IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

WINDSOR REGIONAL HOSPITAL
- The Employer

-and-

ONTARIO NURSES' UNION
- The Union

AND IN THE MATTER OF a grievance of Susan Sommerdyk

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Leonard P. Kavanaugh, Q.C.	- Counsel
Sharon Morris	- Human Resources Department
Vanessa Burkoski	- Director, Emergency and Critical Care Services
Wendy Dalgleish	- Manager, Critical Care Services
Pat Pandalfo	- Human Resources Department
Denise Shuker	

On behalf of the Union:

Nicole Butt	- Counsel
Colin Johnston	- Co-counsel
Sue Wass	- Grievance Officer
Susan Sommerdyk	- Grievor

Incumbent:

Deborah Charron

Hearing held February 6 and March 22, 2006, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This is a job posting grievance in which the Union alleged that the grievor was "relatively equal" to the successful candidate and, as the senior applicant, should have been awarded the disputed position.

II. THE BACKGROUND

August 11, 2005, Windsor Regional Hospital, the Employer, posted a position for Clinical Practice Coordinator in the Critical Care Department. The position of clinical practice coordinator in the critical care unit is primarily a teaching position to advance nursing knowledge and professional practice.

Three applicants were interviewed and assessed by a committee of four persons. Three of the assessors, including one of the grievor's supervisors, were health care professionals employed by the Employer and the fourth assessor was an employee from the Employer's Human Resources department. Each of the four assessors ranked an internal candidate Deborah Charron, then a probationary employee, as the best candidate. An external candidate was ranked second and Susan Sommerdyk, who has 18 years seniority with the Employer, was ranked third. The Employer awarded the position to Ms Charron.

Ms Sommerdyk grieved the Employer's decision.

The parties agreed to the following expedited process: each party made detailed opening statements and referred to a number of documents which were admitted into evidence and the parties then moved directly to submissions with the Union proceeding first, the Employer

second, and no right of reply.

There were no witnesses as all the evidence was in the form of exhibits. I was provided with 26 documents related to the background of the grievor and Ms Charron, and the details of the selection process.

The grievor is a Registered Nurse (RN) with some 20 years experience working in intensive care and critical care. She has worked as a clinical practice manager in the critical care department, a position similar to the one in dispute here, and as clinical practice coordinator. The grievor has had positive performance evaluations.

The successful applicant, Ms Charron, is also an RN with some 15 years experience in various nursing positions. Ms Charron has a Bachelor of Science in Nursing degree. She has taught nursing at St. Clair College in Windsor and, at the time of her application, was teaching at the University of Windsor, in addition to working for the Employer. Ms Charron has had several years experience in pediatric nursing.

The job posting listed various skills, abilities, experience and qualifications. The assessment team evaluated the candidates on 12 different areas of skills (e.g. competence in Microsoft Office) or abilities (e.g. leadership/facilitation) or experience (e.g. clinical experience in the Intensive Care Unit, the Critical Care Unit and the Emergency Room) or qualifications (e.g. Registered Nurse and Bachelor of Science in Nursing) related to the position.

Each of the 12 factors was given a particular weighting and each evaluator provided a score for the candidates on each factor. Eight of the 12 factors were weighted at a maximum of 100 points each:

1. Registered Nurse

2. Bachelor of Science in Nursing degree
3. Clinical experience in an Intensive Care Unit, Critical Care Unit, and Emergency Room
4. Teaching experience
5. Leadership/Facilitation
6. Collaboration/Team
7. Interpersonal Communication, and
8. Learning/Motivation.

Four other factors were weighted at a maximum of 25 points each:

9. Pediatric experience
10. Advanced Cardiac Life Support (ACLS)
11. Pediatric Advances Life Support (PALS), and
12. Competence in Microsoft Office.

The maximum score for each applicant was thus 900. No criticism was made regarding the value assigned to each factor.

Eleven of the 12 factors were described as "required." The one exception was pediatric experience (9.) which was "preferred."

Following the conclusion of the interviews, the scores of each assessor for each candidate were totalled. All four assessors ranked Ms Charron first with scores of 810, 795, 765 and 750 of a total possible score of 900. No assessor gave either of the other two candidates scores as high as Ms Charron's lowest score of 750. The grievor's scores were 610, 570, 570, and 570 - she was third in each assessor's rankings.

