

FILE NO. AA92-07-006

EMPLOYER: Notre Dame Medical Nursing Unit No. 19B

UNION: Notre Dame Nurses Local 55 of MNU

ARBITRATOR: B. Schwartz

APPEARANCES: K. Lercher, for the Employer  
G. Smorang, for the Union

GRIEVOR: M. Smith

DECISION RENDERED: July 16, 1992

EXPEDITED ARBITRATION: Yes

**ISSUES: SKILL AND ABILITY - Assessment - references, interviews; DISCRIMINATION - Language; SECTION 80 of The Labour Relations Act discussed:** The Grievor had applied for but was not awarded either of two L.P.N. positions. A grievance was brought and settled. Both parties agreed that the competition would be redone. A second competition was held, but the Employer declined to award either position to the Grievor. The Employer argued that the Grievor was denied the position because she had unsatisfactory references with respect to clinical performance and patient relations. A crucial factor in the decision not to award the Grievor the position was a letter of reference from previous supervisor in which the Grievor's performance was rated as only "minimally satisfactory". The Union filed another grievance contending that the second competition was tainted by bias against unilingual employees, or that it was at least mishandled in several respects.

**AWARD:** GRIEVANCE ALLOWED IN PART. The Arbitrator found that the Union failed to show that either the first or second competitions were biased against unilingual applicants. In any event, the extent to which bilingualism would be a goal in staffing was a policy matter which was within the discretion of management. Further, he found no evidence in the second competition of personal bias against the Grievor. The evidence showed that the selection panel would have awarded the Grievor one of the positions if the letter of reference had been more positive. As to the reliance on the reference, the Arbitrator commented that a strong possibility existed that the previous supervisor and the selection panel had substantially different understandings of the phrase "minimally satisfactory". The Arbitrator found that if the Employer had not relied solely on the outside reference and also considered an internal reference, then the outcome would have been different. He regarded the Employer's failure to rely on any internal assessments about the Grievor's performance as a clear breach of its duty to conduct a reasonable and fair selection process. However, he found that the defects in the reliance on the reference were the result of good faith mistakes made under considerable time pressure and the unavailability of internal performance appraisals. As a result of the flaws in the selection process, the Arbitrator ruled that the Grievor was denied the right to a fair, reasonable selection process consistent with the collective agreement. As to remedy, he could not conclude that the Grievor would perform well in practice, so he suggested the reassessment of the Grievor to establish whether she met the selection criteria.

47-251-1000

**AWARD**

**NOTRE DAME MEDICAL NURSING UNIT NO 19B**

**and**

**NOTRE DAME NURSES LOCAL 55 of the MANITOBA NURSES' UNION**

**re: Ms. Marguerite Smith,  
Failure to Award a Position,**

**Case No. 451/92/LRA**

**Date of hearing: 29 May, 1992; June 30, 1992.  
Place of hearing: Place Louis Riel, Winnipeg.**

**Award (on the merits) issued: 16 July 1992**

**Appearances: For the employer: Ms. Kristin Lercher  
For the union: Mr. Garth Smorang**

**Arbitrator: Dr. Bryan Schwartz**

MANITOBA LABOR BOARD  
JUL 16 1992

AWARD

NOTRE DAME MEDICAL NURSING UNIT NO. 19B

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Merits

Introduction

Notre Dame is a small rural hospital. It receives and treats cases of all sorts: births, emergencies, psychiatric care and terminal illnesses. The Hospital is one part of a larger organization, the Centre de Sante. Another part is a personal care home, the Foyer Notre Dame. While the same management board is responsible for both facilities, each has its own middle-level managers. The Hospital is unionized, the Foyer is not.

In October 1991, the Hospital held a competition to fill two permanent positions for Licensed Practice Nurses (L.P.N.'s). One position was the equivalent of 60% full time (0.6 E.F.T) the other 80% (0.8 EFT). At the time of the competition the grievor, Ms. Marguerite Smith, held a term position at the Hospital. She was not awarded either job. A grievance was brought, and settled. Both sides agreed that the competition should be re-done; qualifications would be judged on the basis of those existing at the time of the original, October 1991, competition.

A second competition was held, but the Hospital again declined to award either job to Ms. Smith. Another grievance, the one before me, was brought. The union contends that the second competition was tainted by bias, or was at least mishandled in several respects. It asks to have the 0.8 position awarded to Ms. Smith, along with back pay.

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The Manitoba Labour Board informed the incumbents in writing that a hearing would take place, and at the beginning of both days of hearings, I verified informally (by asking the parties in attendance) that the incumbents were indeed aware that they had the right to attend and to participate. They chose not to do so. The employer and the union agree that I have jurisdiction, and neither side raised any preliminary objections.

Contention over the awarding of these positions has now gone on for over half a year. The continuing dispute is no doubt a source of uncertainty and anxiety to the grievor, the incumbents and the hospital administrators. It has proved necessary for me to obtain additional advice from counsel concerning the remedial aspect of this case. Accordingly, I have attempted to issue this award on the merits of the case as quickly as possible.

#### Ms. Smith's Work History at other Hospitals

Ms. Smith, a 1978 graduate of St. Boniface, is a fully certified L.P.N. with many years of work experience. Her practical experience began in the year of her graduation, with a part-time position at Morris General Hospital. She then assumed a full-time position at the Health Sciences Centre. In 1979, on account of her marriage, she moved on to Lorne Memorial Hospital. Under various arrangements, included part-time and casual contracts, she continued a working relationship with Lorne Memorial right up to the time of the October competition at the Notre Dame Hospital. During the second competition, the only letter of reference relied upon by the employer was from a supervisor at Notre Dame, Ms. Ardith Rothwell. The letter rated Ms. Smith as only "minimally satisfactory" in a number of departments, and was a crucial factor in the employer's decision not to award her the position.

Ms. Smith speaks English and Flemish, but in French, she is, by her own admission, very restricted in her abilities.

