

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(the "Union")

- AND -

MOHAWK COLLEGE OF APPLIED ARTS
AND TECHNOLOGY
(the "College")

AND IN THE MATTER OF THE GRIEVANCES OF MICHAEL SWEENEY
(OPSEU FILE NOS. 96C782 & 96C783)

BOARD OF ARBITRATION	Robert D. Howe, Chair	
Nominee	Michael Sullivan,	Union
Nominee	Jacqueline Campbell,	College

APPEARANCES

For the Union

Michael McFadden, Counsel
Fred Deys
Michael Sweeney

For the College

Patricia G. Murray, Counsel
Steve Evans
Kathy Verspagen
Nicole Wharton

Hearings in the above matter were held on December 3, 1996,
and on April 22 and 29, 1997, in Hamilton, Ontario.

A W A R D

Two related grievances filed by the grievor, Michael Sweeney, on March 14, 1996 have been referred to this Board of Arbitration (the "Board") for determination in these proceedings. The statement of grievance in the first one reads:

I GRIEVE THAT I HAVE BEEN IMPROPERLY LAID OFF, IN VIOLATION OF THE COLLECTIVE AGREEMENT, SPECIFICALLY BUT NOT EXCLUSIVELY ARTICLES #6, 27 AND 29. THERE ARE POSITIONS IN THE COLLEGE OCCUPIED BY EMPLOYEES WITH LESS SENIORITY WHICH I HAVE THE COMPETENCE, SKILL AND EXPERIENCE TO FILL. FOR EXAMPLE THERE IS A POSITION OCCUPIED BY WALTER DRAKE IN MOTIVE POWER AND SEVERAL OTHER POSITIONS OCCUPIED BY EMPLOYEES WITH LESS SENIORITY. IN IMT\MECHANICAL THERE ARE THE POSITIONS OCCUPIED BY BARRY WILSON AND OTHER EMPLOYEES WITH LESS SENIORITY. IN COUNSELLING THERE ARE THE POSITIONS OCCUPIED BY IAYNN MILLER, AND EMPLOYEES WITH LESS SENIORITY. THERE ARE ALSO POSITIONS IN INTERNATIONAL PROJECTS OCCUPIED BY PETER YOUNG AND OTHER EMPLOYEES WITH LESS SENIORITY.

The statement of grievance in Mr. Sweeney's second grievance reads:

I GRIEVE FURTHER THAT THE COLLEGE HAS, IN VIOLATION OF THE COLLECTIVE AGREEMENT, SPECIFICALLY BUT NOT EXCLUSIVELY ARTICLES 6, 27, 28, AND 29, AND THE CLASS DEFINITION SECTION, INAPPROPRIATELY AND FALSELY CLAIMED THAT MY WORKLOAD HAS CHANGED AND MY POSITION DISAPPEARED.

The relief requested in both grievances is:

The parties agreed to proceed with the second grievance first, because the essence of that grievance is that the grievor should not have been given a lay-off notice, and the first grievance (alleging a violation of bumping rights) only becomes relevant if the College was entitled to give the grievor that notice.

Three persons were called as witnesses during the three days devoted to hearing that grievance: Michael Sweeney, the aforementioned grievor; Sharon Stanshall, a Co-op Consultant (included in the support staff bargaining unit); and Kathy Verspagen, the College's Director of Co-operative Education and Technology Marketing. In addition to their testimony, the Board has before it 23 exhibits which were entered during the course of the proceedings. In making the findings and reaching the conclusions set forth in this award, the Board has duly considered all of that oral and documentary evidence, as well as the able submissions of counsel.

The College's Co-operative Education Department operates a variety of programs in a co-operative education mode, in conjunction with other departments of the College. The following introductory passages are included in the Co-operative Education portion of the General Information section of the College's most recent calendar:

Co-operative Education extends the academic learning process into the workplace through on-the-job learning experiences that are integrated with the learning objectives of the program of studies.

