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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

DEARNESS HOME (THE CORPORATION OF THE CITY OF LONDON)
- The Employer

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1.on
- The Union

AND IN THE MATTER OF the grievance of Susan Crosby

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Geoffrey P. Belch - Counsel
and others

On behalf of the Union:

Heather A. Fagan - Counsel
and others

Hearing held May 4, June 15, July 17, December 13 and December 19, 2007, in London, Ontario.

AWARD

I. INTRODUCTION

The Union protested the Employer's filling of a temporary vacancy because the posting was withdrawn following the close of applications and re-posted with different qualifications.

II. THE EVIDENCE

The collective agreement between the Corporation of the City of London, the Employer, and the Service Employees International Union, Local 1.on, the Union, regulates the employment of office and clerical employees at the Dearness Home, the Home.

The position in dispute is a temporary full-time scheduler position for the period December 2006 through December 2008. As the title suggests, the schedulers are responsible for ensuring that the proper number of staff with the correct skills are scheduled at all times. Apart from preparing the schedule, the schedulers are responsible for replacing absent staff. At certain times of the year replacing absent employees is a major task and that task was often shared by persons other than schedulers. For example, receptionists are often required to call staff to replace those who are absent. In addition, the schedulers track which employees actually work and report that information for payroll purposes.

In recent years it was common to have one full-time and two part-time schedulers with the full-time scheduler responsible for scheduling the nursing staff and the part-time schedulers responsible for scheduling smaller groups of staff. The part-time schedulers have also worked some weekends doing call-ins - i.e. calling employees to ask them to come to work to replace absent employees.

November 7, 2006, a two year temporary full-time scheduler position was posted. That posting was similar to earlier postings for schedulers. This particular posting was made or approved by the Business Manager who normally had responsibility to fill a position such as this one. The posting ran the full period and came down on the scheduled closing date, November 21. That date passed but no one was hired. Instead, November 28 the Employer issued a notice which indicated that the November 7 posting had been withdrawn.

Among the applicants for this position was Susan Crosby, the grievor. The grievor was the senior applicant and would normally have expected to have obtained the position.

November 28, in addition to the notice that the November 7 posting had been withdrawn, there was a new posting for a temporary full-time scheduler - essentially the same position as in the November 7 posting. The November 28 posting contained two minor changes to remove certain job duties. But there were two more significant changes which were of concern here - the original posting had indicated that scheduling experience was “an asset,” whereas the second posting stipulated one year of experience as a scheduler was required - “ A minimum of one year scheduling experience is essential.” In addition, the second posting added the following qualification - “demonstrated proficiency in . . . scheduling software.” The grievor, who appeared to have met the qualifications for the position when it was first posted, did not have one year of scheduling experience. Her exposure to scheduling was the call in work she had done while a receptionist, and she had no experience with the scheduling software.

The Employer awarded the position to Linda Taylor, a part-time scheduler. Ms Taylor had the required one year experience in the scheduler position and had used the scheduling software. I note that the successful applicant, Linda Taylor, was given notice of the hearing and testified as an Employer witness.

Susan Crosby filed a grievance seeking the position.

The Home is a long term care facility governed by provincial legislation which guarantees certain rights for residents with respect to the quality of their care. Prior to this job posting, the provincial Ministry responsible for the Home had expressed concerns about the care provided to residents and had placed the Home under "enhanced monitoring." Enhanced monitoring indicated that the Ministry had concluded that there were problems in the operation of the Home, that the quality of care would be evaluated more frequently until the problems were resolved and the Home could deliver the quality of resident care required by legislation.

Many employees in this bargaining unit begin work at the Home as part-time employees. Part-time employees do not receive the benefits provided to full-time employees. Many of the part-time employees seek full-time positions and wait for them to be advertised by way of postings under the collective agreement. Generally speaking, the senior applicant has been successful in job postings under this agreement and the Employer has explained its decision to any unsuccessful applicants. In this case, the senior applicant was unsuccessful and no explanation for the decision was offered to the grievor nor to the other unsuccessful applicant.

Eight witnesses testified.

Evidence of Amy Ruttinger

Amy Ruttinger has been employed at the Home for over 11 years, but because of a break in her employment, her seniority is less than that of the grievor. Ms Ruttinger also applied for this scheduler position but was unsuccessful.

Ms Ruttinger has held several positions at the Home including scheduler, a position she held for about seven months some four years ago. In addition, she said that she did scheduler tasks while working as a receptionist including call-ins to replace those who were sick or otherwise absent. She said that when she worked as a scheduler her major duty, in terms of time, was replacing absent staff. She testified that making call-ins was an overwhelming task and was often passed to a receptionist. She agreed that there was a procedure for making call-ins and that a person making call-ins needed to follow that procedure.

When Ms Ruttinger began work as a scheduler she had no prior exposure to Kronos, the scheduling software used at the Home. She said she was nevertheless able to prepare schedules using Kronos and do the rest of the scheduler job.

Ms Ruttinger testified that between Christmas 2006 and New Year she had been called in to work in scheduling and had been the only scheduler working during that period.

