

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAWE COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF SEVERAL LAYOFF GRIEVANCES  
OPSEU #s 96F798-800 (Academic)

BOARD OF ARBITRATION:

HOWARD D. BROWN

CHAIR

JON C. McMANUS

UNION NOMINEE

RON HUBERT

COLLEGE NOMINEE

Appearances for the College:

Robert J. Atkinson, Counsel

Gail Rozell, Manager, H.R.

Appearances for the Union:

David Wright, Counsel

Gary Fordyce, Chief Steward

Tom Geldhard, Vice Pres.

A HEARING IN THIS MATTER WAS HELD AT LONDON ON JUNE 10, 1997.

AWARD

The grievances arise from a layoff of about 55 academic employees of the College in 1996, each of whom were given a notice of layoff as at April 1, 1996. As a result of economic pressures at the College and for a variety of reasons in early November 1995, the College gave notice under Article 29.01 of a financial exigency when the Union was notified that approximately 84 full-time employees in the bargaining unit would be laid off and notice of layoff was given under Article 27.05. This was followed by various consultations between the parties through to March 1996 in accordance with Article 27.05 when the College determined that layoffs would be required and notices to these employees were provided on April 1<sup>st</sup>.

The grievances do not challenge the validity of the layoff notices or that the layoff itself was invalid but are related to the time at which the layoff becomes effective. With particular reference to:

“Article 27.06 (viii) ( c )

Failing placement under 27.06 (viii) (a), such employee shall be laid off with written notice of not less than 90 calendar days. Such employees shall be granted release from all or part of the normally assigned duties, for this period of notice, for the purpose of engaging in retraining activities, where such release is feasible given the normal operational requirements facing the College. Where such release is not possible, the notice period shall be extended by up to 90 days to permit retraining and the employee shall maintain current salary and benefits for the duration of the notice period.”

There are four grievances referred to this Board at this hearing which set out the issue to be determined by the Board as representative of fact situations which would apply to all of the employees who were given notice of layoff and filed grievances. It is

the Union's position that the Grievors should receive either whole or pro-rata time for their vacation entitlement, statutory holidays, professional development days, and non-teaching weeks attributable to their period of employment prior to the layoff notice if they had been released from teaching duties or as some employees had been required to complete their teaching duties, until the date such employees were released from their teaching duties, from which these benefits would accrue to extend the time of layoff notices given under Article 27.06 (viii) ( c). The College made the release of all teaching duties effective at the end of the teaching requirements of those employees who were subject to layoff.

Those employees who were released from teaching assignments on April 1<sup>st</sup> were given 90 days' notice from that date which would extend to the end of June. These employees work the academic year of 10 months and are paid for 12 months with normally July and August off work. Those employees who were released from teaching duties on August 1<sup>st</sup> were paid 2/12s of their salary following the notice period during which they received full pay and benefits. Those employees who were required to complete their teaching duties when the notice became effective were paid 1/12 in addition to the notice period.

The Grievors claim that the notices of layoff should not become effective until they have received the benefits set out in their grievances relating to their work in the academic year of 1995-96. By extending the layoff notice in this manner, their other rights under the collective agreement including seniority and recall would also be extended which could become significant to them. Their workload creates a set of duties described in the collective agreement and in the Union's position, these employees could only be released from such duties in proportion to the non-teaching duties plus the monetary issues and thus extend the notice and retraining period into the fall of 1996.

Retraining referred to in this Article is voluntary and the College does not require a retraining plan or approve any particular type of retraining of the employees affected.

It is the position of the College that Article 27.06 (viii) (c ) is clear and that notice of 90 calendar days is given when it decides not to reassign the employees or at the conclusion of their teaching duties when they are released from those duties. At that time, the affected employees are entitled to and did receive 90 days' notice for the purpose of retraining. The issues concerning displacement by these employees were dealt with in the discussion of the parties prior to the layoff when the employees were released. They were released from all teaching duties and were not required to perform any other work after their release and received full pay and benefits to the end of the retraining period.

