

IN THE MATTER OF AN ARBITRATION

BETWEEN: THE COLLEGES COMPENSATION AND APPOINTMENTS  
COUNCIL

AND: ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

AND IN THE MATTER OF AN ARBITRATION WITH RESPECT  
TO RETURN TO WORK WORKLOAD GRIEVANCES

O.B. SHIME, Q.C.	CHAIRPERSON
A.E. BURKE	NOMINEE FOR THE COLLEGES
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APPEARANCES:

W.M. KENNY	COUNSEL, and others for the Colleges
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Hearings were held on this matter  
at Toronto on October 18, 23 and 24  
December 11, 12 and 13, 2007  
March 7 and 20<sup>th</sup>, 2008

## INTERIM AWARD

On March 24, 2006, the Colleges and the Union agreed to end a work stoppage which commenced on March 7, 2006. The Faculty agreed to return to work on Monday, March 27<sup>th</sup>, 2006. The parties also agreed to a Return to Work Protocol permitting a board of arbitration to determine certain outstanding work issues.

That Protocol is as follows:

- The reduction in the annual salary for a full-time bargaining unit member will be 1/261 of the annual salary for each working day of the work stoppage. Time specified on a SWF covering the work stoppage period shall not be treated as having been worked for the purpose of Article 11.
- During the 2005/2006 and 2006/2007 academic years, to the extent required by the College, any teaching time lost as a result of the work stoppage may be made up at the expense of time reserved for complementary functions and professional development. For clarity, this means that teachers may not be required to perform work ordinarily done during the non-teaching periods to the extent that such time will not be used for teaching.
- Given that the work stoppage commenced mid-week, the interrupted teaching week of the first week of the work stoppage, as well as any possible interrupted teaching week during the first week of return to work in which teaching occurs, will not count as full teaching contact weeks, but will be pro-rated on the basis of the actual contact days taught.
- For the 2005/2006 academic year, the total professional development days referred to in Articles 11.01H 1 and 11.04 B 1 shall be reduced to 9. The College may require that less be utilized, but any not utilized shall be carried over to the year 2006/2007, and may be utilized in addition to the normal allocation for that year. The College may use its best efforts to avoid this occurring.

- Where the only change to the instructional assignment as described on the SWF in force when the work stoppage commenced is the change in the dates of the SWF period and any resultant changes to the total hours, days and weeks, does not constitute a change in circumstances requiring an amended SWF as indicated in 11.02 A 1 (b). Any new SWF issued as a result of the work stoppage shall not require notice contained in 11.02 A 1 (a) or 11.02 A 5.
- No work specified on a SWF for the period of the work stoppage shall be applied to any of the workload limits in Article 11.
- For the purposes of Article 11.01 G 2, the circumstances arising as a result of the work stoppage are deemed not to be atypical.
- For the purposes of Article 2.03, Article 27, Article 32, and Appendix V, the period of the work stoppage will not be considered in determining the time requirements.
- The four-week notification period for vacation will be waived for two weeks following the end of the work stoppage.
- The resumption of salary and benefits is effective on the official return to work date of March 27, 2006.
- The bad faith bargaining charges filed by the Union will be withdrawn.
- The parties agree that a board of arbitration will be appointed to hear any faculty grievances arising out of or related to return to work. Faculty grievances related to workload arising from the return to work shall proceed directly to the board of arbitration who shall have the powers referenced in Article 32.
- There shall be no reprisal or discipline arising from strike activities, including pre-strike activities.
- Continuous service shall not be interrupted.
- Colleges shall pay retroactively parental and pregnancy sub-payments that were not paid during the strike
- Timely return of the residue from the insurance deposit.

