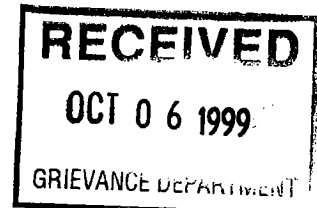


IN THE MATTER OF AN ARBITRATION

BETWEEN:

SENECA COLLEGE

- and -



ONTARIO PUBLIC SERVICES EMPLOYEES UNION

UNION GRIEVANCE

BOARD OF ARBITRATION:

JANE H. DEVLIN

CHAIR

ROBERT J. GALLIVAN

COLLEGE NOMINEE

SHERRIL MURRAY

UNION NOMINEE

BRENDA J. BOWLBY, FOR THE COLLEGE

GEORGE RICHARDS, FOR THE UNION

OPSEU NO.: 97B542 (ACADEMIC)

HEARING DATE: JULY 12, 1999

This matter involves a Union grievance in which it is alleged that in the winter semester in 1997, the College improperly assigned certain Professors workloads in excess of 47 hours per week, including overtime, contrary to Article 11 of the collective agreement. In an earlier award dated June 5, 1998, the Board dismissed the College's preliminary objections to the arbitrability of this grievance.

The relevant provisions of the collective agreement are as follows:

Article 11
WORKLOAD

11.01 A Each teacher shall have a workload that adheres to the provisions of this Article.

11.01 B 1 Total workload assigned and attributed by the College to a teacher shall not exceed 44 hours in any week for up to 36 weeks in which there are teaching contact hours for teachers in post-secondary programs and for up to 38 weeks in which there are teaching contact hours in the case of teachers not in post-secondary programs.

The balance of the academic year shall be reserved for complementary functions and professional development.

Workload factors to be considered are:

- (i) teaching contact hours
- (ii) attributed hours for preparation
- (iii) attributed hours for evaluation and feedback
- (iv) attributed hours for complementary functions

11.01 B 2 A “teaching contact hour” is a College scheduled teaching hour assigned to the teacher by the College.

11.01 C Each teaching contact hour shall be assigned as a 50 minute block plus a break of up to ten minutes.

The voluntary extension of the teaching contact hour beyond 50 minutes by the teacher and any student(s) by not taking breaks or by re-arranging breaks or by the teacher staying after the period to consult with any student(s) shall not constitute an additional teaching contact hour.

11.01 D 1 Weekly hours for preparation shall be attributed to the teacher in accordance with the following formula:

TYPE OF COURSE	RATIO OF ASSIGNED TEACHING CONTACT HOURS TO ATTRIBUTED HOURS FOR PREPARATION
New	1:1.10
Established A	1:0.85
Established B	1:0.60
Repeat A	1:0.45
Repeat B	1:0.35
Special A	as indicated below
Special B	as indicated below

11.01 D 2 No more than four different course preparations or six different sections shall be assigned to a teacher in a given week except by voluntary agreement which shall not be unreasonably withheld.

11.01 D 3 For purposes of the formula:

- (i) “New” refers to the first section of a course which the teacher is
- teaching for the first time. (This definition does not apply to a new full-time teacher who has previously taught the course as a Partial-Load, Sessional or Part-

time employee, nor to courses designated as "Special" as defined below); or

- teaching for the first time since a major revision of the course or curriculum has been approved by the College.
- (ii) "Established A" refers to the first section of a course which the teacher has previously taught but not within the previous three academic years.
- (iii) "Established B" refers to the first section of a course which the teacher has taught within the previous three academic years.
- (iv) Where a non-language course is to be taught in more than one language the first section taught in a second language shall be regarded as "New" or "Established".
- (v) "Repeat A" refers to another section which the teacher is teaching concurrently with the same course for which hours of preparation have been attributed under "New" or "Established", but to students in a different program or year of study.
- (vi) "Repeat B" refers to another section which the teacher is teaching concurrently with the same course for which hours of preparation have been attributed under "New" or "Established" or "Repeat A" to students in the same program and year of study.
- (vii) "Special A" refers to sections of courses in which students may enter on a continuous intake basis or courses which have been organized into individualized self-learning packages.

The first section of a "Special A" course which the teacher has not taught before or which the teacher has not taught within the previous three academic years attracts the numerical value in "Establish A" (1:0.85).

The first section of a "Special A" course which the teacher has taught within the previous three academic years, attracts the numerical value in "Established B" (1:0.60).

Repeat sections of a "Special A" course attract the numerical value in "Repeat A" (1:0.45).