The four assessors gave Ms Charron a higher evaluation for her Bachelor of Science in Nursing degree (2.), a qualification which the grievor did not have, and for her pediatric experience (9.), the one preferred qualification, which the grievor did not have. Both the

grievor and Ms Charron had the Registered Nurse qualification (1.), the required clinical experience in intensive care, critical care and emergency room (3.), and the required teaching experience (4.) and they were regarded by the assessors as being equal on those factors. Although the job posting required both ACLS (Advanced Cardiac Life Support) (10.) and PALS (Pediatric Advanced Life Support) (11.), Ms Charron had one and the grievor the other. The assessors treated the two applicants as being equal on these two factors, taken together. Ms Charron was assessed more positively than the grievor on Leadership/Facilitation, Collaboration/Team, Interpersonal Communication, and Learning/Motivation (5., 6., 7., and 8.). On the other hand, the grievor was assessed more positively on Competence in Microsoft Office (12.).

In addition to the applications and various supporting material, including a binder of material provided by the grievor, the assessors had available to them the information which they learned in the interview process. I do not have that information, but I do have copies of the notes each assessor made regarding the interviews.

Finally, I note that Ms Charron had notice of the hearing and that she attended the hearing.

III. PROVISIONS OF THE AGREEMENT

The key provision is Article 10.07 (c) of the parties' 2001-2004 collective agreement as follows:

ARTICLE 10 - SENIORITY

. . .
10.07
. . .

(c) Nurses shall be selected for positions . . . on the basis of their skill, ability, experience and qualifications. Where these factors are relatively equal amongst the nurses considered,

> seniority shall govern providing the successful applicant, if any, is qualified to perform the available work within an appropriate familiarization period. . . Notwithstanding the level of entry to practice (baccalaureate degree in nursing) which will become effective in 2005, the Hospital will not establish qualifications, or identify them in job postings, in an arbitrary or unreasonable manner.

. . .

IV. POSITION OF THE UNION

The Union submitted that, unless Ms Charron's "skill, ability, experience and qualifications" were demonstrably and substantially superior to the grievor's, I should conclude the grievor and Ms Charron were relatively equal. The Union submitted that the grievor was, in fact, relatively equal to Ms Charron and, because she was the senior applicant, she should be awarded the position.

The Union said the grievor was a model nurse, had outstanding evaluations and had been highly praised by the Employer. She had already worked in this role in the department.

The Union submitted that the Employer had placed undue reliance upon the interviews as opposed to assessing the candidates' "skill, ability, experience and qualifications." The Union said the grievor did not have a good interview but that fact should not be used to prevent her from receiving the position.

Finally, the Union said that under this collective agreement the Employer had to be correct in its assessment of the candidates and that it was improper for an arbitrator to defer to the Employer decision. The Union then reviewed the evidence regarding "skill, ability, experience and qualifications" and asked that I find the grievor was relatively equal to Ms Charron.

The Union sought:

1 A declaration of a violation of the agreement;

2. An order that the grievor be placed in the position, or, in the alternative, an order that the competition be re-done;

3. An order that the Employer compensate the grievor; and,

4. That I remain seised to deal with any difficulties in the implementation of the award.

The Union relied upon the following authorities: *Re Elisabeth Bruyere Health Centre and Ontario Nurses' Association* (1982), 6 L.A.C. (3d) 119 (Saltman); *Re Wellesley Hospital and Ontario Nurses' Association* (1989), 5 L.A.C. (4th) 55 (Weatherill); *North Bay Civic Hospital and Ontario Nurses' Association* (June 27, 1994), unreported (Burkett); *Greater Niagara General Hospital and Ontario Nurses' Association* (February 18, 1997), unreported (Devlin); *Peel Memorial Hospital and Ontario Nurses' Association* (June 14, 1995), unreported (Knopf); *The Kingston General Hospital and Ontario Nurses' Association* (January 29, 1995), unreported (Emrich); *Re Belleville General Hospital and Ontario Nurses' Association* (1986), 22 L.A.C. (3d) 255 (Thorne); *Hamilton Health Sciences v. Ontario Nurses' Association (Hart Grievance)* [2004] O.L.L.A. No. 379 (Barton); *Canadian Food and Allied Workers Union, Local 175 v. Great Atlantic and Pacific Co. of Canada* [1976] O.J. No. 32 (Divisional Court); *Re Mount Sinai Hospital and Ontario Nurses' Association* (1990), 13 L.A.C. (4th) 230 (Haefling); *Re Hamilton Civic Hospitals and Ontario Nurses' Association* (1992), 29 L.A.C. (4th) 43 (Knopf).

V. POSITION OF THE EMPLOYER

The Employer agreed that the grievor was a very good nurse.

