In the Matter of an Arbitration

BETWEEN:

ROSS MEMORIAL HOSPITAL

(the "Hospital")

AND

CUPE LOCAL 1909

(the "Union")

(Re: Displacement Grievance, Case No. MJ-05-16)

Before: Eli A. Gedalof, Chair
Harold Ball, Hospital Nominee
Joe Herbert, Union Nominee

Appearances

For the Hospital: Robert J. Atkinson, Counsel, Hicks Morley Hamilton Stewart Storie LLP
Emma Elley, Director of Human Resources
Sharon Gilchrist, Lead Consultant, Human Resources
Pam Druce, Director of Support Services

For the Union: Mark Wright, Counsel, Golblatt Partners LLP
Louis Rodrigues, Vice-President, OCHU
Danny Sheibli, CUPE National Representative
Maggie Jewell, President, CUPE Local 1909
Melissa Lotton, Vice-President and Chief Steward, CUPE Local 1909

Hearing held in Peterborough, Ontario on February 2, 2017

AWARD

Introduction

1. This grievance raises the following question: does the collective agreement between the parties require the Hospital to offer Early Retirement Allowance ("ERA", Article 9.08(B)) or, if necessary, Voluntary Exit Option ("VEO", Article 9.08(C)), to a classification of employees not initially targeted for layoff, where an employee subject to layoff elects to displace an employee in that different class. Nothing turns on the distinction between ERAs and VEOs, both of which are forms of buyout or exit packages, for the purpose of this case. For the sake of simplicity we will refer to them collectively as "ERA/VEO packages". The Union's position is that such a displaced employee is both deemed to have been laid off and entitled to notice of layoff, and that this triggers the Hospital's obligation to first offer ERA/VEO packages prior to issuing the employee notice of layoff. The Union further takes the position that the interpretation of these provisions, which arise from the central hospital agreement, is settled law. The Hospital takes the positon that its obligation to offer ERA/VEO packages is only triggered if it is unable to reassign the displaced employee in accordance with Article 9.08(A)(b). To the extent that prior decisions have found that the deemed layoff of the displaced employee precludes resort to the reassignment provision, those decision makers did not have before them the facts that are before this panel, which it argues illustrate the absurdity of that conclusion, or were simply wrong.

Facts

2. It should be noted at the outset that the parties have resolved all issues related to the affected employee in this case. However, while the parties acknowledged that there may be arguments that the grievances are moot, or that the events giving rise to the parties' agreement ought to affect the outcome, neither party requested that this board deal with the grievance on that basis, and both parties requested that the board instead answer the interpretive question put before us.

3. Both parties begin their arguments from the proposition that Articles 9.08 and 9.09 provide for a unified scheme governing layoffs that must be read together. It is therefore useful to begin by setting out the relevant provisions:

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 that 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.

...

9.08(B) – 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 HOOP 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 classification within department(s) were 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 of 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) week's salary for each year of service, to a maximum of fifty-two (52) weeks' pay.

9.09 – LAYOFF AND RECALL

An employee in receipt of notice of layoff pursuant to 9.08(A)(a)(ii) may:

(a) accept the layoff; or

(b) opt to receive a separation allowance as outlined in Article 9.12; or

(c) opt to retire, if eligible, under the terms of the Hospitals of Ontario Pension Plan (HOOPP) as outlined in Article 9.08(B); or

(d) displace another employee who has lesser bargaining unit seniority in the same or a lower or an identical-paying classification in the bargaining unit if the employee originally subject to layoff has the ability to meet the normal requirements of the job. An employee so displaced shall be deemed to have been laid off and shall be entitled to notice in accordance with Article 9.08(A)(a). [emphasis added]

...

4. The facts in this case are not in dispute.

5. The relevant provisions in this matter were introduced into the collective agreement over successive rounds of interest arbitration. In particular, all but the reassignment provision in Article 9.08(A)(b) have their genesis in the Central Issues Award dated March 31, 1993 between 72 Participating Hospitals and CUPE, referred to as the "Haefling Award". Article 9.08(A)(b) was awarded by a Board of Arbitration chaired by George Adams dated June 28, 1999 in an interest arbitration between the Participating Hospitals, CUPE and SEIU (the "Adams Award"). The language has remained materially unchanged since that time.

