



ONTARIO  
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE  
DE L'ONTARIO

GRIEVANCE  
SETTLEMENT  
BOARD

COMMISSION DE  
RÈGLEMENT  
DES GRIEFS

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GSB # 2289/93  
OPSEU # 94B160

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

BETWEEN

Ontario Public Service Employees Union  
(Lyons)

Grievor

- and -

The Crown in Right of Ontario  
(Ministry of Health)

Employer

BEFORE

Ken Petryshen Vice Chair

FOR THE  
GRIEVOR

Nelson Roland  
Barrister & Solicitor

FOR THE  
EMPLOYER

Melissa Nixon  
Counsel, Legal Services Branch  
Management Board Secretariat

HEARING

June 1, 2, 1999  
September 20, 23, 1999

## DECISION

Mr. Randy Lyons is employed as a Registered Nurse (“RN”) at the Brockville Psychiatric Hospital (“BPH”). In addition to therapeutic duties, a substantial portion of his responsibilities involves the secure custody of patients in a locked portion of a medium secure unit within the BPH. Mr. Lyons filed a grievance dated December 3, 1993 (“the discrimination grievance”), the substance of which reads as follows:

I grieve that I have not been treated in a fair and equitable manner, in that I have been discriminated against by not receiving the forensic allowance that others working along side me have.

Mr. Lyons filed another grievance in December, 1994 (“the health and safety grievance”). The substance of that grievance provides as follows:

I grieve that the employer is failing to provide me with a safe & healthy workplace, contrary to Article 18 of the collective agreement by withholding from RN’s the forensic allowance currently paid to PNA’s working on this unit, thereby promoting an atmosphere of anger & resentment. Further the employer continues to apply undue stress upon me in refusing to deal with the issue of equal pay for equal security duties contrary to the principles of pay equity.

As his grievances disclose, the focus of Mr. Lyons’ concern is that Psychiatric Nursing Assistants (“PNAs”) receive a forensic allowance while RNs do not. This allowance is received by the PNAs in recognition of the custodial responsibilities associated with the therapeutic care of forensic patients within medium secure units of psychiatric hospitals. The forensic allowance is provided for in a section of the Collective Agreement covering the Institutional and Health Care Bargaining Unit entitled “General Notes and Allowances”. The provision for the forensic allowance, which works out to \$1.68 on an hourly basis, is as follows:

An allowance of \$3,500 per annum in addition to each listed rate in the salary range shall be paid to an employee who occupies a position classified in the Psychiatric Nursing Assistant class series, who together with his or her therapeutic duties, is also assigned for a substantial portion of his or her responsibilities to ensure the secure custody of patients assigned to the locked portion of a medium secure unit within one of the psychiatric facilities operated by the Ministry of Health. A medium secure unit is one in which greater security measures are required than in other units of the hospital and in which the majority of the patients are detained under a Lieutenant Governor's Warrant which requires safe custody and medium security, or under a Warrant of Remand.

As a RN providing care to forensic patients, Mr. Lyons claims that he has at least the same and arguably greater custodial responsibilities than the PNAs, yet he does not receive a forensic allowance. It is not only Mr. Lyons who feels aggrieved by this situation. Other RNs at BPH, RNs at other psychiatric hospitals in the Province and employees in other classifications employed at psychiatric hospitals who perform duties in relation to forensic patients have filed grievances which make claims similar to those made by Mr. Lyons. I was advised that there may be as many as 500 such grievances. The parties agreed to first proceed to a hearing with the two grievances filed by Mr. Lyons. Since the Union takes the position that Mr. Lyons and the PNAs at BPH essentially perform identical custodial duties, it believed that Mr. Lyons' grievances would have the greatest chance of success. The outcome of Mr. Lyons' grievances will undoubtedly have a considerable impact on the resolution of the other outstanding grievances.

