy to which an employee is reassigned pursuant to paragraph (b) need not be posted.
- (d) Redeployment Committee

At each Hospital a Redeployment Committee will be established not later than two (2) weeks after the notice referred to in 9.08(A)(a) and will meet thereafter as frequently as is necessary.

- (i) Committee Mandate

The mandate of the Redeployment Committee is to:

- (1) Identify and propose possible alternatives to the proposed layoff(s) or elimination of position(s), including, but not limited to, identifying work which would otherwise be bargaining unit work and is currently work contracted-out by the Hospital which could be performed by bargaining-unit employees who are or would otherwise be laid off;
- (2) Identify vacant positions in the Hospital or positions which are currently filled but which will become vacant within a twelve (12) month period and which are either:
  - (a) within the bargaining unit; or
  - (b) within another CUPE bargaining unit; or
  - (c) not covered by a collective agreement.

- (3) Identify the retraining needs of workers and facilitate such training for workers who are, or would otherwise be, laid off.
- (4) Subject to article 9.11, the Hospital will award vacant positions to employees who are, or would otherwise be laid off, in order of seniority if, with the benefit of up to six (6) months retraining, an employee has become able to meet the normal requirements of the job.
- (5) Any dispute relating to the foregoing provisions may be filed as a grievance commencing at Step 2.

(ii) Committee Composition

The Redeployment Committee shall be comprised of equal numbers of representatives of the Hospital and of the Union. The number of representatives will be determined locally. Where for the purposes of HTAP (the Ontario Hospital Training and Adjustment Panel) there is another hospital-wide staffing and redeployment committee created or in existence, Union members of the Redeployment Committee shall serve on any such hospital-wide staffing committee established with the same or similar terms of reference, and the number of Union members on such committee will be proportionate to the number of its bargaining unit members at the particular Hospital in relation to other staff groups.

Meetings of the Redeployment Committee shall be held during normal working hours. Time spent attending such meetings shall be deemed to be work time for which the representative(s) shall be paid by the Hospital at his or her regular or premium rate as may be applicable.

Each party shall appoint a co-chair for the Redeployment Committee. Co-chairs shall chair alternative meetings of the Committee and will be jointly responsible for establishing the agenda of the Committee meetings, preparing minutes and writing such correspondence as the Committee may direct.

(iii) Disclosure

The Hospital shall provide to the Redeployment Committee all pertinent staffing and financial information.

(iv) Alternatives

The Redeployment Committee or, where there is no consensus, the committee members shall propose alternatives to cutbacks in staffing to the Hospital's Chief Executive Officer and to the Board of Directors.

At the time of submitting any plan concerning rationalization of services and involving the elimination of any position(s) or any layoff(s) to the District Health Council or to the Ministry of Health, the Hospital shall provide a copy, together with accompanying documentation, to the Union.

9.08(8) - RETIREMENT ALLOWANCE

Prior to issuing notice of layoff pursuant to article 9.08(A)(a)(ii) in any classification(s), the Hospital will offer early retirement allowance to a sufficient number of employees eligible for early retirement under HOOPP within the classification(s) in order of seniority, to the extent that the maximum number of employees within a classification who elect early retirement is equivalent to the number of employees within the classification(s) who would otherwise receive notice of layoff under article 9.08(A)(a)(ii).

An employee who elects an early retirement option shall receive, following completion of the last day of work, a retirement allowance of two (2) weeks' salary for each year of service, plus a prorated amount for any additional partial year of service, to a maximum ceiling of fifty-two (52) weeks' salary.

9.08(C) - VOLUNTARY EXIT OPTION

If after making offers of early retirement, individual layoff notices are still required, prior to issuing those notices the Hospital will offer a voluntary early exit option in accordance with the following conditions:

- i) The Hospital will first make offers in the classifications within department(s) where layoffs would otherwise occur. If more employees than are required are interested, the Hospital will make its decision based on seniority.
- ii) If insufficient employees in the department affected accept the offer, the Hospital will then extend the offer to employees in the same classification in other departments. If more employees than are required are interested, the Hospital will make its decision based on seniority.
- iii) In no case will the Hospital approve an employee's request under (i) and (ii) above

for a voluntary early exit option, if the employees remaining are not qualified to perform the available work.

