

96 CAAT

96D327
Local 657
CAAT (A)

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

- and -

CANADORE COLLEGE

Grievance of Frank Mueck - OPSEU File No. 96D327

Before: R. O. MacDowell - Chairman
 John McManus - Union Nominee
 Robert Gallivan - College Nominee

Appearances:

For the Union: Nelson Roland, Counsel

For the College: Paul Jarvis, Counsel
 John Philp
 Richard Beauchamp
 Bruce Sutherland

Hearing held in North Bay on November 15, 1996.

A W A R D

WHAT THIS CASE IS ABOUT

This is the grievance of Frank Mueck ("the grievor"), who challenges the propriety of his layoff. Mr. Mueck received notice of layoff on April 4, 1996, and filed this grievance on April 24, 1996. The "Statement of Grievance" reads as follows:

"Filing grievance under the faculty Collective Agreement, under Article 32.02 [the general grievance provision] and 27.08A."

Article 27.08 reads this way:

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

27.08B If the grievance is processed through Step 2, the written referral to arbitration in 32.03 shall specify, from the positions originally designated in 27.08 A, two full-time positions, or positions occupied by two or more partial-load or part-time employees (the sum of whose duties will form one full-time position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of (i), (ii), (iii), (iv), (v), (vi), (vii) or (viii) of 27.06.

A hearing in this matter was held in North Bay on November 15, 1996. The parties are agreed that the board is properly constituted and that it has jurisdiction to hear and

determine the matters in dispute between them. But the parties are not agreed that this case is arbitrable.

The grievor contends that his layoff was unnecessary. The grievor maintains that the College should have accepted his submission that the program in which he worked was (or could be) financially viable, and thus should not have been cancelled. No one suggests that the College was acting in bad faith; however, the grievor asserts that his proposed plan/budget would have permitted the program to continue, so that his job would not have become redundant.

In the alternative, the grievor contends that he should have been granted sabbatical leave when he applied for it in May 1996 (i.e. after his layoff). In the grievor's submission, sabbatical leave is an alternative to layoff, which would have kept him on the College payroll pending a job opening (for which he says he is qualified) in the support staff bargaining unit. The grievor anticipates such vacancy in the next few months, and believes that his chances of getting that job would be enhanced if he is classified as "on sabbatical" rather than "on layoff".

It is acknowledged that this job opportunity - if it arises at all - will be in a different bargaining unit covered

by a different collective agreement, that there may be issues of the grievor's right to "bump" or "post" from one unit to another, and that the grievor may be in competition for the vacancy with other employees now covered by the support staff collective agreement. However, the grievor maintains that, at the very least, he would remain on the payroll until this job opportunity materialises, and that his collective agreement rights can be considered in the circumstances that obtain at that time. The grievor submits that he should be entitled to sabbatical leave as an alternative to layoff.

The College replies that the grievor's complaints are not arbitrable.

In the College's submission, the grievor's layoff was properly triggered and effected under the terms of the collective agreement, after completion of the union-management consultation process prescribed in that agreement. The layoff was based upon management's assessment of the utility and viability of the program in which the grievor worked; and the fact that the grievor disagrees with that assessment does not provide a basis for challenge, or establish an arguable breach of any provision of the collective agreement. Nor does the grievor actually point to any provision of the agreement which would support this branch of his claim.

The College further asserts that Article 27.08A (upon which the grievor does rely) requires Mr. Mueck to "state in the grievance the positions occupied by full-time and non-full-time employees whom the employee [the grievor] claims entitlement to displace". In the College's submission, a grievor is required to identify the potential targets for bumping; and in this case, Mr. Mueck has not done so - either at the time that he filed his grievance, or at any time thereafter. The College maintains that this requirement is "mandatory", so that on that ground alone, the grievance must fail.

