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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HOTEL-DIEU GRACE HOSPITAL

- The Employer

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 210

- The Union

AND IN THE MATTER OF a policy grievance regarding scheduling and call-in procedures

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Leonard P. Kavanaugh, Q.C.	- Counsel
and others	

On behalf of the Union:

E. R. Durham	- Union Representative
Nick Sajatovich	- Union Representative
Bev Clifford	- Union Representative
Paul Koszo	- Chief Steward
Sue Griffith	- Chief Steward

Hearing held February 17, March 25, May 4, June 23, and September 2, 1999 in Windsor, Ontario.

AWARD

I. INTRODUCTION

The parties negotiated a new provision regulating the scheduling of part time employees and the procedure to be followed when "calling in" part time employees for additional shifts. After ratification of the collective agreement the Employer notified the Union of its plan for administering this provision. The guidelines for administering the provision were similar to an earlier Employer bargaining proposal which the Union had rejected and the Employer had withdrawn during negotiations. The Union alleged that the Employer had violated its statutory duty to bargain in good faith by administering the provision in this manner and by failing to inform the Union of its plan during bargaining,

II. THE FACTS

The Employer operates a hospital in Windsor at two sites. The employees in this bargaining unit work at both locations, mainly in the Support Services Department. The Support Services Department was recently created through the merger of the former Nutrition and Food Services Department and the Environmental Services Department.

The new department has many part time employees. Because the collective agreement had previously been silent on the scheduling of part time employees, different practices had developed in the former departments. The different treatment of employees under the previous agreement led to grievances and to discussions between the parties.

The Union suggested that the Employer propose language for the new agreement to address this problem. The Employer's first written proposals (May 1998) included language on this issue but that proposal was not discussed in any substantive way during negotiations. The

Employer revised its proposal after the initial meeting and that revised proposal, the September proposal, was as follows.

Article 14.19 New

Scheduling of Part Time Employees

(a) At the time a schedule is posted all hours will be equally distributed, as much as possible, among the part time employees. The Hospital maintains the right to determine the placement of employees into their work assignments within their classifications. The Hospital will endeavour to offer training such that appropriate staffing is maintained and to facilitate the equal scheduling of hours.

(b) Any additional shifts which may arise will be offered to regular part time employees on the basis of rotating seniority provided the available employee has the ability, qualifications and training to do the available work. If while implementing the call in procedure, the employer is unable to reach an individual employee the next person on the call in list will be contacted.

(c) If an individual requests weekend only work such request will be considered and not unreasonably denied. If honoured, it is understood that such employee will not be included on the Call-In list for additional shifts.

(d) When the turn of an individual employee to be called is by-passed because the employee is not trained for the area, the employer will make note of this and will begin with this individual when the next additional shift for which the employee is trained becomes available.

(e) An employee may put in writing to the immediate supervisor a desire not to be called for additional shifts. Employees will have the opportunity to have their name removed or added to the call-in list every six (6) months.

(f) If an employee has refused 3 consecutive call in shifts, the supervisor will review with the employee the desire to remain on the Call-In list. If the employee refuses a further three (3) consecutive Call-in shifts the name will be removed from the list.

(g) It is expected that part time employees be available 12 months each year for all shifts unless on an approved Leave of Absence or scheduled vacation. Two (2) weeks prior to the posting of a schedule a part time employee may make a written request for personal time off up to a maximum of 2 requests per pay period. Such request will not unreasonably be denied provided the Hospital is assured that sufficient employees are available to work.

(h) The Hospital recognizes that from time to time, under special circumstances, a part time employee may need to have the posted schedule adjusted through the exchange of shifts with another employee. The Hospital shall endeavour to grant this privilege provided that the shift is of equal length and the replacement employee is qualified and trained to perform the work. Such adjustments will be limited to a maximum of two (2) per pay period. Where a schedule adjustment occurs, it will count as an adjustment for both the employee initiating the change and the employee agreeing to the

change. Any further adjustments must be requested in writing to the Director or Designate and will be considered as follows:

7 days notice for a vacation day
72 hours notice for an Absent day
Emergencies on a situation by situation basis

(i) The Hospital reserves the right in cases of emergency after no replacement can be found, to fill the vacant shift as it sees fit.

(j) Once full-time statutory holidays have been scheduled, the Hospital shall endeavour to equalize the remaining statutory holiday hours for part time employees within a department over a one year period.

