

CAAT GRIEVANCE AWARDS

Continuation of Page (continued)

AND IN THE MATTER OF THE GRIEVANCES OF V. ANDERSON (#87A61), D. POUPORE, A. SUOSALO, S. ASHICK, H. POTVIN

BOARD OF ARBITRATION H.D. BROWN, CHAIRMAN
 R. NABI, UNION NOMINEE
 R.J. GALLIVAN, EMPLOYER NOMINEE

APPEARANCES FOR
THE EMPLOYER BRENDA BOWLBY, COUNSEL
 S. KALLIO
 ARLENE MAKYNEN

APPEARANCES FOR
THE UNION MARY CORNISH, COUNSEL
 AND OTHERS

FURTHER HEARINGS IN THIS MATTER WERE HELD AT SUDBURY ON MARCH 8 & 9, 1988.

Decision

AWARD

The Board issued an interim award dated July 28, 1987 by which it found jurisdiction to deal with each of the five grievances which relate to the same issue of a release of the grievors from sessional employment with the College. At the initial hearing the Board dealt with the preliminary objection of the College as to the arbitrability of these grievances. Following the release of the interim award, the Board dealt with the evidence and submissions of the parties on the merits of these grievances. Upon completion of the hearings, the Board met in Executive Session to consider the submissions and the preparation of its award.

The response of Mr. Hurly, the Director of Personnel, to each of the grievances on November 6, 1986 was the same and is as follows:

College
Cambrian
College

November 6, 1986

Mrs. S. Bertrim
Steward, OPSEU Local 655
Cambrian College

CAAT GRIEVANCE AWARDS

Division (continued)

Dear Mrs. Bertrim:

We met Wednesday, October 29, 1986, to discuss the union grievance concerning the employment of S. Ashick in a full-time capacity.

It was the union's position that the level of activity in Preparatory Programs supported the continuing employment of the individual in question.

The College explained that its requirements in this area were dependent on external funding from a variety of agencies and sources which made it difficult to predict continuous needs.

The College, at this time, is reviewing the stability of its funding in Ontario basic Skills. Once that review is completed, the College will move to staff accordingly with the individuals best suited to its needs.

Sincerely,

Mr. Hurly
Director of Personnel

RCd:ga

cc: M. Lamo
T. Kaehn
S. Kallio
A. Legault
G. Cronkurien

The Union claims that the five grievors were terminated by the College only because they were attaining 52 weeks of employment which under Appendix III of the agreement would have the effect of changing their status from sessionals to full-time. By their termination prior to that occurrence, it is the Union's position that the College was in violation of Appendix III, more

CAAT GRIEVANCE AWARDS

D. Session (continued)

particularly set out as follows:

1(a) A sessional employee is defined as a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period. Such sessional employee may be released upon two (2) weeks' written notice and shall resign by giving two (2) weeks' written notice.

(c) If a sessional employee is continued in employment for more than the period set out in paragraph (a) above, such an employee shall be considered as having completed the first year of the two (2) year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be twelve (12) full months of continuous or non-continuous accumulated employment during the immediately following twenty-four (24) calendar month period.

(d) If the college continues a full-time position beyond one (1) full academic year of staffing the position with sessional appointments, the college shall designate the position as a regular full-time bargaining unit position and shall fill the position with a member of the bargaining unit as soon as a person capable of performing the work is available for hiring on this basis.

2. The College will give preference to the designation of full-time positions as regular continuing teaching positions rather than sessional teaching positions subject to such operational requirements as the quality of the programs, enrolment patterns and expectations, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community.

The College will not abuse the usage of sessional appointments by combining sessional with partial-load service and thereby maintaining an employment relationship with the College in order to circumvent the completion of the minimum twelve (12) months sessional employment in a twenty-four (24) month period.

The issue to be determined for each of the grievances is whether the College is in violation of the agreement when it terminated the employment of the grievors before they had obtained

CAAT GRIEVANCE AWARDS

D .sion (continued)

twelve (12) full months of employment in a twenty-four (24) calendar month period set out in Section 1(a) above. The Union took the position that where the work in which these teachers were employed continued and was available, they should have been continued in their employment and allowed thereby to obtain a change of status. The termination by the College to prevent them from attaining that change is, in the Union's position, contrary to the agreement. The Union seeks reinstatement of the individuals as if the termination of employment had not occurred as well as union dues and compensation for the employees.

