

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND
TECHNOLOGY IN THE FORM OF FANSHAWE COLLEGE
(hereinafter called the "College ")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

UNION POLICY GRIEVANCE DATED May 26, 1992

BOARD OF ARBITRATION: Richard H. McLaren, C. Arb.

Sherril Murray, Union Nominee

David Guptill, College Nominee

COUNSEL FOR THE COLLEGE: Bob Atkinson

COUNSEL FOR THE UNION: Scott Watson

A HEARING IN RELATION TO THIS MATTER WAS HELD AT LONDON, ONTARIO, ON MAY 16, 18
AND 30, AND JUNE 29, 1994. WRITTEN ARGUMENT WAS COMPLETED ON SEPTEMBER 23, 1994.
EXECUTIVE SESSION BY CONFERENCE TELEPHONE CALL APRIL 23, 1995.

A W A R D

This matter involves a Union Policy Grievance in connection with the Nursing Assistant Program {hereafter the NA Program} offered by the College through the Health Technology Division of its School of Health Sciences and Human Services. The grievance alleges that the College violated:

Articles 7, 8 and Appendix 2, et al of the Collective Agreement when they failed to give preference to the designation of full time positions as regular rather than partial load teaching positions in the Nursing Assistant Program.

As remedy we seek that the College immediately designates six additional full time regular teaching positions in the Nursing Assistant Program. (Exhibit 1)

The thrust of the grievance as presented in evidence and argued by the Union focuses upon the clinical portion of the program {Course Number HI262}. The grievance covers the time frame from the Fall of 1990 in September until the Summer of 1992 in May. The number of positions alleged not to have been designated as regular rather than partial load was changed to five from the six in the grievance.

In the first year of the grievance time frame the NA Program was in transition. Prior to the 1990 - 1991 academic year it had been operated by the Ontario Government as a Regional School in London, Ontario. The College took over the program from the Regional School and has been operating it since that time. Thus, the academic year 1990 - 1991 was a transition period in which the predecessor program was being completed with students graduating from it; and, the NA Program operated by the College commencing.

The NA Program is 36 weeks In length. A student may commence the program in September and graduate the following June; or, in January and graduate the succeeding December. The September, 1990 intake was the last complete intake under the curriculum of the Regional School. The two intakes run simultaneously, with the January intake being suspended over the summer vacation. Upon commencing its NA Program in January of 1991 the College introduced a three term curriculum to replace the previous four term system of the Region I School.

The College's three term Program involved an initial term of 15 weeks including both classroom study and clinical experience. A second term of 15 weeks involved 22 hours in a clinical setting, 2 hours in the lab, and 6 hours of theory. The final term was 6 weeks of 30 hours per week of clinical experience. It is the 22 hours of clinical setting in the second term which the grievance focuses upon.

Exhibit 11 is a document prepared by the College with which the Union is in substantial agreement. It is in chart form and sets out the courses, students and faculty for the period from 1990 - 1991 through 1993 - 1994. The enrollment information from that document is set out below:

<u>INTAKE</u>	<u>STUDENT NUMBERS</u>				<u>TOTAL ATTRITION</u>
	<u>TERM 1</u>	<u>2</u>	<u>3</u>	<u>4</u>	
September, 1990	70	70	63	60	10
January, 1991	70	47	47		23
September, 1991	69	66	61		08
January, 1992	68	49	43		25

September, 1992	70	50	49	21
January, 1993	70	47	39	31
September, 1993	51	37		13

This table reveals that intake was reasonably stable until the College's decision to reduce it for the program beginning in September of 1993. Thus, enrolment was predictable but the attrition rate was less so, particularly in the time frame of the grievance.

The staffing of the windout of the Regional School program in September of 1990 to the January intake involved a combination of full time and partial load positions according to Exhibit 11 and the testimony of Dean Kirkby. That pattern continued through to the graduation of the last of the Regional School students in June of 1991. Employees in regular full-time positions entirely staffed the inaugural semester of the NA Program. The second term was staffed by a combination of regular full-time and partial load positions. Partial load positions were only utilized in the clinical portion of second term. The third term of the NA Program was primarily staffed without the use of partial load employees.