- (viii) "Special B" refers to preparation for sections of a course in which the objectives describe the students' application of knowledge in actual work settings.

The first section of a "Special B" course which the teacher has not taught before or which the teacher has not taught within the previous three academic years attracts the numerical value in "Established A" (1:0.85).

The first section of a "Special B" course which the teacher as taught within the previous three academic years, attracts the numerical value in "Established B" (1:0.60).

Repeat sections of a "Special B" course attach the numerical value in "Repeat B" (1:0.35).

Additional time necessary to arrange and prepare for student placement in such learning situations shall be attributed on an hour for hour basis and recorded on the Standard Workload Form (SWF), as referred to in 11.02.

- (ix) Hours for curriculum review or course development assigned to a teacher on an ongoing basis, in lieu of teaching or in a non-teaching period, shall be attributed on an hour for hour basis and recorded on the SWF.

11.01 E 1 Weekly hours for evaluation and feedback in a course shall be attributed to a teacher in accordance with the following formula:

RATIO OF ASSIGNED TEACHING CONTACT HOURS TO ATTRIBUTED HOURS FOR EVALUATION AND FEEDBACK		
Essay or Project	Routine or Assisted	In-Process

1:0.030
per student

1:0.015
per student

1:0.0092
per student

11.01 E 2 For purposes of the formula:

- (i) "Essay or project evaluation and feedback" is grading:
- essays
 - essay type assignments or tests
 - projects; or
 - students performance based on behavioural assessments compiled by the teacher outside teaching contact hours.
- (ii) "Routine or assisted evaluation and feedback" is grading by the teacher outside teaching contact hours of short answer tests or other evaluative tools where mechanical marking assistance or marking assistants are provided.
- (iii) "In-process evaluation and feedback" is evaluation performed within the teaching contact hour.
- (iv) Where a course requires more than one type of evaluation and feedback, the teacher and the supervisor shall agree upon a proportionate attribution of hours. If such agreement cannot be reached the College shall apply evaluation factors in the same proportion as the weight attached to each type of evaluation in the final grade for the course.

11.01 E 3 The number of students in a course or section shall be determined initially by the College's planning estimates and recorded on the SWF as provided for in 11.02.

The number of students in a course or section shall be reviewed after completion of the course or section or, at the request of the teacher, following the last day for withdrawal of registration by the student(s), and revised where appropriate.

11.01 F Complementary functions appropriate to the professional role of the teacher may be assigned to a teacher by the College. Hours for such functions shall be attributed on an hour for hour basis.

An allowance of a minimum of five hours of the 44 hour maximum weekly total workload shall be attributed as follows:

three hours for routine out-of-class assistance to individual students

two hours for normal administrative tasks.

11.01 G 1 Where preparation, evaluation, feedback to students and complementary functions can be appropriately performed outside the College, scheduling shall be at the discretion of the teacher, subject to the requirement to meet appropriate deadlines established by the College.

11.01 G 2 Where there are atypical circumstances affecting the workload of a teacher or group of teachers which are not adequately reflected in this Article 11, Workload, additional hours shall be attributed, following discussion between each teacher individually and the supervisor, on an hour for hour basis.

11.01 H 1 The College shall allow each teacher at least ten working days of professional development in each academic year.

11.01 H 2 Unless otherwise agreed between the teacher and the supervisor, the allowance of ten days shall include one period of at least five consecutive working days for professional development.

11.02 H 3 The arrangements for such professional development shall be made following discussion between the supervisor and the teacher subject to agreement between the supervisor and the teacher, and such agreement shall not be unreasonably withheld.

11.01 I Teaching contact hours for a teacher in post-secondary programs shall not exceed 18 in any week. Teaching contact hours for a teacher not in post-secondary programs shall not exceed 20 in any week.

11.01 J 1 Notwithstanding the above, overtime worked by a teacher shall not exceed one teaching contact hour in any one week or three total workload hours in any one week and shall be voluntary.

11.01 J 2 Such teaching contact hour agreed to in excess of the respective weekly teaching contact hour maximum shall be compensated at the rate of 0.1% of annual salary. Such workload hours agreed to in excess of the 44 hour weekly workload maximum shall be compensated at the rate of 0.1% of annual salary. Such overtime payments shall be for the greater amount but shall not be pyramided.

11.01 J 3 All such voluntary overtime agreements, which shall not be unreasonably withheld, shall be set out in writing on the SWF for that period by the College and filed with the teacher and the Union Local within ten days.

11.01 J 4 Probationary teachers shall not be assigned teaching contact hours or total workload hours in excess of the maxima under any circumstances.

