

CAATA

90C819

Local 562

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HUMBER COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

GRIEVANCE OF PAUL MICHAUD

BOARD OF ARBITRATION:

JANE H. DEVLIN

CHAIRMAN

MARY LOU TIMS

COLLEGE NOMINEE

JOE HERBERT

UNION NOMINEE

Appearances for the College:

Ann E. Burke

Dennis Stapinski

Appearances for the Union:

David I. Bloom

Paul Michaud

CHL

OPSEU FILE NO.: 90C819

Hearings held in Toronto on March 28, 1991 and November 25, 1991;  
Written Reply Argument received March 11, 1992

In this case, the Grievor, Paul Michaud, claims that the College improperly designated the period from June 7, 1990 to September 4, 1990 as the retraining period to which he was entitled under Article 8.05(h)(iii) of the Collective Agreement. This Article, together with Articles 8.05(h)(iv) and (v), are as follows:

8.05(h)(iii) failing placement under paragraph (h)(i) above, such employee shall be laid off with written notice of not less than ninety (90) calendar days. Such employee shall be granted release from all or part of the normally assigned duties, for this period of the 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 ninety (90) days to permit retraining and the employee shall maintain current salary and benefits for the duration of the notice period.

8.05(h)(iv) at the termination of the period referred to in paragraph 8.05(h)(iii) above, such employee shall be assigned within the College 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.

8.05(h)(v) failing placement under Article 8.05(h)(iv) above, such employee shall be laid off without further notice.

The Grievor, Mr. Michaud, is a full-time Teaching Master at the College and in the spring of 1990, he taught Computer Engineering in the Technology Division. On April 10, 1990, the College gave the Grievor 90 calendar days' written notice of layoff in accordance with Article 8.04(g) of the Collective Agreement. The Grievor was advised that the notice

period would expire on July 12, 1990 and that, in the meantime, he was entitled to meet with representatives of the College to discuss various aspects of his layoff, including the availability of alternative assignments under Article 8.05.

On April 27, 1990, the Grievor and a Union representative met with Dennis Stapinski, the Manager of Compensation and Employee Relations for the College. During this meeting, Mr. Stapinski outlined the procedure to be followed under Article 8.05 of the Collective Agreement. Mr. Stapinski also advised the Grievor that unless he elected to engage in retraining in accordance with Article 8.05(h)(iii), he would be laid off effective July 12, 1990. There was no discussion of the impact of retraining on Mr. Michaud's vacation entitlement.

On June 6, 1990, the Grievor and a Union representative again met with Mr. Stapinski and with Hyacinth James, a Human Resources Consultant with the College. At that meeting, Mr. Stapinski informed the Grievor that there was no vacant position for which he possessed the necessary competence, skill and experience, nor was there a position to which he could be reassigned to displace a junior employee as provided in Article 8.05. There was then some discussion of retraining and the Grievor testified that Mr. Stapinski advised him that he was entitled to a 90-day period for purposes of retraining and that the period would begin to run from the date of release from his

assigned duties. According to the Grievor, Mr. Stapinski did not specify the date on which he would be released from his assigned duties with the result that the Grievor understood that the 90-day period would begin at the end of the academic year which concluded on Friday, June 23, 1990. In 1990, the summer vacation period was scheduled from Monday, June 25th to Friday, August 26th.

Mr. Michaud testified that because he was not released from his assigned duties until the conclusion of the academic year, he continued to perform work for the College during the period from June 7 to 23, 1990. In this regard, Mr. Michaud testified that he attended a meeting of the joint Health and Safety Committee of which he was a member as well as a meeting of the Union caucus to that committee. He also attended a meeting with a representative of the Ministry of Labour which concerned the composition of the Joint Health and Safety Committee.

In addition, Mr. Michaud estimated that, during the period from June 7th to 23rd, he spent between 25 and 35 hours on program review. The evidence indicates that program review is a process by which faculty are assigned by the Program Review Coordinator to evaluate the effectiveness of programs delivered by the College. In this case, the Grievor was one of three faculty members assigned to review the Business Administration Program and in June of 1990, he attended a number of meetings relating to

the review and revision of the committee's report on the Program. Mr. Michaud also testified that during the period from June 7th to 23rd, he put his course notes in order and spoke to a number of students who approached him concerning their examination results. Mr. Michaud testified that he would not have engaged in these activities had he understood that he was released from his assigned duties effective June 7, 1990.

