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88C557-560
88C589-590
Local 110
Cont (A)

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAW 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 GRIEVANCES OF C. BEGERT, OPSEU FILES 88C557 - 88C560
AND IN THE MATTER OF TWO UNION GRIEVANCES FILES 88C589 AND 88C590

BOARD OF ARBITRATION: Gail Brent
George Campbell, College Nominee
Jon McManus, Union Nominee

APPEARANCES:

FOR THE COLLEGE: Brenda Bowlby, Counsel
Pat Kirkby, Dean of Health Sciences & Human
Services

FOR THE UNION: S. T. Goudge, Counsel
Paddy Musson, Local President
Christine Begert, Grievor

Hearings held in London, Ontario on March 26 and 27, 1992 and in Toronto,
Ontario on April 2, 1992.

DECISION

There are four individual grievances (Exs 1A to 1D) each dated September
16, 1988. The substance of those grievances, all of which are addressed to
C. Asimi, are set out below:

Ex. 1A
(File No. 88C558)

I grieve that the College violated Article 11, the grievance
article, when you refused to meet with me to hear three complaints.

As a remedy I seek an apology and meetings.

Ex. 1B
(File No. 88C559)

I grieve that the College has violated Article 2 of the Collective Agreement.

As a remedy I seek that the College issue a declaration that I am a full time teaching master in the Radiology Program and that they rescind their letter of August 30, 1988 and immediately provide me with all the consequential relief owing to me.

Ex. 1C
(File No. 88C557)

I grieve that the College has given an improper layoff notice.

As a remedy I seek a declaration that I am a regular full time member of the bargaining unit and I seek all consequential relief.

Ex. 1D
(File No. 88C560)

I grieve that the College has violated my rights when it failed to accord me salary including overtime and interest, vacation, seniority and other benefits from Nov. 5, 1985 to the present.

As a remedy I seek immediate payment of all money and benefits owing to me.

In addition there are two Union grievances (Exs. 5A & 5B) filed on August 23 and 29, 1988. They are set out below:

Ex. 5A
(File No. 88C589 dated August 29, 1988)

Local 110 grieves that the College has violated the Collective Agreement when it designated a lay off of C Begart when a full complement position exists and will continue to exist in the Radiography program.

As a remedy the Union seeks that the College rescind the lay off and declare that the teaching position is full-time and that the teacher is Christine Begart

Ex. 5B
(File No. 88C590 dated August 23, 1988)

Local 110 grieves that the College has violated Article 8 when no meetings were held with the Union prior to their claimed termination of C. Begart in April 1988.

As remedy the Union seeks a declaration that Ms Begart is a full time teaching master as set out in the arbitration award of July 22, 1988.

There are objections to arbitrability on all of the grievances. They will be dealt with in due course.

These grievances have had a tortured path to this hearing. This is one of the most unusual situations that we have ever seen, and trying to sort out the matter is almost like trying to unmake an omelet. In view of this, some background as to how these grievances came to be before this board of arbitration is appropriate.

After five days of hearing, which began in December 1986 and ended in May 1988, a board of arbitration chaired by Arbitrator Kates (hereinafter referred to as the Kates board) issued a unanimous award dated July 22, 1988 which dealt with two grievances regarding the grievor. The Kates board found that the grievor was hired as a sessional employee of the College in November 1984, and that she became a full-time employee and member of the bargaining unit one year later. On July 22, 1988 the Kates board ordered that dues be remitted to the Union for the period "effective November 5, 1985 to the present" (see page 40 of Ex. 2A).

The Kates board was not told that effective April 25, 1988 the grievor had been "allegedly terminated" (see page 2 of Ex. 2B) until it reconvened to deal with remedial matters on May 2, 1989. When it reconvened to deal with those remedial matters, it re-affirmed its declaration and ordered the College to pay the dues up to July 22, 1988, for reasons that are dealt with in full in that award.

On September 8, 1989 the four grievances (Exs. 1A to 1D) were to be dealt with by a board of arbitration chaired by the chair of the present board.

The parties agreed to submit a single issue to me sitting as a sole arbitrator. That issue was whether the Kates board had determined the legal issue of the grievor's status at least up to July 22, 1988 so as to bind the parties. At that time the College had applied for judicial review of the Kates board's awards, but the matter had not yet been heard. In an award issued on September 15, 1989 I found that "the issue of the grievor's status prior to July 22, 1988 cannot be raised in the proceedings before me" (see page 11 of that award).

On June 21, 1990 the Divisional Court judicially reviewed the Kates board's awards of July 22, 1988 and June 20, 1989. On July 13, 1990 the Court issued its order "quashing the decisions of the Kates Board of arbitration insofar as either of them purport to grant a remedy which extends beyond April 25, 1988" (see page 11 of the decision). Leave to appeal was denied.

The history of the grievor's employment, at least up to April 25, 1988, was set out in the original Kates board's award (Ex. 2A) at pages 6 to 30. The essential accuracy of that history is not disputed. At the time that the grievor was hired the three Windsor hospitals were part of the Windsor School of Radiography, which they had formed for the purpose of training students. The Windsor School of Radiography was disbanded effective April 25, 1988. According to the finding of the Kates board, which was not disturbed by the Divisional Court, the grievor was hired by the College as a College employee to teach College students at the Windsor School of Radiography.

