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IN THE MATTER OF AN ARBITRATION

BETWEEN: NIAGARA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

AND: ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE MATTER OF WORKLOAD AND LAY-OFFS

BOARD OF ARBITRATION: Kevin M. Burkett - Chairman
R. J. Gallivan - Employer Nominee
Brian Switzman - Union Nominee

APPEARANCES FOR THE COLLEGE: C. G. Riggs - Counsel
Tony Knowles
G. Pevere
J. Balasak

APPEARANCES FOR THE UNION: David I. Bloom - Counsel
Barry Sharpe
Nelson Lacroix

A hearing in the above matter was held in St. Catharines on November 27, 1989.

A W A R D

1. We have before us a number of grievances relating to the process followed by the college in effecting the lay-offs of eight full-time teaching masters in the Fall of 1988. These include six policy grievances and two individual grievances. The essential complaint is that there was no article 8.04(c) meeting at which the circumstances giving rise to the planned staff reduction, the basis for the selection of the employees affected and the availability of alternative assignments were discussed. A secondary complaint relates to the alleged delay in providing the union with Standard Workload Forms as required under article 4.02(1)(d). The union takes the position that the discussion contemplated under article 8.04(c) is a mandatory requirement and the failure to have engaged in such discussion renders the lay-offs that followed void ab initio. The union seeks a declaration to this effect and compensation to the two individual grievors and others similarly affected. The college takes the position that an article 8.04(c) meeting did take place and, therefore, there has been no violation. There is no dispute with respect to our authority to hear and determine this matter.

2. Article 8.04 provides as follows:

"ARTICLE 8 - SENIORITY

8.04 When a College plans to lay off or to reduce the number of full-time employees who have completed the probationary period, or plans the involuntary transfer of such employees to other positions than those previously held as a result of such a planned lay-off or reduction of employees the following procedure shall apply:

- (a) The College will notify the Union Local President of the planned staff reduction and the courses, programs or services affected;
- (b) Within seven calendar days of the receipt of such notification, the College and Union Committees shall meet for the purpose of the College advising of the circumstances giving rise to the planned staff reduction and the employees affected;
- (c) If requested by the Union within three calendar days following the meeting under subsection (b), the College and Union Committees shall meet within seven calendar days of receipt of such request for the purpose of discussing the planned staff reduction, the circumstances giving rise to the reduction, the basis for the selection of the employees affected and the availability of alternative assignments.

It being understood that the College reserves the right to determine the number and composition of full-time, partial-load and part-time or sessional teaching positions, the College shall give preference to continuation of full-time positions over partial-load, part-time or sessional positions subject to such operational requirements as the quality of the programs, their economic viability, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community.

Further meetings may be held where mutually agreed by the College and the Union;

- (d) The Union Committee and the College shall maintain the confidentiality of the meetings and the identity of all employees discussed;
- (e) The Union shall have the right to have a staff representative(s) of the Union present at meetings with the College under subsections (b) and (c) in which event the College shall have the right to have an equal number of additional representatives of the College attend such meetings. However, the attendance of additional persons pursuant to this paragraph shall not cause any delay in the meetings contemplated hereunder or the notice to individuals affected by the staff reduction;

- (f) When a College decides, following such meetings, to proceed with a lay-off of one or more employees who have completed the probationary period written notice of lay-off of not less than ninety (90) calendar days duration shall be given to employees being laid off. If requested by the employee, a College representative will be available to meet with the employee within three (3) calendar days to discuss the basis of the College selection of the employees affected. "

Article 8.05 deals with the actual lay-off procedures once the college "decides to lay off or to reduce the number of full-time employees". The clause commences:

"When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where an employee has the competence, skill and experience to fulfill the requirements of the full-time position concerned, seniority shall apply consistent with the following: "

and then goes on to stipulate the displacement sequence to be followed and the requirement to have the competence, skill and experience to do the job and greater college seniority than the displaced employee.

3. The relevant facts in this matter are as follows:

- There had been considerable discussion within the college prior to the Spring of 1988 with respect to the need to reduce staff because of financial constraints.
- The college, by memo dated June 24, 1988 over the signature of Mr. Glenn Pevere, the Director of Personnel, to Ms. Joan Hastings, the president of the local union,

requested an article 8.04(a) meeting. It was also requested that an article 8.04(b) meeting be held coincidentally as has been done from time to time in the past.