The submission for the Union is that vacations are earned under Article 15 for those who have completed one full academic year of service with the College who are then entitled to two months off work as scheduled by the College which benefit relates to the completion of their teaching duties. The Grievors did not have vacation time as they were given notice of layoff while entitled to the two months of vacation so that in its position, the Grievors are entitled to two months' vacation before their layoff could become effective which would be September 30<sup>th</sup> for those who completed their teaching duties prior to the layoff notice. Other Grievors who were relieved of their teaching duties prior to the end of the academic year are entitled to a pro-rata share of vacation benefits before their retraining period becomes effective. It was submitted that the vacation entitlement cannot be removed by the College. On this issue, the Union referred to the decision in Re: Humber College (Devlin, July 2, 1992).

By Article 16, the employees are entitled to holidays including Canada Day which would fall within the retraining period for the Grievors. It is its submission that this time should be extended by one day to allow for this benefit. The Union requested a declaration by the Board that the 90-day training period is extended by this holiday benefit.

In addition to their teaching workload, there are complimentary functions which may be assigned by the College to a maximum of 44 hours and flowing from the teaching responsibilities, the employees are attributed other hours with pay for a full academic year. It is the Union's submission that the College cannot unilaterally alter the formula set out in the workload provisions of Article 11 and cannot release the employees from other duties because when they are finished with teaching duties, they are entitled to the other benefits of complimentary functions including in Article 11.01 H 1, ten working days of professional development in each academic year. It is submitted that those benefits cannot be removed and should be accorded to the professors who have the right during the teaching period for that time as a complementary function which they earned through teaching.

If an employee did not complete the teaching functions, then the employee should be entitled to a pro rata share of such benefits including professional development days. It is the Union's position that for these employees the effective date of layoff could not be April 1 as they are entitled to a pro rata share of these benefits provided under the collective agreement. Reference was further made to the award in Re Northern College and OPSEU (Morrison), a workload resolution award dated September 28, 1994 which recognizes that the workload formula being negotiated cannot be changed unilaterally to, in that case, increase the workload.

It is the Union's position that during non-teaching periods, a professor has a choice under Article 11.01 (d) when he or she could perform duties such as course development for the next academic year. The College cannot release those non-teaching duties. Vacation and retraining periods are different benefits and vacation is inconsistent with retraining and therefore in its submission, these employees are entitled to two months of scheduled vacation without any other duties after which they would receive 90 days of retraining pursuant to Article 27.06 (viii) (c). The 90 day retraining period is in its submission, exclusive of benefits including vacations, holiday pay and professional development days.

The submission for the College is that Article 27.06 (viii) (c) is clear and does not require the College to extend the 90 days notice by vacation or non-teaching time but is restricted to a requirement of 90 calendar days' notice of layoff. The College permits that period for retraining by the individual but does not require specific retraining as the employee is released from all assigned duties and is free to do whatever the employee decides. During the notice period, the employee is paid full salary and benefits but which is not extended beyond 90 days. The only exception is where the College cannot release an employee from all or part of the teaching duties but that time is not extended for purposes of professional development duties and non contact hours contained in the agreement. The benefits apply to the work duties during the academic year. The layoff notice provision does not provide a leave of absence but for payment after a release of teaching duties which cuts off the benefits. There is no provision to pro rate the continuation of work and benefits. This section overrides the workload provisions in the agreement which are not continued but stopped by the release of the normally assigned duties by the Grievors. It cannot be inferred that this release is subject to a pro rata calculation of teaching duties and benefits.

It was submitted that a vacation period is time off from work without loss of pay and as these employees were released from duty and were not working, they received pay during the notice period but that does not include vacation. They were paid for the statutory holiday which occurred in this period. This Article does not refer to vacations such as included in the discharge provision of Article 27.14 (a). The employees are paid their annual salary for 12 months and are given two months off without teaching duties. The employees who worked 11 months in teaching and were then released, were paid for one month's vacation. The Grievors are not entitled to two months of vacation in addition to their layoff notices. Reference was made in its submission to St. Clair College of Applied Arts and OPSEU (H.D. Brown, June 14, 1989); Re Conestoga College and OPSEU (O'Shea, November 26, 1976); Re Algonquin College and OPSEU (Weatherill, July 8, 1983), in support of its position that the period of retraining is not extended by vacation entitlements.