The Employer submitted, however, that the issue before me was not whether the grievor was

a good nurse but whether she was relatively equal to Ms Charron, whom each assessor had independently ranked first. In a comparison with Ms Charron the grievor did not meet the standard of relative equality which the parties had agreed the Employer would use in this situation. The Employer acknowledged that if seniority became an issue, the grievor was the more senior applicant. But the Employer submitted the issue of seniority did not arise in this instance.

The Employer said the Union submission would have me ignore the relative equality provision and replace it with some other standard. In this situation the Employer was required by the collective agreement to seek the best person, that is to seek excellence, and that is what the Employer did.

The Employer submitted that there was no evidence to support the assertion that the Employer had placed undue reliance upon the interviews, or that the Employer had failed to consider anything it should have considered regarding the grievor.

The Employer submitted that the Union had the onus in this case to prove the grievor was relatively equal to Ms Charron and that there was no onus on the Employer in this case. The Employer submitted the Union had not met its onus, that the Union had not demonstrated that the grievor and Ms Charron were relatively equal. Notwithstanding that, the Employer reviewed the evidence and submitted its decision was correct. The Employer noted that Ms Charron had a Bachelor of Science in Nursing degree, a degree which was required for the position, whereas the grievor did not have the degree; Ms Charron also had pediatric experience, a qualification which the grievor lacked; and Ms Charron was a lecturer at the University of Windsor and she also had considerable teaching experience. In addition, the Employer noted that there was no criticism of the process and that all four assessors ranked Ms Charron well ahead of the grievor.

The Employer asked that the grievance be dismissed.

The Employer relied upon the following authorities: *Re United Automobile Workers and Westeel Products Ltd.* (1960), 11 L.A.C. 199 (Laskin); *Re Ottawa Civic Hospital and Ontario Nurses' Association* (1989), 9 L.A.C. (4th) 348 (Mitchnick); and *Re Kelsey Hayes Canada Ltd. and United Automobile Workers, Local 240* (1972), 1 L.A.C. (2d) 54 (P.C. Weiler).

VI. CONCLUSIONS

Requirement of a Bachelor of Science in Nursing degree

At the beginning of the hearing I was advised that the Union had no objection to either the job posting or to the interview process. However, during its submissions the Union raised a concern about the requirement of the Bachelor of Science in Nursing degree (2.). The hearing had proceeded until that point on the understanding that there was no dispute about either the posting or the process of assessment. The Employer objected to this change in the nature of the dispute so late in the hearing and asked for a ruling. Given the fact that all the evidence had been entered on the understanding that there was no dispute about the criteria listed in the posting or about the process of selection followed, I ruled that it would be unfair to the Employer, which had put in its evidence on that understanding of the issues, to allow the Union to introduce this new issue during the submissions. As a result, I ruled that it was too late in the hearing for the Union to raise the issue of the posting and the qualification of the Bachelor of Science in Nursing degree included in that posting.

The process followed by the Employer

This collective agreement provision is straight forward. The Employer is to assess the applicants for a position and make a decision based on skill, ability, experience and qualifications. That assessment is not done in the abstract but rather in relation to the particular job. The best candidate is to receive the position unless two or more candidates are relatively equal. Only in a situation of relative equality does seniority become a factor.

The job posting listed various skills, abilities, experience and qualifications. The assessment team evaluated the candidates on 12 different factors and no criticism was made of the use of the 12 factors or of the relative value assigned to each of those factors. I therefore use the same factors and values.

I first consider the process followed by the Employer. It is generally accepted that if an employer adopted an unfair process in a job posting, then the outcome of that unfair process is likely to have been incorrect.

As described earlier, the Employer had a committee of four assessors. The assessors evaluated the applicants on 12 factors. Ms Charron was ranked ahead of the grievor on several factors, they were viewed as equal on some and the grievor was assessed more positively on "Competence in Microsoft Office." All four assessors rated Ms Charron higher overall. The grievor was third in each assessor's rankings. In the view of the four assessors, the grievor was not relatively equal to Ms Charron.

The Union suggested the assessors had conducted the evaluations improperly. However, there was no evidence in the exhibits before me to support that suggestion, and the exhibits were the only evidence in this arbitration.

Nevertheless, the Union suggested that the assessors relied too heavily on the interviews. Had they done as alleged and relied excessively on the interviews, rather than assess the applicants' "skill, ability, experience and qualifications," the process might well have been flawed. However, I am unable to conclude from the evidence before me that the assessors placed undue reliance upon the interviews to the exclusion of other evidence.