11.01 M Where a Union Local and a College agree in writing on terms governing workload assignments at the College, such agreements shall be binding on the College, the Union Local and the teachers and timetables shall be established in accordance with such local agreements.

11.02 A 1(a) Prior to the establishment of a total workload for any teacher the supervisor shall discuss the proposed workload with the teacher and complete the SWF, attached as Appendix I, to be provided by the College. The supervisor shall give a copy to the teacher not later than six weeks prior to the beginning of the period covered by the timetable excluding holidays and vacations. It is recognized that if the SWF is subsequently revised by the College, it will not be done without prior consultation with the teacher.

11.02 A 1 (b) The College may, where a change in curriculum requires it, amend assignments provided to a teacher after the original assignment, subject to the teachers' right to refer any matter to the College Workload Monitoring Group (WVG) referred to in 11.02 B 1 and if necessary, the Workload Resolution Arbitrator (WRA) referred to in 11.02 E 1 and appointed under 11.02 F 1.

11.02 A 2 The SWF shall include all details of the total workload including teaching contact hours, accumulated contact days, accumulated teaching contact hours, number of sections, type and number of preparations, type of evaluation/feedback required by the curriculum, class size, attributed hours, contact days, language of instruction and complementary functions.

Article 32 GRIEVANCE PROCEDURES

Union Grievance

32.10 The Union or Union Local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees.

Such grievance shall be submitted in writing by the Union Grievance Officer at Head Office or a Union Local President to the Director of Personnel or as designated by the College, within 20 days following the expiration of the 20 days from the occurrence or origination of the circumstances giving rise to the grievance commencing at Step One of the Grievance procedure.

As indicated in the Board's earlier award, the College employs approximately 500 Professors. The workload of each Professor is set out on a Standard Workload form ("SWF") which is prepared by the College and delineates teaching contact hours and attributed hours as provided in Article 11. Pursuant to that Article, SWF's must be provided to Professors six weeks in

advance of the period covered by the SWF. SWF's are initially prepared based on the College's estimates of enrolment for particular courses which takes into account actual enrolment to date as well as enrolment in previous years. The level of enrolment affects the number of attributed hours. For purposes of determining actual enrolment in a given course, the College conducts an audit approximately ten days after the course commences, which is referred to as the "ten day audit". The parties agreed that this audit determines the remuneration paid to Professors. A final audit of enrolment is also conducted toward the end of each course.

The winter semester in 1997 extended from January to April and SWF's for this semester were initially prepared and reviewed with Professors in October, 1996. Ten day audits of course enrolment were conducted in January, 1997 and final audits were conducted in April of that year.

The grievance concerns the workload of four Professors, namely, Ms. Ness and Messrs. Bishop, Howarth and Wade. As to the individual workload of these Professors, the evidence indicates that Mr. Howarth's initial SWF reflected a total workload of 46.70 hours. At the time of the ten day audit, his total workload was 47.54 hours and at the time of the final audit, it was 47.51 hours. Harvey Brodhecker, Chair of the School of Business Management in

which Mr. Howarth taught in the winter of 1997, testified that when the initial SWF was prepared, he did not intend to assign Mr. Howarth a workload of more than 47 hours per week. Mr. Brodhecker explained, however, that during the winter semester, Mr. Howarth taught two marketing courses, one of which involved a number of sections, and that while enrolment generally declines as the semester progresses, in these courses, enrolment increased over initial estimates by a total of eight students. Mr. Brodhecker also testified that he did not believe it was appropriate to remove students or limit the number of students in these courses and that in the past, the failure to do so had not resulted in any Professor being assigned a workload in excess of 47 hours per week.

As well, Mr. Brodhecker testified that Mr. Howarth was the only Professor who taught one of the marketing courses to which he assigned and, accordingly, it was not feasible to establish another section in that course. At the time, there were also a limited number of Professors who were qualified to teach the other course to which Mr. Howarth was assigned and Mr. Brodhecker testified that enrolment in other sections of that course also increased. He acknowledged, however, that he did not pursue assigning some of Mr. Howarth's students to Professors who taught other sections as Mr. Howarth agreed to the additional workload.

