

IN THE MATTER OF AN ARBITRATION

BETWEEN

PERTH AND SMITHS FALLS DISTRICT HOSPITAL
("the Hospital" / "the Employer")

- AND -

CANADIAN UNION PUBLIC EMPLOYEES, LOCAL 2119
("the Union")

CONCERNING THE JOB POSTING UNION POLICY GRIEVANCE No. 04-15

BOARD OF ARBITRATION:

Christopher Albertyn – Chair
Kathryn Butler Malette – Employer Nominee
Joe Herbert – Union Nominee

APPEARANCES:

For the Union:

Peter Engelmann, Counsel
Erin Moores, Student-at-Law
John Jackson, President, Local 2119
Doreen Beath, CUPE National Representative
Louis Rodrigues, Vice-President, Ontario Council of Hospital Unions

For the Hospital:

Lynn Harnden, Counsel
Virginia Lomax, Student-at-Law
Keitha Harris, Manager, Housekeeping, Laundry and Food Services
Angela McLean, Human Resource Specialist

Hearings held in OTTAWA on September 8 and October 11, 2016.

Written submissions filed subsequently.

Executive meeting in OTTAWA on December 7, 2016.

Award issued on February 9, 2017.

AWARD

1. The issue is whether, when posting notice of a job vacancy, the Hospital is required to specify the actual shift to be worked. The Hospital's practice has been to post "day/evening/night" or "days/evenings/weekends" as the shift for a position, although an actual shift, on the day shift, or on the evening shift, or on the night shift is what the Hospital intends. Management adds to the posting, "Subject to scheduling changes as per management Rights and Article G.01 of the CUPE Collective Agreement".

2. The Union contends that the collective agreement requires that the actual shift be posted. The Employer is unwilling to do so because it fears that, if it were to do so, the successful incumbent and the Union might incorrectly consider the incumbent to have some proprietary entitlement to the particular shift, when, in the Employer's view, the Hospital's management rights in the collective agreement permit the Hospital to regulate what shifts will be worked and by whom.

3. The collective agreement provision the Union relies on is Article 9.05(b). It reads:

ARTICLE 9 – SENIORITY

...

9.05 Job Posting

...

- (b) The posting shall stipulate the qualifications, classifications, rate of pay, department and shift and a copy shall be provided to the Chief Steward.

4. The Employer relies on its management rights in the Local Issues Appendix of the collective agreement. The relevant portions read:

ARTICLE B – MANAGEMENT FUNCTION

B.01 The Union recognizes that the management of the Hospital and the direction of working forces are fixed exclusively in the Hospital and shall remain solely with the Hospital except as specifically limited by the provisions of this Agreement and, without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Hospital to:

...

- (b) hire, assign, ... direct, promote, demote, classify, transfer, layoff, ... employees, ...;
- (c) determine, in the interests of efficient operation and high standards of service, job rating and classification, the hours of work, work assignments, methods of doing the work, and the working establishment of the service;
- (d) manage the operation of the Hospital. To determine the number of personnel required, methods, procedures and equipment required in the operation of the Hospital;

...

5. These management rights are subject to the provisions of the collective agreement:

B.02 These rights shall not be exercised in a manner inconsistent with the provisions of this Agreement.

6. The Employer refers also to Article G – Scheduling, of the Local Issues

Appendix. It is a lengthy provision that describes the scheduling procedures for full-time, part-time and casual employees.

7. The parties provide an Agreed Statement of Facts:

1. John Jackson is the President of CUPE, Local 2119. He has been President since February 2012.
2. Mr. Jackson has worked for the Employer since November 1991. He is and was at all relevant times a full-time Environmental Assistant at the Employer's Smiths Falls site, where he has worked on the afternoon shift since approximately 2009.
3. Keitha Harris is, and was at all relevant times, Manager of Housekeeping, Laundry and Food Services.
4. All positions related to Grievance 04-15 are part of the bargaining unit for which CUPE, Local 2119 is the exclusive bargaining agent. This bargaining unit is governed by the Collective Agreement between CUPE, Local 2119, and the Perth and Smiths Falls District Hospital, expiring September 28, 2017.
 - Collective Agreement, expiring September 28, 2017 (Tab 1)
5. On December 20, 2011, a full-time Environmental Assistant position was posted. The position's shifts on the job posting were listed as: *Days/Evenings/Weekends (Subject to scheduling change as per management Rights and Article G.01 of the CUPE Collective Agreement)*.
 - Job posting, December 20, 2011
6. Kelly Rockey, who at the time was a part-time Environmental Assistant at the Employer's Smiths Falls site, was interested in applying for the position, but only if its shift and rotation were a good fit for her personal circumstances.

