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IN THE **MATTER** OF AN ARBITRATION

BETWEEN: NIAGARA COLLEGE

AND ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE **MATTER** OF THE GRIEVANCE OF A. NORTH

BOARD OF ARBITRATION: MAUREEN K. **SALTMAN,** CHAIR
JACQUELINE CAMPBELL, COLLEGE NOMINEE
EDWARD SEYMOUR, UNION NOMINEE

APPEARANCES:

FOR THE COLLEGE: BRENDA J. **BOWLBY,** COUNSEL

FOR THE UNION: **SOGIE** OMORUYI, COUNSEL

OPSEU FILE NO.: 988560

HEARING DATE: April 30, **1999**

AWARD

This case involves two interrelated claims, one for sick pay and the other for vacation entitlement, on behalf of the Grievor, Angela North, who is employed as the Coordinator of the Correctional Worker Programme.

The relevant facts are as follows: On April 16, 1998, the Grievor, a 20-year employee with the College, suffered a stroke, as result of which she was off work until August 24, 1998. There was no dispute that the College was aware of the Grievor's medical condition, the evidence being that Nancy Cain, then Director of Health and Community Studies, who was responsible for the Correctional Worker Programme, visited at the hospital on the first day of the Grievor's illness, and that she and others from the College continued to visit throughout the period of the Grievor's convalescence.

The 1997 - 1998 academic year extended from September, 1997 to June, 1998, the last day being June 19, 1998. Thereafter, in accordance with its normal practice, the College scheduled a two-month summer vacation period. Accordingly, on June 22, 1998, the majority of the College faculty commenced their annual summer vacation.

From April 16 to June 19, 1998, the Grievor was in receipt of sick benefits. Thereafter, from June 22nd until August 21st, the Grievor's sick benefits

were suspended as she was deemed to have been on vacation. However, notwithstanding that the Correctional Worker Programme was not offered in the months of July and August, the Union claimed that the Grievor was entitled to utilise her accumulated sick leave credits for the period from June 22 to August 21, 1998, when she was recuperating from her illness.

More particularly, the Union submitted that the College violated the collective agreement by unilaterally altering the Grievor's status for the period in question from that of an employee on sick leave to an employee on vacation. The Union further submitted that (1) it is the fundamental reason for an employee's absence which governs the characterization of the period of absence; and (2) as the fundamental reason for the Grievor's absence was a stroke, the proper characterization of this absence was a period of illness, for which sick benefits were payable. Finally, the Union submitted that, as a matter of fairness, the Grievor ought to have been granted sick pay for the period in question and allowed to take vacation at a later date. In this regard, the Union argued that had the Grievor's illness taken place earlier in the academic year and not extended into the normal vacation period, she would have been entitled to sick pay for the entire period of her illness and to her full vacation entitlement thereafter. Accordingly, as a matter of fairness, she should not be deprived of her full sick leave and vacation leave entitlements simply because the timing of her illness was such as to coincide with the normal vacation period.

The College submitted that (1) under the collective agreement, employees are entitled to a two-month vacation period, which is unpaid; (2) in this case, the College was entitled to schedule the Grievor's vacation during the normal vacation period even though she was ill; and (3) the Grievor was entitled to sick pay only for periods in which she was otherwise scheduled to work, which excluded the months of July and August, during which the Correctional Worker Programme was not offered.

The issue in this case is whether the Grievor was entitled to sick pay for the period of her absence from work due to illness from June 22 to August 21, 1998 and to take her vacation at a later date.

The following provisions of the collective agreement are relevant to a determination of this issue:

Article 11
WORKLOAD

11.01 G 1 When preparation, evaluation, feedback to students and complementary functions can be appropriately performed outside the College, scheduling shall be at the discretion of the teacher, subject to the requirement to meet appropriate deadlines established by the College.

11.03 The academic year shall be ten 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.

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Article 15
VACATIONS

15.01 A A full-time employee who has completed one full academic years service with the College shall be entitled to a vacation of two months as scheduled by the College.

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15.02 In scheduling vacations, the College will take into consideration the maintenance of proper and efficient staffing of College programs and operations and the requests of employees. The College will notify employees of their vacation period at least four weeks prior to the commencement of the vacation period concerned. It is understood that following notification of vacation periods, vacation schedules may be changed in circumstances beyond the College's control or by mutual agreement. The College agrees that seniority shall be given consideration in resolving conflicting vacation requests.