As to Mr. Bishop, his initial SWF reflected a total workload of 42.28 hours per week. At the time of the ten day audit, his total workload was 47.46 hours per week and at the time of the final audit, it was 47.23 hours per week. Ron Francis, Chair of the School of Accounting and Finance in which Mr. Bishop taught in the winter semester of 1997, testified that in one course, Mr. Bishop was initially attributed hours for preparation for a "repeat" course but that after some discussion, it was agreed that preparation for a "new" course was appropriate. Mr. Bishop was also assigned to teach this course with another Professor and the course involved a two hour laboratory session and a two hour lecture. Both Professors, however, subsequently advised Mr. Francis that it would be more beneficial to students if the laboratory session, which Mr. Bishop taught, was extended to three hours and the lecture reduced to one hour. As a result of this change, Mr. Bishop's total workload increased to 46.95 hours per week. Moreover, Mr. Francis testified that overall enrolment did not decline to the extent anticipated and, in fact, in some courses, it increased, which was unusual. Accordingly, at the time of the final audit, Mr. Bishop's total workload was 47.23 hours per week. Mr. Francis testified that he had not previously been involved in a situation in which fluctuations in enrolment resulted in a Professor being assigned in excess of 47 hours per week.

Mr. Francis also testified that he considered various options to reduce Mr. Bishop's workload but that as laboratory time was limited, it was not feasible to create another laboratory section. Moreover, for pedagogical reasons, he did not consider assigning a third Professor to the course on a part-time basis. It was also not possible to limit the number of students as the course was scheduled in the second semester of a one year program. As well, some disruption would have been involved had students in Mr. Bishop's other courses been assigned to other sections of those courses. In any event, Mr. Francis testified that he spoke with Mr. Bishop and that an understanding was reached that Mr. Bishop need not attend faculty meetings for which he was attributed .50 hours weekly on his SWF.

As to Ms. Ness, her initial SWF reflected a total workload of 38.88 hours. At the time of the ten day audit, her total workload was 49.70 hours and at the time of the final audit, it was 49.10 hours per week. Maureen Kennedy-Baker, Chair of the School of International Business and Marketing in 1997, testified after the initial SWF was prepared, Ms. Ness requested that she be assigned to teach an additional course to prepare students for a travel-study excursion she was leading to the University of Madrid that spring. Ms. Kennedy-Baker acceded to that request and testified that as a result of attributed hours for preparation for a new course and higher than expected enrolment, Ms. Ness was assigned a

total workload in excess of 47 hours per week. Ms. Kennedy-Baker also testified that in view of student timetables, it was not feasible to create another section in that course. Moreover, Ms. Ness was not willing to forego teaching an independent study course which she had developed the previous spring, nor was there another Professor at the time who was qualified to teach an advertising course to which Ms. Ness was also assigned.

When it became apparent that Ms. Ness' total workload would exceed 47 hours per week, Ms. Kennedy-Baker spoke with her and an arrangement was made whereby assistance would be provided with marking. Ms. Kennedy-Baker, however, did not alter the evaluation factors on Ms. Ness' SWF as she did not want to establish a precedent for course delivery in the future. Although Ms. Kennedy-Baker also testified that she advised Ms. Ness that she need not attend faculty meetings for which she was attributed .50 hours weekly on her SWF, Ms. Ness attended all such meetings. Ms. Kennedy-Baker testified that she had not previously assigned a faculty member a workload of more than 47 hours per week.

As to Mr. Wade, the evidence indicates that his initial SWF reflected a total workload of 43.25 hours per week. At the time of the ten day audit, his total workload was 47.09 hours per week and at the time of the final audit, it was

46.10 hours. Bill Humber, Chair of the School of Civil and Resources Technology in which Mr. Wade taught in the winter semester of 1997, was not available to give evidence on the scheduled hearing date. However, the parties agreed that his evidence would have been to the same effect as other Chairs in that Mr. Wade was assigned a workload in excess of 47 hours per week as a result on unexpected increases in student enrolment which had not occurred in the past.

There was no dispute that all of the Professors agreed to the workloads assigned and none filed a grievance or submitted a complaint to the Workload Monitoring Group. It was also acknowledged that the College did not seek the Union's agreement to assign these Professors workloads in excess of 47 hours per week. Moreover, apart from the grievance before the Board, the evidence indicates that two other grievances were filed in 1997 alleging similar breaches of the collective agreement. The initial grievance, which was filed in May, 1997 and involved one Professor, was subsequently abandoned. The second grievance, which was filed in November, 1997, involved five Professors, and the College advised that this grievance was settled by the parties on a without prejudice basis. Although the Union also indicated that a further grievance was filed in 1999, the College indicated that it had no knowledge of such a grievance.