7. Ms. Rockey contacted Human Resources and was told that the rotation associated with the vacancy was S31.

8. The S31 rotation refers to a Monday to Friday rotation in which the employee works only afternoon shifts, from 2:00 PM to 10:00 PM. The rotation also includes one afternoon weekend shift per month.

9. Ms. Rockey then applied for the position because it suited her personal and family circumstances. She was the successful candidate and currently works in this same position and rotation.

10. On May 17, 2013, a full-time Environmental Assistant 2 position was posted. The position's shifts on the job posting were listed as: *Days/Evenings (Subject to scheduling change as per management Rights and Article G.01 of the CUPE Collective Agreement)*.

- Job posting for Environmental Assistant 2, May 17, 2013 (Tab 8)

11. On February 23, 2015, during a regular meeting between the Local's Labour Management Committee and the Employer (a "Labour Management meeting") the Employer and the Union discussed the Employer's job posting practices that are the subject of Grievance 04-15.

- Labour Management meeting minutes, February 23, 2015 (Tab 3)

12. In emails exchanged on March 7, 2015 and March 25, 2015 with Dave Evans (Manager, Human Resources), Mr. Jackson reiterated the Union's position on the facts giving rise to Grievance 04-15. Mr. Evans responded with the Employer's position.

- Emails between Mr. Evans and Mr. Jackson, March 7 and March 25, 2015 (Tab 4)

13. On March 30, 2015, this email exchange between Mr. Jackson and Mr.

Evans was discussed at a Labour Management meeting.

- Labour Management meeting minutes, March 30, 2015 (Tab 5)

14. On April 28, 2015, Keitha Harris sent an email to all full-time Environmental Assistants at both the Smiths Falls and Perth sites, asking if any were interested in taking the shift of Lester Dezan. Ms. Dezan was a full-time employee who worked on the day shift at the Perth site and was scheduled to retire in May 2015.

- Keitha Harris' email to staff, April 28, 2015 (Tab 6)

15. On April 28, 2015, a full-time vacancy for an Environmental Assistant 2 position was posted. The position's shifts on the job posting were listed as: *Days/Evenings/Nights (Subject to scheduling change as per management Rights and Article G.01 of the CUPE Collective Agreement)*.

- Job posting for Environmental Assistant 2, April 28, 2015 (Tab 7)

16. On April 29, 2015, the Union filed Grievance 04-15.

- Grievance 04-15 (Tab 2)

17. On May 12, 2015, the Employer denied Grievance 04-15.

- Letters from Employer to CUPE, Local 2119, May 12, 2015 (Tab 2)

Either party may lead *viva voce* evidence that may not contradict the facts laid out in this Agreed Statement of Facts.

October 11, 2016

8. The issue raised as a consequence of paragraph 14 of the Agreed

Statement of Facts was resolved in a Consent Award issued on October 24, 2016. That Consent Award concerned grievances 03-15 and 06-15.

9. John Jackson supplemented the Agreed Statement of Facts with oral evidence. He explains that, in environmental services (housekeeping), where the dispute arises, the Employer's long standing and continuing practice is to have fixed, not rotating, shifts. (There are other departments of the Hospital, such as nursing and maintenance, that have rotating shifts). In housekeeping there are several different shifts across the 24-hour day, but, broadly, each shift is substantially a dayshift, or an afternoon-evening shift, or a night shift. So, each housekeeping employee has a position on a day shift, or an afternoon shift, or a night shift. They work the same shift each week, and some weekends. The day shifts are most prized, the afternoon shifts next, and the night shifts tend to have employees who do not have sufficient seniority to post into one of the preferred shift times. Because job postings are filled by the senior qualified candidate, the day shift positions tend to be filled by the most senior employees who have bid up from their afternoon or night shifts. The normal progression for an employee is from a part-time position to a night shift full-time position with benefits, and then, progressively, with greater seniority, into an afternoon-evening shift, and then into a day shift position.

10. Mr. Jackson explains that seniority is bargaining unit wide. While employees in housekeeping might learn from their manager what housekeeping shift is likely to be posted when a vacancy arises, for those outside of housekeeping, they are not likely to know, except from the posting. They may

want to move into a more preferred shift time from their current position, and so would apply for a housekeeping position if they knew the anticipated shift time. When the Employer posts a generic shift description: days/evenings/nights, prospective applicants have no idea from the posting what shift they will actually be assigned to, even though management knows ahead of the posting what that shift will be.