This September proposal was discussed at length by the parties. The Union disliked the proposal and rejected most of it. The Employer was displeased with this reaction and withdrew the entire proposal. Little was said as to the effect the withdrawal would have on scheduling. When the Union asked what the Employer would do regarding scheduling, the Employer indicated that it would look into the matter, that whatever it decided would be "fair and reasonable" and that the Employer would inform the Union.

The Employer witnesses, Mary Benson-Albers, the Director of Human Resources and chief negotiator, and Claudia den Boer, the Director of Support Services and a member of the negotiating team, both testified that they were aware that in the absence of language in the collective agreement scheduling was a management right and that the withdrawal of the proposal did not change that right.

In early October the Employer made a settlement proposal to the Union and indicated that there would be no negotiation on the package. That package included a much simpler proposal on scheduling part time employees as follows:

New 14.19
a) At the time a schedule is posted hours will be equalized as closely as possible among all of the regular part time employees within a classification in a Department or Nursing Unit.
b) An individual may request weekend only work and such request will be considered. If the request is granted then it is understood that hours for the individual will not be equalized with the other part

time employees. A request for weekend only work or a request to return to regular part time scheduling need only be considered twice in each calendar year for each individual employee.

Although the Employer's proposal was said not to be negotiable, negotiations on this issue did occur and the parties agreed to the following revised language:

14.19

a) At the time a schedule is posted hours will be equalized as closely as possible among all of the regular part time employees within a classification in a Department or Nursing Unit.

b) Any additional shifts which arise after the schedule is posted will be offered on the basis of rotating seniority provided the available employee has the ability, qualifications and training to do the available work. If while implementing the call in procedure, the employer is unable to reach an individual employee the next person on the call in list will be contacted.

c) An individual may request weekend only work and such request will be considered. If the request is granted then it is understood that hours for the individual will not be equalized with the other part time employees. A request for weekend only work or a request to return to regular part time scheduling need only be considered twice in each calendar year for each individual employee.

The collective agreement, with that language, was ratified in November, 1998.

Following ratification of the new agreement, the management staff in the Department of Support Services reviewed the new Article 14.19 and considered whether anything else was needed to ensure proper and consistent operation of the agreement. Management concluded that the language on additional shifts needed to be "given flesh" to ensure that it was applied consistently throughout the department at both locations. The managers prepared written guidelines, discussed these with staff in the Employer's Human Resources Department and then advised the Union of this. The Director of Support Services, Claudia den Boer, had been a member of the Employer's negotiating team and the guidelines developed were similar to the more detailed proposals made earlier by the Employer in negotiations. The plans were communicated to the Union in a letter dated December 21, 1998 in which the Employer stated:

> . . . I have enclosed a copy of the practices that the hospital plans to implement with

respect to part time scheduling in the Support Services Department.

As noted, the "practices" were appended and they read as follows:

Scheduling of Part Time Employees

(a) At the time a schedule is posted, hours will be equalized as closely as possible, among all of the regular part time employees within a classification in a Department or Nursing Unit. The Hospital maintains the right to determine the placement of employees into their work assignments within their classifications.

(b) In the case of changes to the posted work schedule where there is 24 hr. or greater prior to the schedule change, additional shifts will be assigned on the basis of rotating seniority provided the employee has the ability, qualifications and training to do the available work. The Hospital will notify the employee of the change to his/her schedule.

(c) "Call-ins" will be considered those work opportunities where there is less than 24 hr. notice and these shifts will be offered on the basis of rotating seniority provided the available employee has the ability, qualifications and training to do the available work. If while implementing the call-in procedure, the employer is unable to reach an individual employee, the next person on the call-in list will be contacted.

(d) When the turn of an individual employee to be called or assigned a shift is by-passed because the employee is not trained for the area, the employer will make note of this and will begin with this individual when the next available shift for which the employee is trained becomes available.

(e) If an employee has refused 3 consecutive call-in shifts (when calling an employee with less than 24 hrs. notice), the employee's name will be removed from the call-in list and reviewed with the employee at the next opportunity for additions/deletions to the call-in list.

(f) An employee may put in writing to the immediate supervisor a desire not to be assigned or called for additional shifts. Employees will have the opportunity to have their name removed or added to the call-in list every six (6) months (Jan. and June). The Hospital recognizes that individual circumstances may change such that an employee's availability would increase/decrease at times other than Jan. or June. An addition/deletion to the call-in list under these circumstances will not be unreasonably denied.

(g) An individual may request "weekend only" work using the "Request for Schedule Change" form. If the request is granted then it is understood that hours for the individual will not be equalized with the other part time employees. Such employee(s) will not be included on the call-in list for additional shifts or scheduled for statutory holidays and will not be granted weekends off. A request for weekend only work or a request to return to regular part time scheduling need only be considered twice in each calendar year for each individual employee (Jan. and June).