The material facts were not in dispute. Mr. Lyons testified in support of his grievances and the Employer did not call evidence. To appreciate why PNAs receive a

forensic allowance and why RNs do not, it is necessary to briefly review certain events going back to 1985.

In 1985, a number of PNAs employed at BPH filed classification grievances. A panel of the GSB heard twenty-five individual grievances in which it was claimed that the PNAs who were permanently assigned to Ward K, as the medium secure ward was then known, were improperly classified. In what is commonly referred to as the Mallette decision (dated December 22, 1989), the GSB characterized the issues before it as follows:

The question for us, simply put, is whether the additional demands placed on the nursing staff by the security systems and procedures in place on ward K, cause their jobs to be inappropriately lumped together in a single classification with the nursing staff on other wards. The secondary question, assuming the initial question is answered in the affirmative, is whether the P.N.A. 2's on ward K can fit themselves within the job classification of Attendant 2, Oak Ridge, or whether a completely new classification must be created.

After reviewing the evidence, the GSB concluded that security duties occupied a significant percentage of a PNA's time and responsibility, and that the PNA job specification and class standard did not reflect this aspect of their duties. While concluding that the job was wrongly classified, the GSB went on to determine that it would be inappropriate to classify the PNAs on Ward K as Attendant 2, Oak Ridge. The GSB gave the parties a period of time to establish a new classification which properly recognized the role played by PNAs on Ward K, a role which comprised almost equal security and therapeutic components.

The parties executed a Memorandum of Settlement dated June 18, 1991, which provided the basis for the payment of a salary allowance to PNAs who work on forensic units. The parties were unable to agree on an appropriate rate for the salary allowance. This issue was resolved at arbitration by a panel chaired by Mr. G. Charney. Mr. Charney noted in the award that the matter was referred to the board of arbitration in accordance with Article 5.8.1 which provides for the arbitration of a classification rate “when a new classification is to be created or an existing classification is to be revised...” as well as pursuant to the order of the GSB in Mallette. After considering the position of the parties, the board of arbitration awarded compensation in the amount of \$3,500 per annum to the PNAs working on medium secure wards. The Board noted that it was “guided by the fact that custodial duties pay a larger sum than therapeutic duties, primarily in our view because such duties are dangerous, not because they are more valuable”. As noted earlier, this forensic allowance was ultimately incorporated into the Collective Agreement.

Employees in other classifications who had some connection to patients on forensic wards in psychiatric hospitals also filed classification grievances. It appears that Mr. Lyons was one of them, although he was not prepared to concede that any earlier grievance he had filed could be characterized as a classification grievance. Although no evidence was called to disclose what happened to those grievances, it appears that they were affected by the statutory and collective agreement changes which occurred in 1993. The PNA classification grievances were dealt with in a context where The Crown Employees Collective Bargaining Act (“the Act”) and the Collective Agreement provided

for the filing of classification grievances and where the GSB had jurisdiction to hear those grievances and provide relief where appropriate. In 1993, the parties agreed that they would take no steps to further any classification grievances under the Act or under the Collective Agreement after August 1, 1993. They also agreed that any classification grievances filed before August 1, 1993, were withdrawn as of that date if a decision of the GSB had not been rendered by August 1, 1993. The Employer agreed to allocate the lump sum of \$20,000,000.00 (“the \$20 million fund”) for the purpose of compensating employees whose classification grievances had been withdrawn. Although he opposed the way the parties addressed the classification issue, Mr. Lyons agreed that he was paid monies out of the \$20 million fund. The Act was also amended in 1993. Section 51 of the amended statute provides that “An order of the Grievance Settlement Board shall not require the creation of a new classification of employees or the alteration of an existing classification”.

Mr. Lyons testified in considerable detail about the nature of the work performed by RNs on medium secure wards at BPH, the extent to which RNs and PNAs perform similar custodial duties and the impact on him and other RNs as a result of the fact that one component of the nursing team, PNAs, receive the forensic allowance while another component of the team, RNs, do not. Prior to the hearing, counsel for the Union provided counsel opposite with a summary of the facts upon which it intended to rely at the hearing. The following summary reflects the material aspects of Mr. Lyons’ testimony.

