

89D 874

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

- and -

NORTHERN COLLEGE

Re: Co-ordinator's Grievance

Before:	R. O. MacDowell	-	Chairman
	Jon McManus	-	Union Nominee
	David Guptill	-	College Nominee

Appearances:

For the Union:	Laura Trachuk, Counsel
	Richard Mason
	John Camp

For the College:	Ann E. Burke, Counsel
	R. Guindon
	J. Cotnam
	C. Westermann
	J. Le Noury

Hearing held in Timmins on March 13, 1991

A W A R D

I

This is a union grievance concerning the payment of the "coordinator's allowances" provided in Appendix A, Item 5 of the collective agreement. The union challenges both the elimination of those allowances at the end of the 1989 academic year, and the way in which they have subsequently been re-introduced.

A hearing in this case was held in Timmins on March 13, 1991. The parties are agreed that the board is properly constituted and has jurisdiction to hear and resolve the matters in dispute between them; however, the College takes the position that this dispute is not arbitrable as a "union grievance". The College asserts that any objection to the way in which these allowances are paid, must be pursued as a personal grievance by the individual teacher directly concerned.

The provisions of the collective agreement referred to in argument, or to which reference will be made, are as follows:

5. Allowances - Professors

...

(b) Coordinator Allowance - Coordinators are teachers who in addition to their teaching responsibilities are required to provide academic leadership in the coordination of courses and or programs. Coordinators report to the Academic Manager who assigns their specific duties. It is understood that coordinators do not have responsibility for the disciplining of teachers in the bargaining unit. It is

not the intention of the Colleges to require employees to accept the designation of coordinator against their wishes.

Those employees who are designated as coordinators will receive an allowance equal to one or two steps on the appropriate scale. Such allowance will be in addition to the individual's salary.

* * *

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.

* * *

4.01 (4)(c)(ix) Hours for curriculum review or course development assigned to a teacher on an ongoing basis, in lieu of teaching or in a non-teaching period, shall be attributed on an hour for hour basis and recorded on the SWF.

4.01 (6) Complementary functions appropriate to the professional role of the teacher may be assigned to a teacher by the College. Hours for such functions shall be attributed on an hour for hour basis.

4.02 (1)(b) The SWF shall include all details of the total workload including teaching contact hours, accumulated contact days, accumulated teaching contact hours, number of sections, type and number of preparations, type of evaluation/feedback required by the curriculum, class size, attributed hours, contact days, language of instruction and complementary functions.

4.02 (1)(f)(i) In the event of any difference arising from the interpretation, application, administration or alleged contravention of Article 4.01 or 4.02, a teacher shall discuss such difference as a complaint with the teacher's immediate supervisor. The discussion shall take place within fourteen (14) 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 teacher in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the teacher and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven (7) days after discussion with the teacher.

Failing settlement of such a complaint, a teacher may refer the complaint, in writing, to the Group within seven (7) days of receipt of the immediate supervisor's reply.

There is no list or definition of the duties of a "Coordinator"; however, the duties of a "Professor" include the following:

CLASS DEFINITION

PROFESSOR

Under the direction of the senior academic officer of the College or designate, a Professor is responsible for providing academic leadership and for developing an effective learning environment for students. This includes:

...

- (b) The teaching of assigned courses, including:
- ensuring student awareness of course objectives, approach and evaluation techniques;
 - carrying out regularly scheduled instruction;
 - tutoring and academic counselling of students;
 - providing a learning environment which makes effective use of available resources, work experience and field trips;
 - evaluating student progress/achievement and assuming responsibility for the overall assessment of the student's work within assigned courses.

- (c) The provision of academic leadership, including:
- providing guidance to Instructors relative to the Instructors' teaching assignments;
 - participating in the work of curriculum and other consultative committees as requested.

In addition, the Professor may, from time to time, be called upon to contribute to other areas ancillary to the role of Professor, such as student recruitment and selection, time-tabling, facility design, professional development, student employment, and control of supplies and equipment.

If this is what a "Professor" may be expected to do, a Coordinator, by implication, would be expected to do something else. Precisely what that "something else" might be, and how it should be rewarded, lies at the core of this dispute.

In order to fully understand this grievance, it is necessary to sketch in some background. The parties disagree about the application of the collective agreement, but they do not seriously debate either the nature or the dimensions of the underlying problem. For the purposes of this decision, we will accept the union's statement and characterization of the facts.

