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IN THE MATTER OF AN ARBITRATION

BETWEEN

LOYALIST COLLEGE
(the "College")

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(the "Union")

RE: UNION GRIEVANCE - STAFFING

Chair Person: Michel Picher
ER Nominee: Peter Hetz
UN Nominee: Ed Seymour

Appearing for the College:

D.K. Gray	Counsel
D. Butler	Vice-President, Human Resources
D. Holland	Dean, Business & Applied Arts
T. Reid	Dean, Corporate Training, Continuing Education & Skills

Appearing for the Union:

Peggy E. Smith	Counsel
Harry Plummer	

A hearing in this matter was held in Belleville on October 2, 2002.

AWARD

This arbitration concerns the Union's grievance alleging a failure on the part of the College to post a full-time vacancy. The Union maintains that upon the retirement of a full-time employee the College failed to post the vacant position, and assigned the work of the position to a sessional teacher contrary to the provisions of Article 2 of the collective agreement. The College maintains that there was no violation of the agreement, as it was entitled to redistribute the work of the position.

The facts are not in dispute. Effective December 31, 2001 Professor Robert Young, an employee of more than 20 years' service, took early retirement. It appears that the College had knowledge of his decision to do so at least by early to mid November, as the evidence before the Board confirms that the reassignment of his courses was communicated to other teachers as early as November 13, 2001. In the teaching session between January 8 and April 27, 2001 Mr. Young had been scheduled to perform 16 contact hours of teaching per week, representing a standard workload form equivalent of 46.4 hours. It does not appear disputed that the same load would have been assigned to him for the same period in 2002. Between September 4 and December 21, 2001 he had an assignment totalling 12 contact hours of teaching, with a "SWF" value of 42.6 hours, figures which it appears would also have applied to the succeeding year had he not taken early retirement.

To deal with the course load which would otherwise have been handled by Mr. Young as a full time professor the College made two alternative assignments for the period of January through April. It assigned his course in Cost Accounting II to another full-time professor, Mr. Gord Peck. That course represented 4 of the 16 contact hours on Mr. Young's standard workload form. The balance of his teaching load, 3 sections of managerial accounting, totalling 12 hours, was assigned to a newly hired sessional instructor, Ms. Karen Baker. While the College acknowledges that the 3 sections of managerial accounting totalling 12 contact hours were assigned to Ms. Baker in the winter term of 2002, it states that it does not intend to maintain that arrangement and that the bulk of what was previously taught by Mr. Young will be reassigned to other full-time staff, including full-time teachers Gary Earle and Hanz Kruger.

The Union's grievance is presented in two parts. Firstly it maintains that the College was under an obligation to immediately post the vacancy for a full-time position in November 2001, in accordance with the provision of Article 2 of the collective agreement. It submits that the assignment of the bulk of Mr. Young's teaching load to sessional teacher Karen Baker violates the requirement to post a vacancy for the job of work which was then plainly available, and needed to be taught without any exceptions occasioned by operational requirements. The second aspect of the grievance concerns what the Union alleges is the continuing failure of the College to post the vacancy in

the fall of 2002. It maintains that at that time the College continued to redistribute the work of Mr. Young's position in a way which was improper. It notes, for example, that while it is true that full-time Professor Hanz Kruger was assigned a course in cost accounting which otherwise would have been taught by Mr. Young, Mr. Kruger was relieved of another course which was apparently assigned to a part-time teacher.

The Union relies on the provisions of article 2 of the collective agreement which provides, in part:

- 2.01 The Colleges shall not reclassify professors as instructors except through the application of Article 27, Job Security.
- 2.02 The College will give preference to the designation of full-time positions as regular rather than partial-load teaching positions, as defined in Article 26, Partial-Load Employees, 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 a new post-secondary programs subject to such operational requirements as the quality of the programs, enrolment patterns and exceptional, attainment 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.

The Union also relies on a prior arbitration award from within the College system, an award involving Fanshawe College and the Ontario Public Service Employees Union which was unreported and dated January 23, 2002 by the majority of a board of arbitration chaired arbitrator O.B. Shime.