11. As mentioned, management's purpose, in not mentioning the actual shift, is not to keep it a secret. The Employer says that any employee interested in a posting may come and ask what actual shift will be worked, and management will give the information. Management's sole reason for not posting the actual shift is because it does not want thereby to signify, and be held to have signified, that the successful incumbent has some proprietary right to that shift, such that they cannot be moved from it without financial consequences to the Hospital. In other words, the Hospital is worried that, by posting the actual shift, that will give the impression of some particular shift entitlement to the successful candidate such that, if they are moved from that shift, they may claim to have been laid-off and so expect the entitlements under the layoff provisions of the collective agreement. By not specifying the shift, and keeping its description generic, management seeks to convey that the anticipated shift may be changed, depending on the Hospital's operational needs. The Hospital says its generic description does not mislead the potential applicants into thinking that management might not, in the future, alter the shift in response to business requirements.

12. We recognize the Hospital's concern. However, in our view, were the Hospital to post the actual shift, that would not derogate from any other rights that the parties respectively have under the collective agreement, including management's rights under Articles B and G, and under Article 9.08(A)(b), and individual employees' rights under Article 9.08(A)(b)(V). The precise application of those respective rights, though, is a matter for separate and later determination, should a dispute over the application of these rights arise.

13. Therefore, securing a position in a particular posted shift would be subject to the respective rights of the parties under the collective agreement, including management's right to determine hours or work and work assignments. To this end, management highlights its entitlements under the collective agreement on the shift portion of the job postings, by adding the words, "*(Subject to scheduling change as per management Rights and Article G.01 of the CUPE Collective Agreement)*".

14. As the Union points out, this case is not about whether or not the Employer has the right to alter the shifts of employees. It is about what information about the shift to be worked must be included on a job posting.

15. We are not persuaded by the Hospital's submission that its generic shift description in the job postings is less misleading than the specific description that the Union advocates. We see that the Hospital wants to bring to prospective applicants' attention notice that the shift may not remain as it is at the time of the

posting (because of management's right to alter shifts, to introduce rotating shifts, etc.) and that the anticipated shift times in the posting may not endure forever, but, when there is no intention of changing the shift at the time of the posting, mention of the actual anticipated times of work on the shift better describes what the potential applicants may expect for them to make an informed decision as to when they will likely be working if they succeed in the posting.

16. As the Union submits, the plain language reading of Article 9.05(b) requires that the actual shift to be worked must be posted. The actual shift anticipated to be worked is one of the required elements of the posting: *Ottawa Hospital and CUPE Local 4000 (Re)*, 89 C.L.A.S. 245, 2007 CLB 12599 (Keller).

17. The Employer's practice of not indicating the actual shift, but of posting a generic shift description, "days/evenings/weekends" or "days/evenings/nights", is not accurate when it is applied to the environmental services department. There the employees do not work rotating shifts, which arguably, these descriptions might satisfy. The housekeeping employees work the same shift each week, with particular starting and finishing times each day. That is the shift that the collective agreement requires must be posted: the actual shift that the successful candidate will be expected to work.

18. As the Union argues, by not giving accurate information of what shift will be worked, the Hospital deprives bargaining unit employees of essential information they need (whether the shift to be worked suits their personal circumstances) in order to determine whether or not they want to apply for the

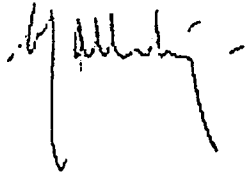
position. Knowing which shift a vacant job posting is for ensures that all employees across the bargaining unit have an equal opportunity to use their seniority to make an informed decision on whether to apply.

19. We recognize, as the Union argues, that seniority is a fundamental collective agreement right, and that, for a long time, employees in the bargaining unit have relied on their seniority in job postings to bid on shifts that fit more conveniently with their family and other needs. Seniority is bargaining unit-wide, and any prospective applicant for a position should be able to see all of the information that is required in Article 9.05(b) on a job posting, including the actual shift anticipated to be worked.

20. Accordingly, we direct that management must post what it expects will be the actual shift times of the vacancy.

21. The grievance is upheld and we declare that Article 9.05(b) of the collective agreement requires the Hospital to specify the actual shift to be worked in its job postings.

DATED at TORONTO on February 9, 2017.



Christopher J. Albertyn
Chair: Board of Arbitration

I concur (see Addendum below)

“Joe Herbert”

Joe Herbert – Union Nominee

I dissent (see Dissent below).