The issue to be determined is whether the College violated Article 11.01 of the collective agreement by assigning Ms. Ness and Messrs. Bishop, Howarth and Wade total workloads in excess of 47 hours per week, including overtime. Moreover, as indicated in the Board's earlier award, it is also necessary to determine whether the grievance concerns an unreasonable standard which is patently in violation of the agreement as provided in Article 32.10 of the collective agreement. This Article sets out the criteria for a Union grievance and provides, among other matters, that a Union grievance shall not include any matter upon which an individual employee would be personally entitled to grieve and the grievance procedure for personal and group grievances shall not be bypassed except where the Union establishes that the employee has not grieved an unreasonable standard which is patently in violation of the agreement. For the reasons set out in our earlier award, the Board found that whether or not the grievance involves an unreasonable standard which is patently in violation of the agreement was more appropriately decided on the merits, rather than on a preliminary basis.

As to the alleged violation of Article 11, it is necessary to consider the various aspects of this Article in context. In this regard, Article 11.01 A specifies that each Professor shall have a workload which adheres to the

provisions of the Article. Workload factors consist of teaching contact hours, attributed hours for preparation, evaluation and feedback and complementary functions and the details of a Professor's workload are to be set out on a SWF. Article 11.01 B defines a teaching contact hour and provides that total workload shall not exceed 44 hours in any week for up to 36 weeks in which there are teaching contact hours for Professors in post-secondary programs and for up to 38 weeks for Professors in non-secondary programs. Article 11.01 D provides for the attribution of hours for preparation based on the type of course assigned and Article 11.01 E provides for the attribution of hours for evaluation and feedback based on the method of evaluation and feedback used. Article 11.01 F provides for the assignment of complementary functions which are attributed on an hour for hour basis. Article 11.01 G 2, which was relied on by the College, provides that where there are atypical circumstances affecting the workload of a teacher or group of teachers which are not adequately reflected in Article 11, additional hours shall be attributed on an hour for hour basis, following discussion between the Professor and his or her Supervisor.

Article 11.01 H deals with professional development. Article 11.01 I provides that teaching contact hours for Professors in post-secondary programs shall not exceed 18 in one week or 20 in one week for Professors in non-post secondary programs. Article 11.01 J provides that notwithstanding the above,

overtime worked by a teacher shall not exceed one teaching contact hour per week or three total workload hours in a week and shall be voluntary. Article 11.01 J 2 specifies the manner in which Professors are to be remunerated for teaching contact hours or total workload hours agreed to in excess of the maxima. Article 11.01 J 3 provides that voluntary overtime agreements shall not be unreasonably withheld and shall be set out in writing on the SWF and filed with the Union within a specified period. Article 11.10 J 4 provides that probationary teachers shall not be assigned teaching contact hours or total workload hours in excess of the maxima under any circumstances. Article 11.01 K specifies the maximum number of teaching contact days and teaching contact hours in an academic year and also sets out the manner in which Professors are to be remunerated for work in excess of the maxima. Article 11.01 L deals with certain matters related to work scheduling and Article 11.01 M provides that where a Union Local and a College agree in writing on terms governing workload assignments, such agreements shall be binding on the College, the Union Local and the Professors and timetables shall be established in accordance with such agreements.

Based on the provisions of Article 11, it is apparent that the parties have established certain limits or maxima which apply to matters such as the assignment and attribution of total workload, teaching contact hours and teaching

contact days. Nevertheless, certain of these maxima may be exceeded and the parties have specified the rate at which Professors are to be compensated for the additional hours or days worked. For purposes of this case, the Board notes that although Article 11.01 B 1 specifies that total workload shall not exceed 44 hours per week and Article 11.01 I provides for a maximum of 18 or 20 teaching contact hours weekly (depending on whether the program is post-secondary or non post-secondary), Article 11.01 J provides that on a voluntary basis, Professors (other than probationary Professors) may be assigned one additional teaching contact hour or three total workload hours weekly on an overtime basis. Article 11.01 J further specifies the manner in which Professors are to be compensated for the additional hours worked.

It was the contention of the Union that a total workload of 47 hours per week, including overtime, represents a "hard ceiling" and that, even on a voluntary basis, Professors cannot assigned a workload beyond that limit. Such an assignment, it was submitted, can only be made pursuant to an agreement between the College and the Union Local as provided in Article 11.01 M.