The circumstances involved the Preparatory Programs Department of the College in which the grievors taught in various courses and times involving 17 courses in 4 levels. The students are on continuing course intake and work through individual learning packages. As indicated in the interim award, the funding for this program is mainly from government sources, Ontario Basic Skills and Canada Manpower. The student enrollment fluctuates. There are full-time sessional and partial load teachers involved in this program. The sessional employees are hired after the classrooms are set up and the full-time teachers are assigned. The five grievors worked at various times as sessional teachers in this program. Sessional employees are excluded from the terms of the collective agreement under Article 1.01. In that Article a sessional is defined as follows:

"Sessional in this context shall mean an appointment of not more than twelve (12) months' duration in any twenty-four (24) month period."

In the 1986/87 academic year the College did not know how many teachers were needed at any one time for this program and attempts to retain sufficient full-time teachers to cover a certain level of requirement and then the balance through the fluctuations by the use of partial load and sessionals, the need for which continued in the 1986-87 academic year when the College added four full-time positions starting in the summer of 1986 in accordance with Section 1(d). The College's position however is that there is no requirement in Appendix III on it to carry on with sessional contracts in order to make those persons full-time employees. Each of the grievors were hired with limited term contracts which were coming to their natural ending when their employment was terminated. The College did not in its submission abuse sessional appointments as it did not combine sessional with partial load service in order to circumvent the qualifying period in Section 1(a).

Anita Suosalo was hired by the College as a sessional teacher On April 1, 1985 to teach in the upgrading section in English and Math, levels 1 and 2. She is a qualified elementary

CAAT GRIEVANCE AWARDS

D .sion (continued)

teacher and had taught school for 10 years in all elementary grades. She had a series of sessional contracts with the College, the last of which ended July 11, 1986. The record of her appointments in the PUP Program indicated the sessional time in weeks with a total accumulation as of July 11, 1986 of 52 but with the overlap it would have been about two weeks less at that time. A note on that College record indicates:

- "- sessional accumulations cannot be over 52 weeks in a two week year period
- partial-load and sessional accumulations - 12 months & 24 months - eligible for union dues."

Ms. Suosalo took the place of other teachers who are absent for various reasons in Math and English and taught in various rooms and was switched around according to the time table filed as Exhibit 6 for the period September 3, 1985 through to August 27, 1986. From June 10, 1986 to her termination she worked in room 3130 taking the place of a regular full-time teacher and that course continued throughout the summer. Her employment was terminated on July 11. She was told in the spring that her 52 weeks would be up before the end of the summer by Mr. Kallio, the Chairman of the Preparatory Program, and based on that she was told that her employment would end on July 11. He told her in March that the effect was that she could only work 52 weeks and at that time had just over 30 weeks of accumulated sessional time and while she wanted to work during the summer, she was told that it would be a problem because her time would be over before the summer ended. Mr. Kallio called the personnel office to make sure that the accumulated record of her sessional time up to that point was accurate. She was not told of any other reason for her termination of employment.

Ms. Suosalo said July 11 did not have any other significance as to other operational requirements in the courses. She said there were always a suitable amount of students for the classes to be taught. A change of teachers does have an effect on the class as students like to have a teacher with whom they are familiar, even though they use the same text. By letter dated June 24, 1986 her sessional appointment as an instructor in the Preparatory Program was confirmed "effective from June 2 - July 11, 1986" which she accepted. She said this was the same type of form which she would receive for her several appointments as a sessional, some of which would be received after she had been working. Some full-time teachers would work during the summer but she said that usually there are sessional appointments to cover for holiday absences of full-time teachers. In February, 1987 Mrs. Potvin retired and was replaced by a full-time employee. She said that Mr. Kallio assured her that he was satisfied with her work. She was told that she could not apply for any other job with the

CAAT GRIEVANCE AWARDS

D .sion (continued)

College for two years after her termination and had not after July 11, 1986 worked for the College.

The parties agreed that the evidence of Ms. Suosalo would apply for the purposes of determining all of the grievances as the facts are, with the exception of dates of termination of employment, the same as well as the legal issues.

