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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITY OF HAMILTON (HEALTH UNIT)
- The Employer

-and-

ONTARIO NURSES' ASSOCIATION
- The Union

AND IN THE MATTER OF Union, group and individual grievances regarding premium pay for evening work

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Mark Mason - Counsel
and others

On behalf of the Union:

Rob Dobrucki - Labour Relations Officer
and others

Hearing held October 23, 2007, January 8 and February 4, 2008, in Hamilton, Ontario.

AWARD

I. INTRODUCTION

The question of interpretation in this collective agreement is as follows:

When are nurses who perform evening work entitled to overtime pay?

II. THE BACKGROUND

The City of Hamilton, the Employer, provides a variety of public health services and employs nurses who are represented by the Ontario Nurses' Association, the Union.

Over the last few years these parties have had many differences regarding overtime pay. In this hearing the parties addressed some 40 grievances which all involved work in the evening. In addition, the parties have previously arbitrated grievances with respect to Saturday overtime pay.

The Employer's Public Health Unit is organized into four divisions - Family Health, Healthy Living, Health Protection and Continuous Improvement. The work of the nurses within the divisions is organized by the Employer into "assignments." Many of those assignments include work in clinics which are scheduled in the evening for the convenience of residents who work during the day. Other assignments include work with schools which requires attendance at school meetings during the evening.

An individual nurse selects one of the various assignments available in her division. Having selected an assignment, the nurse is expected to perform all the work specified in that assignment, including all the evening work.

The primary disagreement between the parties in these grievances related to whether a nurse who selected an assignment which included evening work, work which the Employer expected the nurse to perform, was covered by the flex time provisions or was covered by the overtime provisions.

For many years the Employer has not paid overtime for evening work included in an assignment. In 2005 a new collective agreement was concluded which was signed in April 2006. One of the changes from the previous agreement was the deletion of the definition of overtime as work in excess of 35 hours. Overtime is now described as work "beyond the nurse's normal work day, normal work week and on holidays." These grievances followed soon after the signing of the new collective agreement.

The collective agreement includes standard hours of work - 35 hours per week - and it includes two different schedules - either 8:30 to 4:30, or 9:00 to 5:00, daily Monday to Friday.

The collective agreement also allows nurses to choose to work an approved flexible work week. This notion of flex time is very important to the members of the bargaining unit. If a nurse chooses to work a flexible schedule involving work outside the usual work hours, that work is at straight time rates. If the nurse works over 35 hours in a week, the nurse is to "flex" the equivalent time off - that is take an equal amount of time off - and the collective agreement includes detailed provisions covering flex time and when and how the time off is to be taken.

In addition, the collective agreement provides that all work beyond the normal work day or normal work week is overtime and shall be compensated at a premium rate of time and one-half for overtime Monday through Friday.

Five witnesses testified at the hearing.

Sherry Bell is one of the grievors. She works in the Sexual Health Program in the Health Protection Division. She said that she understood that when she chooses to work after the standard hours it is flex time but when the work is Employer driven it is overtime. She went through some of her records. She identified situations in which she had initiated work outside the standard hours which she had then treated as flex time. She also identified other situations of work outside standard hours which the Employer had initiated, work which she had regarded as overtime and for which she had initially sought overtime pay. She grieved after her overtime pay requests were denied.

Ms Bell agreed that for many years she had worked outside the standard hours and had not claimed overtime, as that had been the practice then. She said she began to claim overtime in 2006.

Kathi Wilkins-Snell is the Union's Labour Relations Officer for this bargaining unit. She identified a change in the language of the parties' collective agreement deleting the previous provision which defined overtime as work in excess of 35 hours in a week. She also outlined the Union view that work outside standard hours which is initiated by the nurse is flex time, but similar work initiated by the Employer is overtime.

Glenda McArthur is a program manger in the Family Health Division. She worked in the bargaining unit from 1980 to 2000 and was president of the Union Local in the late 1990's and 2000. Ms McArthur identified a memo she had sent as Local President to the members of the bargaining unit in 2000. In her memo the notion of employee choice is highlighted. She said that at the time she distinguished between a manager telling a nurse she had to work evenings and a nurse choosing an assignment in which evening work was included. She said

that the nurse who chooses an assignment with evening work is covered by the flex time, not the overtime, provisions. She also identified an overtime grievance in 2000 and the settlement. That settlement clarified how work outside standard hours was treated.