#### Ms. Smith's Work History at Notre Dame

In April 1988, Ms. Smith also began working at Notre Dame Hospital itself. Some of her work was done as a casual, but she did receive a six-month term contract, for part-time work, on three occasions. Ms. Smith was working under the last of the three contracts at the time of the October competition.

During the second competition, the employer searched Ms. Smith's file for evaluations of performance. There were no annual performance reviews, or any other assessments, except for one letter of warning, dated all the way back to 1988. The letter of warning takes Ms. Smith to task for "poor bedside manner" and "not carrying out her load".

Apart from Ms. Smith herself, the only witness called by the

union was Ms. Faye Higgs, who was her supervisor in the period leading up to and including the October competition. Ms. Higgs did not put much weight on the letter of warning. She said its author was eventually fired. Ms. Higgs also said that "rumours were fine" but there were no signed letters of complaint on file. While the letter of warning threatened to remove Ms. Smith from the casual list if her performance did not improve, there are no subsequent complaints on file, and Ms. Smith was in fact offered further work as both a casual and term employee.

Ms. Higgs' duties included hiring, and according to her, procedures were informal. The hospital was small, and a supervisor would "know everyone". Interviews might be conducted, but apparently no formal, systematic or comprehensive system was used for testing qualifications. I would infer that when positions came open, there tended to be few applications from nurses who had no previous association with the Hospital.

According to Ms. Higgs' testimony, in the absence of intervention by her own superiors, she would have awarded a job to Ms. Smith in the October competition. Ms. Higgs was impressed with the co-operation shown by Ms. Smith during a staff re-organization at the hospital. Management had decided that to improve margins of safety, an L.P.N. should be on staff at all times. Ms. Smith had worked with the other nurses to arrive at a schedule, and had personally accepted some of the least desirable shifts. Ms. Higgs also emphasized that Ms. Smith had sixteen years of experience in isolated rural hospitals.

At the hearing, there was some controversy over how much opportunity Ms. Higgs had to personally observe Ms. Smith's work. Ms. Higgs usually worked day shifts, Ms. Smith nights; but on some occasions, Ms. Smith accepted extra shifts during the day. Ms. Claudette Lahaie, one of the top managers, testified that she had not been satisfied with the amount of time Ms. Higgs actually spent "on the floor", overseeing patient care.

It is common ground that Ms. Higgs took two month's leave of absence during the summer of 1991. Ms. Higgs states that if there had been any problems with Ms. Smith's performance, the head nurse would have informed her.

Ms. Higgs testified that her evaluation of Ms. Smith took into account the latter's nursing skills and patient care; there was "no indication" that they were not adequate. Ms. Higgs noted that Ms. Smith could be "brusque" but that was "just her personality" and did not reflect on her skill as a nurse.

Ms. Higgs' testimony did not include any detailed account, based on firsthand observation, of Ms. Smith's performance. As I have already noted, Ms. Smith's employment file does not include any written evaluations from Ms. Higgs.

The Collective Agreement states:

3201: An employer shall complete a written appraisal of a nurse's performance at least once annually. Upon request, the nurse shall be given an exact copy of the appraisal.

3202. The nurse shall have an opportunity to read such document.

3203. The nurse's signature of such document merely signifies that the contents of the document have been read.

3204. If the nurse disputes the appraisal, she/he may file a reply to the document in accordance with Article 29, or she/he may file a grievance under Article 12 of this agreement.

Ms. Higgs agreed that it was her duty to fill out annual performance appraisals, "time permitting". In her view, it did not.

Ms. Higgs herself left her employment with the Hospital after the first competition. She believes she was personally treated in an unfair manner by the hospital - among other things, it was insensitive to her health problems - and senior management of the Hospital was apparently concerned about some aspects of her performance.

Ms. Smith herself testified, but was not examined or cross-examined about the details of her work performance.

Was the first competition tainted by bias against unilingual employees?

The union argued, on the basis of a number of allegations by Ms. Higgs, that the second competition was tainted by bias.

Counsel for both sides spared me a debate over the theoretical meaning of the term "bias". I will assume that to successfully attack a hiring process for bias, a union need not prove that managers actually did rely on improper considerations in arriving at their decision; it is sufficient to show that job applicants have reasonable grounds for doubting that selectors had the capacity and willingness to evaluate all applicants fairly.

Ms. Higgs' testimony on the "bias" issue is largely confined to allegations about what senior managers said around the time of the October competition. Counsel for the union contends that once ill will has been established at the highest echelons of the organization, subsequent processes should be viewed with suspicion. He submits that if bias is shown at an early stage of a process, arbitrators should not put a heavy burden on unions to show that it continued. If senior officials are prejudiced against an employee,

they are unlikely to admit it, and they will avoid leaving any "paper trail" that might prove the point.

I agree with the union's submissions. Indeed, if bias is shown at an early stage of a process, it may well be that the burden shifts to the employer to affirmatively demonstrate that its subsequent conduct was unprejudiced, in both appearance and reality. On the facts presented at the hearing, it has not been shown that even the October process was contaminated by bias against unilingual applicants. Furthermore, I believe that the employer has affirmatively shown that the second competition was conducted without bias against anglophone applicants.

What follows is a review of the evidence that led me to the conclusions just stated.

It is common ground that senior management met in October 1991, to discuss a variety of policy issues. Among them was the promotion of bilingualism at the hospital. Present at the October meeting were two top managers: Mr. Rene Comte, the Executive Director of the Centre de Sante, and Ms. Claudette Lahaie, the Assistant Executive Director. Also present were Ms. Higgs, the Director of Patient Services at the Hospital, and Ms. Jacqueline Theroux, who held the equivalent position at the Foyer.

As we shall see, Ms. Theroux was later appointed Director of Programs at the Hospital, and in this capacity, was responsible for conducting the subject of this grievance, the second competition.

Notre Dame is located in a community that is predominantly French-speaking. Ms. Smith, who lives very close to the hospital, testified that most residents can speak English as well. Around the time of the October competition, top management expressed a determination to promote the Hospital's position as a bilingual facility. A government report had identified the Hospital's potential in this respect. Ms. Claudette Lahaie agreed that one of the factors shaping top management's approach to bilingualism was that its enhanced character as a bilingual facility might help it to survive the budget cutbacks that everyone in the health care community was expecting.