Evidence of Dee Decock

Dee Decock has worked at the Home for some 15 years and is the Union's Chief Steward. She testified that prior to the Home's move to a new building in 2005, the Staff Planning Committee established under the collective agreement had met and reviewed the job posting for schedulers. The content of the posting which management had reviewed with the Union in the Staff Planning Committee was the same as the content of the first posting for this scheduler position. She said that the second posting in this matter had never been reviewed with the Union.

Ms Decock testified that when the first posting was withdrawn she had inquired of a staff member in Human Resources about the matter. Ms Decock said the staff member apologised

for not having notified her and advised that management felt the posting had needed changes and re-posting.

Evidence of Susan Crosby

Susan Crosby, the grievor, is a part-time employee hired in September 2001. She began work as a temporary receptionist, then became a permanent receptionist, then a records clerk, and for the past three years has worked as a unit clerk. While a unit clerk she has also worked additional shifts as a receptionist and as a records clerk. I note that while she worked part-time when she testified at the arbitration, later testimony indicated that she has since obtained a full-time position with the Home.

The grievor testified that each of her new jobs had been obtained through a posting and that she had been the senior applicant in each instance. She said that when hired as a records clerk, and later as a unit clerk, she had no experience in those jobs.

The grievor testified that she was exposed to the assignment part of scheduling on every shift as a unit clerk, as the assignment sheets indicate which staff are working and where. In addition, she said that when she filled in at reception, which she did one to three times each month, she did call-ins. She testified that she had been called and asked to work as a replacement scheduler but she had not accepted any such requests.

She agreed that she had never prepared a schedule nor any reports for payroll and that she had no exposure to the scheduling software. She said she was experienced in other software, including Excel which is used extensively by schedulers. She expressed the opinion that she was qualified for the position and that she would be perfect for it.

Evidence of Anne Morrison

Anne Morrison has worked as the Administrator of the Home since August 2006. She testified that she had worked for many years in health care, and especially long term care, but had been retired prior to accepting the Administrator position.

Ms Morrison testified that before she officially began work at the Home she had been involved with City of London managers and with provincial Ministry officials in a discussion of the results of a Ministry compliance review of the Home. The Ministry officials had provided the results of their compliance review and advised of their conclusion that the Home was consistently unable to meet minimum basic standards, especially in direct resident care. The Home was then placed under enhanced monitoring which meant that the Ministry officials would visit frequently and check on the level of care. If the Home did not demonstrate sufficient improvement, the next step would be enforcement in which the Home would lose its right to admit new residents. The duration of the first period of enhanced monitoring was three months from June 27, 2006. Following a review, a second period of enhanced monitoring was imposed for three months from mid-October. After a second review, a third period was imposed for 30 days beginning February 1, 2007, and then a final 60 day period from mid-March 2007.

Ms Morrison described some of the difficulties facing the Home in the fall of 2006. Apart from the fact of enhanced monitoring, she said the Home was missing nursing administrators and that the Home had a high percentage of staff absenteeism. She said that over 25% of the staff missed more than 12 days per year without any significant medical reasons. She said the absenteeism problem existed in all departments but that absenteeism was worse in nursing. She said that in order to ensure that care was provided in a consistent way the Home needed staff to work consistently with residents. In addition, a large number of positions

were vacant.

As part of the effort to address some of the administrative and managerial difficulties, a new temporary administrative assistant position, excluded from the bargaining unit, was added. The full-time scheduler, Drita Thornton, applied and was successful. Her position then had to be filled. Ms Morrison described the full-time scheduler position as extremely critical for nursing and a vital part of the Home's response to enhanced monitoring.

Ms Morrison said that when she arrived at the Home she had concerns about the old job descriptions and wanted to review them as positions became vacant. She said that she had requested that no postings go up until reviewed by her. However, she testified that the first posting of this position had gone up before she had reviewed it, so she had it removed.

I note that there was no evidence as to whether Ms Morrison nor any other Employer representative reviewed the applications for the first posting. In addition, I note that Ms Morrison was not asked whether she was aware who had applied for the first posting before she cancelled that posting.

After removing the first posting, Ms Morrison said that she had reviewed it with Susan Chandelier, then the Acting Director of Care. Ms Morrison said she added the requirement for one year of experience because the Home was in crisis. She said the Home had no time to stop and provide training, coaching, or orientation. She said the Home needed a person who could "hit the ground running and fill Drita's shoes." She said that anyone without knowledge of the software used would need several months of training and coaching and that the Home could not manage that process during this period of crisis. Ms Morrison had the position re-posted with the various changes.

Ms Morrison said she was involved in reviewing the applicants for the second posting. Linda Taylor had approximately 3800 hours experience as a scheduler and the grievor had none. Linda Taylor had shown her ability with the Kronos scheduling software and the grievor had shown no such ability.