The grievor continued to have students at all three Windsor hospitals up to April 25, 1988. Prior to that she had heard of the College's concern that the Radiography Program in Windsor would not be accredited if the system being employed was continued. She was aware of the concern that the weakness

in the system was that the students were not getting sufficient time with her as the clinical instructor if she was covering three different hospitals. It would appear that this concern was never directly conveyed to her by any member of the College management.

On April 7, 1988 the grievor received a letter from Harold Corbett, Technical Director, Department of Diagnostic Imaging at the Metropolitan General Hospital in Windsor. That letter (Ex. 7) is set out below:

Mrs. Christine Begert
Clinical Instructor
Windsor School of Radiography

Dear Christine:

I am sorry to inform you that, as of April 25, 1988, your position as Clinical Instructor in the Windsor program will end. As I am sure you are aware that each of the three participating hospitals will be making arrangements to provide their own clinical instructor.

Your efforts in fulfilling the role of clinical have been greatly appreciated. I am sure that the students you have instructed have greatly benefitted from your experience and skill.

I will arrange to "pay out" your existing holiday bank. If I can be of any assistance, please don't hesitate to contact me.

Three people were indicated as having been sent copies of the letter. None of them were College people. Mr Corbett was not employed by the College in any capacity.

The grievor subsequently sent resumes to the Metropolitan General Hospital and to the Grace Hospital, both in Windsor. She was accepted to fill the vacancy at the Metropolitan General Hospital for a part-time clinical instructor. She was offered that position by someone employed by Metropolitan General Hospital, and she communicated acceptance to someone employed by that hospital. She testified that a paycheque was essential to her survival, and that she had no intention of resigning from the College. At that time the

Kates board had not yet released a decision and was still holding hearings regarding her status. On April 10, 1988 the grievor wrote to Patricia Kirkby, the Dean of Health Sciences at the College (Ex. 8). The body of that letter is set out below:

I have been given a letter by Mr Corbett informing me that my position as Clinical Instructor in the Windsor School of Radiography will end as of April 25, 1988.

I would also like to inform you that I have accepted a part time position as Clinical Instructor of the Metropolitan General Hospital Diagnostic Imaging Department starting date - April 25, 1988.

The grievor testified that she wrote the above letter because she needed the money and had been told that the only way to continue to be paid was to apply for one of the vacancies in the hospitals. There is no indication that any member of the College's management had ever communicated this to her. The grievor said that she had no intention to resign from the College or to abandon her grievances, which were still being heard by the Kates board when she wrote Exhibit 8. Dean Kirkby testified that she did not consider the grievor's letter to be a letter of resignation because when she received it the College did not consider the grievor to be an employee. The letter was never responded to by either Dean Kirkby or the College as it would have been had it been treated as a letter of resignation.

The grievor had always been paid by cheque issued by the Metropolitan General Hospital. This did not change after April 25, 1988. The grievor had always reported to a number of different people, including Mr Corbett. She testified that after April 25, 1988 she reported to Mr Corbett, to Christine Asimi, the Chair of the Radiography Program, and to Susan Chalmers, the Co-ordinator of the Radiography Program at the College and a bargaining unit member.

Prior to April 25, 1988 the grievor worked at all three Windsor Hospitals and had two College students at each hospital. Beginning April 25, 1988 she had two College students and worked exclusively at the Metropolitan General Hospital. From April 25, 1988 to December 31, 1988 the grievor's working relationship with the College's students did not change from what it had been prior to April 25th. The grievor's working relationship with the College did not change during that period either, nor did the work which she performed. The only changes in her work were that her hours were reduced from 37.5 to 20 per week, the number of students decreased from six to two, and she worked at one location rather than three. Prior to April 1, 1988 she had received \$17.42 per hour, and after that she received \$19.1108 per hour. All of her travel expenses when she travelled to London to visit the College for the thrice yearly clinical instructors' meetings were handled through Ms Asimi's office. Clinical instructors' meetings are held at the College for all instructors at all hospitals where the College places Radiography students, and the College pays for their travel expenses to London.

The grievor continued to work with students at the Metropolitan General Hospital until the end of August 1990. Between April 25, 1988 and August 31, 1990 she always worked 20 hours per week. She set her hours and arranged with Mr Corbett for coverage when she would not be at the hospital. The grievor could not say for sure whether the College paid for anything other than her travel expenses to attend the clinical instructors' meetings after April 25, 1988. No one employed by the College gave the grievor any direction after April 25, 1988. Her dealings with Ms Chalmers were regarding student reports, marks, exams, etc. The College never provided the grievor with any formal evaluations after April 25, 1988.

The grievor could not say why she had not grieved the letter from Mr Corbett (Ex. 7). She confirmed that the only communication which she had with the College management after receiving that letter was the letter which she sent to Dean Kirkby (Ex. 8). The grievor also confirmed that the first grievances she filed were Exhibits 1A to 1D, and that she was communicating with Paddy Musson, the Local Union President, throughout this period.

