

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**HUMBER RIVER HOSPITAL**

**(“the Employer”)**

**and**

**ONTARIO NURSES’ ASSOCIATION**

**(“the Union”)**

**Grievances of Maria Rina Cherubino**

**(“the Grievor”)**

Before:

Larry Steinberg, Sole Arbitrator

Appearances:

For the Employer

Daryn M. Jeffries, Counsel

Pam J. Hinman, Counsel

Megan Rolland, Legal Counsel, Human Resources, Humber River Hospital

For the Union

Philip B. Abbink, Counsel

Karen Todkill, LRO (May 1, 2014)

Sheri Street, LRO (all dates except May 1, 2014)

Nancy Popp, Grievance Rep

Mike Howell, Bargaining Unit President

Hearings held in Toronto Ontario on May 1, June 11, November 7, 2014, January 23, April 10, May 8, November 16, December 3, December 16, 2015, June 14, June 15, 2016. Written submissions received September 1 and 8, 2017.

## Overview

[1] This case involves two grievances filed by the union on behalf of the grievor.

[2] The first is a grievance dated December 6, 2013 alleging retaliation by the employer and failing to provide the grievor with a harassment free work place. This grievance alleges that as a result of the grievor's actions in initiating Professional Responsibility Workload Reports ("Workloads") under the collective agreement and raising issues of health and safety, the employer held a series of investigation meetings regarding the grievor's behaviour and actions.

[3] The second is a grievance dated January 10, 2014 regarding the grievor's termination on January 9, 2014. The termination was for alleged severe unprofessional conduct in relation to interpersonal conflicts with colleagues, refusal to carry out/clarify the order of a physician, verbal altercation with a patient and his visitors and interacting with Security personnel in an aggressive manner with a loud, demeaning tone and attitude resulting in a breach of trust

[4] The parties also agreed to put before me a written warning for unprofessional behaviour issued to the grievor on April 4, 2013 regarding her alleged failure to take an assignment from her Team Leader.

[5] The employer argued that, considered cumulatively, the facts support the employer's decision to terminate the grievor for cause. Alternatively, the employer argued that if I find that there was no just cause for the grievor's termination, the grievor should not be reinstated but should receive a monetary award because the employer/employee relationship cannot be re-established.

[6] The union argued that the employer did not have just cause for termination and that the employer retaliated against the grievor for her actions in applying the collective agreement. The union also argued that, to the extent the grievor's behaviour warranted discipline, the employer took no steps to manage the situation by offering mediation or

applying progressive discipline. Finally, the union argued that a payment in lieu of reinstatement is an extraordinary remedy and is not appropriate in this case and is not justified considering the factors normally applied in these types of cases and because of the employer's failure to progressively discipline the grievor or otherwise deal with the situation in a non-disciplinary manner.

[7] After carefully reviewing the evidence and argument of the parties, I have concluded that the harassment grievance should be dismissed, the grievance concerning the written warning should be allowed and a verbal warning substituted, and the termination grievance should be allowed and a suspension of 10 days substituted. However, I have concluded that this is a case where the extraordinary remedy of damages in lieu of reinstatement is appropriate.

### **The Goodfellow Award**

[8] At or about the same time as this matter was being heard, the parties were litigating a grievance filed by the grievor alleging harassment by the employer. It was heard by Arbitrator Goodfellow.

[9] In May 2016, prior to final argument in this case, the union requested that I delay releasing my award until the release of the Goodfellow award because it argued that the award might be arguably relevant to some of the issues in this matter. It specifically acknowledged the possibility that the award could be harmful to the grievor but pressed its position in any event. The employer strenuously opposed the request primarily on the basis that factual findings in one matter are irrelevant to findings in another matter. I reluctantly acceded to the union's request.

[10] The Goodfellow award is dated August 3, 2017 (2017 CanLII 54356 (ON LA)). It makes some findings about the grievor that do not put her in a favourable light. The union submitted that the findings are not relevant in this matter and that it would be improper for me to rely on such findings. In support of its position, it paid the highest compliment to

counsel for the employer by quoting from their arguments made in May 2016 in opposing the union's request.

[11] The employer noted that, in its view, for the union to now adopt the employer's original submissions is abusive to the arbitration process. Nevertheless, the employer did not press its advantage by seeking to rely on the findings in the Goodfellow award, but rather, maintained its initial position that it would be improper for me to rely on the factual or credibility findings made by Arbitrator Goodfellow. The employer and its counsel are to be commended for the principled approach taken to this issue.

[12] In the result, both parties are now in agreement that it would be improper for me to have regard to the Goodfellow award in reaching my decision in this matter and I have not done so.

### **Background Facts and Some General Conclusions**

[13] The grievor is a Registered Nurse ("RN") who was employed by the employer in the emergency department ("ER") from July 2008 until her termination in January 2014. At all material times, she was in good standing with the College of Nurses ("CNO"). As it was required to do, the employer reported the grievor's termination to the CNO, an investigation was conducted and the CNO took no action.

[14] The ER is a high-stress working environment and receives its fair share of very traumatic injuries—stabblings, gun shot wounds, physical assaults in addition to heart attacks, strokes and other potentially life-threatening conditions. It also received patients suffering from much more mundane conditions who expected timely treatment. The staff, patients and their family and friends must co-exist in a confined physical space while trying to contain and control heightened emotions.

[15] In such an environment, team work is essential among the staff. They must work together harmoniously and cooperatively. The failure to do so could literally result in fatal mistakes or impaired patient care.

[16] The grievor is passionate about her work. From her evidence, it is clear that she considers herself to be an advocate for her patients which, in her view, includes strict compliance with various professional nursing standards. As she stated in her evidence “sometimes being accountable does not make me popular because not everyone lives by those standards” but “you gotta do what you gotta do”.

[17] One of the ways the grievor sought to enforce standards was through the filing of a multitude of Workloads. This document is provided for under Article 8 of the collective agreement titled “Professional Responsibility”. RNs are encouraged to raise issues which they feel negatively impact on their workload or patient care. It is one of an escalating series of steps to resolve issues of professional practice in a timely and effective manner. It is to be resorted to after discussion within the unit at the time of the occurrence and after discussion with the Manager has failed to resolve the issue.

[18] The grievor tended to by-pass the initial discussion steps of the process and either threaten to file or in fact file Workloads. Not surprisingly, this was a point of contention between the grievor and her manager, Diana Avgerinos (“Avgerinos”) and some of her colleagues particularly in view of the fact that most of the witnesses who testified rarely, if ever, filed Workloads. Rather, they testified that they approached Avgerinos when they saw a problem and worked it out with her. Nevertheless, many Workloads were entered into evidence that were signed by not only the grievor but also other colleagues.

[19] Finally, on September 12, 2013, the grievor received a positive performance review completed by Avgerinos who agreed in her evidence that all comments were positive. In fact, she wrote that “Rina works very well in high pressure situations. She is an excellent resource for new staff and students...Rina supports her team effectively”. This was completed after the grievor received a written warning in April 2013 and after the first of the incidents relied on by the employer to support the discharge of the grievor. This description of the grievor does not reflect the picture painted of her by the employer during the hearing to support its decision to terminate the grievor’s employment.

## The Incidents

[20] The following are the incidents which the employer relied on to support the termination of the grievor. In each case I review the facts and determine whether there was just cause for discipline.

[21] Some general comments are in order in view of the significant differences in the evidence of the grievor and the employer's witnesses. In evaluating the evidence of the witnesses, I have had regard to the decisions in *Farnya v. Chorny*<sup>1</sup> and *1083202 Ontario Inc. c.o.b. as Carpon Construction*<sup>2</sup>.

[22] The grievor's evidence was deficient in a number of respects. She was extremely defensive when giving her evidence which, in several instances, caused her not be responsive to the questions asked. Her evidence also suffered in some instances from a lack of clarity on significant points. Moreover, on many occasions, she would not concede the obvious, such as the impact that her behaviour had on others. In addition, at times her evidence, in the context of the situation as a whole, was not probable or reasonable. On balance, there is no doubt that the grievor's evidence in many respects cannot be relied on. Her evidence was almost entirely filtered through the lens of self-interest even where it was painfully obvious that her version of events was not probable in all of the circumstances.

[23] It should be noted that the grievor was subjected to intense cross-examination on minute details and nuances from interview notes which assumed a significance that was not, in my opinion, warranted. Nevertheless, in several instances the grievor disputed the

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<sup>1</sup> 1951 CarswellBC 133 (BCCA) at para.10. "...the real test of the truth of the story of a witness ...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

<sup>2</sup> 2014 CanLII 55008 (ON LRB) at para. 6 "... demeanour of the witnesses, the clarity of their evidence, the witnesses' apparent ability to recall events and to resist the tug of self-interest in their response to the questions, and what seems most reasonable and probable in all of the circumstances having regard to the evidence as a whole."

contents of the interview notes but the union representative, who was present at the interview meetings, was not called to testify.

[24] The evidence of the witnesses for the employer also suffered from significant problems not the least is that there was clearly an anti-grievor animus on their part. This caused them to exaggerate events and feelings so that the grievor was portrayed in the worst possible light.

[25] These issues with the evidence when combined with the evidence that was not called resulted in an evidentiary record that was challenging.

### **Written Warning April 4, 2013**

[26] An incident occurred on March 1, 2013 between the grievor and Reggie Agbuis (“Agbuis”) who was the Resource Nurse<sup>3</sup> on the shift. Agbuis filed a complaint against the grievor regarding the incident. In accordance with its practice, the employer held an investigation meeting with her on March 8, 2013 and with the grievor on March 25, 2013. The meetings were conducted by Avgerinos and Susan Steer (“Steer”) from Human Resources.<sup>4</sup>

[27] Agbuis (a member of the union) testified that she was the Resource Nurse on the day shift and the grievor was assigned to work in the Resus Room on the night shift. A patient was in the ER waiting to be transferred to the ICU. Due to a staffing shortage, there was no one to stay with the patient until the transfer could be implemented.

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<sup>3</sup> The Resource Nurse is responsible for staffing, acting as a liaison to the manager regarding staffing and patient issues in addition to her nursing duties. For present purposes, a significant responsibility is that the Resource Nurse can change the assignment of an RN due patient acuity.

<sup>4</sup> Interviews were held in respect of each incident. They were always conducted by Avgerinos and Steer. A union representative was also present. They followed the same format—a series of pre-printed questions were asked of the interviewee and the answers were handwritten by Avgerinos and Steer. The interviewee was not shown a copy of the notes at the time and was not asked to confirm the accuracy of the notes. Rather, many months or years later, the interviewee (now a witness at the hearing) was asked whether their responses were accurately transcribed. They were then cross-examined in minute detail about minor (and sometimes major) discrepancies between their evidence and the notes.