Ms Morrison expressed her view that call-ins were only a small part of the scheduling function. She described call-ins as a manual function where a person worked from a list and made notes. She testified that after the schedulers left for the day, the task of making call-ins was passed to the receptionist, and after the receptionist left the RN on duty did any call-ins. She said that the scheduling work done in reception was only a small part of the full range of the duties of a scheduler. She said the one year of scheduling experience was intended as a year working in the scheduler role, with experience in and a knowledge of the various systems, not simply making call-ins.

As for the staffing problems, she said that until about four days before the Christmas 2006 holiday she had been sufficiently concerned about having enough staff that she had prepared a contingency plan to reduce care below minimum levels but that the Home had managed to staff enough positions that it did not need to adopt those emergency measures.

Ms Morrison described the first posting as an unauthorized posting, since she had not reviewed it before the posting as she had previously requested. She expressed the opinion that to have hired a person who was not able to do the scheduling function from the start could have had serious consequences for the Home, up to the possible loss of its licence to operate.

Evidence of Susan Chandelier

Susan Chandelier is an Assistant Director of Care at the Home and has a nursing background. She was hired in August 2006 and was Acting Director of Care during the period of this contested hiring. She indicated that she had not done a scheduler job as such, but in earlier positions she had done scheduling work. As Acting Director of Care she had regular contact with the full-time scheduler who did the scheduling for the nursing staff.

Ms Chandelier also outlined the situation facing the Home during the period of enhanced monitoring. She said that the Home had many standards which were not being met. She described several staffing issues, including a general shortage of staff, high absenteeism, and a number of employees who failed to attend work and did not advise the Employer - referred to as "no call, no shows." She said that the full-time scheduler position was critical to the Home's ability to provide good care for residents.

As for the first posting, Ms Chandelier said that the Business Manager had authorized the posting. However, she said that Anne Morrison, the Administrator, had given a direction that all postings were to go through her office, that she (Ms Chandelier) understood the first posting had not gone through Ms Morrison's office, and that it was withdrawn.

Ms Chandelier testified that she had been involved in making the changes for the second posting. She said she felt the Home needed someone in the full-time position who had scheduling experience, understood the staffing issues, and was trained in Kronos, the scheduling software. At the hearing, she expressed the view that someone with no experience in scheduling would find it extremely difficult to move into this position. She said that call-ins were only a small part of the scheduler's work.

Ms Chandelier was also involved in selecting the successful applicant. She said that three persons were evaluated. The grievor had no experience as a scheduler; Amy Ruttinger had

worked over 700 hours as a scheduler a few years previously; and Linda Taylor had over 3,700 hours of experience during her three years of part-time scheduling. In addition, she said Linda Taylor had knowledge of Kronos. She said that, in her view, the necessary qualifications were experience in scheduling and a knowledge of Kronos.

Ms Chandelier said she had worked with Ms Taylor as a full-time scheduler and found her very capable.

Evidence of Drita Thornton

Drita Thornton is currently an administrative assistant and previously was a full-time scheduler. It was her position that was being filled on a temporary basis. She began as a scheduler in about 1999 when the City of London began to use new payroll and scheduling software - Kronos.

Ms Thorton described the duties of a scheduler. She said that with each change in Kronos the scheduling function became more difficult. She said that the City's main concern was payroll and while the Kronos changes may have made payroll easier and more accurate, those same Kronos changes made the scheduling position more difficult.

As for call-ins, she said that call-ins had been about 10-15% of her work as a scheduler.

Ms Thornton expressed her view that a person with no scheduling experience would have great difficulty doing the job. She said it took her two or three years to be comfortable in the job.

Finally, Ms Thornton said that before leaving her scheduler position she had advised Linda

Taylor, then a part-time scheduler, where things were located in the scheduler's office.

Evidence of Ruth Ann Hutcheson

Ruth Ann Hutcheson is a part-time scheduler. She was hired as a scheduler in June 2005 having had prior experience in scheduling and with Kronos, but with a different employer. She said that she was about six months before she felt comfortable preparing schedules for groups with fewer employees than comprise the nursing group. She said she had received further training from Drita Thornton, the full-time scheduler, and from Linda Taylor, then a part-time scheduler. She said she had a lot of "hands on" training and had worked with Drita for some time.

Ms Hutcheson applied for this temporary full-time scheduler position the first time it was posted. She said she felt she could have done the full-time job but that it would have been a struggle for her. She did not apply for the second posting. She also expressed the view that it would be unfair to an employee to put the employee in the full-time scheduler position if that employee did not have prior scheduling experience. She also noted that experience in scheduling at the Home would ease the transition.

She described in detail the nature of her work of a scheduler. She testified that she made extensive use of the Excel software program, as well as Kronos. In addition, she expressed the view that approximately 40% of her time was spent on call-ins.

Evidence of Linda Taylor

Linda Taylor was the successful applicant for the disputed temporary full-time scheduler position. She had been working as a part-time scheduler and said she had about 4,000 hours

of scheduling experience at the Home when she obtained the full-time position.