Evidence was also heard from Edythe Ann Fleming, a teaching master at the College, who teaches in the School of Nursing. She testified that as a nursing instructor she has done full-time clinical instruction in a hospital setting, and confirmed that the summary of her evidence set out at pages 27 to 29 of the first Kates board award (Ex. 2A) was accurate. She also testified that the job classification document reproduced on pages 17 and 18 of that award contained nothing that could not equally apply to her work. Ms Fleming testified that by "'in-room' instruction", referred to in item 2 on page 17 of Exhibit 2A, she meant classroom teaching which she did in the hospital setting, as well as supervision. She also said that as a clinical instructor in 1988 she was not administering and marking tests, although she might have done that in the late 1970's or early 1980's (see item 3, p. 17, Ex. 2A). Regarding item 4, page 17, Exhibit 2A, Ms Fleming said that she arranged with the department heads for individual rotations for students for special learning. She also said that in 1988 she was not ensuring that students received five hours of classroom time per week. Regarding item 5, page 17, Exhibit 2A, Ms. Fleming said that she had daily conferences with the students but did not do radiography film critiques. She indicated that she would not do radiography lectures but would on occasion have lectures. Ms Fleming also indicated that most often her conferences with the students were one hour

long, except on Monday when they were three hours. Regarding item 7, page 18, Ex. 2A, Ms Fleming testified that she did not participate in Radiography committee meetings and did not participate in hospital employee meetings. She said that she interpreted the reference to "clinical liaison meetings at Fanshawe College" as joint meetings with College and hospital personnel involved in clinical training, and she did participate in those for the purpose of jointly planning the student learning experience. Regarding item 10, page 18, Exhibit 2A, Ms Fleming stated that her professional development activities did not have to be approved by the hospital.

Dean Kirkby testified that a nursing clinical instructor will have 9 or 10 students in a clinical unit for a full shift each day. During that period the instructor is responsible for all patient care delivered by the students, as well as the for the teaching/learning process that occurs in the delivery of the care. She said that student nurses are never in a hospital setting without an instructor except during their pre-graduation experience. Dean Kirkby said that the Radiography Program is much more structured because there are very special procedures to which the student must be exposed. She said that those students work with hospital staff a great deal and will do shift work without any teacher supervision. According to Dean Kirkby, the clinical instructor is responsible for co-ordinating experiences and for ensuring that students get the appropriate experience; in addition, the clinical instructor is involved in planning lectures, organizing educational sessions, and administering examinations, none of which are done by the nursing clinical instructors.

Paddy Musson, the Local Union President, testified that she first became aware of Exhibits 7 and 8 sometime in the fall of 1990 when she met with the

grievor and counsel. She also said that prior to April 7, 1988, when Exhibit 7 was written, she had not been aware of any meetings with the College to discuss the question of the disbanding of the Windsor School of Radiography. She also said that she first became aware that the grievor was moved to only one hospital on the morning of the last day of the Kates board's first set of hearings, May 18, 1988. She was first made aware of the College's intention to lay off the grievor on or about August 23, 1988. It was her understanding at the time that the College still intended to send Radiography students to Windsor, and that there were no other cuts that would account for the College's decision to lay off the grievor.

On August 30, 1988, roughly one month following the release of the Kates board's first decision (Ex. 2A), the College sent the grievor the following letter (Ex. 4) over the signature of Barry Moore, the President:

The College takes the position that any employment relationship which may have existed with you ceased no later than 1988 04 25 when your employment with the Windsor School of Radiography terminated and you accepted other employment with the Metropolitan General Hospital.

Without prejudice to the above position and in order to preclude any future question as to your status, be advised that you are laid off effective 1988 11 30. As you are not on salary with the College, no payment of any sort will be associated with this layoff notice period.

Ms Musson said that prior to September 16, 1988, when grievance Ex. 1A was filed, she had taken steps to try to arrange an Article 11 meeting by speaking to Dean Kirkby after having been told by the grievor that she could not get a meeting with her supervisor. The grievor had arranged a meeting with Ms Asimi, but the meeting had been cancelled. She said that the College was taking the position that the grievor was not an employee just as if the Kates board had not issued an award. It was agreed that both the Union and

the College were aware that the grievor would continue to do whatever she was doing after November 30, 1988. The College had no plans to stop sending students to the Metropolitan General Hospital after November 30, 1988, and after November 30, 1988 the grievor served as the clinical instructor for those students.

Dean Kirkby testified that the Colleges became involved in teaching medical technology programs in 1973. Previously those programs had been taught either in hospitals or in regional schools. She said that after 1973 theory was taught in the Colleges and the practical clinical portion was taught in the hospitals. Since 1973 funding for those programs has come from the Ministry of Colleges and Universities rather than from the Ministry of Health. Also since then the Colleges have been purchasing services from hospitals by negotiating an amount per student to cover the clinical portion.

She said that in the Nursing Education Division professors from the College go to the hospitals to supervise nursing students. Their responsibility is generally to do clinical teaching, but they can also have other responsibilities, such as teaching lab course or theory, etc. She indicated that the hospitals have no authority over the nursing clinical teachers, who report to the Chair of Nursing Education. Any complaint the hospitals have about a nursing instructor must be made through the Chair of Nursing Education, and the hospitals have no authority to dismiss a nursing instructor.