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Article 17
SHORT-TERM DISABILITY PLAN (STD)

Participation

17.01 A Effective April 1, 1991, all full-time employees shall be covered by this plan.

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Benefits

17.01 F During absences due to illness or injury, participating employees who would otherwise be scheduled to work shall receive 100% of regular pay for up to and including 20 working days in any one benefit year plus any unused credits carried forward from previous years. Days not utilized in any year shall be considered to be credits (on the basis that one

> credit represents 100% of regular pay for one working day) and shall be carried forward to the next benefit year. Debits shall be made from the total assigned benefit on a day-for-day basis.

The collective agreement provides for an academic year of 10 months' duration (Art. 11 .03) and, in the normal course, a two-month vacation (Art. 15.03). Although a teacher can be required to work for all or part of the 11th month, for which payment is provided, no allowance is made for the loss of vacation period: see Re Ontario Public Service Emolovees Union and The Ontario Council of Reaents for Colleaes of Applied Arts and Technoloav (Conestoaa Colleae); Grievance of Membury, November 26, 1976 (O'Shea (unreported)); Re Humber Colleae of Applied Arts and Technolcov and Ontario Public Service Emolovees' Union; Grievance of Clarke et al., December 23, 1988 (Devlin (unreported)). It is also well established that, regardless of the intervals at which it is paid, annual salary is earned over the course of the academic year and the normal two-month vacation period is unpaid: see Re Ontario Public Service Emolovees Union and The Ontario Council of Reaents for Colleaes of Applied Arts and Technoloqy (Conestoaa Colleae), supra; Re Canadore Colleae of Applied Arts and Technoloqy and Ontario Public Service Employees Union; Grievance of Bell, September 15, 1982 (Brunner (unreported)); Re Confederation College and Ontario Public Service Employees Union; Grievance of Spence, April 26, 1988 (Burkett (unreported)); Re St. Clair College Of Applied Arts and Technoloqy and O.P.S.E.U.; Union Grievance, June 14, 1989 (Brown (unreported)). Moreover, although the manner in which the

parties have defined the academic year (being from September 1st to the following June 30th, where feasible) points to a vacation period of July and August, nevertheless, the College has the right to schedule vacations (Art. 15.01A) although it was agreed that this right is not unlimited. However, so long as the College followed its usual practice of scheduling vacations in the summer months, counsel maintained that it was entitled to treat the Grievor in the same manner as other employees notwithstanding that she was absent due to illness during the academic year. In addition, the right to schedule vacations is subject to certain considerations set out in Article 15.02. That Article also provides for four weeks' notice of the commencement of the vacation period. In this case, the evidence indicates that on May 22, 1998, a standard form memorandum was issued advising employees of their vacation entitlement and that if no other vacation period was requested, the standard vacation period of June 22 to August 21, 1998 would apply. Although a memorandum of this nature was addressed to the Grievor and although the Grievor's mail was hand delivered by a number of co-workers who visited during the period of her convalescence, the Grievor did not recall having received it. Nevertheless, notice of this nature was given on an annual basis and although, due to her medical condition, the Grievor might not have appreciated the significance of this particular notice, in the circumstances, the Board is not prepared to conclude that the requisite notice was not given.

The Union submitted that as the fundamental reason for the Grievor's absence was a medical one, she was entitled to sick benefits for the period from

June 22 to August 21, 1998. In addition, the Union submitted that the College violated the collective agreement by altering the Grievor's status for the period in question from that of an employee on sick leave to that of an employee on vacation. Nevertheless, the Board cannot accept these submissions. Article 17.01 F of the collective agreement provides for the payment of sick pay for an employee who "would otherwise be scheduled to work" in the amount of 100 percent of the employee's regular pay for up to and including 20 working days plus any unused credits carried forward from the previous year. In this case, there was no question as to the availability of unused sick leave credits (the evidence being that, as of April 16, 1998, the Grievor had some 200 accumulated sick leave credits). Furthermore, there can be no question that the Grievor was not otherwise scheduled to work for the period in question as the programme in which she taught was not offered during the summer months and as she was not otherwise scheduled to work following the end of the academic year. Moreover, although there was some suggestion that the Grievor could have been carrying out functions such as preparation, evaluations, etc., which can appropriately be done outside the College, these are functions which are performed during the academic year (Art.1 1 .01 G 1). Accordingly, as the Grievor was not otherwise scheduled to work during the period in question, she was not entitled to sick pay. Furthermore, as the College followed its usual practice of scheduling vacations during the summer months and treated the Grievor in the same manner as other employees, the Board finds that there was no impediment to scheduling her on vacation notwithstanding that she had been absent due to illness during the academic year.

In the result, the grievance must be dismissed.

DATED AT TORONTO, this 2nd day of ~~June~~ July, 1999.

Maureen Sabo
Chair

"Jacqueline Campbell"
College Nominee

"Edward Seymour"
Union Nominee