

**IN THE MATTER OF AN ARBITRATION**  
(Under the *Labour Relations Act, 1995*)

BETWEEN:

SOUTH BRUCE GREY HEALTH CENTRE

(“Hospital”)

-AND-

ONTARION NURSES’ ASSOCIATION

(“ONA”)

**AND IN THE MATTER OF** an arbitration of a ONA Policy Grievance 201602386 and the individual Grievance of Diane Jolliffe, both dated march 3, 2016 regarding compensation for recertification, under the collective agreement between the parties.

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES:

For the Hospital: Lisa M. Kwasek, Counsel; Audrey King, Director, Human Resources; Maureen Rydell, Chief Nursing Officer.

For ONA: John D’Dorsay, labour Relations Officer; Michelle Kennedy, Bargaining Unit President; Diane Jolliffe, Grievor.

HEARING HELD IN WALKERTON, ONTARIO ON MAY 14, 2018.

## **AWARD**

### **I. WHAT THIS CASE IS ABOUT**

1. This matter came on for hearing on May 14, 2018 as agreed by the parties.
2. There are two grievances before me: an ONA policy grievance and an individual grievance. The grievances raise the same issue; namely, whether a nurse is entitled to compensation for attending testing for the purposes of re-certification required by the Hospital.
3. After hearing opening statements it appeared to me then the necessary facts were not in dispute, so I suggested that the grievances could be determined on the basis of those facts. The parties agreed, and made their submissions on the basis of the facts outlined in the opening statements.
4. Although the scope of the grievances as filed was somewhat broader, the essence of ONA's assertion is that the Hospital has violated the Central Collective Agreement binding on the parties by instituting and following a continuing education policy which provides that bargaining unit employees will not be paid for attending for testing to obtain required professional re-certification. In the case of the more specific individual grievance, ONA claims that the grievor was entitled to be paid her regular straight time hourly wages for attending for Advanced Cardiovascular Life Support ("ACLS") re-certification testing on April 29, 2016.

### **II. THE FACTS**

5. The stated purpose of the Hospital's continuing education policy in effect at the time was to encourage and support nursing staff to maintain and advance their knowledge and skills for the benefit of both nurses and the Hospital (and patients). The stated policy expectation was that all nurses would maintain the required skills and certifications necessary in their nursing unit. The policy required certification and specified periodic re-certification for several professional nursing skill sets, including ACLS, and provided that nurses would be reimbursed course registration expenses upon successful completion. The policy provided that "Continuing Education" (which included certifications) should be reviewed during performance appraisals, and as follows:

- 4.7 As a condition of employment, the new employees must provide proof of required certification to their Director/Supervisor within 30 days of their date of

hire. For those employees without required certification, such employees must make arrangements to achieve certification in accordance with the posted position. This shall normally be within 6 months of date of hire.

- 4.8 It is the responsibility of the employee to maintain this certification/re-certification as outlined above.
- 4.9 Recertification will be offered through organized hospital sessions. Required re-certification will be compensated with registration reimbursement upon successful completion.
- 4.10 Employees are allowed a grace period of 90 calendar days from the expiry date to recertify. If the employee does not provide proof or current certification by the end of the grace period, the Director will contact the VP Human Resources, and the employee will be placed on non-disciplinary suspension without pay and the employee will not be scheduled to work until proof of valid certification is provided.

An employee who fails to provide proof of current certification within 120 days of their certification expiring will be deemed no longer qualified to perform their job duties and will result in the termination of his/her employment.

Employees who are unable to participate in the required course must seek employment accommodation by notifying Human Resources and supplying substantiated medical evidence.

Employees whose certification expires while on approved maternity, sick or long-term disability leave, shall be allowed a grace period of 90 calendar days from the date of return to work in order to obtain valid certification. If the employee does not provide proof of current certification by the end of the grace period, the process outlined above will apply.

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- 4.12 Employees' certification status will be recorded in the Human Resources Information System (HRIS) by Education Coordinator.
- 4.13 It is the responsibility of the departmental manager to ensure employees are not working if they do not meet these criteria.

(Underlined emphasis added.)