Dean Kirkby testified that there are several different disciplines in the Health Technology Division, one of which is Radiography. She said that when students from Health Technology programs are placed in a hospital no professor from the College accompanies them. She said that the hospitals have clinical instructors on site to deal with the College students. According to Dean

Kirkby the Radiography instructor is responsible for ensuring that the students are exposed to appropriate learning experiences as determined by the curriculum, and for ensuring that the objectives of the clinical year are met. She said that the clinical instructor is also responsible for evaluating student performance, and for liaison with other hospital staff. Her evidence was that the clinical instructor is supervised by someone in the hospital, and the College has no authority over that instructor.

Dean Kirkby said that, apart from the grievor, in her experience the College has never before been involved in hiring a clinical instructor in the medical technology programs. She said that the College has no input into the amounts paid to the clinical instructors or the benefits received by them. She also testified that the College employs no one to do clinical instruction in medical technology courses in hospitals.

The College does not set the curriculum for the Radiography students. The Canadian Association of Medical Radiation Technologists is the certifying body for Radiography Technologists, and it sets the course of study for those students. When the students are in the clinical placements, they are not supervised by the College. The College is responsible for ensuring that the clinical program is implemented as identified in the syllabus published by the CAMRT, and does this through the office of the Program Co-ordinator. The Co-ordinator is a College employee who has no power to supervise or to instruct the clinical instructors.

The College holds clinical instructor meetings which are vehicles for clinical instructors from the clinical agencies to meet and discuss matters of common concern. They are also the main vehicles by which the College ensures that the clinical portion of a program is going as it should and that it

reflects the curriculum.

In 1987, when Dean Kirkby began at the College, the Windsor program was operated under the Windsor School of Radiography using three hospital sites and using the grievor as the only clinical instructor. The Canadian Medical Association conducted an on-site survey of the Windsor situation in connection with accreditation of the program in October 1986, and released its report on March 17, 1987 (Ex. 13). The report indicated that there were problems with having one clinical instructor and students at three sites. At page 3 it said the following:

A more satisfactory alternative arrangement would be a full-time employee with part-time clinical instructor responsibilities in each hospital to ensure a truly satisfactory clinical experience for the students.

There are problems inherent in the present arrangements. It appears that a desirable level of clinical training for eight students in three hospitals cannot be maintained under the present system. The clinical training program in Windsor needs an in-depth re-evaluation.

Dean Kirkby said that neither she nor the College had the authority to disband the Windsor School of Radiography. She met with representatives of the three Windsor hospitals in May and June 1987, and they reached an agreement to operate the Radiography Program using three independent sites with a part-time instructor at each site. As we have already noted, the Windsor School of Radiography was disbanded on April 25, 1988. Following that date there was no position of Clinical Instructor at the Windsor School of Radiography, and the College commenced placing students at each of the three Windsor hospitals rather than at the Windsor School of Radiography.

The College was not involved in the hiring of any of the three part-time instructors which the Hospitals installed to deal with clinical instruction. The only contact Dean Kirkby had with the grievor was by letter (Ex. 8). At

that time Dean Kirkby did not consider the grievor to be an employee of the College.

Dean Kirkby said that she first learned that the grievor was a College employee was when the Kates board released its first award (Ex. 2A) on July 22, 1988. She said that after April 25, 1988 there was no position in the College for the grievor as a clinical instructor. She said that the College played no role in the grievor's hiring by Metropolitan General Hospital, and played no role in setting the terms of her employment there. She said that following April 25, 1988 the College has treated the grievor no differently than it has any clinical instructor employed by an outside agency. She said that in August 1988, when the grievor was laid off, there was no position in the College available for her. Dean Kirkby also said that in August 1988 there were two faculty members who were junior to the grievor, but she did not believe that the grievor had the competence and skill to bump either of them.

To complete the record, we will reproduce the correspondence filed as Exhibits 3A to G, which relates to the individual grievances, Exhibits 1A to 1D:

Ex. 3A - Letter dated Sept. 20, 1988 from P. Myers, Director Human Resources to the grievor

We understand that you recently attempted to arrange a complaint meeting under article 11 with C. Asimi. This letter will confirm that the College takes the position that you are not an employee of the College and you do not have an immediate supervisor at the College. Therefore, we will not be conducting a complaint meeting under article 11.

However, without prejudice to the College position regarding your employment status, a member of this department will be made available to meet with you to discuss your concerns. Please contact us at 452-4246 should you wish to arrange such a meeting.

Ex. 3B - Letter dated Sept. 22, 1988 from P. Myers, Director Human Resources, to the grievor

We have today received your four memos of grievance. It appears that you would not yet have received our letter dated 1988 09 20 (copy attached) in which we state our position in response to your request for a complaint meeting.

Our position and our offer still stand. Do you wish to proceed with meeting described in the second paragraph of our attached letter?

Ex. 3C - Letter dated Sept. 26, 1988 from the grievor to P. Myers, Director Human Resources

I am in receipt of your letter of September 20, 1988. I will be happy to meet with the College, when the College makes available those persons specified in article 11.

