

HEADNOTE

CAAT(A)

OPSEU#96A080
LOCAL #110

**OPSEU (MASSEY, S.) and FANSHAWE COLLEGE
(Burkett, K. - award dated June 25, 1998)**

LAYOFF - The grievor was a full time Professor of Nursing who received a Notice of Layoff in April 1996. The grievor sought to displace partial load employees and claim a combination of partial load teaching and retraining pursuant to Article 27.06(vi). As of the date of notice of layoff there were no junior persons occupying partial load positions in the faculty. However, by the time the grievor was actually laid off at the end of August 1996 (having completed her teaching assignments for the year and her retraining period) at least 3 persons had been hired to perform partial load assignments for the fall 1996 term. The Union argued that the obligations on the College under Article 27.06 applied until the grievor was actually "laid off to the street" - the end of August. The College asserted that its obligations only arose at the time of notice of layoff -- April 1996.

GRIEVANCE DENIED - The majority concluded the language of Article 27.06 is such that the obligations on the College to grant displacement rights only operate at the time the notice of layoff is given. It is important to note that the majority however states that once a person received notice of layoff they are deemed to be laid off and eligible to exercise recall rights despite the fact that they may be on training and not actual "laid off to the street" (see page 20).

David Wright

96A080
Local 110
CPAT(A)

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAW COLLEGE

("The College")

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("The Union")

IN THE MATTER OF GRIEVANCE:

SHELLY MASSE - OPSEU # 96A080

BOARD OF ARBITRATION:

Kevin M. Burkett - Chairperson
Peter Hetz - Employer Nominee
John McManus - Union Nominee

APPEARING FOR THE COLLEGE:

Robert Atkinson - Counsel
and others

APPEARING FOR THE UNION:

David Wright - Counsel
and others

A hearing in this matter was held in LONDON, Ontario on March 14, 1998

A W A R D

This grievance challenges the layoff of Ms. Shelly Masse, a professor of nursing teaching in the practical nursing program. Ms. Masse, who has worked on a full-time basis since 1990, was served with notice of her impending layoff on April 1, 1996. While her original layoff date was to be July 25, with a release for retraining under article 27.06(viii) on April 26, the release and layoff dates were ultimately changed to August 19 and November 16, 1996, respectively. The grievance claims that the College is in breach of article 27.06(vi) by reason of its failure to assign her to teach NURS 171 in the fall of 1996 and NURS 271 in the winter of 1997 in combination with her retraining activities. There is no dispute with respect to the grievor's competence, skill and experience to teach these courses. There is no dispute with respect to my authority to determine the issues raised by this grievance.

There are two issues raised. The first pertains to the timing of the obligations upon the College under article 27.06. The Union takes the position that the obligation of the College to either place an employee who is under notice of layoff in a vacancy under article 27.06(i) or to allow the employee to displace a less senior employee under articles 27.06(ii)-(vii) extends from the time that the employee is given notice of layoff until the employee is actually laid off to the street. The College takes the position that its obligation in this regard runs from the time as of which a decision is made to lay off to the giving of the notice of layoff. The grievor was issued a notice of layoff dated April 1, 1996. The second issue pertains to duration of the grievor's entitlement to a position or combination of positions under article 27.06(vi). The Union takes the position that the grievor was entitled to a partial-load teaching assignment in combination with retraining activities for the whole of the teaching year; that is for both the fall and winter terms. The College, on the other hand, asserts that if it owed any obligation to the grievor under article 27.06(vi), that obligation was to provide a partial-load teaching assignment in combination with retraining activities for the fall term only.

The facts in this matter are as follows:

- The parties were in agreement as to the relevant facts and agreed to proceed without viva voce evidence. Most of the relevant facts are set out in the exhibits.
- The grievor was employed by the College as a Professor of Nursing teaching in the practical nursing program and had worked in that capacity on a full-time basis since August 1990. She had worked as a part-time and sessional Professor of

Nursing from 1988 to 1990. In the fall of 1995 the College gave the Union notice of intent to lay off under each of articles 27.05 and 29 and on April 1, 1996 issued layoff notices to some 55 members of the academic bargaining unit. This included some 18 professors in the nursing program (both the practical and registered nursing programs). The grievor was one of the persons given such notice. While her original layoff date was to be July 25 (with a release from duties for retraining purposes - see article 27.06(viii) on April 26), this was revised on April 22 to provide for release from duties on August 17, with a layoff date of November 14. Ultimately the release and layoff dates were changed to August 18 and November 16 respectively.