At the October meeting, Ms. Higgs expressed concern that top management was proceeding with too much speed and zeal towards increasing the level of bilingualism at the hospital. She felt that the top management's approach would mean that people like Ms. Smith had no future at the hospital. She believes she specifically raised the matter of the upcoming competition with Ms. Smith.

All witnesses to the October meeting agree that Ms. Theroux also firmly and vocally opposed top management's approach to bilingualism. She agreed with the goal of promoting bilingualism at the hospital, but insisted that it must be achieved at a measured

pace and with a plan. Ms. Theroux even threatened to resign unless the Hospital committed itself to a more gradual and thought-out approach. Claudette Lahaie testified that the top managers agreed with Ms. Theroux that they were proceeding too quickly. While all the details were not made clear to me, apparently the October meeting resulted in an agreement that various committees and individuals should develop specific plans concerning language policy and implementation.

Counsel for the union brought to my attention a communique from senior management, dated November 28, 1991, which says that the Hospital will "continue the process of promoting the concept of bilingualism when reasonable and when resources permit" and will "continue to review every vacant position before it is posted to assess the need for bilingualism, among others, as a criterion". As I read it, nothing in this communique suggests that every nursing job must henceforth be staffed by a bilingual person. Rather, the employer purports to be committed to adopting a "reasonable" and "job-by-job" approach to deciding what level of bilingualism is required for particular positions.

The extent to which bilingualism should be a goal in the staffing of the hospital is a policy matter which, like many others, remains within the discretion of management. Like other policy matters, formulation and implementation must be conducted in a manner consistent with the collective agreement as a whole, including the duty to act reasonably, fairly and in good faith. The union did not suggest that management would display bias any time it decided to make linguistic ability a factor in some of its hiring decisions.

The evidence does not prove that when the October competition was decided, top management maintained any unreasonable or disguised preference for hiring bilingual L.P.N.'s. The decision in the October job competition was made after the October meeting of senior managers - which had produced a consensus that bilingualism should be implemented at a measured pace. The job posting characterized language abilities in the usual way; bilingualism is defined as "an asset". Ms. Smith had previously won competitions held on that basis. I have very little information about how the October competition was actually conducted, but it does appear that top management allowed Ms. Higgs to play a substantial role, even though she was a known defender of unilingual staff members. Ms. Claudette Lahaie was originally one of those favouring a faster approach to bilingualism; yet after the competition was held, she tried to make it clear to Ms. Higgs that Ms. Smith should not be denied a job merely because of her unilingualism.

My conclusion about the October competition, then, is that the union has not been able to affirmatively prove that it was tainted by "pro-bilingual" bias.

Was the second competition tainted by bias against unilingual candidates?

As mentioned earlier, I think that if bias has been proved at an early stage of a hiring process, the burden might shift to the employer to show its good faith at later stages. I do not think bias has been proved at the earlier stage. But suppose I am mistaken on that score. I would still conclude that the employer has demonstrated that those conducting the second process were not biased against unilingual candidates.

Before the second competition began, Ms. Theroux became Director of Programs at the Hospital. As such, hirings became her responsibility. It is clear from the testimony of Ms. Higgs, Ms. Lahaie and Ms. Theroux herself, that during policy discussions, she was a determined moderate on language issues. Ms. Theroux had occasion to give practical demonstrations of her approach; around the time she decided the second competition, she decided another competition in favour of a unilingual candidate.

I found Ms. Theroux to be a credible witness, and I accept her testimony that she received no directions from her superiors on how to conduct the second competition. According to Ms. Theroux, she would have found it "insulting" if anyone had told her how to do her job. Ms. Theroux testified that she decided to adopt her usual approach to hiring; she would determine which candidates were "qualified", then allocate posts strictly on the basis of seniority. Ms. Smith was the most senior person in the competition. (As I understand it, by "qualified" Ms. Theroux meant "satisfactory with respect to the essential selection criteria").

The system adopted by Ms. Theroux actually puts more emphasis on seniority than the Collective Agreement strictly requires. Under Article 2502, seniority must only be considered as "a factor" in hiring. Under Article 2502, the employer could deny a job to the most senior person qualified if she is substantially outscored by another candidate on the selection criteria as a whole. If Ms. Theroux had been determined to do injustice to Ms. Smith, she would not have chosen an approach which gave Ms. Smith the best chance to win the best position.

If Ms. Theroux had wished to put more weight on bilingualism, she could have legitimately done so. She might, for example, have used a "total score" system for deciding among qualified candidates. Proper weights would be assigned to each selection criterion, and the winner would be decided on the basis of total score. Bilingualism and seniority could both be given some weight under such a system, and in some cases, a junior person's big edge in language skills might carry them past another qualified candidate with more seniority. Instead, Ms. Theroux used a system that would award the position to the most senior person qualified, regardless of language ability.

Ms. Smith testified that she asked Ms. Theroux, at the beginning of the hiring interview, how much the bilingual question would be worth. Ms. Theroux said it would be worth five points and that it would serve as a tiebreaker. I would note that in marking the "bilingual" question, Ms. Theroux started the scoring scale at "0". She did not give a negative score for very low levels or non-existent levels of bilingualism; by contrast, Ms. Theroux did use negative scores for only "minimally satisfactory" levels of past performance.

I am not sure whether under Ms. Theroux's theory of hiring, the presence of bilingualism could be a decisive factor in raising a not-quite-good-enough candidate into the ranks of the qualified. Perhaps this is an issue which Ms. Theroux has not had to confront in practice, and to which she has not developed a theoretical answer. It is reasonably clear, however, that under Ms. Theroux's general approach to hiring, she would not screen out an otherwise qualified candidate on the basis of unilingualism. Ms. Theroux testified that bilingualism was "an asset" for a candidate, but not a "basis for denial".

