BETWEEN

ALGONQUIN COLLEGE

(the "College")

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 415

(the "Union")

RE: ARTICLE 2 – CE HOURS (GRIEVANCE NOS. 2010-0414-0136; 2010-0415-0099)

SOLE ARBITRATOR: NORM JESIN

APPEARING FOR THE EMPLOYER: **JOCK CLIME – COUNSEL**

APPEARING FOR THE UNION: **WASSIM GARZOUZI – COUNSEL**

PRELIMINARY AWARD:

Introduction and Background

The grievances in this case allege that the College is in violation of Article 2 of the collective agreement between the parties in numerous cost centres in the College's School of Business. That article requires the College to "give preference to the designation of full-time positions" over partial load teaching positions or sessional positions subject to "operational requirements".

The proceedings in this matter have been organized in distinct parts. In this part of the proceedings the Union asserts that the College has failed to meet the requirements of Article 2 in respect of courses taught in the College's continuing education (hereinafter "CE") program in the School of Business. Indeed, the Union seeks to apply article 2 so as to compel the College to hire full time teachers to teach courses in CE. The College has responded by raising a preliminary motion seeking to dismiss the Union's attempts in this regard. It is the College's position that article 2, when read together with the rest of the collective agreement, and especially with article 27, has no application in respect of courses taught in CE. The College asserts that even if I were to find that the agreement is not clear in this regard and that the collective agreement is ambiguous, that evidence of past practice and bargaining history makes it abundantly clear that the Union has indeed operated under and accepted the interpretation of article 2 urged by the College – namely that article 2 had no application to courses taught in CE.

The Union's position regarding the College's preliminary motion is that the language of article 2 is clearly applicable to CE and that there is no exclusion in the collective agreement to the application of article 2 to CE. Furthermore, the Union asserts that there is previous

jurisprudence (which will be more fully discussed below) confirming that article 2 may indeed be applied to CE. Finally, the Union rejects the College's interpretation of past practice and bargaining history and asserts that the evidence does not support the College's position regarding the application of article 2 to CE. In that regard the Union notes that the collective agreement is a provincial one covering colleges and other affiliated local unions throughout the province. The Union asserts that in a provincial setting such as this any extrinsic evidence must clearly show that there is mutual understanding on a provincial basis as to the impact of such extrinsic evidence before that extrinsic evidence can be relied on as an aid to the interpretation of the agreement.

It should be noted that the evidence regarding CE at this College is that there are no full time teachers in CE although there have been two full time coordinators in certain departments. The CE courses in this college are taught by part time personnel. Some of the courses may be credit courses and some may not be. English courses which are the subject of this case are generally credit courses and are similar to or the same as those taught outside CE. Indeed, although the courses are generally taught in the evening, some may be taught in the day and some of the teachers teaching in the evening may also teach in the day.

Before considering the evidence regarding past practice and bargaining history, and to better understand the position being taken by the parties, it is necessary to set out the relevant provisions of the collective agreement. The relevant provisions of article 2 are as follows:

2.02 The College will give preference to the designation of full-time positions as regular rather than partial-load positions as defined by 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 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 as the quality of the programs, enrolment patterns and expectations, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to the 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 26.01 B defines a partial load employee "as a teacher who teaches more than six and up to 12 hours per week on a regular basis." A full time teacher is a teacher who teaches more than 12 hours per week and generally will teach 15 hours per week. Article 1.01 of the collective agreement defines sessional teachers as non-full time teachers hired to teach on a sessional basis for less than twelve months duration in any 12 month period. It should be noted that sessional teachers are excluded from the bargaining unit.

The courses in CE are generally taught by part time employees. Article 2 does not expressly give preference to full time teachers over part time teachers. Nevertheless there has been some discussion in the jurisprudence over whether the collective agreement gives any

preference to full time teachers over part time ones. A fuller reference to that discussion may be found in my unreported award between these same parties dated February 21, 2013.

Article 27 is a broad ranging article under the heading “Job Security”. It contains a number of provisions dealing with the application of seniority for layoffs and recall. Article 27.11 sets out the procedure for posting and filling full time vacancies.