6. The circumstances giving rise to this grievance are somewhat convoluted. In simplest terms, an employee received notice of layoff, elected to bump another employee, and an ERA/VEO package was not then offered to employees in the displaced employee's classification. As noted above, the parties have actually agreed on the placement of the displaced employee, and this panel has not been asked to base its decision on the manner in which that

agreement was reached. The dispute is not with respect to where the employee has in fact wound up, but rather the Union takes the positon that irrespective of the hospital's agreement to issue the notice of layoff and the parties' subsequent agreement to move the displaced employee into another position, the Hospital should have first offered the ERO/VEO package. In defence of its failure to offer the ERA/VEO package, and again quite apart from the actual process that lead to the placement of the displaced employee, the Hospital argues that it had the right to reassign the displaced employee to the position in any event, and to thereby avoid laying him off and avoid the resultant obligation to offer an ERA/VEO package.

7. The particular events that lead to this grievance began on January 19, 2016, when the Hospital gave notice to the Union of its intention to eliminate the full-time Support Services Lead Hand ("SSLH") position, and to add one full-time Environmental II position. The only incumbent in the SSLH position was Tracy McPhaden ("McPhaden"). At the time of the notice, McPhaden was not actually working in the SSLH position. She had first posted into a temporary vacancy in the Environmental I position, set to expire March 9, 2016, and then effective December 14, 2015, she had posted into a permanent FSA position. During the 30-day trial period for the FSA position, however, McPhaden gave notice that she would not be remaining in that position. She would, then, have returned to her home SSLH position, which was slated for elimination. McPhaden was not eligible for an ERO package, and so by correspondence dated January 22, 2016, she was offered a VEO package in accordance with Article 9.08(C). She declined the VEO, and was therefore given Notice of Layoff on January 22, 2016.

8. At the time she received the notice of layoff, McPhadden was still working in the FSA classification in an assignment referred to as "Carts", which involved the cleaning and picking of soiled carts and dish machine and machine room cleaning duties. Having received notice of layoff, McPhadden elected to displace a junior employee, Travis Storey, who was in an FSA classification in an assignment referred to as "Pots-NSW", which involved pot washing and lunch and meal tray delivery.

9. There is no dispute that McPhadden was entitled to displace Storey and move into the FSA Pots-NSW position. In discussions between the parties, the Hospital suggested that Storey could be reassigned to the FSA Carts position, which would become vacant when McPhaden moved to the FSA Pots-NSW position. The FSA Carts position met the enumerated criteria under Article 9.08(A)(b)(i)-(vi), i.e., it was an "appropriate permanent position", resulted in no reduction of wages or hours, was located in the original work site and was on the same shift. However, the union disputed that the hospital was

entitled to rely on Article 9.08(A)(b), and instead insisted that the hospital provide Storey with notice of layoff.

10. By correspondence dated February 4, 2016, the hospital gave Storey five months notice of layoff and advised him of his right to displace a junior employee under Article 9.09. It did not offer an ERO/EVA option prior to issuing that notice of layoff. The parties ultimately agreed that Storey and McPhadden would remain in their respective positions until the expiration of the five month notice period, at which time they would switch places, with McPhadden moving into Pots and Storey moving into Carts. However, as alluded to above, the parties have not requested that this Board consider either the parties' agreements or the fact of the Hospital having given notice of layoff to Storey in disposing of the grievance. Rather, they request that the board determine whether in the circumstances the hospital was entitled to reassign Storey, or whether it was instead required to offer an ERA/VEO package and then issue notice of layoff, and it is this question that we will answer.

Argument and Analysis

The Union's Argument

11. The union argues that Article 9 of the Collective Agreement provides a comprehensive system of job security in which specified events trigger specified obligations and consequences. Under Article 9.09(d), a displaced employee is "deemed to have been laid off" and "shall be entitled to notice [of layoff]". Article 9.08(B), however, provides that prior to issuing that notice of layoff, the Hospital is obligated to offer the ERO/VEO packages. There are, argues the union, no exceptions in the collective agreement to either the deeming provision, or the consequences that automatically flow from it. In particular, once the deemed layoff has taken place, there is no provision authorizing the Hospital to reassign the displaced employee and therefore avoid the layoff. To imply such a right, argues the union, would be to provide for an employee to be simultaneously laid off and not laid off; a logical contradiction that ought to be avoided in interpreting a collective agreement.