Looking at the particular facts of how the second competition was held, my finding is that Ms. Theroux did not in any way eliminate Ms. Smith from the "qualified" category on account of her limited bilingual capacity. On the contrary, Ms. Theroux testified that after interviewing Ms. Smith she was "impressed" with her results - even though she exhibited a low level of bilingualism. The turning point came when the outside evaluations came in.

Let me briefly consider a possible objection to the finding I have just reported. Ms. Smith - whom I also found to be a credible witness - testified that when Ms. Theroux told her she did not get the job, Ms. Theroux offered comments on three issues: that Ms. Smith had unsatisfactory references with respect to clinical performance and patient relations, and that her bilingualism was "substandard". Ms. Theroux was not asked by either side to verify the "substandard" quote. Neither side mentioned the remark in closing argument. In light of Ms. Theroux's other testimony, I will assume that if she did make the remark, it was not intended to indicate the bilingual category cost Ms. Smith a job she would otherwise have been awarded.

Ms. Theroux recruited Ms. Cheryl Harrison, the incoming Director of Patient Care, to join her on the selection panel. The two prepared an interview questionnaire and interview all the candidates. The panel was initially impressed with Ms. Smith's interview results. The turning point came when the only reference she received was a negative one, and the panel concluded from it that Ms. Smith could not be counted on to perform capably. As we shall see, there are some problems with the way the references were gathered and used; but having heard from Ms. Theroux, and reviewed

her conduct in context, I am convinced that any mistakes were made in good faith.

Was the October or second competition tainted by bias against Ms. Smith or in favour of Ms. de Rocquigny

Ms. Higgs recalls several comments being made that suggest bias against Ms. Smith or in favour of Ms. Mireille de Rocquigny (a successful candidate) personally. For the purposes of the following analysis, I will use the word "bias" to refer to a prejudiced state of mind on the part of managers; it will not refer to good faith mistakes made by managers, even if they had the practical effect of putting Ms. Smith at an unfair disadvantage.

Ms. Higgs believes that she was instructed, at the October meeting of senior managers and in subsequent personal discussions, to delay the October competition until after Ms. Smith's seniority ran out. She specifically recalls receiving this direction from a colleague, Mr. Ulysses Lahaie, and was not clear on whether it came from any other source. As counsel for the union observed, the employer did not call Mr. Ulysses Lahaie to deny the allegation.

I believe that Ms. Higgs was an honest witness; the issue for me is whether she has accurately interpreted or recalled the instruction in question. Emotions were strong during the bilingual debate in October. In such circumstances, people are prone to take a jaundiced view of the motives and intentions of others, and to misunderstand what they are saying. Ms. Theroux, for example, initially thought that Ms. Higgs had irresponsibly "highlighted" the importance of bilingualism when she posted the formal notice of the October job competition, when in fact, Ms. Higgs had simply inserted the usual phraseology. Conversely, it appears to me that Ms. Higgs somewhat underestimated the willingness of some of her colleagues to settle upon an approach to bilingualism that was fair to the current staff.

Let me assume, without deciding, that Mr. Lahaie did make the remarks in question. I would still find that the employer has affirmatively demonstrated that the second process was conducted without personal bias against Ms. Smith or in favour of Ms. de Rocquigny. The only part Mr. Lahaie played in the second competition was to help Ms. Theroux prepare a list of clinical questions. Ms. Smith did very well on that part of the competition. Ms. Theroux and Ms. Harrison did not have any significant prior acquaintance with Ms. Smith. Ms. Theroux testified at length, and impressed me as someone who had been trying her best to be fair. Ms. Harrison also appeared at the hearing, and there was no indication of a biased attitude on her part either. The evidence as a whole leads me to believe that the selection panel would have awarded Ms. Smith the 0.8 position if only the letter of reference from Ms. Rothwell had been more positive.

Ms. Higgs testified that Ms. Claudette Lahaie once referred to Mireille de Rocquigny as "my little protegee". I do not recall Ms. Lahaie being asked to confirm or deny that comment. I have been supplied with no context for the remark, so I am not sure whether it is an accurate report or whether it would disqualify Ms. Lahaie herself from deciding among candidates for the October competition. In any event, Ms. Lahaie convincingly testified that she tried not to get involved in the October hiring process at all; she did not think that a manager at her level should involve herself in hiring at such a junior level. When Ms. Lahaie did intervene, it was with a view to reviewing the October competition to see whether it had been conducted fairly. As far as I know, she took no part at all in the second competition.

Ms. Higgs also testified that at one point, Ms. Theroux herself commented that Ms. Smith would be a bad choice for the job, because she would cause problems for management. I put the comment to Ms. Theroux, and she categorically denied having made any such comment to Ms. Higgs. According to Ms. Theroux, she did not even know Ms. Smith prior to conducting the competition. As Ms. Higgs did not provide any surrounding context for the alleged remark, and it was convincingly denied by Ms. Theroux, I am not prepared to make anything of it.

My conclusion, then, is that the second competition was not actually biased by personal feelings of favouritism for Ms. de Rocquigny or antipathy to Ms. Smith. Given the system of selection used during the second competition, and the persons chosen to conduct it, applicants did not have a reasonable basis for fearing bias. If methods were used that unfairly favoured one over the other, they were the result of honest mistakes.

The selection criteria that were posted

The job posting stated that the qualifications required were "as per LPN job description". The latter begins by listing eight items under the title of "qualifications":

1. Current registration with the Manitoba Association of Licensed Practical Nurses.
2. Experience in a related area is preferred.
3. Physical and mental health to meet the demands of the job.
4. Ability to establish and maintain positive working relationships with others.
5. Has a genuine interest in the health care of people and is sensitive to their needs.
6. Participation in continuing educational activities.
7. Current Basic Cardiac Life Support certification preferred.
8. Bilingualism is a definite asset.

The L.P.N. "job description" document not step there. Most of it actually consists of a long list of items under the title of

"performance criteria". They appear to be a comprehensive and specific explanation of what L.P.N.s are expected to do in practice. For example, the first "performance criterion" is "clinical nursing practice". It lists specific skills such as interviewing patients, assessing their condition, obtaining histories, identifying their needs and helping to develop a plan to deal with them, and so on.

