

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALGONQUIN COLLEGE

(the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 415

(the "Union")

AND IN THE MATTER OF A UNION GRIEVANCE

PAULA KNOPF – SOLE ARBITRATOR

APPEARANCES

For the College

**George Vuicic, Counsel
Odette Regimbal, Director, Staff
Relations
Keith Younghusband, Dean, School
of Academic Advancement and
Languages
Diane McCutcheon, Acting Staff
Relations Officer
Maureen Kem, Academic Chair
General Arts and Sciences/
Languages**

For the Union

**Kristin A. Eliot, Counsel
Jack Wilson, Steward
Tom Fernie, Steward**

Hearing in this matter was held in Ottawa, Ontario on May 7 and July 25, 2001

AWARD

This is a Union grievance alleging that the College has violated the collective agreement by failing to designate, post and fill full-time positions in the Language, Training/General Arts and Science Department, "French as a Second Language" area (hereinafter referred to as FSL). The Union is alleging that sufficient work exists for at least one and as many as three full-time positions. The College denies any violation of the collective agreement. Before any evidence was called, the College raised two preliminary objections to the grievance. At the request of the parties, this award has been prepared to dispose of the preliminary objections.

The relevant provisions of the collective agreement are:

Article 1 RECOGNITION

1.01 The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers, counsellors and librarians, all as more particularly set out in Article 14, Salaries, except for those listed below:

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- (v) teachers, counsellors and librarians employed on a part-time or seasonal basis.

NOTE A: Part-time in this context shall include persons who teach six hours per week or less.

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**Article 2
STAFFING**

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2.02 The College will give preference to the designation of full-time positions as regular rather than partial-load teaching positions subject to such operational requirements as the quality of the programs, attainment of the program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community,

2.03 A The College will give preference to the designation of full-time positions as regular continuing teaching positions rather than sessional teaching positions including, in particular, positions arising as a result of new post-secondary programs, subject to such operational requirements at the quality of the programs, enrolment patterns and expectations, attachment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community. The College will not abuse sessional appointments by failing to fill ongoing positions as soon as possible subject to such operational requirements as the quality of the programs, attainment of program objectives, the need for special qualifications, and enrolment patterns and expectations.

**Article 14
SALARIES**

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Guidelines

Allowances - Professors

14.03 A 3 Coordinator Allowance – Coordinators are teachers who in addition to their teaching responsibilities are required to provide academic leadership in the coordination of courses and other programs....

Postings

27.11 A Notice will be posted in the College of all vacancies of full-time positions in the bargaining unit. Such notice will be posted for at least five working days.

At the same time, notice of these vacancies will be sent to the Union Local President for distribution to the other Union Presidents.

The College will also forward copies of the notice to the other Colleges with the intention that they be posted.

27.16 Extension and Continuing Education programs and courses which are not included in the regular assignment of full-time employees are excluded from the application of this Article for all purposes.


[emphasis added]

The College's preliminary objection to arbitrability centres on the assertion that the collective agreement and the posting provisions do not apply to those teaching FSL on a part-time or contract basis within the Continuing Education Department. Therefore, it is asserted that the Board of Arbitration has no jurisdiction over the staffing decisions of the employees covered by this grievance. Some factual background is necessary for an understanding of the objection. There is no dispute over the relevant facts.


The work and positions covered by the grievance are all in the FSL area. The FSL courses are offered by the Continuing Education Department. FSL courses are offered on both a credit and non-credit basis.

The history of the FSL area is relevant. Prior to 1993, the College offered FSL courses at the post secondary and non-post secondary level. At that

point there was one full-time co-ordinator and three full-time faculty members. In 1993, La Cité Colligiale opened and the post-secondary FSL courses were then transferred to the new French college. The three full-time faculty members at Algonquin College were either laid off or re-deployed.



Since 1996, the only remaining offerings in the FSL area have been under the Continuing Education umbrella. Both credit and non-credit courses are given. These are also referred to as "funded" and "non-funded" courses within this system. There are no longer any full-time teachers in the FSL area. Credit and non-credit courses are all taught by part-time and contract employees. The programs being offered in FSL vary from those running for a matter of days or weeks, to months. There are significant fluctuations in enrolment. The College does employ a full-time coordinator, Jane Thomson, who coordinates the FSL contract personnel and courses. Her name is Jane Thomson. She is a member of the bargaining unit.



