

91F879
CAAT(A)
Local 653

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NORTHERN COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

GRIEVANCE OF SUZANNE TREMBLAY

BOARD OF ARBITRATION:

JANE H. DEVLIN

CHAIRMAN

JOHN T. KOSKI

COLLEGE NOMINEE

BRIAN SWITZMAN

UNION NOMINEE

Appearances for the College:

A.E. Burke

P. MacLean

Appearances for the Union:

Alick Ryder

Richard Mason

OPSEU FILE NO.: 91F879

DATE OF HEARING: April 13, 1992

10-cq-92

The Grievor, Suzanne Tremblay, commenced her employment with the College as a full-time teaching master in August of 1986. Prior to the fall of 1991, she taught in the General Arts Department at the Kapuskasing campus. The Grievor's husband is also employed in Kapuskasing and her children attend school in that locale.

By letter dated August 27, 1991, the College provided the Grievor with 90 calendar days' written notice of layoff as required by Article 8.04(g) of the Collective Agreement. At the same time, the College advised the Grievor that, in lieu of laying her off, it intended to exercise its rights under Article 8.05(a) to reassign her to a vacant position in the General Arts Department at the Timmins campus. There was no dispute that the Grievor possessed the necessary skill, competence and experience to fulfill the requirements of this position. In any event, the College also indicated that it would provide the Grievor with assistance during the period of transition from her previous position to her new position at the Timmins campus.

The Grievor received the College's letter of August 27th on September 3rd at which time she was advised that her assignment to the Timmins campus would take effect on September 9, 1991. The evidence indicates that it takes approximately 2 1/2 hours to drive from Kapuskasing to Timmins and although the

Grievor initially attempted to arrange a shortened work week at the Timmins campus, she was unable to do so.

Accordingly, on September 9, 1991, the Grievor telephoned Peter MacLean, the Director of Human Resources at the College, and advised him that due to personal and family commitments, she was declining the reassignment to the Timmins campus. She subsequently confirmed this conversation in writing and indicated that she continued to be available for a full or part-time position at the Kapuskasing campus. She also indicated that she expected to receive 90 days' notice of layoff and requested information concerning her layoff entitlement.

Following the telephone conversation of September 9th, Mr. MacLean also wrote to the Grievor and advised her that, as her reassignment to the Timmins campus was made in lieu of layoff, it was not open to her to decline the reassignment and elect instead to be laid off. Mr. MacLean further indicated that if the Grievor declined the reassignment, she would be deemed to have resigned her employment with the College. In these circumstances, Mr. MacLean invited the Grievor to reconsider her decision and to contact the College prior to September 16th.

On September 16th, the Grievor telephoned Mr. MacLean and confirmed that she was declining the reassignment to the Timmins campus. As a consequence, Mr. MacLean informed the

Grievor that the College viewed this action as a resignation of her employment. In the result, the Grievor filed a grievance in which she claimed that the College had failed to provide her with 90 days' notice of layoff.

The following provisions of the Collective Agreement are relevant to the determination of Ms. Tremblay's grievance:

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.

- 8.05** When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where an employee has the competence, skill and experience to fulfill the requirements of the full-time position concerned, seniority shall apply consistent with the following:

(a) an employee will be reassigned within the College to a vacant full-time position in lieu of being laid off if the employee has the competence, skill, and experience to perform the requirements of a vacant position;

(b) failing placement under paragraph (a) above, such employee shall be reassigned to displace another full-time employee in the same classification provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned;
- (ii) the employee being displaced has lesser seniority with the College.

(c) failing placement under paragraph (b) above, such employee shall be re-assigned to displace a full-time employee in another classification upon acceptance of the identical employment conditions as the classification concerned provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned;
- (ii) the employee being displaced has lesser seniority with the College.

(d) failing placement under paragraph (c) above, such employee shall be reassigned to displace two partial-load employees (as referred to in Appendix II) provided that:

- (i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned; and
- (ii) each of the partial-load employees being displaced has lesser months of service with the College as determined in Appendix II than such displacing employee's months of seniority; and
- (iii) it is understood that the College retains the right to assign additional work to the employee, where warranted, subject to the limits prescribed by Article 4.