Brockville Psychiatric Hospital (Brockville) is a psychiatric facility administered by the Ministry of Health.

Brockville contains two medium security wards “Oxford II and Oxford III”. Oxford I is a minimum-security ward. Oxford I, II and III are referred to as “forensic wards”. Oxford II and III are “double locked” due to security concerns arising out of the dangerous nature of the “clients” housed therein. These “clients” are those who have been charged with and/or convicted of criminal offences. The reasons why the clients are present are varied. They may be there for any number of reasons, including:

- i) assessment orders (from Courts);
- ii) Judicial orders to reside, e.g., pending Court dates;
- iii) Disposition orders (formerly L-G.W), which may be:
  - a) pending fitness to plead; or
  - b) NCR (not criminally responsible) due to “insanity”, this usually involves the conviction for violent crimes;
- iv) the “client” may have become unmanageable in a Correctional Facility due to mental illness;
- v) Also “nuisance individuals” are housed in the forensic unit who are not maintainable in the less secure wards of the hospital (due to their violent behaviour).

All of these persons many times are prone to violence.

The “clients” who are housed at Brockville include murderers, rapists, paedophiles, aggravated assaulters, sexual assaulters, arsonists and other types of offenders most of which involve offences against the person.

The diagnosis includes a variety of personality disorders, mood disorders, psychotic disorders and sexual disorders, often including more than one diagnosis.

Therefore, some “clients” are put there because they lack “intent” because of insanity (for the violent crimes they committed). This obviously requires a significantly higher level of security in Oxford II & III than the rest of Brockville. Oxford II and III are the only wards that receive judicial remands.

There has been a murder of a “client” committed by a “client” who was housed in the Medium Security at the Oxford II Ward or its predecessor (Ward K).

In addition, there was a hostage taking on Oxford III wherein a female nurse was taken hostage by a male patient, and the “client” jammed his finger in the eye socket of a RN.

There was also murder committed in the community by a “client” who had been discharged from the Medium Security facility of Oxford II.

Things have become more difficult in recent years in that Brockville cannot automatically return difficult patients to Oakridge as per the now defunct “yo-yo” clause. In the past this was possible, now seriously dangerous “clients” who properly should be at Oakridge may remain at Brockville indefinitely. In addition, employees have to enter dorms at night for security rounds (houses 2 – 4 “clients”). Also, “1/2 walls” no longer exist in the living quarters and dorms now have “privacy” curtains, which makes observation of the “clients” more difficult and risky. As was mentioned earlier, “civil” patients requiring a greater degree of security due to extreme anti-social or aggressive behavior exhibited by them are also housed there.

R.Ns who are employed in Oxford II and III are also responsible for escorting clients into the community, which complicates security concerns. There are no head nurses on Oxford II, only two Nurse Managers between 3 floors. There is now a Team Leader position, which is not a paid position despite increased responsibility as to duties and increased stress.

The nurse managers do not maintain a full time presence on the floors.

### **LIST OF DUTIES**

- R.Ns **supervise** R.P.N.s and instruct them on security duties;
- R.N.s equally perform all security and custodial duties as the R.P.Ns do.

We refer you to the **Malette** decision and adopt what is contained therein, including but not restricted to, pps. 18–19 of that decision.

...

As in **Malette**, security duties occupy a significant percentage of the R.Ns time and responsibility, quite similar to that of the R.P.N.s. There is a high stress level involved working on Oxford II and III wards. Due to the forensic nature of the wards, there is an equal measure of “security” and “therapy” that must be practised, as opposed to other wards where there is an emphasis on therapy. There are also significant custodial elements, particularly when escorting “clients” into the community.

The priorities in the forensic wards are:

- i) safe custody;

- ii) safety of public; and
- iii) clients safety.