[28] Agbuis testified that she asked the grievor to look after the patient until the transfer was completed. She described the grievor's response as loud and confrontational. She stated that the grievor raised her voice and asked how she was supposed to do two assignments. Agbuis testified that she explained the situation to the grievor who replied that it was an unacceptable assignment and that she would file a Workload. In her interview, Agbuis had a slightly different version. It was noted that she said that the grievor's response was "No then I would be getting 2 assignments. I am not taking person. If I do I will initiate a workload complaint form." Agbuis testified that she then went and assigned the triage nurse to look after the patient.

[29] Agbuis testified that she followed this course of action because she wanted to avoid a further confrontation with the grievor and she was at the end of her shift and wanted to go home.

[30] Agbuis also testified that the grievor later approached her about the situation after she had assigned the triage nurse to the patient. Agbuis waved her away and said it was "OK" since she did not want to further engage with the grievor. This is consistent with the grievor's evidence that she later approached Agbuis to ask her if she had decided what the grievor was to do.

[31] Agbuis testified that she was so upset about the incident that she couldn't sleep that night because she felt intimidated and that she was not respected in her role as a Resource Nurse. Finally, Agbuis testified that she avoided all non-patient related conversations with the grievor because she wanted to avoid confrontations.

[32] In cross-examination, Agbuis agreed that it was a good thing that the grievor approached her later to determine if the issue had been resolved. She denied that she was advised by the grievor that the Resus Room was not properly prepared to deal with a Code Blue (an emergency) and denied that the grievor showed her the condition of the room. She also suggested that even if that was the case, there was another cart in the B area that could be used in the event of a Code Blue.



[33] The grievor testified that Abuis advised her that she was going to change her assignment from the Resus Room to Rooms 4 and 5. She specifically testified that one of the patients was an ICU patient which is at odds with other aspects of her testimony and statements made during the investigation that she was unaware that one of the patients was destined for the ICU. She testified that the Resus Room was in very bad condition and would not have been available in the event of an emergency.

[34] She also testified that she asked Agbuis if she could keep the two patients when “the nurse comes in” since she would have started the assignment. Agbuis told her she would have to return to the Resus Room. She stated she then showed Agbuis the condition of the Resus Room (which was denied by Agbuis in her evidence) and she then left. She testified she later saw Agbuis and wanted to ask her if it had been decided where she was to go and Agbuis indicated that someone else had been found and she should go back to the Resus Room.

[35] In cross-examination, the grievor testified that Agbuis did not mention the fact that her request of the grievor to change her assignment had to do with the transport of a patient to the ICU. She also denied raising her voice or in any way acting in a confrontational manner. She could not recall telling Agbuis that if she followed the order, she would have two assignments and that was not reasonable. Finally, she denied telling Agbuis that she would file a Workload. In the result, when asked if Agbuis was making up her evidence, the grievor stated that Agbuis’ testimony was not accurate.

[36] On April 4, 2013, a written warning was issued to the grievor by the employer. It stated that a complaint had been received “which alleged you refused to take a patient assignment as directed by the Resource Nurse on the unit that evening”. The letter continued that “You were asked to take the assignment of an ICU patient while they awaited transport to another unit. There was coverage available for the Resus Room by the Team Leader. Notwithstanding this you continued to refuse to cooperate. This caused a disruption on the unit and resulted in another nurse being pulled from Triage to watch the patient before they could be transferred...”. A copy of the Code of Conduct Policy was attached for her review. The written warning concludes by indicating if the grievor failed

to abide by the employer's policies and procedures or engaged in similar behaviour in the future would she "would be subject to further disciplinary action." Notwithstanding this statement, the grievor never received any further discipline in respect of a long list of transgressions that the employer now wishes to rely on to support the termination of the grievor.

[37] Avgerinos testified that discipline was appropriate because it is the responsibility of the Resource Nurse to change RN assignments based on the acuity of the unit. It is the responsibility of the RN to accept such a change.

[38] She felt that since this was a first situation of unprofessional conduct a written warning was sufficient discipline.

[39] In cross-examination, Avgerinos accepted that the Resus Room was not in very good shape and that the grievor's concern was not frivolous. However, she stated that patients can be resuscitated in other beds. Finally, she affirmed that no form of conflict resolution was offered to the grievor and Agbuis.

## **Conclusion**

[40] The grievor had a valid concern about the condition of the Resus Room which Avgerinos accepted. However, I find that the grievor did raise her voice and projected a confrontational attitude in expressing her concerns. This is consistent with the overwhelming evidence that this is the grievor's manner of dealing with colleagues. I am equally convinced that the grievor truly does not appreciate or is not aware that she is doing so. I think it is also likely that the grievor did mention filing a Workload if she was reassigned. This too was one of the grievor's standard responses when she disagreed with the way work was organized or assigned.<sup>5</sup> But these issues are not what the grievor was disciplined for. She was disciplined for her refusal to take a patient assignment.

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<sup>5</sup> I make no finding that it was inappropriate to have either raised the issue or to have filed a Workload. I refer to it only because the grievor denied having said anything about a Workload to Agbuis.

[41] The evidence does not support that conclusion. There is no doubt the grievor exhibited reluctance to take the assignment and she threatened to file a Workload if she was reassigned. That falls far short of evidence of a refusal to accept the assignment. The fact that she approached Agbuis after the event to ascertain if her assignment had been decided supports the conclusion that no refusal occurred.

[42] Moreover, Agbuis never ordered the grievor to take the assignment with a consequent refusal by the grievor. Rather, Agbuis testified that she did not want to risk a confrontation and wanted to go home since it was at the end of her shift and she therefore assigned the triage nurse instead.

[43] I also conclude that Agbuis' reaction to the situation was outside the expected norm of what really was quite a minor dispute. I believe she exaggerated her emotions and reactions, and I believe, as will be seen in the evidence related to Arvin Agoncillo which is reviewed later in this award, that she was prepared to exaggerate when it came to the grievor's actions.

[44] As a result, the grievance with respect to the written warning for refusing the patient assignment is allowed. However, the grievor should not have responded in the manner she did over what was a perfectly normal course request. I would therefore substitute a verbal warning for the grievor's inappropriate response to the request.

[45] I will now review the seven subsequent incidents which led to the grievor's termination.

#### **July 28, 2013 incident with Dr. Hassan**

[46] The grievor wanted to question Dr. Hassan ("Hassan") regarding some tests he had ordered. She couldn't understand why certain tests had been ordered based on her understanding of the patient's complaints. The discussion did not go well.

[47] In an email to the Chief of Emergency, Hassan alleged that the grievor confronted him and refused to do the tests. He alleged that she said he was only ordering the tests to make more money. He alleged that she yelled at him and said he did not know more than she did, that he was blowing hot air and that he was full of shit. Hassan did not testify.

[48] The grievor also emailed the Chief of Emergency about the incident even before she emailed her own supervisor about the incident. She alleged in her email to Avgerinos that Hassan told her he was the doctor and she was not and that he tells her what to do and not the other way around. She alleged that he said that all the doctors knew she was lazy and admitted that, in response, she stated he was always in the lounge watching T.V. when he was needed for patients.

[49] Part of the confrontation was witnessed by Karen Brardinelli ("Brardinelli"). She was interviewed on August 13, 2013 as part of the employer's investigation but was not called to testify. In her interview, she stated that both the grievor and Hassan acted unprofessionally. She stated that she yelled at him and that they were both belligerent.

[50] In her investigation interview on August 13, 2013, the grievor identified another potential witness (Maria) who was not interviewed by the employer as part of its investigation.

[51] In both the investigation and at the hearing, the grievor denied yelling at Hassan and denied the statements attributed to her with the exception of her comment that he was ordering the tests to make more money. She agreed in her testimony that this comment was unprofessional. She testified that she and Hassan worked together the very next day without incident.

[52] Based on her investigation of the events, Avgerinos concluded that both the grievor and Hassan were unprofessional. Both the grievor and Hassan received a verbal non-disciplinary counselling regarding this incident. Neither were offered any professional counselling regarding dealing appropriately with workplace conflicts.

[53] Since Hassan did not testify the union did not have the opportunity to test his statements that the grievor yelled at him.

### **Conclusion**

[54] This was a very minor incident which is reflected in the employer's response of a non-disciplinary verbal counselling. On the evidence, not only was it justified, but in view of the fact that the written warning was on the grievor's file at the time, the employer responded in a restrained manner to this incident. The fact that I have decided that the written warning should be reduced to a verbal warning does not affect this conclusion.

### **October 19, 2013 Incident with Sonia Verdi ("Verdi")**

[55] In an email to Avgerinos on October 19, 2013, Verdi, an RN in the ER, made a formal complaint about an incident with the grievor on that day.

[56] She alleged that the grievor pointed to her (Verdi's) schedule and spoke to her in an inappropriate way about it. She alleged that when she told the grievor to take any complaints about the schedule to Avgerinos, the grievor said "Yeah and I'll speak to the union". Verdi alleged that she told the grievor not to speak to her in that manner. She alleged that the grievor put her hand very close to Verdi's face and said "talk to the hand, maybe you will get a better answer!"

[57] Verdi's email indicated that she was very upset to be spoken to in that manner and have her personal space invaded by another colleague. She stated that she felt belittled in front of her colleagues, patients and visitors and the incident was witnessed by three other employees. She stated she felt the grievor was not an asset to the department "as her tone and attitude are aggressive and toxic to those around her."

[58] Viridi was interviewed by the employer on November 28, 2013 in regard to her complaint. She also took the opportunity to bring to that meeting a second complaint<sup>6</sup> dated November 28, 2013 alleging inappropriate behaviour by the grievor on November 16, 2013 (grievor didn't ask her if she needed help), November 17, 2013 (Viridi asked to have her shift assignment changed so she wouldn't have to work with the grievor), November 27, 2013 (grievor stated she was putting in a workload even though she didn't speak with Viridi about the issue and even though Verdi attempted, once she was aware of the grievor's concern, to address it; the grievor does not communicate with her; triage was doing secondary assessments since they do not want the nurses to be upset with them) and November 28, 2103 (she felt that when she makes a decision the grievor talks to others about Verdi and only stops when Verdi comes into the area). She testified that she kept track of these incidents because, since the initial incident, she was concerned for her safety and reputation.

[59] At her interview, Viridi repeated her allegations. However, in her email she alleged that the grievor pointed to the schedule. In the investigation meeting she stated that the schedule had been grabbed by the grievor. She stated in the interview that the grievor asked her about the schedule in an aggressive and belittling manner. She stated she felt that she had almost been physically assaulted by the grievor. She stated that the grievor did it all in front of patients.

[60] Viridi also used the opportunity in her interview to make further allegations against the grievor such as the staff are afraid of the grievor, she didn't make eye contact with her when giving report, she blocks beds, that since the incident the grievor doesn't talk to her, that when she is Team Lead all she hears is that the grievor is going to file a Workload and does not give her a chance to address the issue, that everyone complains about her but is too afraid to come forward and are afraid to put patients in her beds. She also added that when she sees the grievor she feels "physically nauseated."

