

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**Canadian Union of Public Employees, Local 2119**

**(the “Union”)**

**-and-**

**Perth and Smiths Falls District Hospital**

**(the “Hospital”)**

**BEFORE:**

**BOARD OF ARBITRATION:**

Christine Schmidt, Chair  
Joe Herbert, Union Nominee  
Kathryn Butler Malette, Hospital Nominee

**APPEARANCES:**

**For the Union:** Peter Engelmann, Counsel  
Daniel Fong, Student-at-Law  
John Jackson, CUPE, Local 2119 President  
Louis Rodrigues, OCHU  
Shirley Moss, Grievor  
Barb Vingerhoeds, Grievor  
Adam Cotsman, CUPE National Representative

**For the Employer:** Lynn Harnden, Counsel  
Luke Prior, Student-at-Law  
Angela McLean, Human Resources  
Nancy Shaw, Vice-President of Clinical Services

## **Introduction**

1. CUPE, Local 2119 (the “Union”) filed a policy grievance and two individual grievances alleging a violation by Perth and Smiths Falls District Hospital (“PSFDH” or the “Hospital”) of Articles 9.08(A)(b), 9.09(h), 10.01, and 10.02 of the OCHU Central Collective Agreement, as well as Article B of the Local Issues Collective Agreement.
2. In particular, the Union alleges that the Hospital improperly contracted out the jobs of two medical transcriptionists (or “dictatypists”), resulting in layoffs.
3. For the reasons below, the Board finds a violation of the contracting out provisions of the collective agreement.
4. The hearing into this matter was held on October 28, 2019. Although further hearing dates were originally scheduled, these proved to be unnecessary when the Hospital made certain concessions, which are noted below, following the first hearing date. In these circumstances, the parties requested that the Board issue its decision.

## **Background**

5. Prior to the events giving rise to the grievances, physicians at the Hospital dictated their notes into the Hospital’s internal dictation system. Medical transcriptionists would listen to those recordings and transcribe the notes, which were then sent back to the physicians for approval.
6. On April 9, 2018, the Hospital wrote the following letter to the Union president, John Jackson:

Dear John,

As you are aware, there has been a significant technological change within our Health Records department. The hospital will be proceeding to the next phase of

voice recognition which will greatly reduce the volume of dictations needing editing by the Transcriptionist.

As per Article 9.08 (a) (i) of the CUPE Collective Agreement please consider this as 5 months written notice that the Perth and Smiths Falls District Hospital will be eliminating two (2) Full-time Transcriptionist positions in our Health Records Department.

Please feel free to contact me to schedule a Redeployment Committee meeting to discuss further.

Yours truly,

Angela McLean  
Human Resources

7. The “technological change” to which the Hospital referred is the Nuance eScription software. The Hospital had purchased Nuance eScription software from Nuance Transcription Services (“Nuance”). The Board did not hear evidence from staff or representatives of Nuance; however, the Board understands that Nuance provides voice recognition and transcription software used in hospitals for the purpose of medical transcription. The software transcribes audio recordings using specialised voice recognition software.

8. At the hearing, the Union pursued their arguments relying on Articles 10.01 and 10.02 of the Collective Agreement.

Articles 10.01 and 10.02 of the OCHU Collective Agreement read as follows:

10.01 – CONTRACTING OUT

The Hospital shall not contract out any work usually performed by members of the bargaining unit if, as a result of such contracting out, a layoff of any employees other than casual part-time employees results from such contracting out.

10.02 – CONTRACTING OUT

Notwithstanding the foregoing, the hospital may contract out work usually performed by members of the bargaining unit without such contracting-out constituting a breach of this provision if the hospital provides in its commercial arrangement contracting out the work that the contractor to whom the work is being contracted, and any subsequent such contractor, agrees:

(1) to employ the employees thus displaced from the hospital; and

(2) in doing so to stand, with respect to that work, in the place of the hospital for the purposes of the hospital’s collective agreement with the Union, and to execute into an agreement with the Union to that effect.

In order to ensure compliance with this provision, the hospital agrees that it will withdraw the work from any contractor who has failed to meet the aforesaid terms of the contracting-out arrangement.

9. As noted above, the Hospital's notice of layoff makes reference to "technological change". This is dealt with in Article 9.13 of the collective agreement:

#### 9.13 – TECHNOLOGICAL CHANGE

The Hospital undertakes to notify the Union in advance, so far as practicable, of any technological changes which the Hospital has decided to introduce which will significantly change the status of employees within the bargaining unit.

The Hospital agrees to discuss with the Union the effect of such technological changes on the employment status of employees and to consider practical ways and means of minimizing the adverse affect, if any, upon employees concerned.

Where new or greater skills are required than are already possessed by affected employees under the present methods of operation, such employees shall be given period of training, with due consideration being given to the employee's age and previous educational background, during which they may perfect or acquire the skills necessitated by the new method of operation. The employer will assume the cost of tuition and travel. There shall be no reduction in wage or salary rates during the training period of any such employee. Training shall be given during the hours of work whenever possible and may extend for up to six months.

Employees with one (1) or more years of continuous service who are subject to lay-off under conditions referred to above, will be given notice of the impending change in employment status at the earliest reasonable time in keeping with the notification to the Union as above set forth and the requirements of the applicable law.

#### **Witness Testimony**

10. The Board heard the testimony of grievor Shirley Moss. Ms. Moss had been a medical transcriptionist for 19 years, all at the Smiths Falls site of the Hospital. Since January 2019, she has been working as a diagnostic imaging clerk. Ms. Moss testified that her duties as a medical transcriptionist included transcribing, editing, and correcting dictated reports, as outlined in the job description in evidence. Prior to the introduction of the Nuance eScription software, only a portion of her time was spent editing or correcting reports.