While working as a part-time scheduler Ms Taylor had provided assistance with the nursing scheduling and had been responsible for doing her own scheduling of smaller work groups. She expressed the view that she was a scheduler for about two years before she felt she was competent to do the nursing schedule. She had been in the full-time job and responsible for the nursing scheduling for approximately one year as of the day she testified and she said she had taken a long time to become comfortable, but that she was starting to get her "sea legs."

III. THE AGREEMENT

There are two bargaining units - one for full-time employees and one for part-time employees - and two collective agreements. However, the two collective agreements are printed together with all the common provisions first, then all those provisions which apply only to the full-time unit, and finally all those provisions that apply only to the part-time unit. Some of the Articles, such as Article 22, below, have different titles in the different parts. In any event, the key provisions applicable to part-time employees in the parties' 2003-2005 collective agreement are as follows:

ARTICLE 6 - RESERVATION OF EMPLOYER'S FUNCTIONS

6.1 The Union acknowledges that it is the exclusive function of the Employer to:

. . .

(b) Hire, discharge, transfer, lay off, promote, demote, classify or discipline employees, provided that . . . [then provides a right to grieve]

. . .

ARTICLE 12 - SENIORITY

. . .

12.5 (a) When a Part-time employee is transferred to another classification in the Bargaining Unit, she shall be subject to a trial period in her new duties of two hundred and forty (240) working hours. . . .

12.6 Seniority shall govern in all cases of promotion, demotion, transfer to a higher paid job or to a job with equal pay. The more senior employee must be qualified to do the job involved efficiently and

in the case of demotion she must be capable of performing the duties of the job to which she is demoted efficiently. . . .

ARTICLE 22 - POSTING OF STAFF VACANCY

22.1 Applications received from members of the Bargaining Unit shall receive first consideration. In the event that there is no applicant, or no successful applicant, from the Bargaining Unit, the Employer may then fill the vacancy from outside the Bargaining Unit.

ARTICLE 22 - TRANSFER OF SENIORITY

. . .

22.9 **Application to Full-Time Vacancies**

Where vacancies are posted for positions within the Full-time Bargaining Unit and no applicants within the Full-time Bargaining Unit are considered to be suitable to fill such vacancies, consideration will be given to applications from employees in this Bargaining Unit to fill such vacancies prior to the consideration of persons not employed by the Home. Where the Home fills such vacancies from among applicants from this Bargaining Unit, the seniority of such applicants will be observed for such purposes provided the senior applicant possesses the necessary qualifications and ability to perform the work available.

IV. UNION POSITION

The Union reviewed the evidence summarised above. The Union noted the importance of seniority in the collective agreement, especially in Article 12.6 and 22.9, above, and the right to a trial period in Article 12.5 (a).

In this instance, a full-time position was posted November 7, 2006, with a closing date of November 21. The evidence was clear that the senior applicant was normally awarded the job. The posting ran the full period and came down on the scheduled closing date. The grievor applied and was the senior applicant.

The Union said that what occurred after the closing showed bad faith on the part of the Employer - the Employer had chosen the person it wanted, but it was not the grievor. One week later the Employer purported to withdraw the posting and posted the job again with a few small changes in the qualifications, especially the change to make scheduling experience a requirement, as opposed to an asset as it had been in the first posting. This withdrawal and

re-posting was a very unusual event. In addition, the Employer had never previously made changes in qualifications without first discussing the proposed changes with the Union.

After the re-posted position closed, an e-mail announcement indicated that Linda Taylor had been successful. The evidence indicated that management normally explained the decision to the unsuccessful applicant(s). No one from management provided an explanation for the decision to the grievor or to Amy Ruttinger, the other unsuccessful applicant, both of whom were senior to Ms Taylor.

These events led to the grievance because the grievor was senior, had the necessary qualifications and the ability to do the work. The grievor had done scheduling work both before and after she was unsuccessful in her application. None of the part-time employees previously hired as schedulers had worked as a scheduler before they were hired and none of them knew the computer program used for scheduling (Kronos) before being hired. The grievor was in the same position as all those other schedulers.

The Employer explanation was not persuasive. Anne Morrison, the Administrator, said she had implemented a process under which she was to review all postings in advance. That may explain why the posting was withdrawn but was not an explanation for the change in qualifications so as to exclude the grievor. Ms Morrison had testified about the enhanced monitoring the Home was under and the importance of Kronos, but the two were not linked.

Susan Chandelier, the Acting Director of Care, spoke of the issues of absenteeism and the need for staff, but she had no experience as a scheduler. She indicated she felt the hiring was done in accordance with the collective agreement but was unable to say why.

Drita Thornton, whose scheduler position was being filled, put a “complicated spin” on the

job, but she had started as a scheduler with no experience in scheduling. Before leaving the scheduler position for her new administrative position she had explained to Linda Taylor, the successful applicant, where everything was and the Union said that this fact suggested no one else had even been considered for the position.

Ruth Ann Hutcheson is a part-time scheduler. She indicated she had prior experience with Kronos before starting work with the Employer but she had done no scheduling. Much of what Ms Hutcheson did as a scheduler was done using the Excel software program and the grievor had extensive experience with Excel.