- By memo dated April 23, the grievor informed the College that she wished to exercise her rights under article 27.06(vi) to combine a partial-load assignment and retraining. On July 31, the grievor, in her referral to arbitration, reiterated this selection and particularly identified, among other work, NURS 171.
- While there were no partial-load assignments in the practical and registered nursing programs in either the winter or summer 1996 terms, by at least May 23 the College was aware that it would have partial-load assignments in the nursing area, including in NURS 171, available in the fall term. In mid-August three people were hired as partial-load instructors for NURS 171 for the fall term. Three persons were also hired as partial-load instructors for NURS 271 in the winter 1997 term, on similar terms. One of the three persons hired in the winter

was the grievor. Another was Ms. Regan who had also been hired in the fall. The grievor has more seniority than Ms. Regan. The third partial-load instructor in the winter term, K. Thompson, taught as a partial-load instructor in the fall term in the registered nursing program.

- The parties were signatories to a local agreement from April 1, 1993 to March 31, 1996 under which it was agreed that no full-time professors would be given notices of layoff during that period.
- Prior to issuing the layoff notice to the grievor, the College assessed whether there were any positions to which the grievor could be reassigned in accordance with the provisions of subparagraphs(i)-(viii). The College determined that there were no such positions and accordingly issued the notice of layoff to the grievor in accordance with article 27.06(viii)(c) of the collective agreement.
- There were no partial-load teaching assignments in the practical nursing program in either the winter term 1996 or the summer term 1996. As of May 23, 1996 the College had unassigned teaching for fall 1996 in NURS 171 consisting of four 10-hour blocks. NURS 171 is a one-term course.
- The grievor was released to engage in retraining, in accordance with article 27.06(viii)(c) on August 18, 1996.
- In mid-August 1996 three persons were hired as partial-load instructors (not professors) to teach NURS 171 for the fall term.

Articles 27.06 and 27.08 read 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 layoff 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 fulfil the requirements of the full-time position concerned, seniority shall apply consistent with the following:

- (i) An employee will be reassigned within the College to a vacant full-time position in lieu of being laid off if the employee has the competence, skill and experience to perform the requirements of a vacant position.
- (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 fulfil the requirements of the position concerned;
 - (b) the employee being displaced has lesser seniority with the College.
- (iii) Failing placement under 27.06(ii), such employee shall be reassigned to displace a full-time employee in another classification upon acceptance of the identical employment conditions as the classification concerned provided that:
 - (a) the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned;
 - (b) the employee being displaced has lesser seniority with the College.
- (iv) Failing placement under paragraph 27.06(iii), such employee shall be reassigned to displace two partial-load employees provided that:
 - (a) the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned; and
 - (b) each of the partial-load employees being displaced has lesser months of service with the College as determined in Article 26, Partial-Load Employees, than such displacing employee's months of seniority; and

- (c) it is understood that the College retains the right to assign additional work to the employee, where warranted, subject to the limits prescribed by Article 11, Workload.
- (v) (a) Failing placement under 27.06(iv) or where the employee has waived in writing the right in 27.06(iv), such employee shall be reassigned to displace one partial-load employee and one or more part-time employees whose assigned courses are as described in 27.06(v)(b), provided that:
 - (i) the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned: and
 - (ii) each of the employees being displaced has lesser months of service with the College (as determined in Article 26, Partial-Load Employees), or Appendix IX, as appropriate) than such displacing employee's months of seniority; and
 - (iii) it is understood that the College retains the right to assign additional work to the employee where required so that the work assignment so created constitutes a full-load assignment in accordance with the limits prescribed by Article 11, Workload.
- (v) (b) The courses taught by the part-time employees displaced must be:
 - (i) the same as, or
 - (ii) essentially the same as, or
 - (iii) prerequisite courses to those taught by the partial-load employee concerned.
- (v) (c) Such employee shall have the layoff notice extended until completion of the assignment so created and shall maintain current salary and benefits for the duration of that assignment.
- (v) (d) Upon completion of the assignment so created, or as mutually agreed between the College and the employee, such employee shall be reassigned to a vacant full-time position if the employee has the

competence, skill and experience to perform the requirements of a vacant full-time position.