In 2005 Ms McArthur was a member of the Employer negotiating team which negotiated the current collective agreement. She indicated that the changes made to the collective agreement were intended by the Employer to incorporate into the agreement the provisions of the 2000 grievance settlement. She was uncertain whether that intention had been discussed with the Union during negotiations or was discussed only among the members of the Employer negotiating team.

Ms McArthur agreed that the notion of employee choice had been important to the Union throughout the time she has worked for the Employer.

Linda Blake-Evans is the manager of the STD, Sexual Health and Van Needle Exchange Program in the Health Protection Division. The nurses in that program work in clinics dealing with sexually transmitted diseases, among other matters. Some of those clinics are conducted outside the "standard hours." All nurses who work in this program are told at the time of hiring that they are expected to work evenings and all nurses do work evenings. All the nursing assignments in this program include evening work.

Ms Blake-Evans testified that during her time in the bargaining unit, before she took a management position, she had regularly worked evenings and for most of that time she made no overtime claims. However she did note that shortly after a 2006 arbitration award between these parties dealing with overtime (the 2006 Rose award, below) she filed a claim for overtime for evening work. She withdrew the grievance when she sought a management position.

Sue Sherwood is the manager of the school program in the Healthy Living Division. She testified that all the nurses in her program perform work outside the standard hours in order to meet program needs and she said it was standard practice to treat those hours as flex time. She testified that this practice had been consistent throughout her employment. She said that if the practice changed so that hours outside the standard hours were overtime, the costs would rise and there would be difficulty running her program as there was no money in the budget for the overtime pay.

III. THE AGREEMENT

The following are the key provisions of the parties' 2004-2007 collective agreement:

ARTICLE 4 - STANDARD HOURS OF WORK

4.1 (a) The standard hours of work for nurses coming within the scope of this Collective Agreement shall be thirty-five (35) hours per week, and the schedule which is to normally apply throughout each year shall be 8:30 a.m. to 4:30 p.m. or 9:00 a.m. to 5:00 p.m. daily, Monday to Friday, exclusive of a one (1) hour lunch break. There may be times when a nurse may be required to change the nurse's hours of work. A nurse may request to change the nurse's hours of work, subject to the approval of the Program Manager.

(b) Nurses who choose to work an approved flexible thirty-five (35) hour work week or work over their regularly scheduled hours, Monday through Friday, shall adhere to the following process:

(i) It is expected that the majority of nurses will continue to work between the hours of 8:30 a.m. to 5:00 p.m. However, nurses will be allowed to choose to work extra hours and flex the excess time off, including attaching up to three (3) days in the calendar year of flex time to their vacation. Accrued flex time is to be taken within eight weeks of working the extra hours. The above is allowed as long as the needs of the program are met. For the purposes of scheduling, regular vacation entitlement takes precedence over flex time.

(ii) ONA members (nurses) who choose to flex their schedule shall work a flexible 35 hour per week schedule, Monday to Friday, between the hours of 8:00 a.m. and 10:00 p.m. at straight time pay. Any work that is done outside these hours or any work in excess of the averaged flex 35 hour arrangement, which is authorized as overtime by the Employer, is paid at 1.5 of the nurse's straight time pay rate. (Note: Regular hours worked in the Van Program from 10:00 p.m. to midnight will be paid

at straight time rates unless such hours are assigned and authorized as overtime by the employer and exceed the daily regular scheduled hours.)

(iii) ONA members who choose to work more than a 35 hour per week schedule will flex the excess time off at straight time as outlined in #1 above. Should the nurse not schedule the time off within the above mentioned eight (8) week period the employer will schedule the nurse off within the following four (4) week period. If the employer does not schedule the nurse off within the four (4) week period following the initial eight (8) week period, the provisions of Article 4.2 apply.

(iv) Nurses will establish their own 35 hour per week work schedule based upon the work assigned to the team. The nurses will set their work schedule provided that the needs of the program can be met and the employer incurs no extra cost, otherwise the employer maintains the right to schedule to meet the needs of the program.

(v) The managers, on the basis of reverse seniority within a program, will assign any work that is not covered by the voluntary scheduling of assignments and/or workload, with a limit of two (2) evenings per week.

(c) It is understood that there will be times when nurses have to take additional hours for emergency situations, or assignments as approved by the Director, or designate. Such overtime is for special assignments and is in excess of the nurse's normal workload and shall be compensated in accordance with the provision of Article 4.2.