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<sup>6</sup> The grievor did not see the second complaint until she was preparing for the hearing. She was never asked by the employer to respond to the allegations in it.

[61] Virdi testified that she greatly admired Avgerinos as a manager. She described her as “amazing”, “non-judgmental” and “fair”. She stated that the grievor would not communicate with her and that she had a very defensive attitude if she tried to speak with her about something. She testified that she had never filed a Workload because she could go to Avgerinos with her concerns who would deal with the issue

[62] She further testified that since the grievor was terminated she has not been asked to fill out a Workload but when the grievor was there she would get upset if her colleagues refused to sign the form. She said prior to the termination of the grievor “you could cut the tension with a knife” but that since her termination the staff are more calm and respectful of each other.

[63] She described the grievor’s tone of voice as “loud”, “aggressive”, and “physically threatening in body language”. She described her feelings of humiliation and upset. She described the grievor as “anxiety provoking” in the workplace. She said that some staff told her they felt like having an anxiety attack when they had to give report to the grievor.

[64] She testified that she felt physically ill on the day she was to testify knowing that she would see the grievor and that every time she had to go to work she felt nauseated if she had to work with the grievor.

[65] In regard to her comments at the investigation meeting that the grievor was toxic, Virdi repeated her position about the grievor’s reaction to a refusal to fill out a Workload and further included that the grievor sabotaged every staff meeting, humiliated Avgerinos in staff meetings and talked about her in a bad way in the staff lounge saying she was a bad manager. She further elaborated by testifying that her toxicity extended to the point where visitors couldn’t visit if the grievor was there since she got the police involved.<sup>7</sup>

[66] In cross-examination, Virdi indicated that she worked with the grievor for several years prior to 2010 and had problems with her. She testified she went to the manager but

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<sup>7</sup> The reference to police involvement concerns another incident to be addressed later in this award.

nothing was documented. (In her evidence, Avgerinos stated that she had previously heard that staff were afraid of the grievor and testified that staff had come to her with concerns about the grievor. They were told to document the situation and send it to Avgerinos but they did not want to get into an investigation because they did not want to be harassed by the grievor). Others refused to be Team Lead if the grievor was working. None of this was ever brought to the grievor's attention.

[67] Romana Demchyshyn ("Demchyshyn") was one of the witnesses to the incident identified by Viridi in her email. She was interviewed on November 5, 2013. She stated that the grievor was questioning Viridi's schedule. She stated that the interaction "wasn't loud or a spectacle. Patients couldn't hear". She was asked about "body language/tone" and stated that the grievor was "judgmental and assertive in her tone" and that Viridi was calm. She was of the view that the issue should have been discussed privately or taken to management. She did not confirm Viridi's statement in her email about the grievor putting her hand in Viridi's face. She was not called as a witness.

[68] On cross-examination, when confronted with the notes of Demchyshyn's interview which did not support her characterization of the grievor's behaviour, Viridi testified that she disagreed with her and that was her perception. Viridi agreed that Demchyshyn was close enough to have heard and seen the various actions of the grievor that were the subject of her complaint.

[69] Demchyshyn was interviewed before Viridi. Inexplicably, these discrepancies were not raised with Viridi during her interview. In addition, in her examination in chief, when asked whether Demchyshyn supported Verdi's account of what occurred, Avgerinos stated that she did and that the grievor "was in her (Verdi) personal space". Demchyshyn did not mention anything about the grievor being in Verdi's personal space. In cross-examination, Avgerinos agreed that she believed that the grievor grabbed the schedule.

[70] Tracy Leathers ("Leathers") was also identified as a witness by Viridi. She was initially interviewed on November 8, 2013 and claimed not to have witnessed anything. She was re-interviewed on December 10, 2013. She expressed some sympathy for the



issue that upset the grievor and the other RNs about Viridi's schedule. She stated she did not see the grievor and "She did not engage, she retreated" in the Acute room. She was not called as a witness.

[71] The third employee witness identified by Viridi (who was also identified by the grievor as a witness), Sheila H., was not interviewed and did not testify.

[72] The grievor was interviewed on December 3, 2013 while she was on paid administrative leave<sup>8</sup> regarding the incident on October 19, 2013. She disagreed with Verdi's version of events in every material respect and in cross-examination stated that Viridi was not telling the truth.

[73] The grievor indicated that two other nurses (Kavita and Sheila) were discussing Viridi's schedule. Neither of them was interviewed by the employer or called to testify.

[74] The grievor testified that her comments to Viridi were in respect of certain training that the grievor felt she was entitled to in priority to Viridi. She voiced her issue with Viridi who told her that if she has a problem with it she should speak with Avgerinos. She testified that Viridi then walked away with her hand up.

[75] The grievor testified that she left the area and went to the acute area where Viridi was also working. The grievor testified that Viridi approached her and the grievor put her hand up, told Viridi that she did not want to discuss or argue with her and walked away. This appears to coincide with the statement made by Leathers in her investigation interview.

[76] The grievor was asked about a discrepancy in the interview notes of Avgerinos and Steer who attended all the interviews. At the interview, the grievor was asked if Viridi's version of the "talk to the hand" allegation was accurate. Averginos' notes indicate that the grievor denied making the statement but also attributed the following statement to the

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<sup>8</sup> The grievor was placed on an administrative leave with pay on December 2, 2013 while the employer investigated concerns raised by her and about her. On December 10, 2013, the leave was extended until further notice as the employer was continuing its investigation. The administrative leave only ended with the grievor's termination on January 9, 2014.

grievor ‘ “I did say talk to the hand” [quotes in the original] as asked’. Steer’s notes do not include these words. The grievor testified that Avgerinos’ notes are not accurate. As noted above, the union representative who attended the meeting was not called to testify.

[77] The grievor was also asked about the allegations in Verdi’s second complaint. She testified she was never advised of the complaint prior to her termination and only saw it when she was preparing for the hearing. Not surprisingly, she had little or no recollection of most of the incidents referred to.

[78] In cross-examination, when confronted with the fact that in her interview Demchyshyn said the grievor questioned Viridi about her schedule, the grievor replied that she didn’t know. She did admit to raising her hand in the Acute room when she walked away from Viridi but again denied making the statement “speak to the hand” and invading her space. Finally, the grievor did not agree that there was anything in her tone that could possibly have been upsetting to her colleagues.

## **Conclusion**

[79] Verdi and the grievor had very different views of what occurred. The testimony of Demchyshyn would have been of much more assistance in navigating the nuances of their evidence than hearsay evidence in the form of the evidence of Avgerinos and the notes of her investigation meeting.

[80] There is no doubt that whatever occurred on October 19, 2013 was extremely upsetting to Viridi. However, I cannot find that the grievor’s behaviour was as extreme and serious as alleged by the employer for the following reasons.

[81] First, the evidence is clear that Verdi has no respect for the grievor. It is not an overstatement to say that her evidence and demeanour clearly reflect an anti-grievor animus. She described the grievor and her behaviour in very pejorative terms. Moreover, these feelings were not simply the result of the incident on October 19, 2013 but have existed for years. I believe that her personal opinion of the grievor had the effect of

causing her to exaggerate her evidence. For example, in her email to Avgerinos the day of the incident she stated that the grievor “pointed” to her schedule. In her evidence at the hearing she stated the grievor “grabbed” the schedule which was not supported by Demchyshyn in her interview.

[82] Second, her tendency to exaggerate events involving the grievor is supported by the hearsay evidence of the one witness to the incident who was interviewed. In her email, Viridi stated that she felt belittled in front of, among others, “patients”. In her investigation meeting interview, Demchyshyn stated that “Patients couldn’t hear”. In addition, Demchyshyn did not mention seeing the grievor put her hand in Viridi’s face as she alleged. This is critical since this is the most serious allegation. Finally, Verdi’s characterization of the grievor as being “loud, aggressive and physically threatening in body language” does not line up with Demchyshyn’s statement that she was “judgmental and assertive in her tone”.

[83] As a result, I cannot find as a fact that the grievor acted in the way described by Viridi. After considering all of the above, I do not find that this incident should result in any discipline for the grievor.

#### **November 6, 2013 Incident with Phyllis Costa (“Costa”)**

[84] The incident on this day gave rise to cross-complaints by and against the grievor and by and against Costa.

[85] On November 6, 2013 Costa was the triage nurse and the grievor was assigned on the B side (sub-acute). Part of the job of a triage nurse is to determine the needs of patients when they present at the ER and then to move them to the appropriate area for treatment.

[86] On November 6, 2013 Costa believed that there was an unnecessarily long wait to get beds for patients. She and the offload nurse, Amy Turpin, were frustrated by their inability to get patients moving into beds. She believed that the grievor was responsible because she was refusing to take any more patients even though she had empty beds.

Costa stated in her interview that after waiting for most of her shift the situation had not improved even though she had informed Leathers who was the Team Lead.

[87] As a result, on one occasion, while the grievor was on break, Costa moved a patient into the grievor's area. The evidence from all witnesses was that this not best practice and that patients are normally only moved into the area of a nurse with their knowledge and consent. Costa acknowledged that this was the correct procedure, and in fact, during her investigation interview on November 29, 2013, she described what she did as "kinda sneaky."

[88] The second incident involved a similar set of circumstances. In this instance, Costa went into one of the rooms the grievor was responsible for and moved the patient out to the hallway and moved another patient in. This resulted in words being exchanged which were over heard by a patient and colleagues

[89] Costa's complaint alleged that the grievor made inappropriate comments to her. She alleged that she approached the grievor and told her another patient needed to be brought in. She alleged that the grievor replied that she had not completed the assessment of the previous patient Costa had brought in. Costa said that she offered to help the grievor with the assessment but the grievor refused. Costa then said that the grievor had to take the patient whether she wanted to or not.

[90] Costa's complaint alleged that the grievor said that she (Costa) was a bully and that "she was going to get it" and that she was the "manager's friend and that "triage nurses do not bring patients in just team leaders."

[91] The grievor's complaint was that Costa was bullying and intimidating her. The crux of her complaint was that Costa was moving her patients without speaking with her about whether the grievor could safely treat another patient. The grievor alleged it was a busy day both from a volume point of view and an acuity point of view.

[92] She described the acuity of her patients and included their patient numbers. According to her she had some very sick patients that day. She alleged that after she told Costa a number of times that she could not come into her assignment and move her patients without speaking with her first, Costa came up very close to her, and with her finger pointed at the grievor's face, stated that she was the triage nurse, she can do it and she was getting a new patient whether the grievor liked it or not.

[93] This discussion was overheard by a patient who filled out a comment form. The patient alleged that Costa spoke very rudely to the grievor and was in her face. She alleged that the grievor tried to explain proper procedures to Costa. She characterized Costa's behaviour as bullying. The patient was not interviewed as part of the employer's investigation of the incident and did not testify at the hearing.

