IN THE MATTER OF AN ARBITRATION UNDER
THE ONTARIO *LABOUR RELATIONS ACT*

BETWEEN:

ALGONQUIN COLLEGE

("the Employer")

AND

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("the Union")

WORKLOAD RESOLUTION ARBITRATION
DAVID FERRIES

AWARD

ARBITRATOR: BARRY STEPHENS

FOR THE EMPLOYER: PETER MCKERACHER

FOR THE UNION: PATRICK KENNEDY

Heard on June 22, 2010

Decision Released July 8, 2010

<u>A W A R D</u>

[1] The complainant, David Ferries, is an instructor in Financial, Office and Legal Studies. Mr. Ferries has had a hearing disability for 20 years or more. The employer has been aware of his disability throughout, and has received medical documentation with respect to the disability that has not been challenged. I was advised that the disability makes it difficult for Mr. Ferries to maintain appropriate communication in a classroom setting, given the size of the room, the number of people present and the inevitable ambient background noise. For some time, at least during the period of his disability, a significant portion of Mr. Ferries' workload assignment has been to act as the Continuing Education (CE) Coordinator. This work involves mostly one-on-one communication, either in person or over the phone, which Mr. Ferries has been able to carry out in spite of his hearing limitations. Although Mr. Ferries has carried a full workload throughout, he has not had a teaching assignment for the past 20 years.

[2] Mr. Ferries files the present workload complaint as a result of the fact that, in Winter 2010, his SWF was amended to remove the CE assignment. At the time, he was given two classroom-teaching assignments, although subsequent to the complaint the employer agreed this assignment should be removed from the complainant's SWF pending the consideration of any accommodation discussions. The SWF indicates that Mr. Ferries will continue his work as the Coordinator for Professional Accounting, and there is no dispute with respect to that part of his assignment.

[3] The grievor was advised of the change to his assignment, including the teaching portion, in an email he received from Dave Donaldson, the Dean of the School of Business. The email indicated that the coordinating work was being removed as a result of "integration of the SPTS work back into the School of Business", and that the work would be reorganized in accordance with "a new model more in line with other programs within the School of Business". Later that day, Mr. Ferries received the SWF in question. He then had a discussion later in the day with his department chair, Lisa Taylor, objecting to the inclusion of the teaching assignment given his hearing disability. Ms. Taylor responded that the employer was following correct procedure by issuing the SWF with the teaching assignment, and it was up to Mr. Ferries to respond by requesting accommodation, and the Human Resources Department would process any such request.

[4] The union asserts that the SWF violated the employer's duty to accommodate and his rights to be treated with dignity with respect to his disability under the Ontario *Human Rights Code*. The complaint also alleges the employer violated the obligation under Art. 11.02 A 1 (a) to "…discuss the proposed workload with the teacher", given that the notice he received did not allow for meaningful discussion or input with respect to the SWF. The union also disputes the reasons provided by the employer for the change to the SWF, and alleges that the changes were a rationale for the real objective, which is to move Mr. Ferries out of the assignment that he has filled for many years for

reasons that have not been made clear. The remedy requested by the union is that the disputed work should be re-assigned to Mr. Ferries.

[5] The employer argues there was no violation of Mr. Ferries' human rights, and that such an allegation was, in any case, not a matter for the workload resolution process. The employer asserted that accommodation issues must be addressed through the accommodation process, and that a workload resolution arbitrator is confined to strict issues of workload assignment as set out in the collective agreement. With respect to the coordination work at issue, the employer argued that Mr. Ferries did not maintain any rights of ownership over the work, no matter how long he has performed it, and that the employer has the right to assign such work to other employees using a different model. Put another way, the employer submitted, a workload complaint is about whether a disputed workload is appropriate, and cannot be used as a method for procuring a specific assignment for a teacher. The employer also takes the position that Mr. Ferries had not formally requested accommodation at any time prior to his current complaint, and that his request, now that it had been made, would be processed through the appropriate process.

Decision

[6] I do not accept the employer's submission that the workload resolution process is exempt from or outside human rights concerns. The fact that there is a process in the workplace to deal with requests for accommodation does not mean that the employer

can safely put off human rights concerns until after a request or complaint has been filed through the proper channels. More importantly, a Workload Resolution Arbitrator cannot and should not discount human rights issues as part of the workload resolution process. The law requires that human rights should be respected in every process and in every aspect of the College's relationship with its employees, and I must give due consideration to whether Mr. Ferries' human rights have been respected in the manner in which his SWF has been issued.

[7] In this instance, I do not believe the employer's actions were consistent with Mr. Ferries' human rights, or the requirements of the Article 11. The employer was aware that Mr. Ferries had hearing problems, and has been provided with medical documentation with respect to the disability. While Mr. Ferries may not have formally requested accommodation prior to 2010, his workload assignment was, for many years, structured in such as way as to accommodate his hearing issues. It seems logical to conclude that this history is sufficient to justify a reasonable understanding on Mr. Ferries' part that he was already being accommodated, regardless of whether any specific procedure had been followed, and that he had a right to expect such accommodation to continue.

[8] I agree with the employer's assertion that the collective agreement does not confer any right to 'ownership' with respect to a particular assignment, and I do not believe it would be appropriate to order the employer to reinstate the disputed

coordinating work as a remedy for a Workload Resolution complaint. However, leaving aside the reasons for the change in assignment (which are beyond the scope of the instant complaint), it is my view that the employer had an obligation, after having apparently accommodated Mr. Ferries' disability for so many years, to take meaningful steps to find another assignment that would meet his needs prior to issuing the new SWF. This was required both as a measure of accommodation and in recognition of the requirement of the *Human Rights Code* that the employer should act with due consideration for the dignity of individuals with disabilities.

[9] In addition, while the prior discussion of SWF's set out in Art. 11.02 A 1 (a) might not require much advance notice in the vast majority of cases, in this case a significant change was made in the complainant's assignment that, leaving the legal accommodation issues aside, raised serious practical questions about what Mr. Ferries would be able to do. There is no evidence that the employer had identified some method or technology that might permit the complainant to return to the classroom, let alone evidence that any such alternatives were discussed with him. Indeed, since Mr. Ferries was not notified of the change until just before the SWF was issued, I do not see how he could have provided meaningful input on such short notice. As a result, I have concluded his right to discuss such input, as set out in Art. 11.02 A 1 (a), was effectively denied.

[10] As a result, the complaint is upheld. It is my view that the SWF issued to Mr. Ferries was not consistent with the *Human Rights Code* or the collective agreement. However, I do not agree that the appropriate remedy is to order the disputed work be assigned to the grievor. Rather, the employer is ordered to prepare a new SWF that accommodates Mr. Ferries' physical limitations in accordance with the requirements of the *Human Rights Code* and the collective agreement.

[11] I understand that Mr. Ferries may file or has already filed a grievance with respect to this matter. I note that this decision does not touch on the broader issues that may arise in such a grievance, such as the adequacy or currency of medical information, the precise restrictions to be accommodated, the employer's reasons for changing the delivery model, the availability of other accommodated work, or any remedial orders beyond the specific remedy requested by the union in this case.

Barry Stephens,
Workload Resolution Arbitrator
July 8, 2010