Although the policy has been changed (and the amended current policy is not before me), the parties agree that the same issue of compensation for attendance for re-certification testing purposes arises under the current policy.

6. Articles 9 and 11 of the Central Collective Agreement include the following provisions:

## ARTICLE 9 – PROFESSIONAL DEVELOPMENT

9.01 Continuous professional development is a hallmark of professional nursing practice. As a self-regulating profession, nursing recognizes the importance of maintaining a dynamic practice environment which includes ongoing learning, the maintenance of competence, career development, career counselling and succession planning. The parties agree that professional development includes a diverse range of activities, including but not limited to formal academic programs; short-term continuing education activities; certification programs; independent learning committee participation. The parties recognize their joint responsibility in and commitment to active participation in the area of professional development.

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9.06. Both the Hospital and the Union recognize their joint responsibility and commitment to provide, and to participate in, in-service education. The Union supports the principle of its members' responsibility for their own professional development and the Hospital will endeavour to provide programs related to the requirements of the Hospital. Available programs will be publicized and the Hospital will endeavour to provide nurses with opportunities to attend such programs during their regularly scheduled working hours.

9.07 The Hospital will endeavour to schedule mandatory in-service programs during a nurse's regular working hours. When a nurse is on duty and authorized to attend any in-service program *within the Hospital* and during her or his regularly scheduled working hours the nurse shall suffer no loss of regular pay. When a nurse is required by the Hospital to engage in any learning opportunities outside of her or his regularly scheduled working hours, the nurse shall be paid for all time spent on such learning opportunities at her or his regular straight time hourly rate of pay.

Where the hospital requires e-learning, it will make reasonable efforts to enable hospital e-learning requirements during a nurse's regular working hours. Where a nurse is unable to complete required Hospital e-learning during regular working hours and is required to complete hospital e-learning outside of her/his regular working hours, the Hospital will identify in advance the time that will be paid at her or his regular straight time hourly rate of pay.

Part-time nurses will be credited with seniority and service for all such hours paid as provided above while engaged in such learning opportunities.

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### 11.09 Education Leave

The parties acknowledge that the responsibility for professional development is shared between the nurse and the Hospital. In this regard, the local parties will endeavour to provide flexible work schedules to accommodate the nurse's time off requirements.

- (a) Leaves of absence, without pay, for the purposes of furthering professional nursing career development may be granted on written application by the nurse to the Chief Nursing Officer, Supervisor or designate. Requests for such leave will not be unreasonably denied.
- (b) A full-time or regular part-time nurse shall be entitled to leave of absence without loss of earnings from her or his regularly scheduled working hours for the purpose of taking any examinations required in any recognized course in which nurses are enrolled to *enhance* their nursing qualifications.

For greater clarity, the period of the leave shall include the night shift prior to any scheduled shifts commencing on the day of the examination as long as payment under this clause does not result in payment for more than one regularly scheduled shift.

The nurse agrees to notify the immediate manager of the date of the examination as soon possible after she or he has become aware of the date of the exam.

- (c) Leave of absence without loss of regular earnings from regularly scheduled hours for the purpose of *attending short courses, workshops or seminars to further professional nursing career development* may be granted at the discretion of the Hospital upon written application by the nurse to the Chief Nursing Executive, Supervisor or designate.
- (d) Regular part-time nurses will be credited with seniority and service *for all such hours paid* for writing examinations, attending courses, workshops or seminars to further career development as provided above.

NOTE: (Note 2 applies to full-time nurses only)

Provisions in existing Collective Agreements providing for time off to study for College of Nurses examinations, to write registration examinations or examinations for courses of study related to employment shall be continued in effect and added to the above provisions in such Collective Agreements.

(Italicized emphasis added.)

7. In January 2016, the grievor applied for and received permission to attend for the testing component of an ACLS course for re-certification purposes on April 29, 2016. The grievor selected that date, which was a regular 11.25-hour shift work day for the grievor. The grievor claimed that this was an education day for which she was entitled to compensation. The Hospital disagreed. It advised the grievor that it would not pay her wages for that regularly scheduled work day, and that she could either take an unpaid leave day, a vacation day, or apply her accumulated overtime. It is not clear what the grievor chose to do, but that is neither here nor there for purposes of the determination required.

