

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

FANSHAWE COLLEGE

(THE COLLEGE)

A N D :

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF THE UNION GRIEVANCE: RE RICK BURJAW  
OPSEU FILE NO. 311079; OPSEU REFERENCE NO. 2003-0110-0079

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR  
ROBERT J. GALLIVAN, COLLEGE NOMINEE  
EDWARD SEYMOUR, UNION NOMINEE

APPEARANCES FOR THE COLLEGE:

Robert J. Atkinson, Counsel  
Michele Parkin, Staff Relations Consultant

APPEARANCES FOR THE UNION:

Peggy E. Smith, Counsel  
Patty Musson, Pres. L. 110  
Tom Geldard, V.P. L. 110  
Gary Fordyce, Chief Steward

A HEARING IN THIS MATTER WAS HELD AT LONDON ON MARCH 30, 2004.

AWARD

The grievance filed under the provisions of the collective agreement in effect between the parties is dated March 24, 2003 filed by Paddy Musson and addressed to Linda Ballantyne, Director of Human Resources and states as follows:

“The College violated Article 2 of the Collective Agreement when they wrongly designed the position held by Rick Burjaw as partial-load rather than full-time.

As remedy, we seek that the College designate the above-referenced position as a full-time bargaining unit position.”

Article 2.02 of the collective agreement is:

“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.”

There are 13 separate Union grievances in the same language as above with reference to other partial-load teaching assignments for Professors in the Business Division and which the Union intends to present separately at arbitration. The reply of Gail Rozell to these grievances at Step 2 on July 3, 2003 is in part:

“The College representatives explained several partial-load assignments were due to several full-time faculty, who normally teach in the marketing programs, were off due to illness. There were a few partial-load assignments that occurred due to specialized skills, hours left over from assigning full-time faculty and in addition, there was on faculty member who was off on a professional development for the 2002/03 academic year.

By filling these teaching hours with partial-load faculty, the College does not believe there has been any violation of the Collective Agreement and therefore the grievances are denied.”

Rick Burjaw was offered by Dean Dowker of the Business Studies and Information  
Department:

“temporary employment as a partial-load Professor in the Business Studies Division of the College for the period January 6 to April 17, 2003...”

which was set out in a letter which included the conditions of the temporary employment on December 12, 2002 which he accepted on January 9, 2003. Mr. Burjaw has been a partial-load employee since 1987 regularly teaching 12 hours a week with specific and unique courses assigned to him as indicated in the schedule of the assignments to the partial-load staffing in this Division. Further, he has been involved during the Fall Semester with coaching of the Marketing Team for competitions involving six to eight hours per week which task had previously been done by the Co-ordinator of Marketing and continued in that manner for three hours per week.

It is the Union's position that Article 2.02 was clearly circumvented by the College while Rick Burjaw was looking for an had applied for full-time postings to teach the programs for which he is qualified and where on average he taught 15 hours. The Union requests that the Board order the posting of a full-time position and that in these circumstances, this position be awarded to Rick Burjaw.

The initial submission for the College is that the grievance is focused on a position held by Rick Burjaw and none other and is one of 127 identically worded grievances filed by the Union pertaining to the winter term 2003 in each of which a partial-load employee has been named. This grievance is the first of these grievances to be dealt with at arbitration. The Grievor is a partial load employee who taught 12 hours per week in this Winter Term which falls within the definition of a partial-load employee set out in Article 26.01 as follows:

“26.01 B A partial-load employee is defined as a teacher who teaches more than six and up to and including 12 hours per week on a regular basis.”

The marketing competition coaching was not part of his course of teaching. It is the position of the College that the grievance cannot form a basis for a breach of Article 2.02. The Grievor has been a partial-load and not a full-time employee so that the Union must designate a full-time position which when indicated, and only when this is shown does the College have a requirement to dispute or justify its position. The grievance is flawed because the collective agreement makes a distinction between partial-load and full-time positions and the Union cannot

establish the threshold issue by reference to only one teaching term in the Winter 2003. It would require an amendment of the grievance to look outside his position to have other courses assigned to him when it is only his teaching position at issue. Therefore as a preliminary matter, it was submitted that the Union could not establish that there was a full-time position and cannot require that a partial-load position should be full-time by combining parts of other partial-load positions.

Following the opening statements of Counsel, it was agreed that written submissions would be given to the Board by Counsel on the preliminary issues raised at this hearing. Following receipt of the written submissions by June 8<sup>th</sup>, the Board met in executive session on June 23<sup>rd</sup> to consider these submissions in the preparation of this award.