Ex. 3D - Letter dated Oct. 6, 1988 from P. Myers, Director of Human Resources, to the grievor

We are in receipt of your letter of 1988 09 26. Our position remains as previously expressed to you. We will not be arranging meetings under article 11 or article 4. Our offer to make a member of the Human Resources staff available to meet with you still stands.

Ex. 3E - Memo dated Oct. 31, 1988 from B. Moore, College President, to the grievor

The following is without prejudice to our position that you are not an employee of the College and therefore you do not have a right to access to the grievance procedure.

We note that the above-mentioned grievances have not been referred to the next step of the grievance procedure in the manner required by article 11 of the collective agreement. The College takes the position that the referral provisions are mandatory and that failure to comply constitutes abandonment of these grievances.

Ex. 3F - Memo dated Nov. 1, 1988 from P. Musson, Local Union President, to B. Moore, College President

Due to the College's refusal to meet any of the requirements of the grievance procedure we are, at the request of Christine Begert, sending all her individual grievances to arbitration.

Ex. 3G - Memo dated Nov. 2, 1988 from B. Moore, College President, to P. Musson, Local Union President

The following is without prejudice to our position that Ms Begert is not an employee of the College and therefore does not have the right

to access the grievance and arbitration procedures.

We have received your memo dated 1988 11 01 in which you advise that Ms Begert has requested that her grievances be referred to arbitration. You will have received a copy of our memo dated 1988 10 31 in which we put Ms Begert on notice that we consider her grievances to have been abandoned.

The purpose of this memo is to put the Union and Ms Begert on notice that the College reserves the right to object to the jurisdiction of a board of arbitration to hear these grievances on the ground that by application of the collective agreement these grievances are deemed to have been abandoned.

We will also reproduce the correspondence (Exs. 6A to 6F) which relates to the Union grievances (Exs. 5A & 5B):

Ex. 6A - Memo dated Sept. 9, 1988 from P. Myers, Director Human Resources, to P. Musson, Local Union President

This memo is in response to your policy grievances dated 1988 08 23 and 1988 08 29 which were discussed at Step 1 on 1988 09 06. The following is without prejudice to any position the College has or may adopt with respect to the status of C. Begert or to our settlement offer dated 1988 08 30.

I understand the Union position in the grievance dated 1988 08 23 to be that the College failed to hold the meeting(s) mentioned in article 8.04. As remedy you seek a declaration that Ms. Begert is a full-time employee of the college.

I understand the union position in the grievance dated 1988 08 29 to be that the work now being conducted by C. Begert continues unchanged since 1988 04 25, and that in the absence of the reduction or elimination of such work, it must be carried out by a member of your bargaining unit, namely Ms. Begert.

It is the College view that layoff was unnecessary. At the time Ms. Begert was informed of the dissolution of the Windsor School of Radiography and that her employment ceased to exist. Ms. Begert informed the College of those events and advised us that she had accepted alternate employment. We are of the opinion that Ms. Begert thereby quit any employment relationship she might have had with Fanshawe College.

The arbitration award found Ms. Begert to be a Fanshawe employee on technical grounds. Her position was not a staff position. When the hospitals decided to dissolve the Windsor School of Radiography and to hire their own clinical instructors, her employment simply ceased to exist. She accepted this. We believe the union was aware of these facts at the time and cannot complain of them at this late

date. Fanshawe College was not aware in April that Ms. Begert had any employment status. Accordingly no planned reduction occurred.

The College takes the position that these grievances are untimely, that they are not the proper subject matter of policy grievances and no violation of the collective agreement has occurred. In any event, the layoff meeting(s) complained of have now occurred.

In the circumstances both grievances are denied.

- Ex. 6B - Memo dated Oct. 31, 1988 from B. Moore, College President, to P. Musson, Local Union President

The following is without prejudice to our position regarding the status of C. Begert.

We note that the above mentioned grievances have not been referred to the next step of the grievance procedure in the manner required by article 11 of the collective agreement. The College takes the position that the referral provisions are mandatory and that failure to comply constitutes abandonment of these grievances.

- Ex. 6C - Memo dated Sept. 16, 1988 from P. Musson, Local Union President, to B. Moore, College President

I am in receipt of Mr Myers' memo regarding our grievances on Christine Begert's improper layoff and the failure to hold an 8.04 meeting at the time of her alleged layoff.

While consistent with the College's treatment of her I find the response unacceptable and request a Step Two meeting if there is any possibility that we can resolve this matter.

- Ex. 6D - Memo dated Nov. 3, 1988 from P. Musson, Local Union President, to B. Moore, College President

I received your response to our Union grievances on Begert. Please check your file for the enclosed memo.

Should you not intend to have a Step Two meeting please regard this memo as a referral of our grievances of Aug. 23 and Aug. 29 to arbitration.

- Ex. 6E - Memo dated Nov. 10, 1988 from B. Moore, College President, to P. Musson, Local Union President

Your memo dated November 3rd was received together with a photocopy of your memo dated September 16th. I feel bound to tell you that I did not receive the September 16th memo earlier and that the first time I saw it was when the attached arrived at my office on November 7th.

The College position remains as expressed in our memo of Oct. 31st.