. . .

4.2 (a) All time worked beyond the nurse's normal work day, normal work week and on holidays as defined in Article 7 shall be considered overtime.

For all overtime, which must be authorized by the immediate supervisor, the nurse shall be entitled to payment or lieu time off for such time worked at the rate of one and one-half (1 1/2) for each hour worked Monday to Saturday and double (2) time for each hour worked on Sunday and a Statutory or Proclaimed Holiday. Such time shall be taken at a time mutually agreeable to the nurse and the immediate supervisor.

(b) If a nurse chooses time off it shall be at a time mutually agreed upon by the Employer and the nurse. Up to five (5) days' lieu time earned from overtime may be added to the nurse's annual vacation entitlement. The maximum amount of lieu time which may be accumulated by each nurse at any given time is the equivalent of (10) working days.

(c) Nurses who work for a minimum of two (2) hours directly following the end of their normal working day shall be entitled to a meal allowance payment of seven dollars ($7.00). A meal period of one-half (1/2) hour or more shall be on non-paid time.

. . .

ARTICLE 12 - MEDIATION/ARBITRATION

. . .

12.7 The decision of the Arbitrator or the Board of Arbitration appointed pursuant to this Article is final and binding on the Employer, the Association, and any nurse affected thereby.

. . .

Reference was also made to provisions in the previous collective agreement. Apart from the addition of clarification in Article 4.1 of the current agreement incorporating some of the language of the 2000 grievance settlement, the key difference in the language was in Article 4.2. The previous Article 4.2 was as follows. Note that the first sentence (bolded), which had defined overtime as time beyond the 35 hour flexible work week, was not continued in the current collective agreement:

4.2 (a) **Overtime is defined as time beyond the thirty-five (35) hour flexible work week described in Article 4.01.** (My emphasis) All time worked beyond the normal day, the normal work week and on holidays as defined in Article 7 shall be considered overtime.

For all overtime authorized by the immediate supervisor, the nurse shall be entitled to payment or lieu time off for such time worked at the rate of one and one-half (1 1/2) hours for each hour worked. Such time shall be taken at a time mutually agreeable to the nurse and the immediate supervisor.

IV. UNION POSITION

The Union said the question of interpretation confronting me in this matter was simple - in light of the changes in the language of the new collective agreement are nurses now entitled to overtime pay for their evening work?

The Union said that the provisions in dispute had already been interpreted in arbitration and sound labour relations indicated that consistent interpretations were desirable.

The Union said Arbitrator Rose in his 2001 award (below) interpreted “normal work” in Article 4.2 and found that the term meant the same as “standard hours” in Article 4.1. The parties had retained the two terms in the next round of bargaining and I should reach the

same conclusion as had Arbitrator Rose.

In his 2006 award (below) Arbitrator Rose concluded that the language change made at the beginning of Article 4.2 was important and created a different overtime entitlement. He concluded that a nurse who worked part-time on Saturday was entitled to overtime premiums for that work, even if the Saturday work was the nurse's only work for the Employer that week. The Union noted that the Employer had been unsuccessful in its judicial review of the 2006 Rose arbitration award (below).

The Union said its position has remained constant. Work required by the Employer which is outside the standard hours is overtime and attracts a premium. Interpretations of the collective agreement should be consistent from one arbitrator to another, and the Union view was consistent with the two awards by Arbitrator Rose on overtime work.

Under the flex time arrangements a nurse may choose to work hours outside the normal hours and the Union said those hours did not qualify as overtime. The concept of choice is clear in the flex time provisions in the agreement. Choice means there are a range of options and you choose one. But a choice must be meaningful; the concept of "choose to work evenings or choose to quit" is not a true choice under the flex time provisions.

The provisions of Article 4.1 and 4.2 were substantially revised in the new agreement and, in this situation of new language, the practice under the language of the previous agreement is of little or no value. It is difficult to conceive how the changes in the language from the previous agreement to the current agreement could have been intended to do anything other than change employees' rights.

While the overtime language may be unusual, it is the clear language of this collective

agreement and it should be enforced. Flex time has no relevance in a situation in which an employee is working on an assignment which involves work outside standard hours. That employee does not choose the evening work.

In summary, the Union said when evening work - such as a clinic - is scheduled and advertised, the Union members must work those hours. Requiring an employee to "choose" to treat this as flex time is contrary to the agreement. Instead, when the Employer requires non-standard hours of work, which the Employer has a right to do, then the overtime provisions are triggered.