It was the submission of the College that in this case, unexpected increases in student enrolment, which had not occurred previously, resulted in a small number of Professors being assigned in excess of 47 hours per week. The

College further contended that these increases in enrolment constituted “atypical circumstances” as a consequence of which additional hours could be assigned in accordance with Article 11.01 G 2. In the Board’s view, however, for a number of reasons, the submission of the College cannot prevail. Firstly, although the evidence suggests that student enrolment generally declines, rather than increases, the collective agreement contemplates that there will be fluctuations in enrolment and, for this reason, audits of enrolment are conducted. Accordingly, it is not clear that fluctuations in enrolment constitute “atypical circumstances” within the meaning of Article 11.01 G 2.

More importantly, Article 11.01 G 2 provides that where there are atypical circumstances affecting the workload of a Professor or group of Professors not adequately reflected in Article 11, additional hours may be “attributed” following discussion between the Professor and his or her Supervisor. In this case, none of the Professors in question was attributed additional hours beyond those specified in the formulae set out in Article 11.01. Instead, the attribution of hours expressly provided for in that Article resulted in each Professor being assigned a total workload in excess of the maximum of 47 hours per week, including overtime, specified in Article 11.01 J.

Moreover, in the Board's view, Article 11.01 G 2 is not intended to permit assignments of more than 47 hours per week. In this regard, we note that in contrast to Articles 11.01 J and K, Article 11.01 G 2 contains no provision respecting the rate at which Professors are to be compensated for the additional hours worked. Furthermore, if the College were correct, assignments of total workload in excess of 47 hours per week could be made following discussion between the Professor and his or her Supervisor and would not explicitly require agreement on the part of the Professor which is necessary for overtime assignments between 44 and 47 hour per week. Such a result would be anomalous. Accordingly, the Board finds that Article 11.01 G 2 is not intended to permit assignments of total workload beyond 47 hours per week, including overtime, and that such assignments are expressly prohibited by Article 11.01 J.

In addition, as the grievance concerns assignments of total workload which exceed the clear standard set out in Article 11.01 J, the Board finds that it involves an unreasonable standard which is patently in violation of the agreement as provided in Article 32.10. In the Board's view, this conclusion is also supported by the award in Fanshawe College of Applied Arts and Technology and Ontario Public Service Employees' Union February 27, 1991 (Kruger (unreported)) in which the Board found that the criteria for a Union grievance had been satisfied where four full-time employees who also occupied part-time

positions were not paid premium pay for hours worked beyond their regular hours. In this respect, the Board found that the College had established an unreasonable standard in patent violation of the agreement.

A similar conclusion regarding the propriety of a Union grievance was also reached in Fanshawe College of Applied Arts and Technology and Ontario Public Service Employees Union March 29, 1989 (Burkett (unreported)). Although the award was initially set aside by the Divisional Court, an appeal to the Court of Appeal was allowed and the application for judicial review dismissed: see Re Board of Governors of Fanshawe College of Applied Arts & Technology and Ontario Public Service Employees Union et al. (1990) 70 D.L.R.(4th) (Ont. Div. Ct.) and Board of Governors of Fanshawe College of Applied Arts and Technology and Ontario Public Service Employees Union et al. June 8, 1994 (Ont. C.A.(unreported)).

In the Fanshawe College award of the Burkett Board, the Union alleged that the College was improperly assigning partial teaching contact hours contrary to Article 4.01(3) (now Article 11.01 C) which stipulated that each teaching contact hour shall be assigned in a 50 minute block plus a break of up to 10 minutes. Although the Union's complaint had previously been upheld by a Workload Resolution Arbitrator, the College contended that it was free to assign

teaching contact hours in less than 50 minute blocks. The majority of the Board determined, however, that the College's refusal to accept and apply the interpretation of a threshold standard adopted by the Workload Resolution Arbitrator constituted the application of an unreasonable standard which was patently in violation of the agreement.

Although in this case, there is no prior award of a Workload Resolution Arbitrator, the issue before this Board was previously considered in Ontario Public Service Employees Union and Fanshawe College April 18, 1996 (MacDowell (unreported)). In that case, the grievance concerned whether the College could schedule Professors to teach beyond the 36 and 38 week limits referred to in Article 11.01 B. In the course of addressing that issue, the Board found it necessary to consider various provisions of Article 11.01 and in doing so, concluded that it was not open to the College to assign Professors workloads beyond the "hard ceiling" set out in Article 11.01 J.