[94] Duja Muhanna ("Muhanna"), a clerical associate, was interviewed but was not called as a witness. She said Costa was not happy when the grievor indicated reluctance to take another patient. She said the grievor got upset when Costa left to get the patient. She said the grievor raised her voice and said that Costa was a bully. She described Costa as calm when she told the grievor that she was difficult and everyone knows it. Notably, she did not support either Costa or the grievor with respect to what each alleged was said and done that day.

[95] Amy Turpin ("Turpin") was interviewed but not called as a witness. She was the offload nurse on November 6, 2013 and was identified by Costa as being particularly frustrated by her inability to get the grievor to accept a new patient.

[96] She said beds were open on the B side. She described the grievor as being upset when Costa moved her patients out and new patients in without being informed and said her tone was frustrated. She said she felt that the grievor was blocking her beds.

[97] Rosa Spataro-Sherman ("Spataro-Sherman") was interviewed and sent an email about the incident. She was not called as a witness.

[98] She said she heard the grievor say to Costa in a “condescending manner” that she (Costa) was going to be protected, “you are the managers friend”. She said that Costa acted appropriately and felt that the grievor’s comment about “your (sic) the managers friend was very unprofessional and almost bullying.”

[99] Leathers was interviewed but did not testify. She was the Team Lead until 3:30 pm on November 6, 2013. She said that she did not think the acuity level was “ridiculously horrible” that day. She said it was steady mostly on B side.

[100] Avgerinos testified that Costa acknowledged that she raised her voice. In cross-examination, Avgerinos confirmed that the patient was not interviewed and that the employer did not check the patient records to determine their level of acuity since she felt that Leathers had confirmed that the level of acuity was not extreme. As a result, she concluded that the grievor’s concern regarding her patients was not legitimate since patients on B side who become acutely ill are moved out and Leathers confirmed that no such movement occurred. Finally, she confirmed that the grievor was interviewed twice—as complainant in her own complaint and as respondent to Costa’s complaint—whereas Costa was only interviewed once. She was not sure why that occurred.

[101] In addition, she confirmed that moving a nurses’ patients without their knowledge and consent is bad practice and that Costa should have been more forthright rather than “sneak” the patient in.

[102] In her evidence, Costa confirmed the contents of her complaint. She also testified that she never filed Workloads but that the grievor would intimidate her colleagues to fill out the Workloads even going so far as to refuse assistance to a colleague unless they agreed. She testified that when the grievor was present no one wanted to be the Team Lead since she would refuse patients and there was always an altercation with patients, their family and doctors. Since the grievor has been out of the workplace she described it as peaceful with no threats, no Workloads and no conflicts.

[103] She denied pointing her finger in the grievor's face and stated that she did not agree with how the patient characterized her behaviour. She testified that the grievor's comment to the effect that "she was going to get it" concerned her greatly. She thought it was demeaning and she testified that she was concerned that perhaps the grievor had something planned after work. She testified that she felt intimidated and that she thought it was a violent remark to the point that she couldn't think straight. She testified it was damaging to her persona.

[104] In cross-examination, Costa said she did not know of any instance when the grievor was physically violent. She also confirmed that she was not offered any process of conflict resolution with the grievor and confirmed that, if offered, she would have participated then and in the future.

[105] She acknowledged that if the acuity of the grievor's patients was as described by the grievor she would not have moved the patients. Finally, she confirmed that she did not receive any discipline arising out of the incident.

[106] In her evidence, the grievor confirmed the contents of her complaint, and in particular, the details regarding the deteriorating condition of one of her patients. She denied calling Costa a bully and testified what she said was that her bullying days are over since she was going to file a complaint. She denied all other comments attributed to her by Costa and Spataro-Sherman.

[107] In cross-examination, she acknowledged she was angry when she spoke with Costa because she was frustrated but disagreed with Muhanna's characterization of the conversation and that she raised her voice and the comments attributed to her by Spataro-Sherman. She disagreed with Costa that she had empty beds that day and that she was blocking her beds and that this was a continual issue.

## Conclusion

[108] Once again it is necessary to decide what occurred without the benefit of hearing from the witnesses who were interviewed or a review of relevant documentation, such as patient records. Based on the evidence before me, I conclude that the grievor and Costa did exchange words on the day. It is the context that is important.

[109] Costa was extremely frustrated by the inability to get patients into a bed. She felt this was a result of the grievor blocking her beds. She received no assistance from the Team Lead (Leathers) in addressing the problem and decided to take matters into her own hands.

[110] By her own admission, she was frustrated and she moved the patients into and out of the grievor's area in an inappropriate manner. The grievor's verbal response to this situation was hotly contested. She denied saying anything inappropriate to Costa or saying anything to her in an inappropriate manner.

[111] This is not corroborated by the interviews of Muhanna (called Costa a bully in a raised voice) and Spataro-Sherman (managers friend). The patient note does tend to support the grievor somewhat but the patient was not aware of the context of the interaction between the grievor and Costa and didn't provide any detail about precisely what was said. It does however reflect badly on Costa who was reported to have spoken rudely to the grievor.

[112] On balance, I think that both Costa and the grievor behaved badly although I believe each was motivated by proper considerations of patient care. Costa was concerned with the length of time it was taking to get patients to a bed and the grievor was concerned that given the level of acuity of her existing patients additional patients would have compromised patient care. It is unfortunate that they could not have had a civil and professional discussion about it and or/involved others to resolve their differences.



[113] Costa received no discipline for this incident. The grievor should be similarly treated.

#### **November 6, 2013 Incident with Dr. Giddens (“Giddens”)**

[114] This incident occurred the same day as the previous incident. It was alleged that the grievor could not read an order written by Giddens and refused to clarify and carry out the order. It was alleged that Spataro-Sherman eventually clarified the order and the grievor carried it out. There was a delay of at least 30 minutes in having the order carried out. As noted above, Spataro-Sherman did not testify.

[115] The matter was initiated by an email from Spataro-Sherman to Avgerinos on November 7, 2013. She alleged that the grievor complained to her that she could not read the order written by Giddens and was frustrated since this had been an ongoing issue that she had raised before with Avgerinos but nothing was done about it. She alleged that the grievor threatened to write a letter outside the organization to inform them what was happening.

[116] Spataro-Sherman alleged that she took a copy of the chart to show to the Chief of the Emergency Department (and to whom Giddens reported) but that she advised the grievor that she had to speak to Giddens to have the order clarified.

[117] She alleged that 20 minutes later she asked the grievor if the order had been clarified and that the grievor replied quite loudly “I told you, I am not carrying out that order, I can’t read it”. Spataro-Sherman alleged that she told the grievor twice more that she had to clarify the order. The first time the grievor allegedly said “I told you I’m not doing it” and that she walked away the second time. Spataro-Sherman then alleged that she took the order to Giddens to get it clarified. She characterized the grievor’s behaviour as unprofessional and as disregarding her patient’s welfare.

[118] The grievor was interviewed on November 26, 2013 about the incident. She stated that she was frustrated with the ongoing issue of the illegibility of the orders written by

Giddens. She said that on November 6, 2013 she had to ask him many times what his orders meant. On one occasion, he told her that if she could not read the order she should ask the Team Lead who would read it for her.

[119] The grievor stated that she had to take time away from her very sick patients to chase down Giddens to clarify his orders. She told Spataro-Sherman that she was not going to chase him anymore.

[120] In direct examination, the grievor related her frustration with Giddens and the negative impact it was having on patient care since she was required to spend time looking for him to clarify his orders. She testified that neither Avgerinos nor Spataro-Sherman could read the order (this was confirmed by Avgerinos in her evidence).

[121] She denied ever saying she wasn't going to follow the order and denied saying that she wouldn't clarify the order. She testified that she simply said she could not follow an order she couldn't read.

[122] On December 2, 2013, the grievor sent an email to a Program Director of the Emergency Department (to whom Avgerinos reported) so that she was "aware of what was going on." She explained that she had taken the issue of the illegibility of Giddens' orders to Avgerinos before who assured her it would be addressed but it never was. She explained that she was the subject of numerous investigations regarding her behaviour and felt that Avgerinos was not "holding her practice to the same expectations" [in keeping with the Codes of Conduct]. She complained that in the meetings and investigations there was "perceived preconception of my conduct."

[123] In cross-examination, she did not agree that she told Spataro-Sherman that she was taking the issue outside the organization and denied she spoke in a loud, confrontational and defiant tone.

[124] The grievor's testimony in cross-examination was inconsistent on the issue of the clarification of the order. In her interview, she said that Spataro-Sherman took the order to Giddens to have it clarified but that she didn't recall her coming back to her and she

did not remember if she clarified the order. At one point in cross-examination she said Spataro-Sherman went to have the order clarified, at another point she said that she clarified the order and at yet another point she said “we” were going to get it clarified. When these inconsistencies were pointed out to her she said she was not sure what happened that day.

## **Conclusion**

[125] This was a serious allegation given the potentially negative impact on patient care.

[126] It is important to be precise about what the employer alleged with respect to this incident. The employer does not find fault with the grievor for not carrying out an order she can't read. Giddens, by all accounts, is a serial offender in this regard and should be dealt with accordingly. Everyone agreed at the hearing that a nurse has a professional obligation not to carry out an order that is illegible.

[127] What the employer is critical of is the grievor's refusal to go to Giddens to clarify the illegible order. The grievor's evidence on this point was inconsistent and not satisfactory. She could not adequately explain what her understanding was regarding how the clarification of the order was to occur. Although I could have benefitted from the evidence of Spataro-Sherman, I am of the opinion that the grievor's own evidence is sufficient to draw the conclusion that she unreasonably resisted going to Giddens to get clarification.

[128] The grievor was very frustrated with the ongoing issue of Giddens' orders, and correctly, was of the view that it detracted from her patient care when she regularly had to track Giddens down to clarify an order. Nevertheless, it was inappropriate to let her frustration lead to a situation of poor patient care inherent in the delay in carrying out the order.

[129] Accordingly, discipline was warranted for this incident.

**Incident on November 8, 2013 Regarding Conflict with a Patient**

[130] On November 8, 2013, the grievor was involved in a dispute with a patient and his visitors. The employer accepted the following account of the events provided by the grievor in her interview and repeated in her evidence

[131] The patient was on a stretcher in the hallway. He had more visitors than allowed under the employer's policy and they were getting in the way of the grievor.

[132] She asked that the visitors comply with the policy (one visitor per patient). The patient and his visitors did not react well. They had been giving her attitude for some time and continued to do so. As the grievor went to look for security to enforce the visitor policy, the patient got off his stretcher and followed behind her into the ambulance bay. The patient yelled at her in a very loud voice "why are you telling my fucking friends to leave, why don't you tell your Italian friends to leave." He repeated this a few times. She told him she was looking for security to deal with the visitors. He then said "you are just asking my fucking friends to leave, you fucking bitch." The grievor responded "pardon me" to which he replied "why did I stutter."

