

IN THE MATTER OF AN ARBITRATION

92C724  
Local 556  
CAAT (A)

BETWEEN:                               GEORGE BROWN COLLEGE

AND:                                       ONTARIO PUBLIC SERVICES EMPLOYEES UNION

AND IN THE MATTER OF GRIEVANCE OF: BARBARA MELLOR  
GRIEVANCE # 92C724

BOARD OF ARBITRATION:           Kevin M. Burkett - Chair  
  Fred Cowell       - Employer Nominee  
  Sherril Murray   - Union Nominee

APPEARANCES FOR THE                J. Lynn Thomson - Counsel  
EMPLOYER:                             Bronwen Morgan - Student at Law  
  A. Lillepold     - Manager,  
  Employment Equity  
  J. Vile           - Dean, Community  
  Services  
  L. Mellenby

APPEARANCES FOR THE                Mary McKinnon   - Counsel  
UNION:                                 Barb Mellor      - Grievor

A hearing in this matter was held in Toronto on June 21, 1993

## A W A R D

1. The Union grieves that the College breached article 8.12 when it filled a vacant counsellor's position from outside the bargaining unit in March 1992 instead of appointing Ms. Barbara Mellor, the only applicant from within the College. The College argued by way of a preliminary objection to our jurisdiction that the grievance fails to disclose an arbitrable issue. It was agreed between the parties that we would deal with the preliminary matter before proceeding further.

2. The relevant provisions of the collective agreement are set out below:

### **Article 7 MANAGEMENT FUNCTIONS**

- 7.01 It is the exclusive function of the Colleges to:
- (a) maintain order, discipline and efficiency;
  - (b) hire, discharge, transfer, classify assign, appoint, promote, demote, lay off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to extent provided in this Agreement:
  - (c) to manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification

of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.

- 7.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.

**Article 8**  
**SENIORITY**

- 8.12(a) Notice will be posted in the College of all vacancies of full-time positions in the bargaining unit. Such notice will be posted for at least five (5) working days.

At the same time, notice of these vacancies will be sent to the College's Union Local President for distribution to the other Union Local Presidents.

The College will also forward copies of the notice to the other Colleges with the intention that they be posted.

- 8.12(b) Where a vacancy of a full-time position in the bargaining unit occurs, and is not filled internally, the College will give consideration to applications received from academic employees laid off at other colleges before giving consideration to other external applicants. Such consideration shall be given for up to and including ten (working) days from the date of posting as described in 8.12(a).

Consideration will include review of the skill, competence and experience of the applicants in relation to the requirements of the vacant position.

It is to be noted that the standard of review in cases of lay off, as stipulated in Article 8.05, is "... the competence, skill and experience to fulfil the requirements of the full-time position concerned."

3. The facts that are relevant to our determination in this regard are as follows:

- The grievor has been employed by the College as a nursing professor and more recently as a staff training and development officer since 1975.
- The College posted a vacancy in the position of Counsellor in Redirection Through Education Programs (the delivery of life skills and education upgrading to ex-psychiatric patients) on January 10, 1992.
- Ms. Mellor applied for the position even though it did not carry any increase in salary. It is to be observed that this is essentially a single classification bargaining unit. Ms. Mellor was the only applicant from within the College.
- Ms. Mellor was interviewed for the position on February 3, 1992. The external candidates were interviewed on February 5, 1992. Ms. Mellor was given notice by letter February 14, 1992 that "after careful consideration we have concluded that your qualifications and experience do not fully meet the requirements of this particular job .... "

4. The College argues that the grievance fails to disclose an arbitrable issue. It is submitted that because the College fulfilled the positive obligation upon it to post the position there can be no breach of Article 8.12 and there being no breach of Article 8.12 there can be no suggestion that, somehow, the College failed to exercise its managerial discretion under Article 7.01 in a reasonable fashion. The College submits that this agreement is unique in so far as it does not stipulate what the standard of review is to be in a job posting case. The College asks us to contrast the standard specified in respect of the lay off of a bargaining unit member within the College in Article 8.05 and the standard specified in respect of the consideration to be given to an academic employee laid off at other Colleges in Article 8.12(b). In the absence of any such standard in Article 8.12(a) in respect of the consideration to be given to the application of an academic employee within the college for another academic position within the college, it is argued that no such standard was intended. The College suggests that there are no such provisions for employees not in danger of being laid off because these employees are in fact seeking a lateral transfer with no loss in pay. The College argues that having fulfilled the positive obligation of posting the position it complied with the requirements of Article 8.12(a) and that having complied with Article 8.12(a) it cannot be argued that it failed to exercise its unilateral right to transfer (or refuse to transfer) in a manner that was not reasonable. The College relies on the following awards in support of its position:

George Brown College and Ontario Public Service Employees Union August 5, 1992  
(G. Brent) (Unreported)

