

IN THE MATTER OF AN ARBITRATION

BETWEEN

ST. LAWRENCE COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

GRIEVANCE RE ARTICLE 2

BOARD OF ARBITRATION:

JANE H. DEVLIN

CHAIR

RICHARD O'CONNOR

COLLEGE NOMINEE

RON DAVIDSON

UNION NOMINEE

LYNN THOMSON & PATRICIA P. BRETHOUR, FOR THE COLLEGE

SUSAN BALLANTYNE, FOR THE UNION

In this case, the Union claims that the College has violated Article 2.02 of the collective agreement by failing to combine partial-load positions to create one additional full-time teaching position in the Music Theatre - Performance program at the Brockville campus. Article 2.02 provides as follows:

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 program objectives, the need for special qualifications and the market acceptability of the program to employers, students, and the community.

The grievance was filed in March, 2007 and for purposes of the Union's claim, the evidence dealt primarily with the 2006/2007 and 2007/2008 academic years.

By way of background, Music Theatre is a three-year program which was first offered at the Brockville campus in the fall of 2004. The Brockville campus is one of three campuses at the College. The other two are located in Kingston and Cornwall. The brochure for the Music Theatre program indicates that it gives students an opportunity to develop skills in singing, acting and dancing that will enable them to find employment in the Canadian musical theatre industry. The brochure also indicates that training is provided by instructors from the professional theatre community all over Ontario and the program involves classroom, studio and production components.

Lorraine Carter, who is currently the Vice-President Academic and was previously the Executive Director of the Brockville campus, was instrumental in seeking

and obtaining approval for the Music Theatre program from the Ministry of Training, Colleges and Universities. She testified that a full-time faculty member was hired in each of the first three years of the program and that, as a rule of thumb, there is one full-time faculty member for each year of program delivery. Ms. Carter also testified that during the budgeting process in early 2007, efforts were made to be conservative but as the third year of the program was being delivered for the first time, there were a number of unexpected expenses.

Beverlie Dietze, who is currently the Dean of the Brockville campus, testified that when Music Theatre was first offered in the fall of 2004, there were 35 students enrolled in the program. In the fall of 2007, there were 38 students in the first year of the program and a total of 66 to 72 students in all three years of the program. At that time, three full-time faculty members taught exclusively in the Music Theatre program and another full-time faculty member, who served as the Co-ordinator, taught in that program as well as other programs. A number of courses were also taught by partial-load and part-time faculty members and, in addition, experts were retained from time to time to teach students skills, such as flying, which were required for particular productions. Ms. Dietze testified that based on the number of students, the Music Theatre program had more full-time faculty members than any other program offered at the Brockville campus. In this regard, she testified that in the Registered Practical Nursing program, there were 70 students and two and a half full-time faculty members and in the Police Foundations program, there were 50 students and two full-time faculty members.

Lorne Pardy, who was called as a witness by the Union, has been working professionally in the theatre since 1981 and has an impressive list of acting and directing credits. Mr. Pardy began teaching in the Music Theatre program at the College on a partial-load basis in the spring of 2006 and continued to teach in the program in the 2006/2007 and 2007/2008 academic years. In 2007, Mr. Pardy also taught acting in the theatre department at the University of Ottawa and in 2008, he taught a performance course in the theatre program at Algonquin College.

With regard to the Music Theatre program in Brockville, the evidence indicates that in the spring of 2006, Mr. Pardy replaced a professor who was absent and taught a voice course for six hours a week for a six-week period. In the fall of 2006, he taught two voice and text courses to first and second year students for a total of eight hours a week. In the winter semester in 2007, Mr. Pardy taught two speech and voice courses, a scene study course and a drama study tutorial for a total of 11 hours each week. He testified that he was also qualified to teach improvisation, scene study and acting courses as well as a drama study tutorial taught by another partial-load professor for a total of 12 hours a week. He testified, as well, that he could have taught a make-up course and part of a stagecraft course. Mr. Pardy testified that the latter course deals with theatre administration, theatre hierarchy and the design of costumes, lighting and sets. He agreed that he is not qualified to design or sew costumes.

In the fall of 2007, Mr. Pardy taught acting, improvisation, Shakespeare and scene study courses for a total of 12 hours per week. He testified that he was also qualified to teach speech and voice courses taught by another partial-load professor for a total of seven hours per week and a scene study course taught by a part-time professor for four hours a week. With regard to voice courses, Mr. Pardy testified that he was trained in the Linklater method and although he is not an accredited instructor, he testified that accreditation is not required to teach at the college level. He also acknowledged that training in another method could be advantageous as it would provide a different perspective to students.

