

IN THE MATTER OF AN ARBITRATION

BETWEEN

NORTHERN COLLEGE

("College")

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("Union")

Re: Union and Tremblay Group Grievances

SOLE ARBITRATOR: James Hayes

APPEARANCES

For the Union:

David Wright, Counsel
Suzanne Tremblay
Neal McNair
Lad Shaba

For the College:

Wallace Kenny, Counsel
Audrey Penner
Natalie Dorval

A hearing was held in Timmins on September 2, 2016.

AWARD

1. The Union grieves the scheduling of faculty training days in 2015 alleging a breach of Article 11.08 of the Collective Agreement maintaining that such training was not “undertaken by mutual consent and agreement”.
2. The Union requests declaratory relief and an order that faculty members named in the group grievance have such work added to subsequent amended Standard Workload Forms (“SWFs”).
3. The arbitration proceeded without prejudice to the College’s position that the subject matter in issue was not the legitimate subject of a union grievance.

Facts

4. The parties tendered an Agreed Statement of Facts supplemented by numerous documents, excerpted below.
5. The College advised faculty during the spring of 2015 of its intention to schedule August 31, September 1 and September 2nd as training days prior to classes beginning for the fall semester. E-mails were sent to all faculty members in March and May.
6. Faculty were also advised of the event by Deans by e-mail or in staff meetings prior to the end of the winter term in June.
7. At a Workload Monitoring Group (“WMG”) meeting held in June, the College confirmed that the sessions were mandatory, that all faculty were expected to attend, and that those who did not could be disciplined.

8. The training was in addition to, and not treated as part of, the Article 11.01 H 1 professional development day entitlement.
9. The tentative training program was shared in July and confirmed in late August. Further descriptions of the event were sent in late July and early August.
10. Some faculty were exempted from attendance due to having other activities they needed to attend to; for example, the Union local president had union responsibilities in Toronto.
11. No grievances were filed alleging that the content of the training sessions was unreasonable.
12. Other training sessions are delivered on a voluntary basis.
13. The College has previously “SWF’d” other mandatory training courses. (SWFs for grievor Tremblay for winter 2014 and a memo from Peter MacLean dated November 15, 2013 were submitted).

Relevant Provisions of the Collective Agreement

14. Counsel referred to the following clauses:

Article 11.08:

In keeping with the professional responsibility of the teacher, non-teaching periods are used for activities initiated by the teacher and by the College as part of the parties’ mutual commitment to professionalism, the quality of education and professional development.

Such activities will be undertaken by mutual consent and agreement will not be unreasonably withheld.

No SWF will be issued but such activities may be documented. Where mutually agreed activities can be appropriately performed outside the College, scheduling

shall be at the discretion of the teacher, subject to the requirement to meet appropriate deadlines.

Article 11.01 B 1 (excerpt):

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.

.....

Article 11.01 H 1:

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

Article 11.01 D 3 (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.

Article 11.01 F 1 (excerpt):

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.

.....

Union Submission

15. The Union emphasizes the parties' agreement that the training in question falls within the scope of the first paragraph of Article 11.08. Training was conducted in non-teaching periods and fell under the general rubric, "quality of education" and "professional development". As such it acknowledges that the College was entitled to initiate such activity.

16. However, the Union submits that the College did not initiate but, instead, dictated that training days be held. In doing so, the College ignored the Article 11.08 second paragraph requirement for "mutual consent". There was no initial invitation

or seeking of consent. That necessary threshold was not crossed. Accordingly, the following legal question of whether agreement was “unreasonably withheld” is not reached in the instant case.

17. The Union refers to *Cambrian College*, 1991 Carswell Ont 7422 (Brent) and *Humber College*, November 1, 2005 (Devlin), cases where the language of Article 11.08 and, in particular, the phrase “unreasonably withheld” was reviewed. The Union submits that certain comments made in *Fanshawe College*, June 5, 2014 (Jesin) were *obiter* and, if read literally, wrong.