- iv) The number of voluntary early exit options the Hospital approves will not exceed the number of employees in that classification who would otherwise be laid off. The last day of employment for an employee who accepts a voluntary early exit option will be at the Hospital's discretion and will be no earlier than thirty (30) calendar days immediately following the employee's written acceptance of the offer.

An employee who elects a voluntary early exit option shall receive, following completion of the last day of work, a separation allowance of two (2) weeks' salary for each year of service, to a maximum of fifty-two (52) weeks' pay.

5. The Hospital relies on Article H.2(d) of the local appendix for its decisions. The relevant portions read:

H.2. Scheduling

The normal hours of work shall be as follows:

- (a) A four-week work schedule shall be posted two (2) weeks in advance of the commencement of the work schedule;

...

- (d) It is understood that should the Hospital decide to change the employees' master rotation, it shall so notify the Union and, if requested, meet to discuss the proposed changes at least thirty (30) days in advance of such changes;

...

6. From the Hospital's perspective, no positions were eliminated, and no employees were laid-off. All that occurred was a change in the master rotation, as contemplated in Article H.2.

7. The Hospital relies also on the Reservation of Management Rights



provision in the local appendix, Article B. The relevant portions read:

The Union acknowledges that it is the exclusive function of the Hospital subject to the terms of this agreement:

- a) To maintain order, discipline and efficiency, and to make, alter, and enforce rules and regulations to be observed by employees.
- b) To ... direct, ...transfer ... employees, and to assign employees to shifts, ...
- c) Generally to manage and operate the hospital in all respects and, without restricting the generality of the foregoing, to determine ... the services to be rendered, the methods, the work procedures, ... to schedule the work and services to be provided and performed; ... All of the above actions by the Hospital are subject to the grievance procedure.

8. As indicated in paras. 3 and 9 of the Agreed Statement of Facts, the shift that Randy Fraser had been working in The Systemic Therapy Unit, 7am to 3pm, was changed to an evening shift because of changes in the anticipated needs of that Unit. Also, the Hospital required greater coverage later in the day, so some day shifts had a later start and finish time, though they remained day shifts.

9. Rather than move Mr. Fraser to the new shift, the Hospital decided it would be fairest to the full-time housekeeping employees to open up all the shifts, on the basis of seniority. Mr. Fraser, being the most senior full-time employee, was then able to choose his shift. The further available shifts were selected down the line of seniority, over a period of a month, with the most junior being allocated the last remaining shift. This resulted in a new master rotation.

10. No-one lost any work or pay; though many of the full-time housekeeping employees had changes to the start times of their shift, as set out above in para. 10

of the Agreed Statement of Facts. No-one's actual work hours of their shift changed from days to evenings, or from evenings to nights, except Mr. Pettem's. He wanted that change. All of the employees remained within housekeeping, though some were assigned to different areas of work.

11. The Union policy grievance is the Union's claim that it ought to have received notice of the elimination of a position, on the argument that the permanent alteration of Mr. Fraser's shift was "the elimination of a position", as contemplated in Article 9.08(A)(a) and he ought to have received notice of layoff.

12. The group grievance by 17 employees claims that they ought to have received notice of layoff. They claim to have been laid-off because their shifts were changed.

13. At the hearing, the Union also challenged the unilateral process used by the Employer for employees to select their new shifts on the basis of seniority. The Union accepted, though, that the employees whose new shift had the same time slot (days, evenings or nights) did not have their positions eliminated. The Union continued to pursue its claim that Mr. Fraser's position had been eliminated because his former shift was changed from days to evenings.

14. The job posting language in Article 9.05 reads:

- (a) Where a permanent vacancy occurs in a classification within the bargaining unit or a new position within the bargaining unit is established by the Hospital, such vacancy shall be posted for a period of seven (7) consecutive calendar days. ...
- (b) The postings shall stipulate the qualifications, classifications, rate of pay, department and shift and a copy shall be provided to the Chief Steward.

...