It is also significant that R.N.s can replace R.P.N.s (NOT vice versa) and therefore perform the same duties as R.P.N.s They do not receive the same forensic allowance pay. Contrasted to the foregoing, general part-time R.P.N.s called in will receive forensic pay although not performing full duties, due to inexperience with the special skills required in the medium secure environment of forensics.

Stress is created by unequitable treatment between R.P.N.s and R.N.s. This creates a sense of “enmity” between classes based on unfairly differential pay and treatment.

The Employer’s unfair refusal to recognise R.N.s’ contribution in forensic wards causes demoralisation and a sense of decreased value to the employer.

Finally, employees, primarily R.N.s, in forensic wards are subject to inordinate and unjustified complaints against them by “clients” to their professional behaviour and are subject to inordinate meritless lawsuits.

Excluded from the foregoing summary are the specific references from the Mallette award concerning the duties performed by PNAs in relation to perimeter and internal security, and the similar duties performed by RNs. In my view, it is unnecessary for present purposes to detail these duties. It is clear from the oral evidence and the material before me that, at all material times, RNs perform at least the same and to some extent greater custodial duties than the PNAs. It is also clear that the position specification for the RN does not reflect the fact that security duties occupy a significant percentage of the RNs’ time and responsibility.

Mr. Lyons’ testimony demonstrates that he feels very strongly about this issue. Although RNs are paid more than PNAs, PNAs are paid the forensic allowance for performing certain duties and RNs, who perform the same duties, are not. Mr. Lyons testified that comments are often made by PNAs about this discrepancy and that the

different treatment has detrimentally affected the relationship between the two groups of employees. Mr. Lyons also testified that the Employer's failure to recognize the full scope of the duties performed by RNs on medium secure wards creates a stressful environment for himself and other RNs. It is not difficult to appreciate why the payment of the forensic allowance to PNAs and not to RNs has caused Mr. Lyons to feel that he and other RNs are not being treated fairly. However, the issue before the GSB is whether the Employer has contravened the Collective Agreement as alleged and whether it would be appropriate to direct the Employer to pay the RNs a forensic allowance to remedy that contravention.

Counsel for the Union argued that neither of the two grievances filed by Mr. Lyons is a classification grievance. Although noting the different treatment resulting from the payment of a forensic allowance to PNAs but not to RNs, the emphasis in counsel's submissions was on the alleged breach of the health and safety provision in the Collective Agreement. Mr. Roland noted that the parties did not create a new classification or revise the PNA classification but, rather, they agreed to the payment of a forensic allowance. Counsel argued that it is clear from the Charney award that the forensic allowance was being ordered because the PNAs perform their duties in a dangerous work environment. Counsel submitted that it was because of the health and safety risks they encounter that the parties agreed that PNAs should receive additional compensation. Since the RNs work in the same environment and are subject to the same health and safety risks, counsel argued that RNs should also receive a forensic allowance. Counsel also submitted that the different treatment has resulted in more stress on RNs,

contrary to the health and safety provision. Counsel argued that the only remedy for this situation is to direct that the Employer also pay RNs a forensic allowance.

Counsel for the Employer argued that the two grievances filed by Mr. Lyons are in essence classification grievances. Although they are in a different form, counsel argued that the essence of the claims made in these grievances is that Mr. Lyons performs duties not recognized by his existing classification. It was argued that since the GSB no longer has jurisdiction to deal with classification grievance, Mr. Lyons' grievances should be dismissed on this basis alone.

Ms. Nixon also argued that the Union failed to demonstrate that the Employer had contravened either the discrimination clause or the health and safety provision in the Collective Agreement. It was submitted that the Union did not establish that the PNAs and the RNs were treated differently on the basis of a prohibited ground. As well, counsel maintained that the Union failed to demonstrate that the Employer had failed to make reasonable provisions for the health and safety of Mr. Lyons and other RNs. Counsel requested that Mr. Lyons' grievances be dismissed.