Mr. Kuehubaun, President of the Local Union, referred to minutes of the Academic Campus Committee meetings in April and May, 1984 to show that the Union had been concerned at that time and continued its concern since, of sessionals and partial load being given an opportunity to become full-time employees. He said the Employer indicated that it would not intentionally let such persons go in order to avoid their chance of becoming a full-time employee if they were doing a good job and the program in which they were employed continued. Since that time the parties have entered into a subsequent collective agreement. He agreed that there has not been such resolution for the use of sessionals, but he said the Union accepted what the College said it would do in that regard. The Union, however, did agree on term appointments. None of the persons he referred to were employed in preparatory studies and not involved in a continuous intake course, but were post secondary teachers. He agreed that the continuous intake did distinguish the Preparatory Program from others in the necessity to analyze staff complement during the year.

Mr. Hurly said the College tries to avoid turnover of sessional employees and such a commitment was made to the Union. If a sessional teacher is satisfactory to the department and the department required further work and was hiring, the sessional teacher would be carried on after 52 weeks in some departments, but not in Preparatory studies; however, at no time was a guarantee given to sessionals that they would be continued. Sessionals were not told that they would not be continued in employment on the basis that they had reached 52 weeks but if the teaching requirement for the department was there, they would have an opportunity at continuing their employment which would be reviewed individually. The criteria was whether the work was available in the department and the individuals were satisfactory on the departmental criteria. That did not involve a consideration of the number of weeks the sessional had worked to that point. Sessional employees had been continued by the College beyond 52 weeks of employment in some areas.

Mr. Kallio has been the Chairman of the Preparatory Program since the spring of 1985 and said that the program is designed to develop basic skills to the grade 12 level for persons who had been out of school for ten years or so and who were interested in a career change and needed skills training and were generally between 25 and 40 years old. There is individual study with individualized learning with the teacher monitoring the

CAAT GRIEVANCE AWARDS

D .sion (continued)

progress and acts as a resource person for the students. There were 17 courses. Students moved through the levels at different paces and work independently through the course, which is publicly funded. The enrollment level was not consistent and predictable only to the extent that he knew the base line, but there were fluctuations through the year with the lowest numbers in the summer period. There were no guarantees of funding each year. They hired sessionals and partial load teachers after he had guessed at the class schedules and space available. After slotting the full-time teachers, he would fill the remainder of the requirements with part-time. There was full-time equivalence in 1986 during the course of the year, according to his notes, of about an average of 3. In the summer of 1986 three full-time faculty were hired and a fourth was hired in February to cover the retirement of Ms. Potvin so that the total complement increased by three that year. Those who were hired had previously worked as sessionals and were hired in a competitive hiring process of which the grievors, along with all other sessionals, were informed. All of them except Ms. Anderson applied as she had moved to North Bay at that time.

Mr. Kallio said the selection was made on the basis of recommendation of the faculty committee, which opinion was that the grievors were not as strong in the requirements as those who were selected. He did interview Ms. Suosalo in March, 1986 and said he told her that she could not work for a year as a sessional after her termination in July and was not at that time prepared to commit himself to have her continue as a full-time teacher and it would have been necessary for her to go through the hiring process by the committee established for that process. The number of teachers he requires is based on the number of students in the class and he would not know before the registration how many students would be involved. He schedules the classes and divides them among the teachers required for the teachers who attend. He assumed that Ms. Suosalo's 52 weeks ended on July 11, 1986 and said that she would not be able to work again until she was at a point two years from the original start date as a sessional and he had scheduled her in that manner so that she did work beyond 52 weeks. In the March, 1986 budget he decided to obtain funds for three full-time employees. Other part-time and sessional teachers were hired for the Preparatory Program for September 1, 1986. The decision to hire full-time employees was taken in August after Ms. Suosalo was terminated, at which point that decision was pending but had not been made. The employees were notified of the full-time positions in late September; however, in July he believed that there would be funding available for the three full-time positions which he had requested through the budget.

