

In the Matter of a Labour Arbitration pursuant to the Ontario *Labour Relations Act*

Between:

**THE CORPORATION OF THE COUNTY OF NORFOLK
(HALDIMAND-NORFOLK HEALTH UNIT)**

-and-

ONTARIO NURSES' ASSOCIATION

ONA Case #s 202005842, 202005847, 202005849, 202005850, 202005852,
202005853, 202005856, 202005858, 202005860, 202005862, 202005865, 202005866,
202005868, 202005869, 202005870, 202005872, 202005873, 202005874, 202005875,
202005876, 202005877, 202005878, 202005879, 202005880, 202005881, 202005882,
202005883, 202005885, 202005888, 202005889, 202005891, 202006620, 202006963,
202006966, 202006967; ONA Consolidated Case # 202100448

Arbitrator: Randi H. Abramsky

Appearances

For the Employer: Thomas Agnew Counsel

For the Union: Rob Dubrucki Counsel

Hearing: A hearing in this matter was held via video conferencing on January 24, 2022 and then by written submissions received on September 2, September 27 and October 6, 2022.

SUPPLEMENTAL AWARD

1. On August 26, 2021, I issued an Award which determined that the Government of Ontario's enactment of emergency orders did not alleviate the requirement to pay overtime and shift premiums under the terms of the Collective Agreement. The issue of remedy was remitted back to the parties.
2. Following that decision, issues concerning the calculation of overtime remained in dispute. The parties agreed to proceed by way of an Agreed Statement of Facts, which is attached to this decision as Appendix A. Based on those facts, and the Collective Agreement, the parties asked me to address a number of questions, based on examples set out in the Agreed Statement of Facts.

Background

3. The grievances at issue arose during the pandemic in 2020. In response to the pandemic, the Employer changed the regular hours of work of some ONA members. Nurses were advised on April 13, 2020, that the following changes could be made to their schedule:
 - (a) Days worked per week: ONA members were advised that they could be scheduled to work on Saturday and Sunday.
 - (b) Hours worked per day: ONA members were advised that they could be scheduled for longer than eight (8) hours per day, inclusive of a one (1) hour unpaid lunch, which is referred to as the "Regular Shift". For example,
 - (i) An ONA member could be scheduled for ten (10) hours, inclusive of a one (1) hour unpaid lunch, and therefore paid for nine (9) hours in a day.
 - (ii) An ONA member could be scheduled for eleven (11) hours, inclusive of a one (1) hour unpaid lunch and paid for ten (10) hours in a day.

4. These changes lasted from April 13, 2020 to July 24, 2020. Starting on July 25, 2020, the Employer began scheduling ONA members for a Regular Shift, although ONA members continued to be scheduled for Saturdays and Sundays.
5. While ONA did not dispute that the Employer had the ability to alter the hours of work as a result of the operation of O. Regulation 116/20, the Union claimed that the Employer had to pay overtime for any shift longer than 7 hours in any day, and over 35 hours in a week. The Employer paid some overtime, but the Union claimed further overtime was owing.
6. Article 4 of the Collective Agreement reads, in relevant part, as follows:

Article 4 – Definitions of Hours of Work and Overtime

4.1 (a) A full-time Nurse normally works a thirty-five (35) hour work week, Monday through Friday, with one (1) hour for lunch and two (2) fifteen (15) minutes coffee breaks each day, it being understood that time off for lunch shall not be deemed to be time worked for the purposes of this clause.

...

(c). The regular hours of work are 0830 hours to 1630 hours, Monday to Friday. Nurses may be scheduled for seven (7) consecutive hours of work, exclusive of a meal period, between 0730 hours and 2200 hours to cover programs regularly scheduled outside of the regular hours of work. ...

...

4.2. Work in excess of seven (7) hours in any day or in excess of thirty-five (35) hours in any week when authorized by the appropriate Program Manager or designate shall be regarded as overtime and compensating time off shall be scheduled at a mutually agreeable time by December 31 of the year after which such overtime was earned. This compensating time shall be at time and one-half (1 ½) the Nurse's basic rate of pay. ...

7. The parties agreed, for the purposes of the issues in dispute, that a "work week" "is a seven (7) day period that starts at 12:01 a.m. on Saturday morning and ends at 11:59 on Friday.

Example 1(a)

Where an employee works daily overtime hours during a Work Week, should those daily overtime hours be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?