College Submission

18. The College submits that the Collective Agreement forecloses the Union’s remedial claim. The activity in issue here, training days, was conducted in a non-teaching period. Paragraph three of Article 11.08 states that no SWF will be issued in such a situation. The relief sought is also inappropriate because, if granted, activity from a non-teaching period would be transferred to a teaching period, with possible impact upon the legitimate assignment of work pursuant to Article 11.01 B 1. Article 11.01 D 3 (ix) provides the only exception to this governing principle. The only temporal limitation to work performed in a non-teaching period is one imposed by “reasonableness”.

19. Insofar as the merits are concerned, the College refers to *Fanshawe, supra* in which Arbitrator Shime’s *Sault College*, May 12, 2005 award is referenced as follows:

At page 7 [Shime Award], the majority observes that although the College may assign work unilaterally during the teaching period, it may not do so during the non-teaching period under article 11.08. However the majority noted the following exception: “...there is an exception permitting the College to initiate and assign educational activities, as defined by that article, which are reasonable in nature, and for which consent may not be withheld”. Thus the majority recognizes that there are circumstances in which the College may unilaterally assign appropriate tasks as contemplated by Article 11.08 absent the teacher’s consent where it would be unreasonable to withhold consent.

20. On this authority the College submits that it had the right to assign the training days in question. It says that there is no evidence that any of the Grievors raised contemporaneous objection to that assignment.

21. The College also refers to: *Canadore College*, July 19, 2016 (Starkman) where it was concluded that, in the absence of evidence with respect to the circumstances of any individual professor, “the assignment of occupational health and safety computer based training of three hours duration during a non-teaching week was prima facie reasonable” (at p. 14); *Durham College*, October 11, 1995 (Schiff); and, *La Cite*, July 21, 2016 (O’Neil) where it was held that issuing a separate SWF for Article 11.01 D 3 (ix) curriculum review and course development did not breach the Collective Agreement.

22. Insofar as alleged practice is concerned, the College submits that the Agreed Statement discloses only a couple of differing fact patterns that provide no assistance.

Decision

23. As became clear at the hearing, what is striking about this dispute is the extent of the parties’ agreement about the legal rights and obligations located in Article 11.08.

24. The parties agree that Article 11.08 applies to the training days in question. They agree that the College may initiate such activity because it concerns the quality of education/professional development, enumerated purposes. They agree that mutual consent is required. They agree that agreement to initiated activity may not be unreasonably withheld. They agree that faculty members may withhold consent individually so long as they act reasonably. The Union concedes that, because of the ‘work now grieve later’ rule, the College may assign such activity if it were to

conclude that a faculty member has unreasonably withheld consent—subject to the right of the professor to grieve.

25. It appears therefore that these grievances reduce to a dispute over the way in which the College approached the training day assignment in the first instance. As previously indicated, the Union argues that, rather than first seeking consent, the College elected instead to assign the activity first. There was no invitation to discuss. The Union says that the College’s conduct improperly assumed an initial unilateral right to assign. It submits that the College’s interpretation, if vindicated, would serve to reverse the order of proceeding contemplated by the Article and nullify the informing principle of mutual fair consideration of the activity in question.

26. What happened here? It is useful to consider the chronology:

- On May 13, the Vice President, Academic and Student Success, advised all staff that with respect to “the set aside dates of August 31st to September 2nd...we want to have peers leading peers in a mini-educational conference format, addressing educational issues faculty have identified, sharing best practices, and teaching strategies, to start off the year with additional tools in your toolkit. All departments will have college wide meetings...”
- There was some discussion concerning the training days at a Workload Monitoring Group meeting held on June 10th. The Minutes of the meeting record that:

The Union took the position that if the time allocated for PD activities was made mandatory, it had to be on a SWF, if is not mandatory, then attendance must be voluntary for faculty. The Union also read article 8 [presumably reference to Article 11.08] and said it was their position that the time being allocated by the College for professional development had to be by mutual consent and that neither the union nor the faculty provided mutual consent. The Union said that it has not been provided

with any details or instructions and they have no idea about what is happening with this item.....The College pointed out that the language in article 8 also included the language ‘...and agreement shall not be unreasonably withheld’...”.