Nevertheless, the College submitted that the Fanshawe College award of the Burkett Board is distinguishable as in that case, the College adopted a policy of assigning teaching contact hours in less than 50 minute blocks. In this case, it was contended that the College did not intend to assign Professors workloads in excess of 47 hours, including overtime, and that such assignments

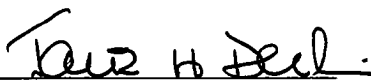
resulted from unexpected increases in student enrolment. In the Board's view, however, the submission of the College cannot prevail. Article 11.01 provides that each Professor shall have a workload which adheres to the provisions of the Article. The Article contains a number of "clearly defined threshold standards" and, as noted by the Burkett Board, it would be unusual to establish such standards and yet deny the Union the means to ensure their consistent application. Accordingly, as the College deviated from the threshold standard set out in Article 11.01 J, the Union was entitled to grieve and the propriety of that grievance cannot turn on whether or not the College intended at the outset to assign workloads which exceeded the standard. Moreover, we find that such assignments constituted a patent or clear violation of the agreement.

Finally, as to the suggestion that the workloads of Mr. Bishop and Ms. Ness did not exceed 47 hours per week, including overtime, as Mr. Bishop was not required to attend faculty meetings and Ms. Ness was provided with marking assistance, the Board notes that no formal amendment was made to the SWF of either Professor. Article 11.02, however, requires that all details of a Professor's workload be set out on a SWF. In the circumstances, therefore, it was not open to the College to enter into arrangements with individual Professors regarding workload assignments not reflected on the SWF, nor could the College make arrangements with individual Professors for workloads in excess of 47

hours per week, including overtime. Instead, as indicated previously, such assignments can only be made pursuant to an agreement between the College and the Local Union in accordance with Article 11.01 M.

In the result, the Board finds that to the extent that the College assigned the Professors in question total workloads in excess of 47 hours per week, including overtime, it violated Article 11 of the collective agreement. Nevertheless, in the Board's view, this is not an appropriate case for a cease and desist order which was requested by the Union and relief shall be limited to a declaration of the violation. The Board shall remain seized for purposes of implementation of this award.

DATED AT TORONTO, this 4th day of October, 1999.


Chair

See Dissent Attached
College Nominee

"Sherril Murray"
Union Nominee

DISSENT OF R.J. GALLIVAN

I cannot concur in a decision which relies on entirely different facts from other arbitration awards, and which holds that the rules governing union grievances no longer apply to the hours of work provisions of the contract. The rules which the parties have agreed are to be applied to union grievances such as the one before us are found in Article 32.10:

The Union or Union Local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees.

The Chair has found that that Article no longer applies to union grievances dealing with the hours of work provisions of Article 11 because to apply it as written could lead to an "unusual" result.

While the concept of union grievances separate from employee grievances is not unusual in labour contracts, the second sentence of the above Article is unusually specific in setting out four pre-conditions for a valid union grievance:

- an issue which an employee could grieve but didn't
- an unreasonable standard
- a patent violation
- an adverse effect on employee rights.

All four conditions must be met; if even one is not, a union grievance is not valid under this contract. It is also clear that whether the conditions are met or not will depend on the facts unique to each case

That provision sets out a clear "hard ceiling" on weekly hours for probationary employees. However, having set that absolute ceiling for probationers, the parties to the contract chose not to use similar language for non-probationary employees. Is it thus possible that the parties did not intend there to be an absolute maximum limit on weekly hours for non-probationary employees? Since the answer is at least arguable, there can be no "patent violation". The union's argument may be the more compelling one, but it is no better than arguable. That being the case, the union grievance on the issue before us cannot be a valid one since it fails to meet the "patent violation" threshold test.

The Chair relies on three arbitration awards dealing with various aspects of hours of work to determine that the issue before us meets the Article 32.10 tests. The first is by arbitrator Kruger in Fanshawa College and OPSEU, February 27, 1991 (unreported) which accepted as a valid union grievance (under the Support Staff contract, not the different Academic agreement we must interpret) an allegation that full-time employees were also doing part-time work for their same employer without being paid overtime premium for work beyond their total regular hours. The arbitrator found that since the Support Staff contract clearly requires overtime pay, since the College practice not to pay it was a standard applied to all its full-time employees doing extra part-time work, and since the practice could have an adverse effect on employees by denying overtime assignments at premium pay, the arbitrator found the conditions for a union grievance to have been met.

The second case relied upon by the Chair is an award by arbitrator Burkett in Fanshawe College and OPSEU, March 29, 1989 (unreported). In that case the employer was assigning teaching contact hours in blocks of less than 50 minutes despite Article 4.01(3) (now Article 11.01C) which reads in part:

Each teaching contact hour shall be assigned as a 50 minute block plus a break of up to ten minutes.