- (v) (e) Failing placement under 27.06(v)(d), such employee shall be laid off without further notice upon completion of the partial-load assignment.
- (vi) (a) Failing placement under 27.06(v) or where the employee has waived in writing the right in 27.06(v), such employee shall be reassigned to displace one partial-load employee and engage in approved retraining activities such that the employee retains current salary and benefits for the duration of the partial-load assignment provided that:
 - (i) the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned; and
 - (ii) the partial-load employee being displaced has lesser months of service with the College (as determined in Article 26, Partial-Load Employees) than such displacing employee's months of seniority.
- (vi) (b) Such employee shall have the layoff notice extended until completion of the partial-load employee's assignment and shall maintain current salary and benefits for the duration of the partial-load assignment.
- (vi) (c) Upon completion of the partial-load assignment, or as mutually agreed between the College and the employee, such employee shall be reassigned to a vacant full-time position if the employee has the competence, skill and experience to perform the requirements of a vacant full-time position.
- (vi) (d) Failing placement under 27.06(vi)(c), such employee shall be laid off without further notice upon completion of the partial-load assignment.
- (vii) (a) Failing placement under 27.06(vi)(a), or where the employee has waived in writing the right in 27.06(vi)(a), such employee shall be reassigned to displace a sessional employee (who has more than 90 days remaining on the sessional employee's term appointment)

provided that the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned.

- (vii) (b) Such employee shall have the layoff notice period extended until completion of the sessional employee's assignment and shall maintain current salary and benefits for the duration of the sessional assignment.
- (vii) (c) Upon completion of the sessional assignment or as mutually agreed between the College and the employee, such employee shall be reassigned to a vacant full-time position if the employee has the competence, skill and experience to perform the requirements of a vacant full-time position.
- (vii) (d) Failing placement under 27.06(vii)(c), such employee shall be laid off without further notice.
- (viii) (a) Failing placement under 27.06(vii)(a), or where the employee has waived in writing the right in 27.06(vii), such employee shall be reassigned to displace a part-time employee upon acceptance of the identical employment conditions as the part-time employee concerned provided that:
 - (i) the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned; and
 - (ii) the part-time employee being displaced has lesser months of service with the College as determined in Appendix IX than such displacing employee's months of seniority.
- (viii) (b) Such a reassigned person shall be deemed to be laid off and eligible for recall in accordance with 27.09B and 27.09C, 27.03E and the rights under 27.09A.
- (viii) (c) Failing placement under 27.06(viii)(a), such employee shall be laid off with written notice or not less than 90 calendar days. Such employee 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.

- (viii) (d) At the termination of the period referred to in 27.06(viii)(c), such employee shall be reassigned to a vacant full-time position, if the employee has the competence, skill and experience to perform the requirements of a vacant full-time position.
- (viii) (e) Failing placement under 27.06(viii)(d), such employee shall be laid off without further notice.

27.08 A An employee claiming improper layoff, 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 layoff 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 27.08A, 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.

Issue #1

In support of its position with respect to the first issue, the Union submits that the obligation upon the College under article 27.06 to place the affected employee in a vacant position or to permit such employee to displace another extends from the time of the giving of the notice to the time as of which the notice period is exhausted. It is submitted, therefore, that on the facts here the grievor was entitled under article 27.06(viii)(a) to displace the junior partial-load employees who were hired in mid-August and started work at the beginning of September - two weeks after the grievor completed her last teaching assignments and one week after the expiry of her remaining vacation. As will be recalled, the College takes the position that it is under no obligation under article 27.06(viii)(a) where there were no partial-load employees in nursing at the time the grievor received her notice of layoff in April.

The Union argues, firstly, that the purpose of article 27.06 is to ensure that, subject to qualification, positions are given to senior employees and that it is the junior employees who are laid off to the street. It is submitted that the College's interpretation creates a significant period of time during which a senior employee about to be laid off would have no means of displacing a junior employee or assuming a vacancy. The Union argues, secondly, that under the College's interpretation where an affected employee's displacement rights are limited to the time of the giving of notice, it is within the power of the College to serve the notice of layoff at a time when it knows that there are no suitable vacancies or displacement opportunities. The Union asks rhetorically what is to