The pattern of partial load positions was as follows:

<u>Time</u>	<u>Total Partial Load Designation (Both Intakes)</u>
Sept 9 - Nov. 30/90	8 Partial Load
Oct. 8 - Feb. 8/91	14 Partial Load
Jan. - April 19/91	11 Partial Load
April 22 - June 14/91	12 Partial Load
Sept. - Dec./91	7 Partial Load
Jan. - April/92	11 Partial Load
Grievance Filed	
May - June/92	0 Partial Loads (9 full-time Nursing Program Teachers brought over from Nursing Program)
Sept./92 - Dec./92	8 Partial Load
Nov./92- Dec./92	6 Partial Load
Jan. - April/93	6 Partial Load.

The clinical experience for the NA Program was carried out at three different health care facilities in London: Victoria Hospital, Parkwood Hospital and Marian Villa. Students are divided into groups of 9 or 10, with each group assigned to a particular unit within one of the particular health care institutions. At least two faculty members would supervise the clinical experience. In part, this is caused by the fact that the College can only assign up to 18 teaching contact hours per week to a regular full-time professor according to the terms of the Collective Agreement. On occasion more faculty members were used. The attrition rate in the NA Program also has an effect on the staffing of the clinical teaching in second term.

Exhibit # 21 provides an illustration of how the staffing worked in practice. In Term 2 in the Winter of 1992 student numbers dictated that there be 7 clinical groups, each one taught by two professors. One professor would teach Monday and Tuesday 6 hours each for a total of 12; the other would teach 4 hours on Wednesday and 6 on Thursday for a total of 10. Three regular full-time professors were utilized, and they had additional teaching hours in the Program. Eleven partial load professors who taught exclusively in the second term clinical program filled the balance of the slots in the staffing pattern. The pattern attempted to achieve a goal of two professors per clinical group, each working approximately equal hours on two consecutive days per week with no other clinical teaching assignments.

Aside from the actual staffing pattern that was used, the Union offered its own model of how the staffing could be achieved in a fashion designed to maximize the use of regular full-time positions (Exhibit 13). It used the actual enrollment but divided it into only five sections of students. It also followed the pattern of only two professors teaching each section. The difference was that the pattern of one person teaching Monday/Tuesday and the other teaching the group Wednesday/Thursday was broken into different configurations.

Dean Kirkby describes the rationale of the College configuration and in so doing provides a critique of the model proposed by the Union. The configuration of two different professors teaching on two consecutive days, or what was called in evidence the "2 and 2" staffing pattern, allegedly enables the student to develop a rapport equally with both professors. It was her opinion that this was the best learning environment for the students. Accomplishing this goal necessitated the use of partial load professors. The Union model permitted some clinical groups to be taught on the 2 and 2 approach but others would have a 3 and 1 arrangement, which was also not necessarily consecutive.

The arguments of counsel are merely summarized here as they were expressed in extensive written briefs.

The Union submissions are directed at seeking a declaration that there has been a breach of Appendix II, paragraph 6 by the College failing to give preference to the designation of five full-time positions.

Appendix II, paragraph 6 of the Collective Agreement provides:

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

The College is obligated to "give preference" to the designation of full-time positions as regular. That obligation is subject to operational requirements. The Appendix goes on to give an illustrative series of examples which is not exhaustive or "all-encompassing" as was found to be the interpretation in Humber College in a unanimous decision by a Board of Arbitration chaired by Arbitrator Howe dated April 12, 1994. This proviso is in effect a release from the contractual obligation to "give preference" to the designation of full-time positions as regular. It could operate as such in this case if the College can establish that there are operational reasons for staffing the NA Program in a certain way which involves the use of partial load positions. The issues that must be decided are two fold:

1. are there full-time positions; and
2. regardless, are there operational reasons for the existing staffing pattern?