Sunnybrook Hospital and Sunnybrook Hospital Employees Union Local 777 March 19, 1987  
( G. J. Brandt) (Unreported)

Niagara College and Ontario Public Service Employees Union November 21, 1991  
(K. P. Swan) (Unreported)

Canada Packers Inc. and United Food and Commercial Workers International Union Local 175 July 5, 1991 (K. A. Hinnegan)(Unreported)

Fanshawe College of Applied Arts and Technology and Ontario Public Employees Union May 6, 1983 (G. Brent) (Unreported)

Fanshawe College and Ontario Public Service Employees Union August 17, 1992  
(M. Bendel) (Unreported)

5. The Union takes the position that the final paragraph of Article 8.12(b), which stipulates that "consideration will include review of the skill, competence and experience of the applicants ..." applies to internal applicants under Article 8.12(a) as well as to external applicants under Article 8.12(b). The Union argues that it could never have been contemplated that candidates from "off the street" would have the benefit of a higher standard of consideration than academic employees within the College. The Union asks us to read Article 8.12(a) and 8.12(b) together and to infer that the College must first consider internal applicants under Article 8.12(a) and then external applicants from other Colleges (who are laid-off) under Article 8.12(b) and that the same standard of consideration is to apply to each category as they are considered in sequence. It is

argued that not only did the College fail to apply the standard but that it considered the grievor's application in conjunction with, rather than prior to, considering applications from external candidates. In the alternative, the Union cites four reasons in support of its position that a test of reasonableness can be applied to the exercise of the Colleges discretion in rejecting the application of the grievor. It is argued firstly that the requirement to post under Article 8.12(a) fetters management's discretion to unilaterally select; secondly, that an employee with seventeen years of service is entitled to fair treatment; thirdly, that because Ms. Mellor stood to gain from the appointment (under Articles 4.01(iv)(a) and 28) there was an obligation to accord her application fair and reasonable consideration; and fourthly applying principles of administrative law, any voluntary exercise of discretion must exhibit procedural fairness. The Union asks us to dismiss the preliminary challenge to our jurisdiction and dispose of the grievance on it's merits.

6. We start by rejecting the Union contention that the final paragraph of Article 8.12(b) applies to the consideration of internal applications under Article 8.12(a). The final paragraph follows directly upon the stipulation in the first paragraph of Article 8.12(b) that consideration is to be given to applications from laid off academic employees. It is clearly intended, when read in context, to define the consideration that is to be given to this category of applicant. We have no hesitation in concluding that if the parties had intended to have the same standard of consideration apply to internal applicants

from within the college they would have said so expressly and unequivocally in Article 8.12(a), as they have done in Article 8.05 and 8.12(b). We adopt the words of Arbitrator Brandt in re Sunnybrook Hospital and Sunnybrook Hospital Employees Union Local 777 (November 13, 1987), unreported (Brandt), wherein, in finding that a claim for a part-time position under a collective agreement that did not require the posting of part-time positions was not arbitrable; stated:

We observe at the outset that the kind of clause which the Union claims should be "assumed" to exist in the collective agreement or which should be "inferred" as existing by reason of certain other provisions in the agreement, is commonly given express and detailed reference in collective agreements. The ability of employees to bid for job vacancies and to rely on their seniority as a basis for claiming such jobs over other employees is a matter of considerable importance to employees and is an important part of the Union agenda in bargaining. In view of this it is not unreasonable to expect that, if it is to be found that the parties intended such a clause to be in their collective agreement, they would set it out in relatively clear and express terms.

The parties, in their wisdom, have chosen not to incorporate an express standard of consideration into Article 8.12(a) as they have done elsewhere; perhaps because of the lateral nature of any transfer sought by an internal applicant. Whatever the reason, there is no express standard of consideration that applies in the case of an internal applicant.

7. Before considering the implication flowing from the

absence of an express standard of consideration for internal candidates we turn to the argument advanced by the Union that it could never have been intended that external applicants off the street would be given the benefit of the standard of consideration set out in the last paragraph of Article 8.12(b), while internal applicants would not. However, this is precisely what the parties have done in drafting Article 8.12. It is to be remembered that external applicants, in contrast to laid off academic employees from other Colleges, are not bargaining unit employees and are not members of the Union and therefore, the practical effect is that the standard is limited in its enforceable effect to academic employees laid off at other Colleges; a not unreasonable result.

8. Does the absence of an express standard of consideration coupled with the rights in Article 7.01 (management rights) give the employer an absolute and unfettered discretion in the processing of internal applications?. This case is to be contrasted to re Sunnybrook Hospital (supra) wherein there was no language whatsoever dealing with the posting of part-time vacancies; Fanshawe College and OPSEU (May 6, 1983) unreported (Brandt) where there was no language whatsoever restricting the Colleges rights to make sessional appointments; and Niagara College and OPSEU (November 29, 1991) unreported (Swan) where there was no language whatsoever providing for the arbitral scrutiny of the performance appraisal document on any grounds "even if bad faith were clearly alleged and consistently asserted!"

