

**IN THE MATTER OF AN ARBITRATION**

GAAT(A)  
LOCAL 657

**BETWEEN:**

**CANADORE COLLEGE**

**(The College)**

**- and -**

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION**

**(The Union)**

**AND IN THE MATTER OF THE GRIEVANCE OF J.P. CONDON - #97D939**

**BOARD OF ARBITRATION:**

Kenneth P. Swan, Chairman  
Barry Matheson, College Nominee  
Jon McManus, Union Nominee

**APPEARANCES:**

**For the College:**

D.K. Gray, Counsel  
R. Beauchamp, Director, Human Resources  
F. Knight, Vice-President, Academic  
S. Taus, Dean

**For the Union:**

Richard Blair, Counsel  
Dean Bonner, President  
Paul Condon, Grievor

## A W A R D

Hearings in this matter were held in North Bay, Ontario on November 28, 1997 and October 2, 1998. At the outset of the hearing, the parties were agreed that the board of arbitration was properly appointed, and that we had jurisdiction to hear and determine the matter at issue between the parties.

That matter arises from the grievance of John Paul Condon, dated April 11, 1997, to the effect that he had been laid off, and that he had been refused a right pursuant to paragraph 27.06(ii) to displace another full-time employee with lesser seniority, Claude Charland. That provision, which is central to this arbitration, is as follows:

**27.06** 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:

...

- (ii) Failing placement under 27.06(i), such employee shall be reassigned to displace another full-time employee in the same classification provided that:
  - (a) the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned;
  - (b) the employee being displaced has lesser seniority with the College.

There is some history to this grievance which bears on the arguments advanced by the parties. Mr. Condon was hired as a Professor in the Law and Security Administration program in the

School of Human Services on August 17, 1992. He is a member of the bar of Ontario, and practiced law as a criminal lawyer for some time before taking up employment at the College. He taught courses primarily related to criminal law and the criminal justice system, and was highly regarded as a teacher.

In 1996, there was a rationalization of programs in this subject area resulting in the creation of a new School of Law and Justice with a new Dean, Sylvia Taus. The new school was to combine a Legal Assistant Program, a Law and Security Administration program, and a Correctional Worker program. The grievor was involved in the administrative reorganization of the programs within the school.

Unfortunately, one of the results of the rationalization was that the grievor was given a notice of lay-off in June 1996. This ultimately led to a grievance dated July 18, 1996, and a Step I grievance meeting. The thrust of the grievor's position was that he was entitled, pursuant to paragraph 27.06(ii), to displace one of two faculty members in the Correctional Worker program, both whom had less seniority. The two faculty members named were Claude Charland and Elaine Sue Seto-Denny.

Following the grievance meeting, Dean Taus wrote to the grievor on August 7, 1996 in the following terms:

Following our meeting of July 25, 1996, at which time your Step 01 grievance was heard by Mike deMoree, Bruce Sutherland, and me, I have given careful and thorough consideration to whether or not you possess the skill, competence and experience to teach in the Correctional Worker program.

In my opinion, you do possess the skill, competence and experience to fulfill the requirements of the positions you designated in your grievance, and I have requested

that your lay off notice be rescinded.

The junior of the two employees named was Ms. Seto-Denny, and she was accordingly displaced. In the fall of 1996, therefore, the grievor began teaching in the Correctional Worker program, where there were two faculty, himself and Mr. Charland, who was the Coordinator of the program. After teaching for the 1996-97 academic year, the grievor himself was notified that he would be displaced by a Professor senior to him. This resulted in the filing of the present grievance, which alleged irregularities both in relation to the displacement of the grievor, and in the College's refusal to either retain him and require the displacing professor to take Mr. Charland's position, or to allow the grievor himself to displace Mr. Charland. By the time of the hearing, the Union had abandoned any assertion that the displacing professor was not entitled to do so, and the dispute between the parties had resolved itself to one issue: it being conceded that the grievor was senior to Mr. Charland, who was hired by the College in 1993, the parties disagree as to whether the grievor has the competence, skill and experience to fulfill the requirements of the position concerned, that occupied by Mr. Charland.