8. In Example 1, the parties posit that a nurse works 10 hours on Monday, Wednesday, Thursday and Friday, and is off work on Saturday, Sunday and Tuesday. The parties agree that for the ten-hour shifts on Monday, Wednesday and Thursday, each employee is entitled to three hours of overtime.
9. The Employer asserts that the same applies for the Friday, 10-hour shift, for a total of 12 hours of overtime for the week, or 24 in a two-week pay period. The Union asserts that during the Friday shift, the nurse surpasses the 35 hour mark, so that the last five hours of the shift should attract overtime pay. It submits that the nurse is entitled to 14 hours of overtime for the week under this schedule, or 28 in a two-week pay period.
10. The Employer argues that the Union's approach amounts to a "pyramiding" of benefits. It submits that the same overtime hours are being used twice – once to qualify for daily overtime, and again to qualify for weekly overtime, which, in its view, is "classic pyramiding." In support of its contention the Employer cites *Re Brinks Canada Ltd. and Teamsters, Local 213*, 2010 CarswellBC 3785 (Pekeles); *Re Grimms Fine Foods*, 1999 CarswellBC 3916 (Hope); *Re Headwaters Health Care Centre and ONA*, 2004 CarswellOnt 9756 (Surdykowski).
11. The Union does not agree that the "same overtime hours are being used twice"; it submits that the hours attracting the daily overtime are not the same hours attracting the over 35-hour overtime premium. It also submits that while both involve "overtime", daily and weekly overtime premiums serve different purposes.

Reasons for Decision – Example 1(a)

12. The questions posed by the parties demonstrate the very real difficulty of trying to interpret a collective agreement that never contemplated the type of scheduling that resulted from the pandemic. It is very much a situation of trying to fit a round peg into a square hole. It is quite clear that the parties did not anticipate a schedule that significantly differed from the regular seven hour, Monday to Friday, work shift.
13. Yet the language of the Collective Agreement, as written by the parties, must be interpreted in light of these unexpected changes. In this case, on a plain reading of Article 4.2, overtime is required for “work in excess of seven (7) hours in any day or in excess of thirty-five hours in any week...” This language, on its face, requires overtime in either situation. There is no provision as to whether (or not) daily overtime hours may be counted to determine if an employee has reached the weekly overtime threshold. There is also no language concerning “pyramiding” of benefits.
14. I agree with the Employer’s submission that the likely reason why Article 4.2 refers to both daily and weekly overtime thresholds is to ensure that an employee who does not exceed the 7-hour daily overtime threshold during the week, but works an extra shift on the weekend, will still qualify for overtime. That makes sense in the regular 7-hour shift Monday to Friday situation. But the issue here is whether the weekly overtime threshold of 35 hours has been met as the employee reaches hours 36 to 40 during the work week, based on a schedule of four 10-hour shifts, or whether those three extra hours on Monday, Wednesday and Thursday may not be considered in determining whether the weekly overtime threshold of 35 hours has been met. Which brings us back to the “pyramiding” question.
15. Having carefully considered the arguments of the parties, the cited case law, and the specific facts of this case, I am not persuaded that counting all the hours worked on a four 10-hour shift schedule should be viewed as double counting the hours in terms of weekly overtime. These four ten-hour shifts were the employees’ regularly scheduled hours during

this period – not extra overtime hours picked up during the week, then counted twice. The overtime premium for working more than 7 hours in a day arises from Article 4.02. The fourth 10-hour shift then placed the employees above the 35-hour weekly threshold. To not count the prior three ten-hour shifts, in their entirety, in calculating the weekly number of hours worked would effectively negate the requirement that overtime be paid for hours worked in excess of 35 in a work week. While the Employer’s approach contemplates the daily limit of 7 hours in a day, it does not accept that the employees have been scheduled for 40 hours in a work week.

16. In my view, although both the daily and weekly overtime thresholds address “overtime”, they deal with two separate situations: daily and weekly. The daily overtime threshold is to compensate employees for working longer than the employee’s regular 7-hour day, and the weekly threshold is to compensate an employee for working extra hours – beyond 35 - during the regular work week. The new schedule impacted both, and under the plain terms of Article 4.2, the employees were entitled to receive the benefit of overtime pay/lieu time, for hours 36-40 on the fourth 10-hour shift.
17. Consequently, for the reasons set out above, I am persuaded that, under the specific facts of this case, where the hours were part of the employee’s regularly scheduled shift, daily overtime hours during a Work Week should be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that work week.

Example 1(b)

During the period of time when the Employer was scheduling ONA members to work longer than a Regular Shift (*i.e.*, between April 13, 2020 and July 25, 2020), is the Employer able to reduce the overtime amounts otherwise owing to an ONA member by taking credit for 7 hours (one Regular Shift time off) per Work Week that the Employer alleges some ONA members received during the relevant period?

18. The Employer argues that, under the Collective Agreement, employees generally work a five-day work week, with two days off per week. It submits that by scheduling employees to work four 10-hour shifts, “the employee was granted one (1) additional day off in each week (each Tuesday) in lieu of overtime pay. The regular shift length is seven (7) paid hours, so the employee was given a total of fourteen (14) hours off in lieu of overtime pay in Example 1. The employee’s overtime entitlement should therefore be reduced by fourteen (14) hours.”
19. The Union emphatically rejects this argument.