There was simply no evidence of any procedural wrong committed by the assessors, nor of any flaw in the process which the Employer followed.

Substance of the Employer decision

Although the fact that the process was fair makes it more likely the Employer reached the correct decision, the substance of the Employer's decision must still be considered. I now turn to the issue of whether the Employer violated the collective agreement in selecting Ms Charron.

The parties made submissions on the standard of review. Many of the authorities deal with that issue. There are some awards which suggest that an arbitrator should examine the Employer decision to determine whether it was reasonable and there are other awards which suggest that an arbitrator needs to determine whether the Employer decision was correct. Some of that difference is attributable to the language used in the collective agreement under consideration. If the language of the collective agreement is "where, in the opinion of the Employer, the applicants are relatively equal" etc., an arbitrator may review the Employer decision to determine whether the decision was "reasonable." On the other hand, if the language of the collective agreement is "where the applicants are relatively equal" etc., and it is not qualified in the collective agreement as being "in the Employer's opinion", an arbitrator may review the decision to determine whether it is "correct."

However, I see no need to consider that debate in any further detail. In my view, those awards simply indicate that the proper approach in this grievance, as in most grievances, is to decide whether the Employer did what was required by the collective agreement. In this instance, if the grievor was relatively equal to Ms Charron, then the Employer was required to award the position to the grievor. I must decide whether the grievor was relatively equal to Ms Charron.

In addition, I note that the onus in this grievance, as in most grievances, is on the party which alleges that the other party has violated the collective agreement. That is, in this case the Union, which alleged the Employer violated the agreement, must provide evidence demonstrating that the Employer was wrong when it concluded Ms Charron and the grievor were not relatively equal.

Returning to the specifics of this matter, Ms Charron had a Bachelor of Science in Nursing degree (2.), which was required, as well as experience in pediatric nursing (9.), which was preferred. The grievor had neither. In those two areas, weighted at a total of 125 points of a grand total of 900 points, the grievor was not relatively equal to Ms Charron, a conclusion also reached by the four assessors.

Both the grievor and Ms Charron had the RN qualification (1.), the required clinical experience in intensive care, critical care and emergency room (3.), and the required prior teaching experience (4.), such that there is little difference between them in those areas worth a total of 300 points, a conclusion also reached by the assessors.

The grievor had the Advanced Cardiac Life Support (10.) whereas Ms Charron had the Pediatric Advanced Life Support (11.). Both the ACLS and the PALS were required, and again there is little difference on these two factors taken together which were worth a total

of 50 points, a conclusion also reached by the assessors.

The grievor was very skilled in Microsoft Office (12.) and in other areas of computers and I would rate her higher than Ms Charron on this factor worth 25 points, although the evidence, including the notes taken by the assessors in the interviews, indicate that Ms Charron had reasonable skills in this area. Nevertheless, the grievor would have to be rated more highly on this factor, a conclusion also reached by the four assessors.

This brings me to the remaining four factors:
5. Leadership/Facilitation,
6. Collaboration/Team,
7. Interpersonal Communication, and
8. Learning/Motivation
worth 100 points each. These factors are difficult to assess from the written material. I note that the interviews focussed heavily on these areas as the interview questions were primarily designed to draw out from the candidates their abilities and experience in these areas. I, of course, do not have the full answers from the candidates, although I have the brief notes made by the assessors during those interviews. I have reviewed those notes as well as the applications, performance evaluations, and all the other material in evidence before me.

At this point it is helpful to recall what I am being asked to decide. Each of the four assessors rated the grievor behind Ms Charron in these four areas taken as a group, although in two of the four areas one assessor, the grievor's supervisor, gave them the same score. The Union asks me to find those assessments to have been wrong and says that I should conclude that the grievor and Ms Charron are relatively equal. Based on all the exhibits before me I am unable to find that the assessors', and thus the Employer's, assessment on these four factors was incorrect.

With Ms Charron's strength on factors 5. Leadership/Facilitation, 6. Collaboration/Team, 7. Interpersonal Communication, and 8. Learning/Motivation, together with her nursing degree (2.) and her pediatric experience (9.), while acknowledging the grievor's strength on Microsoft Office (12.), I conclude that Ms Charron was a superior applicant and that the two applicants were therefore not relatively equal. It follows that the Employer did not violate the collective agreement in awarding the position to Ms Charron.

The grievance is dismissed.

Dated at London, Ontario this 21st day of April, 2006.

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Howard Snow, Arbitrator