12. In support of its position, the union relies principally on two prior awards, *Sudbury Regional Hospital and Canadian Union of Public Employees, Local 1623*, 2007 CanLII 37013 (ON LA) (Albertyn) (the "Albertyn Award") and *St. Joseph's Healthcare (Hamilton) and CUPE Local 786*, 2014 CanLII 42574 (ON LA) (Kaplan) (the "Kaplan Award"), both of which it argues address the identical issue, and interpret the relevant provisions in accordance with the union's position here. The union also relies on *Scarborough Hospital v. Ontario Public Service Employees Union, Local 581*, [2014] O.L.A.A. No. 344

(Herman) (the "Herman Award"), which reaches the same conclusion under the identical language found in the OPSEU collective agreement. The *Scarborough Hospital* award in particular examines the mechanism by which the deemed layoff provision operates to afford displaced employees with their options, finding that the deemed layoff occurs first, followed by the giving of notice. It is during the intervening period between the deemed layoff and the actual delivery of notice of layoff to the employee that the employer must offer the ERA/VEO options in accordance with Articles 9.08(B) and (C). The union further referred to *St. Peter's Hospital v. Canadian Union of Public Employees, Local 778*, [1998] O.L.A.A. 867 (Kaplan), an award that dealt with the language in the Collective Agreement as it existed after the Haefling Award and before the Adams Award, and which found that the employer was obligated to make early retirement offers to employees in the classification of displaced employees.

13. The case law, argues the union, is both compelling and settled. And while these decisions are not binding on this board of arbitration, the fact that they interpret central hospital language applicable in hospitals across the province means that they should be paid particular deference. Further, argues the union, since the first of those awards there have been successive rounds of bargaining through which the relevant central language has remained unchanged. In the circumstances, argues the union, it would be highly disruptive to reach a different conclusion in this case.

The Hospital's Argument

14. The Hospital begins its argument with the similar proposition that Article 9 of the Collective Agreement provides a unified scheme, but focusses on the interrelationship between Articles 9.08(A), (B) and (C). The Hospital argues that within that scheme, the reassignment provision under Article 9.08(A)(b) effectively pre-empts the layoff, and therefore the obligation to move to the next steps of the process in (B) (offering an ERO package) and (C) (offering a VEO package). The Hospital argues that the purpose of reassignment provision is to avoid the disruption of the layoff procedure set out in Article 9.09, and that there is no basis for limiting its effectiveness to only the initial position targeted for reduction.

15. The Hospital acknowledges that this article has not been interpreted in this manner in prior awards, but argues that the result in those prior awards is illogical and absurd, since it obliges the employer to offer exit packages to employees when there is no need to reduce the complement of employees, and when there is an appropriate position into which the displaced employee can be reassigned. The particular facts in the instant case, argues the Hospital, illustrates the absurdity of this conclusion. An employer would be

precluded from reassigning the employee to an otherwise acceptable position and face the potential of highly disruptive chain bumping simply because the employee was displaced rather than having been the incumbent in a position targeted for elimination in the first place.

16. The Hospital argues that the prior awards have placed undue weight on the language in Article 9.09, which provides that a displaced employee shall be "deemed to have been laid off and shall be entitled to notice in accordance with Article 9.08(A)(a)". This provision, argues the Hospital, triggers an obligation to provide notice of layoff, but does not dictate that the layoff must actually take place. In particular, the Hospital argues that where the employee provided with notice can be reassigned, the layoff can be rescinded just as it could be rescinded as a result of some other change in circumstances. Article 9.08(A)(b) excludes from the definition of layoff an employee who would "otherwise be entitled to notice of layoff". The Hospital argues that this exclusion would include an employee who is entitled to notice of layoff by virtue of having been displaced.

17. In support of its position, the Hospital argues that a careful review of the awards giving rise to the current scheme in Articles 9.08, including the dissent in the Adams Award, supports the conclusion that the reassignment language introduced in the Adams Award was intended to address the problem of chain bumping. That problem, argues the Hospital, arose from the earlier Haefling Award granting bumping rights, and the purpose of the reassignment language was to provide the employer with the flexibility to avoid the disruptive effect of chain bumping, and stop the chain once it reached a positon where the employer could appropriately reassign the displaced employee.

18. With respect to the Albertyn Award, which is followed in the Kaplan Award, the employer argues that the arbitrators did not have before them the facts to illustrate the dissonance that arises from the creation of two classes of employees, where each is treated very differently depending on whether they are the first to be targeted for layoff, or a subsequent link in the chain. The Hospital further points to the dissent in that award, which like the Hospital takes the view that majority has given undue weight to a single sentence in Article 9.09(d) at the expense of the overall scheme. In the circumstances, the Hospital argues that this board of arbitration should either distinguish or reject the reasoning in those awards.