In the Humber College case, the evidence is that the Grievor was not advised of the specific date of his release from assigned duties and continued to perform duties for the College including a program review. The issue was the entitlement of a 90-day period for the purposes of retraining to start from the date of release from his assigned duties and when he could be required to engage in retraining and whether that could be done during his vacation period, scheduled by the College from June 25<sup>th</sup> to August 26<sup>th</sup>. The Board held that:

“engaging in retraining is not consistent with being on vacation and accordingly retraining and vacation cannot occur simultaneously. Moreover, if the College's interpretation were correct, there would be no incentive to release an employee from his assigned duties during the initial notice period as by deferring the release, an employee could be required to retrain during the scheduled vacation period. In our view, such an interpretation would deprive the employee of the vacation entitlements set out in

the collective agreement or alternatively, would force the employee to forego some portion of the period provided for retraining under Article 8.05 (h) (iii) of the collective agreement...”

In a St. Clair College award referred to in the above award, the issue was a claim that teachers who were paid to September 15, 1988 which included two months’ vacation, should receive 90 days’ notice plus the two months’ vacation as they were advised on June 15<sup>th</sup> of their layoff on September 15<sup>th</sup>. The Grievors took their vacation period as scheduled and were paid regular salary pursuant to Article 8.04 (f). They were entitled to 90 days’ notice of layoff which overlapped the vacation period. It was the Union’s position that their vacation period should be exclusive of the period of notice and claimed an additional two months’ salary for the employees. That was rejected by the Board which found that as the parties included in the discharge provisions for an additional notice period as presently in Articles 27.14 (a), a similar term was not included in the layoff provision and stated:

“consistent with the College’s submission that employees have a period of vacation entitlement and are not given paid vacation. There are entitled to 100% of their regular salary spread over 12 months. Therefore, it follows that when the College gave notice of vacation in the regular course of its scheduling that it was independent of the notice of layoff which was subsequently imposed. There is no term in the collective agreement which requires an employee who has been given notice of layoff that the vacation period must be dealt with separately and in addition to the 90-days’ notice requirement so as to entitle such employees to additional compensation...”

The facts in the instant grievances commence with the circumstance of an employee being released from all or part of normally assigned teaching duties as of

April 1, 1996 when the notice of layoff was given or where an employee was required to complete the teaching duties during the academic year at the end of which the employee was released from all such duties. At that time, the notice required and given under Article 27.06 (viii) ( c ) was 90 calendar days effective from the release of such duties “for the purpose of engaging in retraining activities”. There is no dispute that the College had declared a financial exigency and the Union was then notified of impending layoffs which was followed by consultations between the parties. The College did not require these employees to engage in any particular type of retraining, that endeavour was left to the individual’s discretion and there was no compulsion by the College to do anything after the release of their duties and the notice of layoff was given pursuant to this Article. In our view, this situation is distinguished from the facts in the Humber College award which we find should not be applied in the circumstances of this case. The finding in the St. Clair award however, is consistent with the appropriate application of the right of the College under Article 26.07 (viii) ( c ) to firstly release employees from assigned duties for the period of the notice which is set at 90 calendar days. The period of notice provided by this Article is not qualified by any attachment for extension of the notice time because of benefits which may have accrued or have been applied during the academic year to these employees. Such a condition would require an addition to the terms of this Article, should the Union’s submission on these grievances be accepted.

A vacation as provided by Article 15 is a period off work after the academic year and scheduled by the College for which the employees are paid as part of their total remuneration for the calendar year. If that time off work was to be exclusive of a notice of layoff which might affect their vacation attached to their teaching duties during the academic year, that should have been explicitly recognized in the layoff procedure as it is for discharges from employment in Article 27.14 (a). Consistent with such intent however, the College paid the Grievors, their full salary for the 12-month period which

would include their time off work as if notices of layoff had not been given. The only exception in the layoff provision to the notice period of 90 calendar days is where the College for operational requirements cannot release the employee as at the date it ascertains a layoff is necessary in which event, there is an extension of the notice by 90 days from the date when the release from such duties became effective. Therefore, for those employees who were released from all duties on April 1<sup>st</sup>, their notice period extended to June 30<sup>th</sup> and for those who continued their teaching duties during the academic year and were released on completion of those duties, the notice period of 90 days commenced from that date. We find that there is no basis in the terms of the collective agreement applicable to layoffs to extend those periods of notice as claimed by the Union.