Most importantly, insofar as the application of article 2 is concerned, article 27 contains a provision requiring the College to provide the Union with information detailing the make-up of the teaching staff. For example, Article 27(12) of the collective agreement provides that three times per year the College is required to provide the Union with notification of all personnel (including sessionals) assigned to teach credit courses. This provision is necessary to enable the Union to ensure that article 2 is adequately enforced and to ensure that the College is indeed giving preference to full time personnel over partial load and/or sessional personnel as required by article 2. However article 27(16) provides that “Extension and Continuing Education programs which are not included in the regular assignment of full time employees are excluded from the Application of this Article for all purposes”. As a result the College asserts that it is not required to, nor has it ever, provided the Union with data regarding the identity of those teaching courses in CE. Indeed, according the College, this exclusion of CE from all of the provisions of article 27, reflects the intention of the collective agreement to exclude CE from the application of article 2.

Past Practice and Bargaining History

The College introduced extrinsic evidence to establish the following two factual propositions. First, the College sought to establish that the Union had never, prior to this grievance, used article 2 to compel the College to hire full time personnel in CE. Second, the College sought to establish that over the years the Union's provincial bargaining committee had made a number of proposals, which, if accepted would have clearly resulted in changes in the collective agreement leading to the clear applicability of article 2 to CE. However, none of those proposals had found their way into the collective agreement. Thus according to the College these factual propositions support its conclusion that the Union has understood and indeed acted as though article 2 had no application to CE.

The College sought to establish these propositions through the examination of Diane McCutcheon, the College's Director of Labour Relations, through the introduction of documentary evidence and through cross-examination of the Union's witnesses (particularly in regard to bargaining history).

Ms. McCutcheon has been employed by the College for approximately 23 years, 19 of which had she had held positions in the College's Human Resource Department. She became the acting Director of Labour Relations on May 1, 2012 and shortly after that she was permanently appointed to that position.

Ms. McCutcheon stated that during the mid 1990's she became responsible for providing the Union with the data required under article 27(12) of the collective agreement and that from 2002 she was responsible for overseeing the provision of this data in her capacity as manager, and later as director of labour relations. She stated that the Union relied on the data

provided under article 27(12) to support its efforts to rely on article 2 to compel the College to hire additional full time personnel. She further stated that during her tenure, the Union had never been provided with data pertaining to CE under article 27(12). She also stated that she had been aware of approximately 100 article 2 cases filed by the Union but that the Union had never filed a grievance or claim under article 2 in relation to CE previous to the claim being made in this case.

Ms. McCutcheon testified that there were 24 colleges (including Algonquin) covered by the collective agreement. In preparation for her evidence she testified that she had arranged for the other colleges to be polled to see if any affiliated locals had ever grieved to compel the application of article 2 to CE and particularly whether any had sought to apply either of two decisions – one decided by a panel chaired by R. O. MacDowell and another decided by P. Knopf.

[The MacDowell decision may be cites as *St. Lawrence College,* unreported, July 22, 2005. In that case there was a grievance seeking preference for full time personnel in accordance with article 2 over 2 partial load employees working in CE. The decision in that case dismissed a motion that the grievance was not arbitrable and simply concluded that article 2 "was arguably applicable to the circumstances put before us". A decision on the merits was never issued. The Knopf decision involved a case between these same parties. The case is cited as *Algonquin College,* [2001] O.L.A.A. No. 632. In another preliminary ruling the arbitrator determined that it had jurisdiction to consider certain credit course assignments were made in compliance with article 2. Again, no decision on the merits was ever issued.]

Ultimately, 20 colleges responded to Ms. McCutcheon's polling efforts. One response referred to the grievance resulting in the MacDowell preliminary ruling referred to above. Another referred to a matter dealt with by a local agreement. All the other responses confirmed that there had been no grievance seeking to apply article 2 to compel the hiring of full time personnel for the CE program.

The Union called two witnesses – Edward Montgomery and J. P. LaMarche. Mr. Lamarche has been the Union's chief steward since 2006. He is also on the provincial joint grievance and scheduling committee. In his testimony he essentially confirmed that the Union utilizes in data provided by the College under article 27(12) to determine whether it should file a grievance alleging a violation of article 2. Where the data shows a spike in hours taught by partial load or sessional teachers, the Union will then consider whether an article 2 claim should be initiated. A grievance under article 2 will not generally be filed in respect of hours taught by part time employees unless there is evidence suggesting the College is employing part time employees to the point where one might conclude that the College is abusing its right to employ part time employees.