Reasons for Decision – Example 1(b)

20. Although I agree that the collective agreement contemplates a 7-hour paid work day, Monday to Friday, and therefore implicitly recognizes two days off per week, I am unable to conclude that the third day off was “pay in lieu” of overtime earned. The Employer submits: “The employee earned the right to have the additional day off by working overtime, on previous days. The employee received compensation in the form of time off for some of that overtime work.”
21. The third day off was the result of a scheduling choice by the Employer to have employees work four 10-hour shifts, rather than five 7-hour shifts. The extra day off was not a “lieu” day for working overtime on previous days. Article 4.2 of the collective agreement provides as follows (emphasis added):

Work in excess of seven (7) hours in any day or in excess of thirty-five hours in any week when authorized...shall be regarded as overtime and *compensating time off shall be scheduled at a mutually agreeable time by December 31 of the year after which such overtime was earned.* This compensating time shall be at time and one-half (1 ½) off or pay at time and one-half (1 ½) the Nurse’s basic rate of pay. ...

22. Under this provision, even if the Tuesday off could be viewed as a lieu day (which I do not find it is), the Employer has no right to unilaterally schedule it. Lieu days must be

“scheduled at a mutually agreeable time.” The Employer asserts that it had the management right to schedule the lieu day in this manner. Given this specific Collective Agreement language in regard to how lieu days are to be scheduled, however, I am unable to agree.

23. Consequently, I conclude that the Employer may not reduce the overtime amounts otherwise owing to an ONA member by taking credit for 7 hours (one Regular Shift time off) per Work Week.

Example 2

When an ONA member takes flex time hours during a Work Week, should the paid flex time be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that Work Week?

24. In this example, the parties posit that an employee has Saturday and Sunday off, works 7 paid hours on Monday, takes 7 hours of “Flex Time” on Tuesday, then works 10 hours on Wednesday and Thursday, and works 7 paid hours on Friday.
25. This example, and a number of subsequent examples, deal with the issue of whether hours for which an employee receives pay, but does not physically work, should be counted to determine the weekly overtime threshold.
26. Flex Time is governed by the Employer’s Flex Time Policy. Under that policy, employees are permitted to alter their hours within certain parameters, which can result in accumulating flex hours that can be used to take time off work. An example is if an employee works through half their lunch period, they can bank 30 minutes of flex time to take time off at a later date.

Reasons for Decision – Example 2

27. Article 4.2 provides for overtime for “*work* in excess of seven (7) hours in any day or in excess of thirty-five hours in any week...” (emphasis added). The case law is quite clear

in this regard. As stated by Arbitrator Outhouse in *Re Brookfield Foods and BCTW, Local 446*, 1987 CarswellNS 600, at para 17:

17. Dealing first with the interpretation issue, while the question was once a subject of debate, it is now well settled that “hours worked” and similar expressions denote hours actually worked and do not include paid sick leave or statutory holidays. Simply put, “hours worked” and “hours paid” are not equivalent expressions. Ample authority for this conclusion is found in the cases cited by the employer and it is far too late now in my opinion, if predictability is to be accorded any weight in the arbitration process, to gainsay those decisions. ...

28. To the same effect is *Re Community Living Greater Sudbury and OPSEU, Local 676*, 2009 CarswellOnt 3940 (Albertyn), where the arbitrator determined that “hours worked” did not include paid lieu days (from overtime worked or statutory holidays, vacation or sick time) based on the ordinary meaning of “work”. He stated, at para 26:

Overtime pay is directly linked to hours worked. As Employer counsel argues, the ordinary meaning of “work” is that of the employee engaged in the active performance the physical or mental exertion, of doing their duties. The only reason to extend the meaning of “work” beyond this would be if the language of the collective agreement deemed it so.

29. See also, *Re Hamilton Health Science Centre and CUPE, Local 7800*, 2018 CarswellOnt 6402 (Levinson) (paid lieu time not included in overtime calculation); *Re Lakehead Association Community Living and OPSEU Local 708*, 1993 CarswellOnt 5642 (Brown) (paid sick days and statutory holidays not included in overtime calculation); *Re Rosstown Natural Foods Ltd. and UFCW*, 2019 CarswellBC 3165 (Peltz) (paid holiday time not included in overtime calculation).
30. In *Re Revera Inc and SEIU, Local 1*, 2015 CarswellOnt 8080 (Goodfellow), at issue was the calculation of “works less than 1,500 hours in the vacation year” for calculating vacation pay. The Employer excluded time spent on vacation, sick leave, bereavement

time, statutory holiday hours (except where the holiday is worked), hours spent on union leave, education leave, training time, time off on WSIB or EI disability and maternity/parental leave. The arbitrator upheld the Employer's exclusions, except for required training. He stated, at paras. 35-36:

35. I agree with the Employer that an employee "works" an hour when he or she spends that hour engaged in activity for the benefit of the Employer. In my view that would exclude all of the time presently excluded by the Employer except training time. An employee that is receiving training that is authorized or required by the Employer for the benefit of the Employer is "working" for the Employer when he or she receives that training. "Work" is not restricted to the performance of an employee's "normal duties" or "job". All that is required is the expenditure of effort on behalf of the Employer that was required of an employee by the Employer as a function of the employment relationship.