Since the loss of the full-time teachers, the College has never considered the employees in the FSL area as members of this academic bargaining unit, with the exception of the full-time co-ordinator, Jane Thomson. She was previously an English as a Second Language teacher whose work evolved into the task of co-ordinating the FSL activities. Her current work is exclusively related to the contract activity in FSL. No one else on contract who is associated with FSL has his/her union dues collected or remitted. No standard work load forms are completed for the FSL teachers. Their names are not included in the seniority list. The College has not received any challenge by the Union about the status of any of these individual employees. This grievance constitutes the Union's first formal objection to the treatment of employees in the FSL area.

Part of the Union's case concerns the assertion that one person's work load in particular amounts to a full-time position. Ms. Wakas is assigned 25 hours

per week as a co-ordinator for FSL and also teaches on a regular basis. The College asserts that Ms. Wakas has always been considered as a part-time employee because she is said to teach six hours per week or less and because her assigned 25 hours of co-ordination work amounts to less than a full-time position.

The Preliminary Objections Asserted by the College

The College has asserted two preliminary objections to the arbitrability of these grievances. First, it is asserted that the collective agreement does not apply to Continuing Education and contract positions. It is also asserted that FSL employees are excluded from the bargaining unit and have never been treated as members of the bargaining unit. Because all the employees teaching FSL are contract or sessional employees, it is submitted that they are excluded from the bargaining unit and that a board of arbitration has no jurisdiction over the staffing decisions concerning these employees. Further, it is asserted that Article 27.16 excludes extension and Continuing Education programmes from the job posting provisions of the collective agreement. Accordingly, it is submitted that even if the Union were able to establish that sufficient work existed to warrant any full-time positions, the collective agreement excludes FSL programmes from the job posting provisions and prevents the Union from achieving the remedy it seeks.

Secondly, it is submitted that since the part-time co-ordinator and the sessional teachers are part-time employees, they are not members of the bargaining unit and therefore the Board has no jurisdiction over such employees.

In support of its positions, the College relies on the following decisions; *OPSEU and George Brown College (Benhaggai grievance)*, unreported decision of Mort Mitchnick dated February 16, 1993 and *Cambrian College and OPSEU (Paquin grievance)*, unreported decision of Michel Picher dated

February 27, 1996 and *OPSEU and Fanshawe College (Academic Grievance)*, unreported decision of Mort Mitchnick dated July 31, 1996 and *George Brown College and OPSEU (part-time counsellors)*, unreported decision of Pam Picher dated December 24, 1994.

Submissions of the Union

Counsel for the Union began by acknowledging that the case law has established that "pure" Continuing Education teachers have not been considered to have status to grieve pursuant to article 27.16 of this collective agreement. It was submitted that the Employer's cases only precluded claims by people teaching exclusively non-credit courses in the Continuing Education area. However, the case at hand was distinguished on the basis that this is not an individual grievance but a union grievance that asserts that there is bargaining unit work that falls within the protections of Article 2 of the collective agreement. It was argued that the effect of the jurisprudence that the Employer is relying upon under article 27.16 is simply to exclude non-credit Continuing Education courses from the protection of the collective agreement. However, the Union stresses that this College is offering both credit and non-credit courses and that the credit courses were never intended to be excluded from the scope of the collective agreement. Further, it was argued that the College's treatment of Ms. Thomson as a member of the bargaining unit indicates an acceptance of the principle that not all Continuing Education or FSL work is considered outside the bargaining unit. It is stressed that the College has not used Article 27.16 to exclude Ms. Thomson from the bargaining unit. Further, it is argued that Article 14.03 A 3 recognizes co-ordinators as teachers. Therefore, it is argued that this arbitrator has jurisdiction to determine whether the combination of coordination and teaching duties amount to a full-time position. The Union stresses that the College's designation of the current staff as part-time does not preclude the jurisdiction of this arbitrator from determining whether full-time vacancies exist with

respect to the Continuing Education courses that are being offered in FSL for credit. It was submitted that this arbitrator has jurisdiction to determine whether full-time positions do exist in FSL and whether they ought to be posted and filled.

Finally, the Union protested the fact that the College did not raise any objections to arbitrability during the grievance step process and instead notified the Union of the jurisdictional objections the day prior to the calling of the first witness. It was suggested that the College has waived its right to raise the jurisdictional objections at this time.

Response of the College

Counsel for the College cited the following cases as authority for the position that there can be no waiver of jurisdictional issues: *Dryden Paper Co. Ltd. and United Paperworkers Union, Locals 105 and 1323* (1976) 11 L.A.C. (2d) (H. D. Browne) 337, *Hawker Siddeley Canada Inc., Orenda Division and International Association of Machinists & Aerospace Workers, District Lodge 117*, (1991), 21 L.A.C. (4th) 289 (R.D. Joyce) and *Atomic Energy of Canada Ltd and Society of Professional Engineers & Associates* (1994), 41 L.A.C. *4th) 310 (P. Knopf).