### **Submissions**

#### *The Union*

15. With respect to the Union grievance and Mr. Fraser's part in the group grievance, the Union argues that what occurred was the elimination of Mr. Fraser's position. He says both the Union and Mr. Fraser should have received notice of layoff.

16. The Union submits that the Hospital could not reassign Mr. Fraser to the evening shift because that was not "the same or substantially similar shift" to his day shift. Therefore Mr. Fraser's position was eliminated, and he and the Union were entitled to notice of layoff.

17. The Union argues also that, besides Mr. Fraser, all of the full-time employees in housekeeping were laid-off because they each lost their shift and could then bid for the newly created positions on the basis of seniority; there being no foundation for such a procedure under the collective agreement. The Union characterizes what occurred as a general layoff of the full-time housekeeping employees, without proper notice to the Union and to the employees.

18. The foundation for the Union's argument is Article 9.05, the Job Posting provision, above. The Union submits that the actual shift is an essential feature of the job posting. The Hospital is required to stipulate the shift; it makes up part of

what constitutes the position being posted. A failure to specify the shift in a job posting is a violation of the central collective agreement: *Perth and Smiths Falls District Hospital v. CUPE, Local 2119*, 2017 CarswellOnt 2532 (Albertyn).

19. The Union asserts that the importance of an employee's shift to the position they hold is borne out by the reassignment language, which allows reassignment only to a position that has "the same or substantially similar shift or shift rotation" (Article 9.08(A)(b)(V)). The Union submits that the actual shift is a "critical job interest" (see *Participating Hospitals v. Participating Local Unions of CUPE and SEIU*, central interest award, June 28, 1999 (Adams), p.4). The Union refers to other provisions of the collective agreement to suggest that the employee's actual shift is recognized as a critical job interest, e.g. in the right of a transferred employee to return to their "former duties on the same shift ..." during the trial period of the transfer, in Article 9.07(A), and following pregnancy and parental leave under Articles 12.06 and 12.07.

20. The Union relies on *Carlton Cards v. Canadian Paperworkers Union, Local 322*, 1990 CarswellOnt 5211 (Devlin). That case determined that the shift was a fundamental aspect of the job, such that the change of shift from the day to the afternoon meant the elimination of the job. The finding was made on the strength of two collective agreement provisions: the first, entitling a laid-off employee, on recall, to return to the shift they occupied when laid-off; the second, requiring that the shift of the position be included in job postings.

21. The Union refers also to *Kraus Carpet Mills Ltd. v. UFCW, Local 175*, 1991 CarswellOnt 6512 (Marszewski). The arbitrator found that the employer could not introduce a rotating shift system that nullified all the existing shifts,

because shift entitlement was founded on seniority.

22. The Union relies also on *Scarborough Hospital v. CUPE, Local 1487*, 2006 CarswellOnt 760 (Burkett). The same collective agreement was being interpreted. The issue was whether a change of shift times meant that the affected employees had been laid-off. As in the present case, the Union acknowledged that “a layoff does not occur, nor is there a requirement for notice of layoff, should the reassignment of an employee protect the critical job interests of the employee that are identified” (para. 8) in Article 9.08(A)(b). The board of arbitration found that the limitations on reassignment in Article 9.08(A)(b) (to avoid the reassignment being considered a layoff) were “bright line requirements” that had to be met (para. 13), to avoid triggering the seniority rights that applied in the event of layoff. The board of arbitration then concluded that, by reducing the shift hours of certain employees and by introducing rotating shifts for some who had been on straight day shifts, the hospital had not met the bright line requirement to reassign each employee to “the same or substantially similar shift or shift rotation” (para 14).

23. The Union contrasts the management rights provisions in the collective agreement before us with the language in the collective agreement that was before Arbitrator P. Picher in *Kingston General Hospital v. CUPE, Local 1974*, 2011 CarswellOnt 5952 and Arbitrator Cummings in *Kingston General Hospital v. CUPE, Local 1974*, 2008 CarswellOnt 10329.

24. The *Kingston General Hospital* case (P. Picher) had the following facts. The affected employee, Ms. O’Neil’s, day shift was cancelled and replaced by a midnight shift. She volunteered to move to the midnight shift from the day shift.