Mr. Stapinski's version of the meeting of June 6, 1990 differed somewhat from that of Mr. Michaud. Mr. Stapinski testified that prior to the meeting on June 6th, he spoke with Michael Harper, the Dean of the Technology Division, who advised him that the Grievor had completed his assigned duties on May 25th when he handed in the examination results for his students. As a result, Mr. Stapinski testified that at the meeting on June 6th, he informed the Grievor that his release for purposes of retraining would take effect on June 7, 1990. At the hearing, Mr. Stapinski explained that although the College required Teaching Masters who were subject to layoff to outline their plans for retraining, this was done to ensure that retraining was, in fact, undertaken. The College did not, however, approve individual retraining plans.

In any event, there was no dispute that whether or not the Grievor was advised on June 6th of his immediate release from his assigned duties, Mr. Stapinski did make it clear during the

meeting that it was the College's view that retraining could be undertaken during the vacation period. In other words, it was the College's position that retraining and vacation could occur simultaneously.

Shortly after the meeting of June 6th, Mr. Michaud forwarded a memorandum to Mr. Stapinski indicating that he intended to take his vacation during the months of July and August and that he proposed to engage in retraining during the fall semester at which time he intended to enroll in the computer science program at York University. While Mr. Michaud conceded that when he wrote this memorandum, he was aware of the College's position with respect to retraining and vacation, he testified that it was the Union's position that retraining and vacation were separate benefits which could not occur simultaneously.

In late June of 1990, the College informed the Union that the Grievor's retraining period would extend from June 7 to September 4, 1990. The Grievor, of course, disputed that he had been released from his assigned duties on June 7th. Nevertheless, in view of the College's position that retraining was to take place during the summer months, the Grievor advised the College that his retraining would consist of the completion of a computer science course at York University in which he had enrolled in May of 1990. The course concluded in early August and during the summer, the course was held twice weekly in the evening. The

Grievor also informed the College that he intended to undertake self-directed retraining on Unix, a computer operating system. In this regard, the Grievor testified that he consulted two other faculty members and obtained texts and course materials on Unix which he studied during the summer months. The Grievor also testified that because of his retraining and his efforts to find alternate employment, he did not travel to Vancouver for three weeks in August of 1990 as he had planned to do prior to being advised of his layoff.

In mid-July of 1990, the College informed the Union that a sessional vacancy existed for the 1990/91 academic year and that it was the College's view that the Grievor possessed the skill, competence and experience to fill this vacancy. The College also wrote to the Grievor on July 31st confirming the offer of this sessional position.

The Grievor accepted the College's offer and worked on a sessional contract for the 1990/91 academic year. During this period, the College maintained the Grievor's current salary as required by the Collective Agreement. In addition, on a without prejudice basis, the College maintained the Grievor's benefits rather than paying a percentage in lieu of benefits which is evidently paid to sessional faculty. Subsequently, in May of 1991, the Grievor was recalled to a full-time teaching position

effective September of 1991 and during the summer of 1991, the College maintained the Grievor's pay and benefits.

Apart from Article 8.05(h)(iii), (iv), (v), which are set out above, the following provisions of the Collective Agreement are relevant:

**Article 4**  
**WORKLOAD**

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**4.03** The academic year shall be ten (10) months in duration and shall, to the extent it be feasible in the several colleges to do so, be from September 1 to the following June 30. The academic year shall in any event permit year-round operation and where a College determines the needs of any program otherwise, then the scheduling of a teacher in one or both of the months of July and August shall be on a consent or rotational basis.

. . .

**Article 5**  
**VACATIONS**

**5.01 (1)** A full-time employee who has completed one full academic year's service with the College shall be entitled to a vacation of two (2) months as scheduled by the College.

**5.01 (2)** A teacher assigned to teach for an additional month (11th month) over the normal teaching schedule of the equivalent to ten months as part of a continuous twelve (12) month program shall be entitled to a vacation of one (1) month, as scheduled by the College. Such teacher shall also receive a bonus of ten (10) percent of the employee's annual salary for the additional eleventh month of teaching assignment to be paid on completion of such assignment. A teacher assigned to teach in the eleventh month for less than a full month will be entitled to a pro-rate amount of the ten (10) percent bonus referred to above, to be paid on completion of such assignment.

A member of the teaching faculty teaching in a continuous program shall not be required to teach for more than twelve (12) consecutive months without a scheduled vacation of at least one (1) month.

**5.01 (3)** It is understood that the above provisions for vacations are not intended to prohibit Colleges from scheduling non-teaching periods at Christmas and New Year's or at any other mid-term break.

. . .

**Article 8  
SENIORITY**

. . .

