

926606  
Local 243

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NIAGARA COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

UNION GRIEVANCE

BOARD OF ARBITRATION:

JANE H. DEVLIN

CHAIRMAN

RON HUBERT

COLLEGE NOMINEE

JANE GRIMWOOD

UNION NOMINEE

Appearances for the College:

Vincent P. Johnston

J. Garner

B. Clarke

Appearances for the Union:

Ian Anderson

Barbara Fonfara

Art Domenicucci

OPSEU FILE NO.: 92G606

HEARING DATE: May 12, 1993

In this case, the Union alleges that from February 24, 1992, the College ought to have included Art Domenicucci in the bargaining unit. It is the position of the College that Mr. Domenicucci was properly excluded from the unit on two grounds: firstly, he was working in a part-time position and, therefore, was "regularly employed for 24 hours per week or less". Secondly, although he performed certain additional duties during the period from February to November of 1992, this involved work on "a project of a non-recurring kind" which was also a basis for exclusion from the bargaining unit.

The provisions of the collective agreement which are relevant to a determination of the grievance are as follows:

## 1. RECOGNITION

### 1.1 Exclusive Bargaining Agent

The Union is recognized as the exclusive bargaining agent for all Support Staff employees of the Colleges, save and except:

- foremen and supervisors;
- persons above the rank of foreman or supervisor;
- employees performing duties that require the use of confidential information relating to employee relations and the formulation of the College budget or the Campus budget, as the case may be;
- persons regularly employed for twenty-four (24) hours per week or less and persons employed temporarily during the College vacation periods;
- students employed on a cooperative educational training program, with a school, college or university;
- graduates of the College employed for up to twelve (12) months following completion of their courses and associated with certification, registration or other licensing requirements;
- persons hired for a project of a non-recurring kind.

## 1.2 Staffing Considerations

Recognizing that the College reserves the right as provided in Article 3, to determine the number and composition of full-time, part-time, and otherwise excluded positions, and to determine the work assignments that are appropriate in each case, the College agrees to endeavour to give preference to full-time over part-time assignments, and to cover part-time to full-time assignments where feasible, subject to such operational requirements as may be appropriate.

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## 1.6 Non-Recurring Projects

An individual may not be maintained in a project of a non-recurring kind for a period of more than twelve (12) continuous months unless there is an extension agreed upon in writing between the Local Union and the College.

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## 4. UNION/MANAGEMENT INTERESTS

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### 4.3 List of Part-Time Employees

Once every four (4) months, the Local Union may request in writing a list of persons regularly employed for twenty-four (24) hours per week or less, who have been employed continuously for two (2) months or more and persons hired for projects of a non-recurring kind. Within fifteen (15) working days of the request, the College shall supply the list showing the name, start date, anticipated termination date if known, job performed, department, payband, estimated average hours per week, and regular work location, of each such employee.

Within ten (10) days of receipt of the said list, the Local Union may request that it be discussed at a meeting of the Committee constituted under Article 4.2.2. At such a meeting the College shall provide explanations for assigning work on the basis of part-time and full-time assignments, and the nature of any projects of a non-recurring kind for which people were hired in the preceding four (4) months. The College shall consider any representations which the Local Union may make with respect to the assigning of work on a full-time or part-time basis; concerning the feasibility of converting part-time to full-time assignments; and concerning the staffing of positions resulting from projects of a non-recurring kind.

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Mr. Domenicucci began his employment with the College on June 13, 1990. He initially worked as a part-time Development Officer in the Continuing Education Department. The evidence indicates that there are 7 full-time and 3 part-time Development Officers in this Department which is one of a number of Departments in the Ventures Division. Within this Division, there are also Development Officers in the Access and General Education, Joint Ventures, Skills Development and Technical Skills Departments. In the Academic Division, there is one full-time Development Officer in the School of Business and Hospitality.

In the Continuing Education Department, where Mr. Domenicucci was employed, each Development Officer is responsible for identifying community needs for training and developing courses to address those needs. For this purpose, the Development Officer prepares a statement of proposed courses for approval by his or her Director. Once approval has been obtained, the courses to be offered by the College are listed in a catalogue which is distributed to the general public.

Provided there is sufficient demand for a particular course, the Development Officer then performs a variety of coordination functions which include making recommendations as to potential instructors and arranging for space and equipment as

well as texts and other materials. In some cases, the Development Officer is also responsible for setting up the financial records for the course and, depending on the nature of the course, he may also interview prospective students. As well, the Development Officer assists the instructor in developing curriculum (although this is not necessary if the course has previously been offered by the College).

At the outset of the course, the Development Officer is also involved in orienting the instructor and periodically attending classes to ensure that things are running smoothly. In addition, the Development Officer monitors the attendance of students at the course and counsels students who are having difficulty. He also ensures that necessary paperwork is generated in connection with the course. As well, he evaluates the course and, in some cases, may be responsible for monitoring the progress of students following completion of the course.

The evidence indicates that each Development Officer is responsible for certain specified subjects and, at any given time, may be involved in the delivery of a number of courses offered at one or more College campuses. In this regard and although there is some variation, the evidence indicates that a full-time Development Officer is generally involved in the delivery of some 60 to 80 courses.