Counsel for the College also challenged the Union's assertion that the jurisprudence has made a distinction between credit and non-credit courses in the Continuing Education Department. It was submitted that the collective agreement simply excludes Continuing Education courses from the ambit of the posting provisions, whether they are being taught on a credit or non-credit basis. Further, it was submitted that Ms. Wakas cannot be considered as a teacher under Article 1 of the collective agreement because she teaches less than six hours per week on a regular basis and because her co-ordination duties are not that of a teacher. It was

stressed that there is no classification of "co-ordinator" under this collective agreement. Finally, it was argued that the distinguishing factor between Ms. Thomson and Ms. Wakas is that Ms. Thomson works on a full-time basis whereas Ms. Wakas should only be considered as a part-time employee and therefore excluded from the collective agreement.

The Decision

I shall commence with the issue of whether the College has waived the right to assert the jurisdictional issue by failing to raise the objection until the day before the evidence was to commence. The *Dryden Paper* and *Hawker Siddley Canada* cases, *supra*, have established that the principle of waiver does not apply to fundamental issues of jurisdiction. Simply put, a jurisdictional matter cannot be waived by the passage of time or by the failure to raise an objection in a timely manner. Jurisdiction is so fundamental to an adjudicator's power that it cannot be conferred or denied by the conduct of one party. That is not to say that there is no concern about the fact that the jurisdictional issue has been raised at this stage of the proceedings. As a matter of basic labour relations, it is critical that the parties address all the issues in dispute in the grievance step process. This ensures the proper utilization and administration of the grievance and arbitration provisions of a collective agreement. This is the only way that the parties can come to understand each other's case and try to achieve resolution on their own. That is why arbitrators do not allow parties to raise issues at a hearing that have not been discussed in the grievance step process.

It is especially unfortunate and difficult when a party raises an important jurisdictional objection the day before the case is convened for a hearing on the merits of a grievance. This deprives the parties of the timely chance to address serious questions regarding the scope and the intent of their collective

agreement, as well as the implications of the grievance itself. However, the fact remains that a fundamental jurisdictional objection has been raised to the arbitrability of the grievances as framed. The College's belated assertion of this objection does not preclude it from raising the objection before the arbitrator. Therefore, the preliminary objection must be addressed.

The first question is whether there is jurisdiction to deal with FSL work which is part of the Continuing Education programme. This is a Union grievance. This is not a case where someone is seeking to enforce individual rights. Therefore, it is not a case where a person's status to grieve is at issue as was the case in the *George Brown* (Benhaggai) or *Cambrian* (Paquin) cases. This is a case where the question is whether there is jurisdiction to enquire into the Union's assertion that sufficient work exists to trigger the protection of Articles 2.02 and 2.02 A. It is also a question of whether there is jurisdiction to order posting in the Continuing Education Department.

The determination of these questions turns, in part, on the collective agreement's treatment of Continuing Education classes. In the *George Brown* (Benhaggi) case, the status of Continuing Education teachers was addressed. The Union was asserting that teachers in Continuing Education were not excluded from the collective agreement. The college argued that the conduct and practice of the parties established that there was never any intention to cover persons hired solely for Continuing Education courses in the collective agreement. Extensive evidence of the history of bargaining and the evolution of the *Colleges Collective Bargaining Act* was considered. The Board of Arbitration concluded (at page 23): ".... Continuing Education teachers are not covered by the provisions of the collective agreement as it has been negotiated by the parties." But the Board of Arbitration also notes at page 22:

That is not to say (as article 8.09 [now 27.16] itself notes) that all [sic] Continuing Education hours are therefore irrelevant for the

purposes of the collective agreement, and restrictions pertaining to those teachers otherwise covered by it. The Canadore College case amply demonstrates that they are not. Indeed, even before that, Mr. Brown in a case at Sheridan College (issued May 30, 1983) focused on the very words

"which are not included in the regular assignment of full-time employees"

in Article 8.09 to find that Continuing Education hours taught by an employee already in the bargaining unit counted towards completion of the employee's probationary period. In fact, the more interesting distinction adverted to in that decision, with respect to the case now before us, is found at page 19, as follows:

. . . In our opinion, Article 8.15(b) does not support the Employer's position in this matter, in that it deals with information requirements to be given by the Employer to the Union, of persons in two categories and exempts such information concerning excluded employees teaching in the Extension and Continuing Education Division, but not of those employees who are bargaining unit members who may be assigned work in Extension and Continuing Education Departments, which would include the grievor. . . .)

