IN THE MATTER OF AN ARBITRATION
Pursuant to the *Colleges Collective Bargaining Act, S.O. 2008*

Between:

CONESTOGA COLLEGE
(The College/Employer)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 237
(The Union)

Re: College Grievance - Article 20
OPSEU File #2008-0237-001

P R E L I M I N A R Y A W A R D

BOARD OF ARBITRATION:	Paula Knopf - Chair John Podmore - Employer Nominee Ed Seymour - Union Nominee
APPEARANCES	
For the Employer:	D. Brent Labord, Counsel Debra Marshall Edith Torbay Henry Reiser Michael McClements
For the Union:	Mary Anne Kuntz, Senior Grievance Officer John Innanen

The hearing of this matter was held in Kitchener on March 10, 2008.

This case involves a grievance filed by the Employer, alleging a breach of the Professional Development Leave provisions of the Collective Agreement and seeking, as part of the redress, repayment from a professor of the compensation paid to him during the period when a leave had been granted. Under the parties' Collective Agreement, an employer grievance is called a College Grievance. At the outset of the proceedings, the Union raised two preliminary objections, one related to timeliness and the other to jurisdiction. The parties agreed that the jurisdictional issue should be addressed first and they reserved their rights with respect to all other matters. Accordingly, this Preliminary Award deals only with the jurisdictional objection.

The context of the case is important, although at this stage of the proceedings, it should be noted that no factual determinations have been made. However, the chronology of events was outlined through documentary evidence that was introduced on consent. Although there may be many facts that will become significant to the ultimate merits of the case, the only the facts that are relevant to the jurisdictional issue shall be outlined in this Preliminary Award. They are actually quite simple. The Employer is a respected College of Applied Arts and Technology that offers a broad range of courses. Historically, it issued diplomas upon graduation. However, in recent years it has been accredited to grant Bachelor degrees in some programs, including Electronics. Rudy Hofer is a Professor of Electronic Engineering. He holds a diploma in that field, as well as teaching credentials from Queen's University. He has taught in the College's "Diploma" program since 1998 and was involved in the early years of the department's "Degree" program. However, the Ministry of Training, Colleges and Universities demands that once a Bachelor level degree program becomes established, the professors have to hold credentials at least one level beyond the degree program in which they are teaching. As a result, Mr. Hofer's assignment reverted to the Diploma program. The College's evidence would be that the Department Chair and others discussed this situation with Mr. Hofer and he was encouraged to pursue various options that would lead to him acquiring a Master's degree. He was specifically encouraged to persue an Executive M.B.A. from the

University of Windsor that is offered from the Conestoga campus. It is offered in evening and weekend classes over a two year period.

From April 2006 to December 2006, Mr. Hofer was off work, using up his accumulated vacation entitlements. In the Fall of 2006, Mr. Hofer applied for a Professional Development Leave to cover the period from January 1, 2007 to December 31, 2007. He gave the following reasons for seeking the leave:

> a) improve my understanding of electronic manufacturing techniques;
> b) improve my ability in embedded programming; and
> c) improve my project management skills
>
> I intend to achieve item (a) by introducing an electronic project to the market. I intend to achieve (b) by examining and evaluating C compilers for common microcontrollers and lastly, I intend to achieve (c) by enrolling in the University of Windsor MBA program offered here at the college.
>
> Benefits that will accrue directly to the college include:
> Stronger ties to industries that hire our grads, better ability to deliver curriculum in the applied degree program (as year 1 encompasses electronic manufacturing and program management.) being [sic] able to provide more current/industry relevant skills to students, and lastly obtaining the educational credentials needed for teaching in the degree program.

In support of the application, he filed the prescribed application form and had his Department Chair submit a letter of support. That letter reads in part:

> As you are aware we can only support either your salary or the maximum amount allowed by the college for the tuition expenses. . .
> I wish you luck in the pursuit of your MBA as the expertise you will gain in Project Management/Manufacturing will be of benefit to the Electronics/Computer Engineering Technology programs.