She, being the more senior of the volunteers, was given the shift. She did not want to go back to the day shift. The Union brought a policy grievance to require that she be returned to the day shift, then laid-off, and that a new position be posted on the night shift, for which Ms. O'Neil could apply.

25. Arbitrator P. Picher found for the hospital that there was no layoff, on the following facts: the shift change was for bona fide operational reasons in the interest of the efficient operation and the highest standard of service; management had an express right to establish and change shifts; the affected employee no longer desired to work the eliminated shift, but wanted to work on the new shift; reasonable notice was given to the Union of the shift change; and there was no change in complement and no essential change in job duties.

26. Consequently, Arbitrator P. Picher found that the notice provisions required for a layoff were not triggered, and that the hospital could make the shift change.

27. The Union submits that, in the context of the above facts, which militated against making any change to what management had done, Arbitrator P. Picher relied particularly on the extensive management rights for the finding she made. In the case before Arbitrator Picher the hospital had the express management rights: "to determine to what time and under what conditions" employees shall perform their duties; and "to determine in the interest of efficient operation and highest standard of service, the hours of work, work assignments ... provided always that reasonable notice shall be given to the employee or employees involved in any changes to be made". In the Union's submissions, those management rights are not matched in the collective agreement before us.

28. The Union submits that the Hospital cannot use its management rights to layoff the whole housekeeping staff and then apply a variant of the principle of seniority that is not found in the collective agreement. The Union refers to the particular applications of seniority in the collective agreement, e.g. to apply for jobs and for bumping on seniority, but nowhere is there reference to the re-assignment of all the shifts in a department by seniority. It argues that how an employee exercises seniority in employment is a function of what the collective agreement allows. What the Hospital did, the Union submits, was to allow bumping for the shifts without notice of layoff, when the collective agreement allows bumping only after notice of layoff. Consequently, the Union submits that all 17 people in the housekeeping department were laid-off, and they and the Union ought to have been given notice of their layoff.

29. The Union accepts that a slight change of the start time of a shift, does not alter the shift. So, a shift starting an hour later than what occurred previously, is not a change of shift. A day shift is still a day shift, even when it starts an hour later.

30. The recent award by Arbitrator Craven in *Lakeridge Health Corporation and Canadian Union of Public Employees*, unreported, Interim Award, issued on September 21, 2018, concerned a hospital moving employees from a site in Ajax to a site in Bowmanville. All aspects of their work remained the same other than the location change. The question was whether this constituted a layoff, engaging the provisions of Article 9.08(A)(a), in light of Article 9.08(A)(b)(IV).

31. Arbitrator Craven found that the hospital's action was a layoff. He construed 9.08(A)(a) – the layoff provision – in light of the qualification to

reassignment found in 9.08(A)(b)(IV), on the basis of the site location change. While noting that a strict construction of the Article may not be supportive of his analysis, he found that a purposive reading would recognize the importance of job location to the employees and so he characterized the relocation as a layoff.

32. Arbitrator Craven found that a layoff does not require a temporary disruption or cessation of work. The conditions applying to a reassignment in the Article 9.08(A)(b) (for those who would otherwise receive notice of layoff) described what would amount to a layoff. Those conditions are the “critical job interests” of the employee, the loss of which would amount to a layoff.

33. The Union asks, in applying this reasoning to the present case, that we arrive at a similar construction between (a) and (b) of Article 9.08(A)(V) on the basis of the “same or substantially similar shift” provision.

34. The Union submits, following the *Lakeridge* decision, that a reassignment that does not conform to the reassignment language is a layoff and it requires notice under Article 9.08(A)(a).

#### *The Hospital*

35. The Employer says there was no layoff. The Hospital needed to change the Master Rotation work schedule to address changes in operational demands. The Hospital had a complete right to change the master rotation under Article H.2(d). All the Hospital had to do was give timely notice to the Union of the proposed change, which it did. It could then change the schedule as it chose. It decided to do so in a way that respected employee seniority, by allowing each employee to pick their shift, on the basis of seniority. Not even an hour of work



was lost by the housekeeping staff. There was accordingly no layoff.