Linda Taylor's evidence did not assist the Employer case.

The Union then reviewed the authorities below.

The Union said the Employer must act reasonably and in good faith. But the Employer had not done so and had instead "cherry picked" one person for the job over a more senior applicant. The Union submitted that the Employer's cancellation of the first posting, after the posting had closed, was "null and void." The Union said that only the first posting should be considered. The Employer demonstrated bad faith in the way it withdrew, changed, and then re-posted the position. There was no sound and practical reason to have done as the Employer did. The Union asked that I find the vacancy had to be filled using the first posting.

The Union then considered who would be entitled to the position under the first posting. Under this collective agreement, if the senior applicant had the qualifications and ability to do the work, she was entitled to the position. The grievor was senior and she had the qualifications and ability required in the first posting.

The Union sought the following:

1. A declaration that the second job posting was null and void;
2. A declaration that the Employer had violated the collective agreement;
3. An order that the grievor be awarded the position of scheduler;
4. An order that the grievor be compensated for lost wages and benefits; and
5. That I remain seised.

In reply to the Employer submission, the Union said that the language of the collective agreements in the Employer cases differed substantially from the language in this agreement. The Union said I should therefore apply the approach in the cases it had cited, as the language in the collective agreements considered in those cases was similar to the language here.

The Union relied upon the following authorities: *Re Chilliwack General Hospital and British Columbia Nurses' Union* (1994), 47 L.A.C. (4th) 270 (McPhillips); *Re Corner Brook Pulp and Paper Ltd. and Communications, Energy and Paperworkers Union of Canada, Local 60N* (1998), 73 L.A.C. (4th) 1 (Oakley); *Re Foothills Provincial General Hospital and Alberta Union of Provincial Employees* (1998), 76 L.A.C. (4th) 371 (Moreau); *Ontario Public Service Employees Union v. Ontario (Ministry of Finance) (Leung Grievance)* [2001] O.G.S.B.A. No. 54 (Abramsky); *Re Kingston General Hospital and Canadian Union of Public Employees, Local 1974* (2005), 144 L.A.C. (4th) 373 (Emrich); *Re Corporation of the Town of Kirkland Lake and Canadian Union of Public Employees, Local 26* (2004), 133 L.A.C. (4th) 278 (Haefling); *Re City of Sydney and Canadian Union of Public Employees, Local 933* (1992), 24 L.A.C. (4th) 349 (MacDonald); *Re Board of School Trustees, Delta School District and Canadian Union of Public Employees, Local 1091* (1994), 46 L.A.C. (4th) 216 (Laing); *Re Boliden-Westmin Resources Ltd. and Canadian Autoworkers Union, Local 3019* (1998), 74 L.A.C. (4th) 374 (Blasina); *Re Pepsi-Cola Canada Beverages (West)*

Ltd. and United Food & Commercial Workers International Union, Local 330W (1994), 44 L.A.C. (4th) 47 (Chapman); and *Re Her Majesty the Queen in Right of Newfoundland (Treasury Board) and Newfoundland Association of Public Employees (Young)* (1992), 27 L.A.C. (4th) 137 (Browne).

V. EMPLOYER POSITION

The Employer also made an extensive submission.

The Employer began by responding to the remedies sought by the Union. The Employer said that the position had been re-posted for sound and practical reasons. There had been no violation of the agreement, and the disputed position should not be awarded to the grievor.

The Employer accepted that the applicants were entitled to have their applications considered but that consideration was subject to the provision at the end of Article 22.9 - the applicants must have the necessary qualifications and ability to do the work.

The Employer then reviewed and commented upon the Union authorities and applied them to the facts before me. The Employer said that those authorities recognized the right of an employer to cancel a posting. The Employer said in this collective agreement that right was expressly reserved to management in Article 6. The issue before me was: Did the Employer have grounds to terminate the first posting and revise the posting?

Anne Morrison explained that her intent had been for all postings to be reviewed by her personally. However, contrary to Ms Morrison's intention, the first posting had gone up before she reviewed it. There were two duties deleted in the re-posted position and there appeared to be no issue with those changes. The removal of those two duties supported the

Employer view that there had been errors in the initial posting.

In any event, there were two crucial aspects of the scheduler position.

First, the Home operates continuously and the full-time scheduler had to schedule some 200 members of the nursing staff over three shifts seven days a week. The Employer witnesses had testified about the problems facing the Employer and the many vacant shifts in the fall of 2006. The Employer said with the staffing issues and the enhanced monitoring by the provincial government, there was a state of crisis at the facility. The Employer needed someone who was familiar with scheduling software and could create and update schedules. In light of that, it was reasonable for Anne Morrison to have concluded that the Employer needed someone in this position who possessed scheduling experience. Changes were made from the first posting to the second, changes to require experience and a knowledge of scheduling software.

The second key aspect of the scheduler position was the preparation of payroll reports and that was the same in both postings.

In summary, the Employer said there were valid reasons for the Employer to decide to cancel the first posting, then to revise it and specify the qualifications which were needed for the position.