The Co-operative Education Department, in conjunction with other faculty and departments, is responsible for:

- Providing opportunities for paid, supervised off-campus work semesters in co-operating business, industry or government agencies.
- Providing comprehensive career development services for co-operative education students within the academic curriculum.
- Enhancing the potential for graduate employment through occupational socialization and career development in jobs commensurate with student aspirations and training.

The grievor commenced employment with the College in April of 1981 as a Co-operative Education Co-ordinator, which is a position included in the academic bargaining unit. (The position of Co-operative Education Co-ordinator will also be referred to as "Co-ordinator" in this award, for ease of exposition). In that capacity, he was initially responsible for the College's Industrial Mechanic and Fitter/Welder co-op programs. However, by the mid 1980's he had become the Co-operative Education Co-ordinator for the College's Civil Engineering Technology, Construction Engineering Technician, and Transportation Engineering Technology programs, which remain three of the eighteen College programs currently operating in a co-operative education mode.

As of September of 1986, the job description for Co-ordinators read, in part, as follows:

A co-op educator is responsible for academic leadership and for developing effective learning environments through the delivery of co-operative education. Functions include:

(a) Consulting with program and course directors and other members, advisory committees, accrediting agencies, employers and students in the design, revision and updating of the academic curriculum including that of the work semester....

(b) The facilitation of learning including:

- * ensuring student awareness of course objectives, approach and evaluation techniques;

- * preparing students to become independent

learners; * providing an appropriate learning environment in

the form of work semesters in business, industry and government to meet the needs and qualifications of the students.

- * teaching as assigned;

- * evaluating student progress/achievement and assuming responsibility for the overall assessment of student co-op learning.

(c) Tutoring and academic counselling of students....

(d) The provision of academic leadership including:

- * providing guidance to employees and teaching faculty relative to the co-op experience;
- * participating in the work of curriculum and other consultative committees as requested.

In accordance with that job description, the duties which the grievor performed in his position as a Co-ordinator included classroom teaching in co-op preparation classes covering topics such as resume writing, interviewing techniques, ethics, career goal setting, and report writing; meeting with students on an individual basis to provide additional information, clarification, and counselling; marketing the co-op program to employers to ensure that there were a sufficient number of paid work term co-op jobs available for students; evaluating employment environments to determine their suitability for co-op students; visiting workplaces during the co-op work terms to provide support and guidance for the students and their employers; and evaluating the students' work term reports. In performing those tasks, he spent approximately seventy percent of his time with students.

During the workplace visits, it was the grievor's practice to meet first with the students' supervisors to get their perspective on how the students were doing, and to discuss the students' goals and objectives. He would then meet with each of the students to go over their workplace logs and to discuss whether they were satisfied with their progress, and also to discuss the extent to which their

employers had assisted them in meeting their goals. If the student was experiencing problems with the placement, the grievor would meet with the employer with a view to correcting those problems.

The grievor would also meet with employers from time to time for the purpose of developing new co-op job opportunities for students. Since the grievor wanted the students to work in an environment in which they could learn and grow, he considered a number of factors in determining whether a new job would be suitable, including the type of student the employer was willing to hire (i.e., a first year, second year, or third year student), the nature of the employer's operations, the type of work the employer intended to have the student perform, and the extent to which the employer was prepared to permit student participation.

In addition to the grievor and seven other Co-operative Education Co-ordinators, the College also employed four Placement Officers (included in the support staff bargaining unit) in its Co-operative Education Department. Their duties and responsibilities included assisting the Co-ordinators with co-op preparation classes, troubleshooting and facilitating the application and interview process, providing in-school student and employer support, and engaging in informal job development activities. When the Co-ordinators were not on campus (as was often the case due to their workplace visitation responsibilities), Placement Officers would also review and analyse information received from employers by telephone or fax concerning jobs proposed for inclusion in the co-op programs, and

post those that they considered to be suitable so that students could apply for them.