II

For some years, the College has had persons designated as "Coordinators", who received either the one-step or two-step salary allowance contemplated by the collective agreement. But there were no consistent standards for the appointment or payment level of Coordinators, nor any settled understanding about what the duties of a Coordinator might encompass. The situation varied from department to department; moreover, in the union's submission, some Coordinators were allotted extra time (in varying amounts) on their standard workload form ("SWF"), others were given no SWF time allocation, and, in any event, the time recorded on the SWF did not necessarily reflect the actual time required to perform the duties assigned. To complicate matters further, counsel asserts that after 1989, in individual departments, some of the functions formerly considered "Coordinator's" duties were performed by persons with the title "Facilitator" without extra payment (but with equally inconsistent SWF consideration), and in some cases the former "Coordinator" continued to perform the same functions without title, recognition, or payment.

The union concedes that there is no agreed definition for the duties of a "Coordinator", but maintains that to the extent that an individual was engaged in such functions, s/he

should be properly compensated, the duties should be reflected on his/her SWF, and if the total hours exceed 44, s/he must receive overtime. The union further contends that the College was not entitled to unilaterally eliminate the position and payment of "Coordinators" at the end of 1989, and could not avoid its contractual obligations by simply giving the coordinator's position another name. The union seeks a remedial direction which, inter alia, would return the situation to the status quo as at April 1989, and require the College to negotiate appropriate definitions, payment standards, and time allotments on the Coordinators' SWFs.

The College submits that it began to examine the use and payment of Coordinators in 1989, as part of a general reorganization following the appointment of a new President . Given the obvious anomalies and inconsistencies, the College decided to terminate all existing assignments at the end of that academic year, and have the Coordinators' functions (to the extent that they could be identified) performed by administrative staff pending a full review of the situation. Coordinators would then be designated for the programs that required them, and allowances allocated, uniformly, in accordance with the work performed.

In the Spring of 1989 all existing Coordinators were given notice that their assignments would terminate at the end of that academic year. The College then set about the task of re-assessing its needs. In a memo dated September 26, 1989, the College President explained its position this way:

During my consultations with staff and faculty of the College, the question of the role of coordinators was discussed. An examination of what was in place at the time, prior to the reorganization, showed the lack of a consistency; some coordinators received two steps, some one step, some received release time in addition to the stipend, others did not, some coordinated activities of a few people, others a large number of people.

A decision was made to establish a rational basis for determining the need for coordinators. The first step of the process was to level the playing field. All existing coordinator positions were ended and the Deans' Council was mandated to set the criteria that would identify the need for coordinators in specific programs.

That process has been established with the expectation that the outcome would be the restoration of necessary and appropriate coordinators. To date, the Health Sciences division has made its case for the need for coordinators, because of the heavy emphasis on the use of outside agencies as part of the curriculum. It is my understanding that the Deans' Council is willing to entertain any other division in the college to make its case, should such a need exist.

It appears that much of what you have requested as your "remedy sought" is already in process. It was never the intention to punish or discriminate against any group, but rather to establish an equitable process within the college.

I hope the above clarifies the College's position to your satisfaction.

(emphasis added)

It will be seen that the President's description of the situation is quite similar to that of the union.

In the Spring of 1989 there were approximately 13 Coordinators potentially affected by the proposed changes. None of those Coordinators has grieved, even though from his/her perspective the situation might have been characterized, variously as: a demotion, an inadequate payment for work done, an improper transfer of work to non-bargaining unit employees, a workload complaint, and so on. Instead, the union filed this grievance challenging the College's actions on a general basis.

The union claims that the blanket elimination of the Coordinators' designation, together with the reallocation or redefinition of their duties, is contrary to both Articles 4 and Appendix 1 of the collective agreement. In the union's submission, this was a general policy decision with consequences for a whole class of employees in the bargaining unit, and thus appropriately questioned in a "union grievance". The College replies that, whatever the merits of the union's complaint, it is a matter which cannot be pursued as a "union grievance", but rather must be dealt with, on a case-by-case basis, by individual grievances under either Article 4 or 11 of the agreement. The College asserts that as a matter of contract interpretation, this problem cannot be addressed as a "union grievance", because it does not meet the requirements of Article 11.10 and, as a matter of equity and efficiency, each individual coordinator's claim

should be assessed on its own merits, in the context of the particular work assignments and department concerned. The College contends that the designation or assignment of "Coordinators'" duties, is the exclusive prerogative of the College, which it may exercise, or not, on an individual basis, in accordance with its own assessment of departmental needs. That discretion is not subject to arbitral review at all, but, in any event, cannot be challenged through the vehicle of a union grievance. Counsel also argues that the board has no jurisdiction to direct the remedy requested (i.e. restore the status quo and negotiate appropriate definitions and payment criteria), and adds, parenthetically, that the very novelty of such relief indicates why this problem cannot be addressed as a union grievance, but only on a case-by-case basis, should individual teachers decide to grieve.

