

FILE NO. AA93-06-007

EMPLOYER: Notre Dame Medical Nursing Unit No 19B

UNION: Notre Dame Nurses Local 55 of MNU

ARBITRATOR: Dr. B. Schwartz

APPEARANCES: K. Lercher, for the Employer

G. Smorang, for the Union

GRIEVOR: M. Smith

DECISION RENDERED: June 30, 1993

EXPEDITED ARBITRATION: Yes

**ISSUES: SKILL AND ABILITY - Assessment - flaws in process; references; Use of seniority - arbitral review:** In two previous awards, the Employer was instructed to review the Grievor's qualifications for a permanent part-time L.P.N. position. The parties agreed that the Grievor had to be awarded the job unless the Employer, acting fairly and reasonably, considered her to be unqualified. They also agreed that her limited French-language skills would not be a disqualifying factor. After reconsideration, the Employer again denied the position to the Grievor. The Union raised concerns with the way the Employer conducted the reconsideration.

**AWARD:** GRIEVANCE DENIED. The Arbitrator found that the Employer had overcome the concern raised at the first hearing that the referees who rated the Grievor's nursing performance might interpret the scoring system differently than the Employer. This time, the Employer appended a detailed guideline defining how it interpreted the values in the rating system, and also a set of the official province-wide standards for L.P.N.s against which the Grievor was to be judged. He also found that the Employer dealt with the concerns regarding the negative references from a previous employer when it asked for clarification on the evaluation given to the Grievor as well as providing the guideline on its rating system. The Union was also concerned with the use of the reference from the Chief of Staff because it thought he was biased against the Grievor as she did not speak French. The Arbitrator agreed with the Employer's review of the evaluation and with its reasons for determining the reference was still reliable. As well, the Arbitrator noted that the Employer placed more weight on the more recent performance of the Grievor. He also agreed with the Employer's reasons in determining that the positive evaluations, which were received from the Grievor's colleagues were outweighed by the negative ones. In conclusion, the Arbitrator ruled that the Employer proceeded systematically, addressed attention to each piece of information, and had a rational basis for assigning each piece a particular weight. Therefore, the Arbitrator found the Employer assessed the Grievor's qualifications reasonably, fairly and in good faith, and its decision not to hire the Grievor was valid. He noted that the scope of his review was not to determine if the Employer's decision was right or wrong.

AWARD (re reconsideration by employer).

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

Hearing on reconsideration employer: 18 June  
Place of hearing: Place Louis Riel  
Date of Award: 30 June 1993

(There were two earlier awards in this matter:

# 1: Merits: Date: 29 May, 1992; June 30, 1992.  
Place: Place Louis Riel, Winnipeg.  
Award issued: 16 July 1992

# 2: Remedy: Date: 16 November 1992  
Place: Boardroom, Aikins, McCauley  
Written Award on remedy: 26 November 1992)

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

Arbitrator: Dr. Bryan Schwartz

RECEIVED

JUL 6 1993

AWARD (re reconsideration by employer).

NOTRE DAME MEDICAL NURSING UNIT NO 19B

and

NOTRE DAME NURSES LOCAL 55 of the MANITOBA NURSES' UNION

### Introduction

In two previous awards, I directed the employer to review Ms. Smith's qualifications for a job opening as a permanent part-time L.P.N. position. For the purposes of the reconsideration, both sides agreed that:

- Ms. Smith must be awarded the job unless the employer, acting fairly and reasonably, considered her unqualified for it; and
- Ms. Smith's limited French-language skills would not count as a disqualifying factor.

The employer again denied the position to Ms. Smith. Both the employer and employee have asked me to determine whether the employer's reconsideration was fair and reasonable.

The reconsideration was conducted by Ms. Cheryl Harrison, the Director of Nursing. Ms. Harrison attempted to confine the process to correspondence rather than conversations. She prepared questionnaires, and requested written responses. In direct examination and a thorough and incisive cross-examination, she endeavoured to explain and defend her procedures and reasoning at the hearing.

After reviewing Ms. Harrison's testimony and the record she compiled, I have concluded that the employer's decision must be upheld.

At the hearing, the union raised a number of interesting questions about the way the reconsideration was conducted. The rest of this award will recall those questions, and my reasons for believing they were answered adequately.

### The scope of the employer's decision, and arbitral review

At the outset, I would wish to caution that in fairness to Ms. Smith, this award should not be given an unduly wide reading.

The essential task for the employer was not to make an all-purpose and permanent decision about Ms. Smith's place in the nursing profession. Rather, the Hospital had to decide whether Ms.

Smith is currently qualified for its own particular needs. Notre Dame does have its distinctive characteristics, including a very small size and staff, and a need to deal with all sorts of cases, including psychiatric ones. It may be that Ms. Smith is qualified for various positions at other facilities; even so, Notre Dame could reasonably decide that she does not currently meet its own requirements.