keep the College from issuing all notices of layoff a full year before actual layoff during the summer or over Christmas when no one is teaching and, therefore, there are no displacement opportunities? The Union argues, thirdly, that the language of article 27.06(i) is consistent with the interpretation that it urges upon us. We are referred to article 27.06(i) where it is stipulated that "an employee served with notice of layoff will be reassigned within the College to a vacant full time position in lieu of being laid off..." (emphasis added). It is submitted that if the parties had intended that the College's obligations would apply only at the time of notice of layoff they would have said so. We are asked to give effect to the words chosen which, in the submissions of the Union, provide displacement rights up to the point of being laid off. It is submitted that because the right to displace is contingent upon not being placed in a vacant position "in lieu of being laid off", the right to displace also continues up to the point of being laid off. Finally, it is argued that the Union interpretation is consistent with the structure of the College and the nature of the work. It is submitted that the focus of the layoff process is work for the following academic year so that employee movement and the consequent disruption is minimized. We are reminded that on the College's interpretation, where notices of layoff are served in April, senior professors served with notice would be forced to either claim a vacancy at that time or displace a junior professor at that time with the result that for each notice of layoff a change in teachers would result in mid-semester. The Union argues that this result could never have been intended in circumstances where the layoff of the senior professor is not to take place until the following fall. The Union

relies upon Niagara College and OPSEU (working grievance) October 3, 1989 unreported (Brown) in support of its position that the time frame for exercising rights under article 27.06 extends up to the time of being laid off.

The College submits that the very issue before us for determination with respect to the time as of which displacement rights are to be enforced has been decided. The College refers to the award of arbitrator Simmons in *re: Fanshawe College and OPSEU (Zurowski) August 12, 1997 (unreported)*, wherein it was found that the 20-day time limit for the filing of a grievance under article 32.02 which is expressly made to apply to layoff grievances under article 27.08A governs. In the *Zurowski case (supra)* the grievor was given notice of layoff on April 1, 1996, effective March 20, 1997. The grievor was released from duties from December 20, 1996 to March 20, 1997 to engage in retraining. The College asks us to adopt the finding of arbitrator Simmons and find that the time as of which placement/displacement rights operate under article 27.06 is within the 20-day period from the receipt of written notice of layoff. It is the position of the College that arbitrator Simmons was correct in his interpretation of the relevant provisions. We are reminded that an arbitrator ought not to depart from the award of a previous arbitrator under the same collective agreement unless the previous award is clearly wrong. The College argues that under the process established by article 27.06, notice of layoff is the last option so that when an employee selected for layoff from his/her position cannot be reassigned to fill a vacant position or to displace a less senior employee, a layoff notice

is issued under article 27.06(viii)(c). The College asks us to reject the contention of the Union that an employee who receives a notice of layoff under article 27.06(viii)(c) is then eligible for reassignment under articles 27.06(i) through (viii). It is submitted that the Union interpretation is contrary to the "waterfall" structure of article 27.06 under which if reassigned under article 27.06(i)-(vii), an employee never receives a notice of layoff under article 27.06(viii)(c).

In response to the Union's reliance upon the practical implications of the College's interpretation, the College argues that if the requirement for layoffs occurs towards the end of a term, as in this case, and the senior affected employee can displace a junior employee in a continuing position then the junior employee will receive the layoff notice and the senior employee will be assigned to teach the junior employee's course in the next term. It is further submitted that the same process would be followed if there was a need for layoffs during the "very few and very short times of the year when no one is teaching" so that the process can be undertaken at any time of the calendar year without affecting seniority rights or disrupting the classroom. The College reiterates that the purpose of article 27.08 is to ensure that displacement rights are defined at an early stage, which can be several months prior to the actual layoff. It is argued that this is so because the fundamental allegation of any layoff grievance filed under article 27.08 is that the grievor should not have been given a layoff notice under article 27.06(viii) but rather should have been reassigned pursuant to one of the preceding sub articles of article 27.06. Accordingly, it is submitted that the clear temporal focus of such a grievance is the time