This Board of Arbitration was constituted pursuant to the Return to Work Protocol. A number of grievances were filed in the fall of 2006 claiming what appears to be overtime or additional payment for work performed subsequent to the strike. We heard submissions based on the parties request to determine the proper scope of the grievances and the relationship between the Return to Work protocol and the collective agreement in order to provide a context for assessing both parties' request for directions. We preferred to review the submissions within a factual framework or context. To that end, and for the purposes of the parties' preliminary request only, we heard evidence surrounding the circumstances which gave rise to a number of the grievances. That evidence has been of assistance in understanding the full nature of the dispute. It appears that a number of faculty members, because of the closeness of the return to work to the end of the school year, made adjustments to the course work and/or class assignments and/or exams. Generally, because of the remaining truncated teaching period faculty members made certain adjustments for which they now claim additional payment from the Colleges.

The first argument advanced by the Colleges is that faculty members receive an annual salary based on the collective agreement formulae in Article 11 of the collective agreement and the amount of time spent and claimed by a faculty member for additional compensation is not relevant. For example, one teacher may spend five hours while another may spend ten hours to prepare a lesson, but that is irrelevant because the collective agreement formulae controls the salary for the specific courses. In effect, the Colleges claim that individual teachers may spend varying times to prepare and teach a course but since their salary is fixed by the collective agreement formulae, if post strike

some teachers spent more time than usual it ought not to change their fixed compensation.

The Union maintains that as a result of the strike, a number of teachers were required to perform additional work mandated by the different Colleges and that type of work was not governed by the usual workload provisions in Article 11.

The parties have made provision for certain unanticipated circumstances which affect a teacher's workload. Thus, Article 11.01G 2 provides as follows:

Article 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”

We determine that atypical circumstances are unusual or irregular circumstances which do not occur normally on a year to year basis. In our view, a work stoppage is an atypical circumstance which may affect the workload of a teacher and for which a teacher may be entitled to additional hours being attributed to his or her workload pursuant to the collective agreement. However, the parties have anticipated that the work stoppage may be considered to be an atypical circumstance and have provided in the Return to work Protocol that:

“for the purposes of Article 11.01 G 2, the circumstances arising as a result of the work stoppage are deemed not to be atypical”.

Accordingly, based on the language of the protocol, we determine the parties intended to preclude the application of Article 11.01 G 2 to the circumstances arising as a result of the work stoppage and that no claim may be made for additional hours based on that Article.

The Colleges maintain that the only way to spend more time on teaching is if a teacher is “assigned additional teaching contact hours or a different course”. Later in the Colleges’ argument there is a reference to Articles 11.02 A 4 which the Colleges argue provides an opportunity for the teacher to complain about an assignment where according to the Colleges, the “total workload” assigned to an individual teacher on the SWF fails to comply with the quantitative elements of Article 11.01. However, that submission ignores the plain language of the Return to Work Protocol. In our view, this matter is governed by the Return to Work Protocol and not the collective agreement. We first turn to consider the Return to work Protocol and then to consider the collective agreement.

(i) The Return to Work Protocol

Different teachers may prepare and plan for the school year in different ways, and at different times, but there is an anticipated flow to teaching in a normal school year. However, individual teachers generally organize their work, including preparation, teaching and marking in anticipation of a normal year. Where there is a work stoppage during the school year, the anticipated normal flow of the school year is interrupted. The work stoppage, in and of itself, may alter the teacher’s normally anticipated workload and depending on the length of the work stoppage, the length of the school year may be significantly altered, requiring further adjustments to the teacher’s workload.

Also, the timing of the work stoppage may have a dramatic impact on the anticipated school year which happened in this case. Here the work stoppage occurred very near the end of the school year making it virtually impossible to gradually phase in what may have been lost educationally during the work stoppage. It also appears from the evidence, because of the shortened teaching period between the end of the work stoppage and the end of the school year, a number of teachers were required to make adjustments to what they had planned. For example, because of what was educationally lost during the work stoppage, some teachers may have been required to adjust the tests and/or exams that they had prepared. Others may have been required to eliminate certain portions of the normal course work, and to take into account or to bridge the eliminated portions they may be required to readjust their lectures, their assignments and their exams. These adjustments and alterations to what was planned for the normal year were not part of the normal flow and not anticipated or planned and were in effect abnormal changes, notwithstanding that these tasks performed by the teachers were similar in nature to what they do in the normal year.