Furthermore, my role as an arbitrator has not been to decide for myself whether Ms. Smith is qualified for the job at Notre Dame. Under this Collective Agreement, that decision essentially belongs to the employer. It involves the exercise of managerial and professional judgment. There was a case for awarding Ms. Smith the position. It might be that a different employer would have reached a different conclusion. As long as this employer has acted reasonably, fairly and in good faith, however, its judgment must be sustained.

#### Communications between the Employer and the Referees in General.

Referees were again issued a form on which to rate Ms. Smith's nursing performance. In various areas, a referee was asked to rate Ms. Smith on a scale that ranged from "0 - minimally satisfactory" to "3" - exceptional/excellent".

Ms. Harrison tried to overcome a concern that the union raised in the first hearing, and with which I agreed. The concern was that the referees might understand the scoring system differently from Notre Dame itself. A referee might think that a rating of "minimally satisfactory" was a low passing grade, rather than a negative score.

This time, Ms. Harrison provided two additional guides for referees.

First, Ms. Harrison appended to each rating form a detailed "key guideline". For example, a rating of "1", "minimally satisfactory", was defined as follows:

1. does not consistently and reliably meet the expectations of the LPN job description and/or the Manitoba Association of Licensed Practical Nurses practice standards;
2. performance and/or knowledge is not consistent with experience and preparation.
3. continues to require guidance and has shown minimal improvement in areas of responsibility and/or weakness.

Ms. Harrison added the following note:

Minimally satisfactory and unsatisfactory shall be considered as a negative score. Although one negative score would not necessarily result in a rejection of the candidate, it would be taken into account with any other scores on the reference sheet.

Second, Ms. Harrison appended a set of the official province-wide "Standards" for L.P.N.s. Each "Standard" explains what is expected of a nurse in a particular area, such as patient assessment.

In my view, the two innovations by Ms. Harrison (the "key guideline" and the list of "Standards") would reasonably ensure that a referee understood the implications of a particular numerical rating. It is reasonably clear that a rating of "1" is not a low passing grade; it will be counted negatively by Notre Dame in making its own hiring decisions.

#### References from Lorne Memorial

During the first process, Ms. Smith's application was dealt a decisive blow by a joint response from Lorne Memorial. It was from Ms. Ardith Rothwell, Administrator, and Ms. Debbie Lambkin, the Head Nurse. They filled out the rating sheet in a way that gave "minimally satisfactory" scores to Ms. Smith in areas of patient relations and nursing process.

In this round, Ms. Harrison asked Ms. Rothwell and Ms. Lambkin to respond separately. Each was asked to respond to three questions:

- (i) Did their initial, March 1992, reference reflect Ms. Smith's current level of performance? Both referees answered yes.
- (ii) Based on the detailed "key guideline", did the referees stand by their March 1992 ratings? Both referees answered yes.
- (iii) In their March 1992 evaluation, Ms. Rothwell and Mrs. Lambkin had mentioned that Ms. Smith had applied for eleven positions at Lorne Memorial, and won only one - and that for a two-week duration. Was Ms. Smith's performance a key element in her being denied positions at Lorne Memorial? Both referees replied that performance was one of the elements. Ms. Lambkin expressly added that "seniority, etc. play a role".

Counsel for the union argued that the answer to question # 3 was ambiguous. If "seniority, etc." were factors, perhaps Ms. Smith was qualified for some of the positions, but lost out for other reasons. Counsel for the union suggested that Ms. Harrison should have sought clarification on this point; that she should have

phoned Ms. Rothwell and Ms. Lambkin, and squarely asked them if Ms. Smith was considered unqualified for the various positions.

I agree with Counsel for the union that the Rothwell and Lambkin answers to question (iii) were imprecise. But question (iii) does not stand alone. The Lorne referees now had a detailed explanation of what the ratings meant, and they still issued her a substantial number of negative scores. These ratings, if accepted, could provide a reasonable basis for Ms. Lambkin's conclusion that Ms. Smith was not qualified for the particular needs of a permanent part-time position at Notre Dame. When asked why she did not seek further clarification on question (iii), Ms. Lambkin responded "I clearly said that 'minimally satisfactory' meant negative."

Ms. Harrison briefly reviewed Ms. Smith's file at Lorne Memorial. She only spent about fifteen minutes at the task. She explained at the hearing that she did not pay much attention to older items on the file. She inferred from my first award that she should concentrate foremost on Ms. Smith's recent and current performance. In my view, Ms. Harrison's rapid review of the older data did not exhibit bias or a disregard for essential information.