Ex. 6F - Memo dated Nov. 12 1988 from P. Musson, Local Union President, to
B. Moore, College President

I am in receipt of your memo of Nov. 10 regarding our policy grievance on Begart.

Both grievances are referred. The content of your memo shall be addressed at arbitration.

To further complicate matters the Union filed grievances relating to the status of the clinical instructors employed at Grace Hospital and at Hotel Dieu Hospital in Windsor alleging that the Hospital was unlawfully contracting out bargaining unit work (see Exs. 9A and 10A). Those grievances were ultimately withdrawn (see Exs. 9B and 10B).

Before proceeding further, it would be prudent to deal with the objections to arbitrability which have been made in relation to all of the grievances:

The relevant provisions of the collective agreement in force at the time are set out below:

8.04 When a College plans to lay-off or to reduce the number of full-time employees who have completed the probationary period, or plans the involuntary transfer of such employees to other positions than those previously held as a result of such a planned lay-off or reduction of employees the following procedure shall apply:

(a) The College will notify the Union Local President of the planned staff reduction and the courses, programs or services affected;

(b) Within seven calendar days of the receipt of such notification, the College and Union Committees shall meet for the purpose of the College advising of the circumstances giving rise to the planned staff reduction and the employees affected;

(c) If requested by the Union within three calendar days following the meeting under subsection (b), the College and Union Committees shall meet within seven calendar days of receipt of such request for the purpose of discussing the planned staff reduction, the circumstances giving rise to the reduction, the basis for the selection of the employees affected and the availability of

alternative assignments.

It being understood that the College reserves the right to determine the number and composition of full-time, partial-load and part-time or sessional teaching positions, the College shall give preference to continuation of full-time positions over partial-load and part-time or sessional teaching positions subject to such operational requirements as the quality of the programs, their economic viability, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community.

...

(f) When a College decides, following such meetings to proceed with a lay-off of one or more employees who have completed the probationary period written notice of lay-off of not less than ninety (90) calendar days duration shall be given to employees being laid off. If requested by the employee, a College representative will be available to meet with the employees within three (3) calendar days to discuss the basis of the College selection of the employees affected.

NOTE: The provisions of Articles 8.05 and 8.06, Appendix IX, remain in effect until August 31, 1988. On September 1, 1988 Articles 8.05 and 8.06 are replaced by those below.

8.05 When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where an employee has the competence, skill and experience to fulfill the requirements of the full-time position concerned, seniority shall apply consistent with the following.

(a) an employee will be reassigned within the College to a vacant full-time position in lieu of being laid off if the employee has the competence, skill, and experience to perform the requirements of a vacant position;

(b) failing placement under paragraph (a) above, such employee shall be reassigned to displace another full-time employee in the same classification provided that:

(i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned;

(ii) the employee being displaced has lesser seniority with the College.

(c) failing placement under paragraph (b) above, such employee shall be re-assigned to displace a full-time employee in another classification upon acceptance of the identical employment conditions as the classification concerned provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned;
- (ii) the employee being displaced has lesser seniority with the College.

(d) failing placement under paragraph (c) above, such employee shall be re-assigned to displace a partial-load employee (as referred to in Appendix II) or a part-time employee upon acceptance of the identical employment conditions as the partial-load or part-time employee concerned provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned;
- (ii) the partial-load or part-time employee being displaced has lesser months of service with the College as determined in both Appendix II and IV than such displacing employee's months of seniority;

(e) failing placement under paragraph (d) above, such employee shall be reassigned to displace a sessional employee (who has more than ninety (90) days remaining on the sessional employee's term appointment for the remainder of such sessional employee's appointment provided that the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned. Such a reassigned employee shall be laid off without further notice at the termination of the sessional appointment.

APPENDIX IX ARTICLES 8.05 AND 8.06

8.05 When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where the competence, skill and experience of employees to fulfill the requirements of the full-time position concerned are relatively equal, seniority shall apply consistent with the following:

- (a) an employee will be reassigned within the College to a

vacant full-time position in lieu of being laid off if the employee has the competence, skill, and experience to perform the requirements of a vacant position;

(b) failing placement under paragraph (a) above, such employee shall be reassigned to displace another full-time employee in the same classification provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position relatively equal to the employee being displaced;
- (ii) the employee being displaced has lesser seniority with the College.

(c) failing placement under paragraph (b) above, such employee shall be re-assigned to displace a full-time employee in another classification upon acceptance of the identical employment conditions as the classification concerned provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position relatively equal to the employee being displaced;
- (ii) the employee being displaced has lesser seniority with the College.

(d) failing placement under paragraph (c) above, such employee shall be re-assigned to displace a partial-load employee (as referred to in Appendix II) or a part-time employee upon acceptance of the identical employment conditions as the partial-load or part-time employee concerned provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position relatively equal to the employees being displaced;
- (ii) the partial-load or part-time employee being displaced has lesser months of service with the College as determined in both Appendix II and IV than such displacing employee's months of seniority;

(e) failing placement under paragraph (d) above, such employee shall be reassigned to displace a sessional employee (who has more than ninety (90) days remaining on the sessional employee's term appointment for the remainder of such sessional employee's appointment provided that:

the displacing employee has the competence, skill, and experience to fulfill the requirements of the position relatively equal to the employee being displaced. Such a reassigned employee shall be laid off without further notice at the termination of the sessional appointment.