36. The Employer points out that the general notions of layoff do not support the Union's position. As a general definition, "employees cannot claim to have been laid-off if there has been no break or interruption of employment or loss of work" (Brown & Beatty, 6:2200 – Layoff). For there to be a layoff, there must be a cessation of work. If the employee continues to work substantially the same number of hours, their grievance is not a layoff, whatever else it may be (*Canada Safeway Ltd. v. RWHDSU Local 454*, [1998] CarswellSask 298, 1 SCR 1079, para. 75).

37. The Employer points out that of the 9 employees affected by shift changes, 8 had their shift times changed by 1 hour. The 9<sup>th</sup> employee, Mr. Pettem, used his seniority to choose to move from the day to the night shift. All that happened for the employees was a change of shift time, not a layoff.

38. In response to the Union's suggestion that the job posting provisions have relevance to this case, the Employer responds that, if the Union were correct, then any change to the "qualifications, classification, rate of pay, department or shift" of a position would result in a layoff. So a change to the rate of pay or the qualifications would then mean that a layoff had occurred. This, the Hospital submits, is illogical and not what the parties intended. The Employer argues that the position the employee applies for under a job posting is the position as it exists then, subject to the right of the Employer to make changes, such as changes to the master schedule.

39. The Employer submits that there is a difference between a shift and a

position. A shift does not define a position. So, when a shift is eliminated, with no loss of any work by any employee, that is not the elimination of a position. That is just a change in an employee's shift assignment.

40. The Employer urges us to review all of the provisions in the layoff language. They necessarily contemplate a situation in which actual hours of work are lost, an actual displacement occurs. There is reference in the Note that appears after Article 9.08(A)(a) to a "subsequent displacement": "Where a proposed layoff results in the subsequent displacement of any member(s) of the bargaining unit, ...". The Employer submits this means that a layoff must be one that causes a displacement. In the facts of this case, there was no displacement of any employee: no-one lost any work, no-one was displaced. This suggests that there was no layoff.

41. The Employer points to other provisions within the layoff language, e.g. Article 9.08(A)(d)(i) and 9.08 and 9.09, that are replete with the notion of displacement. He argues that all of these provisions make sense only if someone has lost their position or lost hours of work and must either accept the layoff or bump to retain a position in the Hospital. Assuming Mr. Fraser accepted the layoff, the Hospital would have had an obligation to recall him in the event of a vacancy, but there would immediately have been a vacancy, viz. for the shift that replaced his shift.

42. The Employer suggests that the re-assignment language, on which the Union relies heavily, Article 9.08(A)(b)(V), is not triggered because there was no re-assignment of any employee. There was no job change for any of the housekeeping employees. There was only a change in their shift hours.

43. The Employer refers to *Kingston General Hospital* (P. Picher), above, particularly at para. 74, and points out the “cumbersomeness” of the layoff procedures, how elaborate they are, with 5 months’ notice to the Union and to the affected employees, with multiple options for the affected employee in possible early retirement, or voluntary exit, or bumping. The Employer suggests that only the clearest language should be understood to limit the employer’s right to set the work schedule and the work hours.

44. As to the Union’s argument that the *Kingston General Hospital* case (P. Picher), above, has stronger language than obtains in the collective agreement before us, the Employer submits that the entitlement of the Hospital to change the rotations within the schedule is sufficient authority for the Hospital to act as it did.

45. The Hospital refers to *Kingston General Hospital* (Cummings), above, for the proposition that a hospital is entitled to change the hours of work of employees on reasonable notice, as was done in this case.

46. In *Kingston General Hospital and CUPE, Local 1974*, 2014 CarswellOnt 8534 (Goodfellow), for a position to be eliminated, “there must be some *actual reduction in the number of positions ...*” (para. 26). The Employer points out that there was no actual reduction in the number of positions in this case, hence, he submits, there was no elimination of a position.

47. With respect to Arbitrator Craven’s *Lakeridge Health Corporation* decision, the Employer submits the decision is wrongly decided. Nonetheless, on the facts of that case, as compared to those here, it argues that the Employer has a specific right to change employee work schedules, while in that case there was no

explicit right to change work locations.