Ms. Smith's file at Lorne Memorial does include an overall "satisfactory" rating as recently as 1987. Her 1990 evaluation does not seem to contain an overall rating, but lists strengths and "areas of improvement." Ms. Harrison considered that some of latter were in fundamental areas, including patient relations and charting. It was reasonable, I think, for Ms. Harrison to conclude that there was no basic conflict between the Lorne file as a whole and the latest references from Ms. Rothwell and Ms. Lambkin.

Counsel for the union argued for another internal contradiction in the material from Lorne Memorial. He pointed out that Ms. Smith had been given a significant amount of casual work at Lorne Memorial. Ms. Harrison conceded that she wonders about that herself. Personally, she would not give casual work to a nurse she considered unqualified for a permanent position.

I do not consider that the credibility of the Lorne references were seriously undermined by the fact that Ms. Smith received casual work there for many years. There were stretches in which Lorne Memorial took a more positive view of her work. Ms. Harrison also pointed out (as I myself did during my first award) that some employers might adopt a somewhat more relaxed standard in assigning casual, as opposed to permanent, work. Ms. Harrison made another reasonable point. She said that even if some mistakes had been made in the past with respect to hiring Ms. Smith, Notre Dame was not obliged to repeat them.

The evaluation from the Chief of Staff at Notre Dame.

My first award said it was a serious error to assess performance solely on the basis of a single outside reference.

Ms. Harrison attempted to remedy that criticism by obtaining references from four of Ms. Smith's nursing colleagues and from the Chief of Staff, Dr. Duvall. The latter gave Ms. Smith fewer negative scores on the whole than the Lorne Memorial referees. But like the Lorne Memorial referees, Dr. Duvall gave Ms. Smith negative evaluations on "communication" and "nursing process".

Dr. Duvall also filled in the section entitled "additional comments". He stated that Ms. Smith is "generally speaking...a good worker". He found her "main weakness" to be "little empathy, cold contact with most patients", especially elderly ones. He considered that she was weak in doing assessments of patients with "social and personal problems".

Dr. Duvall criticized Ms. Smith for not recognizing her inability to speak French as a "handicap", and suggested she should show more "empathy and comprehension" towards patients not able to speak english.

At the second hearing in this matter, counsel for the union raised the possibility that Dr. Duvall might be an enthusiast of increased bilingualism at Notre Dame, and so perhaps might take an unfairly dim view of Ms. Smith's application. Ms. Harrison had read the awards in this case carefully, and she understood that Ms. Smith must be hired if she was otherwise qualified, regardless of her inability to speak French. Ms. Harrison herself seems to accept that a non-French speaking nurse can perform adequately at Notre Dame. When a nurse and patient do not share a language, testified Ms. Harrison, the nurse can and should find nonverbal ways to communicate. In her own experience (with patients who speak languages such as ukrainian or polish), testified Ms. Harrison, it is not very hard to communicate through gestures, facial expressions and so on.

I accept Ms. Harrison's testimony that she was alert to the possibility that Dr. Duvall might underrate Ms. Smith on account of her limited French-language skills. Ms. Harrison concluded that she could rely on Dr. Duvall's reference, however, for the following reasons:

-Dr. Duvall identified essentially the same areas of weakness as the Lorne Memorial referees. Lorne Memorial is a unilingual facility;

-Dr. Duvall cited weakness with respect to "most patients", not only French speaking ones;

-After receiving the "key guideline" from Ms. Harrison, Dr. Duvall reviewed his scoring sheet, and raised one of the

"grades." That indicated to Ms. Harrison that Dr. Duvall was trying to be fair, and did not "have it in" for Ms. Smith.

Ms. Harrison agreed that a doctor might only be on-site for about ten minutes a day. She noted, however, that patient complaints are more likely to be directed to a doctor than to a nurse's co-workers. (I would add myself that there is some evidence that Dr. Duvall was aware of the need for adequate information before rating Ms. Smith; his response to one question was "can't evaluate correctly").

#### Ms. Smith's file at Notre Dame

Ms. Harrison reviewed Ms. Smith's file at Notre Dame. The only item of any relevance was a warning from 1988. It identified some of the same concerns as the Lorne referees and Dr. Duvall. Ms. Harrison considered the warning a "significant factor", but also kept in mind that more recent performance should be given the most weight.

#### The positive material: the performance evaluations from other nurses

Consistently with the second award, Ms. Harrison asked for evaluations from four of Ms. Smith's colleagues at Notre Dame. They all rated Ms. Smith as satisfactory in virtually all respects.

