

Headnote

OPSEU ad Algonquin College (Ferderber) 96G157

Board of Arbitration: MacDowell, Cook, Masse.

**Seniority Date. Adjustment of,**

The grievor had received notice of lay off, and pursuant to the terms of Article 27.08 B of the collective agreement, had selected 2 full time professors she claimed she was entitled to bump. Both individuals were ranked as having less seniority than the grievor on the seniority list. When it came to the attention of the 2 incumbents that they were to be the targets of a bump, they made a claim to the college that their respective seniority dates were incorrect, and in fact they were senior to the grievor. The college reviewed the calculation of their seniority and agreed with the incumbents. The college changed the seniority standing of the incumbents such that they were now ranked ahead of the grievor.

The grievor claimed that: a) pursuant to Article 27.04, the seniority list was fixed and could not be altered or adjusted outside the two week window following the annual posting of the list, and b) the adjustment of the incumbents' seniority was made in bad faith and was discriminatory.

The Union argued that the college has a right and an obligation to correct bona fide errors on the seniority list when ever they are discovered.

Held: The college has a right and an obligation to correct errors on a seniority list, even outside the 2 week window. On the second point, the Board held that the college was entitled to make only bona fide corrections, and it was open to the grievor to argue bad faith and discrimination. The Board ordered the grievor to provide particulars of the bad faith, discrimination and harrassment alleged.

Michael Gottheil

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OPSEU LOCAL 415  
ALGONQUIN COLLEGE

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION AND ITS LOCAL 415

("the Union")

- and -

ALGONQUIN COLLEGE

("the College")

Re: Grievance of Susan Ferderber - OPSEU # 96G157

BEFORE:           R. O. MacDowell           -    Chairman  
                  Camille G. Masse       -    Union Nominee  
                  Hugh John Cook       -    College Nominee

Appearances:

For the Union:                   Michael Gottheil, Counsel  
                                  Doug Brady

For the Employer:                J. Lynn Thomson, Counsel  
                                  Odette Pearson  
                                  Mary Anne Phillips  
                                  Lynn Larabie  
                                  Jim McLaughlin

For the Grievor:                 David Jewitt, Counsel  
                                  Georgina Hancock  
                                  Sue Ferderber

Interveners:                     Jane Hunt  
                                  Sherryl Booth

Hearing held in Ottawa on April 18, 1997

**INTERIM AWARD**

OPSEU LOCAL 415  
ALGONQUIN COLLEGE

I

This proceeding arises from two grievances filed by Susan Ferderber ("the grievor"). In each case, Ms. Ferderber alleges that the College has contravened various provisions of the collective agreement.

In the first grievance, Ms. Ferderber contends that she was dealt with improperly because of an earlier grievance that she filed. Ms. Ferderber asserts that in the months following the settlement of that grievance, she was harassed and penalized for having pursued her collective agreement rights. In the second grievance before us, Ms. Ferderber alleges that she was improperly selected for layoff. The parties are agreed that the two grievances should be heard by a single arbitration panel.

It is not entirely clear how much the evidence in the two grievances will be intertwined. It suffices to say that one feature of the "layoff grievance", is Ms. Ferderber's contention that she should be able to avoid layoff by displacing junior employees occupying positions for which she herself is qualified. This "bumping feature" of the grievance brings into play Article 27.08 of the collective agreement which reads as follows:

### Lay-Off Grievances

27.08 A An employee claiming improper lay-off, contrary to the provisions of this Agreement, shall state in the grievance the positions occupied by full-time and non-full-time employees whom the employee claims entitlement to displace. The time limit referred to in 32.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

27.08 B If the grievance is processed through Step 2, the written referral to arbitration in 32.03 shall specify, from the positions originally designated in 27.08 A, two full-time positions, or positions occupied by 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 (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of 27.06.

Article 27.08 provides that where a layoff grievance involves the right to "bump" a junior worker, the grievor must identify the targets of the "bump" - the so-called "bumpees". Those bumpees (or, more accurately, their positions) then become the focus of the assessment contemplated by the layoff provisions of the collective agreement. And, of course, if the matter proceeds to arbitration, the bumpees (who may be subject to displacement) are entitled to notice of the hearing and an opportunity to participate as parties. (See the decision of the Ontario Court of Appeal in Re Broadly and Ottawa Professional Firefighters Association [1967] 2 O.R. 311; and the decision of the Supreme Court of Canada in Re Hoogendoorn and Greening Metal Products and Screening Equipment Co. Ltd. [1968] S.C.R. 30.)