In the winter semester of 2008, Mr. Pardy taught improvisation, acting in performance and scene study courses and was involved in tutoring for a total of 12 hours per week. He testified that he was also qualified to teach two other scene study courses and two speech and voice courses taught by other partial-load professors for a total of 16 hours per week. Mr. Pardy agreed that he had not taught the latter courses at the College, nor had he taught other courses which he testified that he was qualified to teach. He explained, however, that in some cases, he had taught more advanced levels of the particular courses.

Mr. Pardy also testified that many experienced actors have received training in acting, improvisation, speech and voice and he believed that if the College were to post a full-time teaching position involving courses in these disciplines, there would very likely be a pool of qualified candidates. Moreover, although Mr. Pardy

accepted a position as the Artistic Director of a theatre company in Lethbridge, Alberta beginning in the fall of 2008, he testified that for two years, he had been interested in obtaining a full-time teaching position in the Music Theatre program. He also testified that he would continue to be interested in such a position if it were posted. Mr. Pardy testified, as well, that if he were teaching on a full-time basis at the College, he could continue to do some acting and directing although the timing and the nature of the projects might be affected by his teaching commitments. In this regard, Mr. Pardy testified that Michael Biachin, one of the full-time professors in the Music Theatre program, was involved in acting and directing and had his own production company. Mr. Pardy also testified that a professor who taught on a part-time basis arranged for someone to cover his course so that he could appear in a production in Winnipeg. Mr. Pardy agreed that he does not have a post-secondary degree in drama or fine arts, nor does he have a certificate from the National Theatre School.

Mr. Pardy also acknowledged that his experience in the theatre is broad and varied and unique in many ways and that students benefit from the experience and training that he brings to his classes. He agreed that the same is true of others who work in the theatre community and teach in the Music Theatre program. However, Mr. Pardy expressed concerns about the lack of consistency if too many different professionals were involved.

Ms. Dietze testified that although the Music Theatre Program has always focused on singing, acting and dancing, it is a relatively new program, which continues

to evolve. Accordingly, the hours of some courses may change or there may be some variation in the courses offered in a particular semester. She also testified that it would not be appropriate to combine the courses taught by Mr. Pardy with courses taught by other partial-load faculty members as it is necessary to consider the skills required and examine the timetable with the learning outcomes for particular courses to ensure that students continue to be offered a well-rounded program with a variety of faculty members bringing their expertise to the program. She testified, as well, that it is necessary to consider the skill set of the faculty members involved and that the expertise required may vary depending on the type of productions put on each year.

Ms. Dietze testified that the Music Theatre Program is marketed to students on the basis that they will receive training from professionals in the theatre community and that these professionals bring their performance experience to the classroom. She also testified that exposure to a variety of professionals broadens the educational experience for students and provides them with networking opportunities that will assist them to obtain employment on graduation. As well, students have an opportunity to become aware of upcoming productions and to attend productions in which their professors perform. Ms. Dietze testified that although Mr. Biachin had not requested time off to perform, one full-time faculty member in the Music Theatre program had done so as had a number of part-time and partial-load professors.

Like Ms. Dietze, Ms. Carter testified that in order for the Music Theatre program to be competitive, students must be exposed to professionals in their field with

a broad range of styles and experience. She also testified that as students have to find employment on graduation, it is important that they have a broad network of contacts within the theatre community and that different professionals become familiar with their skills.

Ms. Dietze testified that the College is also in the process of developing articulation agreements with universities which would allow graduates of the Music Theatre program to continue their studies at the university level. Such agreements enable students to obtain credits for certain courses at the college level and Ms. Dietze testified that agreements affect staffing as it is necessary for college faculty to have a baccalaureate degree. Ms. Dietze testified that all of the full-time faculty members in the Music Theatre program met this requirement with the exception of the professor teaching dance. She also acknowledged that at the time the grievance was filed, the College had not entered into an articulation agreement with regard to the Music Theatre program, nor had an agreement been entered into when she gave evidence in the fall of 2009. Ms. Dietze testified, however, that the College was negotiating with two universities at that time.

In addition to evidence relating to the content and staffing of the Music Theatre program, the College sought to introduce evidence of financial considerations in support of its decision not to hire an additional full-time faculty member. Although the Union maintained that financial considerations are not relevant to a claim under Article 2.02 of the collective agreement, the College submitted that hiring an additional full-time

faculty member had a direct bearing on the continued viability of the program. The College further submitted that it was necessary to hear evidence of its financial difficulties in order to properly assess its claim.