as of which the College allegedly fails to reassign under one of these preceding sub articles. The College argues that this is consistent with the clear stipulation in article 27.08, as relied upon by arbitrator Simmons, that the 20-day time limit for processing complaints under article 32.02 "shall apply from the date written notice of layoff is given to the employee." The College reminds us that at the time of the grievor's notice of layoff, there were no partial-load employees working in the practical nursing program nor were there any scheduled for work in the summer of 1996. It is argued that it cannot be that displacement and layoff decisions are to be made subject to future circumstances unknown at the time of the giving of notice of layoff. We are asked to reject the literal interpretation given to the words "in lieu of being laid off" in article 27.06(i) and conclude instead that the intention was to refer to the last resort of notice of layoff under article 27.06(viii)(c). Finally, in response to the Union's assertion that the effect of the College's interpretation is to create a potential gap in an employee's displacement rights in the event that a position becomes available between the filing of a grievance and the effective date of any layoff for which the employee is qualified, the College points to article 27.06(viii)(d). It is submitted that that clause speaks to an employee's rights in the period subsequent to the filing of a grievance within 20 days of receipt of notice of layoff by providing that "such employee shall be reassigned to a vacant position, if the employee has the competence, skill and experience to perform the requirements of a vacant full-time position." In conclusion, we are asked to find that because the grievor

was unable to name any partial-load employee whom she could displace under articles 27.06(vi) (at the time of the receipt of notice of layoff), the grievance must fail.

The Union advises in reply that the *Zurowski* award of arbitrator Simmons is presently under judicial review. The Union argues that the award is wrong and ought not to be followed in that the wrong question was asked and answered. The Union acknowledges that the grievor in that case, as well as this, was required to take certain steps upon receipt of the notice of layoff. However, it is submitted that whereas articles 27.08A and 32.02 deal with the obligation upon the affected employee to commence a grievance, neither of these clauses speak to the timing of the obligations upon the College under article 27.06. The Union argues that there is nothing in articles 27.08A or 32.02 that suggests that the obligation of the College to permit the grievor to move into a vacancy or displace another employee cannot occur at some point after the date of layoff. Absent any submission to the Simmons board concerning the "gap" in rights that would be created if the College's interpretation was accepted with respect to the meaning of the words "in lieu of being laid off" in article 27.06(i), we are asked to disregard the conclusions reached by arbitrator Simmons. Further, the Union, in asking us to reject the *Zurowski* award, points to the *Niagara College* award of arbitrator Brown which, it maintains, was given only cursory consideration in the *Zurowski* award. The Union also relies on the award of arbitrator Mitchnick between these parties dealing with the *Gibbs* grievance dated September 19, 1997 (see *re: Fanshawe College and OPSEU Gibbs*

grievance September 19, 1997) unreported (Mitchnick). It is submitted that the timing argument of the College is implicitly rejected by arbitrator Mitchnick in that award. In holding that the grievance in that case did not have to be recast as a recall grievance, it is submitted that the Mitchnick board acknowledged the right of the Union to proceed with a grievance challenging the right to displace employees in the fall of 1996 when the notice of layoff was given in the spring of 1996 and the layoff occurred in August 1996.

As for the practical impact of the timing of the giving of notice, it is submitted that if the grievor's layoff notice in this case had been rescinded and reissued on August 14, 1996, there could have been no dispute about the grievor's right to claim the work now at issue. We are reminded that if the College's interpretation is accepted, nursing professors would have no rights under article 27.06(iv) through (vii) if given notice of layoff during the summer months. It is argued that it could never have been intended that the College would have the unilateral right to determine the extent of an employee's displacement rights by the timing of the layoff notice.

In response to the College position that its "gap" argument is dealt with by article 27.08(viii)(d), the Union argues that this article demonstrates the "gap" because the right to fill a vacancy under article 27.08(viii)(d) arises at the end of the retraining period. It is argued that because it does not impose an obligation on the College to place the grievor in any vacancy which arises between the date of notice of layoff and the end of the retraining period, even where, as in this case, that period extends for 230 days, the article supports the Union position.

We have given careful consideration to the positions advanced by the respective parties and have decided that the College position must prevail. We start by observing that as an abstract proposition we would expect seniority rights to operate from the time of notice of layoff until the time of actual layoff, to permit a more senior, qualified employee to displace a less senior employee. However, it is the language of the collective agreement that governs. These parties have drafted an extensive and somewhat complicated procedure for dealing with planned layoffs that must be given effect, even if this process operates differently than what might be considered normative.