48. The Employer argues that the *Lakeridge* decision ignores the necessity of first determining if a layoff occurred before any factors in Article 9.08(A)(b) are considered.

### **Decision**

#### *Article H.2*

49. Under Article H.2 the Employer is entitled to change the master rotation. That means it can change the employees' shifts. The Employer must give 30 days' notice to the Union of this intention, then it can make changes to the employees' shift schedules. The Employer may do so, provided no other rights under the collective agreement are breached. The scope of the Employer's right to change shifts is therefore limited by the Employer's obligations regarding layoff.

50. Following notice to the Union, the Employer allowed the available shifts to be selected by seniority to determine what shift reassignments would occur. The effect was that only one person moved to a shift that was not the same or substantially similar to what he had before, and he did that because he preferred to move from the dayshift to the nightshift.

#### *Elimination of position*

51. The collective agreement differentiates between "elimination of a position" and "layoff".

52. As was said in *Kingston General Hospital and CUPE, Local 1974* (Goodfellow), above, the elimination of a position refers to there being fewer positions than there were before. The elimination of a position becomes a layoff when not only are there fewer positions than there were before, but one or more employees have also lost work or some critical job interest as a result of the elimination.

53. For the elimination of a position, five months' notice is required only to the Union. No notice is required to the affected employee. Notice to the employee is required only in the event of layoff. This is because the elimination of a position is concerned with loss of work to the bargaining unit. It is a union concern, not an individual concern and only the Union receives notice of it.

54. Besides notice to the Union in Article 9.08(A)(a), the only provision within Article 9.08 that applies to the elimination of a position is Article 9.08(A)(d), the Redeployment Committee provisions.

55. The "elimination of position" has to do with the position and not with the person occupying it. The elimination involves only the loss of work done by that position. Positions belong to the bargaining unit, subject to management's rights under the collective agreement. So, when a position is eliminated, the Employer gives notice to the Union so that a Redeployment Committee is established to try to find ways to restore the lost work to the bargaining unit.

56. The mandate of the Committee includes finding alternatives for the elimination of the position, e.g. identifying work currently contracted-out but that could be brought back into the bargaining unit; and identifying positions that might become vacant in the next 12 months. The Committee looks for work to

substitute for work lost to the bargaining unit as a result of the elimination of a position.

57. Because, on the facts, no-one has lost work or hours as a result of the changes in shift times, and because the Union has not lost any bargaining unit work, the purposes for the Redeployment Committee's establishment are meaningless in the current case.

58. If there is no accompanying loss of work, the change of a shift within a position cannot amount to the elimination of that position. Therefore, the change of the hours of work of the employees in the housekeeping department, with no accompanying loss of work, was not the elimination of a position.

59. Accordingly, because the position occupied by Mr. Fraser continued, albeit at a different shift time, there was no loss of work to the bargaining unit, hence no elimination of his position.

### Layoff

60. Layoff is different. Whether a layoff has occurred involves an assessment of the impact on the incumbent of any change to a position.

61. The Union argues that what occurred was a reassignment under Article 9.08(A)(b) that did not result in all employees being reassigned to the same or a substantially similar shift. To avoid a layoff, a hospital's entitlement to assign an employee to a different classification or area of assignment must be in the context of the qualifiers that follow Article 9.08(A)(b), including (V), the requirement that the reassigned job be on the same or a substantially similar shift or shift rotation. Otherwise, that reassignment is a layoff (see *Scarborough Hospital v. CUPE*,

*Local 1487*, above, para. 13; *St. Joseph's Healthcare Hamilton and CUPE, Local 786*, 2015 CarswellOnt 5175 (Slotnick), para. 4, and the cases referred to therein). (For similarity between shifts, see: *Niagara Health Systems and SEIU Local 1*, 2005, Carswell Ontario 11143 (Whitaker), particularly para. 30; *St. Joseph's Healthcare Hamilton and CUPE, Local 786*, above). See also *Re Hamilton Health Sciences Corp. and CUPE, Local 4800 (Contracting Out Grievance)*, [2005] O.L.A.A. No. 305 (Burkett), employees, who would otherwise have received notice of layoff because of the contracting-out of their work, were reassigned in a manner contemplated in the reassignment language and so they were not entitled to notice of layoff.