In September 2006, Mr. Hofer's Professional Leave request was reviewed and granted by the Professional Leave Committee which is composed of one faculty representative from each school, three support staff and three management members. The understanding of the Department Chair and the Committee seems to have been that Mr. Hofer would or did begin the MBA program in September 2006 while he was still on his extended vacation. However, by November 2006, it came to the College's attention that Mr. Hofer had not enrolled

in the MBA program. This raised concerns from the Department Chair who indicated in writing that his support for the Professional Leave request had been predicated upon the planned enrolment in the MBA program. The Chair suggested that the leave be cancelled. However, those concerns were set aside when Mr. Hofer wrote that he intended to defer his enrolment in the MBA program until September 2007. On that basis, the Chair restored his support of Mr. Hofer's Professional Development Leave.

From January 2007 to December 2007, Mr. Hofer was away from the College on his Professional Development Leave, receiving 65% of his salary, as well as pension and benefits. In May 2007 he also was granted "approval in principle" for tuition assistance for the Executive MBA enrolment that was to take place effective September 2007.

In early 2008 it came to the College's official attention that Mr. Hofer had not enrolled in the Executive MBA program. Instead, he had enrolled in a workshop series that offers a "Mini MBA Certificate" from the University of Windsor's Centre for Executive Education. While Mr. Hofer tried to assure the College that this program "mirrored" the Executive MBA, the University of Windsor advised the College that the "Mini MBA" was "not academically rigorous enough to be considered equivalent to the 1st year of the Executive MBA program" and would not result in any accreditation towards the MBA.

On the basis of this information, the Professional Development Committee recommended that the College withdraw its financial support for Mr. Hofer's Professional Development Leave due to his failure to enrol in the University of Windsor's MBA Program. Meetings were arranged to discuss this with Mr. Hofer. The process that followed is not relevant to this Preliminary Award. The significant fact is that on April 21, 2008, the College wrote to Mr. Hofer demanding repayment of the $70,324.27 he had received between January and December 2007. Full repayment was demanded by April 30, 2008, or he was

invited to provide a schedule of payments that could be deducted from his future earnings. When no response was received, this College grievance was launched.

The Employer is seeking a declaration that there has been a breach of Article 20 of the Collective Agreement and an order awarding the College damages or repayment from Mr. Hofer. The amount being sought is the full $70,324.27.

The relevant provisions of the Collective Agreement are:

> **PROFESSIONAL DEVELOPMENT LEAVE**
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> 20.01 The College recognizes that it is in the interests of employees, students and the College that employees are given the opportunity by the College to pursue College-approved professional development activities outside the College through further academic or technical studies or in industry where such activities will enhance the ability of the employee upon return to the College to fulfill professional responsibilities.
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> 20.02 To that end, each College will grant a minimum of two percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than six years, and an additional one percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than 15 years, to be absent on professional development leave at any one time in accordance with the following conditions:
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> (i) the purpose of the leave is for College-approved academic, technical, industrial or other pursuits where such activities will enhance the ability of the teacher, counsellor or librarian upon return to the College;
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> (ii) a suitable substitute can be obtained;
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> (iii) the leave will normally be for a period of from one to 12 months;

(iv) the employee, upon termination of the professional development leave, will return to the College granting the leave for a period of at least one year, failing which the employee shall repay the College all salaries and fringe benefits received by the employee while on professional development leave;

(v) the salary paid to the employee will be based on the following scale: 55% of the employee's base salary increasing by five percent per year after six years of employment with the College concerned to a maximum of 70% of the employee's base salary after nine years. It is understood that the College's payment is subject to reduction if the aggregate of the College's payment and compensation or payments from other sources during the period exceeds the amount of the employee's base salary. The amount and conditions of payment will be pro-rated for shorter leaves;

(vi) Applications for professional development leave will be submitted in writing containing a detailed statement of the nature of the proposed leave and its perceived benefit to the College and the employee; to the Chair of the Department at least six months prior to the commencement date;