A Workload Resolution Arbitrator found the College's practice to be in violation of that Article but the College decided not to give the award

general application (as is its right) and continued to schedule blocks of less than 50 minutes. The award concluded that Article 4.01(3) was "unequivocal" and therefore that the College's position was a patent violation and met the other conditions for a valid union grievance.

The third case which the Chair claims supports her view is an award by arbitrator MacDowell at Fanshawe College and OPSEU, April 7, 1995 (unreported). Our Chair says of it:

Although in this case there is no prior award of a Workload Resolution Arbitrator, the issue before this Board was previously considered in Ontario Public Service Employees Union and Fanshawe College April 18, 1996 (MacDowell)(unreported). In that case, the grievance concerned whether the College could schedule Professors to teach beyond the 36 and 38 week limits referred to in Article 11.01 B. In the course of addressing that issue, the Board found it necessary to consider various provisions of Article 11.01 and in doing so, concluded that it was not open to the College to assign Professors workloads beyond the "hard ceiling" set out in Article 11.01 J.

With respect, that is not what Mr. MacDowell said. He concluded that because the contract allowed specific exceptions to the maximum number of hours in a week but made no mention of any exceptions to the stipulated number of teaching weeks, the parties must have intended an absolute limit on the number of weeks:

In other words, where the parties have intended that a workload ceiling could be exceeded in some manner or with the consent of the professor concerned, they have said so. Where the parties intended to make employee consent a factor in the equation, they had no difficulty finding language to accomplish that purpose. They did so explicitly. But there is no such "employee consent" language respecting extra teaching weeks.

...

For the foregoing reasons, we have concluded that the College cannot schedule beyond the number of teaching weeks.... (my emphasis)

Despite the fact that the Chair in our case claims the issue before us was decided by Mr. MacDowell, his Board was not asked to decide that this contract provided an absolute maximum number of weekly

hours. He set out the issue before him as follows:

This is a "policy grievance" filed by the union. The question it raises can be stated quite simply: can the College schedule a professor to teach beyond the 36 and 38-week limits prescribed in Article 11.01 B 1 of the collective agreement....

In fact the union in our case could point to no arbitration award under this contract which dealt with the issue before us of maximum weekly hours. The absence of prior awards on the point supports the view that the College's case was at least arguable, particularly as Mr. MacDowell says in the above Fanshawe award: "No doubt the language is not a model of clarity".


Since the MacDowell award cannot be found as having decided the specific issue before us, can it and the other two awards relied upon by the Chair be used to conclude that the grievance before us is a valid union grievance? Clearly not, since, as outlined above, the facts unique to each case must be tested against the pre-conditions for a union grievance set out in Article 32.10. The facts in each of those three cases have nothing in common with each other or with the facts of our case beyond involving, in the broadest sense, hours of work. It is clearly erroneous to conclude that because those arbitration boards found on the facts before them that the union grievances were valid, the one before us - despite its totally different facts - must also be valid. While consistency of interpretation of the contract by arbitrators is of value to the parties, different fact situations can and should, where appropriate, lead to different results.

For the reasons pointed out in my dissent to the earlier award by this Board (dated June 5, 1998) on the College's preliminary objections to the arbitrability of the grievance, I do not believe that the fourth criterion required by Article 32.10 - adverse effect on employees - has been established by the union. We heard no evidence of any actual adverse effect on the four or any other employees caused by the extra minutes of work. Since overtime is voluntary (Article 11.01 J 1 and 11.01 J 3), thus putting within each employee's discretion the

ability to avoid any potential adverse consequences, a finding of adverse effect cannot realistically be made. Without such a finding, the union's grievance cannot be valid.

By any fair and objective reading of this contract, three of the four conditions for a union grievance simply have not been met. If even one is not, the grievance cannot be arbitrable.

Finally, the Chair argues that to deny the union the right to grieve denies it the means to ensure consistent application of Article 11. In other words, the requirements of Article 32.10 no longer apply to that hours of work Article. It should be unnecessary to have to point out that we are required to interpret the contract as the parties bargained it. We have no evidence of the bargaining history which led the union to accept all the pre-conditions for a union grievance in Article 32.10 nor evidence of what concessions in bargaining the Council of Regents may have made in winning or maintaining that acceptance. (Was the Council attempting to contain the cost of dealing with an overwhelming number of nuisance grievances in this system?) What we do have is an obligation to interpret the bargain the parties struck and to give the words of the contract their normal meaning whether we think the result "unusual" or not. It is not up to an arbitration board to rescue either of the parties from an agreement freely bargained, nor to delete one of its provisions.



R.J. Gallivan