In setting up her interview questionnaire, Ms. Theroux used as her principal headings the eight items listed as "qualifications" in the L.P.N. job description. She used those eight headings, however, to bring into consideration the various "performance criteria."

For example, the performance criterion "clinical nursing" was primarily explored in the part of the interview questionnaire that purports to deal with the qualification "experience". Under the latter title, Ms. Theroux created three subcategories:

-hours of practical experience in the last seven years;

-knowledge questionnaire: applicants were presented with a series of hypothetical situations. According to the questionnaire, "they are meant to assess the knowledge gained from your past experiences which will enable you to perform effective and efficient nursing care to the patients we service at the Notre Dame hospital";

-references: one reference was sought for each applicant. The referee in each case was asked to fill in a standardized form that asked about various aspects of the nurse's past performance.

Counsel for the union did not appear to protest the fact that the actual selection criteria included both "qualifications" and "performance criteria". Ms. Theroux testified that she thought that performance was among the most important considerations in hiring for the job; applicants might have various credentials and knowledge, yet be unable or unwilling to do well in practice.

Counsel for the union also did not quarrel with the fact that the questionnaire explored performance under various headings of "qualifications". So let me simply make two non-binding suggestions which might clarify future competitions:

-in its postings, the Hospital might explain that the selection criteria include both the eight "qualifications" and the ability to meet the performance criteria listed on its L.P.N. job description;

-on its interview questionnaire, the Hospital might make things simpler by exploring some of the performance criteria

under their own headings, rather than lumping them under the eight categories of "qualifications".

The "scoring" system used on the questionnaire; implications of the failure of the questionnaire to award points for seniority.

As previously discussed, Ms. Theroux's intention was not to decide the competition on the basis of who amassed the highest total score on the questionnaire. While she allotted scores to various categories - others, such as having an L.P.N. license, were marked "yes" or "no" - she never totalled up the global score for any applicant. Ms. Theroux testified that she reviewed the results on a "line by line" basis; she was simply attempting to determine if candidates were qualified. (Again, by "qualified" Ms. Theroux meant "satisfactory in terms of the essential selection criteria"). That done, jobs were allocated strictly on the basis of seniority.

The union takes issue with the fact that the employer did not allocate points on its interview questionnaire for seniority. Article 2502 of the Collective Agreement states that:

Seniority shall be considered as a factor in vacancy selection....and if all other posted selection criteria are equal, it shall be considered as the governing factor.

As I have also already pointed out, Ms. Theroux actually chose a system which gave more weight to the seniority of a qualified candidate than Article 2502 strictly requires. Ms. Theroux treated the competition on a "threshold" basis; she was resolved to give the job to the most senior person, provided that she was qualified. Ms. Theroux could instead have awarded the jobs on a "competitive" basis. Under the latter system, the employer gives some weight to seniority; but it is only one selection criterion. The employer can look at other factors, and decide that a junior person is the overall best candidate. A person who is both senior and qualified can lose out.

It might be objected that the selection panel (Ms. Theroux and Ms. Harrison) did not consider seniority as a factor in its determination of whether Ms. Smith was qualified. I believe that the wording of Article 2502 leaves management a fair amount of discretion on how to factor in seniority. It does not seem unreasonable for an employer to screen out employees, regardless of seniority, who appear to be unable to meet selection criteria dealing with the ability to perform the actual job.

The origins of the reference forms.

Under the questionnaire heading of "experience", all the candidates were allocated points for "performance", as judged by the results of a single reference.

Ms. Theroux decided to prepare a standard form for referees to fill out. Referees would be asked to rate candidates on a variety of areas, such as "nursing assessment" and "interpersonal relations with patients". "Marking" would be on a scale that included "unsatisfactory", "minimally satisfactory", "satisfactory", and "excellent". Ms. Theroux and Ms. Harrison decided that "minimally satisfactory" would be given negative marks. They believed that performance was an extremely important factor. Ms. Theroux emphasized at the hearing that at a small hospital, there is "no place to hide" a nurse whose performance is marginal. In many situations, the R.N. might be tied up, and the L.P.N. would have to deal with patients on her own.

At some point, before the standard reference forms were sent out, Ms. Theroux received a letter of reference for Ms. de Rocquigny. It was prepared by the director of nursing at St. Boniface College. It rated Ms. de Rocquigny as "satisfactory" or "excellent" in all respects.

Ms. Theroux felt herself to be under time pressure; the union had indicated its eagerness to have a result from the second competition. Ms. Theroux and Ms. Harrison decided to save time by abandoning their own form, and using the St. Boniface one for all candidates. It seemed to be very similar to the "homemade" form. They also doubted that St. Boniface would fill in their "homemade" form anyway; Ms. Harrison testified that in her experience, if a nursing college is asked to provide a reference, it just pulls out the evaluation form that is already on file.

The application form signed by Ms. Smith had listed her previous employers. She wrote "yes" where the form asked if they could be contacted for references. The application form also asked for a list of three "personal references", and Ms. Smith supplied three names.

Ms. Theroux solicited one reference form for each candidate. She sent Ms. Smith's form to Ms. Rothwell, Ms. Smith's supervisor at Lorne Memorial. Ms. Rothwell rated Ms. Smith as "minimally satisfactory" in thirteen areas, including aspects of "nursing judgment" and "patient relations". She gave Ms. Smith ratings of "satisfactory" in six other areas. When asked for "additional comments", Ms. Rothwell noted that over six years, Ms. Smith had applied for eleven positions at Lorne Memorial, but received only one.

As a result of the negative references, Ms. Smith ended up with net "negative scores" under "performance references" and "relations with patients". Ms. Theroux and Ms. Harrison decided that the two negative scores disqualified Ms. Smith from the job.

The implications of the duty to administer the collective agreement "reasonably, fairly and in good faith...".

