

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**DURHAM COLLEGE**  
(Hereinafter referred to as the College)

**AND**

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION**  
(Hereinafter referred to as the Union)

**AND IN THE MATTER OF THE GRIEVANCE OF W. ANDERSON (97G095)**

ARBITRATOR: Gail Brent

APPEARANCES:

FOR THE COLLEGE: Donald I. Sinclair, Executive Dir. Staff  
Services

FOR THE UNION: Peter McKeracher, Local President

Hearing held in Oshawa, Ontario on February 3, 1998.

**DECISION**

This matter arises out of a grievance dated November 7, 1997 in which the grievor alleges that he should have been paid overtime for the weeks during which Labour Day and Thanksgiving Day fell (see Ex 1., part). The parties raised no preliminary objections regarding jurisdiction or arbitrability. The parties elected to call no witnesses. The relevant facts are contained in an agreed statement (Ex. 1) the body of which is reproduced below:

1. William Anderson, the grievor, has been a professor at Durham College since

August 8, 1989. He teaches in the Applied Arts Division of the Post-secondary Division of the College. The grievor primarily teaches in the Law and Security Administration Program.

2. Durham College is a comprehensive College of Applied Arts and Technology with the major campuses in Oshawa and Whitby. The College employs approximately 220 professors, counsellors and librarians.
3. The Academic staff of the College are governed by the terms of a Collective Agreement effective September 1, 1991 to August 31, 1994 which as (sic) been extended in force since then by operation of law.
4. On September 12, 1997, the grievor agreed to a Standard Workload Form which covered the period September 2, 1997 to October 17, 1997. . . .
5. The grievor was assigned to teach four sections of Introduction to Criminology. The total weekly contact hours were 13. The total weekly workload hours were 46.32. The Introduction to Criminology is completed by writing a common test for all sections. . . .
6. The grievor was assigned to teach two sections of the Introduction to Criminology courses in three hour blocks on Mondays. . . .
7. Two statutory holidays occur during the period covered by the relevant S.W.F., Labour Day (September 1, 1997) and Thanksgiving Day (October 13, 1997). Both these holidays fell on Monday.
8. The Collective Agreement provides that total 'workload assigned and attributed by the College to a teacher shall not exceed 44 hours in any week'. [Agreement Article 11.01B1.] Any 'workload hours agreed to in excess of the 44 hour weekly workload maximum shall be compensated at the rate of 0.1% of annual salary'. [Agreement Article 11.01J2.]
9. The College practise is not to pay overtime for weeks in which statutory holidays fall and where regular contact hours fall on Monday. The grievor was not paid overtime for the weeks of September 1, 1997 and October 13, 1997.
10. The grievor filled (sic) the following grievance [see grievance, Appendix D]

'I would like to grieve the non-payment of overtime for Labour Day and Thanksgiving. Section 16.01A identifies the above a (sic) paid holiday. Article 11 lays out the workload requirements and my S.W.F. contracts my workload between me and the college and indicates an overtime of 2.32 hours per week for seven

weeks. This is a binding, (sic) contract between me and Durham College.'

11. The grievor is at Step 16 on the salary scale and claims 2.32 hours of overtime for two weeks at a rate of .1% of salary. This is \$284.13 in total.
12. The College and the Union have agreed to the appointment of Arbitrator Brent to deal with this matter as a Workload Resolution Arbitration under the Collective Agreement. [Agreement Article 11.01.]
13. There are no preliminary issues as to jurisdiction.

In addition to the above facts, I was informed that the Union has never grieved the College's practice outlined in paragraph 9 of the statement. Further, it was agreed that the grievor was affected in an identical manner the year prior to filing the grievance and did not grieve then. I was also informed that the grievor was at all material times a steward.

During the course of argument the parties referred me to the following provisions of the collective agreement:

**11.01 B 1** Total workload assigned and attributed by the College to a teacher shall not exceed 44 hours in any week for up to 36 weeks in which there are teaching contact hours for teachers in post-secondary programs and for up to 38 weeks in which there are teaching contact hours in the case of teachers not in post-secondary programs.

The balance of the academic year shall be reserved for complementary functions and professional development.