36. Although one might ordinarily expect all such time to be "paid" time that, too, is not required. Pay is neither a sufficient nor necessary condition for something to qualify as "work". The presence of pay does not make something "work", nor does its absence *necessarily* mean that it is not work....

31. It is of interest to note that the parties' collective agreement there included the following clause in its "overtime" provision, which required that overtime be paid for "all hours worked over seven and one half (7 ½) hours in a day...":

f. An employee who is absent on paid time during his scheduled work week because of sickness, WSIB, bereavement, holidays, vacation, or union leave on scheduled days of work shall be considered as if he had worked during his regular scheduled hours during such absence for the calculation of eligibility for overtime rate.

32. There is no such provision in the parties' Collective Agreement in this case.
33. Based on the wording of Article 4.2, the consistent and long-standing arbitral authority, and because flex time, though paid time, is not actual time "worked" on the day it is utilized, I conclude that it may not be counted for overtime purposes. I would also note

that when one considers the rationale for overtime payments – beyond the statutory requirements – it is to compensate an employee because they were required to *work* extra hours, for the added time, energy and inconvenience expended at the Employer’s request (or demand). When one receives a paid benefit but did not work that day, it makes sense that those hours are not included in the calculation for weekly overtime, unless the parties agree otherwise in their collective agreement.

Example 2A

When an ONA member takes compensating time hours as defined in Article 4.2 during a Work Week, should such paid compensating time be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that Work Week?

34. This example posits the same facts as Example 2, except instead of using “flex time”, the nurse utilizes “compensating time off”. “Compensating time off”, under Article 4.2, is time off due to having worked authorized overtime in lieu of overtime pay.
35. For all the same reasons set out in relation to Example 2, paid compensating time should not be counted when determining whether the employee has met the weekly overtime threshold.

Example 3

When an ONA member is off work for a holiday under Article 7.1(a) during a Work Week, should the paid holiday be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that Work Week?

36. The example posits that the Nurse is off on the Thanksgiving Holiday Monday, then works 7 paid hours on Tuesday, 10 hours on Wednesday and Thursday and 7 paid hours on Friday.
37. In the Union’s view, failing to count paid public holiday time undermines the broad public policy purpose of Part X of the *Employment Standards Act 2000*.

38. In *Re Lakehead Association for Community Living and OPSEU, Local 708*, *supra*, at para. 23 the board of arbitration considered this issue and determined that under a provision that required overtime for “all hours worked” in excess of “normal work hours” averaged over a two week pay period, “statutory holidays, time off for sickness or injury and vacations are not included in such calculations unless set out as such in the collective agreement.” It continued at para. 24: “Time off work because of a statutory holiday cannot therefore be considered as time worked in the week the holiday is celebrated and in the pay period as if work had been performed on that day.”
39. Consequently, under Article 4.2 of the parties’ Collective Agreement, overtime arises when an employee *works* in excess of thirty-five hours in a work week. The time off taken for a statutory holiday, or any holiday listed in Article 7.2, should not be counted in the calculation of the weekly overtime threshold.

Example 4

When an ONA member is off work and in receipt of paid sick leave allowance under Article 9 during a Work Week, should the paid sick hours be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that Work Week?

40. This example posits that if a Nurse is off work on Saturday and Sunday, works 7 paid hours on Monday, takes off sick on Tuesday and receives 7 hours of sick pay, then works 10 hours on Wednesday and Thursday, and works 7 paid hours on Friday.
41. For all the reasons outlined in Example 2, and despite the importance of paid sick time which is an earned benefit, it is not time “worked” within the meaning of Article 4.2 of the Collective Agreement. Accordingly, it should not be counted when determining whether the employee meets the 35-hour threshold for overtime.

Example 5

When an ONA member is off work on a paid vacation pursuant to Article 8 during a Work Week, should the paid vacation hours be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that Work Week?

42. This example is identical to Example 4, except that on the Tuesday, the employee takes a paid vacation day, and receives 7 hours of paid time.
43. Again, for all the reasons outlined in Example 2, paid vacation time is not considered time “worked” and should not be counted in determining whether the weekly threshold is met.

Example 6

When an ONA member is scheduled for a shift that is longer than a Regular Shift (*i.e.*, more than 7 paid hours) and the employee calls in sick for that shift, how much sick time is the employee entitled to be paid?

44. This example posits a situation where the Nurse is scheduled to work 8 paid hours per day, Monday to Friday, and takes a sick day on the Tuesday, but works the remainder of the shifts. The Employer has paid the Nurse for seven hours of sick benefits, and the Union asserts that the Nurse should have been paid eight hours of sick time. It was agreed that if a Nurse took a vacation day during the same shift, the Employer would pay the employee seven (7) hours of vacation pay for that day, which is not disputed by the Union.
45. Under the Collective Agreement, full-time employees accrue sick leave credits pursuant to Article 9.1, at the rate of one and one-half (1.5) working days for each month of service. Over the course of a full year, a full-time employee accrues a total of 18 sick day credits, which is reflected in the member’s sick bank as hours (18 sick days = 126 hours). Regular part-time employees accumulate sick leave on a pro-rata basis for each month of service. As sick leave is utilized, the employee’s sick bank is reduced by the corresponding number of hours. Employees are able to use sick leave in increments of less than a full day (*i.e.*, 30 minutes, 1 hour, etc.)