The union submits that the method in which references were gathered was contrary to Article 402 of the Collective Agreement, which states that:

The employer, in administering the collective agreement, shall act reasonably, fairly, in good faith, and in a manner consistent with the collective agreement as a whole.

Under article 80 of the Manitoba Labour Relations Act, all collective agreements must include the language set out in Article 402. In a very recent award, Maple Leaf Foods and United Food and Commercial Workers (June 1990), I had occasion to comment on the general duty of "reasonable, fair and good faith" administration:

I would venture a few general comments about section 80 of the Labour Relations Act. First of all, the language it prescribes - "in administering the collective agreement, the employer shall act reasonably, fairly and in good faith..." - must be considered a full and legitimate aspect of every collective agreement in Manitoba. It must be given full force and effect by employers, and by arbitrators. It is often said that arbitrators must interpret the collective agreements as written, and not the agreement they would prefer to see. Just as arbitrators should not "supplement" collective agreements with provisions of their own invention, arbitrators should not diminish agreements by dismissing provisions that properly belong.

The second point I would make is that s. 80 should not be viewed as calling for "justice in a vacuum". It speaks of fair play in administering a particular collective agreement; it specifically calls upon employers to take account of the terms of the collective agreement as a whole. The terms of s. 80 are an integral part of a collective agreement, and just like any part, they must be read with the others.

Accordingly, in determining whether the employer made proper use of references, I shall frequently make reference to more specific terms of the Collective Agreement.

Referees and the employer may have had substantially different understandings of the terminology used on the reference forms.

Ms. Theroux testified that any "minimally satisfactory" rating would be considered unacceptable, and given a negative number. Ms. Theroux testified that she phone Ms. Rothwell, and asked whether the ratings were up-to-date, what they were based on, and whether they reflected a sudden change in performance. Ms. Rothwell did not testify, however, and Ms. Theroux did not mention any

effort to explain the scoring system to her. The form itself provides no explanation. Ms. Rothwell did not provide any detailed written comments to explain the particulars of her ratings.

On the evidence I have heard, there is a real possibility that Ms. Rothwell thought "minimally satisfactory" would be understood as meaning "within the lower part of the band of acceptable performance for a place like Notre Dame". After all, Ms. Rothwell reported on the form that Ms. Smith had performed 3575 hours of work at her hospital in the previous seven years. Ms. Smith may not have won many competitions, but she was clearly called upon quite frequently to provide nursing services. Perhaps the management at Lorne Memorial considered Ms. Smith as someone who would be "acceptable" for a place like Notre Dame, but quite likely to lose out to a stronger candidate.

If Notre Dame had other references to rely upon, or if Ms. Rothwell's ratings were accompanied by some written explanation, it would be easier to overlook the possibility of miscommunication. As it is, an experienced and senior person was found to be unqualified entirely on the basis of that one scoring sheet.

Notre Dame Hospital did not obtain or rely on any information whatever about Ms. Smith's performance at Notre Dame itself.

I regard Notre Dame's failure to rely on any internal assessments about Ms. Smith's performance as a clear breach of its duty to conduct a reasonable and fair selection process.

Article 2502 of the Collective Agreement requires the employer to give significant weight to seniority in awarding jobs. The Collective Agreement also exhibits that at least a "tiebreaking" preference be given to nurses who are currently in the employ of the Hospital, as opposed to "outside applicants". The Collective Agreement as a whole adopts the general approach that past service with the employer should be worth some competitive edge. One of the advantages of engaging in almost any employment should be the opportunity to build a creditable record of service. An employee in Ms. Smith's position - an "inside" applicant, and the most senior one at that - should at least have had the opportunity to demonstrate her competence through the service she had rendered in the past to the employer. Instead, Ms. Smith's performance was evaluated entirely on the basis of one reference from another employer.

The Hospital is under a duty to provide annual performance appraisals for its employees; Article 32 (quoted above). The employer was probably in breach of its duties under this specific article by not providing annual evaluations of Ms. Smith, who put in a number of six-month term contracts, as well casual work. Even if the employer was not in breach of the article in a technical sense - say, because article 32 somehow only applies to employees

who put in a year of continuous service on a part-time or full-time basis - I would think it was unreasonable for the employer not to provide any written feedback to Ms. Smith (apart from the one warning) during such a long working relationship. In any event, at an absolute minimum, this can be said: the employer should regularly be providing written evaluations to many of the staff. Its supervisors should therefor have a reasonable amount of practice and proficiency at observing performance and evaluating it in writing. It should be a modest and reasonable demand of the employer that it provide a written evaluation of the performance of an employee who is actually on staff at the time of a job competition.

In assessing other candidates, the employer took into account information besides the outside reference.

Ms. Rothwell also filled in a reference form for Ms. Suzanne Wallcraft (who, in the end, was awarded the 0.8 E.F.T. position). It was based on only 85 hours of work experience. Ms. Rothwell left blank the ratings for "nursing process". She wrote at the bottom that "due to this short length of employment here, we have left some items of the reference form blank as unable to assess". Ms. Theroux testified that she was personally familiar with Ms. Wallcraft's work at the Foyer, and that from this personal knowledge, she had a "margin of comfort" that Ms. Wallcraft's "nursing process" was acceptable.

It is clear that in evaluating one of the successful applicants. Ms. Theroux and Ms. Harrison took into account a "reference" other than the one solicited. The "reference" was Ms. Theroux's personal knowledge, based on Ms. Wallcraft's performance at another facility. It is ironic, inconsistent and unfair that Ms. Smith had no opportunity to establish her qualifications by obtaining references from her work at Notre Dame itself.

The reliance on only one outside reference was a substantial defect, and cannot be dismissed as immaterial to the outcome.

It is possible for an arbitrator to look at an error, and confidently conclude that it did not affect the outcome of a competition. No such conclusion can possibly be drawn about the failure to obtain internal references concerning Ms. Smith's performance. The employer ended up relying on a single outside reference, and it was the sole basis for denying Ms. Smith the position. I have no basis to be confident that the Notre Dame selection panel would have reached the same conclusion if it had gathered and considered a more complete set of references.