Article 27.06 is triggered when the College "decides to lay off or to reduce the number of full-time employees." Thereupon follows a series of options for affected employees that commence with reassignment within the College to a vacant full-time position "in lieu of being laid off" and then to the "displacement of another full-time employee in the same classification" under article 27.06(i) and then to a series of displacement options concluding with the displacement of "a part-time employee upon acceptance of the identical employment conditions as the part-time employee" under article 27.06(viii)(a). It is to be noted that there is no mention of a notice of layoff in the preamble to article 27.06 nor through the various sub clauses up to and including article 27.06(viii)(a). Rather, the requirement for a "written notice of not less than 90 calendar days" appears in article 27.06(viii)(c) and is triggered by a failure to be placed under article 27.06(viii)(a). Apart from the practical implications, therefore, the basic structure is one under which the employer's decision to lay off or to reduce the number of full-time

employees triggers a series of options commencing with placement in a vacant full-time position, followed by the displacement of a less senior employee in the same classification, cascading downward through less attractive options to the displacement of a part-time employee and the acceptance of part-time conditions, failing which an employee is "deemed to be laid off" under article 27.06(viii)(b) and is given "written notice of not less than 90 calendar days" under article 27.06(viii)(c). Except for the reference in article 27.06(i) to reassignment to a vacant full-time position "in lieu of being laid off," there is nothing in the structure of the clause to suggest that upon receipt of the written notice of layoff under article 27.06(viii)(c), an employee goes back and begins again the placement and displacement process that commences under article 27.06(i). Indeed, the subsequent provision for "release from all or part of the normally occupied duties, for this period of notice, for the purpose of engaging in retraining activities," in article 27.06(viii)(c) and the provision for "reassignment to a vacant full-time position" at "the termination of the period referred to in 27.06(viii)(c)" supports the opposite conclusion; that is that a surplus employee upon receiving notice of layoff under article 26.07(viii)(c) does not repeat the placement and displacement process but rather, in accordance with articles 27.07(viii)(c) and (d) is provided with retraining and then a final opportunity to fill a vacant full-time position before being laid off to the street under article 27.06(viii)(e).

When reference is had to the language and structure of article 27.06, I am unable to conclude that the stipulation in article 27.06(i) that a surplus employee be reassigned

within the College to a vacant full-time position "in lieu of being laid off" means that all of the various placement opportunities that precede the giving of notice remain open until the employee is laid off to the street. It is clear that all of the placement opportunities under article 27.06 are triggered by a decision of the College "to lay off or to reduce the number of full-time employees." They proceed in descending order, each failed opportunity giving rise to a less favourable opportunity, until the employee receives a written notice of layoff under article 27.06(viii)(c), following which there is an opportunity for retraining and a final opportunity to fill a vacant position. In the face of the language and structure of article 27.06, it must be found that the words "in lieu of being laid off" in article 27.06(i) do not mean that the cascading opportunities commence upon receipt of a written notice of layoff under article 27.06(viii)(c) but rather these words refer to the ultimate possibility of layoff should there not be a vacant position nor any displacement. To find otherwise, would be to stand the clause on its head.

Support for the above interpretation of article 27.06 is found in article 27.08A. Article 27.08A stipulates that "an employee claiming improper layoff... shall state in the grievance the positions occupied by full-time and non full-time employees whom the employee claims entitlement to displace." The clause goes on to stipulate that "the time limit referred to in 32.02 for presenting complaints shall apply from the date written notice of layoff is given to the employee." The requirement to identify the positions that are claimed evidences an understanding that the process by which positions may be occupied under article 27.06 has been completed. If the process has been completed, as

we believe it must be before a written notice of layoff is issued, then the requirement to file a complaint within 20 days of the receipt of written notice makes sense because it operates at the end of the article 27.06 process when an employee is in a position to know if he/she has been denied a position to which an entitlement exists. In our view, the time limit is consistent with and thereby supports the interpretation of article 27.06 that is clear from the language and structure of that clause. In so far as it is argued that the time limit runs from the date of an actual "improper layoff" to the street and that, therefore, all of the article 27.06 rights operate up to that point, reference is made to articles 27.06(viii)(b) and (c). Read together, it is clear that an employee who is not placed under article 27.06(viii)(a) and, therefore, not placed in any position, is deemed to be laid off and eligible for recall from that date forward even though receiving retraining. Having been deemed to be laid off from the date as of which written notice of layoff is required under article 27.06(viii)(c), an employee is in a position to file a grievance claiming improper layoff and it is not surprising that the time limits for the filing of such a grievance under article 32.02 would run from that date. While the Union asserts that there is a distinction between the obligation upon an employee to grieve under article 27.08 and the obligation upon the College to acknowledge rights for placement or displacement under article 27.06, there is an obvious interrelationship between the two. Clear and unequivocal language would be required to have us conclude that the time limits for the filing of a placement grievance under article 27.08 somehow run from a point in time prior to the operation of the various subclauses of article 27.06. Under