“Kathryn Butler Malette”

Kathryn Butler Malette – Employer Nominee

ADDENDUM of UNION NOMINEE

Although this case concerned the Hospital's obligation to post the shift attached to a position whenever a vacancy is posted, as article 9.05 clearly requires, much of the argument was in anticipation of the collective agreement consequences that flow from that result. And while it was not necessary for the Board to decide this issue in order to decide that the Hospital is compelled to post the shift attached to a position, and while the decision leaves that issue to another day, an observation is in order.

The shift identified on a posting, is a constituent element of the position posted (see *Re: Ottawa Hospital* (supra)). While employees in health care facilities may occasionally experience one-off shift changes to accommodate short term scheduling fluctuations, this is of course different from permanently altering one of the constituent elements of a position. Because shift is such a fundamental element of the position, like for example the classification and rate of pay that must also be posted, and because employees exercise their seniority in order to claim positions with those specified constituent elements, a change to one of those constituent elements will fundamentally change an employee's position.

The significance attached to an employee's shift in a continuously operating health care setting, and the seniority rights attached thereto, should come as little surprise. Indeed as counsel noted out at the hearing, whereas article 9.08 A(b) contemplates an employee being reassigned from their area of assignment, or even from their classification, it does not contemplate an employee being reassigned from their shift, and this is expressly protected within the article at 9.08A(b)(v).

Dated at Ottawa this 1st day of February.

Joe Herbert
Union Nominee

DISSENT OF THE EMPLOYER NOMINEE
PERTH AND SMITHS FALLS DISTRICT HOSPITAL
and
CANADIAN UNION of PUBLIC EMPLOYEES LOCAL 2119
IN RESPECT OF GRIEVANCE # 04-15

I must respectfully dissent from the majority decision in this award.

My objection is based on the fact that the majority has wrongly decided that the inclusion of the word "shift" in Article 9.05 of the Collective Agreement requires the Hospital to identify on a posting for an Environmental Assistant the shift or shift rotation that had been worked by the former incumbent in the position rather than identify on the posting that the position is subject to a shift rotation which might be assigned to the position.

The grievance dealt with the posting of Environmental Assistant positions in the Housekeeping department, which, unlike positions in several other departments, have not been scheduled by the Hospital as rotating shifts. We heard at the hearing that potential applicants could verify the shift for the posted position with the Human Resources Department to determine if the shift assigned to the position at the time of the posting worked for them in terms of their personal needs. The Hospital informed applicants in the wording of the job posting that the shift might change by including this notice on the posting:

Days/Evenings/Nights subject to scheduling change as per management rights and Article G.01 of the CUPE collective Agreement.'

In this manner, the Hospital gave complete and accurate information to applicants regarding the shift which would be initially assigned and the potential for change. In my view, this practice was more than sufficient to ensure compliance with the obligation in Article 9.05 to indicate the "shift" of the vacant position.

A similar issue was addressed by Arbitrator Cummings in *Kingston General Hospital v CUPE Local 1974, 2008* where she determined that indicating that shifts would rotate was sufficient information to satisfy the obligation under the Central Collective Agreement to identify the "shift" of the vacant position. She

correctly noted that to include a reference to the reality of potentially rotating shifts gives employees notice of the potential for change.

A similar conclusion was reached by Arbitrator Picher in *Kingston General Hospital v CUPE Local 1974 (2011)* where she rejected the Union's argument that the shift of the past incumbent must be posted as the shift for the vacant position by saying:

"... it would take a far clearer statement of intention than the article 9.05(b) requirement for a posting to stipulate the shift of the position to override management's expressly detailed exclusive right to determine hours of work in the interest of efficient operation and highest standard of service and to change them with reasonable notice".

The majority has correctly pointed out that its ruling does not address the respective rights of the parties under the Collective Agreement including management's right to determine hours of work and work assignments.

The Hospital asserted that it was not only empowered to make changes in shift assignments in response to business needs but that such changes would not constitute a layoff under the terms of the Collective Agreement. This submission has not been addressed by the majority and I would agree that it is properly left for resolution in another proceeding.

In summary, the grievance should have been dismissed on the basis that the Union's evidence did not demonstrate that the 'shift' of the position of Environmental Assistant was either a day shift, evening shift or night shift. Instead, it was precisely what was stated in the job posting: 'Days/Evenings/Nights subject to scheduling change as per management rights and Article G.01 of the CUPE collective Agreement.'

Respectfully submitted,

Kathryn Butler Malette
Employer Nominee

January 10, 2017