Workload factors to be considered are:

- (i) teaching contact hours
- (ii) attributed hours for preparation
- (iii) attributed hours for evaluation and feedback
- (iv) attributed hours for complementary functions

**11.01 J 1** Notwithstanding the above, overtime worked by a teacher shall not exceed one teaching contact hour in any one week or three total workload hours in any one week and shall be voluntary.

**11.01 J 2** Such teaching contact hour agreed to in excess of the respective weekly teaching contact hour maximum shall be compensated at the rate of 0.1% of annual salary. Such

workload hours agreed to in excess of the 44 hour weekly workload maximum shall be compensated at the rate of 0.1% of annual salary. Such overtime payments shall be for the greater amount but shall not be pyramided.

**16.01 A** An employee will be granted the following holidays on the day on which the holiday occurs or is celebrated by the College without reduction of salary:

Good Friday	Civic Holiday
Victoria Day	Labour Day
Canada Day	Thanksgiving Day

In addition I was referred to several provisions in the collective agreement where the word “salary” occurred either alone or modified by words such as “regular” and “normal”. Those provisions included Articles 8, 14, 18.01, 20.02(v), and 23.03D.

The Union’s primary position, briefly stated, is that the failure to pay the grievor his overtime for the two weeks in question amounts to a reduction in salary contrary to Article 16.01 A. The College’s primary position, briefly stated, is that Article 11.01 J 1 contemplates the performance of the overtime work before the obligation to pay arises, and that since the threshold for the payment of overtime was not reached in those weeks, there is no obligation to pay overtime. It counters that there was no reduction of salary because the grievor was paid his full salary as determined by Article 14. The College made additional submissions regarding estoppel and an alternative position regarding past practice should the collective agreement language be found to be ambiguous.

The parties also referred me to the following authorities: ***Ontario Public Service Employees’ Union Local 417 and St. Lawrence College (Vanderschaaf)***, (1996) unreported (Mitchnick); ***Re Colonial Cookies and United Food & Commercial Workers International Union, Local 617P*** (1993), 37 L.A.C.(4th) 69 (Haefling); ***Re Motor Transport Industrial***

*Relations Bureau of Ontario and Teamsters Union, Locals 91, 141, 879, 880, 938* (1973), 4 L.A.C.(2d) 89 (H. D. Brown); and *Ontario Council of Regents for Colleges of Applied Arts and Technology and Ontario Public Service Employees Union (Durham College / Georgian College)*, (1992) unreported (Teplitsky).

In reaching my decision I have taken into account only the facts which were outlined to me, the collective agreement, the full submissions of the parties, and the authorities cited. Neither of the parties made submissions regarding the source of any patent or latent ambiguity in the collective agreement language in question. I therefore am inclined to regard this as a difference in interpretation rather than a question of ambiguity and will not look at the past practice as an aid to interpretation.

The *St. Lawrence College* case, although arising out of a different set of circumstances, does uphold the common view that a claim for overtime must be based on the performance of work beyond the normal hours of work. That also appears to be the basis on which *Ontario Council of Regents* decision was decided.

In my view “salary” as used in Article 16.01 A is directly referable to “salary” as determined by Article 14. Overtime payment is for work done above and beyond that for which “salary” is normally paid, and there is no indication here that “salary” is regarded as including overtime payments. Therefore the grievor did not suffer a reduction of “salary” when the College did not pay the overtime for the weeks which included Labour Day and Thanksgiving Day; his “salary” as defined by Article 14 was still paid to him in full. He did not receive overtime payments for those weeks. Overtime as payable under Article 11 is based on the performance of additional work beyond the normal workload. There is no evidence before me

that such additional work was in fact performed during those two weeks. Given the reduced work week, the College is entitled to assume that the workload did not exceed the normal during those weeks. In order to claim overtime payment in situations which are not covered by Article 11.01 J 2, it is incumbent upon the grievor to show that overtime work was required to be performed by the College during the short work weeks.

I do not believe that such a result leads to an absurd interpretation being put on the collective agreement. Quite the contrary, I consider that any other interpretation could result in the College paying overtime when no overtime was required.

There is no need to consider the estoppel submissions.

For all of the reasons set out above the grievance is dismissed.

**DATED AT LONDON, ONTARIO THIS 5TH DAY OF FEBRUARY, 1998.**

---

Gail Brent