[133] The employer does not dispute that such verbal abuse is inappropriate and that its employees should not be subject to such behaviour. What the employer criticizes the grievor for is her reaction to this situation.

[134] The employer called two security guards, Henry Pak ("Pak") and Massimo Poretta ("Poretta"), as witnesses. Prior to these events there was no evidence that they had any involvement with the grievor.

[135] Pak testified that he filed a report of the incident on November 8, 2013 but it could not be found and therefore it was not in evidence nor did the employer have a copy when Pak was interviewed on November 25, 2013.

[136] He testified that he was stopped by the grievor on his way to deal with an issue in the ER. She advised him that a patient had just called her a bitch. He testified that he spoke to the patient and his visitor (there was only one at that time) about his foul language.

[137] He testified that the grievor tried to go around him to get to the patient and yelled at him. He tried to put himself between them at which point two of the visitors returned to the area. He testified that "Nurse Valerie" (subsequently identified as RPN Valerie Luke ("Luke")) came and assisted him in separating everyone.

[138] He further testified that he was subsequently approached by the grievor. She was still upset and wanted him to file a report. He told the grievor a report would be filed as a workplace violence incident and would be reviewed at the end of the month. He testified that this did not satisfy the grievor who wanted him to tell the patient that he was writing a report and to tell all the visitors to leave. Pak refused since he didn't feel that it would do any good at this point and that Valerie had approved one visitor. He said that the grievor was still upset and he testified that he felt she was being vindictive towards the patient and wanted him punished and removed and that she was making her views known to all of the staff.

[139] Poretta testified that he was approached by the grievor about the patient and his visitors. He testified that he saw the grievor and the patient verbally arguing. He stated that he spoke with the patient and told him and his visitors that only one visitor was permitted. He testified that the patient and his visitors were compliant.

[140] He testified that shortly afterward he was paged to escort a patient who was in four-point restraints. He testified he was approached by the grievor who shouted at him "aren't you going to do anything". He stated that he advised the grievor that he had spoken with the patient and his visitors and they were compliant. He testified that she then stated that he had called her a bitch and asked him if he was going to write a report. Poretta testified that he told the grievor a report would be written after he was finished dealing with the patient who required an escort. He testified that the grievor responded by asking

rhetorically whether that was more important than what happened to her. Poretta testified that he told the grievor that the patient was compliant but that he would speak to him again when he had finished with the escort. He testified that the grievor stormed off.

[141] He identified a witness to this exchange, Fonda, who was a Porter. The witness was not interviewed as part of the employer's investigation and was not called as a witness.

[142] Poretta testified that afterward he did speak again with the patient and that the grievor was in the area speaking very loudly about what had occurred. He testified that this was overheard by Patient Service Coordinator Parmjit Gill ("Gill"). She provided emails about her involvement in the situation. They did not make any reference to the grievor speaking loudly in the vicinity of the patient. She was not interviewed and was not called as a witness.

[143] Luke was summonsed to testify for the union. She was not interviewed even though she was identified by both the grievor and Pak in their interviews as being a witness to the incident.

[144] She provided some general evidence about the grievor's behaviour in the workplace (she had never witnessed the grievor and others in conflict, which is somewhat surprising in light of the evidence of other colleagues, and had no concerns with her as a colleague) as well as the incident on November 8, 2013.

[145] She testified that other than hearing the grievor say to the patient "what did you just call me" and the patient say in response "did I stutter", she neither heard any other comments nor did she become involved in any of the events of the day.

[146] Her evidence was that the patient was on his stretcher and the grievor was getting an ECG machine when she heard the above exchange. She testified that she looked up when she heard it. Her evidence is at odds with that of the grievor who testified that the patient got off his stretcher and followed her through sliding doors to the ambulance bay when he made the offensive comments.

[147] She was asked if she saw any physical interaction between the patient and anyone else or between the grievor and anyone else. She replied that she did not. She was not asked, either in direct examination or in cross-examination, whether she assisted Pak in coming between the grievor and the patient.

[148] She testified that she did not see security arrive in the area but left the area on occasion to get supplies but was not gone for long periods of time. She testified from her location she could have heard someone yell at the patient and hear the grievor talk about the patient. She testified that she did not hear anyone yelling at the patient or raise their voices.

[149] She also testified that the incident occurred sometime between 7:30 p.m. and 8:30 p.m. and that she saw the police talking with the patient about 30 to 45 minutes later. The notes of the police officers indicated that they became involved at 10:15 p.m.

[150] In her evidence, the grievor testified that she was not interviewed about this incident until December 3, 2013 while she was absent on administrative leave.

[151] She denied talking loudly about the incident in the workplace. She testified that she first approached Poretta and then Pak about the situation and testified that security never did respond to her calls. She also called the Manager in charge of the shift (Gill) who, she said, also did not respond.

[152] In an email from Gill to Avgerinos, she indicated that the grievor called her at 10:00 p.m. and she attended around 10:15 p.m. when the grievor was speaking to security. This is contrary to the grievor's evidence that neither security nor the manager responded in a timely way to her requests for assistance.

[153] It was the grievor's evidence that since she was not receiving any assistance from either security or the manager she approached the police who were in attendance at the ER for another matter. The notes of the police officers indicate that they were approached

at 10:15 p.m. They spoke with the patient and advised the grievor that her concerns were not a police matter.

[154] The grievor denied that Pak had to step in between her and the patient. In fact, her evidence was that security never came to the patient. She denied in its entirety the evidence of Pak and Poretta to the extent they said they were involved at all with the grievor that day (other than a brief discussion with Poretta who, the grievor testified, said he was too busy to help her and sent her to Pak who was at the Triage desk and with whom she had a very brief discussion).

[155] In cross-examination, the grievor was asked how, if that was true, Pak put in his report the fact that the patient called her a fucking bitch. The grievor speculated that perhaps the nursing supervisor told him. When it was put to her whether it made any sense that Pak would make up his entire report of the events of that evening, she had no answer. She agreed that Pak barely knew her at the time and did not have any negative feelings towards her.

[156] When the grievor was asked in cross-examination if she agreed that the incident with the patient and his visitors escalated she said there was no altercation and none that escalated.

## **Conclusion**

[157] In this instance, there are a number of conflicts in the evidence that must be resolved, none more significant than whether the grievor had to be restrained by security from approaching the patient.

[158] The evidence on this point is irreconcilable. Pak asserts that it is true. The grievor testified that it was not true. Luke corroborated the grievor's evidence but only to a point. As noted above she was not directly asked whether Pak's evidence was accurate. Rather,



she was asked if the grievor got physical with anyone and whether the patient got physical with anyone.

[159] Pak gave his evidence in a very straight forward fashion. He was not prone to embellishment and his evidence was consistent with the context and the undisputed facts that the grievor was so upset by the incident that she enlisted the assistance of the police and left before the end of her shift because she was stressed out.<sup>9</sup> Unlike some of the other witnesses who testified, he had no prior history with the grievor that might explain or provide him a reason to fabricate such significant evidence.

[160] Luke's evidence suffered from some significant weaknesses.

[161] First, she testified that when she heard the exchange between the grievor and the patient he was sitting on a stretcher. She testified that she had a strong and enduring recollection of the event because the exchange was so unusual. This is inconsistent with the grievor's interview and her evidence that the patient had got off the stretcher and followed her through the doors to the ambulance bay where he made his inappropriate comments.

[162] Second, Luke testified that she was close enough to the patient's stretcher that she could hear if someone was yelling. In her interview, the grievor stated that the patient was yelling and using a loud voice when he made the comment about the grievor's fucking Italian friends, which was part of the exchange, in the ambulance bay area. Luke did not testify that she heard this exchange which she was in a position to hear if it occurred while the patient was on his stretcher.

[163] Third, Luke was also significantly confused about the time that the police arrived.

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<sup>9</sup> Email from Irina Mykhaylov to Avgerinos dated November 9, 2012

[164] Fourth, Luke testified that she had never witnessed the grievor and others in conflict which contradicts all the other evidence in this case.

[165] All of this leads to the conclusion that Luke had less than a perfect recall of the events of that day, and possibly, was not honest. However, the fact remains that if she had intervened as Pak testified, it would have been an event which she could not possibly have forgotten or been confused about.

[166] Having carefully reviewed the evidence, I am of the opinion that Pak's version should be accepted. There is simply no reason for him to have fabricated such an elaborate story. Prior to this incident, he had no contact with the grievor. He was not himself the subject of any disciplinary proceedings as a result of the events of that evening. Simply put, he had no motive to concoct such an elaborate story.

[167] There is also the question whether security responded to this situation or whether they did not respond at all. On this aspect, I also prefer the evidence of the Pak and Poretta. There is simply no reason for either of them to have falsified the reports they submitted of the events that occurred that evening.

[168] On the basis of my findings above, discipline was clearly warranted for this event. This was a serious incident. Once again, as with the Giddens incident, while the grievor had every right to be upset, it is her response to the situation which exposes her to disciplinary action even taking into account the provocation created by the patient's comments and behaviour. The proper functioning of the Emergency Department was disrupted and her actions were unprofessional.

#### **November 24, 2013 Conflict between grievor and Arvin Agoncillo ("Agoncillo")**

[169] In an email to Avgerinos dated November 27, 2013, Agbuis alleged that Agoncillo approached her and advised that the grievor asked him to sign a Workload, he refused and he felt uncomfortable afterward. In the email Agbuis also stated that Agoncillo, told

her that in the future he didn't want to work with or partner with the grievor. She went on to comment on how others felt uncomfortable working with the grievor.

[170] Agoncillo was interviewed on December 13, 2013. He confirmed he spoke with Agbuis "regarding his concerns with Rina." He said when the grievor asked him to sign the Workload he refused. He said that the grievor advised him the form would be going to the union and if he didn't sign it he would not be covered for any of the patients he worked with that day. He said that was ok since he had his documentation. That was the end of the incident. When asked if he mentioned to Agbuis about "concerns" working with the grievor he said "not really—I will ask someone else for help if she is not around."

[171] At the hearing on November 16, 2015, counsel for the employer advised that he had spoken to Agoncillo who had no recollection of the above event. Counsel made a motion to include a will-say statement from him that would be two sentences long—that he doesn't remember the incident and he would have told the truth at the investigation meeting.

[172] The union strongly opposed the motion on a variety of grounds but primarily the unfairness in depriving the union of the opportunity to cross-examine Agoncillo about this incident which was relied on by the employer as one of the reasons justifying the termination of the grievor.

[173] I denied the motion for the reason asserted by the union. The employer requested that I put it "on the record" that the employer made its request and that the union wanted Agoncillo to attend to be cross-examined.

[174] In her evidence, Avgerinos testified that what was wrong with this situation was suggesting to Agoncillo that he would not be covered by the Workload but she agreed in cross-examination, that the grievor could have been explaining to him the union's position which would be acceptable.