- The union, by memo to Mr. Pevere dated June 27, 1988, advised that "no meeting of the UCC can be arranged under article 8.04(b) until the notification requirements of article 8.04(a) have been met". The union went on to advise that because of "the magnitude of the rumoured staff reduction ... all meetings specified in the collective agreement will be required..... "
- The college under cover of a memo dated June 30, 1988 provided the information with respect to "courses, programs and services affected" by the planned staff reduction, as required under article 8.04(a).
- A meeting took place on July 6, 1988 at which the union was provided with a document listing 22 affected employees and, correspondingly, a list of 12 lesser seniority employees who in turn stood to be displaced. The program of one of the affected employees (Dileo) was not shown on the article 8.04(a) list. The college had not at this time interviewed any of the employees shown on the list and, therefore, was not in a position to answer union queries with respect to whether affected employees would transfer voluntarily or involuntarily.

- By memo to the college dated July 11, 1988 the union requested a meeting be held under article 8.04(c) and suggested the date of July 18, 1988. The college replied by memo dated July 12, 1988, under the caption "Request for meeting under article 8.04(c)" that the meeting would be held at 9:00 a.m. on July 18, 1988. The union had confirmed with the college, by memo dated July 7, 1988, that the three day time limit for requesting an article 8.04(c) time limit had been extended to include Monday, July 11, 1988.
- The college had twenty management persons, including ten chairpersons and three deans, in attendance at the meeting of July 18, 1988. At the commencement of the meeting, which had been requested and scheduled as an article 8.04(c) meeting, the union asked that instead it be a continuation of the article 8.04(b) meeting. The union representatives testified that because changes were made to the list of potentially affected employees and because the college had not yet interviewed the affected employees and could not, therefore, confirm whether transfers would be voluntary or involuntary it was premature to have an article 8.04(c) meeting. The union took the position it had not had time to adequately prepare so that it could propose alternate assignments. When Mr. Pevere refused the union request to continue the article 8.04(b) meeting and confirmed that the college representatives were there to conduct an article 8.04(c) meeting, the union representatives walked out.

The union confirmed in its memo of July 26, 1988 to the Chairman of the Board of Governors that "an article 8.04(c) meeting was held" but complained that it had not had the opportunity to discuss the matters contemplated under article 8.04(c).

- The union then confirmed its request for additional 8.04(b) information with a memo to the college of July 18, 1988 as follows:

"MEMO TO Glen Pevere
 Director of Personnel

MEMO FROM Joan Hastings
 President
 Local 242

Based on your notification memo of 1988-06-30, we are expecting a planned staff reduction of 20 layoffs and 2 probationary terminations.

Since the updated and revised list under Article 8.04(b) with which we were provided on 1988-07-18 includes 34 names we are unsure whether we can proceed under Article 8.04(c).

Can you provide us with a list of employees affected through involuntary transfer, layoff or termination which totals 22?

As pointed out in this morning's meeting we have no concern about management's right to conduct interviews to determine whether planned reassignments are voluntary or involuntary and, again, suggest that you proceed with these interviews prior to the preparation of the list required under Article 8.04(b). "

- By memo dated June 23, 1988 the union had cautioned the college not to violate the confidentiality requirement of article 8.04(d).
- The college responded by memo dated July 19, 1988 as follows:

"TO: Joan Hastings, President
OPSEU, Local 242

SUBJECT: Academic Lay-off Procedure

I wish to acknowledge receiving your memo dated 1988-07-18 in which you request a meeting within 7 days under Article 8.04(c) to discuss those members who will be affected by the impending lay-offs and involuntary transfers. As well, I am in receipt of a second memo also dated 1988-07-18, which requests a further list because you are unsure whether you can proceed under Article 8.04(c).

At the meeting held today, (in response to your request to meet under Article 8.04(c)), it was explained that it is the view of management that the information you have received complies with the Collective Agreement. Therefore, no future meetings are required, and your request must be denied.

Accordingly, management will proceed with the lay-off process, including the assignments of staff where indicated. The meetings with the employees who are to be laid off will be scheduled for next Monday and Tuesday, 1988-07-25 and 1988-07-26.

Sgd. Glenn R. Pevere "

- The college then proceeded to implement the lay-offs.
Eight full-time teaching masters were laid off.

4. The relevant facts as they pertain to the provision of Standard Workload Forms in accord with article 4.02(1) are as follows:

- Standard Workload Forms (SWFs) are documents that record a teaching master's teaching assignments. Under article 4.02(1) the college is required to provide the teacher with a SWF not later than 6 weeks prior to the beginning of the period covered by the time table excluding holidays and vacations.

- SWFs for the Fall 1988 term began to arrive at the union office about August 10, 1988.
- The union saw the SWFs as providing information that would allow it to prepare for an article 8.04(c) meeting by determining whether there were alternate assignments, whether courses could be combined, whether part-time and/or partial-load courses could be combined, or whether overtime teaching assignments could be eliminated.