Reasons for Decision – Example 6

46. From the Union’s perspective, the amount of sick leave should reflect the actual lost hours due to illness, and that the use of sick credits is not limited to increments of seven hours.

It asserts that its agreement that a vacation day is 7 hours is irrelevant to this issue since no new vacation time was approved by the Employer during the period in issue due to staffing demands.

47. The Employer argues that the Union's position in relation to sick days and vacation days is inconsistent, and sees no basis to provide 7 hours for a vacation day but more for a sick day. It also asserts that the Collective Agreement is silent on the issue of how many hours is to be paid for a sick day, and therefore it falls within management's right to determine the number of hours, so long as it acts reasonably and consistently with the Collective Agreement. It asserts that paying 7 hours for a sick day is consistent with its past practice and consistent with its practice concerning vacation pay, and that employees still receive more pay for the week than they would have in the past.
48. The Employer also notes that "this is not a case where the Employer's approach disadvantaged the employee." This is because by paying 7 hours of sick time, rather than 8, more hours remain in an employee's sick bank.
49. The Collective Agreement is silent about the number of hours a "sick day" is. Historically, an employee was scheduled for and worked for 7 paid hours in a day, and consequently received 7 hours of paid sick leave if they missed work due to illness, provided they had such leave in their bank.
50. This is another example of fitting a square peg into a round hole. The accrual of sick leave and its use are tied to the regular work week and schedule. The Collective Agreement is silent on how many hours a "sick day" includes, but some guidance may be found in the purpose of sick leave. Sick leave is designed to ensure that employees are able to maintain their income when sick. It enables employees to be able to stay home when they are ill without a financial penalty, which is very important for the individual as well as co-workers, clients and the public. It is an earned benefit, with hours earned maintained in an employee's sick bank. If a scheduled shift is longer than the regular 7 hours, the employee is out of pocket the additional time if the sick leave benefit is capped at 7 hours. It may be,

as the Employer asserts, that they still make more money, even with a 7-hour cap on sick leave, than they would have under the pre-pandemic schedule. They are also working more hours. At the end of the day, it is a “wash” – if more sick leave hours are taken for a single absence, there is less left in the employee’s sick bank. But in my view, it is reasonable to provide an employee who takes a sick day with the hours for which the employee was scheduled. It is not reasonable to cap it at 7 hours based on a schedule that was not in place at the time.

51. Accordingly, I conclude that for an 8-hour shift, the employee should receive 8 hours of sick time.
52. In reaching all of the above determinations, I have considered all of the arguments and case law cited by the parties. Not all of the arguments and cases, however, have been included in this Award.

Conclusions:

1. **Example 1(a)** – Under the specific facts of this case, where employees were scheduled for four 10-hour shifts, where an employee works daily overtime hours during a Work Week, those daily overtime hours may be counted when determining whether the employee has surpassed the thirty-five (35) hour weekly overtime threshold for that Work Week.
2. **Example 1(b)** – The third day off was the result of a scheduling choice by the Employer, not a lieu day. But even if it could be considered a lieu day, lieu days must be scheduled by mutual agreement, not unilaterally assigned by the Employer. Consequently, the Employer may not take credit for 7 hours of lieu time per week.
3. **Examples 2, 2A, 3, 4, and 5**– The Collective Agreement provides “*Work* in excess of seven (7) hours in any day or in excess of thirty-five (35) hours in any week when authorized...shall be regarded as overtime....” (emphasis added). Under this language, an employee must “work” for the requisite number of hours to be entitled to overtime. The

case law is very clear and consistent that paid time is not equivalent to “work” time, and may not be counted in the calculation of overtime, unless the collective agreement provides otherwise. Consequently, an employee who takes flex time, compensating time, a statutory holiday, paid sick time, or a vacation day, has not “worked” that time under Article 4.2, and those hours should not be counted to determine if the employee met the weekly overtime threshold.

4. **Example 6** – The Employer’s payment of 7 hours of sick leave was based on its historical practice of doing so when employees worked 7 hour shifts. During the period in question, employees worked longer shifts. Given the purpose of sick leave, which is to enable employees to stay home when ill without loss of compensation, it is reasonable to allow employees to use their sick credits to compensate for their missed scheduled hours. This comes at no additional cost to the Employer, as the sick time comes from the employee’s own sick bank. By using more credits for a single absence, the employee’s sick bank is reduced. It was not reasonable for the Employer to cap the sick time at 7 hours.

5. As agreed by the parties, I shall remain seized.

Issued this 26th day of October, 2022.