The parties themselves in the protocol have acknowledged the abnormal nature of the remaining school year. Thus, they have provided that “any teaching time lost as a result of the work stoppage may be made up at the expense of time required for complementary functions and professional development”. Also, professional development days in the collective agreement were reduced to nine (9), subject to the Colleges being able to “require that less be utilized”. Further, the four week notification for vacation was waived for two weeks following the end of the work stoppage. These adjustments indicate that the period following the work stoppage was abnormal and compensatory adjustments had to be made.

Those adjustments also included workload and most significantly, the parties specifically anticipated that there might be “**faculty grievances arising out of or related to return to work**”, and “**Faculty grievances related to workload arising from the return to work**”, and therefore constituted this Board of Arbitration to deal with those “workload” grievances. There is no reference back to the collective agreement; the workload expressly referred to is a “workload arising from a return to work” it is not a workload, predicated on teaching contact hours or on the issuance of a SWF, which is referred to in the Return to Work Protocol as an “**instructional assignment**”.

Clearly, the parties expressly and specifically anticipated an abnormal situation where there would be unanticipated adjustments and alterations to what would normally have occurred in the event there had not been a work stoppage. And certainly the preliminary evidence indicates that prima facie adjustments and alterations were made to what would have been the normally anticipated workload flow. The work stoppage impacted the normal teaching year and coupled with the remaining truncated school year there was very little time to compensate for the lost time due to the work stoppage, so that the teachers were called upon to make a variety of adjustments and alterations that were not part of their normally anticipated workload. It was for that reason the parties constituted a separate Board of Arbitration to deal with the unanticipated “workload arising from the return to work”.

We also note, as described in our earlier preliminary award, that the arguments, at that time, addressed pre-arbitration procedural steps only that the College claimed must be taken, and our

award specifically dealt with those procedural matters. The argument did not address substantive issues and it was only after the first preliminary award was issued that the parties addressed the substantive matters. Accordingly, there was no intent in our first preliminary award to address the substantive issues that were subsequently more fully argued and which this award now addresses. After deciding the preliminary procedures issue, we added as a “caveat” that we were not precluded from considering the impact of the return to work on substantive matters under the collective agreement. That was not a final determination of the issues confronting us in this award.

Board member Burke apparently finds some contradiction in that statement but without finally deciding those issues at this stage of the proceedings, the evidence we have heard indicates that when members of the bargaining unit returned to work, they made adjustments that may warrant some additional payment. Those adjustments cannot be considered in a vacuum, they necessarily must, as a practical matter, be considered in relation to the normal instructional assignments which had originally arisen under the collective agreement. Accordingly, we confirm our earlier statement that we are not precluded “from considering the impact of the return to work on substantive matters under the collective agreement”, or alternatively, as it now appears, the impact on the normal instructional assignments of the work stoppage and its relationship to the post work stoppage workload claims.

(ii) The Collective Agreement

Under the collective agreement teaching contact hours are **assigned** and based on those preparation hours, evaluation and feedback hours, and complimentary functions are **attributed**

pursuant to the article 11 formulae. The College in the first instance is responsible for curricula. Thus, Article 11.01 D 3 refers to “the course or curriculum approved by the College”, while Article 11.02 A 1 (b) permits the College to amend assignments. It is reasonable to assume that curricula are designed so as to fit within the normal college term or year, and that at the outset of that term or year, the College will assign a teacher to teach a defined course or curriculum that falls within the terms of the year. Once the teaching contact hours are assigned, the attributed hours fall into place in accordance with Article 11.

As we have stated, at the end of the work stoppage the parties agreed to the return to work protocol. There are a number of instances in the protocol where the parties specifically referred to the collective agreement. More particularly, the parties made specific mention of the work assigned prior to the work stoppage. For example, the protocol provided if the only change to the instructional assignment to the SWF in force when the work stoppage commenced was a change in dates an amended SWF was not required.