Assuming that the second posting was allowed, it was left to the Employer to determine whether the senior applicant had the necessary qualifications. As the grievor had neither scheduling experience nor familiarity with the software used, the Employer had not violated the collective agreement in failing to award the position to her as the senior applicant. It is for the Employer to determine whether an applicant has the necessary qualifications in any

posting, and that means those qualifications specified in the posting.

The agreement contains a trial period in any transfer within the part-time unit, but in this case, had the grievor obtained the position, it would have been a transfer from the part-time unit to the full-time unit and there was no clear right to a trial period in that instance. But in any event, the right to a trial period would only arise if the applicant had the qualifications specified in the posting.

The Employer noted that in some of the cases relied upon by the Union, there had been no evidence about the reasons for cancelling the postings and, in that situation, an inference of bad faith can easily arise. But here the Employer led evidence of the reasons for the cancellation and re-posting and there was no bad faith. In addition to the two managers, the Employer noted it had called three employees who all had done the scheduling job and those witnesses all testified that it was unreasonable to think that an inexperienced person could obtain the job and then learn the duties in 30 days. It was reasonable to conclude that the Employer's concern was to ensure that the person moving into this job was able to perform the work.

As for the Employer's conclusion that the grievor did not possess the necessary qualifications and ability to do the work, the Employer said the onus was on the Union to demonstrate that the grievor did have the qualifications and ability. But the grievor had never prepared a schedule, she had never worked in the scheduling office, and she had no training on scheduling software. Her exposure to scheduling functions had been limited to the call-in of employees when there were absences which needed to be filled. Unlike the grievor, the successful applicant, Linda Taylor, had worked as a scheduler and it was reasonable for the Employer to conclude she had the necessary qualifications and ability and that the grievor did not.

The Employer asked me to dismiss the grievance.

In the alternative, if I found unfairness in the re-posting, the Employer submitted that the proper remedy was to direct it to complete its assessment of the applicants for the first posting. The Employer said it would be improper to award damages to the grievor who might ultimately be unsuccessful in obtaining the posted position.

The Employer relied upon the following: *Re Reynolds Aluminum Co. Canada Ltd. and International Molders and Allied Workers Union, Local 28* (1974), 5 L.A.C. (2d) 251 (Schiff); *Re Lennox Industries (Canada) Ltd. and United Steelworkers, Local 7235* (1983), 12 L.A.C. (3d) 241 (Kennedy); *Re Greater Niagara General Hospital and Ontario Nurses' Association* (1988), 2 L.A.C. (4th) 416 (Brunner); *Re Intertek Testing Services and International Longshoremen's and Warehousemen's Union, Local 514* (2002), 111 L.A.C. (4th) 97 (Blasina); *Re Dare Foods Ltd. (Biscuit Division) and Bakery, Confectionary, Tobacco Workers' and Grain Millers' International Union, Local 264* (2004), 128 L.A.C. (4th) 331 (Beck); and *Re Halifax Regional Water Commission and Canadian Union of Public Employees, Local 227* (1999), 79 L.A.C. (4th) 35 (North).

VI. CONCLUSIONS

The thrust of the Union's submission was that the Employer had violated the collective agreement in withdrawing the first job posting. On the other hand, much of the Employer's evidence was devoted to the reasons for changing the qualifications when the Employer re-posted the position.

There are two issues before me:

1. Was the Employer entitled to cancel the first posting?

2. If the Employer was entitled to cancel the first posting, was the Employer then entitled to revise the qualifications for the second posting?

1. Was the withdrawal of the first posting a violation of the collective agreement?

In brief, a job was posted November 7, 2006, in the usual manner and with the usual qualifications. The grievor applied, and it appeared that she was qualified for the posting. The grievor, as the senior applicant, expected to obtain the position. But the expected did not happen. Instead the Employer withdrew the posting. Did the Employer violate its obligations under this collective agreement in cancelling that first posting?

There is very little in this collective agreement about the posting procedure. Article 6 (above) indicates that the Employer has the right to promote, etc., but that general management right to promote is subject to the other specific provisions of the agreement.

Article 22.1 (above) is the extent of the language on the posting process itself. As this case involves a change in job qualifications, I note that this Employer was entitled to specify the qualifications in the posting it issued. The Employer could have included experience as a scheduler and proficiency with scheduling software - the qualifications in the second posting - in its initial posting.

While Article 22.1 makes it clear that the parties intended a job posting process, the collective agreement contains no provision explicitly indicating when the Employer must post a vacancy or when the Employer may withdraw a posting. As there is no explicit restriction on the Employer's right to cancel a job posting, I find that the collective agreement provides no clear assistance to the Union.

However, there are other provisions in this collective agreement which provide rights for senior employees who apply under a job posting. Article 12.6 (above) provides for a preference for senior employees in a number of situations, including the consideration of applications made pursuant to a job posting. Article 22.9 (above) applies most directly to this situation of a part-time employee seeking a full-time position under a job posting and it provides a preferential right for the senior employee.