There is no dispute that the grievor is capable of performing the teaching duties involved in Mr. Charland's position; the dispute is as to whether he is able to perform those aspects of Mr. Charland's workload which relate to his appointment as Coordinator of the Correctional Worker program. Mr. Charland came to the College with some 13 years of experience as a correctional officer, probation and parole officer and policy and program analyst in the Ontario Ministry of the Solicitor General and Correctional Services. He thus brought experience both as a front-line correctional officer, including experience in crisis intervention involving disturbances and

hostage-takings in correctional institutions, and in development of correctional policy.

In 1992-93, Mr. Charland had taught a course in corrections in the Law and Security Administration program at Canadore College as a part-time teacher. When, in the spring of 1993, he saw an advertisement for a new position of Professor/Coordinator in the Correctional Worker Program which the College was planning to start in the Autumn 1993, he applied for the position and was successful. As the first coordinator of a new program, he was involved in designing and implementing the curriculum. In the first year of the program, he taught all of the core courses, and established the links to the correctional community which made possible the field placement component of the program. He also established and recruited members for the advisory committee for the program. He was involved in the hiring of Ms. Seto-Denny as the second Professor in the program, and has presided over the development of the program from its inception.

The evidence also makes it clear, without going into detail, that Mr. Charland's intimate familiarity with the field of correctional work and the correctional community has continued since his employment at the College, and he continues to have close links of various kinds with institutions and organizations in the corrections field.

Although the dispute between the parties is relatively narrow, there are three separate issues to be considered. The first of these is whether, as the Union claims, the College is bound by the statement in Dean Taus' letter of August 7, 1996 that the grievor then possessed "the skill, competence and experience to fulfill the requirements of the positions" designated in the grievance, which included both the position of Ms. Seto-Denny into which he bumped, and the position of Mr. Charland, which he now seeks.

The Union argues that the use of the plural indicates that the grievor was deemed to be qualified for either of the two positions, and observes that copies of the letter were sent to the acting President, the Vice-President Academic and to the College's Human Resources Department, as well as to the grievor and his Union steward. This letter, the Union argues, is an offer to settle the grievance, which has been given wide circulation to officials at the College who have not objected to it, and thus it has a particular force once accepted by the grievor as terminating his grievance pursuant to clause 32.03 of the collective agreement.

There is no doubt that a settlement of a grievance offered in the course of the grievance procedure and accepted by the grievor or the Union is a binding resolution of the grievance, and cannot be withdrawn by an employer: See *Re Air Canada and Canadian Airline Employees' Association* (1980), 27 L.A.C. (2d) 405 (Weatherill) and *Re O.P.S.E.U. (Margaret Brown) and Crown in Right of Ontario (Ministry of the Attorney General)*, Grievance Settlement Board File 188/82, March 10, 1987 (Brent). Had the College attempted to resile from Dean Taus' letter in 1996, there can be little doubt that it would have been enforced. But the effect of the letter was fully executed when the grievor displaced Ms. Seto-Denny. She was the junior employee in the Correctional Worker program, and it was her displacement that was envisioned as the practical effect of Dean Taus' letter.

In the circumstances of this case, we do not think that the College must also be bound by every grammatical nuance of the letter and by its unforeseen consequences. The letter was written to address one situation, the displacement of Ms. Seto-Denny by the grievor in a program which still had its founding coordinator in place. In our view, the letter was not intended to speak to any future

displacement of Mr. Charland, and it would be placing too great a burden on the language of the letter to treat it as binding the College to a particular course of action in a future situation not envisioned at the time it was written.

The second issue is whether the grievor is entitled to claim a position which has been designated as a coordinator position. The College argues that the designation of coordinators is a management function, and that no Professor has a claim or a right to be designated as a coordinator. Therefore, the College argues, it follows that clause 27.06(ii) cannot be used to assert a right by seniority to a position which has been so designated.

The only provision of the collective agreement which deals with the status of coordinator is paragraph 14.04 A 3, which is as follows:

**Guidelines**

**Allowances - Professors**

**14.03 A 3** 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 salary schedule. Such allowance will be in addition to the individual's salary.