62. In each of the cases referred to by the Union and by Arbitrator Craven in *Lakeridge*, the circumstances were such that the affected employees lost some substantive core component of their positions, some critical job interest. (In *Re CUPE, Local 1487 and Scarborough Hospital (Julien Grievance)*, [2004] O.L.A.A. No. 132 (Mitchnick) a unit was closed, the employees lost their positions and they were reassigned to vacancies across the hospital. The breach of the obligation to give notice of layoff applied to the employees who were forced to switch from 8-hour to 12-hour shifts and on nights, not days, with no opportunity to use their seniority rights. In *Re Scarborough Hospital and CUPE, Local 1487 (Contracting Out Grievance)*, [2006] O.L.A.A. No. 42 (Burkett), above, certain employees had their hours reduced and others had their shifts altered from straight days to rotating shifts.)

63. A layoff is of concern to the Union and to the affected individuals. That is why both receive notice. The focus, with respect to a layoff, is on the impact on the particular, individual employee who is affected. That is the correct focus in assessing whether, in fact, a layoff has occurred.

64. We recognize that layoff typically involves the loss of hours and earnings, if not the loss of the employee's complete job. It also involves such other items which parties may agree to in their collective agreement as constituting a layoff. The parties' collective agreement sets out conditions for reassigning employees facing layoff that enable a hospital to avoid the layoff. These conditions have been described as "critical job interests" (*Participating Hospitals* (Adams), above; *Scarborough Hospital* (Burkett), above, among others). The critical job interests involve the following: recognition of seniority, reassignment to an appropriate permanent position, without loss of wages or hours of work, within the original work location or nearby, and on the same or a substantially similar shift.

65. While these conditions apply to the reassignment of an employee who would otherwise be entitled to receive notice of layoff, they are a guide to what the parties intend for reassignments that would not amount to layoff in circumstances when the affected employees do not face the prospect of layoff. By describing the critical job interests as they do in the collective agreement, the parties are suggesting that, if these interests are not recognized in a reassignment, that may mean that a layoff has occurred.

66. In treating these critical job interests as a guide as to whether or not a change in employment through a reassignment amounts to a layoff, the critical job interests are not to be applied in a rote manner (i.e. the absence of one or another interest is, *ipso facto*, a layoff). An inquiry must be made, on the particular facts affecting the particular employee, as to whether a critical job interest has been lost. If so, a layoff has likely occurred.

Was Mr. Fraser laid-off?



67. A shift change might mean that an employee has been laid-off if that employee's critical job interest has been lost. It depends on the particular circumstances of the shift change in relation to the entitlements of the particular employee affected.

68. Mr. Fraser's morning shift in the Systemic Therapy Unit was eliminated, but through the seniority selection process the Employer undertook, he remained on the day shift as he had been before. Consequently, his shift ended up being substantially the same as it was before.

69. The fact that Mr. Fraser's own shift ceased to exist, and was substituted by an afternoon shift, did not determine what happened to him. Through the reassignment of the shifts he went to a substantially similar shift. It was still a day shift, such as he worked before. He suffered no loss of any critical job interest. Seniority was applied to his reassignment (he was the first to choose a shift, being the most senior); his reassignment did not result in a reduced wage or fewer work hours, and he continued to do the same work at the same site. He was, accordingly, not laid-off.

Was Mr. Pettem laid-off?

70. Mr. Pettem's case is virtually on all fours with that decided by Arbitrator P. Picher in the *Kingston Hospital* case, above. For similar reasons, we come to the same conclusion that Arbitrator Picher did. The shift change was for bona fide operational reasons, management had an express right to change shifts, the affected employee, Mr. Pettem, wanted to work the new shift, the required notice of the shift change was given to the Union, there was no change in classification, and no essential change in job duties.

71. Mr. Pattem, who did not grieve the change of his shift, had his shift changed to a shift that was not the same or substantially similar to what he had been working. In his case, this was not, though, a breach of a critical job interest. As we have noted, he elected to move from the day to the night shift and the notice requirements of H-2(d) were applied. His own job interest was maintained through the reassignment.