When the College first became involved in co-operative education in the early 1980's, there were relatively few co-op students and co-op education fees were non-existent or very low. Since the job market was quite strong and there were no external competitors for co-op jobs (other than the University of Waterloo), co-op jobs were relatively plentiful. Thus, the main task of the Co-ordinators was to work with students to convince them of the value of the co-op experience, to prepare them for the world of work, and to counsel them before, during, and after their work terms. However, in the ensuing years the emphasis gradually shifted to co-op "marketing" as a result of changes that occurred in the social and economic environment, including the increased number of co-op students, the relative shortage of co-op jobs, and the strong competition for those jobs from universities, secondary schools, other community colleges, and unemployed graduates. Higher co-op fees and the reduced availability of "summer jobs" also gave rise to greater co-op job placement expectations on the part of the College's co-op students, and placed greater pressure on the Co-ordinators to "find" co-op jobs.

Those changes, combined with the economic necessity of operating the Co-operative Education Department on a more cost effective basis, prompted the College to develop and implement an alternate model of operation designed to maintain academic integrity while providing a more cost-effective sales and marketing component. Under that new model, the number of Co-ordinators has been reduced

(from eight to four) and the number of support staff has been increased, with the position of Placement Officer being replaced by the newly-created position of "Co-op Consultant".

Co-op Consultants are responsible for marketing various training programs and services available through the Faculty of Engineering Technology, such as contract training initiatives, apprenticeship, and unpaid work placement. They are also responsible for performing the co-op job development marketing functions previously performed primarily by the Co-ordinators. Co-op consultants determine whether jobs offered by employers for inclusion in the program are associated with a program of studies offered by the College on a co-op basis. Any questions they have in that regard are referred to academic staff for resolution. Their responsibilities also include visiting workplaces during the co-op work terms to provide support and guidance for the students and their employers, and to promote job development for future co-op placements. The efficiency of those workplace visitations has been increased by dividing them among the Co-op Consultants on a geographical basis, rather than on a program basis as had been the case when they were performed by the Co-ordinators. In describing the purpose of those visits, Ms. Stanshall (a Placement Officer who became a Co-op Consultant under the new model) gave the following testimony:

Basically I'd say it's a P.R. [public relations] visit. I ask a series of questions to the employer and to the student, and the ensuing conversation will usually indicate to me the level of satisfaction the employer has with the student and also how satisfied the student is with the job.

She also testified that, in terms of her role, she perceives both the employer and the student to be "customers". If during those visits any problems surface which the Co-op Consultant feels incapable of handling, they are referred to the appropriate Co-ordinator or academic department.

Under that new model, Co-op Consultants continue to provide the in-school employer support which had previously been provided by Placement Officers, but no longer provide in-school student support (such as the counselling and assistance which they had previously provided to students on an individual basis regarding matters such as resume writing and job search skills). The reduced number of Co-ordinators continue to teach co-op preparation classes. They also provide an increased amount of in-school student support, as the elimination of their job monitoring functions makes them more readily available on campus to provide guidance and counselling to students. Co-ordinators remain responsible for student evaluation. They perform work term evaluations through a compilation of monitoring information provided by the employers (who provide an interim and final evaluation of each student) and the students' work term reports. The aforementioned work site visits are not given a grade in this process, and no academic evaluation occurs when the Co-op Coordinators visit the work site.

The restructuring of the duties and responsibilities of those positions brought Mohawk College more closely in line with what was occurring at other colleges in the Ontario community college system, and made the duties and responsibilities of the positions in

question more reflective of those typically carried out by persons in similar positions at other colleges. Indeed, it is clear from Ms. Verspagen's evidence that in carrying out that restructuring, the College relied upon the arbitral jurisprudence which has been developed as a result of grievances filed in respect of similar changes which have occurred at other Ontario community colleges.

In commenting on the disparity which exists between the current marketing focus of the work place visits and the more academic focus described in the co-operative education guide prepared in 1993 by the College Co-operative Educators of Ontario (of which the College is a member), Ms. Verspagen testified, in part, as follows:

She also described the co-op work terms as "an added value work experience in addition to a full program of studies".