Randi H. Abramsky

Randi H. Abramsky

APPENDIX A

In the matter of an arbitration before Arbitrator Randi Abramsky (Premium grievances)

between

**THE CORPORATION OF THE COUNTY OF NORFOLK
(HALDIMAND-NORFOLK HEALTH UNIT)**

(hereinafter, the "Employer")

-and-

ONTARIO NURSES' ASSOCIATION

(hereinafter, "ONA")

AGREED STATEMENT OF ISSUES AND FACTS

- 1) To expedite the Arbitration process, the "Parties" noted above have agreed to use this Agreed Statement of Facts. Neither Party may call evidence to contradict any of the facts noted below. In the event that there is a conflict between oral evidence and the facts noted below, the Parties agree that the Arbitrator should prefer the facts below.
- 2) The Employer operates a public health unit incorporated pursuant to the *Health Protection and Promotion Act*, R.S.O. 1990, C. H.7 that serves primarily the residents of counties of Norfolk and Haldimand. ONA represents all Registered Nurses, Registered Practical Nurses, and nurses with a temporary certificate employed by the Employer, save and except Supervisors and persons above this classification.
- 3) The Parties are subject to a Collective Agreement (*hereinafter*, the "CA") with a nominal expiry date of December 31, 2021. The CA is attached as **Tab 1**. The Parties agree that this CA was in effect at all times relevant to the grievance hereunder and remains in effect on the first hearing date for this arbitration.

4) The Parties appeared before Arbitrator Randi Abramsky on August 24/21. An award was issued following that date, which is dated August 26, 2021 (the "**First Award**") and is attached as **Tab 2**. The proceedings today arise from issues that remain in dispute between the Parties after the issuance of that First Award.

5) Article 4.2 of the CA deals with overtime pay and provides as follows:

Work in excess of seven (7) hours in any day or in excess thirty-five (35) hours in any week when authorized by the appropriate Program Manager or designate shall be regarded as overtime and compensating time off shall be scheduled at a mutually agreeable time by December 31 of the year after which such overtime was earned. This compensating time shall be at time and one-half ($1\frac{1}{2}$) off or pay at time and one-half ($1\frac{1}{2}$) the Nurse's basic rate of pay. In the event of the Employer denying authorization for overtime hours, the reason(s) for such denial shall be provided.

6) A "work week" for the purposes of the issues in dispute in these grievances is a seven (7) day period that starts at 12:01 am on Saturday morning and ends at 11:59 pm on Friday (the "**Work Week**"). ONA members are paid biweekly.

7) In early April of 2020, the Employer informed ONA members that their shifts would be changing starting Monday April 13, 2020. ONA members previously were scheduled for five (5) shifts per week, Monday to Friday, for eight (8) hours, which was inclusive of a one (1) hour unpaid lunch break. ONA members were paid for seven (7) hours of work per day.

8) Starting on April 13, 2020, the Employer advised ONA members of the following changes to their schedule:

a) **Days worked per week:** ONA members were advised that they could be scheduled to work on Saturday and Sunday.

b) **Hours worked per day:** ONA members were advised that they could be scheduled for longer than eight (8) hours per day, inclusive of a one (1) hour unpaid lunch (for the purposes of this Agreed Statement of Facts the Parties will refer to a shift lasting seven paid hours as a "**Regular Shift**"). For example:

- i) An ONA member could be scheduled for ten (10) hours, inclusive of a one (1) hour unpaid lunch, and therefore paid for nine (9) hours in a day.
 - ii) An ONA member could be scheduled for eleven (11) hours, inclusive of a one (1) hour unpaid lunch, and paid for ten (10) hours in a day.
- 9) ONA members were scheduled for shifts that were longer than a Regular Shift from April 13, 2020 until on or about July 25, 2020. Starting on or about July 25, 2020, the Employer began scheduling ONA members for a Regular Shift, however ONA members continued to be scheduled for Saturdays and Sundays.
- 10) ONA did not object to the right of the Employer to alter the hours of work to be scheduled by the Employer per day, or the days upon which work could be scheduled per week, in light of the Regulations under the *Emergency Management and Civil Protection Act*. However, ONA informed the Employer that it would ask for hours worked beyond seven (7) paid hours, exclusive of one 1-hour unpaid meal break period, on any single day to be paid at time-and-one-half rates and for all hours worked in excess of thirty five (35) hours in any Work Week to be paid at time-and-one-half rates, both further to Article 4.2.
- 11) Following the issuance of the First Award, the Employer provided ONA with a calculation of the amounts the Employer believed were owing to the grievors. The Parties were able to agree on some of the amounts, but some issues remain outstanding. The Employer has not compensated any ONA member for any claimed premium that was the subject of the First Award.
- 12) The Employer agrees that where an ONA member works six (6) or seven (7) shifts in a Work Week, the ONA member is entitled to be compensated at time-and-one-half rates for the work performed by that member on the sixth and/or seventh day of such Work Week. The Employer also agrees that ONA members are entitled to shift premiums for any hours that are worked outside the regular hours pursuant to Article 4.1(f). Some ONA members were paid the above amounts at the relevant time. The

Employer has agreed that it will pay any outstanding amounts that have not yet been paid within sixty (60) days of the award in this arbitration being issued. The Employer has provided ONA with an accounting of the shift premium amounts it says are owing and ONA is in agreement with those amounts.