The right of the Employer to cancel a posting and the right of an applicant under that posting to have her application considered in accordance with the provisions of the collective agreement may come into conflict. It is therefore necessary to consider how the parties intended such a potential conflict be reconciled.

The idea of a limitation on the Employer's right to cancel a job posting was accepted by the Employer. The Employer position was simply that what it had done in this instance was legitimate and was not in violation of the agreement.

Based on the two provisions of this collective agreement which expressly provide rights for employees applying for a job posting based on their seniority (Articles 12.6 and 22.9), and on the language of this collective agreement generally, I find that the parties intended that there would be a limit on the right of the Employer to cancel a posting. I believe the parties intended that the posting process would not be manipulated by the Employer to the detriment of the rights and expectations of a senior applicant, whether the manipulation was done to ensure that a person the Employer preferred would be successful in the posting, or otherwise.

When can the Employer cancel a posting?

I conclude that the parties intended a balancing of the competing rights. In balancing those

rights, each cancellation of a posting will be different. There may be many different factors which will need to be considered in order to properly balance the Employer's right to post positions and to hire, on the one hand, with an employee's right to proper consideration as an applicant for a posting. For example, cancelling a posting because of a mistake in the posted start date might be an adequate reason for withdrawing a posting if the cancellation is made one hour after the posting, but that same reason might not be adequate if the cancellation occurs after the close of applications. Both the reason for cancellation and the timing of the cancellation would seem to be relevant factors. There may be situations in which the timing of the cancellation is of a little importance. Because each cancellation will be different, I am confident that other factors will also be relevant.

Based on the language of this collective agreement and a consideration of some of the types of cancellations of postings that may occur, I conclude that the parties intended that the exercise of the Employer's right to cancel a job posting under this collective agreement be subject to a reasonableness test: *Was the cancellation reasonable in all the circumstances?* This approach requires an arbitrator to consider all the facts of a particular cancellation and determine whether that particular cancellation was reasonable, given that the Employer has a right to cancel and the employees have a competing right to have their applications considered in accordance with the language of the agreement.

I note that this approach of *reasonable in all the circumstances* is used in other instances where an arbitrator is reviewing a dispute involving the exercise of employer discretion.

This notion that an employer should not be allowed to manipulate the negotiated posting process and thereby avoid the seniority rights contained elsewhere in the agreement, a notion which I have concluded was the parties' intention in this collective agreement, has also been recognized in a number of the cases cited interpreting other collective agreements.

The case relied upon most heavily by the Union, and also relied upon by the Employer, was *Chilliwack Hospital*, above. There were similarities there with the facts of this case. A position had been posted. The grievor was the senior applicant for the first posting and would likely have obtained the position under that first posting. However, the posting was withdrawn, and later re-posted without any change of substance, other than a change in the starting date. When the position was re-posted there was an additional applicant who was awarded the position based on seniority.

Arbitrator McPhillips expressed the issue before him as whether the employer had the right to cancel the first posting. He reviewed the collective agreement and, as in the collective agreement before me, found no direct reference to the cancellation of a posting. Arbitrator McPhillips concluded that the arbitral jurisprudence was particularly relevant and he reviewed a number of authorities. In terms of cancelling a posting, he concluded that an employer must have a "sound practical reason" (p. 280) to do so.

No clarification was given as to why "sound practical reason" or "sound and practical reason" was adopted as the standard for reviewing the cancellation of a job posting, other than this test had been used in earlier cases. I do not find the term "sound and practical reason" a clear standard as it suggests that the examination of the cancellation is totally dependent upon the employer's reason for the cancellation. However, it is clear from Arbitrator McPhillips' award that what will be found to be a sound and practical reason to cancel a posting will depend not simply on the employer's reason. He considered when the cancellation occurred - that is, whether it was early in the posting, after the closing date for the receipt of applications, etc., - as well as whether there had been a significant change in the facts relating to the position. That is, his award makes it clear that what will be a sound and practical reason to cancel a posting will depend on all the circumstances of the case. The "sound and practical reason" standard of review is equivalent to the "reasonable in all the

circumstances" approach which I concluded these parties intended in this collective agreement.

I have examined all the other authorities cited by the two parties but they add little to this issue.

I have found that:

1. It is implicit in this collective agreement that the parties intended that the posting process not be manipulated by the Employer to the detriment of the rights of a senior applicant as specified in the agreement, whether the manipulation is done in order to ensure that a person the Employer prefers will be successful in that posting, or otherwise;
2. The parties intended that the Employer's right to cancel a posting is subject to a test of "reasonable in all the circumstances;" and,
3. The approach adopted in *Chilliwack,* and in some of the other cases cited, to decide whether an employer has manipulated the process, an approach relied upon here by both the Union and the Employer, was whether the employer had a "sound and practical reason" for withdrawing the first posting, a test which I conclude is equivalent to the "reasonable in all the circumstances" approach.

I now deal with the specifics of this case.