5. The union submits that the procedure established under article 8.04 as a prerequisite to the college's decision to lay off is mandatory such that a failure by the college to follow the stipulated procedure renders the lay-offs that follow void ab initio. The union asserts that on the evidence before us there was no article 8.04(c) meeting, even though the union requested one, with the result that the lay-offs which took place are void. The union maintains that because the list provided to the union was not in final form prior to July 18, 1988 it is not surprising that the union would then seek time to review the final list and prepare for an article 8.04(c) meeting. The union asserts that in order to properly prepare for such a meeting it had to know who was being involuntarily transferred and who was being laid off. The union asks us to find that the refusal of the college to give it the time required to prepare for an article 8.04(c) meeting constitutes a fundamental breach that defeats the purpose of the article. The union refers us to Centennial College and OPSEU (August 3, 1983) unreported

(Weatherill); Algonquin College and OPSEU (April 25, 1986) unreported (Swan); and Fanshawe College and OPSEU (May 17, 1989) unreported (Devlin) in support of its position that the procedure in article 8.04 is mandatory and that strict compliance is required. In the absence of there having been an article 8.04(c) meeting the union asks us to declare that the lay-offs which ensued are void ab initio and to direct that the two individual grievors be compensated accordingly.

6. The college maintains that a clear distinction is drawn between article 8.04 and article 8.05 on the basis of the article 8.04 procedure being activated when the college "plans to lay off" and the article 8.05 procedure being activated when the college "decides to lay off". The college argues that it complies with article 8.04(a) when it provided the list of courses and programs that were affected and that it complied with article 8.04(b) when it provided the first displacement list of 22 affected employees. The college submits that under article 8.04(b) it did not have to provide the second displacement list of potentially affected employees. The college maintains that this was additional information provided to assist the union to prepare for the article 8.04(c) meeting. The college dismisses the union complaint that the list was not finalized on the ground that it is contemplated under article 8.04 that the process remain in the planning stage and further that any college initiated discussion with potentially affected employees would constitute a breach of the confidentiality requirement of article 8.04(d). The college maintains that it satisfied the

requirement of article 8.04(c) when it responded to the union's request for an article 8.04(c) meeting by arranging for such a meeting on July 18, 1988 and appearing with 20 managers prepared to discuss the required subject matter. It is submitted that where the union refuses to discuss the required subject matter and walks out it cannot be found that the college is in breach of the agreement by reason of there not being an article 8.04(c) meeting. The college defends its late forwarding of the SWFs on the basis that to have moved more quickly would have breached the confidentiality requirements of article 8.04(d).

7. The union argument in reply is that it is no answer to say that additional information was provided when the article 8.04(b) information was changing up until July 18, 1988 such that the union could not have adequately prepared for an article 8.04(c) meeting. The union disputes the college's reliance on confidentiality as a defence to not providing the SWFs in a timely fashion. In the absence of constructive consultation the union asks us to find that the required procedures precedent to a lay-off were not followed and, therefore, the lay-offs are void ab initio.

8. Article 8.04 of the collective agreement requires that the parties engage in constructive consultation before a firm decision to lay off is made. The article, when read in conjunction with article 8.05, requires that this consultation take place before a decision is made; that is during the planning stage. Article 8.04 is framed in terms of a "planned" lay-off while article 8.05, which establishes displacement procedures,

is triggered "when the college decides to lay off". The article is very specific with respect to the nature of the consultation that is required. Information is to be provided by the college under article 8.04(a) (courses, programs and services affected). Under 8.04(b) the parties are to meet within seven days at which time the college must advise "of the circumstances of the planned staff reduction" and identify the employees affected. Finally, under article 8.04(c) the parties are to meet a second time, if requested by the union, "for the purpose of discussing the planned staff reduction, the circumstances giving rise to the reduction, the basis for the selection of the employees affected and the availability of alternative assignments". The three awards relied upon by the union correctly hold that this procedure is a mandatory precondition to any decision to lay off.

9. Against this backdrop we turn to the facts of the case. It is clear on the evidence before us that the college complied with the articles 8.04(a) and (b) requirements. The union was supplied with a list of the courses, programs or services affected, were told that the planned lay-offs were the result of severe financial constraints and, finally, were provided with a list of the employees affected. We will have more to say about the nature of the requirement to specify the employees affected. However, the discussion required under article 8.04(c) did not take place. Our task is to determine whether, in the circumstances of this case, the absence of article 8.04(c) discussion constitutes a breach of the agreement and, if so, to determine the appropriate remedy.