72. In these circumstances, it cannot be said that Mr. Pattem lost a critical job interest. He was therefore not laid-off, and so neither he, nor the Union, was entitled to notice of layoff.

Were any other employees laid-off?

73. All of the other housekeeping employees were reassigned to shifts that were the same or substantially similar to those they had worked before. None had their classification, area of assignment, wages, or hours of work changed as a result of the reassignment.

74. In the result, no-one was laid-off. The Union was therefore not entitled to notice of the elimination of a position, nor to notice of layoff, and none of the employees in the housekeeping department was entitled to notice of layoff.

Conclusions

75. The Union criticized the process followed by the Employer in effecting the reassignments. The Employer was entitled to change the master rotation. That means it was entitled to change the shifts of employees, subject to ensuring that the employees' critical job interests were respected. The Employer gave the

required notice of 30 days to the Union. The purpose of that notice is so that the parties can together discuss how best the critical job interests of the employees can be maintained with the changes the Employer wishes to make to their shifts. We have no evidence of the Union requiring a meeting with the Employer, as is provided following such notice. If the Union does not use the opportunity to discuss the proposed changes to the master schedule, the Employer can proceed unilaterally to effect the changes, as the Employer did in this case. In that event the Employer must ensure, as it did in this case, that the employees' critical job interests are maintained.

76. The Employer's changes to the master schedule had implications for the shift times of the housekeeping employees. The method for dealing with the proposed changes was appropriate for discussion in the master rotation meeting(s) between the Hospital and the Union, as is contemplated in Article H.2(d).

77. For the reasons given, there was no elimination of a position, as is contemplated in Article 9.08(A)(a), and no-one was laid-off because no-one suffered any material loss of their position, nor any loss of a critical job interest. Accordingly, the elimination of position and layoff provisions of the collective agreement were not engaged. Only Article H.2(d) was engaged and the Hospital gave the required notice for what it intended.

78. There was accordingly no requirement for the Hospital to give notice of layoff to Mr. Fraser, or to Mr. Pettem, or to the Union, or to any other employee. There was therefore no breach of the collective agreement.

79. The grievances are accordingly dismissed.

DATED at TORONTO on March 5, 2019.



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Christopher J. Albertyn  
Chair: Board of Arbitration

I concur.

“Tor Veltheim”

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Tor Veltheim  
Employer Nominee

I dissent (Dissent below).

“Joe Herbert”

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Joe Herbert  
Union Nominee

**DISSENT**

This determination in this case obviously turned on unique Local Appendix provisions and facts. Nevertheless, I think the Chair has viewed these through an

inaccurate lens, and I would correct this, with the greatest of respect to my colleague, as follows.

The Chair's appreciation of the term 'elimination of a position' is obviously wrong. In his view, for there to be an elimination of a position, a precondition is that there are fewer positions at the end than there were at the beginning. While it is a truism that the existence of fewer positions than before will mean one or more positions have been eliminated, that is not at all exhaustive of the circumstances in which an elimination of a position occurs. For example, the elimination of a position on the day shift and the simultaneous creation of a position on a different shift, will mean that the first has been eliminated and, the second created. This approach, under this collective agreement, is consistent with article 9.089(A)(b)(v), which requires that an employee properly reassigned (i.e. reassigned in a manner which avoids layoff), is assigned to a job on the same or a substantially similar shift.

It cannot be under this collective agreement, that the same position entails a job on a different shift. The preferable analysis is found in arbitrator Devlin's decision at *Carlton Cards*, where the elimination of a position on one shift accompanied by the creation of a position on a different shift, is sufficient to allow that a position has been eliminated.

Finally on this point, barring collective agreement provisions to the contrary, it is only ordinary sensibility and reasoning that is required to understand that a position has been eliminated where such a fundamental element of the position has been removed. Here, the collective agreement provisions, both at

9.08(A)(b)(v), and at article 9.05 which required that the shift of a position be posted, point in the direction of shift being a critical element of the position.

I would have found that a position had been eliminated and ordered the appropriate remedies.

Dated at Carmel, CA, this 24<sup>th</sup> day of February, 2019

Joe Herbert  
Union Nominee