There was surprisingly little evidence about the details of this cancellation. Ms Morrison testified she had previously "requested" that all job postings be approved by her in advance of the posting. That evidence was uncontradicted. I note that a "request" from Ms Morrison as the Administrator of the Home as to how she wanted job postings to be handled seems in reality to have been a direction or order and I have evaluated this matter on that basis. In any event, the Administrator testified further that the first posting in this case had not been

reviewed and approved by her in advance. She said the posting was withdrawn for that reason.

Ms Chandelier testified as to her understanding of the reason for cancelling the posting and her understanding was consistent with the Administrator's evidence.

While there was clearly a suspicion on the part of the Union that the Employer had another motivation, there was no evidence of another reason. There was no evidence that the Administrator knew who had applied for the first posting before it was cancelled - she was not asked any question which would have elicited that information. There was no evidence that the cancellation was designed to influence the outcome by enabling, or preferring, a particular candidate. There was no evidence even that the Administrator decided that the qualifications specified in the first posting were inappropriate and that she cancelled for that reason. I conclude the reason for the cancellation of the posting was simply the fact that the Administrator had not approved the posting.

Although the Administrator had not approved the first posting, it was clear that a manager with apparent authority had authorized the posting. This collective agreement excludes a number of managerial positions from the scope of the bargaining unit. Based on the number of excluded managers, it seems clear that these parties intended in this collective agreement that other managers would be able to exercise managerial functions on behalf of the Home. Notwithstanding the Administrator's direction about personally reviewing all postings in advance and the fact that she did not personally approve the first posting, I nevertheless find that the posting was made by the Employer. Moreover, I find that someone on behalf of the Employer had received the applications, knew who had applied, knew or could easily have known who was the senior applicant, and knew or could have known who among the applicants was likely to obtain the position.

Is the fact that the first posting had not been personally reviewed and authorized by the Administrator a reasonable basis for cancelling this posting? Based on the evidence before me, I find this was not a reasonable basis for cancelling the posting a week after the closing date for applications. The fact that the Administrator had directed that all postings be approved by her in advance and that this posting was not so approved may indicate a problem in communications among the members of the management group, but does not amount to a reasonable basis for cancelling this posting.

As my approach is one of reasonable in all the circumstances, I acknowledge that this cancellation might have been reasonable in different circumstances - it might have been reasonable if it had occurred much earlier, such as the day after the posting went up, or in a situation where the collective agreement provided different seniority rights. However, under this collective agreement, one week after this posting had closed, the applicants for the position had the right to have their applications reviewed and considered in accordance with the collective agreement, and the grievor as the senior applicant had special rights. In balancing those employee rights with the right of the Employer to cancel a posting, I conclude that a week after the close of applications was too late for the Employer to cancel this posting on the sole basis that the Administrator had not personally approved that posting.

Given the lack of detail and clarity in the evidence as to the reason(s) for the cancellation of the first posting, I will also consider whether the cancellation would have been reasonable if I am incorrect as to the reasons for cancellation and, in fact, the Administrator had decided that the job posting should have required both one year of experience as a scheduler and proficiency using scheduling software because of the “crisis” facing the Home at the same time as she noted that she had not approved the first posting, and that she had cancelled the first posting for a combination of those reasons. The difficulty I have with this alternative scenario is again the timing. I conclude that it would have been unreasonable for the

Employer to have posted the position, left the posting up the full time, allowed a further week to pass, and only then for the Employer to have decided that it did not like the qualifications which its own managers had established, even allowing for the fact that the Administrator had not approved the posting initially.

I declare that the Employer violated the collective agreement when it cancelled the first posting.

I wish to make clear what I have decided and, in particular, what I have not decided. I have not decided this Employer is prevented from establishing or changing the qualifications for positions. As I noted above, this Employer has the right to set the qualifications. What I have decided is that after setting the qualifications, posting a position with those qualifications, allowing that posting to run for the full time specified in the posting, and allowing another week to pass, it was unreasonable for the Employer to then cancel this posting.

2. Could the Employer change the qualifications in the second posting?

In light of my conclusion on the issue of cancelling the first posting, it is unnecessary to deal with this issue.

3. What is the appropriate remedy?

Having found that the Employer violated the collective agreement, I now turn to the appropriate remedy.

Had the Employer not violated the agreement, it would have been required to evaluate all the

applicants for the first posting using the criteria in the collective agreement and the qualifications in that first posting.

In the circumstances, I conclude that the appropriate remedy is to refer the matter back to the Employer to complete the process from the point at which its violation of the collective agreement occurred. The Employer is therefore directed to complete the assessment of all the applicants for the first posting. I note that the grievor was the senior applicant and that under Article 22.9 her ". . . seniority . . . will be observed . . . provided the [grievor] . . . possesses the necessary qualifications and ability to perform the work available."

Summary:

I declare that the Employer violated the collective agreement when it cancelled the first job posting. I direct the Employer to complete the first posting by assessing the applicants for that posting.

I will remain seised to deal with any issues which may arise in the implementation of this award, including any further issues which may arise regarding remedy.

Dated at London, Ontario, this 14th day of March, 2008.

Howard Snow, Arbitrator