Outstanding Issues

- 13) The Parties agree that several issues remain outstanding and request that Arbitrator Abramsky answer these questions in a supplemental award. The Parties submit the following examples to frame the issues that remain outstanding. The Parties agree that Arbitrator Abramsky shall remain seized of any disputes between the Parties with respect to the First Award or any supplement award that is released in relation to the below questions.

Example 1

Week 1

Saturday April 18	Sunday April 19	Monday April 20	Tuesday April 21	Wednesday April 22	Thursday April 23	Friday April 24
Off	Off	Worked 10 paid hours	Off	Worked 10 paid hours	Worked 10 paid hours	Worked 10 paid hours

Week 2

Saturday April 25	Sunday April 26	Monday April 27	Tuesday April 28	Wednesday April 29	Thursday April 30	Friday May 1
Off	Off	Worked 10 paid hours	Off	Worked 10 paid hours	Worked 10 paid hours	Worked 10 paid hours

- 14) In the above example, the employee worked 40 paid hours each Work Week for a total of 80 hours bi-weekly. The Employer initially paid the employee 70 hours at straight time, and 10 hours at the overtime rate of time-and-one-half.

15) Following the issuance of the First Award, the Employer submits that the following is owed to the employee in the above example:

- a) 3 hours of daily overtime each day for hours worked in excess of 7 hours in a day. This totals 12 hours of overtime in Week 1 (3 hours/day x 4 shifts) and 12 hours of overtime in Week 2 (3 hours/day x 4 shifts), for a total of 24 overtime hours.

16) The Employer submits that the 24 hours of overtime should be reduced by the 10 hours of overtime paid initially by the Employer for a total of 14 hours of overtime owing. The total of 14 hours of overtime is reduced further by the following:

- a) 7 hours of straight time (one shift time off) in Week 1 and 7 hours of straight time (one shift of time off) in Week 2.
- b) The total of 14 hours of overtime is payable at time-and-one-half (1.5) for a total 21 hours of pay (14 hours x 1.5). When 21 hours of pay is reduced by the 14 hours of straight time in paragraph 16(a) above, the Employer takes the position that 7 hours of pay (paid at straight time) is owing to the employee in this example.

17) ONA submits in this example that the employee should be paid overtime as follows:

- a) 3 hours of daily overtime for hours worked in excess of 7 hours on April 20, April 22 and April 23 for a total of 9 hours of overtime, plus overtime for the last 5 hours of the shift on April 25, as those 5 hours represent work in excess of 35 hours in Week 1. ONA submits that the total owing in this example is 14 hours of overtime in each Work Week, which amounts to a total of 28 hours of overtime in this bi-weekly period.

18) ONA agrees that 28 hours of overtime can be reduced by the 10 hours of overtime initially paid to the Employee to those Employees who have received such payments already (see paragraph 14 above). ONA does not agree that the 28 hours of overtime in this example should be further reduced by any alleged lieu time during either Week 1 or Week 2.

Questions to be answered with reference to Example 1

19) The Parties agree that the following questions are to be answered:

- a) Where an employee works daily overtime hours during a Work Week, should those daily overtime hours be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?
- b) During the period of time when the Employer was scheduling ONA members to work longer than a Regular Shift (i.e. between April 13, 2020 and July 25, 2020), is the Employer able to reduce the overtime amounts otherwise owing to an ONA member by taking credit for 7 hours (one Regular Shift time off) per Work Week that the Employer alleges some ONA members received during the relevant period?

Example 2

Saturday Oct. 3	Sunday Oct. 4	Monday Oct. 5	Tuesday Oct. 6	Wednesday Oct. 7	Thursday Oct. 8	Friday Oct. 9
Off	Off	Worked 7 paid hours	Flex Time (7 hours)	Worked 7 paid hours Plus 3 hours OT	Worked 7 paid hours Plus 3 hours OT	Worked 7 paid hours

20) A copy of the Employer policy on the accumulation and use of “flex time” is attached as **Tab 3** (the “Policy”). The Parties agree that this Policy was applied in the workplace prior to the period in which ONA members were scheduled to work more than 7 paid hours in a day (i.e. prior to the period from April 13, 2020 to July 25, 2020). The Parties agree that this Policy continued to operate in the workplace during this time period, however, employees were not permitted to bank flex time under the Policy between on or about May 2/20 and September 9/20.

21) The Parties agree that the following question is to be answered with respect to Example 2:

- a) When an ONA member takes flex time hours during a Work Week, should the paid flex time be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?

Example 2A

Saturday Oct. 3	Sunday Oct. 4	Monday Oct. 5	Tuesday Oct. 6	Wednesday Oct. 7	Thursday Oct. 8	Friday Oct. 9
Off	Off	Worked 7 paid hours	Compensating Time off (7 hours)	Worked 7 paid hours Plus 3 hours OT	Worked 7 paid hours Plus 3 hours OT	Worked 7 paid hours

22) The Parties agree that the following question is to be answered with respect to Example 2A:

- a) When an ONA member takes compensating time hours as defined in Article 4.2 during a Work Week, should such paid compensating time be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?