Finally, the College asserts that the purpose of the "professional development leave" described in Article 20 of the Agreement, is to enhance the ability of teachers to fulfil their professional responsibilities (see Article 20.01). It is not a device to postpone some employment consequence that would otherwise flow from the way that the College is being run or the application of the collective agreement. Professional development leave is intended to enhance future work performance, not extend employment status or provide an income supplement to an employee who would otherwise be leaving the active work force. It was not designed to be an alternative to layoff, or, as here, a means to maintain the grievor's income

while he is waiting for a job opening in another bargaining unit.

In the College's submission, the grievor's circumstances simply do not fall within the intended ambit of Article 20, which (among other things) regulates the length and purpose of professional development leaves, and requires an applicant to submit a detailed written statement of the "nature of the proposed leave and its perceived benefit to the College at least six months prior to the commencement date". The six months advance notice is important in itself, and serves to underline what "professional development leave" is all about.

The College maintains that the grievor's situation meets neither the terms nor purpose of Article 20 ("... to enhance the ability of the teacher ..."). Article 20 was not mentioned in the grievance, the grievor has not provided the required six months' notice, and, in fact, the grievor was not even seeking sabbatical leave prior to his layoff. In the College's submission, Article 20 has no application to the grievor's situation.

In summary, the College submits that none of Mr. Mueck's complaints fall within the ambit of the collective agreement, and that his grievance should therefore be dismissed.

DECISION

We begin by observing that the collective agreement contains a rather broad management rights clause, which reads as follows:

**Article 6
MANAGEMENT FUNCTIONS**

6.01 It is the exclusive function of the Colleges to:

- (i) maintain order, discipline and efficiency;
- (ii) 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 the extent provided in this Agreement;
- (iii) manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, course, 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.

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

Article 6 makes it clear that the College retains the right to manage its operations (including restructuring programs) except to the extent that the exercise of such right is specifically modified or restricted by the provisions of the

collective agreement. And there are such restrictions. For example, under Article 27.05 "Layoff and Involuntary Transfer" and Article 29 "Extraordinary Financial Exigency", the College is required to engage in extensive consultations with the union before taking decisions which might adversely impact upon the job security of employees in the bargaining unit.

But no one in this case suggests that the College has breached any of these obligations or has otherwise acted in a manner that is arbitrary or in bad faith. Nor are such violations of the agreement referenced in the grievance itself. And that fact that the College may not have accepted or agreed with the grievor's proposal to preserve his program and his job, does not, in itself, establish a breach of any contractual obligation. Nor was the union able to point to any provision of the agreement that might support such claim.

In our view, it is unnecessary to canvass the issues, arguments, or authorities discussed by arbitrator Kaplan in Re York Region Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association (1995), 52 L.A.C. (4th) 285 - a case which was put before us and relied upon by the College. We simply note that those issues and arguments do not fit and were not pursued by the union in the instant case, so it is unnecessary to consider whether York Region [or Re

Cybermedics Health Services Ltd. and OPSEU Local 544 (1992), 27 L.A.C. (4th) 77 (McLaren)] provide a rebuttal.

On the other hand, the decisions of arbitrator Shime in Re OPSEU and St. Lawrence College (September 11, 1986) and arbitrator Weatherill in Re Fanshawe College and OPSEU (June 17, 1987) are clearly relevant - both because they arise in a College setting, and because they touch on the arbitrability of Mr. Mueck's grievance. Both cases deal with what is now Article 27.08 of the agreement - the provision referred to in the grievance. And both cases support the College's position that this particular grievance is not arbitrable.

In St. Lawrence College the grievor claimed that he had been laid off contrary to the terms of the collective agreement, and (as in the instant case), was met with the response that the grievance did not specify the persons whom the grievor sought to displace. Arbitrator Shime observed, in part:

But of greater significance in this case is the requirement that a grievor, pursuant to Article 8.08 [now 27.08A] specify the names of employees whom he claims he should displace. This collective agreement is rather unusual in that regard. However, in the grievance being arbitrated, no employees are designated and thus, there has been a failure to comply with the specific provisions of Article 8.08. ... The parties have taken great care in drafting this provision and inserting it into the collective agreement. ... Also,

Article 8.08B [now 27.08B] provides that the employee specified "shall thereafter be the subject matter of the grievance and arbitration". Thus, we conclude that the specifying of employees in the context of this collective agreement is not a trivial matter and the failure to specify as required by the collective agreement must be given serious consideration. Whether the requirement is serious enough that it should not be considered as a mere procedural matter but a matter of substance the omission of which is fatal to the grievance is a matter that need not be decided here ..."