(vii) All applicants will be notified in writing by the College President as to the disposition of their application for professional development leave;

(viii) The College may on its own initiative propose plans of professional development leave to employees; however no employee shall be under obligation to accept such a proposal;

(ix) This Article shall not preclude the College from permitting greater numbers of employees to be absent on professional development leave;

(x) The fulfillment of the minimum of two percent of full-time employees on professional development leave (arising out of employee-initiated leaves) will depend upon the receipt and approval by the College of a sufficient number of qualified applications in accordance with the criteria set out above;

(xi) In the event that more eligible employees apply for professional development leave than will be approved, preference for applications that fulfill the purpose of the leave as set in 20.02 (i) shall be given to the applicants with greater length of service since their last professional development leave under this Article;

(xii) An applicant who is denied professional development leave shall be notified in writing of the reasons for the denial. Approval of an application for professional development leave shall not be unreasonably withheld;

(xiii) For professional development leaves that are granted for a period of less than one year, the payment shall be pro-rated. The unused portion of the allowable earned leave shall be available to the teacher, counsellor or librarian subject to the application and approval processes of the College and those defined within this Article. Seniority for the purpose of granting the unused portion shall include the seniority used in granting the first portion plus subsequent accrual. Payment for the unused portions of leave when taken shall be paid at the same proportion of salary as established in 20.02 (v) when the first portion was taken;

(xiv) The College shall provide to the Union Local, once each year, the names of all applicants and the names of all successful applicants and the duration of the leaves granted.

College Grievance

32.10 The College shall have the right to file a grievance with respect to the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall be presented in writing signed by the College President or the President's nominee, to the Union at the College concerned with a copy to the Union Grievance Officer within 20 days following the occurrence or origination of the circumstances giving rise to the grievance, commencing at Step 2. Failing settlement at a meeting held within 20 days of the presentation of the grievance, the Union shall give the College its written reply to the grievance in 15 days following the

> meeting. Failing settlement, such grievance may be referred to arbitration within 20 days of the date the College received the Union's reply.
>
> Definitions
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> . . . . .
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> 32.12 C "Grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.

The relevant statutory provisions from the *Colleges Collective Bargaining Act:*

> **14.** (1) Every collective agreement shall provide for the final and binding settlement by arbitration of all differences between an employer and the employee organization arising from the interpretation, application, administration or alleged contravention of the agreement, including any question as to whether a matter is arbitrable.
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> (2) If a collective agreement does not contain a provision that is mentioned in subsection (1), it shall be deemed to contain a provision to the following effect:
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> > Where a difference arises between an employer and the employee organization relating to the interpretation, application or administration of this agreement, or where an allegation is made that this agreement has been contravened, including any question as to whether the matter is arbitrable, either the employer or the employee organization may, after exhausting any grievance procedure established by this agreement, notify the other in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of its appointee to an arbitration board.……. The single arbitrator or the arbitration board, as the case may be, shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding on the employer and the employee organization and on any employee affected by it. The decision of a majority is the decision of the arbitration board, but, if there is no majority, the decision of the chair governs. The arbitrator or arbitration board, as the case may be,

> shall not by his, her or its decision add to, delete from, modify or otherwise amend the provisions of this agreement.
>
> (18) The decision of an arbitrator or of an arbitration board is final and binding on the employer, employee organization and on the employees covered by the collective agreement who are affected by the decision, and such employer, employee organization and employees shall do or refrain from doing anything required of them by the decision.