11. After the introduction of the eScripture software, Ms. Moss continued to work as a transcriptionist during the five month notice period in the Collective Agreement, pursuant to Article 9.08(A) (a). However, her work changed as a result of eScripture. While she still used her computer, headset, keyboard, and foot pedal, Ms. Moss performed more editing work relative to her previous experience prior to the Hospital's transition to use of Nuance software.

12. The Board also heard the examination-in-chief of Diane Pecore. Ms. Pecore has been a medical transcriptionist for 25 years. She testified regarding her experience of working as a medical transcriptionist at an Eastern Ontario hospital. As well, she testified about her use of the Nuance eScripture Transcription software while working at that hospital.

### **Documentary Evidence**

13. The Board received a number of documents which included invoices from Nuance to the Hospital, emails between Hospital staff and the Nuance salespeople, the contract between Nuance and the Hospital, and a spreadsheet detailing medical transcriptionist work. The emails from Nuance to the Hospital included references to the Hospital "**outsourcing**" its labour.

### **Hospital Concession**

14. Prior to the scheduled second date of hearing, counsel for the Hospital wrote to counsel for the Union to advise that the Hospital had carried out an examination of the documents relating to the contractual relationship between the Hospital and Nuance and conducted further investigations into the scope of services provided by Nuance. It had concluded that Nuance was, in fact, providing editing services which overlapped with the services which had been provided by Hospital medical transcriptionists. The Hospital advised that, since a portion of the services provided to the Hospital pursuant to the contract constituted "work usually performed by members of the bargaining unit"

within the meaning of Article 10.01 of the Collective Agreement, there had been a breach of Article 10.01 and that the layoff of the two medical transcriptions therefore represented a violation of the Collective Agreement. The Hospital agreed to reinstate the two employees and to compensate them for lost wages.

### **Submissions of the Parties**

15. While counsel for the parties did not make final submissions, the Board did receive extensive opening statements from both Union and Hospital counsel.

16. The Union argued that the Hospital had violated the contracting out provisions of the Collective Agreement when it had engaged Nuance to perform medical transcription services, resulting in the two layoffs at issue in the grievances.

17. In its arguments, the Union relied upon the decision by Arbitrator Goodfellow in *(Sunnybrook Hospital Employees Union, Local 777 v Sunnybrook Health Science Centre, 1997 CanLII 22679 (ON LA), [1997] OLAA No. 103)*.

18. In its opening statement, the Hospital submitted that it had not been aware that staff at Nuance was conducting work which overlapped the work which had been performed by its medical transcriptionists. The Hospital's understanding was that it was receiving software-generated transcripts and that Nuance staff would only conduct a "quality control" prior to the Hospital's receipt of the transcripts. Counsel argued that Nuance staff performing a cursory review of the software-generated transcripts did not amount to contracting out of work which had been performed by Hospital employees.

### **Analysis**

19. The Board finds that the Hospital has violated the Collective Agreement. The Board commends the Hospital for its acknowledgment of the breach which obviates the need for further hearing dates.

20. As discussed by Arbitrator Goodfellow in the *Sunnybrook* award, no contracting out provisions prevent the hospital from assigning work outside the bargaining unit. As he states at paragraph 43:

The purpose of "no contracting-out" or "bargaining unit work" provisions in a collective agreement is to protect bargaining unit jobs by preventing an employer

from assigning the work of the bargaining unit to persons outside the bargaining unit...So long as that work continues to be performed on the Hospital's behalf, bargaining unit members will be entitled to continue to perform it."

21. In addition, the fact that a collective agreement may contain a technological change provision does not negate or change the employer's obligations regarding contracting out. As noted in the *Sunnybrook* award at paragraph 47, "[t]echnological change' and 'no contracting-out' guarantees serve different functions" and the "technological change obligations in a collective agreement [do not], somehow,...limit the reach of any "no contracting-out" guarantees."

22. These comments apply equally in the present case. The fact that the Hospital's decision to move to the Nuance eScription software may be a technological change does not justify or allow the Hospital to assign the actual work of the Hospital's medical transcriptionists to transcriptionists employed by Nuance.

23. In the present case, the documentary evidence and in particular emails from Nuance to Hospital mentioning the "outsourcing" of labour, together with the viva voce evidence, confirm that Nuance Transcription Services' employees were performing work of the bargaining unit.

24. Article 10.01 prohibits any contracting out if it results in layoffs. As was conceded by the Hospital following its scrutiny of the nature of the services provided by Nuance, the two grievors were laid off as a result of this contracting out.

25. Article 10.02 states that the Hospital may contract out work if the contractor stands in place of the Hospital for the purposes of the collective agreement. That did not happen here. Both of the grievors were given notice of layoff following which they

exercised bumping rights and then started working in Diagnostic Imaging Clerk positions. They did not work for Nuance Transcription Services.

**Conclusion**

26. For these reasons, the grievances are allowed. The Board finds that the Hospital is in violation of Article 10.01 of the Collective Agreement because it contracted out work of the bargaining unit to Nuance. As a result, the Board orders that the grievors be reinstated with full back pay. The Board leaves to the parties the implementation of its order and retains jurisdiction over any dispute that might arise.

Dated at Toronto on this 6th date of May 2020.



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Christine Schmidt, Chair

"I concur"

Joe Herbert, Union Nominee

"I concur"

Kathryn Butler Malette, Hospital Nominee