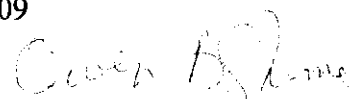
While the parties anticipated there would or could be changes related to workload arising from the return to work, there is no reference to that workload being assessed under Article 11, nor is there any suggestion that such a workload falls under the aegis of Article 11. Nor did the parties agree to such workload issues being referred in the normal way to the College Workload Monetary Group (WMG) and to the Workload Resolution Arbitration (WRA) pursuant to Article 11.05. In our view, the parties envisioned that there would or could be a workload arising from the return to work which was different from the normal workload assigned and/or attributed under Article 11. They

specifically focused on a “workload arising from the return to work”, and designated a Board of Arbitration separate from the collective agreement workload process to deal with those issues. They made no mention of applying Article 11 considerations to matters arising out of or related to return to work. Specifically, there is not a reference back to Article 11 in the protocol to consider workload grievances arising from the return to work and while other references were made to the collective agreement, the absence of any reference to Article 11 concerning the workload grievances suggests these matters not be dealt with under the usual Article 11 collective agreement provisions. The workload in issue is not the usual or normal work envisioned under Article 11 of the collective agreement or the applicable Article 11 workload resolution process. In summary, the parties clearly anticipated that there would be specific circumstances related to the return to work which flowed from the work stoppage and the truncated school year that would require special consideration outside of the ambit of Section 11 of the collective agreement.

As we indicated earlier, this Board heard evidence in order to provide a context for assessing the parties joint request for directions to be provided at the outset. The Union called evidence but the Colleges elected to call no evidence, and in these circumstances we are not prepared to make a definitive or final determination with respect to both the grievances and the principles at issue. The evidence indicated that the fact situations vary depending on the particular circumstances of each case. Accordingly, the principles that arise from the grievances filed are to be determined on a case by case basis. Therefore we confirm our original award dated May 23, 2007 that paragraph 12 of the protocol is a stand alone provision “intended to deal specifically with post strike matters arising out of or related to return to work”. The grievances are to be scheduled for hearing at a time to be agreed

upon, and failing agreement at a time to be fixed by the Board.

DATED AT TORONTO THIS 27<sup>th</sup> day of April, 2009



Owen B. Shime, Q.C.  
Chairperson

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A. E. Burke, Nominee for the Colleges

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"J. Hayes"  
J. Hayes, Nominee for the Union

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE COLLEGES COMPENSATION AND APPOINTMENTS COUNCIL

AND

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

AND IN THE MATTER OF AN ARBITRATION CONCERNING CERTAIN RETURN TO WORK  
GRIEVANCES

DISSENT

Having had the opportunity to review the reasons for the majority decision with respect to this preliminary motion, I must respectfully dissent for the following reasons.

Nearly 1200 grievances have been filed in which teachers are seeking additional payment for work they claim they would not have had to perform but for the March 2006 strike. The majority concludes that this work is not governed by the collective agreement. In other words, workload arising from the return to work following the strike is not covered by the collective agreement (namely, Article 11) and therefore the rules governing workload as set out in the collective agreement do not apply. The majority finds that such workload is to be considered outside the ambit of the collective agreement, including those provisions which specifically address workload.

The majority principally relies upon paragraph 12 of the Return to Work Protocol in support of its conclusion. Paragraph 12 of the Return to Work Protocol states:

The parties agree that a board of arbitration will be appointed to hear any faculty grievances arising out of or related to return to work. Faculty grievances related to workload arising from the return to work shall proceed directly to the board of arbitration who shall have the powers referenced in Article 32.

With respect, it is my view that the majority's award is fundamentally flawed in light of the following facts. First, Arbitrator William Kaplan's interest arbitration award dated June 28, 2006 directed that "All agreed upon items to be incorporated into the collective agreement". The Return to Work Protocol was an agreed upon item. It was incorporated into the collective agreement. This board

of arbitration therefore takes its jurisdiction from the interest arbitration award and the collective agreement and is therefore obliged to interpret and apply the collective agreement, as modified by the Protocol that was itself incorporated into the collective agreement. To suggest that this board of arbitration is empowered to consider grievances related to return to work outside the terms of the collective agreement is to ignore the interest arbitration award and the collective agreement as the foundations for its jurisdiction.