The submission for the College is that the Union cannot establish a violation of Article 2.02 on the grievance as framed. There is an onus on the Union to establish that there was significant work to generate a regular full-time position. It must demonstrate that the work being performed in two or more partial-load positions over a significant period of time, typically two academic years, constitutes one or more full-time positions. It is only then that the College has the onus to justify the use of partial-load positions. This grievance relates to a single partial load position which by definition cannot be a full-time position which involves the teaching of more than 12 hours per week on a regular basis whereas a partial-load position involves teaching of more than six and up to 12 hours per week on a regular basis. It is not possible for the work in one partial-load position in the winter term of 2003 to constitute sufficient work to be a regular

full-time position. Therefore, it is submitted that the Union could not found a prima facie case. Reference on this heading was made to the following arbitration awards in the College system: George Brown College (Shime, December 23, 2002), Algonquin College (Knopf, May 27, 2003), Fanshawe College (McLaren, May 2, 1995), Fanshawe College (Samuels, March 19, 1986).

It is further submitted for the College that by requesting the Board to consider other courses taught by other partial-load employees during the winter term 2003 which Mr. Burjaw could have taught but to which he was not assigned, is an expansion of the grievance and in effect the Union asserts a new grievance which should not be allowed by the Board. The Union is attempting to convert its grievance based on a single partial-load assignment into a generic grievance concerning partial-load positions in the Business Division which would be a new and different grievance than filed with the Board. Article 2.02 deals with positions and not individuals so that a declaration of a full-time position does not constitute a declaration that the incumbent should be considered as a full-time employee which is the remedy requested by the Union at the hearing. Evidence of the work of other positions is not relevant to the determination of this grievance nor would the evidence of Mr. Burjaw's work assignment be relevant to the other 12 identically worded grievances in the College's Business Studies Division all of which alleged that a partial load position occupied by an individual is a full-time position.

Article 2.02 is concerned with positions, not individual employees and provides a preference for the designation of positions as full-time rather than partial load but not whether a

partial-load employee should be provided with other work to become a full-time employee. The grievance by definition cannot succeed and should be dismissed on a preliminary basis. Furthermore, it is its position that the Union should not be allowed to reformulate its grievance as to its nature and the remedy sought to assert a new and different grievance. Re Fanshawe College and OPSEU, L. 110, 113 L.A.C.(4<sup>th</sup>)328 (Burkett).

It is submitted for the Union that on the face of the grievance there is an allegation of a violation of Article 2.02 and that the College designate the partial-load position held by Mr. Burjaw as a full-time position. To demonstrate a prima facie case, the Union seeks to introduce evidence that there were sufficient hours of work when combined with the assignments to Mr. Burjaw that would constitute a full-time position. Evidence of the work assigned to other partial-load employees is necessary and relevant to that issue. The Union has identified particular hours of work assigned to Mr. Burjaw and submits that the hours of work which were assigned to other partial-load employees could have been assigned to Mr. Burjaw which would have created a full-time vacancy. Reference in this regard was made to the following awards: Re Fanshawe College (Schiff, May 6, 1999); Re Algonquin College (Knopf, May 27, 2003); Re Fanshawe College (Samuels, March 19, 1986); Re Algonquin College (Knopf, August 3, 2001); Re Fanshawe College (Brown, October 3, 2002).

The Union further submits that it does not seek to expand the grievance which clearly involves Article 2 of the collective agreement and its evidence is required to determine the issue raised by the grievance which is that the hours of work assigned to the partial-load position held

by Mr. Burjaw could be added to hours that are currently assigned to other partial-load positions to create one full-time position. It is submitted that issue has been clearly raised in the grievance as filed.

The Union referred to Re Blouin Drywall (1975) 8 O.R.(2d)103 in submitting that the Board is required to exercise its jurisdiction to interpret the grievance broadly so as to deal with the real and continuing difference between the parties. The particulars of the grievance have been identified through the grievance step meetings and discussions by the parties involving evidence that there are hours of work that would constitute a full-time position. The College is not prejudiced and the Union does not seek to introduce an alternate claim to what is inherent in the grievance. While recognizing that the remedy the Union requested at the hearing is broader than sought on the face of the grievance, it is its position, that the Board has jurisdiction to award the appropriate remedy on the facts in dispute.

It is the Union's position that there is an evidentiary basis not only for the Board to declare that there is a full-time vacancy but that Mr. Burjaw should be appointed to the position. The remedy being sought however, is not determinative of the substance of the grievance which issue remains the same as to whether there are sufficient hours of work to declare a full-time vacancy. If the Board determined that it had no jurisdiction to award the remedy sought by the Union at the hearing, that would not defeat its jurisdiction to deal with the merits of the grievance and to hear evidence of whether there are hours of work available that when combined with the partial-load assignment of Mr. Burjaw constituted a full-time position. After hearing the

evidence, the Board can then determine the appropriate remedy. Further reference was made to Re Fanshawe College and OPSEU, L. 110 113 L.A.C.(4<sup>th</sup>)428 (Burkett); Re Fanshawe College (Brent, February 22, 1989); Re Humber College (Schiff, January 31, 1995).