In the course of their submissions, the parties referred to two awards which dealt with the issue of financial considerations where a claim was advanced under Article 2.02 of the collective agreement. In *Ontario Public Service Employees Union and Humber College of Applied Arts and Technology* April 12, 1994 (Howe (unreported)), the Board found that the list of operational requirements set out in that Article was not intended to be exhaustive. However, the Board also noted that the examples listed in the Article pertained to the quality and effectiveness of college programs, rather than fiscal issues such as the cost of providing the programs. The Board found that this militated against interpreting the term "operational requirements" to include financial matters. The Board noted, as well, that the nexus between staffing and financial considerations was dealt with extensively in other provisions of the collective agreement. Accordingly, as financial considerations were not referred to in Article 2.02, the Board concluded that they did not form part of the exception to the general requirement to give preference to full-time teaching positions. In this regard, the Board commented as follows:

It is evident from the wording of both provisions that the lists of "operational requirements" contained in them are not meant to be exhaustive. If that had been the negotiators' intention, they could easily have used language such as "subject to the following operational requirements...", instead of subject to such operational requirements as ...". The use of the latter phraseology indicates that the items listed in those provisions are not intended to be all-encompassing, but

rather to be examples of what constitute "operational requirements". However, those examples do provide some guidance regarding the proper interpretation of the phrase "operational requirements", as they are illustrative of the type of considerations which the College may legitimately take into account in determining whether a departure is warranted from the general requirement of giving preference to the designation of full-time positions as regular teaching positions.

The examples listed in Article 2.02 all pertain to the quality and effectiveness of College programs, rather than to fiscal matters such as the cost of providing the programs. (With the possible exception of "enrolment patterns and expectations", the same is true of Article 2.03 A.) The existence of that qualitative "common thread" militates against interpreting "operational requirements" to include financial matters. (This interpretative approach involves the application of an approach somewhat analogous to what has sometimes been referred to by means of the maxim "noscitur a sociis" in areas of the law concerned with the construction of statutes and other legal instruments. That maxim (which means "it is known from its associates" is a legal interpretative doctrine which recognizes that general words associated with specific words often take colour from the specific words, so as to restrict the general words to a sense analogous to the less general words with which they are associated.)

In addition to the foregoing, a number of other factors also militate against adopting the interpretation of "operational requirements" urged upon us by College counsel. As noted by Union counsel during the course of her submissions, the nexus between staffing and financial considerations is dealt with comprehensively in other parts of the Collective Agreement, such as Article 27 (JOB SECURITY), Article 28 (EMPLOYMENT STABILITY), and Article 29 (EXTRAORDINARY FINANCIAL EXIGENCY). The inclusion of those specific, detailed provisions of the Collective Agreement renders it unlikely that even though no mention is made of financial considerations in Article 2, the negotiating parties nevertheless intended the provisions of that Article to be construed as also dealing with the connection between staffing and financial considerations. Since financial matters are almost invariably of very great importance to parties negotiating collective agreements, one would reasonably expect that if financial considerations were intended to form part of the "operational requirements" exceptions to the general rule specified in Article 2.02 and 2.03 A, the parties would have specifically referred to it in their list of examples, particularly where the College's ability to rely upon financial considerations in applying those provisions could well give rise to an exception of such magnitude as to virtually eliminate the general rule.

The issue was subsequently considered in an award involving these parties in *St. Lawrence College and Ontario Public Service Employees' Union* October 20, 1998 (Swan (unreported)). In that case, the Board agreed that mere cost was not properly considered under Article 2.02 as it would always be less expensive to use partial-load and part-time, rather than full-time, faculty members. Nevertheless, the Board concluded that there might be cases where financial factors rose to such a level that they had a direct bearing on one of the specified operational requirements or possibly, another which might be identified by inference from those specified. In this regard, the Board commented as follows:

In general, we agree that mere cost cannot be a factor; once it has been established that a full-time teaching load is available, it will always be cheaper to cover that load with part-time or partial-load teachers than with a full-time appointment. If mere cost were to be a factor, it would trump the preference established by clause 2.02 every time. In that regard, therefore, we are in agreement with the award in the *Humber College* case.

On the other hand, there may be occasions when financial factors rise to such a level of importance that they have a direct bearing on one of the specified operational requirements, or possibly another operational requirement which can be identified by inference from those specified. For example, if hiring one full-time faculty member meant that some course offerings had to be eliminated in order to maintain the program as financially viable, then the financial implications might rise to such a level as to affect the quality of the program.

After considering the parties' submissions and the awards referred to, the majority of the Board, with Mr. Davidson dissenting, granted the College's request to introduce evidence of financial considerations. Although we agreed that differences in the cost of partial-load and full-time faculty members are not generally considered under Article 2.02, in the earlier *St. Lawrence College* award, the Board noted that

there could be cases where financial factors rose to such a level as to affect one or more operational requirements.