Counsel for the College submits that the employer was under no obligation to treat Mr. Young's departure as creating a vacancy. In that regard he notes that by assigning 4 hours of Mr. Young's 16-hour contact load to a full-time professor, the College assigned the remaining 12 hours to a sessional instructor. He stresses that in that circumstance the evidence does not disclose the assignment of a full-time vacancy into the hands of partial load or sessional teachers contrary to the staffing provisions of Article 2. He notes to the Board's attention the fact that partial load teachers are, under the provisions of the collective agreement, expressly recognized as being able to teach between 6 and 12 hours per week. Counsel for the College draws to the Board's attention the provisions of Article 6, which is the equivalent of a management's rights provision, including the right of the College to "determine compliment". He also stresses the provisions of Article 11.01 i which allows for a maximum of 18 teaching contact hours in post secondary programs and Article 11.01 B1 which permits a total assigned work load to a maximum of 44 hours in one week. He also refers, by analogy, to the layoff provisions of Article 27.05(iii) which deals

with staff reductions and recognizes that "... it being recognized that the College reserves the right to determine the number and composition of full-time, partial-load and part-time or sessional teaching positions, the College shall give preference to continuation of full-time positions over partial-load, part-time or sessional positions subject to such operational requirements as the quality of the programs, their economic viability, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community."

Counsel for the College also notes to the Board's attention the fact that the provisions of Articles 2.02 and 2.03 A of the collective agreement are expressly qualified by the phrase "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." He maintains, in that context, that it was open to the College to have regard to operational requirements in deciding how to deal with the circumstance of Mr. Young's early retirement, particularly in the term immediately following his departure.

In support of his submissions, counsel refers the Board to a number of prior awards. From within the College system he cites the following unreported decisions, **Niagara College and OPSEU** (P.C. Picher January 16, 1989);

Fanshawe College and OPSEU (Howard D Brown February 27, 1993);
Fanshawe College and OPSEU (Richard H. McLaren May 2, 1995);
St. Lawrence College and OSPEU (D.D. Carter June 13, 1997); **Fanshawe College and OPSEU** (Stanley Shiff May 7, 1999); **George Brown College and OSPEU** (Howard D. Brown August 23, 2000). He also refers the Board to the following reported awards on the general issue of the declaring and filling of vacancies: **Re: R.J. Simpson Manufacturing Co. (Canada Ltd) and United Automobile Workers, Local 1738** (1976) 11 L.A.C (2nd) 145 (Hinnegan); **Re: Toronto Harbour Commission and Canadian Union of Public Employees, Local 186** (1979) 22 L.A.C (2nd) 56 (Teplitsky); **Beacon Hill Lodges of Canada Ltd and Service Employees Union, Local 210** (1985) 20 L.A.C (3rd) 316 (McLaren); **Guelph General Hospital and Ontario Nurses Association** (1992) 22 L.A.C (4th) 260 (Burkett).

We turn to consider the merits of the grievance. In doing so we first address the issue of the obligation of the employer with respect to the winter term of 2002, the period during which it assigned 12 of Mr. Young's contact teaching hours to a sessional teacher. At the outset we are less than persuaded by the suggestion of Counsel for the College that the exception of "operational requirements" found within the language of Article 2 of the collective agreement gave a justification to the course of action followed by the College. There is nothing in the materials before us to suggest that there were any new developments in respect of enrolments, course offerings or any other unusual

facts which would fall within the purview of those things described as operational requirements within the express language of Articles 2.02 and 2.03 A. There is no suggestion in the material before us that issues such as the quality of the programs, enrolment patterns, program objectives or needs for special qualifications, to cite but a few, came into play in any meaningful way. Nor can the Board accept the suggestion of counsel for the College that the College could adopt a "let's wait and see" attitude. There was, very simply, no actual or perceived problem in respect of those operational requirements enumerated within the language of Article 2.03 A such as would justify the hiring of a sessional teacher for the work in question. Nor was there any operational hardship, as the 5 day posting requirement of Article 27.11 and the related decision making process as to the possible candidates could easily have been accommodated within the more than 6 week period which was available to the College before the commencement of the winter term of 2002.

In considering this aspect of the case we are impressed with the similarities between the instant grievance and the facts considered by arbitrator Shime in the **Fanshawe College** award cited above. In that case the College was advised of the leaving of a professor, effective January of 2000 in early December 1999. Arbitrator Shime rejected the College's argument as to operational considerations and at p.12 the following comments appear:

In the result we determine that the only basis for not posting the vacancy prior to January 10, 2000, was that Mr. Zajc did not feel

there was sufficient time for posting and he was aware that there were two other people available to teach the courses taught by Mr. Beattie. The decision made at the time was expedient, but without regard to the provisions of the collective agreement and the responsibility of the College under that agreement. The other reasons given for not filling the vacancy were at best only speculative in December 1999 and early January 2000. In the result, we are not prepared to accept the College's excuse that operational considerations, enrolment or complement, were valid considerations at the relevant time. Not only was there no mention, at the time of enrolment (Mr. Zajc admitted it was not a consideration until the Spring) but also consideration of the number of faculty was speculative. The College's decision ignored its obligation to post a vacancy and stripped the College's obligation to give preference to full-time positions contained in Articles 2.02 and 2.03 of any meaning whatsoever.