Ms. Harrison testified that she did not disregard the positive evaluations. On balance, however, Ms. Harrison concluded that they were outweighed by the negative ones. Ms. Harrison's reasoning - which had a reasonable basis in fact and logic - was as follows:

-on checking time sheets, Ms. Harrison discovered that most of the nurses who provided ratings had worked very few shifts recently with Ms. Smith;

-patient complaints are more likely to be directed to a head nurse or doctor than a nurse's working colleague. Patients sense that co-workers tend to have a sense of friendship and solidarity;

-a co-worker may be reluctant to provide a negative evaluation, out of loyalty or friendship, or fear of creating an unpleasant situation if Ms. Smith were hired;

-there was concrete evidence in this case that some of the nurses were not comfortable at being called upon to rate Ms. Smith. At the first hearing, there was testimony by Ms. Theroux that Ms. Penny appeared reluctant to be involved. Another nurse specifically complained to Ms. Harrison that she was not comfortable at being called to do an evaluation;



-supervisory personnel, including head nurses, have more experience than ordinary staff when it comes to evaluating performance.

#### Right of Reply to The New Information

In cross-examination, counsel for the union raised the point that Ms. Smith was not shown the new reference letters (including Dr. Duvall's) and invited to respond to them. The point was not pursued much, if at all, during closing argument.

In theory, it might be argued that Ms. Smith did have some right of reply. The argument might go like this:

When Ms. Smith was a term employee, Notre Dame should have given her written feedback and added it to her file. She had a right to respond to such comments. The references obtained by Ms. Harrison were, in effect a substitute for those "missing" comments, so a similar right of reply exists.

Now suppose, for the sake of argument, that the argument just presented is valid. It would make no practical difference in this case. This is reasonably certain: even if Notre Dame actually had given Ms. Smith a copy of Dr. Duvall's letter and invited her to respond, the final outcome would have been the same. Ms. Harrison would still have denied her the job. Furthermore, Ms. Smith would not have presented any new argument or evidence that would have required Ms. Harrison to award her the job.

Dr. Duvall did not level any really novel criticism at Ms. Smith's performance. He took much the same line as the Rothwell/Lambkin letter of March 1992. In two earlier hearings, the union had the opportunity to counter those criticisms.

To the extent that Dr. Duvall's letter raised any new issues, the union was able to address them at this third and final hearing. During a very able and thorough cross-examination, counsel for the union was not able to shake Ms. Harrison's confidence in her conclusion. After hearing all of the union's submissions, I have still concluded that Ms. Harrison gathered and analyzed the information in a reasonable manner.

#### Notre Dame's Standards

As Ms. Harrison viewed the material, she had four mutually consistent indications that Ms. Smith was inadequate in areas that included patient relations and patient assessment. The indications were: the references from Ms. Lambkin, Ms. Rothwell and Dr. Duvall, and the letter of warning on the Notre Dame file.

Ms. Harrison considered that if these deficiencies existed, they warranted denying Ms. Smith the position. Ms. Harrison (like

Ms. Theroux at the first hearing) emphasized that Notre Dame has a very small staff. An L.P.N. must often take responsibility for patient care without having much help or supervision. Ms. Harrison also emphasized that many of the patients are psychiatric cases, in which empathy and communication are the essence of the nurse's duty.

Counsel for the union made a number of points about standards with which I agree. Ms. Harrison's task was to determine whether Ms. Smith was qualified - not whether she was the best in the competition, or whether she was a "supernurse". Performance evaluations are supposed to provide frank feedback, with a view to improved performance; the mere fact that some areas of improvement are identified from time to time does not necessarily mean a nurse is unqualified.

While Ms. Smith did very well on her interview, the employer here could reasonably take the view that actual performance can be a decisive factor in determining whether a candidate is qualified. On reviewing Ms. Harrison's evidence at this hearing, as well as the first, I am convinced that in assessing performance, she interpreted and applied "qualified" in a fair and reasonable manner.

### Conclusion

The material on Ms. Smith's qualifications for the job was mixed.

There was a case, which the union presented capably, for awarding her the job. She had considerable experience at both Notre Dame and Lorne Memorial. She performed very well on her interview questions, and her co-workers at Notre Dame rated her practical performance as satisfactory. Even the Chief of Staff at Notre Dame, whose evaluation contained some strong criticism, agreed that Ms. Smith is "on the whole...a good worker".

On the other hand, three supervisors identified the same areas of weakness in Ms. Smith's recent performance. In light of its distinctive needs, Notre Dame could reasonably view adequacy in these areas as essential.

In the end, Notre Dame had to weigh the positive and negative material that addressed the crucial areas of performance. The Collective Agreement authorized the employer to make a professional and managerial judgment. In reaching it, Ms. Harrison seems to have proceeded systematically; she addressed her attention to each piece of information, and had a rational basis for assigning it a particular weight.

It is not my task to determine whether Ms. Harrison's ultimate decision was right or wrong. It is sufficient to say that it was a judgment made reasonably, fairly and in good faith.

Accordingly, the grievance must be denied.

Bryan Schwartz  
Dr. Bryan Schwartz  
30 June 1993