The restructuring described above resulted in the elimination of four Co-operative Education Co-ordinator positions, including the position held by the grievor. In determining which Co-ordinators were to be laid off, the College went strictly by seniority. Two of the other Co-ordinators who were given notice of lay-off (Elaine Tuc and Nick Urquhart) had more seniority than the grievor, who had more seniority than the fourth Co-ordinator who was given that notice.

It is the Union's position that the assessment and selection of job opportunities, and the visitation of work sites during co-op work terms are both inherently academic activities. It

is also the Union's position that the scheme of the Colleges Collective Bargaining Act (the "Act") is that community college employees are either engaged in academic activity or anything else, and that if a job or task is inherently academic it has to be performed by a member of the academic bargaining unit. In this regard, he referred the Board to the following provisions of the Act:

1. In this Act and in the Schedules,

"bargaining unit" means the academic staff bargaining unit of employees or the support staff bargaining unit of employees set out in Schedules 1 and 2;

"employee" means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;

SCHEDULE 1

The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians but does not include,

[The schedule lists ten categories of managerial and other exclusions, the details of which are not germane to the instant case.]

SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

[The schedule lists eleven categories of managerial and other exclusions, the details of which are not germane to the instant case.]

In commenting on those provisions, counsel for the Union also drew our attention to an unreported Ontario Labour Relations Board decision dated September 19, 1984 (File No. 1668-83-M) between the Union and Fanshawe College, in which the O.L.R.B. wrote, in part, as follows regarding a Co-op Liaison Officer:

1. This is an application under section 81 of the Colleges Collective Bargaining Act (hereinafter referred to as the Act) for a determination of the employment status of Mr. D. Blay who is classified as a Co-op Liaison Officer.

5. The Board has adopted a two-stage approach in determining a person's status under the Act. The first step involves determining in which bargaining unit the person should be placed if found to be an employee. The second step is to determine whether the person in question is in one, or more, of the categories expressly excluded from the relevant schedule.

6. If Blay is to be included in the academic bargaining unit described in Schedule 1, he must be found, on the evidence before the Board, to be either a teacher, a counsellor or a librarian. The evidence clearly establishes that Blay is neither a teacher nor a librarian. There is evidence, however, that he does have contact with students and does give them advice with respect to the cooperative programme and the preparation of resumes for presentation to

prospective employers. He also advises students in order to help them prepare for job interviews. The evidence of Blay is that he had been a teacher at Fanshawe College but said he would have to distinguish "very much" between what he did as a teacher and what he does as a Co-op Liaison Officer II. In the latter occupation he is engaged in preparation of students basically for the reality of going out to work. The evidence of Blay is that while he imparts certain practical knowledge to the students, his role is different to that of teaching because the job is to promote co-operative programmes to employers and to students. He sees his job to be a marketing function and completely different to the teaching function. The job takes the Co-op Liaison Officer outside the College in order to enable him to promote the programme with employers.

7. It is the view of the Board that the word "counsellor" set out in Schedule 1 "secures its particular context from being lumped together with 'teachers and librarians' all of whom are in direct functional contact with students and therefore comprise a bargaining unit constituting 'the academic staff'" (Ontario Public Service Employees' Union and The Board of Governors of Algonquin College, [1977] OLRB Rep. May 257). In our view the marketing of cooperative programmes to students and employers does not fit into the academic context in which the word "counsellor" appears in Schedule 1 together with "teachers and librarians". In the result, the Board finds that the Co-op Liaison Officer would not fall into the academic unit if he were found to be an employee, but that he would be properly included in the support staff bargaining unit provided he does not fall within the exclusions set out in Schedule 2.

Union counsel submitted that the O.L.R.B. decision is not determinative of the instant case because it does not detail the facts which led to the conclusion that the work performed by the individual in question constituted a marketing function. He further submitted that even if that decision is not distinguishable from the instant case, we are not bound by it, nor by any of the other cases relied upon by the College, by virtue of Isabelle v. Ontario Public Service Employees Union (1981), 122 D.L.R. (3d) 385 (S.C.C.), which held that although the Act provides for centralized collective bargaining (in

which the Council of Regents is statutorily authorized to bargain for all of the colleges), neither the Act nor the collective agreement provide for centralized arbitration under which an arbitration award issued in respect of a grievance against one college is binding upon all of the other colleges.