The Union asked for the following remedies:

1. A declaration that all work required by the Employer of Union members beyond the normal hours in Article 4.1 attracts the overtime premium (the Union noted that the factual focus of these grievances was evening work because the issue of week-end work had already been resolved in the Union's favour);
2. An order that the Employer pay each individual grievor the overtime premium;
3. An order for interest on the payments made under paragraph # 2, retroactive to the dates worked in those grievances;
4. That I remain seised; and,
5. Any further remedy which I deem just.

In reply to the Employer submission, the Union said there was nothing done or said by the Union which would support an estoppel finding. As for evidence of past practice and evidence of negotiating history, there was no basis to use it in interpreting the collective agreement unless I found an ambiguity, and there was no ambiguity in this language.

The Union relied upon the following: *Hamilton-Wentworth Public Health Unit v. Ontario*

Nurses' Association (Policy Grievances) [2001] O.L.A.A. No. 88 (Rose); *City of Hamilton and Ontario Nurses' Association, Local 50 (Armacinski Grievance)* [2006] O.L.A.A. No. 181 (Rose); *City of Hamilton and Ontario Nurses' Association, Local 50* [2006] O.J. No. 4851 (Div.Ct.); *City of Hamilton v. Ontario Nurses' Association, Local 50 (Armacinski Grievance)* [2007] O.L.A.A. No. 331 (Rose); Excerpt from *Random House Webster's Unabridged Dictionary* (2nd ed) 2001 (definitions of "choice" and of "choose"); Brown and Beatty *Canadian Labour Arbitration* (Aurora: Canada Law Book; 2007) Section 5:3122; *Re Printing Specialities & Paper Products Union, Local 466, and Interchem Canada Ltd.* (1969), 21 L.A.C. 46 (Weatherill); *Re Longo Brothers Fruit Market Inc. and United Food & Commercial Workers' Union, Local 633* (1995), 52 L.A.C. (4th) 113 (Solomatenko); *Re St. Clair Chemical Ltd. and Oil, Chemical and Atomic Workers, Local 9-14* (1973), 5. L.A.C. (2d) 50 (H. D. Brown); *Re United Glass and Ceramic Workers, Local 248, and Canadian Pittsburgh Industries Ltd.* (1972), 24 L.A.C. 402 (H. D. Brown); *Re Northern Electric Office Employee Ass'n and Northern Electric Co. Ltd.* (1968), 19 L.A.C. 125 (Weatherill); *Re Parking Authority of Toronto and Canadian Union of Public Employees, Local 48* (1974), 5 L.A.C. (2d) 150 (Adell); *Re DHL Express (Canada) Ltd. and Canadian Auto Workers, Local 4215, 144 and 4278* (2004), 124 L.A.C. (4th) 271 (Hamilton); *Re John Bertram & Sons Co. and International Associatin of Machinists, Local 1740* (1967), 18 L.A.C. 362 (P.C. Weiler); *Service Employees International Union, Local 204 v. Leisureworld Nursing Homes Ltd.* [1997] O.J. No. 1469 (Div.Ct.], affirmed by the Court of Appeal.

V. EMPLOYER POSITION

The Employer submitted that this was a complicated fact situation involving many grievors and many instances, and noted that the Union had called only one grievor to testify. I had heard no evidence from any part-time employee and it would be absurd to conclude that a part-time employee whose only work was one evening per week was entitled to the overtime

premium. The Employer said it had called three witnesses from three areas to provide a flavour of the complexity of the fact situation.

The Employer noted that no nurse had claimed overtime for many years because the accepted and uniform practice was to use the flex time provisions. The new language was agreed upon in 2005 but no grievance was filed on this evening work until much later.

The Union position represented a profound change, but there was very little evidence about the change. What little evidence there was came from the Employer witnesses. Ms McArthur testified that the practice had been consistent for some 25 years. She noted that in 2000 the parties settled a grievance and the settlement simply clarified the existing practice. The intention in putting those grievance settlement provisions into the agreement was to further clarify the existing practice which had developed over many years. Ms McArthur testified that when an employee chose an assignment which included evening work that work would be flex time, but when an employee was instructed to work evenings that work would be overtime.