(e) (i) failing placement under paragraph 8.05(d) above or where the employee has waived in writing the right in paragraph (d) above, such employee shall be reassigned to displace one partial-load employee (as referred to in Appendix II) and one or more part-time employees whose assigned courses are as described in paragraph 8.05 (e) (ii) below, provided that:

- (a) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned; and

- (b) each of the employees being displaced has lesser months of service with the College (as determined in Appendix II or Appendix IV, as appropriate) than such displacing employee's months of seniority; and
 - (c) it is understood that the College retains the right to assign additional work to the employee where required so that the work assignment so created constitutes a full-load assignment, and is in accordance with the limits prescribed by Article 4.
- (e) (ii) the courses taught by the part-time employees displaced must be:
- (a) the same as, or
 - (b) essentially the same as, or
 - (c) pre-requisite courses to those taught by the partial-load employee concerned.
- (e) (iii) such employees shall have the layoff notice extended until completion of the assignment so created, and shall maintain current salary and benefits for the duration of that assignment.
- (e) (iv) upon completion of the assignment so created, or as mutually agreed between the College and the employee, such employee shall be reassigned 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.
- (e) (v) failing placement under paragraph 8.05(e) (iv) above, such employee shall be laid off without further notice upon completion of the partial-load assignment.
- (f) (i) failing placement under paragraph 8.05(e) above or where the employee has waived in writing the right in paragraph (e) above, such employee shall be reassigned to displace one partial-load employee (as referred to in Appendix II) and engage in approved retraining activities such that the employee retains current salary and benefits for the duration of the partial-load assignment provided that:
- (a) the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned; and

(b) the partial-load employee being displaced has lesser months of service with the College as determined in Appendix II than such displacing employee's months of seniority.

(f) (ii) such employee shall have the layoff notice extended until completion of the partial-load employee's assignment, and shall maintain current salary and benefits for the duration of the partial-load assignment.

(f) (iii) upon completion of the partial-load assignment, or as mutually agreed between the College and the employee, such employee shall be reassigned 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.

(f) (iv) failing placement under 8.05(f) (iii) above, such employee shall be laid off without further notice upon completion of the partial-load assignment.

(g) (i) failing placement under paragraph 8.05(f) (i) above or where the employee has waived in writing the right in paragraph (f) (i) above, such employee shall be reassigned to displace a sessional employee (who has more than ninety (90) days remaining on the sessional employee's term appointment) provided that the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned.

(g) (ii) such employee shall have the layoff notice period extended until completion of the sessional employee's assignment, and shall maintain current salary and benefits for the duration of the sessional assignment.

(g) (iii) upon completion of the sessional assignment, or as mutually agreed between the College and the employee, such employee shall be reassigned 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.

(g) (iv) failing placement under 8.05 (g) (iii) above, such employee shall be laid off without further notice.

(h) (i) failing placement under paragraph 8.05 (g) (i) or where the employee has waived in writing the right in paragraph (g) above, such employee shall be

reassigned to displace a part-time employee upon acceptance of the identical employment conditions as the part-time employee concerned provided that:

- (a) the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned; and
- (b) the part-time employee being displaced has lesser months of service with the College as determined in Appendix IV than such displacing employee's months of seniority.

(h) (ii) such a reassigned person shall be deemed to be laid off and eligible for recall in accordance with Article 8.06 and 8.10.

(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 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.

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

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

. . .

- 8.08** (a) 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 Article 11.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

(b) If the grievance is processed through Step 2, the written referral to arbitration in Article 11.03 shall specify, from the positions originally designed in (a) above, 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 the sub-paragraphs (a), (b), (c), (d), (e), (f), (g) or (h) of Article 8.05.

It was the submission of Mr. Ryder, on behalf of the Union, that the College was required to provide the Grievor with 90 calendar days' notice prior to implementing its decision to lay her off which, in this case, took the form of a reassignment to the Timmins campus. Alternatively, in the event that the College was entitled to proceed under Article 8.05(a) prior to the expiry of the 90 day notice period, Mr. Ryder submitted that the Grievor was not obliged to accept the reassignment but could elect instead to be laid off or to exercise her displacement rights. Were this not the case, Mr. Ryder contended that a senior employee could be deprived of the displacement rights provided for in Article 8.05(b) to (h) of the Agreement. Mr. Ryder further submitted that the Grievor's claim to exercise her displacement rights does not involve an expansion of the grievance and he requested that the Board remain seized to deal with this issue.

It was the submission of Ms. Burke, on behalf of the College, that once the College provides an employee with 90

calendar days' notice of layoff as required by Article 8.04(g), it may proceed to reassign the employee in accordance with Article 8.05. Ms. Burke contended that as such a reassignment is made in lieu of layoff, there is no requirement to await the expiry of the 90 day period. Moreover, Ms. Burke contended that an employee may not decline a reassignment to a vacant position and elect instead to be laid off. In this regard, Ms. Burke submitted that the language of Article 8.05(a) can be contrasted with other aspects of the layoff procedure in which an employee may waive the right to exercise certain displacement rights. In the result, an employee who declines a reassignment pursuant to Article 8.05(a) is properly deemed to have voluntarily terminated her employment with the College.

Finally, Ms. Burke took objection to the Grievor's claim to exercise her displacement rights and submitted that such a claim is beyond the scope of the grievance. In this regard, Ms. Burke pointed out that the Grievor did not, as required by Article 8.08 of the Collective Agreement, identify in her grievance the employees whom she sought to displace. In these circumstances, it was submitted that no such claim may be advanced at the hearing.