The question left open by arbitrator Shime in the concluding sentence of this passage, was answered by arbitrator Weatherill about 14 months later in the Fanshawe College decision. Once again, the board of arbitration had to consider the propriety of a layoff, and once again there was a problem because the grievor had not specified the names of the individuals whom he sought to displace. On this point, arbitrator Weatherill commented:

... The grievor was entitled to grieve such a layoff. The grievance does not meet the requirements of the collective agreement in respect of such a claim. In particular, the grievance does not set out the names of employees against whom a right of displacement is asserted. That is a requirement of the collective agreement in cases of this sort, and it is obviously a substantial, not merely a formal one. ... Failure to meet this requirement is, in our view, fatal to the success of the grievance insofar as it may be taken as seeking reinstatement in employment.

(emphasis added)

In the result, the board held that the grievor was precluded from seeking reinstatement, and was confined to challenging the adequacy of his layoff notice (an issue which is not present in the instant case).

These are admittedly old cases. But they are precisely on point, no contrary authorities were cited to us, and the language in question has been maintained, without material change, since 1987, over several rounds of bargaining. Had the parties wished to change the contract language to avoid the interpretation given by arbitrators Shime and Weatherill, they could easily have done so. But they did not. On the contrary. Article 27.08B, as currently framed, merely reinforces the mandatory thrust of Article 27.08A; because 27.08B narrows the number of positions which can ultimately be the subject of arbitral review. The matters that can proceed to arbitration are a subset of the positions identified in Article 27.08A - which makes it all the more important for the grievor to identify the field from which the arbitrable subset is selected.

In other words, the current structure of the agreement reinforces the interpretation advanced by arbitrators Shime and Weatherill ten years ago.

It follows, we think, that Mr. Mueck's grievance is fundamentally defective and therefore is not arbitrable. We agree with the College's submission in this regard.

Is the grievor nevertheless entitled to pursue a professional development leave as an alternative to layoff? In our view, the answer is no.

Strictly speaking, the grievance only refers to Article 27, and does not mention Article 20 which sets out an entirely different range of rights and responsibilities. However, quite apart from that, we do not think that the grievor's circumstances fall within the ambit of Article 20, or that he has met its requirements.

Simply stated, "professional development leave" means what it says: a period of subsidized upgrading, from which a teacher returns with enhanced skills; moreover, we do not foreclose the possibility that, in particular circumstances, sabbatical upgrading may facilitate a transfer from one teaching job in a bargaining unit to another. After all, just as the College may change its program mix to meet the needs of students, a teacher may have to accommodate himself/herself to those changes, and that may require further study on his/her part. However, the grievor's circumstances simply do not fit within those parameters. His belated request for subsidized "professional development leave" fits neither the purpose nor the procedures prescribed in Article 20.

For the foregoing reasons, this grievance is dismissed.

For the purpose of completeness, however, we wish to make it clear that nothing in this decision should be construed as commenting on the grievor's desire to be considered for a job in the other bargaining unit should a job opportunity materialize at some time in the future. Nor should anything in this decision be construed as affecting the rights of persons on sabbatical when a "downsizing" occurs, or the rights of persons who wish to use sabbatical leave to enhance their flexibility and employability as teachers in the bargaining unit. Our decision is confined to the particular form and facts of the grievance before us; and, as noted, we are all of the view that this particular grievance must be dismissed.

Dated at Toronto this 12th day of December, 1996.


CHAIRMAN

I CONCUR:

"John McManus"

UNION NOMINEE

I CONCUR:

"Robert Gallivan"

COLLEGE NOMINEE