The submission for the Union is that the College was in violation of the collective agreement by releasing the grievors to avoid their completion of twelve (12) months in twenty-four (24) and to obtain full-time rights under the collective agreement. In its submission there was an intention by Mr. Kallio to structure Ms. Suosalo's contract to have it end at the end of her 52 weeks of

CAAT GRIEVANCE AWARDS

D Decision (continued)

service and prohibited her from working further even though she was a competent employee and the work was continued by sessionals. But for that action, she would have been continued in the position and employment beyond 52 weeks which she wanted to do. It was submitted that the purpose of Appendix III is to protect the integrity of the bargaining unit and to ensure the rights of sessional employees are protected as well as those who would become members of the bargaining unit. In its submission, the College did not have the right to manipulate the employment of sessionals to prevent them from exceeding twelve (12) months in twenty-four (24). While there could be a shorter term contract for a sessional where the work continues for that course and the teacher is competent and satisfactory to the College, then the sessional should be allowed to continue as indicated by the academic meetings in 1984 referred to by the President of the Local Union. On the facts in this case, it was submitted that both the criteria were met that the grievor was satisfactory to the department and the work was continuing and therefore preference should have been given by the College to continue the sessional. The Union argued that the College was estopped from asserting this position which was contrary to the previous statements to the Union in 1984. There was sessional employment available which was continued and a full-time position existed at the time when Ms. Suosalo was terminated, by which she was prevented from obtaining full-time status. It was argued that the purpose of Appendix III is to protect sessional appointments so that the College cannot use its general management's rights to defeat the rights of such an employee which are set out in the Appendix and those rights include an assurance that employees who do the work for the College are granted full-time status. Reference was made to Re Fanshawe College and OPSEU (Brown, January 1987); Re Loyalist College and OPSEU (Delisle, February, 1985); Re Algonquin College and OPSEU (Kates, October 1984).

It is the submission for the College that sessional appointments are made in a series of contracts of various limited terms and are used to fill the slack for vacancies and where in a course such as preparatory studies the enrollment fluctuates and is difficult to predict. The contract for Ms. Suosalo ended on July 11 and was for a term to cover the period she was required and was told at that time that it would be one year before she could be employed as a sessional again. The College takes the position that it is not required under the agreement to continue the employment of sessionals who have reached twelve (12) months in twenty-four (24) months in order to hire that person as a full-time employee. The grievor had not reached 52 weeks in 24 months although indicated on the record as such but which was inaccurate, but assuming that she had, it was submitted that she does not have the right to force the College to continue her employment in order that she may obtain fulltime status pursuant to Appendix III.

Sessionals are excluded from the agreement under the Act and by the collective agreement which must be given primary

CAAT GRIEVANCE AWARDS

D sion (continued)

weight as opposed to an Appendix to the agreement which itself cannot override the Act. In Article 7 of the agreement it is acknowledged that the College has the right to hire employees. By Article 7.02 the College agreed that its management's function set out in Article 7.01 will be "exercised in a manner consistent with the provisions of this agreement". It was submitted that Appendix III does not require the College to hire a sessional at all as that is left in the College's discretion under Article 7.01. The Preparatory Department is different from a post secondary course where the enrollment is known in advance as in this continuing intake situation, class sizes and teaching requirements vary with students moving at their own pace between the levels so that the program staffing needs are difficult to predict. The need for sessional employees fluctuates through the year with the prime time for covering of vacancies in the summer. In these requirements, three full-time jobs were continued on in the 1986-87 academic year which were filled by Competition by the faculty committee and the three best, in their opinion, were hired. The College did comply with Section 2 of Appendix III by giving preference to regular continuing positions.

It was submitted that the College is not obliged to create positions as full-time teaching positions which it does not need to designate as such and there is no right in the collective agreement for a sessional employee to be brought into the bargaining unit as a full-time employee. The College did not combine sessional and partial load service appointments in order to defeat the application of Section 1. The agreement does not require sessionals to be kept on employment for at least 12 months and thereby to obtain full-time status. The dividing line under the agreement is twelve (12) months in twenty-four (24) and until that is reached the sessional employee does not obtain probationary full-time status. It was argued that the Union's submission would go beyond the terms of the collective agreement.