The first issue to be determined, then, is whether the College was required to await the expiry of the 90 calendar day notice period referred to in Article 8.04(g) prior to reassigning

the Grievor to the Timmins campus. Having considered the provisions of the Collective Agreement, it is our view that there was no such requirement. While Article 8.04(g) provides for 90 calendar days' notice of layoff, Article 8.05(a) specifies that a reassignment to a vacant position pursuant to that Article is made "in lieu of being laid off" with the result that the notice provision does not apply to such a reassignment. Moreover, Article 8.05(a) provides for a reassignment "within the College" and, therefore, applies equally to a reassignment at another campus as to a reassignment at the same campus. In the latter case, there would be no reason to delay the effective date of the reassignment. As well, where a number of employees are subject to layoff, the College's operation could be severely hampered if it were precluded, for a period of 90 days, from making reassignments which would have the effect of avoiding a layoff. In any event, in our view, the language of the layoff procedure does not support the interpretation advanced by the Union but instead makes it clear that the parties contemplated that assignments pursuant to Article 8.05(a) would be made during the notice period.

For this reason, we find that the awards in Centennial College and Ontario Public Service Employees Union August 3, 1983 (Weatherill (unreported)) and Fanshawe College and Ontario Public Service Employees Union May 17, 1989 (Devlin (unreported)) which were relied upon by the Union are distinguishable. In each of

those cases, the College notified an employee of the impact of a planned staff reduction prior to consulting with the Union as required by Article 8.04. In the Centennial College award, the majority of the Board found that the requirement for consultation was not a mere formality but was a condition precedent to the involuntary transfer of the Grievor. In contrast, in this case, the expiry of the 90 calendar day notice period provided for in Article 8.04(g) is not a condition precedent to the College reassigning an employee to a vacant position in accordance with Article 8.05(a) of the Agreement.

The next issue, then, is whether it was open to the Grievor to decline such a reassignment. In this regard, Article 8.05 of the Collective Agreement sets out the procedure to be followed when the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or to transfer involuntarily full-time employees to another position from that previously held as a result of such layoff or reduction of employees. Article 8.05(a) to (h) then sets out the placement and displacement provisions which are to apply to affected employees.

Article 8.05(a) provides that an employee will be reassigned within the College to a vacant position in lieu of being laid off provided the employee has the skill, competence and experience to fulfill the requirements of the vacant

position. The balance of the Article then sets out certain displacement rights and provides that if an employee is not placed in accordance with these provisions, he or she may be entitled to an extension of the notice period for purposes of retraining. Thereafter, the employee shall be reassigned to a vacant position, again providing the employee has the skill, competence and experience to fulfill the requirements of the vacant position.

In our view, it is clear from the provisions set out that a reassignment to a vacant position pursuant to Article 8.05(a) is mandatory in the sense that it is not open to an employee to decline the reassignment and elect instead to be laid off or to exercise displacement rights in accordance with the remainder of Article 8.05. In this regard, not only does Article 8.05(a) provide that an employee with the necessary skill, competence and experience will be reassigned to a vacant position within the College but the language of this provision is to be contrasted with other aspects of the layoff procedure in which an employee may waive the right to exercise displacement rights and yet be entitled to exercise such rights under the remaining subsections of Article 8.05. No similar proviso appears in Article 8.05(a).

As pointed out by the Union, however, by requiring an affected employee to accept a reassignment to a vacant position,

that employee could be required to transfer to another campus and be deprived of the opportunity to exercise displacement rights. Nevertheless, as noted previously, Article 8.05(a) provides for a reassignment "within the College" rather than at a particular campus and, in this respect, is consistent with the notion that, under this Collective Agreement, employees enjoy college-wide seniority. Moreover, the parties have clearly agreed that as an initial step in the layoff procedure, an affected employee is to be reassigned to vacant position for which he or she is qualified as by this means the employee may be maintained in employment without the attendant disruption which can accompany the exercise of displacement rights.

The interpretation we have adopted is also consistent with a number of awards relied on by the College in which it was held that in the event of a layoff, an employer is entitled to retain senior employees who have the necessary qualifications to perform the work. Absent specific language in the Collective Agreement, an employee cannot elect to take layoff, rather than exercise his seniority rights: see Re William Neilson Ltd. and Canadian Food & Allied Workers', District 15 (1972), 1 L.A.C.(2d) 190 (O'Shea); Re Northern Electric and United Automobile Workers, Local 1535 (1972), 1 L.A.C.(2d) 275 (Simmons) and Re Daycon Mechanical Ltd. and Sheet Metal Workers International Association, Local 397 (1991), 19 L.A.C.(4th) 129 (Davis).