8. The typical 2-day long ACLS course is intended to provide the skills needed to assess and administer care within the first 10 minutes of an adult cardiac arrest. The educational component of the course is delivered on Day 1. Certification or re-certification testing is administered on Day 2. The grievor did not attend for the Day 1 educational component of the ACLS course. She attended for only the Day 2 re-certification testing. ONA claims the grievor is entitled to be compensated for her time for attending at the re-certification testing on April 29, 2016 (which ONA says is her entire scheduled shift that day). ONA does not claim that the grievor is entitled to compensation for any pre-testing preparation which she did. (Indeed, it is not clear that the grievor did any preparation since ONA says that the grievor regularly used and demonstrated her ACLS skills in the normal course of her workplace duties and responsibilities.) Nor does ONA claim that the grievor is entitled to be compensated for her travel time.

9. The parties referred to a consultation process which preceded the implementation of the policy in issue. Although there is a dispute about the breadth and effect of that consultation process, there is no dispute that the theory advanced by ONA in support of the grievances was not the subject of discussions during that consultation process. It is therefore irrelevant to the determinations required.

### **III. SUBMISSIONS**

10. ONA concedes that Articles 9.06, 9.07 and 11.09 do not apply, except to the extent that ONA asserts that Article 9.07 identifies the appropriate rate of compensation for the grievor's attendance for re-certification on April 29, 2016. However, ONA points out that the ACLS re-certification was required by the Hospital, and that not only were a nurse's certifications reviewed during the performance appraisal process, failure to obtain the re-certification required by the Hospital's policy would have resulted in a non-disciplinary unpaid suspension and possibly to the termination of the grievor's employment. Therefore, argues ONA, attendance for required re-certification constitutes "required work" for which the grievor is entitled to collective agreement compensation. ONA submits that when the Hospital, and not the College of Nurses of Ontario or any other external body, "requires" something of a nurse (and skill set certification is not required by any external body) in order for her to maintain employment, it constitutes work, and the nurse is entitled to be paid for doing the thing required, in this case, the external assessment of continuing competence in ACLS.

11. Mr. D'Orsay referred to the following decisions in support of ONA's submission: *Dominion Stores Ltd. v. R.W.D.S.U., Local 1065*, (1978) 20 L.A.C. (2d) 118 (Teed, Chair); *Steinberg Inc. v. U.F.C.W., Local 486*, (1985) 20 L.A.C. (3d) 289 (Foisy);

*London & District Assn. for Mentally Retarded v. O.P.S.E.U.*, (1984) 16 L.A.C. 165 (Saltman, Chair); *Nova Scotia (Civil Service Commission) v. N.S.G.E.U.*, (1986) 25 L.A.C. (3d) 5 (Outhouse); *Lapaco Paper Products Ltd. v. U.S.W.A.*, (2003) 117 L.A.C. (4th) 74 (Weatherill); *Lethbridge (City) v. ATU, Local 987*, (2012) 225 L.A.C. (4th) 374 (Wallace); *Thunder Bay Regional Health Sciences Centre v. Ontario Nurses' Association*, 2007 CanLII 21590 (ON LA - Gray); *Oshawa General Hospital v. Ontario Nurses' Association*, June 3, 1988, Barrett, unreported); *Guelph General Hospital v. Ontario Nurses' Association*, 2005 CanLII 63783 (ON LA - Snow) – “*Guelph General #1*”; and, *Guelph General Hospital v. Ontario Nurses' Association*, February 11, 2016, Swan, unreported – “*Guelph General #2*”.

12. The Hospital submits that what was (and is) “required” is that a bargaining unit nurse continue to be qualified to perform her job, including maintaining all of the necessary certifications for the particular position. The Hospital says it is up to every nurse to make sure that her certifications are current, and to take the steps required to obtain re-certification as required. The Hospital argues that certification maintenance as a requirement of continuing employment is no different from the requirement that a nurse maintain good standing registration with the College of Nurses, and denies that this constitutes “work” for collective agreement compensation purposes.