Mr. LaMarche agreed that until the present grievance, the union, during his tenure, had not sought under article 2 to compel the College to employ full time teachers in CE. He stated that the claim in this case arose from a discussion he had with Elizabeth Skittmore – a coordinator if English in CE – in 2009. The Union was already considering an article 2 claim in respect of English being taught by partial load and sessional teachers outside of CE. In his discussion with Ms. Skittmore he learned that there were 10 sections of English being taught in

CE. Until that time he did not realize that there were that many sections of English being taught in CE. Given that five sections make up a full time teaching load, it was decided to Include CE hours in pursuit of the Union's article 2 claim over the teaching of English.

Mr. LaMarche conceded that until the discussion in 2009 with Ms. Skittmore, the Union had never considered pursuing a claim under article 2 for courses taught in CE. However, he added that he was always open to consider a claim for CE where the evidence warranted it and the Union never took the view that CE was excluded from the application of article 2. It should be noted at this point that the Employer submitted documentary evidence of brochures and from its website indicating that the extent of its activity in CE was well publicized.

Evidence of bargaining history was primarily elicited through the examination and cross-examination of Edward Montgomery. Mr. Montgomery had been on the Union provincial bargaining team for the Union for every round of bargaining but one from 1987 up to and including the round of bargaining in 2012. He was Vice Chair of the team in 1987. He missed the round of bargaining prior to the Social Contract in 1993 and was chair of the team from 1993 until 2012, except that in 2012, he co-chaired the team.

Mr. Montgomery testified in respect of a number of Union proposals that had been made during his tenure seeking amendments to article 27(12) and to article 2. For example, in 2001 and 2002, the Union sought an amendment to article 27 that would require the colleges to provide a list of all teachers, including those teaching courses in CE. Those proposals were not agreed to. In 2003 the Union sought an amendment to article 27(16) limiting the exclusion of CE from article 27 only to non-credit courses. Under the proposal credit courses would be

covered by the rest of article 27. This proposal was not agreed to by the colleges. This proposal was made again in 2005. In addition the Union proposed that the Employer's right to employ part time teachers be restricted to non-credit courses. These proposals were rejected by the Colleges. Finally in 2009 the Union proposed an amendment to article 2 which would require the colleges to make all reasonable efforts to provide all students – except those in CE and Extension – with full time teachers. Again, those proposals were rejected.

According to Mr. Montgomery, these proposals do not constitute a recognition by the Union that article 2 is not applicable to CE. In fact, according to Mr. Montgomery, there is no exclusion of CE in article 2 and the Union has always considered that article 2 does in fact apply to CE. He acknowledges that there have been attempts to increase the amount of information that the colleges have to provide for CE but that that does not derogate from the applicability of article 2 to CE. In the case the proposal to amend article 2 to provide students, except those in CE and Extension, with full time teachers, he indicated that the Union was simply prepared to make a trade off for CE to increase the college's general obligation to provide full time teachers. He was adamant that the proposal was in no way an acknowledgement that article 2 did not apply to CE.

Position of the Parties

The Employer takes two positions in support of its motion. The first is that the exclusion of CE from the application of the rest of Article 27 clearly reflects an intention of the parties to exclude CE from the application of article 2. The second is that evidence of past practice and

bargaining history reflect a clear understanding and acknowledgement by both parties that article 2 has no application to CE.

Dealing with the impact of article 27, counsel for the Employer emphasized that the disclosure requirements set out in article 27(12) are necessary to allow the Union to enforce and apply article 2. It is through that disclosure that the Union becomes aware which courses are being taught by full time employees, partial load and sessional employees. It is through the review of that information that the Union is able to determine whether article 2 is being complied with or whether a claim should be made to support the hiring of additional full time teachers. According to counsel, by excluding CE from the application of article 27, the parties clearly indicated that 27(12) data need not be disclosed in CE. Since this data need not be disclosed the parties then must be taken to have determined that article 2 would not be applied to CE.