Analysis

19. Each of the Albertyn, Kaplan and Herman Awards address the fundamental question that is before this Board: can the Hospital have resort to the reassignment provision with respect to an employee that has been displaced.

20. The Albertyn Award articulates the issue at paragraph 1 as "a dispute over the options available to an employee who is bumped by a more senior employee who has received a notice of layoff." In that case it was the denial of the ability for the displaced employee to exercise their own bumping rights that was in issue. The Kaplan Award articulates the issue in the opening paragraph as whether the hospital violated the collective agreement "by reassigning an employee who had been bumped pursuant to Article 9.09(d) of the collective agreement instead of issuing that employee a notice of layoff in accordance with Article 9.08(d)". In that case, the employee was seeking access to all of the rights available on layoff. The Herman Award, at paragraph 1, articulates the issue in the same manner in which it was framed before us: "whether the Employer...is required to offer an Early Retirement Allowance ("ERA") and a Voluntary Early Exit option ("VEE") to employees who are displaced when they are bumped from their positions by employees who earlier received layoff notices." (We note here, as the Hospital pointed out, that the ERA/VEO Packages are offered on a classification basis, rather than individual basis, although when dealing with a single incumbency position this may be a distinction without a difference). Each of these awards, however the issue is articulated, deal with whether the "deemed layoff" of a displaced employee precludes the application of the reassignment provision. That is the issue before this board. Whether or not there is an obligation to offer ERA/VEO packages is a consequence that flows necessarily from the answer to that question.

21. Thus, we find that the Albertyn, Kaplan and Herman awards cannot be meaningfully distinguished, and in order to find in favour of the Hospital, we would need to conclude that those decisions were wrongly decided. Before examining those decisions more closely and in light of the arguments put forward by the responding party, there are several points that we wish to emphasise.

22. It is clear that the Albertyn, Kaplan and Herman awards are not binding upon us. If we were to conclude that the interpretation of the collective agreement reached in those decisions is wrong, we would not hesitate to reject that interpretation and substitute our own. However, it bears emphasising that these decisions are nonetheless entitled to a substantial degree of deference, especially in the circumstances of this case. The provisions in issue in this case are central language applicable to numerous hospitals across the province. They are the subject of central hospital bargaining, the results of which are

likewise binding on numerous hospitals across the province. It is indisputable that in this context conflicting interpretations of the same language can be highly disruptive to the central bargaining process.

23. Further, there have been two subsequent rounds of bargaining since the Albertyn Award in 2007, over which the language has remained unchanged. In 2014, seven years after the Albertyn Award, Arbitrator Kaplan makes the following observation at page 9 of his Award:

> We find implausible the suggestion that the parties negotiating the current collective agreement would have assumed or intended that the identical collective agreement provisions would now be given a meaning exactly opposite to the interpretation found in the Albertyn award that was issued in 2007.

That observation, with which we fully agree, is of equal force in the current case.

24. Upon careful review of the prior arbitration awards, in addition to the Haefling and Adams Awards giving rise to the provisions in issue, and having carefully considered the Hospital's arguments, we are satisfied that the interpretation adopted by Arbitrators Albertyn, Kaplan and Herman is correct, and that the grievance should therefore be allowed.

25. The essence of the decision in the Albertyn Award is set out at paragraphs 22-28 as follows:

> 22. The critical words in 9.09(d) are that the displaced employee is "deemed to have been laid-off". The entitlement to receive notice of layoff flows automatically from this. This, we find, is a quite different situation from what is contemplated in Article 9.08(b).
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> 23. Article 9.08(b) contemplates a circumstance which is, by definition, not a layoff. Article 9.09(d) contemplates a circumstance which is, by definition, a layoff. When an employee is bumped, like Ms. Whissell, she is "deemed *to have been* laid-off" [our emphasis]. The layoff is something that, by definition, has already occurred. Article 9.08(b) contemplates a circumstance which could, in the ordinary course amount to a layoff, but is not a layoff because it complies with the sub-paragraphs which follow. What would otherwise be a layoff is not when it complies with the terms of Article 9.08(b)(i) to (v). Article 9.09(d) cannot fit this exception because, once bumped, the bumped employee is deemed to have been laid-off.
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> 24. Article 9.08(b) can be applied only to an employee who has not been laid-off. Such employee, instead of being laid-off and receiving notice of layoff, is re-assigned. Under Article 9.08(b), the re-assignment is not a

layoff. Ms. Whissell was not such an employee. She was, by virtue of Article 9.09(d), deemed to have been laid-off when she was bumped. Article 9.08(b) cannot therefore apply to her. She could be offered a position, but she could not be re-assigned. As a deemed laid-off employee, she could refuse to accept any position offered and maintain her layoff.