There is no other provision defining the status of coordinator, and there is no separate class definition in the collective agreement. The class definition for the Professor classification appears to include both the nuts and bolts of duties which might be assigned to a coordinator, and

the overall requirement for providing “academic leadership” which is specified as central to the coordinator function in paragraph 14.03 A 3.

There are a number of arbitration awards elaborating the status of coordinators. *Re Algonquin College and Ontario Public Service Employees Union (Montgomery)*, unreported, July 19, 1982 (Weatherill), *Re Niagara College and Ontario Public Service Employees Union (Triano)*, unreported, January 31, 1992 (Simmons) and *Re Niagara College and Ontario Public Service Employees Union (Heron)*, unreported, August 6, 1986 (Brent) all stand for the proposition that the designation of coordinators is a management function, to be exercised in the sole discretion of the College. A person so designated has no right to expect tenure in that position, and may be removed at the College’s discretion, at least if discipline is not the motive. Two earlier decisions, *Re Seneca College and Ontario Public Service Employees Union (Nicholson)*, unreported, July 11, 1977 (Weatherill) and *Re George Brown College and Ontario Public Service Employees Union (Mason)*, unreported, July 29, 1997 distinguished between removal of coordinator for non-disciplinary reasons, which is not reviewable by an arbitrator, and removal for disciplinary reasons, which is.

The College argues that the status of coordinator involves the conferral of both trust and leadership duties on a Professor important enough to justify a significant allowance, which could total thousands of dollars. That conferral is entirely in the discretion of the College, and the College cannot be compelled to grant this status to any particular Professor. By analogy to the “bumping up” cases in the arbitral jurisprudence, which do not permit an employee to gain a promotion by invoking seniority in the displacement process after a lay-off, the College argues that no one can gain a coordinator position by claiming a right to displace a coordinator pursuant to clause 27.06.

The evidence indicates, as do the arbitral awards cited above, that there is a wide spectrum of practice in relation to the appointment of coordinators. At this College, the evidence is that coordinators have been appointed unilaterally by College management, have been elected by faculty members, or have been selected by rotation among all members of a department or program. Indeed, shortly before the grievor was first laid off from the Law and Security Administration program, he was scheduled to be coordinator for one program year of that program in accordance with a scheme of rotation which would involve the appointment of a coordinator for each of the two program years.

In our view, there can be no general rule abstracted from either the collective agreement or the arbitral jurisprudence that a person who has been designated as a coordinator is somehow insulated from being displaced pursuant to clause 27.06. In every case, the question must be whether the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned. If that is the case, and the displacing employee is the more senior, then the displacement will have been authorized by the terms of that provision. There is simply nothing in the collective agreement which raises an appointment as coordinator to the level of a "super seniority" position to prevent an otherwise valid displacement under this provision.

That does not mean, however, that the College is bound to assign coordinator duties to the displacing employee. The College may decide to dispense with the designation of a coordinator, or pass that designation on to someone else. That may or may not require some adjustment in teaching assignments, but that cannot affect the right of a senior employee to bump a junior employee.

The final issue, therefore, is whether on the facts of this case the grievor had the competence, skill and experience to fulfill the requirements of the position held by Mr. Charland. Answering that question requires a closer look at the requirements of the position, and the qualifications of the grievor to perform it. In assessing those factual issues, it is important to recall what the collective agreement requires. As set out by the present chair in *Re Seneca College and Ontario Public Service Employees Union (Margulis)*, unreported, August 19, 1994 (Swan), at pp. 14-15:

It will be observed that, unlike earlier versions of this collective agreement between the parties, the agreement applicable to this case provides a so-called "threshold clause", which does not set up a competition between an employee attempting to displace and those who are to be displaced, but simply requires that the employee possess the competence, skill and experience to fulfill the requirements of the position concerned. Thus, it is not necessary for the grievor to demonstrate that he is better qualified than the incumbents, but only that he is objectively qualified to fulfill the requirements of the position. Similarly, it is irrelevant if the incumbents are better qualified than the grievor, provided that the grievor meets the criteria set out in the collective agreement.

