

Feb 17 1995
94B666

IN THE MATTER OF a union grievance

AND IN THE MATTER OF the arbitration of the grievance

BETWEEN:

Humber College of Applied Arts
and Technology

- and -

Ontario Public Service Employees Union
(for academic employees)

PLACE & DATE OF HEARING: Toronto, Ontario, January 20, 1995

BOARD OF ARBITRATION:

Robert Gallivan
Sherril Murray
Stanley Schiff, chairman

APPEARANCES FOR THE EMPLOYER:

Nancy Hood, director, human resources
Dale Hewat, counsel

APPEARANCES FOR THE UNION:

Eleanor O'Connor, local vice-president
Robert Mills, local chief steward
Nelson Roland, counsel

AWARD & REASONS

The College has issued a policy statement entitled "Appointments of Academic Administrators", which it has circulated among bargaining unit members. The union grieves that the document violates the collective agreement in intent and specific detail. The body of the document reads as follows (with the parts the union here challenges printed in italics):

Introduction

- The College recognizes the value of ensuring that academic and other administrative positions are held by people knowledgeable of and responsive to issues related to student success.
- At the same time, the College recognizes the value in and responsibility for providing faculty and co-ordinators developmental opportunities to move into administrative positions.
- It is, therefore, necessary to establish some clear guidelines related to the internal appointments to academic administrative positions in order:
 - (1) to encourage professors to compete for academic administrative positions;
 - (2) *to provide a measure of continued job security for professors moving from the academic bargaining unit to the administrative group;*
 - (3) to provide effective, constructive and timely orientation to and training for the position and feedback on performance;
 - (4) to provide a period of time for new academic administrators to consider on-going administrative appointments *while ensuring a measure of job security, position choice and easy access back into the faculty bargaining unit.*

Procedure

1. All full-time administrative vacancies will be posted in accordance with College practices.
2. It is understood that administrators hired from outside the Humber College community will be hired in accordance with the normal terms and conditions of employment for administrative employees.

3. Any internal academic candidate for an administrative position will be appointed on an **acting** basis for a one (1) year term, renewable for a second (2nd) year. *The appointment will be treated as a secondment.* Under normal circumstances, no academic administrator will remain in an "acting" position for more than two (2) years. *An "Acting" Administrator carries the full responsibilities of the position.*

The academic employee will continue to pay union dues; and pursuant to Article 27.03(D) of the Academic Collective Agreement, shall continue to accumulate seniority while on a "College-approved secondment for up to 24 months".

4. Upon appointment, the Dean or other relevant College manager will ensure that the "Acting Administrator" receives clear communication regarding the duties and responsibilities of the position and expectations for successful performance.

5. Within the first six weeks of the appointment, the College will ensure that the new academic administrator will receive appropriate orientation and training.

6. In addition to other formal *performance evaluations currently conducted* at the College in accordance with the terms and conditions of employment for administrative employees or with College practices, the College will ensure appropriate developmental performance feedback is provided at or about:

- 6 months
- 1 year
- 18 months

with more frequent and informal feedback provided as required.

7. No reappointment will be automatic. The College must review the performance and make a recommendation regarding reappointment for the second year. At the end of the 18-month period, the review should be extensive enough to ensure there is relevant information upon which the College and the employee can make a decision regarding a long-term administrative position.

At this point, the Professor will either return to the academic bargaining unit or the College will offer a full-time administrative position.

8. It is understood that the administrative position will only be reposted at this point if the Professor returns to the bargaining unit.

9. Any Professor who accepts a long-term administrative position and then wishes to return to the Academic bargaining unit *at a later time* will have to apply to a posted vacancy. Seniority rights will be in accordance with the collective agreement.

10. The College favours that Chairs and Deans teach in an appropriate area of their expertise.

The policy is the product of a lengthy process of consideration and consultation by various college committees. As the Introduction says, its purpose is to attract experienced academics into administrative positions by giving them limited term appointments during which they may test whether life as college administrators is to their liking. The attraction is supported by promises that they remain part of the bargaining unit during the term, subject to all rights and duties the collective agreement sets out, and that they return to their former positions within the unit at the end of the term should they decide that permanent administrative positions are not for them. The promises are justified, the College argues, by section 27.03 D (v) of the agreement: as section 3 of the Procedure says, "[t]he appointment will be treated as a secondment." Section 27.03 D (v) reads:

27.03 D A full-time employee shall continue to accumulate seniority for the purpose of this Article while:

....

(v) on a College-approved secondment for up to 24 months.

Someone seconded under section 27.03 D, the College says, does not stop being a member of the bargaining unit for any relevant purpose. While the policy talks of "academic administrators", the parties agree that the concern is with the acting position of department chair.