In this case, the College submitted that hiring an additional full-time faculty member had a bearing on the continued viability of the Music Theatre program. In these circumstances, it was the view of the majority that the appropriate course was to hear the evidence that the College sought to introduce and to assess that evidence at the conclusion of the hearing. Moreover, although the Union noted that financial considerations were not referred to in the College's reply to the grievance, the reply was prepared in the spring of 2007. It appears that financial considerations became a more significant issue for Music Theatre and other programs during the following academic year in respect of which both parties led evidence. We also note that this is not a case in which the relief claimed is confined to the spring of 2007 as the Union is seeking the posting of a full-time teaching position.

The evidence introduced by the College indicates that it began operating with a deficit in 2004. In December, 2006, the Ministry of Training, Colleges and Universities appointed an independent fact finder to examine the College's financial situation and he issued a report in March, 2007. Thereafter, the Ministry arranged for independent auditors to carry out a more detailed analysis and that process continued through the summer of 2007. A new President was also appointed in the summer of 2007 and during a reorganization that took place at that time, Ms. Carter was appointed Vice-President Academic. She testified that in view of the economic problems facing

the College, the new President worked with the Ministry and the College undertook to develop a deficit management plan, which included a review of programming to ensure that programs were both efficient and effective.

For purposes of the review, a resource committee was formed to provide costing data, portfolio analysis and information on enrolment trends. Program planning teams were also established at each campus and Ms. Carter testified that each team was responsible for reviewing the "bottom" 25% of programs offered on the campus as defined by the contribution margin. This margin reflects the difference between revenue and expenditures attributable to a particular program. Ms. Carter explained that a decision was made to review programs with the lowest contribution margin at each campus, rather than throughout the College as a whole, because the College wanted to maintain the existing three campus model.

The evidence indicates that each program planning team was chaired by the campus Dean and the teams reported to the steering committee which was charged with developing a College-wide plan. The steering committee was chaired by Ms. Carter and included the chairs of each program planning team, a member of each team and representatives from Human Resources, the Finance Department and the Registrar's office. The steering committee reported, in turn, to the executive committee, which consisted of the President, the Vice-Presidents and the Executive Director of Human Resources.

Ms. Dietze chaired the program planning team at the Brockville campus and testified that in late October, 2007, an invitation was extended to individuals working on the campus to join the team. She testified that the team, which was subsequently formed, consisted of eight to ten employees and included members of management, faculty and support staff. Ms. Dietze also testified that the team was required to examine programs with a contribution margin of less than 20%. In this regard, she testified that the College and the Ministry of Training, Colleges and Universities determined that programs ought to be contributing 30% to the cost of college operations and that a contribution margin of 20% was viewed as an "alert". Accordingly, Ms. Dietze testified that in the course of the review, the program planning team examined programs to see what could be done to increase revenue and decrease expenditures in order to move toward a contribution margin of 30%.

Ms. Dietze acknowledged that despite the mandate of the program planning team, no review was undertaken of the BScN program which was in a deficit position on all three campuses. The evidence indicates that this program was offered pursuant to a contract with Laurentian University and that students were granted a degree by the University. Ms. Carter testified that, in fact, the College approached Laurentian to renegotiate costs and obtained some relief. Ms. Dietze also testified that Ms. Carter, the College's Chief Financial Officer and the Deans were developing a strategy to determine the contribution margin required for the BScN program. By 2010/2011, the program was expected to be in a "steady state", meaning that it would be making some form of contribution.

As to other programs, Ms. Dietze testified that at the time of the review, five of the 12 programs offered at the Brockville campus did not meet the 20% contribution margin. These consisted of the Business Administration, Aesthetics, Personal Support Worker, Hairstyling and Music Theatre programs. Ms. Dietze also testified that the program planning team met once a week for two hours to review the revenues and expenditures of these programs as well as enrolment trends, attrition rates and the relationship of the programs to community needs. Program costing summaries setting out the revenue and expenditures for each program were provided by the Finance Department. Ms. Dietze testified that representatives of the various programs were also invited to make presentations to the program planning team during which they offered suggestions as to how revenues could be increased and expenditures decreased. The program planning team updated the steering committee every three to four weeks and made two presentations to the committee, the first in December, 2007 and the second, in March, 2008.

Ms. Dietze testified that as a result of the review, the program planning team recommended suspension of the Business Administration program, which had declining enrolment and was operating with a deficit. Suspension of the Hairstyling program was also recommended and Ms. Dietze testified that the fact that the program was offered at the Kingston campus was a factor in the team's decision. As well, the team recommended suspension of the Aesthetics program, which had a positive contribution margin at the time. Ms. Dietze testified that enrolment in that program had

been fluctuating and in November, 2007, there were 12 students in the program. She also testified that 18 to 20 students were required in order for the program to be viable. The evidence indicates that the program planning team's recommendations for suspension were accepted by the steering committee.

