

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAWE COLLEGE

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF THE UNION GRIEVANCE: RE RICK BURJAW  
OPSEU FILE NO. 311079; OPSEU REFERENCE NO. 2003-0110-0079

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR  
ROBERT J. GALLIVAN, COLLEGE NOMINEE  
EDWARD SEYMOUR, UNION NOMINEE

APPEARANCES FOR THE COLLEGE:

Robert J. Atkinson, Counsel  
Michele Parkin, Staff Relations Consultant

APPEARANCES FOR THE UNION:

Peggy E. Smith, Counsel  
Tom Geldard, V.P. L. 110  
Gary Fordyce, Chief Steward

A FURTHER HEARING IN THIS MATTER WAS HELD AT LONDON ON  
OCTOBER 6, 2004.

INTERIM AWARD

In the Board's award dated August 17, 2004, the Majority found that teaching assignments of:

“other Partial-Load employees in that Division at the time of reference is therefore relevant to that issue which is the gravamen of the grievance referred to this Board”.

The Board also stated at that page,

Whether the period of reference for one term is sufficient for the Union to meet the onus is not a preliminary issue for the Board to now resolve but may be considered with the merits of the grievance.”

The College raised a further preliminary issue at this hearing on which the Board was requested to rule before proceeding with the merits of the grievance, that the Union is seeking to expand the temporal scope of the grievance beyond the Winter Term of 2003. As the Union has made new allegations as to its allegation that there was a full-time position in the Business Division and seeking to look back to the Fall Term of 2001, continuing through to the winter term of 2003 as well as evidence of staffing following that term, it is the College position that the Union is restricted to the grievance as filed and the Board should proceed on that basis and consider only the circumstances of the one-term of concern which is in the Winter Term in 2003. It is the

submission of the College that the Union seeks to widen the scope of the grievance which should not be allowed.

The Board did not in its previous award deal with the period of reference of one-term only or whether it would admit the evidence sought to be introduced by the Union both before and after the Winter Term in 2003. The Union intends to produce evidence of work schedules in the Business Division both before and after the Winter Term in 2003 to show that a full-time position existed in that term. The preliminary issue raised by the College at this hearing is its concern as to the scope of the grievance in that the Union in its submission widens the dispute in the grievance and the evidence which the Board would allow to be introduced in this matter. Following the submissions of Counsel, the Board reserved its decision without dealing with the merits of the grievance. This award therefore concerns only this preliminary issue being necessary to resolve for the purposes of preparation and presentation of the case by the parties prior to proceeding with the merits of the grievance.

The College's position is that the Union seeks to expand the scope of the grievance beyond the Winter Term 2003 by alleging that there were full-time positions since the Fall Term of 2001. The focus of the Rick Burjaw claim in this grievance has been the assignments in the Winter Term of 2003 as indicated in the Step II response by the College to this grievance when it was recorded that the Union requested information to the Winter 2002/03 Term. The Union therefore should be restricted to the grievance as filed and the Board should not admit this form of evidence of the staffing situation in the Business Division prior to the Winter Term 2003 and

to use that evidence to determine if there was a full-time position in that term to which the grievance is directed.

It was further submitted that it was beyond the Board's jurisdiction to look at and consider staffing in the Business Division both prior to and following the Winter Term of 2003. The grievance was not treated as a continuing grievance but concerns on its face only what occurred in that Winter Term when it is to be determined by the Board if there was a breach of the Collection Agreement by the College. The Union should not be permitted therefore to widen the scope of the grievance to use the evidence of teaching assignments prior to and after that Winter Term to determine that there was a full-time position at that time as such evidence is not relevant to that issue. It was submitted that the Union's evidence should be confined to the four-month period of the Winter Term to determine if there was then a breach of the Collective Agreement as it was that term that the Union chose to challenge as to the staffing on a single term basis and should be held to that method. The grievance is premised on one-term full-time position and should not be turned into a multi-term different basis which would be an abuse of the process. It is its position that the Board should restrict the evidence to the grievance as filed as set out in the Board's prior award.

The Union's submission is that the question of relevance of evidence involves its admissibility. The grievance under Article 2 is based on the identification of work and is a continuing grievance when at some point the evidence crystallizes to show that there was a full-time position in the Business Division. Evidence both prior to and after the Winter Term of

2003 is relevant to the Board to craft an appropriate remedy as well as to meet the Union's onus to demonstrate a breach of the collective agreement by the College. The Board is requested to rule that evidence is admissible in considering an award of a full-time position to a particular individual without which evidence the Board could not grant a full remedy. As set out in Arbitrator Knopf's award, the onus shifts to the College as soon as the Union demonstrates the existence of a full-time position and the evidence of the parties should not be restricted in that regard to the one Winter Term. The issue is not whether the Union seeks to widen the scope of the grievance but whether the evidence sought to be introduced by the Union is admissible based on its relevance. It is the Union's position that this is a continuing grievance and that it should therefore be allowed to lead evidence of the circumstances both prior to and following the Winter Term 2003. It was submitted that such evidence is relevant to the Board's consideration of an appropriate remedy. The Union requests the Board to rule that such evidence is available to the Union to produce in support of the merits of the grievance and the remedial issue.

The initial onus on the Union is to establish that there was a full-time position in existence in the Business Division in the Winter Term 2003 which is the allegation in the grievance. The Board has in its prior award found that:

“evidence of the teaching assignments of other Partial-Load employees in that Division at the time of reference is therefore relevant to that issue”

What may have occurred in that Division in the organization of staff both before and after the grievance is arguably relevant to the purposes of meeting the onus of the Union in the grievance. We do not conclude that the Union seeks to expand in this manner, the scope of the grievance which is confined to the Winter Term 2003 but rather the evidence sought to be introduced would have on the face of the submissions of the Union, sufficient relevance to the issue of whether a full-time position then existed and having regard to the terms of Article 2.02 that the Board should not exclude its use at the hearing. Whether the Board in consideration of the merits of the grievance, subsequently determines whether to give weight and use such evidence in its deliberations, is not the test of admissibility of this evidence. We are satisfied that the Union's submission discloses sufficient probative value of this evidence to allow its admission.

We find further that the admissibility of this evidence does not expand the issue to be decided by the Board. If the evidence supports a finding that there has been an on going alleged breaches of the Collective Agreement, the Board may conclude that this is a continuing grievance which could only be determined by the production of such evidence which the Union now proposes to lead. We have reference to the award in Re Sheridan College (November 1996, Schiff) where the majority of the Board found on the evidence that there had been continued breaches of the Collective Agreement by the College both before and after the grievance in which a violation of Article 2.03A. Having regard to the foregoing, the Board will

admit the Union's evidence to support its allegation that the grievance in this matter is continuing which issue relates to the evidence the Union intends to produce in the instant matter.

The Board further accepts the submission of the Union that evidence of the staffing in the Business Division following the Winter Term 2003, may have relevance to the remedial issue which will arise if the Board determines that there has been a breach of Article 2.02 by the College in the Winter Term 2003 as alleged by the Union in so far as formulating an appropriate remedy to this grievance.

For these reasons, the Board will admit the evidence sought to be introduced by the Union. The objection of the College to the Board's jurisdiction in this regard is thereby dismissed. The hearing will be continued to deal with the merits of the grievance.

DATED AT OAKVILLE THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2004

---

HOWARD D. BROWN, CHAIR

---

ROBERT J. GALLIVAN, COLLEGE NOMINEE

---

EDWARD SEYMOUR, UNION NOMINEE