These issues may be dealt with seriatim. It is logical to commence with the full-time issue as there is no obligation if there are no positions which are full-time. In effect it is a threshold factual issue. However, regardless of the presence of such positions there can be a release from the obligation for operational requirements. Both issues also raise the collateral issues of burden of proof and the shifting onus. The second issue also raises the collateral issue of the standard of arbitral review of the College's rationale as to operational requirements.

At stake between the parties on these issues is efficiency and cost from the College perspective and job protection of full-time employees from the Union perspective. These can be irreconcilable perspectives in this case. The issue in the case then becomes one of precisely what is the College contractually bound to do in the circumstances.

1. Are there full-time positions ?

The evidence clearly establishes that there was an extensive use of partial load personnel. The College submits that the first year of the time frame ought not to be counted because the NA Program was in transition from the Regional School to the College. It further submitted that the remaining period of one academic year, 1991-1992, is an insufficient period in which to make a determination under Appendix II.

Teaching assignments are done primarily on an academic year planning cycle. Article 4.01(2)(a) establishes a work load for an academic year. An academic year provides the basis for the entire work load equalization process of Article 4 and its concomitant SWF's. It would, in such circumstances, be logical and appropriate to interpret Appendix II as implicitly having such a time frame as well. It is so found in this award. The Humber decision, supra used a period of one and a half years. Although the time frame issue decided here did not need to be decided in that case.

The College's submission concerning discounting the first year in the application of the Appendix must be done within the concept of operational requirements and not as being some time frame that could not be examined by the Board. Therefore, the Board finds that a two year time frame to examine the contractual obligation is an acceptable one in the circumstances of this case. The Board has data for a four year period which enables it to put the grievance in perspective. However, the obligation of the Appendix does not need to be spread over this time frame. The Union has restricted the grievance to a two year period. It is found that this is both acceptable and appropriate given this Board's interpretation of the Appendix and its applicable time frame.

Exhibit 11 reveals that full-time nursing program teachers were brought over from the Nursing Program to staff the clinical period in May & June of 1992. This was done because the parties had entered into a local No Layoff Agreement, Exhibit #20. The Board finds that the partial load positions, as set out at page 3, could have been designated as regular despite the fact that the two 15 week terms only total 30 weeks of a work load which has a contract ceiling of up to 36 weeks. The employees could have done other work within the Health Technology Division as was done with Nursing Program teachers who came over to the NA Program in May to June of 1992. Continuing Education was not the exclusive option the College had in assigning further teaching to persons filling these positions. Therefore, it is found that there were full-time positions for which the College could have given preference as being regular.

2. Are there operational reasons for the staffing pattern?

This issue involves the interpretation of the proviso to the College's obligation to give preference to the designation of full-time positions as regular found in Appendix II. There is no evidence that the College could only attain its program objectives or market acceptability by acting as it did. These are two of the operational requirements listed as illustrative examples of circumstances where the provision might relieve the College of the burden of the Appendix. This case also contains no evidence that the College's actions were based upon cost saving or financial considerations, as was the case in Re Humber College, in an unanimous decision of Arbitrator Howe, dated April 12, 1994.

On the facts here there is no issue that full-time NA Program teachers are less qualified to teach courses offered by the partial load designates. Thus, the College is not attempting to justify its conduct on the basis of "special qualifications", a factor listed in Appendix II. There are no apparent program or pedagogical reasons established in evidence for using partial load personnel.

The only part of the illustrative list found in Appendix II which might have application to the facts here is the "quality of the programs". The list in the Appendix is not exhaustive and there can be determined to be other factors which are operational requirements in appropriate cases. The College's rationale for its staffing pattern was put in evidence through the testimony of Dean Kirkby. In summary she testified that the "2 and 2" approach was the best available way to maximize the quality of the clinical program and the academic experience of the students. Such a staffing pattern required the use of a combination of existing regular full-time positions and partial load positions in order to work. Such evidence is either within the enumerated phrase of Appendix II, being "quality of the programs"; or, it is one of the considerations beyond the non-exhaustive list of operational requirements found in Appendix II.