Ms. Dietze testified that the program planning team did not recommend suspension of the Personal Support Worker program because it was the team's view that there were opportunities to increase enrolment. Similarly, the team did not recommend suspension of the Music Theatre program. Although this program had a negative contribution margin at the time, Ms. Dietze testified that Music Theatre was a "niche" program which was unique to the Brockville campus and that faculty members were passionate about the program as were members of the community. She also testified that Music Theatre was a new program which was still evolving and that enrolment had been increasing. Accordingly, the team was of the view that if enrolment could be increased by ten students and efforts made to improve retention, the program could move to a viable contribution level of between 20% and 30%. On this basis, the team made the decision not to recommend suspension of the program.

Ms. Carter testified that at the time of the program review, Music Theatre was regarded as a new program because at that point, the third year of the program had been delivered only once. She explained that all new programs are given an opportunity to be viable. She also testified that the Music Theatre program had been the beneficiary of a fundraising drive for purposes of redeveloping the Brockville

campus and that some of the funds raised were used to carry out renovations on drama rooms, music and dance studios. Because of the commitment made to the community regarding the use of the funds raised, Ms. Carter testified that an extra effort might have been made to retain the Music Theatre program but that, in any event, at the time of the review, it was a new program.

During the course of her evidence, Ms. Dietze reviewed the revenue and expenditures associated with the Music Theatre program and she admittedly had some difficulty explaining some of the items on the costing summary. The summary indicates that in the 2006/2007 academic year, the contribution margin for the program was -9.86% and in the 2006/2007 fiscal year, it was -5.14%. Ms. Dietze also testified that although the program planning team projected a contribution margin of 21% in 2007/2008, that margin was not achieved. Instead, the unaudited statements indicate a contribution margin of 12.19% and the audited statements indicate a contribution margin of 13.03%.

Ms. Dietze testified that in view of the financial position of the Music Theatre program at the time, the College did not consider hiring an additional full-time faculty member. In this regard, she testified that an additional full-time faculty member hired at step 8 of the salary grid would have reduced the contribution margin for the 2007/2008 fiscal year to 7.88%. She also testified that most new faculty members are placed above step 8 of the grid and that a faculty member with a baccalaureate degree would generally be placed between steps 11 and 14 of the grid. For purposes of

calculating the costs associated with the addition of one full-time faculty member, Ms. Dietze testified that the hours of part-time or partial-load faculty members were decreased by 11 per week in each semester. In this regard, she explained that a new full-time faculty member generally has 11 to 13 teaching contact hours per week as he or she is entitled to preparation time associated with a course being taught for the first time. Ms. Dietze testified that in the normal course, full-time professors in the Music Theatre program have between 12 and 14 teaching contact hours per week.

Ms. Dietze also testified that if an additional full-time faculty member were hired in the Music Theatre program, she would have to work with the Finance Department to develop strategies to increase revenue or decrease expenditures. One of these strategies could include offering two plays, rather than two musicals as plays are less expensive to produce. She testified, however, that this would reduce the quality of the program and the learning outcomes. She also testified that offering only plays could affect the market acceptability of the College's program as it competes for students with programs at Sheridan and St. Clair Colleges and those Colleges offer a combination of musicals and plays. Accordingly, if the program at St. Lawrence did not offer musicals, enrolment could be affected. Ms. Dietze testified, as well, that learning outcomes would not be met as the program is intended to provide students with an opportunity to acquire skills in singing, acting and dancing. Ms. Dietze explained that in their graduating year, students perform in a showcase in Toronto which is attended by agents and members of the theatre community and their performances include a musical number from a production in which they were involved. Accordingly, Ms. Dietze

testified that although the College could consider changes to the curriculum, those could jeopardize the quality of a program that the College was trying to maintain and enhance. She also testified that the level of student achievement would be directly affected if a course were not offered or there was a reduction in program hours.

Ms. Dietze testified that as the Music Theatre program did not achieve the 21% contribution margin that had been forecast for 2007/2008, she continued to have significant concerns about the program's viability. She explained that although the program was extremely important to the campus, she also had budgetary responsibilities. In this regard, she testified that a contribution margin of 11% to 13% was not acceptable and that if the Music Theatre program could not achieve a margin of 20% to 30%, she would be obliged to recommend its suspension.