In the Continuing Education Department, three types of courses are generally offered; namely, vocational, credit and non-funded courses. Vocational courses are primarily offered to individuals who have been certified in a particular trade whereas credit courses involve instruction at the post-secondary level. In the case of both vocational and credit courses, funding is provided primarily by the Ministry of Colleges and Universities. Non-funded courses, which are in the nature of general interest courses, are not funded by an outside agency but rather by tuition fees charged to the participants.

To some extent in the Continuing Education Department, although primarily in the other Departments referred to, Development Officers are also involved in making proposals or tenders for training to outside agencies. The agencies to which such proposals or tenders are made include the Canadian Employment and Immigration Centre ("C.E.I.C."), the Niagara Industrial Training Advisory Corporation ("N.I.T.A.C.") and the Ministry of Skills Development ("M.S.D."), now the Skills Development Branch of the Ministry of Education and Training. On occasion, proposals or tenders are also made to the Niagara Peninsula Industry Council ("N.P.I.C.").

Although each agency has its own procedure by which funding may be obtained (which, in some cases, involves the College competing with other organizations for funding), there

would appear to be no dispute that any particular proposal for training made by the College may or may not be successful at any given time and a proposal which is accepted one year may not be accepted the following year. The evidence further indicates that if a proposal is accepted and training provided, the co-ordination functions in relation to the program may be carried out by the Development Officer involved in formulating the proposal. In such circumstances, the functions performed are similar to the co-ordination functions performed by a Development Officer in the Continuing Education Department.

With this background, then, it is necessary to consider the events which gave rise to the grievance. As indicated previously, Mr. Domenicucci began his employment with the College as a part-time Development Officer on June 13, 1990 and he regularly worked 24 hours per week until May 6, 1991. Thereafter, he was selected to fill a temporary full-time position as a Development Officer in the Continuing Education Department and, in this capacity, he worked 37.5 hours per week from May 6, 1991 to October 4, 1991. The evidence indicates that the position occupied by Mr. Domenicucci during this period was posted as temporary in order to provide the College with an opportunity to determine whether there was sufficient demand for another full-time Development Officer in the Department. Evidently, a second temporary full-time position was also posted during this period.

Subsequently, in September of 1991 (presumably having determined that there was sufficient demand for additional Development Officers), the College posted 2 full-time vacancies. The first vacancy was filled by Noreen Casson, who had filled the second of the two temporary positions. The competition for the remaining vacancy was delayed as a result of the death of Mr. Domenicucci's mother and Mr. Domenicucci was subsequently interviewed for the position in mid-October of 1991. Before the selection process was completed, however, a funding freeze was imposed with the result that the position was not filled at that time. Accordingly, from October 7, 1991 until early March of 1993 when Mr. Domenicucci obtained a permanent full-time position as a Development Officer in the Continuing Education Department, he worked as a part-time Development Officer in that Department and was regularly employed for 24 hours per week.

Beginning on February 24, 1992, Mr. Domenicucci also obtained an assignment in the Skills Development Department where he worked for 16 hours per week until November 13, 1992. He was paid for this work at the rate of a Development Officer. The work in question related to project-based training which was purchased by C.E.I.C. and involved a joint program between the College and the Unemployed Help Centre of St. Catharines. The evidence indicates that this was the first occasion on which the College had been involved in a tripartite contract for the

purpose of providing training. In any event, the program in issue, which was known as the Immigrant Engineer program, was aimed at recent immigrants with technical skills and involved both a work placement component as well as course instruction. The majority of courses in the program were technical in nature and were identical to courses already being offered by the College through the Continuing Education Department. These courses, however, were delivered separately to participants in the Immigrant Engineer program. The program also included course instruction in English as a Second Language.

The evidence indicates that while Mr. Domenicucci was not involved in interviewing participants for the Immigrant Engineer Program, he did perform other co-ordination functions similar to those he performed as a part-time Development Officer in the Continuing Education Department. In particular, he made recommendations as to suitable instructors, scheduled and monitored the delivery of courses, assessed student needs and recommended modifications to the curriculum to address those needs. As well, he was involved in monitoring the work placement component of the program and although he did not perform a similar function in the Continuing Education Department, it would appear that work placement is a component of other courses offered by the College.

Although the Immigrant Engineer program was initially to be completed by November 13, 1992, it was extended for a further month and, during this period, Mr. Domenicucci was assigned to the Skills Development Department for 8 hours each week. The evidence further indicates that prior to 1992, the Immigrant Engineer program had not been offered by the College, nor has it been offered since that time. Moreover, although the parties agreed that the program might be offered in the future, the College indicated at the hearing that it had recently been advised that the program would not be offered again.