More broadly, there is clearly a growing interest, as reflected in the amendment to Article 8.15(b) itself, on the part of the Local to monitor the allocation of any available credit hours, be they amongst Continuing Education or amongst sessional teachers, with a view to identifying, especially in times of restraint, a potential source of full-time workload hours (see the comments of the board in Fanshawe College, a decision released by this same chair, on June 18, 1992).

The *Cambrian College* case, *supra*, dealt with an objection to the status of the Continuing Education teacher to grieve her rate of pay and conditions of employment as well as a threatened dismissal and allegations of sexual discrimination. The grievor was characterized by both parties as a "pure Continuing Education teacher." She taught no credit courses. The Board of Arbitration in the *Cambrian College* case accepted and followed the decision in the *George Brown*

case in deciding that the grievor had no status to pursue her claims under this collective agreement. It should be noted that the *Cambrian College* award and the dissent make several references to the fact that the grievor taught only non-credit courses.

The principles in these cases can now be applied to the case at hand. It is clear that teachers of non-credit Continuing Education courses have not been recognized as having the status to grieve under the collective agreement. However, the cases do give recognition to the concept that some Continuing Education teaching hours may be relevant for some purposes under the collective agreement. They may be scope for recognition for teaching credit hours for purposes of work load restriction on full-time teachers.

The question before this arbitrator is a jurisdictional one. I do not yet have to determine whether the Continuing Education hours amount to a full-time position or the implications of such a finding. But it certainly is within the jurisdiction of an arbitrator under this collective agreement to determine whether credit hours assigned in FSL comply with articles 2.02 and 2.03 A. Article 27.16 does not exclude Continuing Education hours for all purposes and protections of the collective agreement.

Further, while the *George Brown* and *Cambrian College* cases draw a distinction between the credit and non-credit Continuing Education courses, the cases do not address the status of the Continuing Education credit courses for purposes of triggering protections of article 2.02 and 2.03 A. I note that the Union has recognized in its submissions that non-credit courses are treated differently than the credit courses. Therefore, I must conclude that this arbitrator has jurisdiction to determine whether the FSL credit course assignments at the College comply with articles 2.02 and 2.03 A.

I have also concluded that there is jurisdiction to deal with the question of whether the combination of co-ordination and teaching duties can amount to a full-time position. It is clear that Ms. Wakas would have no status to pursue such a claim because she is a part-time employee and therefore not a member of this bargaining unit. This is consistent with the *Fanshawe College and George Brown (Picher)* decisions cited above. But the case at hand is a Union grievance. It is not a grievance filed on behalf of Ms. Wakas or seeking a personal remedy for her. It is a claim that the "bundle" of co-ordination and teaching work amounts to a full-time position. Whether the facts can establish this is a question that goes to the merits of the case. But the jurisdictional question is whether co-ordinating and teaching duties can establish a full-time position within this bargaining unit.

There are two reasons why it must be concluded that there is jurisdiction to look at the bundle of co-ordination and teaching duties. First, the collective agreement recognizes that co-ordinators are teachers. Article 14.03 A recognizes that co-ordinators are teachers who are required to provide both teaching and co-ordinating activities. Therefore, while co-ordinators may not be a distinct classification within the collective agreement, co-ordinators are recognized as teachers within the meaning of Article 1.01 of the collective agreement. Secondly, the practice of the College recognizes co-ordinators as members of the bargaining unit. The evidence establishes that Ms. Thomson is a full-time co-ordinator within the FSL unit and is considered by management to be a member of the bargaining unit. Her duties are exclusively attached to Continuing Education. However, the College itself does not treat her as outside the bargaining unit. This shows a recognition and practice of treating a FSL co-ordinating role as falling within the academic bargaining unit. Therefore, it would be inappropriate to decline jurisdiction to enquire into whether another set of co-ordinating and teaching duties in FSL amount to a full-time position within this bargaining unit.

Therefore I have concluded that I have jurisdiction to consider whether the FSL credit course assignments comply with articles 2.02 and 2.03 A of the collective agreement. I have also concluded that Article 26.16 does not preclude consideration of the combined co-ordination and teaching of credit courses in the FSL department for purposes of articles 2.02 and 2.03 A. I have not answered the question of the effect of article 27.16 on any full-time positions that the Union may be able to establish in FSL. But that is not a jurisdictional question. That goes to the merits of the case and the extent of remedies that may be available.

This matter shall be reconvened at the mutual convenience of the parties.

DATED at Toronto, Ontario this 3 day of August, 2001.



Paula Knopf
Sole Arbitrator