It was submitted that the College did not have a defined policy as to the use of sessionals but that it would hire the best of those available where they were required depending on the work available in the department. In this case there was work available for three full-time positions in the 1986-87 term which was recommended by Mr. Kallio in the spring of 1986 and indicated in his budget request. That request when approved was dealt with by an evaluation committee which dealt with the hiring of three full-time employees for the fall of 1986. Those jobs had been filled by sessionals until the full-time employees were hired by the College which increased the full-time complement. The College was not obliged to hire the five grievors who were at or near 52 weeks of employment because of the fact that they had been employed as sessionals for that length of time. The College has the right to take into account operational requirements and is not required to hire sessional employees. There was no detrimental reliance established by the Union and therefore the College was not stopped in this action.

CAAT GRIEVANCE AWARDS

D .sion (continued)

Sessional appointments are used throughout the College system as term appointments to cover vacancies of full-time staff for whatever reason and in each case there is a separate contract negotiated with the teacher for a specified term of employment. When such a contract expires it is not unusual, as in the case of Ms. Suosalo, that another subsequent term Contract is entered into between the College and the teacher to cover the needs of the College in a particular course or employment requirement. Sessional employees of the College are contract employees and are not members of the bargaining unit covered by the collective agreement. The only method that such employee can achieve rights under the collective agreement is through Appendix III which deals specifically with sessional employees. In that agreement the College has certain obligations to meet set forth in the specific articles referred to above. The Union does not dispute the right of the College to hire and use sessional employment to cover its short term requirements. The dispute arises when such persons reach the end of their appointed time in the terms of their contract whereby to continue by contract would exceed the definition in Section 1(a) and would therefore bring in their rights specifically provided in Section 1(c).

In our opinion, the key to the application of the latter Section is found in the open word "if". The College has the discretion to hire under Article 7.01. That discretion must be exercised consistently with the terms of the collective agreement but it is only if a contract employee is continued by the College in its discretion that the full-time probationary rights under Section 1(c) of Appendix III are applicable. That Section is consistent with Article 7.01 as it reflects the College discretion of hiring. With those definitions in place in the agreement, it cannot be a mystery as to how sessionals are hired or appointed and for what terms they are to be used as all of that information is set out in the personal contracts entered into between the College and the sessional employee. There is no restriction in the collective agreement on the College to hire for a period of 52 weeks or less, and if the person agrees to such contract her right under Section 1(a) is to two weeks written notice of a release.

A person who accepts a forty week sessional contract, for example, has only the expectation of working for 40 weeks under that contract, but another contract might be entered into before a further period of time depending on the College requirement and if in total the time exceeds the definition, then the provisions of Section 1(c) would apply to provide the probationary full-time right to that person, but that is a matter of discretion of the College hiring requirements. The agreement does not require the College to provide more employment to a sessional than it requires simply because that personal contract was for 52 weeks or close to that period of time. There is nothing magic about 52 weeks of employment which would by itself give rights to a person under a sessional contract for that time. It is only when the College

CAAT GRIEVANCE AWARDS

D .sion (continued)

determines that such, a period of employment shall be continued on a sessional basis for its reasons, that the persons subject to the sessional contract can acquire the right under Section 1(c). That must be the conclusion even though the work which had been required of such sessional employee is continued in the department where work is available. The criteria is not whether work is available but whether the College determines whether it will hire that person on a sessional contract which will exceed the defined period of time. That discretion of the College is not, in our opinion, removed under Appendix III of the agreement.

Where the College determined as in this department that there was availability for full-time positions, Mr. Kallio prepared for that expectation in his budget in the spring of 1986 and subject to approval it was dealt with through hirings of full-time employees that fall on a competitive basis. The grievors were given an opportunity to apply but were not hired by the College for the three full-time positions which were then available. The College did in that circumstance however, give preference to the designation of full-time positions which were regularly continuing positions pursuant to Section 2 of Appendix III. That at least three of the grievors did not obtain the full-time positions which were declared to be available by the College is not the issue and we cannot make any finding as to the appropriateness of the hiring practices or the evaluation made by the faculty committee in the filling of those positions. The only issue is whether the College was obliged to continue the employment of the grievors because they had reached or were close to reaching twelve (12) months employment within a twenty-four (24) month period and that issue defined at the outset of this case, must be resolved under the strict terms of the collective agreement in favour of the College.