The collective agreement allocates scarce work opportunities on the basis of seniority and ability, and ordinarily, the relative seniority of competing employees can be determined simply by looking at the seniority lists that the College is required to post in January of each year. The list is regulated by Article 27.04 of the collective agreement, which reads this way:

**Lists**

**27.04 A** In January of each year, the College shall prepare and post lists as follows:

- (i) a seniority list of all regular full-time employees showing the employee's name, classification, division or department, and seniority as determined pursuant to this Article.
- (ii) a list of all probationary employees showing the employee's name, division or department, date of hire, and date of completion of the probationary period.
- (iii) a seniority list of all partial-load employees employed since the previous January showing the employee's name, division or department, and accumulated service to date.

Such lists shall also be sent to the Union Local President.

**27.04 B** Such lists shall be posted for at least two weeks and the information contained therein shall be considered correct for all purposes unless the employee disputes its accuracy within such two-week period by filing written notice thereof with the College.

**27.04 C** If an error is established subsequent to the period referred to in 27.04 B, the correction shall not render the College liable in any manner for actions based thereon.

The seniority list provides a benchmark to which employees can refer when they are considering their rights under the collective agreement; and, usually, there is no dispute about the employees' ranking or the accuracy of the list. The controversy usually involves the employees' relative ability to do particular jobs. However, in this case, there is also an issue about the relative position of employees on the seniority list - and, in particular, whether a potential bumpee can correct any "errors" of which she becomes aware, after she learns that she may be bumped. That is what allegedly happened here.

The board was advised that when Jane Hunt and Sherryl Booth learned that they might be displaced by the grievor, they challenged the accuracy of the seniority list. They said that their seniority was improperly calculated or recorded, and that, in fact, they had more seniority than the grievor. They asserted that as more senior employees, they should not be considered a target for displacement. And the College agreed with them.

In other words, the position of the interveners (articulated by the College) is that the prospect of displacement prompted them to contest their position on the seniority list, and prompted the College to rectify that list.

The result for the grievor (among other things) is that she would have to designate two other possible bumpees.

The grievor says that, in the circumstances of this case, it is too late for the interveners or the College to rectify any errors which may appear on the seniority list; moreover, she is suspicious of the whole process - coming, as it does, in the shadow of her allegations of continuing improper treatment. That is the potential connection between the two grievances, to which we have already referred.

The College says that it is obliged to rectify errors that are brought to its attention, and that it did so here by applying a formula that had been agreed upon last year with the local union president. The College points out that the "correction" was made prior to the grievor's actual layoff, and not long after the bumpees were notified that their positions might be examined. In the College's submission, the list was rectified in time for the grievor to make another selection under Article 27.08. There is no serious prejudice to her.

The union agrees that the College is obliged to rectify any bona fide mistake on the seniority list, because to act on an erroneous list would undermine the principle of seniority: a junior worker would be able to displace a senior

one. In the union's submission that result is inconsistent with the scheme of the collective agreement, and would undermine the rights of employees - who are not responsible for such errors on the list. The union asserts that the list can and must be corrected, whenever an error is detected.

The question, then, is whether (or when) an established seniority list can be changed, and the potential impact of such change on a grievance that is already "in process" at the time the change is made. However, before addressing what the collective agreement has to say about that, it may be useful to sketch in the chronology; because part of the grievor's argument turns on the sequence of events. From the grievor's perspective, the "ground rules" have been changed on the eve of the arbitration proceeding, and, in her submission, that should not happen.

## II

The grievor has been an employee in various capacities since 1991. In 1995 she filed a grievance claiming that she met the requirements for "full-time status" as defined by the collective agreement. That grievance eventually came on for hearing before a panel chaired by arbitrator Mitchnick. However, the case was eventually settled on terms that resolved

the issue of the grievor's status, and, as we understand it, also fixed her seniority date. (The settlement itself was not put before the board.)

