IN THE MATTER OF AN ARBITRATION

BETWEEN

William Osler Health System

("Hospital" or "Employer")

and

Ontario Nurses' Association

("Union")

Influenza Policy

SOLE ARBITRATOR: James Hayes

APPEARANCES

For the Union:

Danielle Bisnar, Counsel

For the Employer:

John Cox, Senior Labour Relations Specialist

The issues in dispute were identified in a conference call and addressed in written submissions completed on October 31, 2016.

AWARD

1. During central bargaining for the 2014-2016 Collective Agreement, the Ontario Hospital Association and ONA entered into a Memorandum of Agreement ("MOA") pursuant to which I was appointed to resolve some of the then outstanding grievances related to influenza policies and practices at various hospitals, including William Osler Health System.

2. The primary issue dividing ONA and the hospitals was the controversial 'vaccination or mask' policy ("VOM policy") adopted by many hospitals. The question proceeded to arbitration by test case leading to the decision in *Sault Area Hospital,* 2015 CanLII 55643 (ON LA). Following an exhaustive review of the available medical scientific literature and having heard from a number of expert witnesses, I determined that:

> Absent adequate support for the freestanding patient safety purpose alleged, I conclude that the Policy operates to coerce influenza immunization and, thereby, undermines the collective agreement right of employees to refuse vaccination. On all of the evidence, and for the reasons canvassed at length in this Award, I conclude that the VOM Policy is unreasonable. (at para. 13)

3. Since the release of that award, ONA has reached agreement about appropriate influenza vaccination policies with almost all of the hospitals bound to the MOA.

4. These parties remain in disagreement with respect to only two aspects of the Hospital's Influenza Vaccination Policy. At my request, they confirmed their agreement that I have jurisdiction to determine this dispute.

First Issue

Hospital proposal

> All staff will be offered vaccination annually against influenza or it is recommended that staff wear a procedural mask for the duration of the annual influenza season (from when

> the vaccine is available to April 30th) while in any patient care area at Osler. The influenza season may be extended if increased community levels of influenza are identified in consultation with Public Health.

5. The Hospital submits that that it seeks only a recommendation that unvaccinated employees wear a procedural mask. There is no requirement to do so and there is no evidence of the Hospital exercising any coercion on employees to wear the mask. The *KVP* case law relied upon by the Union does not address recommended practice.

6. The Union submits that: "the Hospital's ongoing recommendation to mask throughout the influenza season maintains a normative expectation that staff will continue to 'vaccinate or mask'. It says that: "this normative expectation, formalized in the employer's Policy, is inconsistent with Arbitrator Hayes' findings in *Sault Area Hospital* and constitutes an unreasonable policy and an unreasonable exercise of management rights and discretion in a manner contrary to the Collective Agreement.

Second Issue

> **Hospital proposal**
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> Unvaccinated staff that are unable to receive vaccination and/or prophylaxis for reasons supported by a physician to be medically contraindicated, will be reassigned, if possible, to another area within the hospital for the duration of the outbreak. If staff, prior to being moved to another area, are exposed to patients in the outbreak unit will continue to wear a mask in patient care areas until it has been determined that they are not symptomatic. If reassignment is not available the staff will be booked off with pay, until the outbreak is declared over by Infection Prevention and Control and the Public Health Unit. Physicians will not be reassigned and paid.

> **Union proposal**
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> Regardless of vaccination status, staff who have been exposed to influenza on an outbreak unit and are subsequently reassigned to another area of the hospital will wear a procedural mask while providing direct patient care for one incubation period of 72 hours. Following one incubation period of 72 hours, staff will be reassessed by Infection Control and, if determined to be symptom free, will no longer be required to wear a procedural mask.

7. The Hospital submits that the general language "until it has been determined that they are not symptomatic" is preferable as it is responsive to "variations, by individuals and strain of influenza, as to the length of the incubation period". "The period may be shorter or longer than the fixed period proposed by the Union."

8. The Hospital submits that the concept of 'patient care area' is preferable to 'while providing direct patient care' as "employees are around patients, in patient care areas, even when not providing direct patient care". It maintains that: "If there are any issues with regards to the application of the phrase 'patient care areas' for individual units at the Hospital these can be addressed through a variety of ways including directly to their Manager, the Hospital-Association Committee and the Joint Health & Safety Committee."

9. The Union submits that a clear time line for the mask requirement is desirable and that: "its proposal of 72 hours is reasonable in that it is based on available evidence and represents a longer than average incubation period for influenza". It points to the evidence heard in *Sault Area Hospital*.

10. The Union submits that the Hospital's proposal of "patient care areas" is overly broad. In the alternative, it proposes: "while providing direct patient care and/or while in areas of patient care units normally accessible to patients (excluding, for example the nursing station, staff lounge, utility rooms etc.)."

Decision

11. For the purpose of this Award, it is unnecessary to review *KVP* principles as they were understood and applied in *Sault Area Hospital.* The Award is issued, however, having regard to those principles and the evidentiary base established therein.

12. Insofar as the First Issue is concerned, I do not agree that the recommendation to wear a mask for the duration of the influenza season in any patient area of the Hospital is sustainable. I found at para. 319 of *Sault Area Hospital* that there was "scant scientific evidence of the use of masks in reducing the transmission of influenza virus to patients". In the absence of further evidence to the contrary, I conclude that there is no reasonable basis for the recommendation and that it should be deleted from the Policy.

13. Insofar as the Second Issue is concerned, I am satisfied that a blend of the Hospital and Union proposals is preferable to either of them standing alone.

14. The Union accurately summarizes the evidence heard in *Sault Area Hospital* about the typical length of the influenza incubation period before the onset of symptoms. Nevertheless, I am reluctant to designate a specific number of hours; the length of time will almost certainly vary with individual circumstances. The Hospital's written submission states that: "We have chosen with our proposed language to have individual assessments made by Infection Control Practitioners at the Hospital." On the assumption that those assessments will be made available and conducted very close to the 72-hour mark, I find the Hospital's approach to be acceptable. I also find that the Union's alternative suggestion to the 'patient care area' question to be appropriate.

15. In the result, the proposed paragraph would include the following in addition to the other matters referenced therein:

> Regardless of vaccination status, employees who have been exposed to influenza on an outbreak unit and are subsequently reassigned to another area of the hospital will wear a procedural mask while providing direct patient care, and/or while in areas of patient care units normally accessible to patients, until it has been determined by Infection Control Practitioners, or other competent medical professionals, that they are not symptomatic.

16. The foregoing directions are intended to convey the determinations requested by the parties. The parties are of course at liberty to draft any language

that may better carry out their mutual intentions in accordance with the spirit of this Award. As stated in the *Sault Area Hospital* decision at para. 3: "It seems to me self-evident that medical judgments and policy decisions relating thereto should be located, primarily, elsewhere." These questions should only be left to labour arbitrators as a last alternative.

17. I remain seized should that be necessary.

Dated at Toronto, Ontario this 9th day of November, 2016.

James Hayes