In further support of this position counsel noted that the application of article 2 would lead to absurd results. For example, counsel noted because CE is excluded from all of article 27, it is also excluded from the posting requirement set out in article 27(11). If article 2 were applied to compel the hiring of a full time position in CE there would therefore be no mechanism to post the position. The more sensible interpretation therefore is, according to counsel that article 2 is simply not applicable to CE.

Counsel acknowledges that I need only consider the evidence of past practice and bargaining history if I find that the collective agreement is ambiguous on the question of whether article 2 applies to CE. He submits however that the evidence clearly resolves any

ambiguity in favour of the interpretation put forward by the Employer. he relies on the evidence put forward dealing with the historic failure of the Union or its affiliates to purse the application of article 2 to ce, as well as the failure of the Union to convince the Employer to accept proposed amendments to the collective agreement which would have resulted in the unambiguous application of article 2 to CE.

The Union asserts that in fact the collective agreement is clear that article 2 does apply to CE. It also asserts that the extrinsic evidence does not support the position of the Employer but rather supports the Union position.

Counsel for the Union submits that if the parties would have intended to exclude CE from the application of article 2, the collective agreement would have clearly set that out. He points out however that there is no exclusion of CE in the language of article 2. Therefore, regardless of the disclosure requirements of article 27, CE is not excluded from the application of article 2. Counsel relies on a number of cases in support of his position, the most compelling of which are the MacDowell decision in *St. Lawrence College,* the Knopf decision *Algonquin College* and *Canadore College,* February 20, 1990 (unreported) (Brown, Cameletti, Majesky).

In *Canadore College,* the Union grieved that full time employees were improperly assigned to teach non-credit courses in CE in addition to their regular full time load. The additional hours in CE resulted in overall assignments of greater than the maximum hours allowed under the workload provisions in the agreement. The Employer argues that because of the exclusion of CE from what is now article 27, including the exclusion from the seniority clauses contained therein, the assignments in CE could not be reviewed for their compliance

with the workload provisions. This argument was rejected by the arbitration board, as the board refused to infer an exclusion of CE hours from the workload provisions from the exclusion of CE from what is now article 27.

Counsel asserted that arbitrator Knopf's decision is based on facts similar to those in the present case and that her decision is determinative in the Union's favour. In that case the Union grieved the failure to post and full time positions to teach French as a second language (FSL) in the continuing education department. These were credit courses. The Employer raised a preliminary objection to the arbitrator's jurisdiction to determine the grievance. The basis for the objection was the assertion that the posting provisions and the collective agreement did not apply to those teaching FSL and that the arbitrator had no jurisdiction over staffing decisions in that area.

One of the teachers whose hours were the subject of consideration in the grievance was designated as part time, although she taught six hours per week but also worked for an additional 25 hours per week performing coordination duties.

At paragraph 21 the arbitrator determined that "it is certainly within the jurisdiction of the 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". At paragraph 23, the arbitrator added: "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.

According to Union counsel these conclusions, if followed must result in my assumption of jurisdiction to hear and determine this case.

Counsel referred to the *St. Lawrence College* decision and noted that the arguments made by the Employer in this case regarding the impact of the exclusion of CE from article 27 were made and rejected in the *St. Lawrence* case. In that case the arbitration board again had to consider whether article 2 applied to employees and courses in CE. In this case the grievance sought to compel the college to hire a full time teacher to teach hours that were being taught by partial load employees in CE. At pp. 50-60 of the decision the Board outlines submissions made by the college which were similar to the submissions made by the College in this case. In particular heavy reliance was placed on the exclusion of CE from the application of article 27.

At p. 108 of its decision the board noted that "The impact of article 27.16 is confined to the "application *of this Article".* Article 27.16 says nothing about the application of *any other Article* in the collective agreement and, in particular, it says nothing about the application, or non-application, of Article 2". Indeed, the board also noted that article 27.16 sets out that the rest of article 27 does in fact apply to CE courses "when the CE courses and programs are included in the "*regular assignment of full time employment".* Later at pp, 110 and 111 the board notes that "if Article 2 were applied here to the teaching work in [CE], in order to create a regular full time work assignment teaching ECE credit courses, then it would (on the surface at least), create precisely the kind of full time work assignment that, on the face of Article 27.16 … would avoid the exclusionary impact of that decision.

Again counsel submits that these passages make it clear that I do indeed have the jurisdiction to apply article 2 to CE and to consider whether article 2 should result in the hiring of full time staff in CE.