13. The Hospital submits that attendance for testing to satisfy re-certification requirements is different from attendance at a training or educational course which an employer mandates an employee must attend, or even from attendance for an entire (i.e. for both the educational and the testing components) re-certification course as in the case of *Oshawa General Hospital*. The Hospital submits that the situation presented in this case is the same as in *Guelph General #2*, but with a new argument by ONA which the Hospital argues is equally unconvincing.

14. In addition to responding to and distinguishing the decisions cited by ONA, particularly the non-hospital sector cases, Ms. Kwasek referenced the *Nursing Act* and Arbitrator Swan’s decision in *Guelph General #2*, and referred me to *Vancouver (City) Fire and Rescue Services v. Vancouver Fire Fighters' Union, Local 18*, 2016 CarswellBC 624 (McPhillips) in support of the Hospital’s submissions.

#### **1V. DECISION**

15. The issue is not whether the Hospital should or should not compensate a nurse for attending for testing for the purposes of re-certification required by the Hospital. The issue is whether the Hospital is required by the Central Collective Agreement to do so.

16. There is no suggestion that the Hospital is not entitled to have a continuing education policy, or that the policy in issue was (or is) unreasonable. The only issue is whether the time that an employee is required to spend in order to comply with the policy is work which attracts collective agreement compensation.

17. *Dominion Stores Ltd.* and *Guelph General #1* were training course cases – which this case is not. *Lethbridge (City)* was a rate of pay case, not a compensation entitlement case. *Nova Scotia (Civil Service Commission)* was a case of voluntary training unrelated to the employee’s job, and which appears to have included an aspect of “double dipping”. *Steinberg Inc.* was an odd case concerning a company information session which the Arbitrator obviously concluded employees were required to attend. *London & District Assn. for Mentally Retarded* and *Thunder Bay Regional Health Sciences Centre* were training associated travel time cases – which once again, this case is not. *Lapaco Paper Products Ltd.* concerned aptitude testing for a posted position (i.e. a new position for the applicant employees) solely for the employer’s benefit which had nothing to do with professional qualification or continuing qualification for the employees’ existing positions. In *Oshawa General Hospital* nurses were required to take an entire re-certification course; that is, one which included a significant the educational as well as a testing component. Although a lengthy decision which reviewed arbitral jurisprudence at length, and concluded in *obiter* (at paragraph 88) that there are a “myriad of factors which can inform a decision about what constitutes “work” in any particular circumstance”, and that the issue must be determined in the context of the of the particular relationship and collective agreement, the ratio of the decision is that the condition of hire and continued employment requirement that all City of Vancouver fire fighters have a Class 3 driver’s license with an on highway air brake endorsement in compensation issue was imposed by an external authority, and that there was nothing in the collective agreement which suggested a mutual intention to confer the benefit claimed.

18. None of these decisions concerned compensation for stand-alone re-certification testing, and there is nothing in them that offers any pertinent analytical assistance.

19. The issue in *Guelph General #2* was whether nurses who were required to maintain the same ACLS and Pediatric Advanced Life Support (“PALS”) certification in good standing as a condition of continued employment were entitled to be paid for the time spent doing so. Articles 9.07 (as it then was – but which has not changed in any material way) and 11.09 of the Central Collective Agreement were in issue. Arbitrator Swan reviewed the collective agreement and arbitration history (including *Hotel-Dieu Grace Hospital v. Ontario Nurses’ Association*, (2004) 76 C.L.A.S. 103 (Crljenica)) of



the provisions, and concluded that the re-certification testing required by the employer did not attract payment under Article 9.07 because (at paragraph 8):

There was not a course involved, only a testing process to ensure that a qualification required for work in the units concerned was maintained at an acceptable standard. The fact that the testing process might have been iterative, and that nurses might improve their knowledge and skills through the testing process, does not change the essential nature of the re-certification as a test rather than a course. The parties provided separately for courses and for examinations in clauses 9.07 and 11.09, and that distinction must be respected.

20. Although the Arbitrator questioned the correctness or applicability of the *Hotel-Dieu Grace Hospital* decision, he left aside consideration of Article 11.09 because (as I read his decision) that was not referred to in the grievance. However, he remained seized to deal with any issue of compliance with that provision. There is no suggestion that anything came of that.