25. We are not faced in this case with the question of whether someone who is re-assigned is entitled to notice of layoff. The question we face is whether Ms. Whissell, who was expressly entitled to notice of layoff by virtue of her being deemed to have been laid-off, could be disentitled from receiving the notice of layoff and deprived of the alternatives set out in Article 9.09. In our view, this is not possible under the collective agreement. Article 9.08(b) was not engaged at all because the Hospital was dealing with someone who was deemed laid-off, and not with someone who could be re-assigned.

26. As Union counsel argues, the inclusion of the deeming provision in Article 9.09(d) – "an employee so displaced *shall be deemed to have been laid-off* .." – makes clear that the event is not merely a "proposed layoff" (see Article 9.08(a)), but an actual layoff that has already occurred.

27. The Hospital argues that Ms. Whissell is an employee "otherwise entitled to notice of layoff", under Article 9.08(b), and so someone who could be re-assigned rather than receive notice of layoff. We do not agree. The reference to an employee otherwise entitled to notice of layoff is to an employee who has not been laid-off; to one who, upon being re-assigned, would otherwise be considered to have been laid-off, but for Article 9.08(b).

28. Consequently we find that the Hospital could not re-assign Ms. Whissell when it purported to do so. The Hospital ought to have treated her as a laid-off employee and given her notice of layoff under Article 9.08(a).

26. Arbitrator Kaplan adopts this reasoning and reaches the same conclusion at page 8 of his award, where he finds that an employee who has been deemed to have been laid off cannot be reassigned, because the reassignment provision in Article 9.08(A)(b) is specifically an alternative to layoff, and not an option that is available once an employee has already been laid off. He further notes that "[i]f the parties wish to amend their collective agreement in order to provide for the reassignment of laid-off employees, it would be a simple and straightforward matter for them to do so."

27. Arbitrator Herman in his award addressed the argument that the hospital could not be required to offer ERA/VEO packages because those packages must be offered prior to issuing notice of layoff, and by virtue of the deeming provision the layoff had already taken place. Arbitrator Herman found

that while a displaced employee was "deemed to have been laid off", the employee was still entitled to notice of layoff , and that before to issuing that notice of layoff, the employer was still obligated to offer ERA/VEO packages in accordance with the equivalent of Article 9.08(B) and (C). Those provisions require that the offers be made "prior to issuing notice of lay off in any classification", and the arbitrator points out that there is no exception for lay offs that occur as a result of an employee having been displaced.

28. The Hospital argues that the established interpretation places undue significance on the words "deemed to have been laid off", and undermines the purpose for which the reassignment language was introduced in the Adams Award, which was to mitigate against the disruptive effects of bumping arising from the Haefling Award, and especially the cascading effect of chain bumping. The Hospital points to the partial dissent of Mr. Filion, the employer's nominee in the Adams Award, as reflective of this intention:

> The new definition of layoff will provide the Hospitals with the ability to reassign employees who would otherwise be entitled to notice of layoff. This should have the effect of substantially reducing the number of layoff notices, provide some relief against chain bumping to hospitals who have Collective Agreements with CUPE, and perhaps provide some hospitals with the ability to contract out by avoiding layoffs.

29. In our view, there are a number of problems with the Hospital's argument in this regard. The majority reasons in the Adams award simply do not identify the provision as a panacea to chain bumping. Rather, the provision was awarded as part of a balancing act in light of the rejection of the hospital's request to loosen the constraints on contracting out. The rationale for introducing the reassignment provision is typically brief, and reads as follows (at page 5):

> In light of the above [referring to his rejection of the proposed amendment to the contracting out language], Article 10.02 for SEIU and Article 9.08 for CUPE merit a balanced redrafting to grant greater flexibility to the hospitals to reassign an employee who would otherwise be entitled to notice of layoff, provided certain critical job interests of that employee receive protection. On the evidence adduced, the extent of notice of layoff and the elimination of a positon to employees and unions are, in relative terms, somewhat excessive and should also be modestly reduced. However, the hospitals' request to delete giving notice to the unions in the case of an elimination of a position is denied. The unions have important institutional interests in receiving such notice.