Example 3

Saturday Oct. 10	Sunday Oct. 11	Monday Oct. 12	Tuesday Oct. 13	Wednesday Oct. 14	Thursday Oct. 15	Friday Oct. 16
Off	Off	Thanksgiving Employee Off with Pay	Worked 7 paid hours	Worked 7 paid hours Plus 3 hours OT	Worked 7 paid hours Plus 3 hours OT	Worked 7 paid hours

23) The Parties agree that the following question is to be answered with respect to
Example 3:

- a) When an ONA member is off work for a holiday under Article 7.1(a) during a Work Week, should the paid holiday time be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?

Example 4

Saturday Oct. 3	Sunday Oct. 4	Monday Oct. 5	Tuesday Oct. 6	Wednesday Oct. 7	Thursday Oct. 8	Friday Oct. 9
Off	Off	Worked 7 hours	Paid sick time (7 hours)	Worked 7 hours Plus 3 hours OT	Worked 7 hours Plus 3 hours OT	Worked 7 hours

24) The Parties agree that the following question is to be answered with respect to
Example 4:

- a) When an ONA member is off work and in receipt of paid sick leave allowance under Article 9 during a Work Week, should the paid sick hours be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?

Example 5

Saturday Oct. 3	Sunday Oct. 4	Monday Oct. 5	Tuesday Oct. 6	Wednesday Oct. 7	Thursday Oct. 8	Friday Oct. 9
Off	Off	Worked 7 hours	Paid Vacation Day (7 hours)	Worked 7 hours Plus 3 hours OT	Worked 7 hours Plus 3 hours OT	Worked 7 hours

25) The Parties agree that the following question is to be answered with respect to Example 5:

- a) When an ONA member is off work on a paid vacation pursuant to Article 8 during a Work Week, should the paid vacation hours be counted when determining whether the employee has surpassed the thirty five (35) hour weekly overtime threshold for that Work Week?

Example 6

Saturday Oct. 3	Sunday Oct. 4	Monday Oct. 5	Tuesday Oct. 6	Wednesday Oct. 7	Thursday Oct. 8	Friday Oct. 9
Off	Off	Scheduled for 8 paid hour shift (exclusive of 1 hour lunch) and worked 8 paid hours.	Schedule for 8 paid hours (exclusive of 1 hour unpaid lunch) Employee calls in sick	Scheduled for 8 paid hour shift (exclusive of 1 hour lunch) and worked 8 paid hours.	Scheduled for 8 paid hour shift (exclusive of 1 hour lunch) and worked 8 paid hours.	Scheduled for 8 paid hour shift (exclusive of 1 hour lunch) and worked 8 paid hours.

26) The above example reflects the fact that the Employer was scheduling ONA members for shifts that were longer than a Regular Shift for a temporary period of time (see paragraph 8(b) above).

27) During the period when the Employer was scheduling ONA members for longer than a Regular Shift, if an employee took a sick day, the Employer would pay the individual seven (7) hours of sick benefits for that day.

28) If the ONA member took a vacation day during a shift that the ONA member was schedule for a shift longer than a Regular Shift, the Employer would pay the ONA member seven (7) hours of vacation pay for that day.

29) The Employer's position is that during the period when ONA members were being scheduled for shifts that were longer than a Regular Shift, if an ONA member took a vacation day or a sick day, the ONA member should be paid seven (7) hours for the day in question. Full-time ONA members accrue sick leave credits pursuant to Article 9.1 of the collective agreement at the rate of one and one-half (1.5) working days for each month of service. Over the course of a full year, a full-time member accrues a total of 18 sick day credits. This is reflected in the ONA member's sick bank as hours (18 sick days = 126 hours). Regular part-time ONA members accumulate sick leave on a pro-rata basis for each month of service. When Norfolk County provided an ONA member with 7 hours of sick credits during the relevant period, the ONA member's sick bank was reduced by the corresponding number of hours. By tracking sick leave credits in hours, employees are able to use sick leave credits in increments of less than a full day (i.e. 30 minutes, 1 hour, etc.).

30) ONA's position is that during the period when ONA members were being scheduled for shifts that were longer than a Regular Shift, if an ONA member took a sick day, the ONA member should be provided with sick pay equivalent to the length of the shift scheduled for that day. In the above example, the employee would be paid eight (8) hours of sick benefits for the shift on October 6. ONA is in agreement that the ONA member would be paid seven (7) hours of vacation pay for the shift on October 6.

31) The Parties agree that the following question is to be answered with respect to Example 6:

- a) When an ONA member is scheduled for a shift that is longer than a Regular Shift (i.e. more than 7 paid hours) and the employee calls in sick for that shift, how much sick time is the employee entitled to be paid?