The issue, then, is whether Mr. Domenicucci was properly excluded from the bargaining unit subsequent to February 24, 1992. In addressing this issue, the first matter to be determined is whether the work performed by Mr. Domenicucci in the Skills Development Department involved "a project of a non-recurring kind" within the meaning of Article 1.1 of the collective agreement. In this regard, it was the submission of the College that there were a number of features of the Immigrant Engineer program which distinguished it from other programs offered by the College. In particular, it was contended that the program was the result of a tripartite contract in which the College had not previously been involved. The program was also offered on only one occasion and was not subject to guaranteed funding. Moreover, the program was offered separately to a particular group and there was no evidence that this group had

been targeted in the past. Further, the program combined both a workplace component as well as instruction in English as a Second language. In these circumstances, the College contended that the program was properly characterized as a project of a non-recurring kind.

In the Board's view, however, while the program in question may have been unique in targeting immigrant engineers, many programs offered by the College target particular groups and offer a particular mix of courses. Moreover, like the Immigrant Engineer program, other programs are also not subject to guaranteed funding and, in this regard, the evidence is clear that proposals or tenders for training which are made to outside agencies may be successful one year and not the following year. In these circumstances, it would not appear unusual that the Immigrant Engineer program was offered on only one occasion. Moreover, while that program may have involved a tripartite, rather than a bipartite contract, nevertheless, as pointed out by the Union, the program was simply one of a number of programs offered by the College on an ongoing basis. Further, there was no suggestion that, in the past, the status of Development Officers included in the bargaining unit has been dependent upon the extent to which they performed co-ordination functions for programs resulting from tenders or proposals made to outside agencies.

In the Board's view, the exclusion from the bargaining unit for "persons hired for a project of a non-recurring kind" is intended to allow the College some flexibility to deal with a special undertaking such as that in Humber College and Ontario Public Service Employees Union July 25, 1985 (Brown (unreported)). There, the College entered into an arrangement with the Ontario Government to provide the services of a bus driver for trips throughout the Province as part of a bi-centennial celebration. In these circumstances, the Board determined that the undertaking involved a "once only special project" which was non-recurring and that, as a result, the individual who worked on the project was excluded from the bargaining unit.

In this case, in contrast, while the Immigrant Engineer program was offered on only one occasion, it was the kind of program which the College offers on a recurring basis. Moreover, it was a program which required co-ordination functions similar to those frequently performed by members of the bargaining unit. In all the circumstances, therefore, it cannot be said that Mr. Domenicucci was hired for a project of a non-recurring kind so as to justify his exclusion from the bargaining unit under Article 1.1.

The next matter for determination, then, is whether Mr. Domenicucci's exclusion from the unit was warranted on the basis

that he was regularly employed for 24 hours per week or less. In this regard, there was no dispute that during the period from February 24 to December 11, 1992, when Mr. Domenicucci was assigned to both the Continuing Education and Skills Development Departments, he continuously worked for more than 24 hours per week. Nevertheless, it was the contention of the College that the period referred to was unusual or atypical and that, in assessing Mr. Domenicucci's status, it is necessary to review the entire period of his employment with the College. On this basis, it was submitted that Mr. Domenicucci was regularly employed for 24 hours per week or less as it was only during the period from May to October of 1991 and from February to December of 1992 that he worked more than 24 hours per week.

There is no doubt that in cases where an employee's hours of work are subject to ongoing fluctuation, a Board of Arbitration may take into account a considerable period of employment with a view to determining whether the employee regularly works a specified number of hours per week. In this case, however, for a period in excess of nine months subsequent to February 24, 1992, Mr. Domenicucci was continuously employed for more than 24 hours per week. His hours were not subject to fluctuation and given the duration of the period in question, we find that subsequent to February 24th, he was no longer regularly employed for 24 hours per week or less.

In the result, the grievance is allowed. As to the matter of remedy, the Union requested that Mr. Domenicucci be credited with the appropriate seniority and further that the Union be compensated for the loss of dues. The College took the position that even if the grievance was a continuing one, relief ought to be confined to the permissible period for initiating the grievance, which was filed in October of 1992. The College also pointed out that the operative collective agreement was signed in mid-September of 1992 and submitted that the Board does not have jurisdiction to grant relief under a prior collective agreement.


While we accept the College's submission as to the limitation on the Board's jurisdiction, the Board clearly has authority to determine seniority entitlement in accordance with the collective agreement under which the grievance was filed. Article 14 of that agreement appears to deal specifically with the calculation of seniority for employees transferred into the bargaining unit.

As to the claim for Union dues, relief shall be confined to the applicable time period for filing the present grievance. However, in the Board's view, there is no basis for requiring the College to assume responsibility for the payment of dues as proposed by the Union. As pointed out by the Board in Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd. (1970), 21 L.A.C. 322 (Weiler), had there been compliance

with the collective agreement, dues would have been paid by the employee and merely transmitted to the Union by the College. Accordingly, given the purpose of a damage award, which is to put the aggrieved party in the position it would have been had the contract been adhered to, we find that the recovery of dues must be by way of deduction from the pay of Mr. Domenicucci in accordance with the procedure set out in the collective agreement.

The Board shall remain seized for purposes of implementation of this award.

DATED AT TORONTO, this 30th day of July, 1993.

  
Chairman

"Ron Hubert"  
College Nominee

"Jane Grimwood"  
Union Nominee