30. Both the Union's and the Hospital's interpretation are consistent with providing the hospital with a greater flexibility to reassign employees and avoid having to issue notices of layoff. Further, the ability to avoid issuing a notice of layoff in the first place, even if limited to the initial position targeted for elimination will, in the words of the dissent, "provide some relief against chain bumping", since it can prevent the chain from starting at its first link. To ascertain the extent or degree of flexibility intended with any specificity, i.e., to determine what that interest arbitration board found would constitute a "balanced redrafting" of the provision, it is necessary to look to the actual language that was awarded.

31. In our view, reading Articles 9.08 and 9.09 together, the language simply does not support the Hospital's interpretation. On the Hospital's interpretation, the words "deemed to have been laid off" in Article 9.09(d) merely trigger the obligation to provide a notice of layoff. Read together with Article 9.08(A)(b), the hospital argues the obligation to provide the notice under Article 9.09(d) does not automatically trigger the various options on layoff, because provided the conditions for reassignment are met, a layoff specifically does not include such reassignment of an employee "who would otherwise be entitled to notice of layoff". Yet to read the words "deemed to have been laid off" in this manner would be to effectively read them out of the agreement.

32. Article 9.09(d) does not merely provide that the employee is entitled to notice of layoff. It provides that the layoff shall be "deemed" to have taken place, and it is this deemed event that gives rise to the obligation to provide notice, and therefore the obligation to extend the various options in advance of providing that notice. There is nothing in the exclusion from the meaning of layoff set out in Article 9.08(A)(b) to suggest that it was intended to apply after the fact. Rather, it simply states that where the reassignment of an employee would otherwise entitle to them to notice of layoff, that reassignment shall not constitute a layoff provided that the stipulated conditions are met. In the instant case, the layoff is not triggered by a reassignment such that Article 9.08(A)(b) could operate to save the Hospital from the obligations it would otherwise have under Article 9.08. Here the layoff is triggered by the displacement of the employee and the deeming provision in Article 9.09. That is, simply put, a circumstance that falls outside the scope of Article 9.08(A)(b). This is the same conclusion that Arbitrator Albertyn reached at paragraph 27 of his award, cited above:

> 27. The Hospital argues that Ms. Whissell is an employee "otherwise entitled to notice of layoff", under [then] Article 9.08(b), and so someone who could be re-assigned rather than receive notice of layoff. We do not agree. The reference to an employee otherwise entitled to notice of layoff

is to an employee who has not been laid-off; to one who, upon being re-assigned, would otherwise be considered to have been laid-off, but for Article 9.08(b).

33. The Hospital is of course correct when it points out that the interpretation we adopt creates two classes of employees. Incumbents in the positon targeted for elimination can, under the proper conditions, be reassigned and will not be offered the opportunity to exercise the various rights on layoff. Employees who are displaced, in contrast, will be entitled to exercise those options as of right, even where there is a position available that meets the criteria for reassignment. It also flows from this that the hospital may be required to offer ERO/VEO packages in circumstances where it is not seeking to reduce its overall complement. Where a displaced employee elects to exercise her or his own bumping rights, there is of course the prospect of chain bumping. But these consequences flow from language that was introduced into the Collective Agreement in 1999, as part of a balancing exercise that saw the employers obtain a beneficial amendment to the collective agreement. The fact that the amendment did not provide the employers with perfect relief against what it has identified as the disruptive consequences of the layoff provisions introduced in the Haefling Award is not a basis for ignoring the plain language of that provision. This language is the subject of prior arbitration awards, the parties have had two opportunities to bargain around this provision since the first of those awards, and the language has remained unchanged. Simply put, if the parties wish to revisit the particular balance adopted in the Adams Award, the place to do so is in bargaining.

Conclusion

34. For all of these reasons we find that the reassignment provision in Article 9.08(A)(b) is not applicable in the circumstances of this case, and declare that the Hospital violated the Collective Agreement in failing to offer an ERO/VEO package, in accordance with Articles 9.08(B) or (C) of the Collective Agreement.

Dated at Toronto, Ontario, this 12th day of April, 2017.

"*Eli Gedalof*"

Eli A. Gedalof, Chair

I dissent. Dissent to follow.

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Harold Ball, Hospital Nominee

I concur.

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Joe Herbert, Union Nominee