In evaluating an incumbent, employers should generally be reluctant to rely heavily on a single outside reference. The person making it will usually not be as well-known to the employer as its own supervisors. The selection panel is not likely to be aware of

the politics or personality conflicts that might be affecting the outside evaluation. In any event, any single opinion can simply be mistaken.

Looking at the particular facts of this case, there is evidence that raises some question about whether Ms. Rothwell's assessments were correct in all respects. For example, Ms. Smith did very well on the interview questions concerning her knowledge of how to deal with clinical situations. Yet Ms. Rothwell gave Ms. Smith low ratings on matters such as "nursing assessment" and "knowledge of nursing theory". Perhaps Ms. Smith is one of the people who knows what to do in theory, but has limitations in practice. Then again, perhaps Ms. Rothwell has somewhat underestimated Ms. Smith's clinical abilities. Similarly, on Notre Dame's own test questions concerning patient relations, Ms. Smith scored as well as the other candidates. Ms. Rothwell's evaluations rated her "minimally satisfactory". The practical record, if more fully explored, might justify Notre Dame in concluding that Ms. Smith should not be hired; then again, it might not.

It is true that Ms. Smith agreed that Ms. Rothwell could be consulted; but she also listed a number of other past supervisors, and some additional "personal references". Ms. Smith's consent to consulting Ms. Rothwell cannot be inflated into permission to use Ms. Rothwell as the sole and unchallengeable source of evaluation about her past performance.

I have not reached any conclusions about Ms. Smith's clinical and "people skills"; what I do hold is that Notre Dame Hospital did not have a fair and reliable procedure for coming to its own conclusions.

A supplementary observation about the inability of Ms. Smith to reply to the substance of the outside referee's evaluation.

The considerations already provided furnish ample grounds for concluding that the selection cannot stand. I will add an "extra" point about the fact that Ms. Smith never had a chance to reply to the outside reference. I do not recall the union's specifically making this specific argument, and if it were a decisive factor in my decision, I might have called counsel back to hear argument on it from both sides. As it turns out, however, the additional observation I am about to make only supports a conclusion that I would certainly have reached anyway.

My "extra" point is this: it is hazardous to rely on a single, outside opinion when the employee is given no opportunity by the selection panel to respond to the substance of its criticism. I was not provided with any evidence about whether Ms. Smith ever had an opportunity to respond to Ms. Rothwell's tepid view of her at Lorne Memorial. As Ms. Smith agreed that Ms. Rothwell could be used as a referee, perhaps her opinion came as something of a surprise. In

any event, whatever chance Ms. Smith has had at Lorne Memorial to contest Ms. Rothwell's opinion of her, she was never given an opportunity to respond to the substance of the criticism by the selection panel itself. The reference from Ms. Rothwell came in after the interview. At the interview itself, no one said to Ms. Smith, "we hear that you may have some difficulty relating to patients; what do you have to say in response?"

I notice that Article 32 of the Collective Agreement gives an employee a chance to reply to an appraisal prepared by a supervisor at Notre Dame. Article 2905 allows a nurse the right to examine any document in her personal file, and file a reply. Article 2906 assures the right to have a union representative present when a file is examined, and to grieve any derogatory entry. Even casual nurses are specifically extended the rights under articles 2905 and 2906; Article 3511. The general scheme of the Collective Agreement is that an employee should have a chance to contest criticism. It is inconsistent with this general thrust that an employee can be denied a job entirely on the basis of an outside reference, without ever having a chance to address the employer on the substance of the criticism advanced.

The defects in the refereeing process were the result of good faith mistakes made under genuinely difficult circumstances.

Ms. Theroux acknowledged during her testimony that opinion on the performance of Ms. Smith and other candidates should have been available "within our walls". As already mentioned, Ms. Theroux did search the files - and found them desolate. She approached several people at Notre Dame about participating on the interview panel, and was expressly or implicitly rebuffed. Ms. Penny, who used to be a supervisor, but had rejoined the ranks, indicated through her reactions that she would not wish to be on the interview panel; Ms. Theroux plausibly attributed Ms. Penny's reluctance to the fact that the staff work very closely together. Ms. Theroux approached one of the doctors, but was told that he did not want to get involved in a staffing decision at the L.P.N. level.

Ms. Theroux testified that she felt herself to be under considerable time pressure. The union had indicated its eagerness for a decision. It did not actually threaten or file a grievance, but Ms. Theroux was new to a unionized environment, and was not sure of how much pressure the union meant to exert. There was no testimony from anyone on why the "personal references" of the applicants were not canvassed, but I would guess that a sense of urgency was one of them.

It should also be remembered that Ms. Theroux was not only new to Notre Dame, but had to construct a hiring process from scratch. When she arrived, the Hospital did not have in place a systematic process. There were no tried-and-tested questionnaires, no scoring systems, no procedures for gathering references. Ms. Theroux's task

was further complicated by the fact that she had to implement a memorandum of settlement arising from an earlier grievance.

I have no doubt that Ms. Theroux made a sincere and determined effort to conduct a fair interview process, and that the flaws in process were good faith errors made under circumstances that were very difficult. My conclusion, however is that there were serious defects in the process and that they resulted in a denial of Ms. Smith's right to a selection process that was fair, reasonable and consistent with the Collective Agreement as a whole.

### Remedy

On the specific issues dealt with so far, my award may be considered as "final" as the usual award.

Counsel and I agreed at the end of the 2-day hearing that both sides should address the issue of remedy as well as the merits of the case, but that I should reserve the right to seek further assistance of counsel on remedy after I came to some decision on the merits. We all found it somewhat difficult to discuss all the remedial possibilities in detail, given the many uncertainties about which aspect of the second competition (if any) would be considered defective.

I have indeed found it appropriate to seek further assistance of counsel at this stage. I can indicate, however, some essentially final conclusions about remedial paths that are excluded, and indicate to counsel my tentative thinking about the best way to proceed.