[175] Also in cross-examination, she acknowledged the inconsistency between Agbuis' email and what Agoncillo said in the interview about whether he had any concerns about the grievor and felt uncomfortable with her. Avgerinos said this inconsistency did not cause her to question Agbuis' credibility.

[176] Agbuis testified and confirmed the contents of her email. In both cross-examination and in reply she could not recall the names of the other employees who said they would not work with or had concerns about working with the grievor.

[177] The grievor testified and denied telling Agoncillo that if he didn't sign the Workload that he wouldn't be covered for that day. She stated that she didn't know what that meant. She did agree that she told him it would go to the union.

### **Conclusion**

[178] The evidence concerning this issue suffers from two fatal flaws. First, Agoncillo did not testify. In view of the fact that the notes of his interview were at odds with what Agbuis testified he said and what was in her email, his attendance for cross-examination was critical. I cannot draw any conclusion that the grievor behaved badly that day from the evidence before me which includes the interview notes of Agoncillo's interview.

[179] Second, the incident itself is so minor and of such insignificance that it would not attract discipline in any event.

### **November 25, 2013 Conflict between Grievor and Security Department**

[180] It was alleged by Poretta that on November 25, 2013 he had an unpleasant encounter with the grievor.

[181] He alleged that she approached him and stated that visitors were out of control and that security should be doing a visitor control round every few minutes. Poretta stated that he went to the area indicated by the grievor where he found two visitors. He told them that only one visitor was allowed and they complied.

[182] He stated she returned to his post about 20 minutes later. He characterized her as talking "loud and down" to him when she told him that the visitor situation was out of control. He asked her to not to speak to him in that manner and she then threatened to call the union.

[183] Poretta testified he called Pak who then did a patrol in the ER area where he did not find a visitor control issue. Pak confirmed this in his evidence.

[184] The grievor was not advised about this incident and was not interviewed about it. She only learned about it when preparing for the hearing. She had no recollection of any of these events, but on a general basis, denied ever speaking with security personnel in the manner described by Poretta.

## **Conclusion**

[185] The grievor was denied the opportunity to respond to this matter in a timely way. She was severely prejudiced because she had no recollection of the incident. As a result of that, and the relatively minor nature of the incident, this event does not attract any discipline.

## **Decision to Terminate**

[186] On December 2, 2013, the grievor was placed on paid administrative leave to cover her scheduled shifts up to December 5, 2013 while the employer concluded its investigation of the above matters. On December 10, 2013, the leave was extended indefinitely.

[187] By letter dated January 9, 2014 the employer terminated the grievor's employment effective that day. The employer noted that concerns regarding her behaviour had been documented which included numerous interpersonal conflicts with her colleagues, refusal to carry out and/or clarify the order of a Physician, her involvement in a verbal altercation with a patient and his visitors and interacting with Security personnel in an aggressive manner with a loud demeaning tone and attitude.

[188] The employer stated that these actions "demonstrate severe unprofessional conduct, are intolerable and constitute a breach of trust that is necessary to maintain your employment with the Hospital. Thus, this constitutes cause for termination."

[189] Avgerinos testified that the employer came to this conclusion because things seemed to be escalating in the department and the grievor was antagonistic to other RNs, to security, patients and doctors. The employer felt that her behaviour was negatively impacting the operation of the department and that nurses were approaching her with their concerns but were afraid to file a formal complaint for fear of retaliation by the grievor.

[190] When asked in direct examination why the employer concluded that termination was appropriate and not another, less severe penalty, she replied that it was felt that the situation was escalating, that the grievor was not listening to the constructive feedback and counselling she was being given and that her behaviour was affecting everyone in the department.

[191] She also testified that since the grievor's termination the number of workloads has decreased and that she and the staff worked out any problems there might be. She also stated that the staff feels it is safer to work in the department and there are no fears of altercations that disrupt the work. She also stated that in her opinion patient care had improved since colleagues could rely on each other without confrontation.

## **Position of the Parties**

[192] I do not intend to undertake a detailed review of the extensive and comprehensive submissions made and authorities relied on by the parties over the course of two days of legal argument, all of which were extremely helpful to me. Rather, I summarize below the arguments made and refer to what I consider to be the most relevant authorities.

### **Employer**

[193] The employer submitted that in determining the facts regarding what occurred in each of the incidents it relies on to support the termination of the grievor, the choice is whether I prefer the evidence of six witnesses who testified credibly and consistently with their prior statements and interviews or whether they are all lying as asserted by the grievor.

[194] More particularly, the employer stated that in order to accept the grievor's evidence would require that I find that her manager, the human resources personnel, Spataro-Sherman, the security guards and three bargaining unit members were all not telling the truth regarding the various incidents that were the subject of testimony.

[195] The employer asserted that the grievor simply refused to acknowledge any wrongdoing with the exception of one small part of the Hassan incident and characterized her actions as contrary to her responsibilities as a RN and an employee.

[196] The employer argued that the grievor created a hostile work environment and pointed to the evidence, in particular, of Agbuis (uncomfortable communicating with her), Verdi (afraid of her; she sabotaged other RNs; it was toxic before she was terminated; other RNs refused to work with her; when she was Team Lead she was asked by other RNs to change their assignments so that they did not have work with the grievor) and Costa (grievor intimidated her).

[197] The employer catalogued the nature of the grievor's interactions which, in its view, support the conclusion that termination is warranted on a just cause standard. These included her failure to take instructions from Agbuis, a Resource R.N., conflict with Hassan and not following orders of Giddens, verbal altercation with Verdi, blocking beds in the Costa situation, failure to communicate with her colleagues, bullying threats to Costa, escalating the incident with the patient and his visitors on November 8, her rude and unprofessional interaction with Pak and Poretta and her alleged bullying of Agoncillo.

[198] The employer argued that when the evidence is viewed in its entirety, the grievor demonstrated no remorse and did not show any awareness of the effects her behaviour had on others. This does not provide any basis on which to mitigate the penalty imposed.

[199] The employer argued that high standards of behaviour and performance are expected of health care workers including RNs (*Kennedy Lodge Nursing Home v. SEIU, Local 204*, 1991 CarswellOnt 6445 (Davis); *Royal Victoria Hospital v. ONA*, 2011 CarswellOnt 8745 (Luborsky)).

[200] The employer asserted that repeated insolent and abusive behaviour has been recognized as a serious problem for employers and reinstatement is not an option where the employee does not demonstrate an understanding of the issue (*Sun-Rype Products Ltd. v. Teamsters, Local 213*, 2010 CarswellBC 2047 (McPhillips); *Pope & Talbot Ltd. v. IWA-Canada, Local 1-423*, 2002 CarswellBC 3325 (Chertkow)).

[201] The employer noted that even in cases where there has been little or no prior progressive discipline of employees who have exhibited behavioural or attitude issues, termination has been upheld if the grievor fails to exhibit at the hearing the requisite insight or self-awareness that they are were not in fact correct on every issue and everyone else was wrong (*CUPE, Local 38 v. Calgary (City)*, 1995 CarswellAlta 991 (Ponak) ("City of Calgary"); *Toronto (City) v. CUPE, Local 79 (Beckford)*, 2015 CarswellOnt 8509 (Randall)).



[202] Anticipating the union's argument, the employer asserted that it is irrelevant if its investigations were flawed because of the full and complete arbitral review of the grievor's actions (*Durham (Regional Municipality) v. CUPE, Local 132 (X Grievance)*, [2011] OLAA No. 410 (Bendel)).

[203] The employer reviewed each of the incidents and urged me to accept its evidence in preference to that of the grievor and strongly argued that all of its just cause allegations were established.

[204] The employer also catalogued in great detail what it asserted were 41 occasions that the grievor lied during the investigation and at the hearing. This included evidence given by the grievor at the hearing that was inconsistent with her statements during the investigation and inconsistent with other evidence given by her at the hearing. Examples were also given where the grievor said that the employer's investigation notes were not accurate, even to the point where, when she disagreed with some of them, she stated the reason was that the employer representative wanted to get rid of her.

[205] The employer was particularly critical of the grievor's evidence regarding the incident with Giddens and her interaction with Spataro-Sherman regarding clarification of the order. The employer pointed out several occasions where the grievor's evidence changed from Spataro-Sherman told her to clarify, to Spataro-Sherman was going to get it clarified, to "we" were to get it clarified to "I" needed to get it clarified. The employer asserted that when the investigation notes, emails and evidence are reviewed together, the grievor's evidence amounted to a "jumble of lies".

[206] In summary, the employer argued that the grievor's evidence cannot be accepted and that its evidence should be preferred which is sufficient to support a discharge for cause.

[207] In the alternative, the employer argued that if there was no just cause for discharge, then this is an appropriate case for me to exercise my discretion to order compensation in lieu of reinstatement.

[208] The employer referred to the well-known case of *De Havilland Inc. v. CAW-Canada, Local 112*, 1999 CarswellOnt 5421 (Rayner) at para. 5 where the following factors were referred to that might support such an extraordinary remedy: refusal of co-workers to work with the grievor, lack of trust between the grievor and the employer, the inability or refusal of the grievor to accept responsibility for any wrongdoing, the demeanour and attitude of the grievor at the hearing, animosity on the part of the grievor towards management or co-workers and the risk of a “poisoned” atmosphere in the workplace. Arbitrator Stout added to this list the factor of indications by the grievor that they are not prepared to change the way they deal with employees and management (*Humber River Regional Hospital v. ONA*, 2012 CarswellOnt 8834 (Stout) (“HRRH:”) at para. 304).

[209] The employer argued that every one of these factors is present in this case. The employer characterized the relationship as a complete breakdown of trust—the employer no longer trusts the grievor with patients and the grievor no longer trusts management or her co-workers.

[210] The employer emphasized that in considering whether this remedy is to be applied, the focus is not on the culpability of the grievor’s behaviour but rather on the consequences of her conduct (*Hendrickson Spring Stratford Operations v. USWA, Local 8773*, 2009 CarswellOnt 14105 (Solomatenko)(“*Hendrickson Spring*”). In the employer’s view, the evidence in this case is clear—the grievor created an environment at work that was toxic, disruptive and antithetical to the critical team work approach so important in a hospital emergency department.

[211] Once again anticipating the union's argument, the employer argued that the virtual lack of any progressive discipline in this case does not negate resort to this remedy (*Hendrickson Spring; Children's Hospital of Eastern Ontario v. OPSEU*, 2015 CarswellOnt 13987 ("CHEO") (Parmar); *Peterborough Regional Health Centre v. ONA*, 2012 CarswellOnt 6388 ("PRHC") (Starkman); *Extendicare Ltd. v. ONA*, 1981 CarswellOnt 1958 ("*Extendicare*") (Adams)).

## **Union**

[212] The union's argument had several main themes.