The Union submits that the College does not meet its quality objectives through the use of partial load professors. The Union instead argues that the quality of programs is better served by full-time faculty. It cites some of the activities performed by full-time faculty that enhance program quality as: curriculum development to meet provincial standards; delivery of and assisting the student to transfer nursing theory and acquired skills from the classroom to clinical practice; conducting tutorials and being accessible to students who need remedial assistance throughout the teaching weeks of the college school year; participating in divisional and other meetings within the college as required; and, participating in professional

development. The other evidence the Union provides relates to its various scheduling models. Most of that is used to prove the College treated the Appendix as discretionary and did not turn its mind to the mandatory nature of the Appendix until the memo from Ms. Kirkby in 1992. That memo responded to models put forward by the Union when a No Lay Off situation arose.

All of the foregoing raises the issue of the standard of arbitral review of the College rationale. It is the submission of the College that if the Board is satisfied that the rationale is bona fide, the Board should defer to the expertise of the College and its representatives. It is submitted that the Board ought to refrain from assessing the relative merits of the College's staffing pattern and the various alternative schedules advanced by the Union. In essence this means that a Board of Arbitration should not decide that members of management, for example Dean Kirkby in this case, were wrong in their assessments of the operational requirements unless there is clear and compelling evidence to show that the College has not given appropriate consideration to its contractual obligation of operational requirements.

On the facts in this matter there is no such clear and compelling evidence that management had not given consideration to its contractual obligations as to the operational requirements. Indeed, the memo of May 20th, 1992 by Dean Kirkby, six days before the grievance giving rise to these proceedings states:

The current pattern provides the following opportunities:

1. promotion of sound academic experience for students;
2. consistency in clinical scheduling for students and teachers;
3. flexibility in responding to attrition in the program; and
4. effective utilization of full-time complement.

Both sides put forward some compelling arguments as to the merits of their scheduling patterns in connection with program quality being an operational requirement. However, the Union's proposal lowers the amount of student groups to five from seven thereby changing the student faculty ratios. An important item in a learning environment which is practically oriented. Further, the Union proposal creates unequal scheduling patterns for students which

may or may not have an effect on the learning environment. The 2 and 2 schedule has the fundamental strengths set out in Dean Kirkby's memo which this Board concludes that the union models cannot match. In contrast the strengths in the Union's model can be met through proper management of the current staff, i.e. professional training, helping to translate classroom learning, etc.

This Board must conclude that the College had given appropriate consideration to operational requirements and thus to its contractual obligation. While there may be, as there is here in the Union's model C and other evidence, other methods of doing the same staffing of the clinical program it can not be said that the management method was wrong in their assessment of operational requirements or failed to do an assessment. It was merely different than what the Union might have done were it required to make the same assessments. That does not make the College assessment wrong. It also demonstrates that the College undertook, through Dean Kirkby, consideration of operational requirements. Therefore, on the standard of arbitral review to be applied in these matters the College did consider its contractual obligations as they arise in Appendix II. In the absence of a finding that they did so incorrectly then this Board of Arbitration ought not to interfere in that decision because the College has met their responsibilities and their obligations.

The necessary deduction from the above conclusion must be that the proviso of Appendix II operates to relieve the College of its obligation to give preference in the designation of full-time positions as regular. This occurs because the operational requirements as discussed in this award, and the scope of their review by this Board of Arbitration, mean that the obligation is not contractually required due to operational requirements. This conclusion is independent of whether there are any full-time positions which might be designated as regular. Although in this award it is found that there are such positions established in the evidence.

For all of the foregoing reasons the declaration sought by the grievance must be denied. It is ordered that the grievance be dismissed.

DATED AT LONDON, ONTARIO THIS 2nd DAY OF MARCH, 1995

Richard H. McLaren, C.Arb.

I concur/dissent

"SIGNED"
Sherril Murray, Union Nominee

I concur/dissent

"SIGNED "
David Guptill,
College Nominee