10. The article 8.04(c) discussion was scheduled to take place on July 18, 1988. The college appeared at that meeting with twenty senior managers prepared to engage in the discussion required under article 8.04(c). At that meeting the union, without having advised the college in advance, sought to continue the article 8.04(b) discussion and, when the college insisted upon engaging in the article 8.04(c) discussion, walked out of the meeting. The reason cited by the union for wanting to continue the article 8.04(b) discussion was the absence of a finalized list of affected employees and the inability of the college to advise it as to whether the transfers that would be required would be voluntary or involuntary. In our view the union misconceived the article 8.04(b) requirement and, indeed, in doing so cast itself in a lesser role vis-a-vis the article 8.04(c) discussion. Article 8.04(b) does not require the college to provide a list of the employees who will be laid off after bumping. Rather, the list that is required is a list of employees who are affected because their courses, programs or services are being eliminated or reduced. The college supplied this list under the heading "1st displacement". The college went beyond and, in addition, supplied a second list of employees who stood to be bumped. Given that discussion was to follow under article 8.04(c) with respect to the basis for the selection and the availability of alternative assignments, and given that these discussions are to be held in the planning stage preceding a decision as to who, specifically, is to be laid off, it must be reasonably anticipated that the article 8.04(b) list is

subject to change and amendment as the consultation process unfolds. Indeed, when the union requested the article 8.04(c) meeting on July 18, 1988 it must have been satisfied that the information that it had complied with the requirements of article 8.04(b). In our view the information provided by the college on July 6, 1988, which contained a total of 34 names (22 under the 1st displacement heading and another 12 under the 2nd displacement heading) gave the union the information that it required to investigate and prepare for the article 8.04(c) meeting.

11. The union also complained that it was unaware which transfers would be voluntary and which would be involuntary. However, given the requirement for confidentiality in article 8.04(d), a requirement that the union impressed upon the college in writing on June 23, 1988, it could not have been in the contemplation of the parties when they agreed to article 8.04 that this information (which requires direct discussion with the affected employees) be provided. As importantly, it seems to us that meaningful discussion with respect to the circumstances giving rise to the reduction, the basis for the selection of the employees affected and the availability of alternative assignments can be engaged in without knowing whether each transfer will be voluntary or involuntary. The purpose of the article 8.04(c) discussion is to allow the parties to sift through the various possibilities that exist to either minimize the extent of the lay-off vis-a-vis full-time teachers or, where

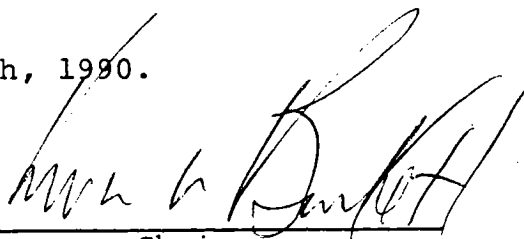
a lay-off appears unavoidable, to work through, in advance, the application of seniority and the other factors set out in article 8.05 in order to ensure compliance with article 8.05 and to minimize the extent of employee disruption. The purpose of article 8.04 is to involve the union in the planning process prior to there being a decision made with respect to specifically who is to be laid off. Given the requirement for meaningful discussion it could never have been intended, therefore, that the information provided to the union prior to this decision being made be in final form. The intention, which is clear from a reading of articles 8.04 and 8.05, is that the information, although still in a state of flux, facilitate the union preparations for the article 8.04(c) discussions. We are satisfied that the information provided met the requirements of articles 8.04(a) and (b) and provided the union with the capability to prepare for the article 8.04(c) meeting.

12. We are unable to find, therefore, that the union had legitimate grounds to walk out of the July 18 article 8.04(c) meeting. The college had satisfied the requirements of articles 8.04(a) and (b), had arranged for an article 8.04(c) meeting at the request of the union and had appeared at that meeting with twenty managers prepared to engage in the article 8.04(c) discussion. The union walked out of the meeting when the college refused to reopen the article 8.04(b) discussion. We must conclude, therefore, that although no article 8.04(c) meeting took place this was as a result of the union's decision to walk out of the July 18 meeting. In these circumstances we have no alternative but to find that the union action served to rescind

its request for an article 8.04(c) meeting. The union having first requested an article 8.04(c) meeting and then, by its actions on July 18, 1988, having rescinded its request, there was no contractual obligation upon the college to reschedule the meeting. In these circumstances the absence of an article 8.04(c) meeting is not fatal to the subsequent carrying out of the lay-offs and we hereby so find.

13. The evidence discloses that the college did not provide the SWFs to the union in a timely fashion pursuant to article 4.02(1). However, its failure in this regard is incidental to compliance with article 8.04 and arguably could have put the college in contravention of the confidentiality requirement of article 8.04(d). In these circumstances we simply declare that the college breached article 4.02(1) when it failed to provide the affected teachers with copies of their SWFs for the Fall term six weeks prior to the beginning of the Summer vacation period.

DATED at Toronto the 13th day of March, 1990.



 Chairman

I concur

 "R. J. Gallivan"
 Employer Nominee

Reasons to follow

 "Brian Switzman"
 Union Nominee