article 27.08, the time limits for the filing of a placement grievance run from the date written notice of layoff is given. Written notice of layoff is given under article 27.06(viii)(c) after the various placement opportunities have been exhausted. Accordingly, the commencement of the time limits for the filing of a grievance from the giving of written notice of layoff under article 27.06(viii)(c) confirms our interpretation of article 27.06 with respect to the time as of which the placement and displacement opportunities exist.

The Union argues that it could never have been intended that displacement rights would not operate up to the date of layoff to the street. It is argued that where the notice period is for a minimum of 90 days and often, as here, for a much longer period, it could never have been intended that a senior employee subject to layoff would be unable to displace a junior employee right up to the moment of layoff. While I acknowledged at the outset that it is normative for displacement rights to operate up to the time of layoff, it is not unusual for there to be collective bargaining tension as to the extent and depth to which bumping will be permitted. These parties have agreed that the displacement process will run from the College's decision to lay off, so that every surplus employee has an opportunity to displace a junior employee, and failing placement to receive a written notice of layoff and a minimum 90-day notice period during which retraining is provided. The parties have further agreed that employees who have been unable to displace get a last opportunity to fill any existing full-time vacancy for which they are qualified at the expiry of the retraining period. Finally, if laid off to the street, recall

rights operate for a period of two years. This is the process that has been agreed upon and it is the process to which we must give effect. This result does not somehow cause us to twist the language to force some other result.

The *Zurowski award (supra)* by the Simmons board dealt with the same issue and came to the same conclusion as we have in determining the period for which layoff rights are assessed under this collective agreement.

The answer, according to this board, lies in art.27.08A which in the last sentence of that article reads: "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." That time limit in art. 32.02 requires that a complaint must be discussed with the employee's immediate supervisor within 20 days following a complaint raised by the employee. The comments in **Niagara College** does not [sic] assist the board in determining this issue. That decision refers to the decision of the college and the effective date of the layoff. The decision by the College on the one hand, following notice to the employee of a layoff, and the "effective date of the layoff" are two separate and distinct dates. The notice to layoff is, for our purposes, contained in art. 27.08A which limits the time following notice to present complaints and that is the time when the complaints must be referred to the College. It is also at that time that the employee must state in her complaint that she is being improperly laid off. In the instant situation the grievor was notified on April 1, 1996 that she was to be laid off. She filed her grievance on April 15, 1996 claiming that her impending layoff was improper. While the effective date of her layoff was March 20, 1997 (with a retraining program from December 20, 1996), she nevertheless had a complaint on April 15, 1996 that her layoff was improper.

In this board's view the grievor was (quite properly) of the view that her employment was such that she was to be laid off at a future date. She claimed that her impending layoff was improper and filed her grievance accordingly. In this board's view had the grievor waited until December 1996 the College would have had a viable argument that her grievance was out of time because she had received notice of her impending layoff in

April 1996. So this board's view is that the period for which her layoff rights were to be assessed was April 1996 and not December 1996.

When the grievor filed her grievance on April 15, 1996 alleging improper layoff she was obligated to look around on April 15 for a vacant position then existing, pursuant to art. 27.06(i), or name employees who held full-time positions pursuant to art. 27.06(ii) or (iii), or name partial load part-time and sessional employees pursuant to the remaining subparagraph of art. 27.06.

Accordingly, the answer to Question #2 is April 15, 1996.

While we have provided a more in-depth analysis of the relevant clauses, we concur in the conclusion reached by the Simmons board.

The Union relies on the award of arbitrator Brown in Niagara College and OPSEU, Martin Grievance, October 31, 1989, wherein he confirmed the right of the grievor to displace as of the date of layoff. However, while arbitrator Brown cites language identical to articles 27.06(i) and (ii) of the instant collective agreement, he makes no reference to the deemed layoff and the giving of written notice of layoff following the exhaustion of the displacement options up to and including the displacement of a part-time employee and the acceptance of part-time conditions under article 27.06(viii)(a). Absent any reference to language providing for the written notice of layoff after the exhaustion of displacement opportunities and absent language stipulating that the time limit referred to in article 32.02 for presenting complaints shall apply from the date the written notice of layoff is given to the employee, as appears in article 27.08A of the collective agreement before us, it must be found that the *Niagara College* award is

distinguishable. That award cannot be relied upon to support a conclusion different than that which we have reached on a close analysis of the language here.