Second, paragraph 12 of the Return to Work Protocol refers to “faculty grievances” (emphasis added). It is faculty grievances related to workload arising from the return to work that this board has the authority to adjudicate. Article 32.12 C of the collective agreement defines a “grievance” as “a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.” By definition, a “grievance” must raise an issue concerning the collective agreement. The term grievance has no other meaning as between these parties. In this context, it makes no sense for this board to find that grievances arising from the return to work are not governed by the collective agreement when the very nature of a “grievance” is that it must arise from the interpretation, application, administration or alleged contravention of the collective agreement.

Paragraph 12 of the Return to Work Protocol states that “faculty grievances related to workload arising from the return to work shall proceed directly to the board of arbitration” (emphasis added). The word “workload” is not a generic term. It has specific meaning to these parties. Indeed, Article 11 of the collective agreement is entitled “Workload”. Essentially, all of the grievances claim additional payments because of work that teachers allege they performed. Article 11 of the collective agreement establishes a formula (called the “workload formula”) as the measure against which workload is assessed. As the majority acknowledges, teaching contact hours are assigned and then preparation hours, evaluation and feedback hours, and complementary functions are attributed. As set out in Article 11.01 B 1, a teacher’s workload consists of four components:

1. Teaching contact hours
2. Attributed hours for preparation
3. Attributed hours for evaluation and feedback
4. Attributed hours for complementary functions

The collective agreement sets out various maxima related to workload. Relevant to these grievances, the total workload that a College may assign and attribute to a teacher in any week must not exceed 44 hours. Where work is performed in

excess of 44 hours, overtime is payable and the collective agreement describes how such overtime is calculated.

Consequently, there are only two ways under the collective agreement for a teacher to earn compensation over and above his/her annual salary:

1. Where the workload formula generates a combination of assigned and attributed hours that exceed the workload limits spelled out in the collective agreement; or
2. Where there are atypical circumstances within the meaning of Article 11.01 G 2 of the collective agreement.

With respect to the second point and as the majority recognizes in its award, the parties expressly anticipated that the work stoppage might be considered to be an atypical circumstance and provided in the Return to Work Protocol that:

- For the purposes of Article 11.01 G 2, the circumstances arising as a result of the work stoppage are deemed not to be atypical.

Since the parties have agreed that the circumstances arising as a result of the work stoppage are deemed not to be atypical, this board only has jurisdiction to award additional compensation to a teacher if the workload limits established by the collective agreement's workload formula have been exceeded.

The majority finds that the Return to Work Protocol made no reference to Article 11 insofar as workload grievances are concerned which, according to the majority, suggests the parties did not intend for these matters to be dealt with under Article 11 of the collective agreement. This cannot be correct. The Return to Work Protocol is replete with references to Article 11 and how the Article 11 formula was modified following the return to work. Most significantly, the parties agreed in paragraph 7 of the Return to Work Protocol that the circumstances arising as a result of the work stoppage are deemed not to be atypical for the purposes of Article 11.01 G 2. If the majority is correct in stating that the parties intended that grievances related to workload arising from the return to work were not to be considered under Article 11, none of Article 11 (including Article 11.01 G 2) would apply. There would have been no need to stipulate that the circumstances arising from the work stoppage are deemed not to be atypical for the purposes of Article 11.01 G 2 as the parties agreed in paragraph 7. Paragraph 7 would have been redundant. It is clear from paragraph 7 and other parts of the Protocol that when the parties wished to limit the application of provisions in Article 11, they said so without ambiguity. If the parties had, in fact, agreed that Article 11 was not to apply to workload grievances arising from the return to work, they would have said so without ambiguity. They did not.