**8.04 (g)** When a College decides, following such meetings to proceed with a lay-off of one or more employees who have completed the probationary period written notice of lay-off of not less than ninety (90) calendar days duration shall be given to employees being laid off. If requested by the employee, a College representative will be available to meet with the employee within three (3) calendar days to discuss the basis of the College selection of the employees affected.

. . .

It was the submission of Mr. Bloom, on behalf of the Union, that the College violated Article 8.05(h)(iii) of the Collective Agreement by designating the Grievor's retraining period as the period from June 7 to September 4, 1990. In particular, Mr. Bloom contended that the Grievor was not released from his assigned duties until the commencement of the scheduled vacation period on June 25, 1990. From June 7th to June 23rd, the Grievor performed complimentary functions relating primarily to health and safety and program review and it was submitted that the College benefited from the Grievor's work in this regard. Moreover, Mr. Bloom contended that retraining could not occur during the vacation period. Retraining and vacation, it was submitted, are distinct benefits under the Collective Agreement and, accordingly, the College could not designate the retraining

period during the months of July and August so as to defeat the Grievor's vacation entitlement. In the result, Mr. Bloom requested that the grievance be allowed and that the Grievor be compensated for the loss of his 1990 vacation entitlement.

It was the submission of Ms. Burke, on behalf of the College, that 8.05(h)(iii) of the Collective Agreement must be read in the context of the layoff provisions as a whole. In this regard, Ms. Burke pointed out that Article 8.05(h)(iii) provides for 90 calendar days' notice of layoff and it was submitted that this requirement can be satisfied by the notice of layoff referred to Article 8.04(g) provided that the employee can be granted release from his normally assigned duties during the notice period. It is only in the event that release is not feasible that the notice period is extended by up to 90 days to permit retraining and the College is required to maintain current salary and benefits during this period. In this case, it was contended that the Grievor was advised of his immediate release from his assigned duties by Mr. Stapinski on June 6, 1990 and while the Grievor may have performed work for the College subsequent to that date, he did so with full knowledge of the College's position. In any event, Ms. Burke contended that a "release from all or part of the normally assigned duties" as provided in Article 8.05(h)(iii) must be read as a reference to teaching duties and would not encompass the work performed by the Grievor in June of 1990. In fact, Ms. Burke submitted that no

release is necessary during the non-teaching portion of the academic year. It was further contended that retraining can occur during the vacation period as retraining is intended to provide an employee with an opportunity to upgrade his qualifications during the summer months with a view to obtaining a position in the fall semester. In the alternative, however, if there was a breach of the Collective Agreement in this case, Ms. Burke submitted that there was no clearly demonstrated loss and, accordingly, no compensation is warranted.

The issue then is whether the College properly designated the period from June 7 to September 4, 1990 as the Grievor's retraining period or whether, in fact, the Grievor was deprived of his 1990 vacation entitlement. In this regard, Article 8.05(h)(iii) of the Collective Agreement provides that failing placement under Article 8.05(h)(i), an employee shall be laid off with written notice of not less than 90 calendar days. In our view, this is a reference to the 90 calendar day notice of layoff provided for in Article 8.04(g) of the Collective Agreement. Article 8.05(h)(iii) then provides that an employee shall be granted release from all or part of his normally assigned duties during this period of notice for purposes of engaging in retraining activities, where such release is feasible given the operational requirements of 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.

In this case, the Grievor was provided with 90 calendar days' notice of layoff on April 10, 1990 and there is no dispute that, at least initially, it was not feasible for the College to release the Grievor from his normally assigned duties for purposes of retraining. The first issue to be determined, therefore, is whether the Grievor was released from his assigned duties effective June 7, 1990. In this regard, although it was the initial submission of the College that no release was necessary as Article 8.05(h)(iii) applies only to a release from teaching duties, the Board cannot agree. Had the parties intended Article 8.05(h)(iii) to apply only to a release from teaching duties, undoubtedly, they would have said so. They did not do so, however, but instead referred to a release from "normally assigned duties" which, in our view, is a broader term and encompasses duties other than teaching duties. The College also pointed out, however, that Article 8.05(h)(iii) refers to a release from all or "part" of an employee's assigned duties and, on this basis, submitted that the Grievor could have continued to perform certain work for the College while undertaking retraining in accordance with Article 8.05(h)(iii). Even if this were the case, however, Article 8.05(h)(iii) speaks of an employee being "released" from assigned duties during the initial notice period and, in our view, this cannot occur without the employee being

advised that he is free from all or part of his work obligations in order to begin retraining activities.

The issue then is whether Mr. Michaud was advised of his release effective June 7, 1990. Although Mr. Stapinski testified that he informed the Grievor at the meeting on June 6th that his release would take effect the following day, Mr. Stapinski met with a number of employees who were subject to layoff and, therefore, had some difficulty recalling the details of his meeting with the Grievor. Mr. Stapinski acknowledged that he made no notes during this meeting.