We conclude that the College misunderstands the scope of section 27.03 D (v) and how it meshes with sections 27.03 F3 and 27.03 F4. Since we do not have before us any individual grievor's concrete claim presenting specific facts, our explanation of why this is so will largely avoid interpreting the agreement's provisions beyond what is necessary for determining the grievance.

Section 1.01 of the agreement excludes from the bargaining unit anyone who is a chair and, by invoking the Colleges Collective Bargaining Act, anyone who is employed in a managerial position. That means that all academic administrators are excluded. The evidence and the clear statement in section 3 of the Procedure show that persons in the acting chair position will exercise complete managerial authority. By virtue of section 1.01, persons who take on the jobs under the policy therefore immediately cease to be members of the unit and have only such rights identical to those of unit members which the agreement specifically gives them.

What rights are these?

From standard dictionaries we see that "secondment", undefined in the agreement, means a person's temporary transfer from the person's usual position to another position with the expectation of return in due course. If persons put in the acting chair's position have been seconded there for the purpose of section 27.03 D (v), they would, as the opening words say, "continue to accumulate seniority for the purpose of" Article 27. Although we do not decide the point, it may be that they would also be entitled to return to their former positions when the temporary chair jobs are done: such a conclusion would follow from the meaning of secondment. But beyond that, while serving as acting chair, they would have none of the rights or duties under the agreement of persons within the unit.

We conclude, however, that under a proper reading of the collective agreement, the persons appointed to positions as acting chairs do not come within section 27.03 D (v). That provision is deliberately worded to apply to an unnamed variety of situations when persons

go temporarily to other positions. Moreover, its wording does not contemplate the College causing those people to go; the College is merely required to approve the going. In contrast, section 27.03 F 3 specifically applies where the College causes persons within the unit to take positions as College employees outside the unit. That is the very situation before us. Section 27.03 F 3 reads this way:

27.03 F 3 A person who is covered by the Agreement and is assigned a position with the College outside the Agreement after August 31, 1978 will be credited with and maintain seniority as at the date of assignment for six years thereafter while in the employ of the College.

To harmonize the two provisions, the generality of section 27.03 D (v) must yield to the specifics of section 27.03 F 3. Section 27.03 F 3, and not section 27.03 D (v), applies to all situations where persons within the unit become acting chairs or other management personnel involved in the supervision of the unit's members.

The position of acting chair the policy contemplates is therefore subject to section 27.03 F 3 insofar as the incumbents' accumulated seniority is concerned. How that seniority may later be used is then governed by section 27.03 F 4. At least absent section 27.03 F 4, those persons might have used their seniority credited under section 27.03 F 3 when claiming a vacancy upon completion of their term as chair. Arbitrators have almost unanimously said that is so. A recent example may be found in Re Orillia Soldiers Memorial Hospital and Ontario Nurses' Association (1992), 31 L.A.C. (4th) 116 (Levinson, chairman) (citing and quoting from leading awards). But section 27.03 F 4, apparently responding to this near-consensus, may prevent the person from exercising the credited seniority when first claiming a vacant unit position. Whether or not that is so, we do not here decide. What we do

decide is that, beyond the seniority rights sections 27.03 F 3 and 27.03 F 4 give to the acting chairs, they have no rights under the agreement at all. They certainly have no right, apart from the procedure the agreement sets out, to return to the positions they held before moving into administration.

These conclusions, of course, make an acting chair's job unattractive. They will probably have the effect of deterring many academically qualified persons from taking on the job when their qualifications are exactly what the College and their colleagues want. These are not results the parties may welcome. They are, however, the results the agreement as now drafted mandate. If the parties want, they can of course make whatever adjustments they can now agree on.

The grievance is allowed to the following extent:

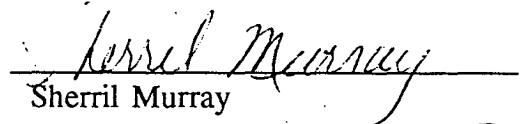
1. We declare that, with the exceptions we note, those parts of the policy printed above in italics do not, as we have explained, accurately reflect the demands of the collective agreement. The exceptions are the following portions of the Procedure: section 3, first paragraph, last sentence; section 6; and section 9.

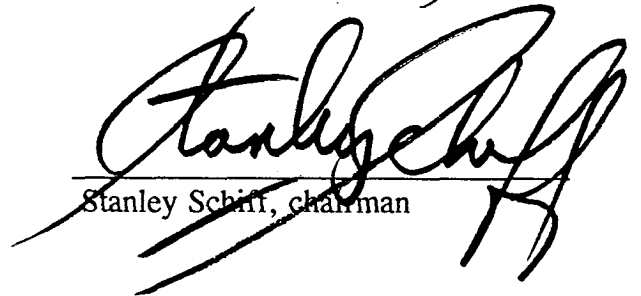
2. The College shall forthwith cease attempting to attract chairs under the policy as printed above, and shall so inform all persons in the bargaining unit.