We are satisfied that the above remarks are apposite to the case before us, as it relates to the actions taken by the College with respect to not posting a vacancy in relation to the position left by Mr. Young in the winter term of 2002. There were no operational considerations of any substance preventing a posting or alternative full-time assignments in accordance with the collective agreement. In that respect the grievance is therefore allowed, in part. We hereby declare that the College did fail to post the vacancy made available at the time of the grievor's departure, that there were no operational requirements within the meaning of Article 2.02 and 2.03 A of the collective agreement which relieved it from the obligation described within Article 2 to give preference to the designation of full-time positions in the circumstances which then arose. We also direct that the College remit to the Union the union dues which would be payable in relation to a full-time position for that term and retain jurisdiction in the event of any dispute with respect to the quantum of such dues. In coming to the

conclusion that we do we obviously place substantial weight on the fact that the greater part of the teaching load carried by Mr. Young, being 12 of 16 hours, was assigned to a sessional instructor, in substantial disregard of the requirements of Article 2.03 A of the collective agreement.

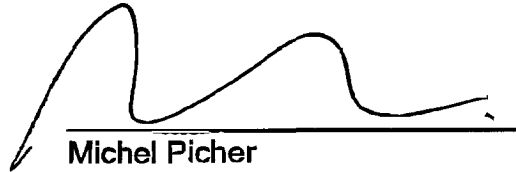
We are not persuaded, however, that the Union's case is compelling with respect to the events which later ensued, in relation to the fall term of 2002. It does not appear disputed that for that period of time one of the sections of the courses previously assigned to Mr. Young was in fact cancelled. The greater part of his teaching load was redistributed to other full-time staff, including Professors Gary Earl and Hanz Krueger. We agree with counsel for the College, and with the supporting remarks of arbitrator Shime in the **Fanshawe College** award that the college was entitled to redistribute the work of Mr. Young, to the extent that it did so in substantial part among other full-time professors.

The circumstances which obtain in relation to the fall semester of 2002 do not, by contrast, involve the wholesale hiring of a sessional instructor to replace Mr. Young. Given the elimination of one of the sections which Mr. Young would have taught, and the reassignment of the balance of the work to other full-time professors, we do not see in the circumstances which arose at that time any basis to find that the College avoided the obligations of Article 2.02 and 2.03 A of the collective agreement by undermining the volume of work available to full-time staff. In coming to that conclusion we do not ascribe substantial weight to the

fact noted by counsel for the Union that an adjustment was made in Mr. Krueger's workload by the assignment of one of his courses to a part-time employee. In our view the whole of those circumstances do not constitute evidence of the existence of a vacancy which would have required a job posting under the provisions of Article 27.11 of the collective agreement. For these reasons the second aspect of the grievance must be dismissed.

As noted above, we retain jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this award.

Dated at Toronto this 20th day of November 2002.



Michel Picher
Chairperson

I dissent for reasons set out below

Peter Hetz
Nominee for the College

I concur.

"Ed Seymour"
Ed Seymour
Nominee for the Union

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Having read the decision in the above-captioned matter, I regret that I am unable to concur that a violation of the collective agreement occurred.

On the facts presented to the Board of Arbitration, the hours formerly taught by Mr. Young were divided among Full-time faculty and Sessional faculty. After taking into account the 4 hours that were assigned to a Full-time faculty member, there were only 12 hours left for assignment. Under this collective agreement, the 12 hours left represent a partial load assignment, and the College was perfectly within its right to assign the remaining workload to anyone it chose.

In any case, however, I do agree with the award that by the time the next semester had arrived, the College had by then dispersed the work sufficiently so that there was no doubt that no Full-time assignment existed. As such, if the award's conclusion is accepted, the only remedy available is an order requiring the College to remit to the Union an appropriate amount of union dues.

Dated this 20th day of November 2002.

"Peter Hetz"

Peter Hetz

Nominee for the College