The Employer has always accepted that choice is an issue. An employee may choose to take an assignment with evening work. If so, the Employer said that flex time applies. The Employer said that choice in this instance takes on the flavour of “agree” - when a nurse wishes to work after normal hours there is no real difference from a nurse taking on an assignment. In the first case the nurse chooses or agrees to the work, and in the latter case the nurse also chooses or agrees to the work outlined in the assignment. Once an employee takes on an assignment, that assignment shapes the employee’s normal schedule.

The Employer said that this case differed substantially from the grievances before Arbitrator Rose (above) as those had not involved the flex time provisions. Here the flex time

provisions were clearly in dispute.

The Employer said that:

1. The Employer interpretation of the provisions was to be preferred to the Union interpretation;
2. In the alternative, if the agreement was not clear, then I should look to the bargaining and to the past practice and conclude that the Employer interpretation was correct; and,
3. In the further alternative, if the Union position was correct, then the Union should be estopped and the Union interpretation should only apply after the end of this agreement.

The Employer relied upon the following: *Essex (County) v. Canadian Union of Public Employees, Local 2974.1 (Sick Leave Grievance)* [(2006] O.L.A.A. No. 416 (Snow); *London (City) v. London Civic Employees' Union. Local 107 (Winter Control Grievances)* [2007] O.L.A.A. No. 130 (Snow); *Re Quaker Oats Co. of Canada Ltd. and Service Employees Union, Local 183* (2000), 91 L.A.C. (4th) 1 (Emrich); *Noranda Metal Industries Ltd. v. International Brotherhood of Electrical Workers, Local 2345* [1983] O.J. No. 842, 44 O.R. 529 (CA); and *Re Canadian Waste Services Inc. and United Food and Commercial Workers International Union, Local 175* (1999), 85 L.A.C. (4th) 73 (Snow).

VI. CONCLUSIONS

When is this Employer required to pay nurses overtime for their evening work?

While the issue before me is a narrow one, the answer requires considerable elaboration.

The overtime provisions of this collective agreement are unusual. Overtime is commonly thought of as the time worked in excess of 35 or 40 hours in a week and, in the past, this collective agreement did define overtime as time worked beyond 35 hours in a week. But that definition was discontinued in the current agreement and overtime is now described simply as the work beyond the nurse's normal work day.

Although normal work day and week are not defined, the parties have arbitrated overtime issues and in two awards Arbitrator Rose (2001 and 2006, above) has interpreted normal work day and week. He concluded that normal work day and week have the same meaning as the standard hours and schedules in Article 4.1 such that the normal work day and week mean 35 hours per week, being either 8:30 a.m. to 4:30 p.m., or 9:00 a.m. to 5:00 p.m., daily Monday to Friday, exclusive of a one hour lunch break. The parties have agreed in Article 12 that these arbitration rulings are final and binding upon them and, because of these rulings, both parties acknowledged that the evening work was outside the nurses' normal work day.

My own view is that Arbitrator Rose reached the correct interpretation of this collective agreement.

Article 4.2 states that all time worked beyond the normal day or week is overtime. If a nurse usually works 9 to 5, one would think all the work outside those hours would be overtime. But the parties also agreed in Article 4.1 (b) (ii) that approved 35 hour flexible work arrangements do not attract overtime pay for work between 8:00 a.m. and 10:00 p.m. Moreover, they agreed in Article 4.1 (b) (iii) that any work on a flexible work schedule beyond 35 hours was to be taken off at straight time.

Recall that this Employer organizes the nurses' work into "assignments" and that many of

those assignments, including all the assignments in some programs, include evening work. The parties recognized in Article 4.1 (c) that "there will be times" when nurses have to take on additional hours on "assignments" as approved by the Director or designate. That Article makes it clear that such work is overtime and paid at overtime rates.

What, then, about evening work done pursuant to one of the Employer work assignments? Is that evening work part of a nurse's flexible work schedule or is it overtime? This question involves a determination of what the parties intended. As is usual, when seeking to determine the parties' intention I begin with an examination of their collective agreement.

There are three provisions of the collective agreement which assist with this question of interpretation.

The first provision is Article 4.1 which repeats the notion of a nurse choosing flexible work several times - the word "choose" is found in the introductory portion of Article 4.1 (b), in 4.1 (b) (i), in 4.1 (b) (ii), and in 4.1 (b) (iii). It is clear that in these flex time provisions the parties intended to include nurses who "choose" to work outside the standard hours. There is so much emphasis on "choose" that I find it difficult to conceive that the parties intended to also include the situation of a nurse agreeing to a work assignment which involves evening work, where all the available assignments involve evening work such that there was no other choice available to that nurse.