We find that the College complied with the terms of Article 27.06 (viii) (c), by its service of a written notice of layoff to the affected employees when they had been released from all or part of their normally assigned duties and provided 90 calendar days' notice with full pay and benefits to them. The purpose of that notice period expressed in this Article is not a mandatory requirement of the employee in order to obtain the benefits during that notice period when the affected employee has no further assignment obligations with the College. The payment by the College of the unexpired vacation entitlement is consistent with Article 15 and satisfies the requirements of the College as to the Grievor's vacation entitlement which is a period off work. That benefit is not inconsistent with a voluntary retraining programme which the employee may enter in that period when the professors are not required to work as the College released them from all duties on the effective dates of their layoffs.

We note in the Algonquin College award, the Board stated:

“A person is not on vacation when his employment relationship has ceased although he may receive vacation pay upon the termination of employment...”

The Board finds that vacation entitlement, statutory holidays, professional development days and non-teaching weeks are matters arising from the Grievors’ teaching responsibilities during the academic year and are separate benefits attaching thereto and do not qualify the right of the College to layoff employees which event is subject to the specific conditions applicable to layoffs expressed in Article 27.06 and the notice requirement in (viii) (c ). We find that the notice period provided in this layoff cannot be extended by the time claimed included in the issues set out in these grievances. It is our opinion to allow this extension of the terms of Article 27.06 (viii) (c ) would require its amendment which would be contrary to Article 32.04 (d) by which the Board is not authorized to amend any terms of the collective agreement.

When the College gave notices of layoff to the Grievors, their employment relationship was concluded subject to the conditions of the collective agreement applicable to layoffs which relate to possible displacements to retain a position of employment but when those considerations were exhausted and the layoff became effective April 1, 1996, the Grievors’ employment ceased with the release of their duties. Following that event, the Grievors were entitled to the 90-calendar day notice “for the purpose of engaging in retraining activities”. Whether the Grievors engaged in such activities was an individual decision and not mandated by the College to which they had no further responsibility for teaching or non-teaching functions. Vacations, professional development days, complementary functions and statutory holidays are assumed in a continuing employment relationship and part of work assignments and the responsibilities of the professors and fall within the conditions applicable to the academic year. The

College has the right to end both teaching and non teaching functions which were completed by those whose teaching duties were ended by the notice on April 1<sup>st</sup> or as the day when employees who continued after April 1<sup>st</sup> to teach were released from further teaching duties. That is the period of extension provided in this Article. In either circumstance, the Grievors were paid for Canada Day which fell within their period of vacation for which they were paid on the basis of the formula set by the College. That statutory holiday could not therefore be used in any event in this cause to extend the layoff notice period.

We find that the Union did not establish that there is a full or pro rata extension of the layoff notice period which the Grievors can claim under the headings of their grievances as none of those issues are supported in the application of the clear language of Article 27.06 (viii) ( c). By this Article, the College is not required to do anything other than compliance with the 90 calendar days' notice calculated from the date that it releases an employee from all or part of the normally assigned duties. That is the sole test to establish the date from which this notice period becomes effective and is to be calculated and cannot be otherwise extended by reference to other conditions of employment which have not specifically been included in the terms of Article 27.06 (viii) ( c ) which applies to the layoff of the Grievors.

We find that the Union did not establish the College was in violation of Article 27.06 (viii) ( c) as alleged in these grievances which are therefore dismissed and we so award.

DATED AT OAKVILLE THIS                      DAY OF JULY, 1997

---

Howard D. Brown, Chair

---

John McManus, Union Nominee

---

Ron Hubert, College Nominee