In the case before us the parties have incorporated language requiring the College to post "in the College all vacancies of full-time positions in the bargaining unit." The requirement to post within the College, if the clause is to have any meaning at all, carries with it the implied requirement to consider the internal applicants who respond to the posting. While we can accept that absent any express standard of consideration (as is contained in most collective agreements) the intention was to give the College a broad discretion, we are unable to conclude that the intention was to give to the College an unfettered or absolute discretion that is beyond the scope of arbitral review.

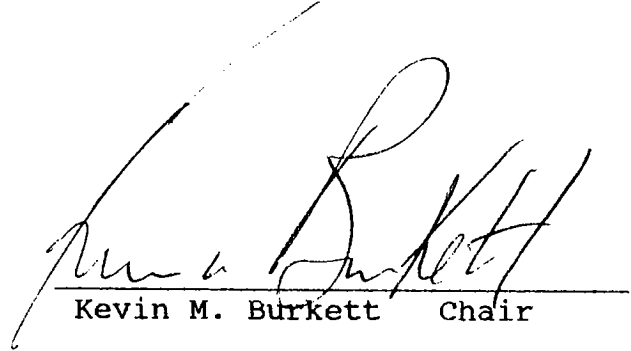
9. The acceptance of the proposition that a management right can be limited or circumscribed "explicitly or implicitly by some other provision of the collective agreement" is found in re Canada Packers and United Food and Commercial Workers (July 5, 1991) unreported (Hinnegan) and in re Niagara College and OPSEU (Swan) supra. We are satisfied on the language of Article 8.12(a) that the College cannot simply reject the internal applicants out of hand. There exists an implicit, albeit limited, restriction upon what would otherwise be the unfettered right of the College to transfer employees. Having so found we do not at this juncture have to speculate as to the extent of the implied restriction. However, in the face of our finding that there is an implied restriction, albeit one that gives the College a broad discretion, it is open to a grievor to allege that

his/her application under Article 8.12 (a) was not given the consideration required under the clause.

10. Furthermore, in so far as a precondition to consideration being given to the application of a laid off academic employee from another College, under Article 8.12(b), is that the vacancy "is not filled internally," the parties have established a sequence for the consideration of applications. Not surprisingly, internal applications filed under Article 8.12(a) are to be considered prior to consideration being given to the applications of laid off academic employees from other Colleges. Accordingly, it is also open to an internal applicant to allege, as the grievor in this case has done, that the process is flawed if the internal application(s) is considered together with, instead of in advance of, consideration being given to the application of laid off employees from other Colleges. This too is a matter that must be decided on the basis of the evidence led and the submissions made at a hearing on the merits.

11. Having regard to all of the foregoing we hereby dismiss the preliminary objection of the College that the grievance fails to disclose an arbitrable issue. This matter is to continue at the time and place set for hearing.

DATED in Toronto the 18th day of August, 1993.



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Kevin M. Burkett Chair

Partial Dissent Attached

"Fred Cowell"

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Fred Cowell Employer Nominee

I Concur

"Sherril Murray"

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Sherril Murray Union Nominee



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July 30, 1993

Dear Mr. Burkett:

**GEORGE BROWN COLLEGE & O.P.S.E.U.  
GRIEVANCE OF B. MELLOW #92C724  
PARTIAL DISSENT**

I hereby respectfully submit a partial dissent in response to your interim draft award in the above matter.

I concur with Chair's conclusion, at the end of paragraph 7, that the standard set out in Article 8.12(b) is limited in its enforceable effect to academic employees laid off at other Colleges.

I cannot conclude however, that it follows that there exists an implicit restriction on the College's right to transfer employees. I also cannot conclude that the College could not decide simply to forgo hiring of internal applicants. The only requirement set out in 8.12(a) is to post. The only qualifying statement in 8.12(b) is that the position "is not filled internally", no criteria are given, or limitations placed on, the decision making process. While it would be speculative, it is possible that the College could decide for reasons of equity or diversity, to seek applicants external to the College. In such a circumstance, it is clear from the language of 8.12(b) that it would have to give consideration to laid-off employees from other Colleges according to the criteria set out in the clause.

It would seem, and to this limited extent I would agree with the Chair's conclusions in paragraph 10, that 8.12(a) foresees that a decision not to fill internally be made prior to consideration, whatever counsel may ultimately argue that means, being given to laid-off employees. I would urge limiting a review of the College's decision to issues of timing.

Yours truly

A handwritten signature in cursive script, appearing to read "F. J. Cowell".

F. J. Cowell

Kevin M. Burkett  
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