The grievor asserts that following the settlement of this grievance in the spring of 1996, there was a change of attitude in the workplace, which affected the way in which her work was assigned. In the wake of the settlement, she was not held in the same esteem, or given the work opportunities, that she had had before. Accordingly, on April 4, 1996, she filed what we have described above as "the first grievance" before us, alleging, in effect, that she was being penalized for making her earlier claim. This grievance was scheduled to come on for hearing in November 1996, before a board of arbitration chaired by Owen Shime.

In the meantime, however, on May 1996 the grievor received a layoff notice, which prompted what we have described as the second grievance. The second ("layoff") grievance was filed May 15, 1996. So as of November 1996, there were two grievances outstanding: one alleging (broadly) "harassment", and a second one alleging an improper layoff. And to complete the picture, it should be noted that as part of Ms. Ferderber's layoff grievance, there is what her counsel has described as a "stand alone" component, in which she seeks to avoid layoff by

displacing two other employees whose jobs, she says, she can perform. According to the grievor's counsel, this job claim stands independently of the propriety of the layoff, and can be pursued whether or not there was any "harassment" in the period following the 1996 settlement.

When the matter came on before arbitrator Shime in November 1996, the parties agreed that the two grievances should be heard together because of the potential overlap of the facts and the remedies involved. A new hearing date was fixed for April 18, 1997. And, as noted, the grievor identified Ms. Hunt and Ms. Booth as the two potential bumpees - as she was required to do by Article 27 of the collective agreement.

The grievor identified 18 employees whom she believes she is entitled to displace, and designated Ms. Booth and Ms. Hunt as the individuals in full-time positions who were to be the focus of the bumping aspect of the layoff grievance (see Exhibit 8). Since Exhibit 8 is undated, we do not know precisely when this designation was made. However, it does not seem to be disputed that the grievor made her selection on the basis of the then existing seniority list.

It was that list that was challenged by Ms. Booth and Ms. Hunt, who claimed that their relative position was not properly recorded.

It appears that sometime in March 1997 - that is, within a few weeks of the scheduled arbitration hearing - the two bumpees received notice of the impending hearing and (now facing the prospect of displacement), requested a review of their seniority date, Ms. Booth and Ms. Hunt asserted that their position had been improperly calculated. The College says that it acceded to their request for a review, and applied a formula that had been worked out last year between the College and the President of OPSEU Local 415.

The purported result of that reconsideration is recorded in memos to the grievor dated March 24, 1997 and April 1, 1997. The College advised that, as a result of this review, there were changes to the seniority dates of Ms. Booth and Ms. Hunt, which would be reflected on the seniority list.

At that point, no one had yet been laid off.

From the grievor's perspective, of course, the ground had shifted in the shadow of her arbitration proceeding. In her submission, she had made her selection based upon the

existing seniority list, and it was both improper and too late to change it.

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With this background, then, the board was asked to consider: whether it was possible under the collective agreement to change the rankings on a posted seniority list; whether it was permissible to do so in the circumstances of the grievor's case; and what effect should be given to the February 1996 Minutes of Settlement, establishing the grievor's status and fixing her own seniority date.

At issue is the permanence and reliability of the seniority list, which was in place when the grievor made her decisions and upon which the grievor (and others) might be expected to rely. Is that list fixed or flexible; and if it is flexible, under what circumstances can charges be made?

### III

We might begin with the observation that "seniority rights" are a central feature of modern collective bargaining, and are intimately connected with an employee's work opportunities and job security. Seniority provides a means of

resolving competing claims, not only between the individual employee and her employer, but also between that employee and her fellow workers. Thus, in Re Tung-Sol (1964), 15 L.A.C. 161, Judge Reville observed:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important requirements as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

(emphasis added)

So what does this collective agreement say about the issue before us?

Article 27.04 A requires the College to publish a seniority list in January of each year, and Article 27.04 B gives employees a two-week window of opportunity to challenge its accuracy. However, Article 27.04 C qualifies the former provision, and makes it clear, in our view, that errors can be established and corrected after the two-week period - provided only that "the correction shall not render the College liable in any manner for actions based thereon".

In other words, affected employees can rectify their relative positions on a seniority list at any time. They are not limited to the two-week "challenge period". However, if they do not launch their complaint within that period, the College is relieved of any responsibility for past decisions based upon that list.