There has been some debate in the jurisprudence as to precisely which bundle of duties is to be used as the template against which an employee wishing to displace must be measured. In *Re St. Clair College and Ontario Public Service Employees Union (Barei)*, 1989 6 L.A.C. (4<sup>th</sup>) 442 (Carter), the template proposed was "the core pattern of duties and responsibilities performed by an incumbent teacher during the course of her employment". In later cases, such as *Re Fanshawe College and Ontario Public Service Employees Union (Dobos)*, unreported, June 4, 1998 (Burkett) and *Re George Brown College and Ontario Public Service Employees Union (McAuley)*, unreported, July 24, 1998 (Mitchnick), a much narrower "snap-shot" template is proposed, the position of the

incumbent as it is comprised in the academic term in which the lay-off is to take place. This debate is of no significance here, because the evidence does not disclose any significant difference between the assignment anticipated for Mr. Charland in the fall of 1997, and the pattern of his assignment over the brief history of the program. We think it is reasonable to exclude from consideration the special start-up functions performed by Mr. Charland, for example in relation to curriculum development and organization of an advisory council. Those functions were spent by the time of the grievor's lay-off, and the only issue is whether the grievor was qualified to be left in charge of the maintenance of the structures already established.

There can be no doubt, and the Union concedes, that by any test Mr. Charland is the better qualified as between himself and the grievor to both teach and perform the coordinator function in the Correctional Worker program. His lengthy experience and intimate involvement with corrections was ideal for the position of founding coordinator of the program, and there can be no doubt that the program owes much to his knowledge and experience. But as the majority points out in the *McAuley* award, it is not the ideal which the College would seek at the hiring stage that is the test of competence, skill and experience under clause 27.06, nor is it even the standard set by a particularly able incumbent. The test is whether the displaced employee can "fulfill the requirements of the position concerned". No doubt, given the juxtaposition of the wording, it was intended that the displacing employee would fulfill those requirements competently and skillfully, at a level of quality which would reasonably permit the delivery of the program. It would not be enough merely to be able to go through the motions of performing the duties of the position, but it is not required that those duties be performed at a superior level established by a particularly qualified incumbent.

As we have already observed, there is no dispute that the grievor could teach the courses involved in Mr. Charland's position, a concession by the College which we understand to include all of the complementary functions involved in teaching the courses. What remains to be considered, therefore, are the additional complementary functions assigned to Mr. Charland as coordinator for the program.

This bundle of assignments may be viewed in both a quantitative and a qualitative way. Quantitatively, in the 1996-97 academic year, the weekly allocation of hours to these functions fluctuated. For the fall term, including the months of September, October, November and December, Mr. Charland was assigned four hours per week for duties related to the coordinatorship, three hours for student placement, and 1.5 hours for student counselling. For the first two weeks of classes in January, the only assignment was 1.65 hours for the coordinatorship. For the remainder of January and all of February, the assignment was four hours for the coordinatorship, 2.15 hours for student counselling and 25 hours for student placement, relating to the field placement component of the program. For the remainder of the academic year, the months of March and April, the only allocation is 1.65 hours per week for the coordinatorship. For the 1997-98 academic year, the other assignments remain relatively the same, but the coordinatorship is assigned for four hours per week throughout both terms.

Qualitatively, while the collective agreement does not give any real content to the duties of a coordinator, there exists a College document setting out, as a generic template, a description of the coordinator's position. It is as follows:

1. Act as a communication link between the program staff and the Dean's office.

2. Manage the integrity of the program curriculum, including accuracy of outcomes, credits, hours, promotional and information documents (e.g., calendar).
3. Develop draft semester schedules.
4. Develop advisory committee agendas and minutes.
5. Develop linkages with non-faculty positions.
6. Provide recommendations on alterations to delivery systems.
7. Participates in school/college meetings which require program responsibilities.
8. Arranges distribution of advisees for advisors.

It will be observed that these are largely administrative functions, at least as they are written here. To whatever extent they require academic leadership, that must be inferred from the responsibility involved in some of the assignments of administrative duties.

The grievor testified extensively about his experience in academic administration during his years teaching at the College, and his experience in general with the performance of administrative responsibilities. We have no doubt that he is qualified to perform all of the duties set out in the College document for any program with which he is familiar and in which he is qualified to teach. That applies, in our view, to the Correctional Worker program as well as to the Law and Security Administration program, where he would have been one of two coordinators but for his lay-off.