On this issue I also note the evidence from both the Union and Employer witnesses that the idea of choice for the nurses in this bargaining unit has been important for many years. The thrust of that evidence was that the nurses felt it important to have some possibility of arranging their work in a manner that accommodated their other commitments and interests. There was no suggestion in that evidence that the reason for flexible work schedules was to

enable the Employer to staff its evening or weekend work at straight time rates.

The second provision which assists in determining whether this work on an assignment was intended by the parties as flexible work is Article 4.1 (b) (i), the first sentence of which states "It is expected that the majority of nurses will continue to work between the hours of 8:30 a.m. to 5:00 p.m."

Article 4.1 (b) (i) appears early in the provisions regarding flexible work schedules and this sentence clearly states the parties' expectations - the parties "expected" that a majority of nurses will work day-time hours only. This section of the flex time provisions indicates that the parties intended to establish a system of flex time arrangements which only a minority of nurses would "choose."

If the Employer's submission is correct, in the two programs most fully described in the evidence, where every assignment includes evening work, 100% of the nurses are expected to work evenings, and 100% of the nurses do work evenings, then 100% of those nurses have chosen a flexible work schedule. But the parties expected only a minority of nurses to work flexible work schedules which suggests that the parties' concept of flexible work included in this collective agreement differs from the Employer's submission on this issue.

On the other hand, I note that this Employer can "assign" nurses to work overtime outside the daytime hours. The collective agreement places no limit on overtime work. This Article 4.1 (b) (i) suggests to me that some of the nurses who are working evenings on an "assignment" might be doing so as overtime.

Thirdly, and finally, Article 4.1 (b) (v) assists with my interpretation of this matter. It specifies that managers "will assign any work that is not covered by the voluntary scheduling

of assignments and/or workload, with a limit of two (2) evenings per week." It seems clear that this Article was intended to address any evening work which the nurses did not select through "voluntary scheduling" - suggesting again that evening work is initially to be the choice of a nurse. This Article then addresses what the Employer should do if there are not enough volunteers - the work is assigned "on the basis of reverse seniority."

In reviewing these three provisions of the agreement separately, and now considering them together, I have great difficulty in reconciling these three provisions relating to flex time with the Employer's submission on flex time. Taken together, the three provisions persuade me that the parties did not intend that the Employer would be entitled to organize the work of the nurses into assignments, include evening work as part of every assignment, and then assert that by choosing one of those available work assignments every nurse was choosing to work evenings and was therefore covered by the flex time arrangements, not the overtime ones. In particular, I am unable to conclude that by accepting an assignment with evening work when there were no assignments available without evening work, all those nurses were choosing to work flexible work schedules. While the nurse may well be choosing the assigned evening work, it is a further step to say that the nurse is also choosing a flexible work schedule. I conclude that the nurse does not choose a flexible work schedule simply by choosing an assignment which requires evening work and that at least some of those nurses were working overtime.

I acknowledge that I am unable to provide a method for distinguishing between flex time and overtime which will easily resolve all the many possible fact situations which might arise. However, the key is the parties' use of the word "choose."

In order to "choose" to work in the evening a nurse must also have the option of choosing to not work in the evening. If a nurse's only available options all involve evening work, then

the nurse has not chosen to work evenings merely by selecting one of those options. In order for the evening work included in such an assignment to be flex time, at a minimum the nurse would have to have had the option to choose to work only during the standard hours.

Two examples may assist.

Suppose that a nurse is in the office working on paperwork. If the nurse wishes to finish that paperwork before leaving for the day, rather than finishing the work the next day, and she speaks to her supervisor and is allowed by the supervisor to stay and finish it, that extra work would be her choice and is not overtime. This nurse had the option of finishing the work another day.

As another example, suppose that a nurse suggests to the Employer that the Employer add another clinic to operate from 5:00 until 7:00 p.m. on Thursday of every week in a specific location not adequately served by the existing clinics. Moreover, suppose that the nurse indicates that she wishes to work at the clinic every week. The Employer approves the clinic and prepares an assignment for the nurse which includes the work in that clinic and the nurse then does the work. In my view, that is a situation of a nurse choosing to work a flexible schedule and her Thursday evening work at the clinic is not overtime. This nurse expressed her desire to work the clinic and, while she had other options, she chose to work Thursday evenings.