During the course of the submissions, reference was made to the following sections of Articles 3 and 9 of the Collective Agreement:

- 3.1 There shall be no discrimination practised by reason of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, or handicap, as defined in section 10(1) of the Ontario Human Rights Code (OHRC).

- 9.1 The Employer shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. It is agreed that both the Employer and the Union shall co-operate to the fullest extent possible in the prevention of accidents and in the reasonable promotion of safety and health of all employees.

I agree with counsel for the Union's position that the grievances filed by Mr. Lyons in December 1993 and 1994 are not classification grievances. I suspect Mr. Lyons wishes that the earlier grievances filed by RNs, which I assume were classification grievances, would have proceeded in a similar fashion to and achieved the same results as the PNA classification grievances. However, the 1993 statutory and Collective Agreement changes made that route unavailable. As counsel for the Union noted, the same fact situation may give rise to more than one contravention of the Collective Agreement. To address what he perceives as an extremely unfair situation, Mr. Lyons filed his discrimination and health and safety grievances, in effect alleging contraventions of Articles 3 and 9, respectively, of the Collective Agreement.

As noted earlier, the Union focused on the alleged contravention of the health and safety provision. The Union did not argue that the different treatment of PNAs and RNs was based on a prohibited ground set out in Article 3.1 of the Collective Agreement or was contrary to the provisions of the Human Rights Code. It likely did not make such an argument because it recognized that such a submission could not possibly succeed. It is clear that the payment of the forensic allowance to PNAs and not to RNs does not constitute discrimination within the meaning of Article 3.1 of the Collective Agreement.

One aspect of the Union's submissions relating to the health and safety provision is that the PNAs were provided with a forensic allowance because they work in a dangerous setting and since Mr. Lyons works in the same setting, he should also be paid a similar allowance. Although there is an internal logic to this position, it is based on a false premise. The PNAs are paid a forensic allowance in order to recognize the time that they spend performing custodial duties. Apart from some of the language used by Mr. Charney, the focus of the GSB decision and the Charney award is on the extent of the custodial duties performed by PNAs. Most telling in this regard is the wording of the forensic allowance provision in the Collective Agreement which illustrates that the allowance is paid because of the extent to which PNAs perform custodial duties. It does not follow, therefore, that Mr. Lyons is entitled to a forensic allowance because he, like the PNAs, work in a dangerous setting.

The PNAs and the RNs who work on the medium secure wards are exposed to health and safety risks which PNAs and RNs who work on other wards at BPH do not experience. But this situation, by itself, does not lead to the conclusion that the Employer has failed to make reasonable provisions for the health and safety of those RNs, like Mr. Lyons, who work on medium secure wards. Other than the fact that PNAs receive a forensic allowance and RNs do not, the Union did not refer to any failure on the part of the Employer to provide for the health and safety of Mr. Lyons. Although the fact that RNs do not receive a forensic allowance has had an impact on the relationship between the two groups that constitute the nursing team and has resulted in added stress for RNs, the parties did not intend the health and safety provision to be interpreted so broadly so as

to address the effects of a pay discrepancy. In my view, the Union has been unable to demonstrate that the Employer has failed “to make reasonable provisions for the safety and health of its employees”.

I agree with counsel for the Employer that any resolution of this situation for RNs must be through an amendment to the Collective Agreement. Since they are now unable to obtain relief by way of classification grievances at the GSB, Mr. Lyons and other employees who feel they are entitled to additional pay because of the nature of their work with forensic patients must rely on the Union to attempt to advance their concerns with the Employer. Like other employees who believe they deserve more pay or additional benefits, they will have to rely on the bargaining process to achieve their objective.

For the foregoing reasons, Mr. Lyons’ grievances are dismissed.

Dated at Toronto, this 10<sup>th</sup> day of November, 1999.

A handwritten signature in black ink that reads "Ken Petryshen". The signature is written in a cursive, flowing style.

Ken Petryshen – Vice-Chair