We are not persuaded by the submissions for the Union that the College was estopped in asserting its strict rights under the terms of the collective agreement. While there is evidence of academic committee meetings in 1984, there has been a collective agreement negotiated by the parties since then, the terms of which are reflected in the agreement referable to the grievances and in any event, there is evidence which we accept from Mr. Hurly that the College did not have a policy as indicated by the Union, but that it had in some circumstances continued some sessional employees beyond 52 weeks who were then given the status under Section 1(c). This had not been applied in a department where there was a continuing intake of students where fluctuations of enrollment and staffing requirements existed. We cannot find that the Union had relied on any affirmative statements by the College contrary to the strict rights of the collective agreement which would be to its detriment as it is clear that the Union accepted and acknowledged the use of sessional employees by the College where there are work requirements covered by term appointments referenced by Mr. Kuehubaun in his evidence. The legal elements for the application of the doctrine of estoppel are not therefore established in the circumstances of this case.

CAAT GRIEVANCE AWARDS

D .sion (continued)

In the Loyalist College award the Board said at page 8

"The purpose of Appendix III seems clear. It is a protective device to ensure that the College does not seek to avoid the granting of rights conferred by the agreement by continuing a teacher on a sessional basis rather than offering him full-time status."

We can accept that statement of the purpose of this Section but it does not reflect the right of the College specifically given to it under Section 1(a) of Appendix III to release a sessional employee upon two weeks notice with relationship to the term of the contract entered into between the College and that person. As noted it is only when such an employee exceeds by contract and is therefore continued in employment for more than the period set out in Section 1(a), that the protective right must be accorded to that employee under Section 1(c), but that person must meet the threshold test of "if" she is continued in employment by the College. That discretion remains with the College consistent with its express right to hire under Article 7.01.

The College did provide a preference pursuant to Section 2 by adding three full-time continuing teaching positions which was in accordance with the operational requirements determined for the Preparatory Program. Appendix III does not provide an automatic right to those who were then holding limited term sessional contracts to have their contracts extended beyond whatever time of employment they then had in order to obtain those positions or full-time status under Section 1(c). The College did not exercise any right that was not given to it under the terms of the collective agreement and while the Union argued that the employees were frustrated by the termination of their contracts at or near the point of which they could expect to attain full-time status, that was not an expectation which was either factually or contractually based and cannot be asserted by the Union against the College. The College did not abuse the usage of sessional appointments within the meaning that the second paragraphs of Section 2 of Appendix III which does not apply on the facts of this case.

The College hired sessional and partial load teachers to deal with a specific problem of student coverage for the academic year 1985/86 in a department where there was continuing fluctuation of student enrollment leading to difficulty in establishing teaching requirements. In those situations, the use of sessional contracts is provided and the grievors had accepted such contracts in that department. The grievors would not thereby acquire any rights under the collective agreement until and if they were retained by the College in employment for more than the period set out in Section 1(a). If the Board allowed the Union's submission to grant such relief for employees who were at or near 52 weeks

CAAT GRIEVANCE AWARDS

Decision (continued)

when their contract was terminated and they were released under Section 1(a), it would be required to add to the terms of the agreement which authority it does not have pursuant to article 11.04(d). There was no intent of the College, in our opinion, on the facts of this case to adversely affect the integrity of the bargaining unit but rather it must be concluded that the grievors as sessionals could not enforce a right under the agreement which they did not have nor which this Board could accord to them.

The answer to the issue involved in each of the five grievances referred to this Board is that the college is not obliged under the collective agreement to continue to employ grievors who were employed on a sessional basis in the Preparatory Programs Department in order to obtain the status provided under Section 1(c) of Appendix III. We find that the Union did not establish that the College was in violation of the collective agreement in the manner alleged in each of the five grievances referred to this Board. It is therefore not necessary for the Board to deal with the submissions of counsel as to remedy.

Having regard to all of the evidence and the submissions of the parties and for the foregoing reasons, it is the Board's award that each of the grievances is dismissed.

DATED AT OAKVILLE THIS DAY OF JUNE, 1988.

H.D. BROWN, CHAIRMAN

R.J. GALLIVAN, EMPLOYER NOMINEE

R. NABI, UNION NOMINEE