[213] First, the union asserted that the employer's investigation was so flawed and poorly executed that it amounted to evidence of bad faith on the part of the employer. The union stressed that in many cases the employer did not examine all the available facts (such as patient records) or interview all witnesses (particularly those identified by the grievor) before coming to its conclusions. In a word, the employer was determined to terminate the grievor and purposefully did not fully investigate the allegations against her, preferring to accept the complaints as filed.

[214] Second, the union noted that the employer did not impose any progressive discipline or offer any form of mediation/dispute resolution which is important since the types of misconduct alleged by the employer are amenable to such processes. In addition, the union asserted that there was no just cause for any discipline, but if there was just cause for some discipline, termination was out of proportion to the misconduct.

[215] Third, the union argued that many of the employer's witnesses had their memories refreshed by reviewing the investigation notes which were not written by them and which were not validated by them as accurate at the time of the investigation interview. Therefore, in weighing their evidence this must be taken into account in determining the weight to be given to their evidence

[216] Fourth, the union observed that many potential witnesses were not interviewed and/or did not testify (Gill, Giddens, Hassan, Demchyshyn, Leathers, Spataro-Sherman and Agoncillo among others). To the extent that they did not testify, the union argued that the employer is relying on hearsay evidence about matters where tone of voice and body language are at issue or small variations in what was said can be determinative. The union's inability to cross-examine on crucial points was unfair.

[217] Finally, the union asserted that many incidents concerned the grievor raising issues that are required of her by virtue of her professional obligations and/or collective agreement provisions and/or were normal course discussions concerning matters of interest in the workplace. Her motive in most cases was a concern for her patients which has been recognized as a mitigating factor for misconduct.

[218] The union stressed that the written warning and the incident with Hassan took place before the performance evaluation which was not only positive but significantly so in respect of the very issues (not a team player, interaction with peers) that the employer relies on to justify the termination of the grievor.

[219] The union reviewed each incident in detail and pointed out where some or all of these themes were present. For example, in the Verdi incident where the versions of events are starkly different, the employer did not interview or call as a witness Harris (identified by both Verdi and the grievor as a witness), Kavita (identified by the grievor as a witness) and did not call Demchyshyn to testify. Similarly, in the Giddens incident Spataro-Sherman did not testify notwithstanding that the employer's conclusion that the grievor did not clarify an order was based on her written complaint nor did Giddens testify. In the Costa incident, the employer did not interview the patient notwithstanding that the employer was in receipt of the patient comment card which seemed to support the grievor and did not check the patient records to determine the acuity of the grievor's patients that day.

[220] The union also referred to the fact that the employer was in receipt of the Viridi “add on” allegations on November 28, 2013 which was prior to December 3, 2013 when the grievor was interviewed about the main Viridi allegation and yet the employer never brought these allegations to her attention.

[221] In evaluating the grievor’s behaviour, the union asserted that there were mitigating factors that must be taken into account. These included the fact that the grievor was motivated by her concern for her patients and was advocating on their behalf ((*Joseph Brant Memorial Hospital v. O.N.A.*, 2011 CarswellOnt 9503 (Newman)) and that some issues had been festering for some time and were not addressed by the employer (*Ajax Pickering Transit Authority v. C.U.P.E., Local 129-01* (Craven)).

[222] The union stressed that in considering if there was just cause for discharge it is extremely significant that there was an almost complete lack of the usual processes for termination—there were no warnings that the grievor’s employment was in jeopardy, there was no progressive discipline, there was no evidence of any consideration by the employer of offering any counselling to the grievor or consideration of transferring her to other assignments for which she was qualified. The union asserted that these failures were the cause of very significant unfairness to the grievor which alone should vitiate the termination for cause (*Royal Victoria Hospital of Barrie and O.N.A., Re*, 1998 CarswellOnt 7395 (Harris)) (“*Royal Victoria*”).

[223] With respect to the employer’s alternative remedy of damages in lieu of reinstatement, the union noted that this is an exceptional remedy only to be resorted to when there is no reasonable prospect that the employer-employee relationship can be re-established. The onus is on the employer to prove the facts. (*Univar Canada Ltd. v. Teamsters Chemical, Energy & Allied Workers, Local 1979*, 2011 CarswellOnt 13646 (Harris)) (“*Univar*”).

[224] The union also cited the decision of Arbitrator Stout in *Humber River* and accepted his list of factors that have been reviewed to determine if this extraordinary remedy is

warranted. In the union's view, on balance, the evidence does not support the existence of many of the factors in this case. For example, the union noted that to the extent that lack of trust exists in this case, it is between the grievor and Avgerinos who longer works in the emergency department. The union also noted that the grievor was very careful not to label those she disagreed with as liars and therefore has not poisoned the atmosphere in the workplace. Finally, the union noted that, in the absence of progressive discipline, it is not possible to determine whether the factor of willingness to change the way the grievor deals with colleagues and the employer is present.

[225] The union argued that this exceptional remedy cannot be used as a substitute for progressive discipline (*Univar* at para. 60) since it is unfair to do so, and more importantly, without the benefit of progressive discipline or even non-disciplinary approaches, it is virtually impossible to make the crucial determination about the inability of the parties to re-establish the employee-employer relationship.

[226] The union replied to the cases cited by the employer and noted that they were distinguishable either on the basis that there had been warnings or progressive discipline (*Sun-Rype; Pope, City of Calgary*) and/or the misconduct was more serious and deliberate (*CHEO and Peterborough*).

### **Employer Reply**

[227] The employer's reply was exhaustive and I will summarize what I consider to be the most significant aspects of it.

[228] The employer noted that there were a series of events in a five week period which did not allow it to follow what might otherwise be the normal course of imposing progressive discipline and conducting interviews of the grievor prior to her being placed on administrative leave on December 2, 2013.

[229] While acknowledging that the investigation had some flaws, the employer asserted that the evidence when viewed in its entirety strongly supports a finding of misconduct.

[230] The employer also took issue with one of the union's overarching themes that in almost all cases the grievor was motivated by her professional obligation to advocate for her patients. The employer asserted that the grievor was of the view that if she had a good and substantive point, it excused the unacceptable and unprofessional manner in which she chose to articulate her concerns. The employer argued that even though she may have been exercising her professional responsibilities, it was the way in which she carried out those responsibilities that was at the heart of the matter and the effect it had on her colleagues. The employer characterized the way she chose to advocate as rude, uncivil and demeaning.

[231] The employer also pointed out that a union representative was present at every investigation meeting with the grievor, including the ones in which she testified that the notes taken by Avgerinos and/or Steers did not accurately capture what she said, and was not called as a witness to corroborate the grievor's evidence.

[232] The employer asserted that the grievor was not a credible witness and on numerous occasions was not truthful. In these circumstances, the employer strongly argued that the grievor demonstrated no rehabilitative potential whatsoever which indicates that neither progressive discipline or counselling would have been productive.

[233] The employer disputed the union's position that the grievor's issues were with Avgerinos who is no longer in the ER. The employer pointed out that the grievor testified that five of her former colleagues were not telling the truth and that she took the position that on four occasions Steers wrote things down in her investigation notes that the grievor did not say.

## Decision

[234] The evidence is consistent with respect to the way in which the grievor interacts with her colleagues. A review of the evidence demonstrates quite clearly that the grievor is not subtle when raising issues that she feels strongly about, whether in relation to enforcing nursing standards, in her interpersonal interactions with her colleagues about day-to-day issues or in her interaction with management. In fact, in many instances, she demonstrated a total lack of self-awareness of the impact her way of expressing her concerns had on others. This was the cause of a great deal of turmoil in the work place.

[235] Unfortunately, the grievor's termination did not provide her with any greater insight into the effect of her behaviour on her co-workers. The grievor's behaviour was consistently described as loud and aggressive by the employer's witnesses. In virtually each case, the grievor denied that she behaved as described by those witnesses. In each case the grievor stated that her behaviour was controlled and not disruptive. She went so far as to suggest on several occasions that the employer's witnesses were not honest when they testified that they did not want to work with her, that she intimidated them, that she was not team player and that the workplace was a calm and respectful place to work since her termination.

[236] As a result, I agree with the employer that the grievor has a very strong sense that the ends justify the means. If she feels she has justifiable concerns regarding processes or nursing standards, (and not infrequently she did have legitimate concerns) then, in her mind, she is justified in whatever way she chooses to articulate her point of view. As she said, she has to do what she has to do and that did not make her popular with her colleagues who, in her view, did not always live up to the standards she aspired to.

[237] In testifying, the grievor was her own worst enemy. Particularly in cross-examination, the grievor was very defensive. She rarely gave a straight-forward answer to a straight-forward question. She was constantly searching for a hidden meaning in every question with the result that her answers were very often not responsive to the question asked.



[238] On the other hand, the employer's management of the issues in the workplace was far from satisfactory.

[239] For example, Viridi testified that she advised management regarding her concerns about the grievor prior to 2010 and Avgerinos testified that she had received complaints regarding the grievor's behaviour. Nevertheless, no action was taken by the employer. Rather, the situation was left to fester, and to compound matters, Avgerinos gave the grievor a positive performance review in September 2013 which was completed after the written warning in April 2013 and after the incident with Hasan in July 2013.

[240] In addition, other than the written warning, the employer did not initiate any progressive discipline or even consider any possible non-disciplinary responses. The facts in this case, involving for the most part interpersonal relationship issues between the grievor and her colleagues, cried out for the employer to stand back and assess why the grievor had suddenly gone from someone who was praised in September 2013 for supporting her team to one who in January 2014 was the source of so much upset among those very same team members. I do not accept the employer's speculative justification that no amount of discipline or counselling would have had an effect or that the nature of the misconduct and the rapidity of the circumstances were such that the employer simply did not have sufficient time to respond appropriately.

[241] It is not necessary to cite authority for the central role that progressive discipline plays in a just cause system of discipline. It is the foundation of fairness and legitimacy on which such a system depends. Employees are entitled to fair warning, usually in the form of escalating discipline, that their behaviour is not up to standard and that they risk losing their job if they do not alter such behaviour. If the employee does not respond and alter their behaviour, then the employer is entitled to discharge the employee. The decision to terminate will be accepted as justified and legitimate precisely because the employee was treated fairly. Without fairness, the end result risks losing its legitimacy and industrial unrest would be sure to follow.

[242] As well, the employer reacted by conducting “investigations” which really consisted of nothing more than set-piece interviews conducted in a mechanical fashion. More importantly, there was no follow-up such as reviewing relevant documentation or video evidence or interviewing other employees identified in the interview as possibly having relevant knowledge of the particular incident.

[243] A good example of this is the Viridi incident where, in the face of drastically conflicting stories, all potential witnesses were not interviewed.

[244] In my view, the flaws in the investigation process do not vitiate the discipline but do raise questions about whether the employer was acting in good faith during the process. The employer was in a rush to judgment even in the face of contrary conflicting information from the complainant or disinterested witnesses. For example, the employer chose to accept Viridi’s account that the grievor grabbed the schedule which was contrary to her initial email that she pointed at it and accepted that the grievor was in her personal space even though Demchyshyn did not support that version in her interview and the employer did not even confront Verdi with the discrepancies.