While we appreciate that a reassignment to the Timmins campus would have presented considerable difficulty for the Grievor and her family, nevertheless, the Collective Agreement does not entitle an employee to decline a reassignment to a vacant position pursuant to Article 8.05(a) on the basis that the reassignment involves a transfer to another campus within the College. Accordingly, the Board has no alternative but to find that the Grievor's decision not to report to the Timmins campus amounted to a resignation of her employment.

For the reasons set out, therefore, the grievance of Ms. Tremblay is hereby dismissed.

DATED AT TORONTO, this 9th day of October, 1992.

James H. Desch
Chairman

"John T. Koski"
College Nominee

See Dissent Attached
Union Nominee

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NORTHERN COLLEGE

(the "College")

- A N D -

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION
AND ITS LOCAL 417

(the "Union")

AND THE GRIEVANCE OF S. TREMBLAY #91F879

D I S S E N T

On September 3, 1991, Suzanne Tremblay, the grievor, received a notice of layoff (Exhibit #3), which was signed by the President of the College, Mr. Gervais. In it she was advised that she was being removed from her position at Kapuskasing Campus. Within six days she was to report for work in a vacancy at the Timmins Campus of Northern College.

The official notice of layoff under Article 8 further informs the grievor that:

"You should appreciate that if you disagreed with the reassignment, we see no other options for you under Article 8.05 but lay off."

The grievor is married with three children. They had just started their school year in Kapuskasing. In good weather the drive to Timmins from her home is 2½ hours one way. She initially attempted to get a shortened work week for her new position. That was refused by the College.

The grievor then chose to accept the College's

interpretation of Article 8.05 as outlined to her in Exhibit #3, and she accepted the College's offer of layoff (Exhibit #4). The grievor also stated she remained available for any work at the Kapuskasing Campus.

In response, two days later on September 11, 1991, the grievor received a letter from the Executive Director of Human Resources, Mr. Peter MacLean, which stated a different position to the grievor. In it he stated:

"You indicated on September 9, 1991 that you declined to accept the reassignment. The College can take no other view that you no longer wish to work for the College and wish to resign. You must appreciate that you do not have a choice; you must accept the reassignment or be deemed to be resigned."
(Exhibit #5)

In a telephone conversation of the 16th of September, 1991, the grievor repeated her position to Mr. MacLean. On September 17, 1991, but effective the previous day, Mr. MacLean terminated the grievor.

On these facts, it is my respectful view, the College improperly (whether intentional or not) set up a constructive discharge. This is a violation of the just cause provisions of the Collective Agreement.


Further, I am in agreement with College President, Gervais' interpretation of Article 8.05 as found in the official notice letter (Exhibit #3). All parts of Article 8.05 (a)-(h) were open to the grievor and in the event that she disagreed with the reassignment she could select a lay off. This appropriate, and correct interpretation of Article 8.05 was violated by the actions of Mr. MacLean only a few days later when the grievor, because of her restrictive personal choices, opted to accept President

Gervais' offer of a layoff in lieu of a forced transfer.

Finally, it is my respectful view, that Article 8.04 was also violated. A mandatory 90 day notice period ... "shall be given to employees being laid off." Clearly, this notice is to cover all employees whose position is declared redundant and "who must move to a different position". This notice is not restricted only to employees who are being, "put out on the streets". The notice is required to be given to any employee who might exercise any of the rights found in section 8.05(a)-(h). This 90 day notice period cannot be truncated unilaterally by the College. The grievor did not receive the full 90 day notice period. She is entitled to it as a mandatory provision. Anyone put in such a situation (even without the specific machinations imposed on the grievor) requires such a notice period to rearrange their personal and professional lives. Even if it is assumed that the grievor could be forced to take the position at the Timmins Campus, the parties have negotiated a substantial right of 90 days notice. Instead, at the very least, the College acted prematurely in firing the grievor effective on September 16, 1991, some thirteen days after she was given notice to either report to the Timmins Campus or elect a layoff. In my respectful view, my colleagues have improperly amended Article 8.04 to now read ... "up to 90 days notice" and they have no such jurisdiction to amend the Collective Agreement.

I would have upheld the grievance and ordered the reinstatement of Ms. Tremblay without loss of seniority, wages or benefits.

DATED AT TORONTO this 7th day of October, 1992.



Brian Switzman
Union Nominee

CHAIRMAN'S ADDENDUM

Having read Mr. Switzman's dissent, there are two matters to which I must respond.

1. The arguments advanced by the Union at the hearing are set out in the award. These arguments did not include a submission that the College made an offer of layoff which was accepted by the Grievor. There was also no suggestion that the Grievor was under any misapprehension as to the College's position that she was required to accept a reassignment to the Timmins campus and that she did not have the right to elect layoff.
2. The requirement for 90 calendar days' notice applies to layoff and not to a reassignment to a vacant position in lieu of layoff under Article 8.05(a).

James H. DeWitt

Chairman