(h) It is expected that part time employees be available 12 months each year for all shifts unless on an approved Leave of Absence or scheduled vacation. The Hospital recognizes that from time to time a part time employee may need to have their posted schedule adjusted. The Hospital shall endeavour to grant this privilege according to the following procedure:

- Once the schedule is posted, a part time employee may make a written request for personal time off up to a maximum of two (2) requested shifts per pay period. Such

request will be considered on a first come, first serve basis and will not be unreasonably denied provided the Hospital is assured that sufficient employees are available to work.

- Once the schedule is posted, a part time employee may also make a written request for an exchange of shift with another employee provided that the shift is of equal length and the replacement employee is qualified and trained to perform the work. Such adjustments will be limited to a maximum of two (2) shift exchanges per pay period. Where a schedule adjustment occurs, it will count as an adjustment for both the employee initiating the change and the employee agreeing to the change.
- Requests for days off and/or shift exchanges must be made using the "Request for Schedule Change" form and submitted no later than three (3) days prior to the start of the schedule.
- All shift exchange requests must be submitted within the same pay period
- Approved shift exchanges will not be subject to overtime and shall not result in working a double shift
- Any further schedule adjustments, **after the start of the schedule**, must be requested in writing using the "Request for Schedule Change" form, to the Director or Designate and will be considered as follows:
    - 7 days notice for a vacation day
    - 72 hours notice for a shift exchange or off day (as per the above guidelines)
    - Emergencies on a situation by situation basis. *In these circumstances the employee must speak with a supervisor. Leaving a voice-mail message is not acceptable.

(i) Employees calling in sick must call the appropriate Department extension and provide a **minimum** of one hour's notice prior to the start of a day shift and a **minimum** of four hour's notice prior to an afternoon or midnight shift. All employees's will give one (1) day's notice of their return to work. Employees not following this procedure will receive a letter outlining the particular problem area. After an employee has received two such letters, the disciplinary process will be initiated.

The Union called two witnesses - Nick Sajatovich who is a Union representative and had been chief negotiator and Paul Koszo who is one of the Union's chief stewards and had been a member of the Union negotiating committee. The Union witnesses expressed the view that had the Employer insisted on its September proposal, the proposal would not have been accepted by the Union or taken for a vote and, also, if a package of proposals which included either the Employer's September proposal or the Employer's December guidelines had been presented to the membership for ratification, that package would not have been ratified. Finally, they accepted that the guidelines, both as written and as implemented, did not conflict with or violate the collective agreement.

The Union originally grieved that the guidelines violated the collective agreement. At the beginning of the hearing, the Union also alleged a violation of the *Labour Relations Act.* The parties agreed that I would resolve both issues. In argument, the Union abandoned the position that there had been a violation of the collective agreement.

III. PROVISIONS OF THE STATUTE

Section 17 of the *Labour Relations Act, 1995* is as follows:

> 17. The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

IV. POSITION OF THE UNION

The Union noted that the Employer's September proposal had been fully discussed by the parties and was rejected by the Union. The parties later agreed on a provision which became part of the collective agreement. However, in December the Employer tried to implement the collective agreement using language similar to its September proposal. The Union alleged that this action constituted bad faith and violated the *Act*.

In addition, the Union noted that in reply to the Union's inquiry during negotiations as to how the Employer would deal with scheduling, the Employer had indicated it would do so in a fair and reasonable manner. The Employer did not then advise the Union that it would implement the new provision in a manner which the Union had rejected in bargaining. The Union submitted that the Employer knew in September its plan for scheduling and, by its failure to advise the Union when asked, had violated its duty to bargain in good faith.

In summary the Union submitted that the Employer was required to negotiate these guidelines with the Union. The Union asserted the Employer violated its duty to bargain

in good faith by failing to do so. The Union sought a declaration of violation, an order that the Employer comply with Article 14.19 and an order that the Employer post a notice of its violation of the *Act*.

The Union referred to the following authorities: *K & Son Maintenance Co. Inc.* [1995] OLRB Rep. August 1121; *Sparton of Canada Limited* [1985] OLRB Rep. September 1420; *Saville Food Products, Inc.* [1986] OLRB Rep. April 552; and *Old Oak Properties Inc.* [1996] OLRB Rep. July/August 648.