As indicated above, the remedy requested by the grievor in both of his grievances is rescission of his layoff and reassignment to a Co-operative Education Co-ordinator position (or another full time position), with full restitution of lost salary and benefits with accrued interest.

However, the remedy requested by Union counsel during the course of his submissions is a declaration that the tasks of job clearance (for inclusion in the co-op program) and job monitoring are academic in nature and properly performed by the academic bargaining unit. (He also requested the Board to remain seised, and to allow the parties an opportunity to work out how that remedy would play out in practice.)

Counsel for the College submitted that the grievance to which this award pertains cannot succeed because the Union called no evidence to suggest that the position occupied by the grievor prior to his lay-off still exists, as alleged in the grievance. She further submitted that even if the Union had called such evidence, the grievor would not be entitled to the job because two of the other laid off Co-ordinators have more seniority than he has. It was also her contention that the remedy sought by the Union cannot be granted because both it and the way in which the Union has framed the case in

an attempt to obtain that remedy are significantly different from the grievance as filed by the grievor.

In her alternative submissions dealing with the merits of the case as framed by Union counsel, counsel for the College submitted that although the goals of the College's co-operative education program remain the same, the College is entitled to reorganize the manner in which it delivers that program. She submitted that neither job clearance nor job monitoring are inherently academic in nature, and that the evidence adduced in these proceedings demonstrates that the manner in which they are currently being carried out does not involve an academic function.

In commenting on Isabelle v. Ontario Public Service Employees Union, supra, College counsel argued that the Union's attempt in that case to enforce contempt proceedings against one college based upon an arbitration award involving another college differs markedly from the College's position in the instant case that prior arbitration awards involving other colleges should be followed unless they are manifestly wrong, because to depart from them would be harmful to labour relations. In this regard, she contended that we should follow the following awards in which job development, job placement, and work site visitation were found to be support staff functions: Georgian College and Ontario Public Service Employees Union (OPSEU File #89B533), unreported award dated October 17, 1990 (Carter); Fanshawe College and Ontario Public Service Employees Union (OPSEU File #87B41), unreported award dated December 4, 1987 (Kates); Fanshawe College and Ontario Public Service Employees Union (OPSEU

File #89D310), unreported award dated June 18, 1991 (Brent); Fanshawe College and Ontario Public Service Employees Union (OPSEU File #96C008)), unreported award dated August 20, 1996 (Burkett); and Fanshawe College and Ontario Public Service Employees Union (OPSEU File #87Z12)), unreported award dated May 9, 1990. (Brent).

In his reply submissions, Union counsel suggested that it remains to be determined whether there is enough of the aforementioned work (which the Union contends to be inherently academic) to fill an academic position. He further suggested that the Board need not be concerned about the two laid off Co-ordinators who have more seniority than the grievor, because they have not grieved their lay-offs. He submitted that the arbitration cases relied upon by the College do not address the Union's contention that it is a feature of the Act on which the parties' collective agreements are premised that the work is divided into academic work and non-academic work. Although he indicated that he was advocating a completely watertight division, he contended that adopting the approach advocated by the College could lead to substantial abuses and would be inconsistent with the Act's attempt to distinguish between academic tasks and non-academic tasks.

In Fanshawe College and Ontario Public Service Employees Union (OPSEU File #87B41), *supra*, the majority of an arbitration board chaired by Mr. Kates concluded that a Co-operative Liaison Officer employed by the College to supervise and monitor the work term component of its co-operative education program and the practical training component of its stationary engineering program was not engaged in a teaching capacity and, therefore, was properly included

in the support staff bargaining unit. In that case, the evidence indicated that the employee in question "would visit the students periodically once placed in a facility to iron out any difficulties", and "would speak to the supervising employer representative to ensure that the student is achieving the programme's object in terms of the type of work that is being assigned".