### **Just Cause for Discharge**

[245] In my view, there was just cause for discipline but not for discharge.

[246] As I have indicated above, my assessment is that the written warning issued on April 4, 2013 should be reduced to a verbal warning. Of all the subsequent incidents relied on by the employer, I have found that discipline was warranted for the Giddens incident on November 6, 2013 and the incident with the patient on November 8, 2013.

[247] The Giddens incident was serious since it delayed and could have compromised patient care. Fortunately, there was no evidence that the patient actually suffered any adverse consequences. The evidence led by the employer was hearsay and it called no witnesses with first hand knowledge of the incident. But for the grievor’s own evidence, the employer would not have met its onus on this incident.

[248] However, as noted above, the grievor's evidence was not only unsatisfactory on this issue, it was also sufficient for me to conclude that she did not clarify the order in a timely way as was her responsibility. In view of the now verbal warning that was on the grievor's record, I am of the opinion that a three-day suspension would be appropriate.

[249] The incident with the patient is self-evidently very serious. I have accepted the evidence of Pak that the grievor had to be physically restrained from approaching the patient. Notwithstanding the provocation of the patient's behaviour, the grievor's actions were grossly unprofessional. On the facts, it cannot be described as a momentary aberration, and of course, the grievor denied that it ever occurred. In my view, and in light of previous verbal warning and three-day suspension, a seven-day suspension would be appropriate for this incident.

[250] Accordingly, the termination of the grievor was without just cause, and but for the employer's alternative argument, the grievor would be reinstated to employment with full compensation, benefits, and seniority and the termination would be replaced by a three-day and seven-day suspension without pay.

### **Retaliation and Failing to Provide the Grievor with a Harassment Free Workplace**

[251] As I understood the argument, the theory of this grievance is that because the grievor filed numerous Workloads she was subjected to the series of investigation meetings.

[252] The issue of the number of Workloads filed by the grievor and her behaviour in connection with her requests to get others to sign them, was clearly a point of contention for the employer and the witnesses who it called to testify. It was an irritant, and from the point of view of some employees, a situation that offered the grievor an opportunity to harass them and make them feel uncomfortable.

[253] Nevertheless, I am of the opinion that the Workload issue was not the precipitating factor in subjecting the grievor to the investigation meetings. There was ample evidence

that specific complaints, unrelated for the most part to Workloads, were the cause for the meetings.

[254] This grievance is dismissed.

### **Damages in Lieu of Reinstatement**

[255] It is now well established that damages in lieu of reinstatement is an appropriate remedy in some cases. Arbitrator Stout succinctly summarized it as follows:

[303] It is trite to say that reinstatement is the remedy normally awarded by arbitrators to employees dismissed without just cause. It is only in exceptional or extraordinary circumstances that an employee is denied reinstatement. Those extraordinary or exceptional circumstances generally are in situations where [sic] a continued and viable employment relationship is simply not possible, see *Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79, supra*.<sup>10</sup>

[256] In that same case, Arbitrator Stout also usefully summarized the factors which generally lead to a conclusion that the employment relationship is no longer viable as follows:

[304] The awards provided by the parties illuminate a number of factors which generally lead to the conclusion of unsuitability and that the employment relationship is no longer viable. Those factors include:

- i) Lack of trust between the Grievor and Employer;
- ii) Inability of [sic] refusal of the Grievor to accept responsibility for any wrongdoing;
- iii) The demeanour and attitude of the Grievor at the hearing;
- iv) Animosity on the part of the Grievor towards management or co-workers;
- v) A 'poisoned' atmosphere in the workplace;

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<sup>10</sup> HRRH

- vi) Indications by the Grievor that they are not prepared to change the way they deal with employees and management, see *Extendicare Limited (St. Catharines) and Ontario Nurses' Association, supra*

[257] The employer forcefully and persuasively argued that each and every factor is present in this case.

[258] There is no doubt that the employer no longer trusts the grievor and I believe the feeling is mutual. Notwithstanding the union's argument that Avgerinos was the focal point of the grievor's lack of trust and since she is no longer in the ER this factor is no longer present, I believe the grievor's issues go deeper. She not only accused the human resources personnel of being complicit with Avgerinos in wanting to get rid of her, she also accused her former colleagues of not being truthful about their feelings of not wanting to work with her. Her interactions and attitude toward the personnel in the Security Department also reflect a lack of trust on her part.

[259] With one minor exception (comments she made to Hassan), she did not acknowledge any wrong-doing. Her failure or refusal to show the slightest insight into the fact that her inappropriate behaviour and actions significantly contributed to her termination and the negative feelings toward her by her colleagues. This is an important factor since without such acknowledgement there is little hope her behaviour will be modified.

[260] Her attitude and demeanour at the hearing was problematic at times however I put less weight on this factor. The grievor had another parallel arbitration proceeding at the same time as this proceeding. She was being cross-examined by the same counsel in that case as in this case. The grievor was understandably defensive and exhausted by the process.

[261] Although the grievor sought to mask her animosity toward the employer and her colleagues, it was quite obvious that, along with her lack of trust, she did not hold them in high esteem.

[262] Even though I have found that some of the witnesses embellished or exaggerated their feelings toward the grievor, it is an inescapable conclusion that the grievor's presence in ER created, and would create, significant tension and upset on the part of her colleagues. It is difficult to comprehend how the grievor could be re-integrated into the ER in view of all that has transpired before and after her termination. If the employer had responded appropriately and in a timely way to the obvious issues in the ER, the result might have been different.

[263] Finally, without significant counselling and assistance, and in view of the grievor's inability to appreciate how her behaviour affects others, there are clear indications that the grievor is not prepared to change the way she deals with management and employees.

[264] In the result, I agree with the employer that all of the factors that normally support the extraordinary remedy of damages in lieu of reinstatement are present in this case.

[265] But for the fact that the employer utterly failed to manage the situation, by imposing administrative sanctions and/or progressive discipline, I would have no hesitation in awarding this remedy. However, it seems to me to be manifestly unfair to the grievor to award the extraordinary remedy of damages in lieu of reinstatement in these circumstances.

[266] The employer cited authority that it said stands for the proposition that damages in lieu of reinstatement is still appropriate if the factors that support it exist even in the absence of progressive discipline.

[267] In *Hendrickson Spring*, Arbitrator Solomatenko addressed a union argument that damages in lieu of reinstatement should not abrogate the application of progressive discipline as follows:

235. The union also advanced the argument that a remedy which excludes reinstatement should not be used to abrogate the application of progressive discipline and referred to the arbitrator's comments in *Re Ontario and Professional Engineers, supra*<sup>11</sup>, at p. 225:

More importantly, and while that [reliance on misconduct that is not part of the disciplinary record] is a more generalised concern, it is one which becomes particularly acute in the context of the employer's appeal for a remedy which excludes reinstatement where there is no just cause for discharge. The availability of such a remedy is not and ought not to be a proxy for progressive discipline. It does not and should not provide an opportunity for an employer to, effectively, sever the employment relationship and to deny an essential collective bargaining remedy in circumstances where the application of progressive discipline may have been less than complete...."

As the comments by the Supreme Court of Canada indicate in *Lethbridge, supra*, the applicability of the remedy without reinstatement is not contingent on just cause or culpable behaviour. I would suggest that the relevant jurisprudence is mindful that such a remedy is in fact an exception to the normal collective bargaining remedies. Furthermore, the jurisprudence has clearly enunciated that the use of this remedy based on exceptional factors is not intended to circumvent the progressive discipline process, but simply recognizes the reality of those exceptional circumstances.

236. The obverse of the proposition that the remedy without reinstatement should not be used as a proxy for progressive discipline is that the mechanical or formulaic application of the theory of progressive discipline should not be used as a substitute for making a 'hard' decision. The principle of progressive discipline has constituted the mainstay of disciplinary arbitral jurisprudence for a considerable period, but it is just a theory. The premise is that increasingly more severe penalties will result in the modification or correction in the unacceptable behaviour of the employee. To my knowledge, however, there are no statistical data to corroborate the success of the theory.

[268] With respect, I disagree. Progressive discipline is much more than just a theory. Its efficacy is well-known to the parties who must apply it and live with it. As I noted above,

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<sup>11</sup> *Re The Crown in Right of Ontario and Professional Engineers Government of Ontario* (2005), 143 L.A.C. (4<sup>th</sup>) 193 (Herlich)

it is the manifestation of fairness in our system of industrial discipline and for that very reason it has been “the mainstay of disciplinary arbitral jurisprudence for a considerable period...”.

[269] I agree with the quoted comments of Arbitrator Herlich in the extract from the *Professional Engineers* case based as it is on what I consider to be the proper relationship between progressive discipline and the extraordinary remedy of damages in lieu of reinstatement.

[270] Moreover, I would not limit it to progressive discipline. In view of the nature of the misconduct in this case, administrative approaches such as counselling might very well have been more appropriate and effective than progressive discipline. The point is that an extraordinary remedy such as damages in lieu of reinstatement should be a remedy of last resort.

[271] In the other cases relied on by the employer (*CHEO, PRHC and Extendicare*) in which damages in lieu of reinstatement was awarded in the absence of any progressive discipline, the argument that was made in *Hendrickson Spring* and in this case, was not made. None of these cases are based on a reasoned decision on the point.

[272] As a result of the total absence of progressive discipline or administrative measures, I might have considered reinstating the grievor to employment but not in the ER. It is pure speculation whether, if progressive discipline and/or counselling had been utilized, the grievor would have responded but fairness demands that she should have been afforded the opportunity. What is not speculative would be the effect of now reinstating her to employment in the ER. Although Avgerinos is no longer employed in the ER, there are a number of the grievor’s colleagues who testified that are still working there. It would be extremely disruptive and not in the best interests of the grievor, her colleagues, the patients and the hospital to reinstate her to the ER.



[273] The only other option would have been to reinstate her to an RN position in another part of the hospital. However, at the conclusion of her evidence, I asked the grievor what her view would be of reinstatement to such a position. She stated that she did not want to return to work with the employer unless she was reinstated to the ER.

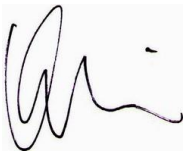
[274] In these circumstances, and since all of the factors which justify the extraordinary remedy are present, damages in lieu of reinstatement is the only possible remedy that makes practical sense.

### **Summary**

[275] The written warning is to be replaced with a verbal warning. The harassment grievance is dismissed. The grievor was not terminated for just cause. In its place, I order that the grievor receive a suspension of 10 days without pay (three-days and seven-days) and damages in lieu of reinstatement.

[276] I remain seized to resolve any difficulty the parties may encounter in implementing this award.

Dated at Toronto Ontario this 11<sup>th</sup> day of September 2017.



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Larry Steinberg, Arbitrator