- At the same meeting, the College confirmed that the training sessions were mandatory, that all faculty were expected to attend and that those who did not could be disciplined.¹
- On June 13th, the Director, Trades, Technology & Applied Research, sent an e-mail that said: “I just want to remind everyone of the excellent training sessions taking place on August 31, and September 1 & 2. The detailed schedule will be posted on NorAction this summer....”
- On June 19th, the Academic Manager, Health Sciences, Community & Emergency Services advised her faculty by e-mail that: “Audrey has asked that I remind Faculty of the upcoming training days on August 31st, September 1st and September 2nd that Faculty are expected to attend prior to the start of the semester. I have been told that the schedule of activities will be posted on NorAction in July....”
- There were subsequent communications concerning the proposed content and scheduling of the August 31st – September 2nd training days.

27. There is no indication in the Agreed Statement or the contemporaneous documents that the College did anything unusual in planning the training days in issue. The purpose of College-wide preparation for the upcoming semester was transparent and, on the face of the internal communications, its legitimacy appears self-evident. The Agreed Statement discloses that some faculty members were excused from attendance although the grievance Reply alleges that: “..in the end, no

¹ College counsel advised me, without Union contradiction, that this statement was made in answer to a question.

input was received from any faculty member that they were prepared to withhold their attendance, reasonably or otherwise”.

28. Nevertheless, given the prescriptive language of Article 11.08, having reviewed the College’s communications with staff, I am bound to accept the Union’s characterization of what transpired. The Article contemplates the initiation of activity by either a teacher or the College. It requires “mutual consent” but also states that: “agreement will not be unreasonably withheld”. In my view, logically, the seeking of “mutual consent” must follow a request for consent. An initial unilateral assignment of work is a qualitatively different act, one that impermissibly vitiates contractually mandated mutuality.

29. If the notice of the training days had included a suggestion that faculty members contact the College if they had individual ideas or concerns, there would have been no room for dispute. But, hindsight is easy. I do not presume to suggest any requirement for a particular choice of words in order to initiate activity within the meaning of Article 11.08 by either a teacher or the College. This is a professional bargaining unit whose members are, obviously, quite capable of assessing conventional College communications and engaging in dialogue in their own way about issues relating to the quality of education and professional development. Absent what happened at the WMG meeting on June 10th, I may well have been persuaded that the communications from the College concerning the training sessions were sufficiently anodyne to amount to a simple notice of conventional pre-semester training, a notice that, by implication, without necessary reminder, invited staff to respond individually with any reasonable objections to participation.

30. But, the Agreed Statement makes clear that nearly three months in advance, at the outset, the Union was informed that the College was treating the training sessions as mandatory, that those who failed to attend could be disciplined. On these facts, the Union argument that the College’s action reversed the order of proceeding in breach of Article 11.08 cannot be dismissed. On these facts, whatever


the actual intent of the College may have been, the explicit message to faculty was that mutual consent was not an issue for this occasion.²

31. With respect, *Sault* and *Fanshawe* present no impediment to this result. In my opinion, those awards, which turn on other issues, may be read easily with what the Union is prepared to concede here; that is, a College may formally assign Article 11.08 activity unilaterally after, but not before, it concludes that the professor has unreasonably withheld consent—subject to a faculty member’s right to grieve.

32. In conclusion, I find that the College violated Article 11.08.

33. This is a narrow fact-driven conclusion and, in my view, declaratory relief provides a sufficient response to the presenting circumstances.³

Dated at Toronto this 12th day of September, 2016.



James Hayes

² My only hesitation stems from the evidence that some faculty were excused from participation, one assumes after raising reasonable grounds for exemption. That made the ultimate conclusion in this Award a closer call.

³ In light of this conclusion, apart from recognizing the ostensible cogency of the College’s position concerning SWF-related relief, I see no purpose in evaluating the competing submissions on this point in gratuitous *obiter*.