The Board has jurisdiction to determine the preliminary matters raised by the parties at the initial hearing and as completely set out in the written submissions subsequently received and considered by the Board. At the outset, it is necessary for the Board to consider and define the issue in the grievance referred to arbitration. This grievance as set out above, has been precisely worded and is consistent with 12 other identical grievances raised in the Business Division which on the surface, indicates dissension in this Division as to staffing by full-time or partial-load teaching positions. There is no doubt that Rick Burjaw specifically referred to in the grievance now presented to this Board, has regularly been employed in a partial-load position through his employment. The grievance alleges that his position was wrongly designated as partial load and as stated on the grievance, clearly a remedy of changing his position to declare it a full-time vacancy could not succeed. Mr. Burjaw was teaching up to 12 hours on a regular basis in the Winter 2003 term which falls within the definition of a partial-load employee and the wage schedule set out in Article 26.04. His teaching assignments to the four courses which he taught as set out in Exhibit 3, form the basis of and total 12 hours of teaching per week which under the definition in the collective agreement is a partial load position. To then allege that there was a full-time position in existence at the outset of his employment for that term is not an issue arising on the face of the filed grievance and could not succeed under Article 2 which is alleged to have been violated by the College.

As well as however, considering the grievance as drafted, the Board is guided by the direction in the Blouin Drywall case particularly referred to by Arbitrator Burkett who stated after referring to the principle that: “Grievances are not to be defeated by mere defects and form or by technical irregularities”:

“arbitrators are to deal with the issue raised on a broad reading of the grievance. Nonetheless, a grievance cannot be expanded to include a matter not grieved which is not material to the instant matter but a party may rely on the grievance as filed ‘read in its broadest terms’. The issue must be considered in light of the “grievance as written including the remedy sought to the issue as raised at arbitration including the remedy sought”.

What then is the essential nature of this grievance which is at once a claim of a violation of Article 2 headed, “Staffing” and as framed at the hearing as well concerns the application of Article 2.02 as to preference in the designation of full-time positions. At the hearing, the Union requested as a remedy, posting a full-time position and as well, to award such position to Rick Burjaw. The first part of that remedial request is consistent with an issue concerning a designation of a full-time position but the second part is an expansion of the remedy requested on the face of the grievance. Nonetheless, the remedial request relates to the issue of the application of Article 2.02 to the grievance and does not alter the nature of the actual issue underlying the cause giving rise to the grievance. A remedial order may be given in a successful grievance as may be in that event determined by the Board which has general power to fashion an appropriate remedy for a violation of the collective agreement should it so be decided. What

the Union has requested as a remedy whether or not accepted by this Board in the result, does not refer to an issue different from the substance of the grievance.

Having determined herein that the style of the framing of the grievance does not preclude an examination by the Board of the actual issue in dispute involving staffing under Article 2 in the Business Division, it follows that the evidence sought to be produced by the Union of other partial load employees in that Division is relevant to the issue in dispute. That position was adopted by Arbitrator Knopf in Re Algonquin College (supra) who wrote at p. 21:

“It is acknowledge that the Fanshawe College decisions of Arbitrator Schiff and McLaren (supra) above suggest that vacancies need only be posted if there exists a full-time position to start with. However, other arbitrators constituted under this collective agreement have not followed those decisions. The trend of arbitral jurisprudence is to interpret Article 2 as giving preference to full-time appointments, to demand that the Union demonstrate sufficient work to justify filling a full-time position and, once that is done, to turn to the College to justify any partial load or sessional appointments as falling within the operation requirements. Exceptions of Article 2.02 and 2.03(a). I agree and adopt this approach in this case.”

In our view, that finding sets out the correct application of Article 2 and is applicable in the circumstances of the present grievance. Therefore, it is the primary onus of the Union to demonstrate in its evidence that there is sufficient hours of work in the Business Division as constituted at the time of the grievance for the Winter Term in 2003, that when taken with the teaching assignments of Rick Burjaw, the total would constitute a full-time position. Having

reference to Arbitrator Knopf's award in Algonquin College, evidence of the teaching assignments of other partial load employees in that Division at the time of reference is therefore relevant to that issue which is the gravamen of the grievance referred to this Board.

Whether the period of reference for one term is sufficient for the Union to meet the onus is not a preliminary issue for the Board to now resolve but may be considered with the merits of the grievance. There is no allegation of bad faith or prejudice to the College in this proceeding and has had knowledge of the real issue in dispute through the grievance meetings although not necessarily the full disclosure of the Union's case which can be rectified by providing particulars to the College.

The Board concludes that the Union is not in these circumstances asserting a new grievance from that which was filed and is now before this Board for hearing but rather the grievance given its broadest meaning and with regard to the obvious general discontent as to the staffing in the Business Division of the College, that this Board has jurisdiction and the authority to determine its merits consistent with Article 32.04(c) of the collective agreement.

Having regard to the Board's conclusions set out above, we request that prior to the next hearing which is now set for October 6, 2004, the parties discuss the issues which may arise in their presentation as to the merits of the grievance so as to expedite these proceedings.

DATED AT OAKVILLE THIS 17<sup>th</sup> DAY OF AUGUST, 2004

---

HOWARD D. BROWN, CHAIR

---

ROBERT J. GALLIVAN, COLLEGE NOMINEE

---

EDWARD SEYMOUR, UNION NOMINEE