The final witness to give evidence in this case was Patricia Kerth, the College's Director of Finance, who is responsible for program costing. Ms. Kerth testified that there has been no material change in the method of costing since she began working at the College in 2003. She also testified that the basic principles are the same for all programs. She explained that each costing includes direct academic revenues in the form of tuition fees, grants and other revenues and direct academic expenses, such as salaries and expenses related to the program. Also included are shared expenses, such as those related to the Dean's office, which are allocated among the various programs. Ms. Kerth testified that other costs, such as those related to facilities, information technology, Human Resources and the Finance Department,

which are not program specific, are not included in program costing. Instead, those expenses are paid with monies generated by academic programs in the form of the contribution margin and government grants which are not program specific.

Ms. Kerth testified that the Finance Department is frequently asked to run scenarios for academic managers so that they can consider the cost implications of hiring another faculty member or the additional revenue that would be generated by an increase in enrolment. She explained that once the costing information is provided, the Finance Department has no involvement in decision-making with respect to particular programs. She also testified that the Finance Department prepared the costing summary for the Music Theatre program which was introduced in evidence and that the figures contained in the summary were accurate. She testified that these figures were taken from the general ledger and from calculations made by the College with respect to shared expenses and the allocation of government grants. Ms. Kerth also testified that in June, 2008, she was asked to prepare a costing for the Music Theatre program based on the addition of one full-time faculty member.

The issue to be decided is whether the College violated Article 2.02 of the collective agreement by failing to combine partial-load positions in the Music Theatre program to create one additional full-time teaching position. In this regard, Article 2.02 provides that 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 program objectives, the need

for special qualifications and the market acceptability of the programs to employers, students and the community.

The Music Theatre program, which is in issue in this case, was first offered at the Brockville campus in the fall of 2004 and, as noted previously, one full-time faculty member was hired in each of the first three years of the program. A fourth full-time faculty member, who served as the Co-ordinator for some time, taught in the Music Theatre program as well as other programs. In the spring of 2007, when the grievance was filed, a number of courses were also taught by part-time and partial-load professors and the brochure for the program indicates that it was marketed to students on the basis that training would be provided by members of the professional theatre community from across the Province.

Dealing firstly with whether there was a full-time teaching load available, the evidence indicates that when the grievance was filed, Mr. Pardy was teaching courses on a partial-load basis for a total of 11 hours per week. He testified that he was also qualified to teach a number of courses taught by another partial-load professor for an additional 12 hours per week. In the fall semester of 2007, Mr. Pardy taught courses for a total of 12 hours a week and testified that he was qualified to teach courses taught by other partial-load professors for an additional seven hours per week. In the winter semester of 2008, Mr. Pardy again taught courses for a total of 12 hours per week and testified that he was qualified to teach courses taught by other partial-load professors for an additional 16 hours a week.

Although Mr. Pardy agreed that he had not previously taught the courses which he testified that he was qualified to teach, he explained that in some cases, he had taught more advanced levels of the courses. We also note that no evidence was introduced by the College to refute Mr. Pardy's claim that he was qualified to teach the courses in question. Mr. Pardy also testified that many experienced actors have received training in acting, improvisation, speech and voice and he believed that if the College were to post a full-time position involving courses in those disciplines, there would very likely be a pool of qualified candidates.

Ms. Dietze testified that, in the normal course, full-time faculty members in the Music Theatre program have between 12 and 14 teaching contact hours per week. Accordingly, based on the evidence, we find that in the spring of 2007 when the grievance was filed and in the following academic year, there were a sufficient number of hours taught by partial-load professors to create an additional full-time teaching position. Moreover, while it was suggested that an articulation agreement with a university would require a new faculty member to have a baccalaureate degree, which Mr. Pardy does not have, the issue in this case does not turn on the specific qualifications and experience of Mr. Pardy. By way of relief, the Union is requesting the posting of a full-time teaching position. We note, as well, that no articulation agreement had been entered into when the grievance was filed or when Ms. Dietze gave her evidence in the fall of 2009.

The College also contended that it would not be appropriate to combine partial-load positions in the Music Theatre program as proposed by the Union because it is essential that students be exposed to a variety of different professionals in the musical theatre industry. The College submitted that such exposure is important for pedagogical reasons because professionals bring their own unique style and experience to their classes. Different professionals also become familiar with students' skills and they may provide networking opportunities that will assist students to obtain employment on graduation.

We recognize that exposure to a variety of professionals is an important feature of the Music Theatre program and that students benefit from the unique, training, experience and networking opportunities provided by professionals teaching in the program. We are also of the view that this type of factor is properly taken into account in assessing operational requirements, which are referred to in Article 2.02 of the collective agreement. Accordingly, were the Union proposing the addition of a number of full-time teaching positions in the Music Theatre program, different considerations might well apply. However, given the hours taught by Mr. Pardy in the winter semester of 2007 and in the fall and winter semesters of the 2007/2008 academic year, it is apparent that very few additional teaching contact hours would have been required to make up a full-time teaching load. As a result, we are not persuaded that the addition of one full-time teaching position would have materially affected the number of professionals to which students in the Music Theatre program were exposed. Although Ms. Dietze also expressed doubts as to whether there would

be qualified candidates in the community in the event that a full-time vacancy were posted, the College was evidently able to fill the existing full-time positions. In our view, there would also be no reason to restrict the posting to a particular community.