8.08 (a) An employee claiming improper lay-off contrary to the provisions of this Agreement, shall state in the grievance the names of up to four (4) employees (of whom no more than three (3) shall be full-time) whom the employee claims entitlement to displace. The time limit referred to in Section 11.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

(b) If the grievance is processed through Step 2, the written referral to arbitration in Section 11.03 shall specify, from the names of such employees originally designated in (a) above, the name of only one full-time employee or two or more partial-load or part-time employees (the sum of whose duties will form one full-time position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of sub-paragraphs (a), (b), (c), (d) or (e) of Section 8.05.

11.02 Complaints

It is the mutual desire of the parties hereto that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate Supervisor within twenty (20) days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate Supervisor an opportunity of adjusting the complaint.... The immediate Supervisor's response to the complaint shall be given within seven (7) days after discussion with the employee.

11.03 Grievances

Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under Section 11.12(c)) in the following manner and sequence provided it is presented within seven (7) days of the immediate Supervisor's reply to the complaint....

Step No. 1

An employee shall present a signed grievance in writing to the employee's immediate Supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought. The immediate Supervisor shall arrange a meeting within seven (7) days of the receipt of the grievance at which the employee, the Union

Steward, if the Steward so requests, the Dean of the Division and the immediate Supervisor shall attend and discuss the grievance. The immediate Supervisor and Dean will give the grievor and the Union Steward their decision in writing within seven (7) days following the meeting. If the grievor is not satisfied with the decision of the immediate Supervisor and Dean, the grievor shall present the grievance in writing at Step 2 within fifteen (15) days of the day the grievor received such decision.

Step No. 2

The grievor shall present the grievance to the President of the College concerned. The President or the President's designee shall convene a meeting concerning the grievance at which the grievor shall have the opportunity to be present, within twenty (20) days of the presentation, and shall give the grievor and the Union Steward the President's decision in writing within fifteen (15) days following the meeting....

In the event any difference arising from the interpretation, application, administration or alleged contravention of this Agreement has not been satisfactorily settled under the foregoing Grievance Procedure, the matter shall then, by notice in writing given to the other party within fifteen (15) days of the date of receipt by the grievor of the decision of the College official at Step No. 2, be referred to arbitration as hereinafter provided.

11.05 General

(a) if the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

(b) if an official fails to reply to a grievance within the time limits set out at any Complaint or Grievance Step, the grievor may submit the grievance to the next Step of the grievance procedure.

11.10 Union Grievance

The Union shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of persons in the bargaining unit.

Such grievance shall be submitted in writing by the Union

Grievance Officer at Head Office or a Local President to the Director of Personnel or as designated by the College, within twenty (20) days following the expiration of the twenty days from the occurrence or origination of the circumstances giving rise to the grievance commencing at Step NO. 1 of the Grievance procedure set out above.

11.12 Definitions

- (a) "day" means a calendar day;
- (b) "Union" means the Ontario Public Service Employees Union;
- (c) "grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.

Let us deal first with the two Union grievances (Ex. 5A & 5B), where the College has objected that they are not proper Union grievances, and/or are untimely, and/or have not been properly processed through the grievance procedure. We have considered the submissions made by both parties regarding these objections. We were referred to Sir Sanford Fleming College and Ontario Public Service Employees' Union, (1988) unreported (Brent).

In Article 11.10 the parties have agreed on rather restrictive language regarding Union grievances. They have specifically agreed that "such grievance shall not include any matter upon which an employee would be personally entitled to grieve" unless the Union can establish "that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of persons in the bargaining unit". Exhibit 5A covers the same alleged violations as are dealt with in one or more of the individual grievances filed by the grievor. Hence the Union cannot establish that the employee concerned has not grieved. Moreover, leaving aside the question of whether this is a case where there is "an unreasonable standard that is patently in violation" of the collective

agreement, Exhibit 5A raises issues that are unique to the grievor and do not affect the rights of anyone else in the bargaining unit. As a consequence we find that Exhibit 5A is inarbitrable in that it is not a proper Union grievance as defined by the collective agreement.

Exhibit 5B complains that the meetings referred to in Article 8 were not held with the Union. Presumably this refers to meetings under Article 8.04. While this is something that the Union alone has the right to complain of, it is clear from the correspondence filed with us that the College did not claim that the grievor was laid off until August 30, 1988, one week after the Union filed the grievance. Therefore, the grievance cannot relate to the notice of lay off given the grievor. The grievance on its face complains of events which occurred in April 1988 and was not filed until August 23, 1988. Even allowing for a forty calendar day time limit, the most generous interpretation of Article 11.10, a grievance filed on August 23, 1988 would have to relate to events which happened no later than mid-July 1988. Therefore, the grievance on its face is untimely insofar as it refers to events in April 1988 that from the evidence the Union was clearly aware of at least on May 18, 1988. As has often been noted in other awards the time limits in this collective agreement are mandatory, and there is no statutory authority to vary them. Therefore, pursuant to Article 11.05 (a) Exhibit 5B must be considered to be abandoned.