In contrast to the evidence of Mr. Stapinski, the Grievor testified that he was not advised at the meeting on June 6th of the specific date of his release from assigned duties and his evidence is supported by notes which he made at the time of the meeting. Moreover, it is apparent that subsequent to June 7th, the Grievor continued to perform duties for the College and, in fact, spent a considerable amount of time on program review. In our view, the performance of this work is consistent with the Grievor's evidence that he was not advised of his release from duties for purposes of retraining effective June 7, 1990. In the circumstances, we are not prepared to find, as was suggested by the College, that the Grievor persisted in performing duties in the face of a clear indication from the College that he had been released from duties for purposes of retraining. In the Board's

view, the evidence does not support such a conclusion and, in the result, the Board finds that the Grievor's release for purposes of retraining did not take effect until the conclusion of the academic year.

The next issue then concerns the timing of the retraining period and, in particular, whether the Grievor could be required to engage in retraining during the vacation period. As indicated previously, in 1990, the summer vacation was scheduled from June 25th to August 26th inclusive. In this regard, Article 4.03 of the Collective Agreement provides that the academic year shall be 10 months in duration and shall generally extend from September 1 to the following June 30th. Article 5.01 then provides that an employee who has completed one full academic year's service is entitled to a vacation of two months as scheduled by the College.

There is no dispute that the entitlement to retraining contained in Article 8.05(h)(iii) appears for the first time in the current Collective Agreement and that the prior Agreement simply provided for 90 calendar days' written notice of layoff. Under that Agreement, it was held that the notice period was not exclusive of the vacation period under Article 5.01: see St. Clair College of Applied Arts and Technology and O.P.S.E.U., June 14, 1989 (Brown (unreported)). Under the prior Agreement, however, the parties did not contemplate any particular activity

on the part of the employee during the notice period which simply involved the affluxion of time. In contrast, the current Agreement specifically contemplates the employee engaging in retraining activities during the initial or extended notice period. In our view, 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 entitlement 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.

This is not to say, however, that from a scheduling point of view, there is to be a hiatus in the notice period in the event that the notice period overlaps the scheduled vacation period. Clearly, the parties have provided for an "extension" of the notice period where an employee cannot be released for retraining during the initial 90 day period. In other words, the notice period continues to run to its conclusion with the result

that an employee such as the Grievor can be required to retrain during the summer months when other employees are scheduled on vacation. In this event, however, the Grievor cannot be deprived of the vacation to which he is entitled under Article 5.01 of the Collective Agreement.

The issue then is what relief is appropriate in the circumstances of this case. The Grievor claims that he is entitled to compensation for the loss of his 1990 vacation entitlement. The evidence suggests, however, that in the summer of 1991, the Grievor received pay and benefits beyond that to which he was entitled as a sessional employee. While there was some issue raised concerning the extent, if any, to which this may be taken into account in fashioning a remedy in this case, the matter was not fully addressed in final argument. Accordingly, the appropriate course is to remit the matter to the parties and remain seized to deal with the issue of compensation as well as for purposes of implementation of our award.

DATED AT TORONTO, this 2nd day of July, 1992.

James H. DeWitt  
Chairman

See Dissent Attached  
College Nominee

"Joe Herbert"  
Union Nominee

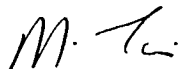
Dissent

I regret that I am unable to concur with the decision of the majority of the Board.

My colleagues find that the Grievor was not released from his assigned duties effective June 7, 1990 within the meaning of Article 8.05 (h) (iii). Whether or not the College was as clear as it may have been in expressly advising the Grievor of his release from duties, I do not share the majority view that this is in itself definitive under the present circumstances where teaching duties had already been completed by the time in question, and the only function assigned by the College which continued to occupy the Grievor's time after June 6, 1990 was the Program Review assignment. In my view, the Grievor was at the very least effectively released from part of, if not the vast majority of his normally assigned duties effective June 7, 1990.

The majority of the Board also finds that retraining pursuant to Article 8.05 (h) (iii) and vacation cannot occur simultaneously. In my view, engaging in retraining is entirely consistent with vacation where the retraining is not imposed or required by the College, but rather is an activity which the affected employee chooses to perform. While the essence of vacation is undoubtedly release from duties, voluntary participation in retraining can in no way be regarded as a duty, and does not, therefore, detract from the vacation status.

For the above reasons, I would have dismissed the grievance.



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M. Tims  
College Nominee