It is necessary, then, to consider financial factors which were also relied on by the College to support its decision not to hire an additional full-time faculty member in the Music Theatre program. As noted previously, we agree that in the normal course, differences in the cost of full-time and partial-load professors are not considered under Article 2.02 of the collective agreement because it will always be less expensive to use a partial-load professor. Nevertheless, as noted in the earlier *St. Lawrence College* award, there may be cases where financial factors rise to such a level as to affect operational requirements of the type referred to in Article 2.02.

In this case, the evidence indicates that in late 2006, after the College had been operating with a deficit for a number of years, the Ministry of Training, Colleges and Universities appointed a fact finder to examine the College's financial situation. Ms. Dietze testified that it was her understanding that St. Lawrence was the only College that was working with the Ministry at the time where a fact finder had been appointed. The fact finder issued his report in the spring of 2007 and, thereafter, the Ministry arranged for independent auditors to conduct a more detailed analysis. In the course of this process and in an effort to address its financial difficulties, the College undertook to develop a deficit management plan, which included a review of programs at each campus which were not making a sufficient contribution to the cost of college

operations. Ms. Dietze testified that the College and the Ministry determined that programs ought to have a contribution margin of 30%.

With regard to the Music Theatre program, the evidence indicates in the 2006/2007 academic year, which is the year in which the grievance was filed, the contribution margin was -9.86% and in the 2006/2007 fiscal year, it was -5.14%. Moreover, although the program planning team at the Brockville campus projected a contribution margin of 21% for 2007/2008, the audited statements indicate that the actual contribution margin was 13.03%. Documentation prepared by the Finance Department indicates that the addition of one full-time faculty member at step 8 of the salary grid would have reduced the margin to 7.88%.

In terms of the revenue and expenses that appear on the costing summary for the Music Theatre program which was introduced in evidence, there is no doubt that Ms. Dietze has some difficulty explaining the manner in which funding units were calculated and how the value of funding units was determined. She also had difficulty recalling the nature of some of the expenses which appear on the summary. However, Ms. Kerth, who is responsible for program costing and prepared the costing summary for the Music Theatre program was called as a witness by the College. In the course of her evidence, Ms. Kerth testified that the figures were taken from the general ledger and from calculations made by the College with respect to shared expenses and the allocations of government grants. She also testified that the figures were accurate and that the same principles were applied to the costing of all programs.

As noted by the Union, the College did not recommend suspension of the Music Theatre program during the course of the program review. Although Ms. Dietze also acknowledged that the program was not recommended for suspension in the 2009/2010 academic year, the evidence regarding staffing and the financial position of the program focused on the 2006/2007 and 2007/2008 academic years. When the grievance was filed in the spring of 2007, the third year of the program was being delivered for the first time. Ms. Carter testified that although efforts were made to be conservative during the budgeting process, there continued to be unexpected expenses associated with the productions put on in the program.


Although Ms. Carter also testified that because Music Theatre was a new program, it was given an opportunity to be viable, we note that efforts to increase revenue were not entirely successful. In fact, the program fell short of the contribution margin that was projected for 2007/2008 and, as noted previously, the actual contribution margin for that year was 13.03%. This margin would have been further reduced if an additional full-time faculty member had been hired. Moreover, although the costing for that faculty member may not have been prepared until June, 2008, it is apparent that there were concerns about the financial position of the program well before that time. For that reason, the program was reviewed by the program planning team. Ms. Dietze testified that as the program was in jeopardy, the College did not consider hiring an additional full-time faculty member.

As noted by the Union, the evidence indicates that the College continued to offer the BScN program although that program was in a deficit position on all campuses. We note, however, that the BScN program was offered pursuant to a contract between the College and Laurentian University and graduates were granted a degree by the University. In any event, we are not persuaded that the fact that the College continued to offer the BScN program is determinative of the issue in this case. The program review at the Brockville campus resulted in the suspension of a number of programs, one of which was making some contribution to the cost of college operations which was not the case with the Music Theatre program.