The union has, quite naturally, sought the remedy of simply awarding the 0.8 job to Ms. Smith. Counsel for the union presented a powerful case for doing so. This matter has dragged on a long time, through no fault of Ms. Smith, and it is not going to be easy to work out a way of conducting a third process. Furthermore, Ms. Smith has ample experience as an L.P.N., has performed the job at Notre Dame herself, and was awarded three term positions. She did well on all aspects of the employer's own interview, apart from the performance references.

The usual course for arbitrators, in the case of defective competitions, is to order them redone. Arbitrators are not as familiar with the nature of a job as employers are, and are reluctant to make the subtle judgment calls that may be involved in assessing and comparing candidates; see Re Manitoba Telephone System and Communication and Electric Workers of Canada, 2 L.A.C. (4th) 136; The Liquor Commission of Manitoba and Manitoba Government Employees, February, 1991 (Schwartz)). Counsel for the union brought to my attention a recent Manitoba award, Fairview Home Inc. and Fairview Nurses MNU Local 21 (Cherniak). The arbitrator found a process to be defective, and awarded the job to

the person with the most seniority. But Fairview was different from this case in several respects. The arbitrator in Fairview felt he had sufficient information, including the latest performance assessment by the employer, to determine that the grievor was "equal or superior to the incumbent in the posted selection criteria". Furthermore, the employer itself agreed that if the arbitrator found the selection process to be unfair, the job should be awarded to the grievor.

Looking at the present case, I do not understand the union to be challenging the fact that selection criteria legitimately included the ability to perform well in practice, and that past performance is an important guide in judging that ability. Unlike the employer in Fairview, Notre Dame has requested that the competition be repeated if found defective, not that the job be awarded to the grievor. On the facts before me, I do not believe there is a sufficient basis for me to step in, as an arbitrator, and conclude that Ms. Smith would perform well in practice. (Let me quickly repeat that I do not have a basis for arriving at the opposite conclusion either). In the Fairview case, the arbitrator had the benefit of performance evaluations prepared by the employer itself. I do not.

The fact that the hospital awarded Ms. Smith several part-time term contracts in the past does not lead me to a definite conclusion about her future performance. An employer might somewhat relax its expectations when filling a position that is limited in hours per week and overall duration. The evidence at the hearing raised some doubt about the closeness with which Ms. Higgs - who awarded Ms. Smith her last contract - monitored Ms. Smith's performance. Ms. Higgs did not prepare written assessments, generally worked a different shift, and may not have been "on the floor", overseeing patient care, as much as her employers expected.

I am not sure what I would do if it were in fact impossible, at this stage, for anyone to obtain reliable information about Ms. Smith's performance at Notre Dame. Perhaps the appropriate remedy would be to award Ms. Smith the position; I don't know. But I fully expect that there are a number of other L.P.N.'s, R.N.'s, doctors and former patients who could provide useful information and opinion. Unless it is convincingly demonstrated that it is now impossible to compile significant information about how Ms. Smith has performed - a possibility I consider extremely unlikely - the parties may take it I have made a decision not to immediately award the job to Ms. Smith.

Both sides suggested that if I found the process to be defective but stopped short of awarding the position to Ms. Smith, I could order the entire competition to be repeated.

During closing argument, I raised another possibility: redoing only the assessment of whether Ms. Smith herself met the

selection criteria. Let me now elaborate. The employer itself was prepared to award the job to Ms. Smith, as the most senior candidate, as long as she proved herself equal to the selection criteria. The comparative standing of other candidates was, according to the employer's own criteria, irrelevant. During the second competition, Ms. Smith was denied a position only because she appeared to be deficient in two respects, both based on the Rothwell reference. I have concluded that the latter was an insufficient basis for arriving at a conclusion.

At this stage, it seems to me that an appropriate remedy could consist of the employer's going back and conduct a more thorough and careful review of Ms. Smith's past performance, including her record at Notre Dame itself. A variety of sources would seem to be available. Perhaps the doctor and nurse who did not want to participate on an interview panel would be prepared to at least provide a letter of reference. So might other staff people, or a representative group of former patients. On the approach just suggested, the employer's task would be narrowly focused. No managers or staff would be put to the trouble of going through an entire new interview process.

I indicated to both sides that they were not obliged to provide me with an immediate response to the possibility I raised. Both sides indicated that they might be in a better position to respond once they knew my views on the merits of the case. Now that I have done so, I would welcome suggestion from counsel on the appropriateness of the "limited-focus" reconsideration of Ms. Smith's performance. In job competition cases, arbitrators sometimes provide specific directions on how an employer should carry out its reconsideration of a competition. I would appreciate the advice of counsel concerning any specific directions I should give to any "limited-focus" reconsideration. Perhaps both sides will be able to agree on a plan that I could include in my order.

Obviously, if both sides return and tell me that they want me to order a repeat of the entire competition, I would be likely to agree. I must also be met with a compelling argument from one side on why the "limited-focus" reconsideration is inappropriate. So it may become appropriate for both counsel to address the issue of how a complete reconsideration should be conducted.

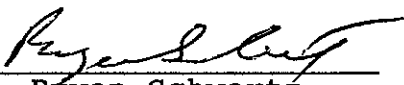
A note on some other issues that were raised, but not resolved in this award.

I will conclude for now by addressing a few "loose ends".

The union argued that one of the incumbents, Ms. de Rocquigny, was in fact unqualified for the job, because at the time of the competition, as a recent graduate, she had only a conditional L.P.N. license. It may turn out that I can fully dispose of Ms. Smith's grievance without settling the point. If it does becomes

necessary for me to provide a ruling - e.g., if both parties desire a reconsideration of the entire competition - I would reserve the authority to do so. I would take a similar approach to the issue of whether it was fair to use an already-completed evaluation form on Ms. de Rocquigny to solicit comments on the other three candidates.

The union also complained that in marking the "experience" category, the employer gave too much numerical weight to "performance evaluations" in comparison with "experience" and "knowledge. If necessary, I will comment on this issue, and any other such outstanding concerns, in giving directions for a "limited-focus" or total reconsideration of the hiring decision.

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Dr. Bryan Schwartz  
16 July 1992