In addition to being supportive of the Union's position on the proper interpretation of the collective agreement, Union counsel submitted that these cases are a complete answer to the College's past practice argument. These cases, particularly *Algonquin* and *St. Lawrence,* are cases in which the Union has in fact pressed the application of article 2 to CE and where arbitrators have found that they have the jurisdiction to consider such claims. With regard to the practice itself counsel notes that one should not expect many article 2 claims in CE as the law on the application of Article 2 to part time employees is evolving and is certainly more problematic than a claim in respect of hours performed by sessional teacher and partial load teachers. Counsel also asserts that if one scrutinizes the bargaining proposals submitted by the Union, while they may have had the effect, if accepted, of confirming that article 2 applies to CE, that is not their stated impact and is only a by-product of what was being proposed.

In reply, College counsel asked me to discount the cases relied on by the Union. First he says that the *Canadore* decision relates to different articles in the collective agreement. He then notes that when the *Algonquin* case was decided there was not yet a determination of whether article 2 might apply to give any preference to full time positions over part time ones. Because this case deals only with an attempt to give preference to full time positions over part time ones, the *Canadore* decision should not be applied. Similarly, the *St. Lawrence* case did not deal with a claim against part time hours but rather dealt with a claim against partial load hours.

Counsel reiterated that there has never previously been an article 2 claim against part time hours in CE and that this grievance should therefore be dismissed. He also asserted that a careful reading of the *St. Lawrence* case indicates that the employer did not make precisely the same arguments regarding the impact of the exclusion of CE from article 27, particularly in relation to the impact of excluding CE from the disclosure provisions of article 27.

Decision

I am compelled to agree with the conclusion reached by the arbitration board in *St. Lawrence College,* that the language of the collective agreement does not exclude CE from the application of article 2. As that board noted, the language of article 27.16 only excludes the rest of article 27 from CE. It does not exclude the application of any other article. The decision also provides an answer to the College's submission that if addition of a full time position is ordered there is no mechanism to post it because CE is excluded from the posting provisions of article 27. As the board pointed out in *St. Lawrence College,* the 27.16 exclusion does not apply to courses in CE which are included "in the regular assignment of full time employment". That means, as the board stated, that if a full time position is ordered to be created, the exclusionary impact of article 27.16 could be avoided.

Therefore, it is my determination that the language of the collective agreement does not exclude CE from the application of article 2. This conclusion means that it is not necessary to consider the impact of extrinsic evidence in making my determination. Nevertheless, I do agree with counsel for the Union, that the pursuit of claims as considered in *St. Lawrence*

College and in *Algonquin College,* provide an answer to the suggestion that the Union has acted as though article 2 has no application to CE. That suggestion is not consistent with the claims pursued in those cases.

Nor do I accept that the bargaining proposals raised in evidence confirm any mutual understanding regarding the application of article 2 to CE. It is true that some of the proposals, if accepted, would have resulted in confirmation that article did have application to CE. But there was no direct proposal to make article 2 applicable to CE, and in the face of the claims pursued in the cases as outlined above I cannot conclude that there was a mutual understanding that article 2 did not apply to CE.

It is more likely that the absence of article 2 claims to CE, generally results from the fact that almost all CE courses are taught by part time staff. Counsel for the College has asked me to conclude as an alternative, that the evidence reflects an understanding that article 2 cannot be applied to convert part time positions in CE. I am not prepared reach that conclusion.

As I have noted previously, there is no express preference in article 2 for full time positions over part time positions. However there is an ongoing discussion and evolution in the cases about the extent to which the collective agreement may be applied to compel the College to convert part time positions to full time positions. It is not clear to me at this time, what if any circumstances might support such a result. As difficult as it may be for the Union to achieve that result, particularly in CE, where there is an ongoing practice of utilizing part time staff to teach the available courses, I do not think it is appropriate to determine, on a preliminary basis, that such a claim cannot be pursued.

Having regard to the foregoing it is my determination that the College's preliminary motion must be dismissed. The matter is remitted back to the parties for their reconsideration and I will schedule hearings for the continuation of this matter at the request of either party.

Dated at Toronto, this 31st day of March, 2014

NJ

Norm Jesin