21. The fact that failure to obtain the re-certification as required by the Hospital's policy would have resulted in a non-disciplinary unpaid suspension and possibly to the termination of the grievor's employment is neither here nor there for purposes of the determination required. The issue is not whether the Hospital is entitled to require a nurse to demonstrate that she continues to have the qualifications necessary to perform the necessary duties and responsibilities of her position. ONA does not suggest that the Hospital is not entitled to do so, or that the policy itself is unreasonable. The issue is whether the grievor is entitled to collective agreement compensation for her time spent in attending for re-certification testing as required by the policy. This is simply a matter of collective agreement interpretation and application.

22. The dispute in this case does not concern an employer requirement to take training, or to upgrade or acquire additional qualifications for either a new or a present position. It does not concern testing for a new position. It concerns only an employer-imposed testing-only present position re-recertification requirement. This case is therefore unlike, for example, *Continuing Care Employee Relations Assn. of British Columbia v. I.U.O.E., Local 882*, (1993) CarswellBC 3622 (Larson) in which employees were required to attend a course for (annual) re-certification purposes. The grievor was required attend for ACLS re-certification testing only, which is substantially the same as the situation in *Guelph General #2*. Not only do I respectfully agree with Arbitrator Swan's conclusions in *Guelph General #2*, in this case ONA does not rely on Article 9.07 other than as suggesting the applicable rate of pay if the grievor is entitled to compensation, and concedes that Article 11.09 does not apply. Instead, ONA advances an argument which it could have but did not make in *Guelph General #2*; namely, that attending for required re-certification testing constitutes "work" which attracts collective

agreement compensation. Although the decision in *Guelph General #2* does not bear directly on the issue in this case, the point of that decision does; namely, that the Central Collective Agreement distinguishes between required training or education on one hand, and required re-certification testing.

23. Indeed, arbitrators have long distinguished between employer-imposed professional training and re-certification requirements. Employer required profession-related training is generally considered to be “work” for collective agreement purposes. However, absent a collective agreement provision which stipulates otherwise, employer required re-certification testing is generally considered not to be work for collective agreement purposes. As Arbitrator Monroe noted in *Fraser Valley Mill Producers Co-operative Association v. I.A.M., District 250*, (1989) 9 L.A.C. (4th) 376 (at para. 36), absent a collective agreement provision which stipulates otherwise, occupational licensing, certification or re-certification testing as a condition of continued employment is not considered work time, and employees are expected to undertake it on their own time. (See also, *Vancouver (City) v. C.U.P.E., Local 15*, 2002 CarswellBC 4111 (Steeves); and *Vancouver (City) v. Vancouver Fire Fighters Union, Local 18*, 2010 CarswellBC 4199 (Moore).)

24. Article 9 of the Central Collective Agreement is a comprehensive professional development provision which focuses on education and learning opportunities for professional growth and progression purposes. Article 11.09 is an adjunct provision which provides education leaves for professional development purposes. There is nothing in these provisions, or anywhere else in the Central Collective Agreement, which speaks to re-certification. Re-certification is not a form of professional development. Re-certification offers a form of professional quality assurance that a nurse continues to be qualified to perform the particular facet of her job.

25. If the mutual intention had been to provide collective agreement compensation for re-certification attendance purposes, that could have been easily accomplished in the same or similar clear manner that Article 11.09(b) does for examinations required in courses nurses take to enhance their qualifications. But the collective agreement does not do so, and I can discern no reason to depart from the well-established proposition that stand-alone re-certification testing neither constitutes “work”, nor otherwise attracts compensation unless the collective agreement specifically so provides. The Central Collective Agreement does not so provide.

26. In the result, I am satisfied that the grievor was not at work on April 29, 2016, and that the re-certification testing she underwent that day did not constitute “work” for collective agreement purposes.

27. The grievances are therefore dismissed.

DATED AT TORONTO THIS 11TH DAY OF JUNE 2018.

*George T. Surdykowski*  
George T. Surdykowski – Sole Arbitrator