The Union also relies on the award of arbitrator Mitchnick between these parties in the Gibbs grievance (*re: Fanshawe College and OPSEU, Gibbs grievance (unreported) September 19, 1997 (Mitchnick)*). In that case, the Mitchnick board allowed the grievor to press her displacement rights up to the commencement of the fall term even though her layoff notice was issued in April. However, there was no extensive analysis of the language and structure of article 26.07 as might have brought that board to the same conclusion as this board. Absent such an analysis, we are not prepared to rely on that award as binding authority for the result sought by the Union here.

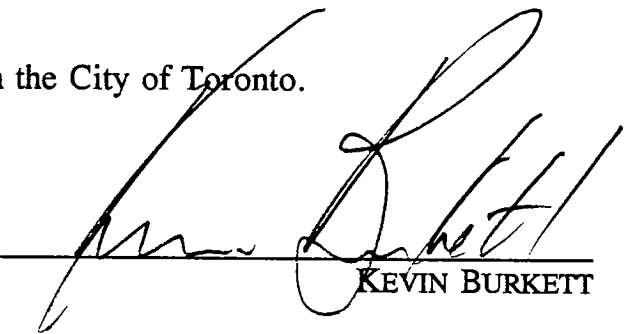
While we are bound to interpret and apply the language of the collective agreement, we acknowledge that under this language there is scope for the College to time any decision to lay off in a manner that might significantly reduce an affected employee's opportunity for placement. However, there is no evidence of the College having done so in this or any other case. More importantly, it would be open to an arbitrator to rectify the adverse impact where it could be established that the employer had acted when it did in order to defeat an employee's seniority rights. Finally, we note the undertaking of the College in its written submission that "if the requirement for layoffs occurs towards the end of a term as it did in this case, and if the College decides that senior employee A can be reassigned to displace junior employee B in a continuing position, then A will not receive a layoff notice, will be reassigned to teach in B's

position in the next term and B will receive the layoff notice." The College went on to comment that it would make a similar accommodation if the need for layoffs arose during a period when no one is teaching.

In summary, we have found that under the clear and express terms of article 27.06, read in conjunction with article 27.08, an employee who is affected by a decision of the College to lay off or reduce the number of full-time employees is entitled under article 27.06(i) to be reassigned within the College to a vacant full-time position failing which the affected employee is entitled to rely upon the displacement provisions of article 27.06(ii) through (viii). If the affected employee is unable to displace a junior employee, he/she receives a written notice of layoff of not less than 90 calendar days following which the affected employee is entitled to retraining under article 27.06(viii)(c), at the termination of which the affected employee shall be reassigned to fill a vacant full-time position under article 27.06(viii)(a), failing which the affected employee is laid off to the street without further notice and becomes subject to the recall provisions. Because the written notice of layoff is provided at the end of the displacement sequence it is not surprising that the 20-day time limit for presenting complaints that applies under article 27.08A runs from the date written notice of layoff is given to the affected employee. There is no way that article 27.06, read in conjunction with article 27.08A, permits an employee to exercise displacement rights for a second time after receipt of the written notice of layoff under article 27.06(viii)(c). This is the same interpretation adopted by the Simmons board in the *Zurowski* matter.

Having regard to all of the foregoing, the answer to the first question is that displacement rights and obligations under article 27.06 are exercised following a decision by the College to lay off but before receipt of the written notice of layoff under article 27.06(viii)(c) and that any complaint with respect to the exercise of these displacement rights, pursuant to article 27.08A, must be made within 20 days of receipt of the written notice of layoff. There were no partial-load assignments that could have been claimed by the grievor at the time that she was entitled to exercise her displacement rights under article 27.06(vi). Accordingly, the grievance must fail and I hereby so declare.

Dated this 25th day of ~~March~~ ^{June} 1998 in the City of Toronto.



KEVIN BURKETT

I ~~concur/dissent~~ To Follow

- UNION NOMINEE

I ~~concur/dissent~~ "SIGNED"

- COLLEGE NOMINEE