I acknowledge that deciding which nurses have chosen evening work, and thereby chosen a flexible schedule, will be difficult in some individual cases, but that potential difficulty cannot be used to override the parties agreement that flexible work schedules are those approved work schedules which the nurse “chooses.”

Before concluding on this issue, for clarity I wish to address two further points.

First, Article 4.2 (a) indicates that all overtime must be approved by the nurse's supervisor. In my view, a nurse who works beyond the normal work day pursuant to an Employer assignment is doing work which has been authorized by the immediate supervisor, as that is contemplated in Article 4.2 (a). This work does not require a separate approval in order to qualify as overtime. To put it another way, if there was no separate approval, it can still be overtime.

Secondly, overtime is the work beyond the nurse's normal work day or work week. Suppose two nurses work at a clinic which runs from 4 p.m. until 6 p.m. One of the nurses usually works 8:30 until 4:30 and the other nurse works 9:00 until 5:00. For the first nurse who works 8:30 to 4:30, her overtime is work done before 8:30 a.m. and after 4:30 p.m. - so in this hypothetical situation her overtime work is from 4:30 until 6:00 p.m. As for the second nurse who works 9 to 5, her overtime is the work done before 9:00 am and after 5:00 p.m. - so in the hypothetical her overtime work is from 5:00 until 6:00 p.m.

Use of past practice

I turn now to the Employer submission that past practice should be used to reach a conclusion as to the parties' intention. Past practice is only used when the collective agreement is ambiguous. Ambiguous does not mean difficult to interpret. An ambiguous agreement under which an arbitrator can resort to past practice as an aid in the interpretation of that agreement is one which conveys two (or more) competing meanings. While this agreement is certainly not a model of clarity, after examining the provisions carefully I am left with no doubt as to the meaning the parties intended. I do not find this collective agreement to be ambiguous on this issue and I do not use past practice.

In any event, I note that there was no clear evidence of past practice under this collective agreement and that the evidence of the practice under the old agreement, while clearer, is of questionable value in a situation where the relevant language has changed.

Use of negotiating history

I also find that the evidence of negotiating history is of no assistance in this case, for similar reasons. I find no ambiguity in this language. In addition, evidence of negotiating history in this sense means evidence of the communications exchanged between the parties during their negotiations. As with past practice, there was no clear evidence of the parties' shared communications in the negotiations, as distinct from the evidence as to the Employer's intention during those negotiations.

Estoppel

I next consider the Employer's estoppel submission. Estoppel is a concept based on fairness. In this context, estoppel would require evidence that the Union had indicated to the Employer that it would not be claiming overtime pay for this evening work or, alternatively, that the Union had indicated to the Employer that it would continue to treat all such work as flex time. The Employer would need to have relied upon those indications to its detriment. If the Employer had acted upon the Union's assurances that it would treat evening work as flex time, it would be unfair to the Employer to allow the Union to change its position. The principle of estoppel could be used to prevent the Union from enforcing its rights under the collective agreement until such time as the Employer had an opportunity to remedy the matter - normally until the next round of collective bargaining.

However, I find no evidence of anything which the Union said or did, or even failed to say

or do, which suggested that it would not be claiming overtime for this work. It follows that there was nothing the Employer did in reliance upon such a Union assurance and I can see no unfairness to the Employer in allowing the Union to enforce its interpretation of the provisions of the collective agreement.

Delay

Finally, I wish to comment on the Employer suggestion that the delay in filing these grievances should influence the outcome. The Employer noted that the collective agreement was settled in 2005 but that the grievances were not filed until much later in 2006. This is correct, but I note that the evidence was that the collective agreement was not put in writing and signed by the parties until just before the grievances were filed. I do not place much importance on this alleged failure to grieve when the nurses did not have a full written collective agreement at hand which they could consult as to their rights.

Remedy

I turn now to the matter of remedy.

1. I direct the Employer to review the work records of all those individual nurses who grieved this issue of overtime work, determine what was overtime, and compensate those grievors for their overtime work.
2. I direct the Employer to pay interest on the overtime pay in paragraph #1 from the date the nurse should have been paid the overtime pay.

The first remedy, above, will require the Employer to review many instances of evening work over the past two years and apply the above interpretation of the agreement. Some difficulties may arise. I will remain seised to deal with any issues which arise in

implementing this award and to address any further issues which remain outstanding in the many grievances.

Dated at London, Ontario this 4th day of April, 2008.

Howard Snow, Arbitrator