It is also problematic that the majority is now relying upon paragraph 12 of the Return to Work Protocol in deciding that workload grievances arising from the

return to work are to be considered outside of the ambit of Article 11 of the collective agreement. In its May 23, 2007 award dismissing the College's preliminary objection concerning timeliness, the majority stated that paragraph 12 was a stand alone procedural provision. The majority concluded its award with the following observation, "As a caveat, we note that paragraph 12 is procedural in nature only and does not preclude this board from considering the impact of the return to work on substantive matters under the Collective Agreement". The majority award in this instance appears to be stating the opposite - that paragraph 12 creates substantive rights to have the workload grievances considered outside Article 11 of the collective agreement and that paragraph 12 does preclude the board from considering the return to work grievances under the collective agreement.

I also note that paragraph 12 of the Return to Work Protocol states that this board of arbitration "shall have the powers referenced in Article 32". This board's jurisdiction is to hear and determine grievances arising out of the substantive rights in Article 11 but, at the same time, this board is not a "Workload Resolution Arbitrator" within the meaning of Article 11. It was therefore necessary to stipulate what powers this board of arbitration was to have. In the Return to Work Protocol, the parties specified that this board has the powers referenced in Article 32 of the collective agreement. It follows then that this board's powers are limited by Article 32.04 D, which prohibits the alteration, modification or amendment of any part of the collective agreement. By holding that workload arising from the return to work is not subject to the collective agreement, the majority is at best altering the collective agreement.

The majority award also raises practical concerns. The effect of the majority's conclusion is that Article 11 of the collective agreement applies to "normal" work whereas workload arising from the return to work must be considered outside of the collective agreement. In its argument, OPSEU acknowledged that the collective agreement continued to apply to the post strike period but, in its view, not to post strike related work. Therefore, as a consequence of the majority's award, two different workload/compensation regimes will apply to work performed by teachers during precisely the same time period. There will be the Article 11 workload rules that apply to "normal" work and an undefined set of rules to be created by this board that apply to work arising from the return to work. This is an impossible distinction to draw and will lead to endless disputes. It is difficult to accept that rational parties have agreed to such an arrangement. Similarly, it is extremely unlikely that rational parties would have agreed to a separate regime governing workload related to return to work without also indicating how such work is to be compensated.

In order to substantially narrow and expedite these matters, the Colleges asked this board to make the following rulings:

1. No additional compensation is payable to grievors for preparation hours relating to the return to work unless the teaching contact hours they were assigned were changed.
2. No additional compensation is payable to grievors for time performing tasks associated with evaluation and feedback unless the teaching contact hours they were assigned were changed or the number of students in their classes increased.
3. No additional compensation is payable to grievors performing tasks associated with out of class assistance or normal administrative tasks.
4. Generally, additional compensation is only payable if the workload exceeds the maxima set out in the workload formula.
5. In any event, specific authorization is required before overtime could be claimed.

Before the parties proceed to litigate nearly 1200 cases, I believe it makes sense to give the parties guidance in the form of general principles as to when additional compensation may be warranted. I would issue the following directions to the parties:

1. Compensation over and above annual salary is governed entirely by the collective agreement and more particularly by Article 11, save and except to the extent that Article 11 was modified by the Return to Work Protocol.
2. In order to be entitled to any additional compensation, the teacher must have performed work in excess of the maxima set out in Article 11 and therefore be entitled to overtime, as provided therein.
3. Additional preparation time and evaluation/feedback time are not compensable unless there has been an addition to teaching contact hours or the number of students in a course originally assigned OR the teacher has been required to make a major revision to a course or curriculum, as that term is used in Article 11.01 D 3.
4. Mere changes to course work, tests or assignments will not attract extra payment.

5. Mere deletions or reorganization of course content will not attract extra payment.
6. Performance of normal administrative tasks, that is the type of tasks normally associated with teaching, will not attract extra payment.
7. The provision of out of class assistance to students of the type normally associated with teaching will not attract extra payment.
8. The provisions of Article 11.01 G 2 do not apply to the work performed as a result of the strike.
9. Where following the strike, the College assigned teaching contact hours or days in excess of those permitted by the collective agreement, overtime is payable in accordance with Article 11.
10. Where a teacher's total workload (as defined in Article 11.02 A 2) exceeds the maxima set out in Article 11.01 B 1, overtime is payable.

For all of these reasons, I am unable to agree with the majority in this matter.

Ann E. Burke