Neither Article 27.04 B nor Article 27.04 C mentions the impact on other employees in the bargaining unit. However, it is evident (if implicit) that any alteration of one employee's ranking may change her position vis-a-vis other employees. But, neither collective-agreement provision of the agreement forecloses that change nor, it would appear, are other employees in the bargaining unit necessarily entitled to notice every time the accuracy of a seniority list is challenged or corrected (see the opinion of arbitrator I. G. Thorne in Re Network North and OPSEU Local 666 (1996), 57 L.A.C. (4th) 9).

In our view, this is the most natural reading of Article 27 (considered as a whole), the reading that is most consistent with the way in which seniority features in this agreement, and the way in which arbitrators approach such issues. It is an interpretation, moreover, which has already

been established by arbitrators under the community college collective agreement that is before us. For example, in Fanshawe College (decision released October 19, 1983), a board of arbitration chaired by John Brunner observed:

It was contended by Counsel for the Employer that Section 8.07(b) [now 27.04 B] required all challenges to be made within the two week posted period, and that paragraph (c) [now 27.04 C] did not extend this beyond that time. He said that the words "error is established subsequent to the period referred to in paragraph (b) hereof" referred to an error established after the two week period but one that had been discovered as a result of a written notice filed within the two week period. With respect we do not agree. In our opinion, the Section is quite clear and should be interpreted as its plain and unambiguous language demands. Under Section 8.07(b) an employee is given the right to challenge the contents of a Seniority List by notice in writing during the two week period that the List must be posted. Absence such challenge, the List is deemed to be correct for all purposes. Paragraph (c) however contemplates an error being established subsequent to the two week period. We do not think that either paragraphs (b) or (c) exclude a subsequent challenge made after the expiration of the two week period, even though no notice of dispute has been filed while the List was posted. However, in that event, the College is given immunity with respect to any consequential action that it may have taken based on the "deemed" accuracy of the List. We are unable to agree that this immunity was intended to operate immediately upon the expiration of the two week period even though a written notice of dispute was filed. It must be pointed out that paragraph (b) does not "deem" the List to be "correct for all purposes" if a written notice of dispute is filed within the two week period. We do not think that paragraph (c) was intended to provide immunity to the College in the case of an error which is challenged within the prescribed time but not "established" until thereafter. In our opinion, paragraph (c) must be given a fair and liberal interpretation so as to entitle a challenge of a Seniority List even beyond the two week period of posting, but in that case, although the error must be corrected, the College is immune from any consequential actions that it has taken based on the List which was "deemed" to be correct for all purposes at the expiration of the two week posting period if no notice of dispute was filed.

The bargaining parties have not changed this language since arbitrator Brunner rendered the above interpretation, some 14 years ago.

It follows, we think, that there is nothing in the collective agreement which prevents Ms. Booth or Ms. Hunt from correcting their positions on the seniority list - even though there may conceivably be some impact on other employees in the bargaining unit, including the grievor. (In all likelihood, that was also the effect of Ms. Ferderber's very first grievance, which, as we understand it, was settled by establishing a position and seniority date for her.) Nor do we think that there is anything in the circumstances of this case - at least as outlined to us at the hearing - which prevents the interveners from rectifying the seniority list when a potential problem comes to their attention.

This collective agreement contains a rather elaborate formula by which employee status and seniority are to be determined. It is hardly surprising, therefore, that, from time to time, there may be disputes about how it should be applied in particular circumstances. (Again, Ms. Ferderber's settled grievance may be an example of that.) The possibility of challenge and review is recognized in Article 27.04.

As a practical matter, though, there is normally no reason for an employee to analyze the seniority list to determine her seniority in absolute terms or relative to others; nor would an employee have the inclination or information to engage in that exercise. In practical terms, the issue is only likely to crystallize when an actual exercise of seniority rights is contemplated - as, in this case, when there is an impending layoff.

Viewed objectively, there is no reason why an employee should not be able to question her seniority when it becomes relevant to her, and there is no reason to foreclose that inquiry merely because it was not launched at an earlier time when there was no apparent reason for doing so.

It may be that Article 27 grants the College immunity from liability for actions based upon an unchallenged list. But as we have already noted, we do not think Article 27 precludes employees from reviewing their position on the list in response to changes in the work environment. Nor does it foreclose changes which may have some operational impact in the future. Accordingly, we do not see any reason why the interveners should be disadvantaged merely because they did not raise their concerns until Ms. Ferderber's grievance alerted them to the potential problem.