It is true that, to carry out the duties which were assigned to Mr. Charland, the grievor would have to make contacts in the correctional community which he does not now have, and would have to deal with individuals whom he does not now know personally, a disadvantage which Mr.

Charland does not have. But there is no reason to think that these individuals, who occupy responsible positions of authority in the correctional community, would act other than professionally when confronted with a new coordinator for the program. It would surely be in their best interests, as well as the best interests of their respective employers, to ensure that the program is a success, no matter how it is staffed. Mr. Charland himself very fairly admitted that there was no reason to think that any of these individuals would withhold cooperation from any successor to him as coordinator.

It is not perfectly clear whether the student field placement duties assigned to Mr. Charland are seen by the College as a function of the coordinator, or simply another teaching duty. In any case, they are duties which were assigned to Mr. Charland at the relevant time, and the grievor is required to demonstrate the competence, skill and experience to fulfill those requirements as well.

The grievor had experience in the field placement program in the Law and Security Administration program, where he taught the field placement course, arranged placements and supervised students during the placement period, over a range of institutions and employers which significantly overlapped the placements in the Correctional Worker program. Once again, while the grievor would have to make some new contacts quickly, and while he would have to supervise placements in institutions where he himself had no direct experience, that would be true of anyone assigned these duties, and quite likely was true to a certain extent of Mr. Charland when he first took up these responsibilities. Given the grievor's experience in the criminal justice system, we are simply unable to conclude that he would not be able to meet the requirements of this aspect of the job.

Finally, there is nothing to suggest that the student counselling aspect of Mr. Charland's workload is in any way different from the student counselling which the grievor, in

common with almost all members of the academic staff at the College, would have been assigned over the years. It is true that Mr. Charland would be a better role model for students intent on a career in corrections, but that does not preclude the possibility that the grievor would be able to meet the requirements of that aspect of the position as well.


Finally, we observe that Dean Taus testified that she would not have confidence in the grievor to run the program as its coordinator, as she did have in Mr. Charland. Frankly, we can understand her concerns; she herself has no background in corrections, and relies extensively on Mr. Charland's background and connections to ensure the quality of the program. But to allow the Dean's lack of confidence in the grievor's ability to perform duties which, in accordance with the standard workload forms filled out for Mr. Charland, constituted only some 10% of the assigned duties, would be to allow a Dean to have a veto over the operation of clause 27.06. As we have already observed, a determination that a more senior academic employee may displace a coordinator does not require that the displacing employee be assigned the coordinator duties. That assignment is up to the College, and presumably in this instance up to Dean Taus. If she would have more confidence with someone else performing those duties, we can see nothing to prevent her from reassigning the coordinator duties elsewhere, and making an appropriate adjustment in workload to account for this.

A situation like the present will always produce unfortunate results. There is no doubt that Mr. Charland is eminently qualified in corrections, and an excellent teacher. His loss will have a significant impact on the Correctional Worker program. There is equally no doubt that the grievor is eminently qualified in the law and criminal justice, and is also an excellent teacher. His skills would

no doubt be much better utilized in other areas of the College's programs. Unfortunately, the financial realities of running the College have required first the College, and then this board of arbitration, to choose between these two individuals, only one of whom can be retained in employment. While we can understand the choice which the College made, it is not the choice which is required by the language of the collective agreement. In our view, the grievor has amply demonstrated that he has the competence, skill and experience to fulfill the requirements of the position occupied by Mr. Charland in the 1996-97 academic year, and he therefore should have been allowed to displace Mr. Charland at that time.

Obviously, the parties should be given the opportunity to implement this decision in the most effective and least disruptive way. We therefore simply declare that the College's decision was contrary to the collective agreement, and remit the implementation of this declaration to the parties for resolution, while retaining full jurisdiction to resolve any disputes which may arise in putting this decision into effect, and in calculating whatever compensation may be owed to the grievor by reason of this breach.

DATED AT TORONTO this 26<sup>th</sup> day of November, 1998.

  
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Kenneth P. Swan, Chairman

I concur

"Barry Matheson"  
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Barry Matheson, College Nominee

I concur

"Jon McManus"  
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Jon McManus, Union Nominee