3. The College shall forthwith inform those persons formerly in the bargaining unit who have been transferred to administrative positions under the policy of the content of this award.

We remain seized of this matter to resolve any difficulties that may arise in concrete instances as a result of this award.

DATED at Toronto this 17th day of February, 1995.


Sherril Murray


Stanley Schiff, chairman

HUMBER COLLEGE OF APPLIED ARTS AND TECHNOLOGY

and

O.P.S.E.U. ACADEMIC GRIEVANCE #94B666

DECISION OF R.J. GALLIVAN

Having carefully reviewed the collective agreement as a whole, I conclude that the only statement in the "Appointments of Academic Administrators" policy which contradicts the collective agreement is the requirement in the policy that an academic employee seconded into a management position continue to pay union dues. A person in a management position at the College, whether in a permanent or "acting" role, is excluded by virtue of Article 1.01 of the contract from the bargaining unit and thus from the requirement to pay union dues. In my view, none of the other sections of the policy, including treating temporary assignments of employees into management positions as "secondments", contradict any provisions of the contract.

The union argued that a number of other parts of the policy violated the agreement as well, but my colleagues quite rightly reject those arguments, in particular the union's objections to paragraphs 6, 9, and the fourth sentence of paragraph 3. I concur in rejecting those union arguments.

However, I regret to have to point out that my colleagues seriously misconstrue the agreement by holding that the College cannot second academic employees on a temporary basis into administrative positions. They reach that conclusion by holding that persons appointed to acting management positions do not fall under Article 27.03 D(v) but rather under 27.03 F3, and by accepting the union's obviously flawed argument that a person can be seconded into a management position

outside his/her own College but not at the originating College - a contradiction without foundation under the collective agreement.

Only part of Article 27.03 D(v) is reproduced in the majority's decision. It is instructive to consider the whole Article:

"27.03 D A full-time employee shall continue to accumulate seniority for the purpose of this Article while:

- (i) in the College's employ;
- (ii) absent through verified illness or injury and/or leave of absence for up to 24 months;
- (iii) on a College-approved leave of absence on an exchange program;
- (iv) on a College-approved professional development leave of absence; or
- (v) on a College-approved secondment for up to 24 months."

A number of observations can be made and conclusions drawn from that Article. First, it will be noted that each of the four types of absence listed is contemplated to be of a temporary nature, that is, illness, exchange programs, professional development leaves, and secondments.

As my colleagues rightly point out, all dictionary definitions to which we were referred by the parties or which the Board itself consulted define "secondment" in terms of a temporary transfer or posting with an implied expectation of return. In that sense then, a secondment under Article 27.03 D is no different than the other types of absences listed therein, each of which contemplate an automatic return at the completion or expiry of the activity which prompted the absence.

Second, the Article makes no distinction in entitlements or rights between a person seconded and a person coming within one of the other three types of temporary absence. That is, there is no provision in the Article, or elsewhere in the agreement that I can find or to which we were referred by the parties, which distinguishes the treatment of a person returning from a secondment from a person returning from

any other of the listed absences such as an exchange program. In the absence of words which would make such a distinction, it is logical to conclude that none was intended by the drafters of the contract.

Third, notwithstanding the union's argument to the contrary, that Article does not distinguish between different types of secondment (nor does any other part of the agreement). If an employee is seconded to undertake, say, a research project in the Ministry of Education and Training, that is no different under the Article than a secondment to a management post at his/her own or some other College. During final argument before us the union (under questioning by the Chair once it became evident where the union's argument logically led) confined its submission to the contention that an employee could be seconded to a management post anywhere outside the College but not to one within if the latter entailed supervising bargaining unit members. Again, if such a major distinction was contemplated by the parties to the agreement the distinguishing words would need to be there, and they are not. We cannot add them, nor interpret the agreement as if they were there. It unfortunately needs repeating that arbitrators cannot "alter, modify or amend any part" of this agreement (a prohibition found in Article 32.04 D). To arrive at the conclusion reached by my colleagues requires that words be added (such as "a secondment to a College administrative position is of a different nature than other secondments as follows...") which the parties themselves have not seen fit to include.

What the parties have done however is to include the following Article:

"27.03 F3 A person who is covered by the Agreement and is assigned a position with the College outside the Agreement after August 31, 1978, will be credited with and maintain seniority as at the date of assignment for six years thereafter while in the employ of the College."