Given the decisions of the Courts in Hoogendoorn and Bradley, it is arguable that, as parties to the arbitration proceeding, employee-interveners can raise any collective agreement issues which might touch upon their interests. Prima facie, they can make representations about the assessment of their relative ability, as well as the calculation of their relative seniority date. We see nothing in this collective agreement which requires an intervener to accede to the grievor's position on either issue - even though it is clear that the purpose of Article 27 is to identify and narrow the parameters of any debate in advance.

In this case, of course, the interveners were able to rectify their ranking on the seniority list prior to the grievor's layoff, prior to the arbitration of her claim, and at a time when she remains able to select other junior workers (if there are any) whom she might be able to bump. The timing is unfortunate, but we do not think that the grievor is seriously prejudiced. Or to put the matter more accurately: we do not think that any prejudice to the grievor outweighs the importance of ensuring that the principle of seniority is respected in application as well as in theory. The fact that the grievor is seeking to exercise her rights in this regard, does not preclude other employees from exercising theirs. In this regard, we accept the position advanced by the union.

It is important, though, to be clear about what we have and have not decided.

We have decided that the interveners can rectify any errors respecting them that appear in the posted seniority list. We do not think that they are prevented from correcting such errors, merely because they did not do so earlier, or because they were responding to the grievor's designation under Article 27.08.

On the other hand, we have not decided that there actually was an error - that is, whether the interveners' ranking was properly changed in accordance with established collective agreement principles, or a formal agreement with the union concluded last year. Either of these propositions would foreclose a challenge by the grievor, but neither of them was canvassed before us in evidence and argument. Accordingly, we have answered the questions put to us ("Can the seniority list be rectified at all or in the present circumstances?") on the assumption that there was a bona fide error in calculating the interveners' seniority that could be corrected when brought to the College's attention.

IV

If an employee is entitled to rectify her seniority date beyond the two-week period prescribed in Article 27, can the grievor now demand a re-calculation of her own seniority date on whatever principles were applied to the interveners? In our view, the answer is no, if the grievor's seniority date was fixed in 1996 as part of the settlement of an earlier grievance. In that case, all of the parties - the grievor, the interveners, the union and the College - are bound to adhere to the seniority date fixed in the earlier settlement.

We do not know the background of the earlier grievance or the precise terms of the parties' settlement. Nor, of course can anyone know whether any seniority date fixed at that time is precisely what would have been generated had the matter been fully litigated. However, that is the nature of settlements: they may or may not accord with the parties' strict legal rights, and are typically concluded precisely because the parties want to avoid the costs and uncertainties of litigation. And, in retrospect, a settlement may appear either unduly generous or quite improvident.

The point is, a settlement is a final and binding determination of all matters in dispute, including any

collateral issues, rights, or benefits, which the parties choose to include in the mix. Once that settlement is executed, it is binding in accordance with its terms. Thus, if the 1996 settlement fixes a seniority date for the grievor, that is the date which is applicable for any subsequent exercise of her collective agreement rights - whether or not the date so fixed actually reflects the terms of the collective agreement. The grievor is not entitled to revisit that issue; and in this regard, her situation is different from other employees (including the interveners) who have not grieved nor settled their seniority status in this way.

V

For the foregoing reasons, the board is satisfied that the interveners are entitled to rectify any errors in their seniority ranking, and, if that is what has occurred here, the grievor is entitled, in response, to select two other employees ("bumpees") pursuant to Article 27.08.

We are also satisfied that, insofar as the grievor's own seniority date is concerned, she is bound by whatever provisions in that regard may be found in the 1996 settlement of her first grievance. She cannot go behind that settlement.

This matter can now be relisted for hearing with respect to all outstanding issues.

In that regard, the attention of the parties is directed to the terms of the board's Interim Ruling.

Signed in Toronto on August 15, 1997.

A handwritten signature in black ink, appearing to read 'R. O. MacDowell', written over a horizontal line.

R. O. MacDowell, for the board majority (the opinion of board member Masse may follow, as necessary and/or may be incorporated into the panel's final Award "on the merits" of the case)