In the Georgian College case, a majority of the arbitration board chaired by Professor Carter held that although there was "an important counselling and teaching component to the job" performed by the college's Co-operative Education Consultants, their "core function" was "to locate suitable job openings in the workplace and to maintain contact with employers during the period of the work experience". Thus, the majority concluded that "[s]tudent counselling, while important, [was] only an ancillary component of the position and not sufficiently substantial so as to bring [the position] within the [academic] bargaining unit". They also wrote, in part, as follows in commenting on that distinction (at pages 9 and 10 of the award):

The distinction we draw in this case is quantitative rather than qualitative. We are not saying that the type of counselling and teaching carried out by the Co-operative Education Consultant is not academic in nature, but only that there is absent a sufficiently substantial component of these responsibilities to warrant inclusion of the position within the academic bargaining unit....

A "core function" test of the type referred to in that case has also been applied in a number of other community college arbitration awards. See, for example, Fanshawe College and Ontario

Public Service Employees Union (OPSEU File #96C008), in which the majority of an arbitration board chaired by Mr. Burkett wrote, in part, as follows (at pages 12 and 13) after citing with approval two earlier awards which had applied that test:

The core function test ... is the best measure for deciding whether an employee is more appropriately in the academic unit or more appropriately in the support unit when, as here, there are overlapping duties and responsibilities.

Reference may also usefully be made to the following passage from page 31 of the majority award in Fanshawe College and Ontario Public Service Employees Union (OPSEU File #89D310), supra:

We respectfully agree with and adopt the reasoning contained in that award and the other aforementioned awards which applied the "core function" test to determine whether a position falls within the academic staff bargaining unit or the support staff bargaining unit. Moreover, we do not view that approach as being in any way inconsistent with the Act. Although Union counsel suggested that it is a feature of the Act that the work performed by community college employees is divided into academic work and non-academic work, the Act and its schedules do not refer to academic work, non-academic work, or any other kind of work in describing the two bargaining units. Rather than being defined by a description of the work or tasks performed, the bargaining units are defined in the Act by reference to the positions or classifications included in them and excluded from them. Since the academic staff bargaining unit includes

only College employees who are employed as "teachers, counsellors or librarians" (subject to specified exclusions), it is entirely appropriate to assess whether the core function of a position is academic in nature in determining whether the position is, in substance, that of a teacher, counsellor, or librarian and, therefore, within the scope of that bargaining unit.

The evidence adduced in these proceedings suggests that the manner in which the grievor performed the tasks of assessing and selecting job opportunities, and visiting work sites during co-op work terms, may well have involved an academic component, although it is clear from the evidence that his performance of those tasks also involved administrative and marketing functions which cannot legitimately be characterized as academic in nature. However, the evidence adduced regarding the manner in which those tasks

have been performed since the aforementioned restructuring that gave rise to the grievor's lay-off casts considerable doubt on whether those tasks retain any academic component, in view of the emphasis placed on marketing and public relations. Moreover, even if we were to conclude that those tasks do retain some academic aspects, it is clear from the totality of the evidence that the core function of the Co-op Consultant position consists of marketing, public relations, and administrative tasks. Accordingly, we are satisfied that the Co-op Consultant position is properly included in the support staff bargaining unit, and that there is no basis for granting the declaratory relief sought by counsel for the Union in his able submissions on behalf of the grievor. In this regard, we respectfully

agree with and adopt the conclusions reached in the aforementioned arbitration awards, as well as in the aforementioned O.L.R.B. decision, that persons performing functions analogous to those performed by Co-op Consultants in the instant case are not "teachers, counsellors or librarians", and are properly included in the support staff bargaining unit.

For the foregoing reasons, the grievor's second grievance is hereby dismissed. The hearing of his first grievance will proceed on June 4 and November 17, 1997, as agreed by the parties..ls1

DATED at Burlington, Ontario this 15th day of May, 1997.

Robert D. Howe

Chair

I concur (with an addendum to follow).

"Michael Sullivan"

Union Nominee

I concur.

"Jacqueline Campbell"

College Nominee