There is no doubt that the Music Theatre program is important to the Brockville campus and that it is a program to which the College, faculty members and the community are committed. However, the evidence indicates that at the relevant time, there were real concerns about its viability and, in our view, the addition of a full-time faculty member at that time would have further jeopardized the program. In circumstances where efforts to increase revenue had not proved entirely successful, we accept the evidence of Ms. Dietze that she would have had to consider changes to the curriculum in an effort to decrease expenditures. We also accept her evidence that the type of changes referred to would have had a negative impact on the quality of the program and the market acceptability of the program. As noted previously, the general requirement to give preference to the designation of full-time positions rather than partial-load positions is expressly made subject to operational requirements of this nature.

In the result, having carefully considered all of the evidence, we find that at the relevant time, the College did not violate Article 2.02 of the collective agreement by failing to combine partial-load positions to create an additional full-time teaching position in the Music Theatre program. While this conclusion is admittedly based on financial considerations, we are not dealing with an established program but rather a new program in which there were genuine concerns about enrolment, retention and expenditures. In light of the financial position of the program at the time, we are of the view that there was a real likelihood that the addition of another full-time faculty would have necessitated changes to the curriculum, which would, in turn, have had a direct impact on the quality and market acceptability of the program. Accordingly, in the particular circumstances of this case, we find that a violation of the collective agreement has not been established and, for the reasons set out, the grievance is dismissed.

DATED AT TORONTO, this 1st day of February, 2011.


Chair

"Richard O'Connor"
College Nominee

See Dissent Attached
Union Nominee

DISSENT

I respectfully dissent from this Award.

The issue here, as I see it, is whether the majority are correct in that Article 2.02 allows them to consider financial factors, if they rise to such a level of importance that they effect the operational requirements.

Article 2.02 states,

“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 programs, attainment of program objectives, the need for special qualifications and the market acceptability of the program to employers, students, and the community.”

In Ontario Public Service Employees Union and Humber College (RobertHowe) the Board found, “The existence of that qualitative “common thread “militates against interpreting “operational requirements “to include financial matters. The Award further states,

“ Since financial matters are almost invariably of very great importance to parties negotiating collective agreements, one would reasonably expect that if financial considerations were intended to form part of the “ operational requirements “ exceptions to the general rule specified in Article 2.02 and 2.03A, the parties would have specifically referred to it in their lists of examples, particularly where the College’s ability to rely upon financial considerations in applying those provisions could well give rise to an exception of such magnitude as to virtually eliminate the general rule.”

I am of the opinion, that given this case law, the Union’s grievance should have been upheld at this point. However, the majority, based on the St. Lawrence College and Ontario Public Service Employees Union (Swan) Award, that found there could be cases where financial factors rose to such a level as to effect one or more operational requirements, granted the College’s request to introduce evidence of financial considerations and assess that evidence at the conclusion of the hearing.

The College’s response to the Union’s grievance at Step 1 on March 30 2007 says, “For this semester there is an off load of 10 complimentary hours for the full-time acting teacher which in turn accounts for four (4) hours of the now full-time hours identified. There are also a number of specialized skills within the Theatre Program which are required to ensure a broad and credible teaching experience for the students, specialized skills which would be very difficult to find in one faculty member. The College has made its staffing decisions based on legitimate operational requirements. This grievance must therefore be denied. “

The College response at Step 2 on May 9, 2007 states,

“The hours in question by themselves are not sufficient to support a full-time position and since each of the positions has a different focus with respect to specialized expertise

(voice, drama dance) the work cannot easily be combined to create a full-time load. The College has made its staffing decisions based on legitimate operational requirements and does not believe there is a violation of the Collective Agreement. “

It should be noted that the majority rejected the above arguments in its decision and just as importantly, both responses show that the College clearly made its decision not to hire a full-time employee based on reasons that eliminated financial considerations as an item that was of any concern to them. In fact, the College's Director of Finance testified she was not asked, what would be the cost for adding one full-time position until a year after the filing of the grievance and the management's response to that grievance.

Although College counsel argued that unlike a grievor or the Union, where case law consistently prevents them from expanding the scope of a grievance beyond what is written on the grievance form, no such prohibition exists in relation to managements written responses, the fact remains, that at the time of the grievance procedure not even the College itself considered financial factors had risen to “ such a level of importance that they have a direct bearing on one of the specified operational requirements. “

For all of the above reasons, I would have allowed the grievance.

If there is any solace to be gained from the majority Award, is that they found “there were a sufficient number of hours taught by partial-load professors to create a full-time teaching position and rejected “that the addition of one full-time teaching position would have materially affected the number of professionals to which students in the Music Theatre program were exposed. “ The majority also found that as the College was able to fill the existing full-time positions with qualified candidates from the community, “there would be no reason to restrict the posting to a particular community. “

It also should be noted, that the majority decision was based on the newness of the program, which gives rise to the belief, that the future may show that this decision is not etched in stone.

Ron Davidson

Union Nominee