All of the individual grievances (Exs. 1A to 1D) are dated September 16, 1988. We will deal with the preliminary objections in the order in which the parties dealt with them (Exs. 1C, 1D, 1B and 1A).

The College argued that Exhibit 1C was not properly referred through the grievance procedure in that it was never referred to Step 2, and that Article 8.08 (a) was not complied with. For the purpose of this preliminary

objection we will assume without so finding that the grievor was an employee of the College on the date that she received notice of lay-off, August 30, 1988.

We note that the College was throughout the grievance procedure taking the position that the grievor was not an employee, and was therefore refusing to hold the complaint meeting under Article 11. That position was taken on September 20, 1988 (Ex. 3A) and before the College was aware that the grievances had been filed (see Ex. 3B). On October 6, 1988 the College took the position that it would not hold any meetings pursuant to Article 11 (see Ex. 3D). Following that notification the grievor and the Union would be free, pursuant to Article 11.05 (b), to proceed to the next step in the grievance procedure. Assuming then that the grievor could move to Step 2, she would have twenty calendar days after October 6, 1988 to submit the grievance to the next step. The referral would then have had to take place sometime on or before October 26th or 27th. There was no such referral. Assuming then that the grievor could refer the matter directly to arbitration following the College's refusal to hold any meetings pursuant to Article 11, then the collective agreement provides that the referral must be made within fifteen days of the receipt of the Step 2 answer. The referral to arbitration was made on November 1, 1988, after the College had put the Union and the grievor on notice that it considered the grievance to have been abandoned because there was no referral to Step 2 in time, and well beyond fifteen days following the last answer the College had given to the grievance. With respect we consider that the referral to arbitration was too late.

As we have already noted, the parties have agreed in Article 11.05 (a) that if there is no compliance with the time limits at any stage of the

grievance procedure, the grievance will be considered to have been abandoned. There is no statutory provision which would allow us to vary time limits. These parties are not strangers to the grievance procedure, and we know of no reason why the grievance was not simply carried forward. We therefore find that Exhibit 1C is inarbitrable.

The same objection was made in relation to the other individual grievances. In view of our finding in relation to Exhibit 1C, we must find that the other grievances are also inarbitrable pursuant to Article 11.05 (a).

In the event that we are wrong in our conclusions regarding arbitrability, let us make some observations concerning the fact situation that was put before us. The grievor was put in the unenviable position of not having her employer determined until after she learned that her job was disappearing. The College was quite clearly caught off guard when the Kates board found that the grievor was its employee, and then matters progressed from bad to worse. It would certainly appear to us that the parties did not do much to try to sort out the situation.

If we were to make a finding regarding the grievor's status on April 25, 1988 when the Windsor School of Radiography was dissolved, we would find that she was still a College employee. Her letter to Ms Kirkby was not regarded as a resignation by the College simply because the College did not then regard the grievor as an employee. The College cannot create a resignation after the fact once it has taken the position that there was no resignation because none was needed. Therefore, the grievor remained an employee of the College, albeit one without duties and receiving no pay on April 25, 1988 and thereafter unless and until the College or the grievor did something to end the relationship.

There is no rule of law that says that a person cannot have more than one employer. We would have found that the grievor became an employee of Metropolitan General Hospital as a part-time clinical instructor on April 25, 1988. She gave the College notice of this, and the College made no objection. Therefore, she could be considered to have taken another job with another employer with the knowledge and consent of the College.

We would also have found, as a matter of fact, that the College ended its direct involvement in placing an instructor in the clinical Radiography Program when the Windsor School of Radiography was dissolved. Therefore, the job for which the grievor was hired by the College, that is as the full-time clinical instructor at the Windsor School of Radiography, disappeared on April 25, 1988. The College should have decided the grievor's future then. That it did not make a decision was no doubt related to its belief that the grievor had never been its employee. When it learned of the finding that the grievor's status as its employee had been determined, it then made a determination to lay off the grievor.

At the time of that determination, we would have to find as a fact there was no College job of clinical instructor in Radiography in Windsor. Therefore, the grievor should have been considered under the lay-off provisions in a manner consistent with her competence, skill, experience, and seniority. If there was no College job for her to claim, then she would have recall rights pursuant to the collective agreement, and after those expired, she would have lost her seniority. Under the circumstances of this case, it is impossible to determine if the grievor could have claimed any position in the College because there never was any such position identified as required by the collective agreement.

It is difficult in this situation not to feel distressed at what has occurred. The grievor was caught in an unenviable situation not of her own making which became virtually unresolvable as the parties tried to protect their positions following the Kates award. If there ever was any remedy for her at all, probably the most that we could have done under the collective agreement was to have the parties turn the clocks back to the time around November 1988 and to determine whether the grievor could have exercised any bumping rights then.

In any event, and for the reasons already set out above, we have found that all of the grievances are inarbitrable.

DATED AT LONDON, ONTARIO THIS 4th DAY OF September, 1992.

Gail Brent

Gail Brent

I concur / ~~dissent~~

4 *George Campbell* JB

George Campbell, College Nominee

I ~~concur~~ / dissent

DISSENT TO FOLLOW

4 *Joe McManus* JB

Joe McManus, Union Nominee