The Submissions of the Union

The Union objects to the arbitrability of this matter, arguing that the Collective Agreement precludes the Employer from seeking a remedy against an individual employee. Further, it was pointed out that not every allegation of wrong-doing is subject to arbitration. The Union took the position that Article 20 simply sets out a process for administering Professional Development Leaves and forms no basis for any arbitral jurisdiction. It was stressed that the Employer alleges no breach of the contract by the Union and it was submitted that the College will not be able to establish any breach of the Collective Agreement. It was suggested that the College's managerial rights might have allowed it to try to discharge Mr. Hofer or impose discipline for his alleged misuse of Professional Leave funding. However, it was argued that the contract provides no basis to fashion an individual remedy against a professor. Further, it was stressed that despite the sophistication of the parties, nothing in their negotiations has lead to language that deals with a failure to fulfill the expectations of a Professional Development Leave. It was suggested that if the parties had intended there to be consequences for a failure to meet expectations of a leave granted under Article 20, they would be found therein. But the lack thereof was said to lead to the conclusion that a board of arbitration has no authority to issue the kind of remedy that the Employer is seeking in this case. The Union stressed that there are only two parties to this Collective Agreement and that this Board of Arbitration lacks the jurisdiction to make a ruling against the Union that would be binding upon or against an individual professor. In support of its position, the Union relied upon *University of Ottawa and Association of Professors of the University of Ottawa,*

(1992) 5 L.A.C. (3rd) 60 (E.E. Palmer); and *Electrical Power Systems Construction Association and International Association of Bridge, Structural and Ornamental Iron Workers,* (1987) 31 L.A.C. (3rd) 434 (S. Tacon). In short, the Union argues that since the alleged facts reveal no allegations of a breach of the Collective Agreement by the Union, this Board of Arbitration should conclude that the matter is inarbitrable.

The Submissions of the Employer

The Employer argued that this Collective Agreement provides that the College, as employer, can file a grievance respecting the interpretation, application, administration or alleged contravention of the parties' contract. It was said that the grievance should be liberally construed, in accordance with the principles in *Blouin Drywall Ltd.,* (1975) 8 O.R. (2nd) 103 (Ont. C.A.), and as applied in *Spruce Falls Inc. and I.W.A.-Canada, Local 2995* (2002) 106 L.A.C. (4th) 41 (P. Knopf). It was submitted that the "essential nature of the grievance" is the Employer's complaint that Mr. Hofer received payments pursuant to the provisions of Article 20 for which he was not entitled. The Employer stressed that its grievance asks for an interpretation of Article 20 and for this Board of Arbitration to apply the evidence to the language of the contract to determine whether Mr. Hofer's conduct resulted in him being paid monies that he was not entitled to receive. If such a finding is made, the College is asking that it be awarded damages for the breach of Article 20 and that those damages be made assessed against and be made payable by Mr. Hofer.

The Employer concedes that the Union has not breached the Collective Agreement in this case. However, the Employer argues that Article 32.11C does not restrict College grievances to allegations of violations by the Union. Further, the Employer relies heavily upon the language of s. 14(1), (2) and (18) of the *Colleges Collective Bargaining Act* [the Act] to establish that the Board of Arbitration can provide an interpretation or resolve a difference arising out of the

Collective Agreement that will be binding upon an employee affected by it. The Employer then referred to the following cases that have held that a board of arbitration does have jurisdiction to award damages against individual members of the bargaining unit where there is enabling statutory language such as found in the Act: *Electrical Power Systems Construction Association* [1992] OLRB Rep. April 445 and *Electrical Power Systems Construction Association and Ontario Allied Construction Trades Council et al.* (1993) 12 O.R. (3rd) 768 (Ont. Div. Ct.); *Ontario (Attorney General) v. Bowie,* (1993) 16 O.R. 476 (Ont. Div. Ct.); *Belleville (City) and C.U.P.E., Local 907* (1994) 42 L.A.C. (4th) 224 (J.F. Allison); *School Board District No. 42 (Maple Ridge-Pitt Meadows) and C.UP.E. Local 703 (1999) 81 L.A.C. (4th) 92 (D.R. Munroe); Dubord & Rainville Inc. and M.U.N., Local 7625 (1998) 71 L.A.C. (4th) 55 (H. Frumkin);* and *Cambridge Memorial Hospital and SEIU, Local 204,* unreported decision of L. Mikus, dated November 28, 1997. The Employer argued that these cases establish language that is found in the parties' Collective Agreement and the applicable statutory language in this case mandate the arbitrability of a difference between the parties over whether Mr. Hofer was entitled to the monies paid to him under the provision of Article 20. Further, it was said that this Board of Arbitration can and should order that the monies should be repaid, or that there has been an overpayment and/or that damages should be assessed against Mr. Hofer. It was stressed that a board of arbitration has "exclusive jurisdiction" over these matters and that any declining of that authority would leave the College with no forum to seek redress.