The Chair of our Board holds that that Article is the one which applies to temporary transfers into management positions, but only where the employee becomes a manager of persons in the bargaining unit. How that imaginative and odd distinction is arrived at is substantially less than adequately explained. If I understand his

reasoning, he comes to the position that the staff moves covered by the disputed policy statement cannot be secondments by concluding that absences under Article 27.03 D are all employee-initiated, requiring College approval, whereas an absence under 27.03 F3 is College-initiated. This conclusion seems to be drawn from the latter Article's use of the words "assigned" and "assignment". With respect, that is a distinction without a difference since an employee on secondment may be "assigned" to a College research project outside the bargaining unit for example, where the "assignment" would be as defined in that project. Again using standard dictionary definitions of "secondment", there is nothing in that word's meaning which presumes a secondment's initiation by the employee. In fact the word's etymology shows military origins, suggesting management command, not employee initiation. Thus nothing turns on the fact that "secondments" under this agreement are mentioned in the same Article as employee-initiated absences.

It is also evident by comparing the two Articles in context (27.03 D and 27.03 F3) that the latter appears designed for staff moves intended at the outset to be permanent or long term (a six year seniority protection for example) but which later may need to be reversed for unforeseen reasons. In contrast, the secondment Article contemplates that staff moves, at least at the outset, be temporary (a 24 month seniority rule instead of six years for example). That difference alone suggests that the type of temporary assignment contemplated under the College's disputed policy falls more properly under the secondment Article than under 27.03 F3.

The Chair also argues that the generality of Article 27.03 D(v) must yield to the specifics of Article 27.03 F3. Again with respect, a "secondment" is no more nor less specific than an "assignment", unless of course the contract specifies otherwise; this contract does not.

In any event, neither Article must yield to the other because it is clear that both deal with different sets of circumstances. That is demonstrated by the fact that under 27.03 D employees who remain in the College's active employ "continue to accumulate seniority" indefinitely while on an exchange program or on a professional

development leave, and for up to 24 months while absent through illness or secondment. Under Article 27.03 F3 on the other hand, seniority does not continue to accumulate during the absence but is frozen (and preserved at that level for up to six years) as at the date of assignment outside the bargaining unit, presumably because the transfer is intended to be permanent but offering protection to the employee in case it is not.

Thus it seems obvious that 27.03 F3 and 27.03 D complement one another - the latter covering four types of temporary absence during which seniority continues to accumulate, and the former covering all other types of absence from the bargaining unit during which seniority does not continue to accumulate. My colleagues ignore that clear distinction between the two Articles and thereby introduce conflict and confusion between two complementary provisions.

Since I have already demonstrated that a temporary assignment of an employee to a College administrative post may appropriately be treated as a "secondment", it follows that 27.03 F3 does not apply to a secondment or to any of the other types of temporary absence covered by 27.03 D.

Nothing of import to the grievance before us turns on Article 27.03 F4 or on the Orillia Soldiers Memorial Hospital case referred to by the Chair. That decision might have application to an agreement which did not contain a clause such as Article 27.03 F4, but since the parties to our agreement have decided how to handle the issue covered by the Orillia case, it is irrelevant to our determination and was not argued before us by either the College or the union.


I agree with my colleagues that while an employee is on secondment outside the bargaining unit his/her rights under the contract are limited. However, I must dissociate myself from the illogical conclusion urged on us by the union and accepted by my colleagues that if an employee is on secondment to a temporary management post at the College his/her right to an automatic return to the bargaining unit is different than if the secondment was to a post (managerial or otherwise) elsewhere. That distinction is not supported by the words of the

agreement and it is erroneous to interpret the contract as if such words were there. There is simply no distinction made anywhere in the agreement between types of secondment.

I also agree with the admission by the majority that its decision will make taking an administrative post unattractive. That is an unfortunate but inevitable result of accepting the union's submissions which strike me as being more of a wish list of how the union would like the contract to read (so as to exercise more power over any of its members who might be so uncomrade-like as to consider taking a management job?) rather than logical argument about how it actually reads. As mentioned above, this was inferred by the union's counsel when he asked us not to interpret the word "secondment" in situations where the employee's temporary assignment placed him/her outside the bargaining unit at some other location - a placement which would raise the issue of automatic return to the unit which the union apparently would preserve for some types of secondments but not others - a distinction which, as I have demonstrated, cannot be supported by the existing terms of the collective agreement.

In conclusion, I would allow the grievance to the extent only of finding that the requirement under the "Appointment of Academic Administrators" policy that academic employees seconded into management positions pay union dues, is contrary to Article 1.01 of the collective agreement. The practice of using the secondment mechanism of the contract for temporary assignments outside the bargaining unit, whether at the College or elsewhere and whether into management posts or otherwise, is not a violation of the contract.

17/2/95



R.J. Gallivan