V. POSITION OF THE EMPLOYER

The Employer's first submission was that the statutory duty to bargain related to making an agreement. Once an agreement was made, the duty ended and it followed that any actions of the Employer which occurred after the conclusion of a collective agreement could not be in violation of this duty. The guidelines about which the Union complained were prepared after the collective agreement was signed. Moreover the normal remedy for a failure to bargain was an order that the parties bargain and, in this instance, they had already concluded a collective agreement.

The Employer noted that the Union witnesses had accepted that the December guidelines were in conformity with the collective agreement and that the Union had abandoned its claim that these guidelines violated the collective agreement. Because of this, the Employer said the claim should be dismissed.

The Employer submitted that this case involved the normal give and take of bargaining. Prior to this round of bargaining the scheduling of part time employees had been a management right. Because of problems with scheduling, the Union asked the Employer to make a proposal. The Employer did, and then withdrew it and said it would do what was fair and

reasonable. The evidence did not suggest that the Employer's subsequent proposal which led to Article 14.19 was the answer to what was fair and reasonable and it would be wrong to limit the Employer to the precise text of 14.19. Nor did the evidence suggest that the Employer knew how it would implement 14.19 before December. Thus the claim that the Employer withheld information was not supported by any evidence.

Finally, the Employer submitted that the Union was not disadvantaged in any way by this process. The Union made no proposal and did not change any proposal based on anything the Employer did. The issue had previously been covered by management rights, and the Union had lost nothing.

The Employer referred to the following authorities: *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al.* (1981), 33 O.R. (2d) 476 (C.A.); *Fashion Craft Kitchens Inc.* [1979] OLRB Rep. October 967; *Kennedy Lodge Nursing Home* [1980] OLRB Rep. October 1454; and *The Corporation of the City of Thunder Bay* [1995] OLRB Rep. November 1355.

VI. CONCLUSIONS

I note that the parties agreed to my jurisdiction to address the claim of failure to bargain in good faith under the *Labour Relations Act, 1995*.

Prior to dealing with the specifics of this case, I comment generally upon the duty to bargain and briefly review the cases cited by the parties on this issue.

The *Labour Relations Act, 1995* encourages free collective bargaining. But bargaining between employers and unions under the *Act* is not completely unfettered. Certain provisions must be included - for example, every collective agreement must include a

provision prohibiting strikes and lockouts during the agreement and must include a provision for the arbitration of grievances. As for the conduct of the bargaining process, the *Act* requires that bargaining be done "in good faith" and that the parties "make every reasonable effort to make a collective agreement". At a minimum the Act requires the parties to recognize each other and try to reach an agreement, as the parties did in this instance.

The *Act* recognizes that employers and unions have different interests and that each will seek to advance its objectives in bargaining. As long as the parties negotiate, whether they reach an agreement, or whether that agreement includes provisions on certain topics, will depend on each party's negotiating ability and its economic or other power. The *Act* promotes rational and open discussion with the expectation that through discussion the real issues can be identified and resolved. (See, for example, *Fashion Craft, supra.*) The *Act* allows parties to make and then change their bargaining position. Finally, the duty to bargain is one which relates to the making of a collective agreement. There is no general duty to negotiate during the term of a collective agreement about such items as, for example, the way an employer will implement a scheduling provision. (See *Kennedy Lodge Nursing Home, supra.*)

The duty to bargain is violated if one party's actions amount to a refusal to recognize the other party or if the party's actions are designed to avoid reaching an agreement. (See *City of Thunder Bay, supra.*) Moreover, a measure of openness and honesty is required in bargaining. Thus in *Old Oak, supra,* the Board held that there was a violation as the employer, who was negotiating for a right to "contract out", concealed the fact that a particular contracting out plan was under active consideration when asked by the union for specifics. In addition, should one party take a bargaining position and thereby induce the second party to change its position, the first party cannot then renege on its position. (See *Sparton, supra, K & Son, supra,* and *Saville Food Products, supra.*)

The Employer submitted that the duty to bargain ended when the agreement was made and

thus that any Employer action after the parties concluded a collective agreement could not be bad faith bargaining. The Employer noted that the guidelines were prepared following the making of the agreement and thus there could be no bad faith bargaining. However, the Union's concerns about the guidelines are closely tied to conduct which occurred before the making of the agreement. While I accept that the duty to bargain in good faith is tied to making a collective agreement and that these parties did conclude a collective agreement, I am not prepared to dismiss the Union claim on the basis that part of the Employer conduct occurred after the making of the agreement. I do not think the issue is as simple as the Employer has asserted, especially when, as here, the actions are intrinsically tied to conduct which occurred prior to making an agreement.