III

Unlike many collective agreements, this one quite clearly distinguishes between those matters which may be the subject of a "union grievance", and those which must be dealt with as an individual complaint. For the most part, it is the individual's responsibility to grieve circumstances which s/he feels may constitute a breach of the collective agreement. Where an individual employee is personally entitled to grieve, the independent role of the trade union is strictly limited to

situations where it can establish that "the employee has not grieved an unreasonable standard that is patently in violation of [the agreement] and that adversely affects the rights of persons in the bargaining unit".

The College actions here in issue were clearly matters "upon which an employee would be personally entitled to grieve". Accordingly, it is incumbent upon the union to demonstrate that it falls within the exception set out above. If it cannot do so, its grievance is not arbitrable, and the individual employees are left with such remedies as may be available to them by way of personal grievance. Similarly, to the extent that a teacher's complaint has a workload or SWF component, it must be pursued on an individual basis pursuant to Article 4.

Can the union overcome that hurdle in this case? We do not think so.

IV

It is obvious that this grievance does not involve any discrete set of facts, employment circumstances, work characteristics or payment criteria; nor can one glean much enlightenment from the terms of the collective agreement. In the union's own submission, the situation is different for each employee, there is no uniform practice or understanding, and the

agreement itself provides no guidance as to what a Coordinator's duties might encompass or how the College must exercise its right to designate Coordinators or assign duties pursuant to item 5(b). The clause merely stipulates that the assumption of such responsibilities will be voluntary and will attract additional compensation on a varying scale. It is implicit that a coordinator will have duties beyond those of an "ordinary" "professor", and that such "complementary work functions" should be recognized on the SWF, but there is no precise definition of such duties and no clear indication of which circumstances might warrant a one-step salary increment, and which might merit a two-step allowance. In fact, it is not even obvious that the specific duties assigned under the rubric of "academic leadership in the coordination of courses or programs" will be the same for various coordinators. And (so the union says) the College itself has not been consistent in this regard.

There is, in short, no contractual "standard", reasonable or otherwise which can be clearly identified, or against which the College's conduct (or the employees' salary entitlement) can be measured and there is no settled policy or practice to serve as a guideline either. Indeed, it was the very lack of such definitive and consistent standards which prompted the College's actions in the first place. Against that background, it is difficult to see how the union can claim that

there has been a failure to grieve an "unreasonable standard" that is "patently" in violation of the agreement. There is no standard and no agreement language with which to compare it.

There is also considerable force to the College's argument that the exercise of its right to designate under item 5(b), even if reviewable in particular cases, would seldom produce the kind of violation which can be addressed by a union grievance. As the cases to which we were referred indicate, to meet the requirements for a union grievance there must be something more than just an "arguable" breach of the employer's contractual obligations. Such breach must constitute a patent violation of the agreement - that is one that is obvious, manifest, conspicuous, plain, self-evident, clear on its face and substantially beyond dispute. That is certainly not this case.

We appreciate the union's concern that, from a practical point of view, the SWF aspect of the problem should not be separated from the issues of definition and designation. But the agreement makes such distinctions and provides its own mechanism for resolving workload problems; moreover, it is not at all inconceivable that (as the union alleges) some of the individuals properly designated and paid as coordinators would still have valid SWF claims under Article 4 even if there is no violation of item 5(b). The SWF issue is distinct and severable.

For the foregoing reasons we are satisfied that this dispute is not arbitrable as a union grievance, and that the grievance must therefore be dismissed. Such dismissal, is, however, without prejudice to the rights (if any) which individual teachers may have and choose to pursue under Articles 4 or 11 of the agreement.

V

We do not wish to leave this matter without making one additional observation. While we express no opinion about either the legal propriety or labour-relations wisdom of unilaterally revoking allowances which individual employees had been accustomed to receive for many years and to which they may ultimately be found to have been entitled, we do wish to reiterate the comments that we made at the hearing: litigation is a divisive, time-consuming, expensive, and ultimately imperfect mechanism for resolving questions of the kind currently before us - particularly where, as here, the litigation alternative potentially involves a multiplicity of proceedings. Whether or not an arbitrator has "jurisdiction" to direct a negotiated settlement of the issues here in dispute, that

approach may ultimately prove to be a more acceptable and "cost effective" approach than the litigation alternative.

Dated at Toronto this 9th day July, 1991.


CHAIRMAN

I DISSENT:

"Jon McManus"

UNION NOMINEE

I CONCUR:

"D. Guptill"

COLLEGE NOMINEE