The Decision

Employer grievances are rare events and they rarely find their way to arbitration. It is also unusual for employers to be arguing for a "broad and liberal" interpretation of a grievance or for a Union to be presenting preliminary objections to jurisdiction. However, the unusual facts of this case have given rise to this interesting jurisidictional issue.

The jurisdiction of a board of arbitration depends upon the nature of the grievance, the remedy being sought, the Collective Agreement and the applicable statutory framework. Beginning with the grievance itself, it alleges that a member of the bargaining unit, Mr. Hofer, did not fulfill his undertakings or the conditions of the Professional Development Leave that had been granted to him in that he failed to enrol in the MBA program. The grievance seeks repayment of $70,324.27. Through the argument of counsel, the grievance was clarified and the Employer asked for an interpretation of Article 20 to determine whether Mr. Hofer received monies that he was not entitled to under the Collective Agreement and, if so, to make appropriate remedial orders. There is no allegation that the Union has violated the Collective Agreement and no claim of redress against the Union.

It is clear that this Employer can file a grievance with respect to the interpretation, application or administration of the Collective Agreement, see Articles 32.10 and 32.11C and s. 14(1) and (2) of the Act. Further, although boards of arbitration are authorized to give "liberal interpretations" to the wording of grievances in order to deal with the "real complaints" that concern the parties, see *Blouin Drywall, supra, at* p.108, this grievance does not need such a liberal reading. The grievance is clear. It specifies the nature of the Employer's concern, it refers to the Collective Agreement provision that is relevant and it sets out the exact nature of the relief being sought. It is true that the remarks of Employer counsel have brought clarity and provided a legal framework for the grievance. However, even without that assistance, the grievance establishes that the Employer's case arises out of Article 20 and that the College seeks damages or repayment against an employee who allegedly did not act in accordance with the plan he had outlined on order to obtain the leave and/or that he did not fulfill the requirements of that provision. The Union and the Employer disagree about whether the facts amount to a violation of Article 20 and they disagree about both the meaning of Article 20 and how it should be administered. Those "differences" make this case arbitrable. The nature of the grievance also gives rise to arbitral

jurisdiction because it concerns the application of the language of Article 20 and the consequences of any failure to complete or fulfill the expectations of a Professional Development Leave. For those reasons, there is a difference between the parties concerning the interpretation, administration and application of the Collective Agreement. Therefore, this College grievance is arbitrable.

The next question to address is whether a board of arbitration has the authority under this Collective Agreement and the Act to make a remedial order against an individual member of the bargaining unit. Aside from the declaratory order the College is seeking, the Employer is also seeking substantial damages from Mr. Hofer personally. The Union argued strongly and effectively that a board of arbitration can only make a remedial order against a party to a collective agreement. That position is quite understandable given the nature of the contractual relationship between the Union and the Employer and the fact that employees are not parties to a collective agreement. However, for several reasons, the Union's objections to this Board of Arbitration's remedial authority over this case cannot succeed. First, the Act makes it clear that a board of arbitration can hear and determine a "difference" between the parties and issue a decision that is "final and binding on the employer and the employee organization *and on any employee affected by it"* [emphasis added], s. 14(2). Further, the decisions of the arbitration board are final and binding on the employees covered by the Collective Agreement "who are affected by the decision", s. 14(18). This language has been interpreted in many contexts to grant arbitration boards the jurisdiction and the exclusive authority to award damages against an employee in the following situations:

1. where an employee was found to have improperly claimed and received room and board allowance to which he was not entitled under the collective agreement, see *Electrical Power Systems Construction Association and Ontario Allied Construction Trades Council et al.* [Div. Ct.]*, supra;*
2. for damages for negligence in the operation of an employer's vehicle, see *Ontario (Attorney General) v. Bowie, supra;*
3. for recovery of overpayment of sick leave, see *Belleville (City) and C.U.P.E., Local 907, supra;*

4. for monies improperly received as a result of a conflict of interest, see *School Board District No. 42 (Maple Ridge-Pitt Meadows) and C.UP.E. Local 703, supra;*
5. for damages for the negligent performance of duties, see *Dubord & Rainville Inc. and M.U.N., Local 7625, supra;*
6. to recover overpayment of wages*, Cambridge Memorial Hospital and SEIU, supra.*

These cases are all premised upon the principles established in *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583, [1995] 2 S.C.R. 929 and summarized in *Dubord and Rainville Inc. and M.U.N., supra,* at p. 65 as follows:

> It follows that it is not the jurisdictional basis of a claim or a matter of whether that claim can stand independently of a collective agreement on some legal basis outside the collective agreement that will be determinant for purposes of jurisdiction. It will, rather, be the context out of which the claim arises and where that context is a collective agreement relationship and the claim bears some attachment, even inferentially, to that relationship, notwithstanding that it may stand on its own on a legal basis outside the collective agreement, it will be considered as falling within the exclusive domain of an arbitrator. Thus, a claim of an employer against an employee arising out of the employer/employee relationship where that relationship is governed by a collective agreement and where there are provisions in that collective agreement to which the claim may relate, even inferentially, will be for a tribunal of arbitration and not the courts of civil jurisdiction to determine.

The Supreme Court of Canada has made it clear that where there is a dispute arising out of a collective bargaining relationship and where the claim is related to or linked to the language of the collective agreement, arbitration is the exclusive forum available to resolve the matter. This means that those disputes cannot be taken before the courts. It also means that those disputes can and must be resolved by the arbitrators or boards of arbitration appointed under those collective agreements.

In the case at hand, we have parties who operate within a collective bargaining relationship. There is a dispute between the Union and the College about the operation, administration and application of Article 20. The resolution of this dispute will be determined by the interpretation of the rights and obligations created under Article 20. The question of whether Mr. Hofer is entitled to the monies he received under the auspices of Article 20 can only be resolved by interpreting and applying Article 20 to the relevant facts in this case. Therefore, this College grievance arises under the Collective Agreement, must be determined in accordance with the Collective Agreement and accordingly falls exclusively within the adjudicative and remedial authority of a board of arbitration. That authority includes the right to make declarations regarding the interpretation of the Collective Agreement and the right to make remedial orders against the individual employee who is bound by its provisions and affected by the conclusions that are reached.

For all these reasons, we have concluded that this Board of Arbitration has the jurisdiction and the responsibility to hear and determine the College grievance in this matter. Further, we have remedial authority that includes the potential of issuing an order against the individual who will be affected by that determination. That person is Mr. Hofer. That could mean that he will be required to pay substantial damages to the Employer, ranging from some to all of the amounts being claimed. However, the merits of the case have not yet been heard or decided. The acceptance of jurisdiction simply means that we must and will hear the evidence and submissions of the parties regarding the outstanding issues, which include one further objection to timeliness and the merits of the case itself.

We remain seized with all the outstanding issues. We also remain available to the parties to deal with interim procedural matters, should the need arise. This

case shall resume proceedings at times that are mutually agreeable to the parties.

Dated at Toronto this 17th day of March, 2009.

"Paula Knopf"

Paula Knopf - Chair

I concur "John Podmore"

John Podmore - Employer Nominee

I concur "Ed Seymour"

Ed Seymour - Union Nominee