What happened here? The Union submitted the Employer had violated its statutory duty to bargain in two ways - first, it prepared guidelines for the implementation of an article which were similar to its withdrawn proposal and, secondly, it failed to disclose its plans for scheduling when the Union asked.

The similarity between the guidelines and the Employer's withdrawn proposal

In considering this issue, it is helpful to examine in detail the process of bargaining as it occurred between these parties.

The parties had problems with scheduling. Under the old agreement these issues were left to management as no provision in the agreement dealt with them. The Union asked the Employer to make a proposal in bargaining. The Employer did so; all of the written proposals were made by the Employer. The first proposal was not addressed in detail. However, the second (September) proposal was thoroughly discussed and the Union communicated its disapproval. The Employer withdrew it. If the negotiations had concluded at that point without including any provision on scheduling, the matter would have remained

a management right, and I have no doubt the Employer could have produced guidelines, as it did here.

However, the Union asked the Employer what it would do about scheduling and the Employer replied that it would look at it and do what was “fair and reasonable”. If the negotiations had concluded at this point without including any provision on scheduling, the matter would have remained a management right. Again, in such an instance, the Employer could have done as it did here.

There was no evidence that the Union changed its bargaining position because of the Employer's withdrawal of its September proposal nor was there any evidence that the Union was otherwise prejudiced by the withdrawal. The Employer then proposed another simpler version (the October proposal) and this led to the inclusion of Article 14.19 in the collective agreement. At this point there was nothing to suggest a failure to bargain in good faith; the Employer made three consecutive proposals, the last of which, through the process of bargaining, led to agreement with the Union.

After the collective agreement was ratified, the Employer reviewed Article 14.19 and considered how it would be applied throughout the entire Support Services Department. The Employer sought to ensure that all its supervisors and other members of management acted in a similar manner. The Employer prepared written guidelines for its supervisors and managers as to the administration of the new provisions and provided a copy to the Union.

The Union abandoned during argument its claim that the guidelines violated the agreement. Given that the Employer's guidelines and the way the Employer administers the guidelines are in conformity with the collective agreement, can the fact that the Employer has, in a number of areas, remained consistent with the position it put forward to the Union in bargaining lead to a conclusion that it has bargained in bad faith? The Union relied upon the

fact that it had indicated during bargaining that it did not like the earlier proposal and the Employer thus withdrew that earlier proposal. In general terms, provided the collective agreement does not regulate the issue, there is no basis to conclude that the duty to bargain means the withdrawal of a specific proposal compels an employer henceforth to manage in a manner different from that proposal. Nothing said or done in this bargaining compels the Employer to manage in a manner contrary to its withdrawn proposal in areas not regulated by the new agreement. The Employer is free in those areas to manage as it wishes, provided, as is accepted here, its actions conform to the requirements of the collective agreement.

Finally, the Union said that if it had known how the Employer would administer the provision, the Union would not have taken the proposed agreement to the members for a vote and that the members would not have ratified it. While this was speculative on the part of the Union witnesses, I accept it as an accurate statement of what would have happened. Nevertheless, even accepting that the Union and its members would not have voted in favour of the Employer's current approach to managing in this area, this conclusion does not mean that the Employer has violated it's statutory duty to bargain.

I find no basis for concluding that the Employer acted in violation of its Section 17 duty to bargain in good faith through its preparation of the December guidelines.

The Employer's alleged failure to disclose its plans for scheduling

The Union also alleged that when the Union asked the Employer in September how it would address the scheduling of part time employees, the Employer withheld relevant information in violation of its duty to bargain in good faith.

As I noted above, the duty to bargain in good faith requires an element of honesty and openness and may be breached by withholding relevant information. The difficulty for the

Union in this instance is in demonstrating that the Employer did withhold relevant information. The Employer witnesses testified about their intentions at the time the Employer withdrew the September proposal when they responded to the Union question. The witnesses testified as to being uncertain, about knowing the issue had been a management right, and about their intention to consider the matter further and advise the Union. However, they said nothing which would indicate an intention to issue guidelines based on the withdrawn proposal. The evidence does not suggest the conclusion that the Employer knew then that it would deal with this issue in the way it ultimately did. In the absence of any evidence that the Employer withheld relevant information, this aspect of the Union submission must fail.

Disposition

The Union complaint that the Employer violated Section 17 of the *Labour Relations Act, 1995* is dismissed.

Dated at London, Ontario this 14th day of September, 1999.

Howard Snow, Arbitrator