

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO COUNCIL OF REGENTS FOR COLLEGES  
(SIR SANDFORD FLEMING COLLEGE)

**Employer**

- AND -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION,  
LOCAL 351 (98C444)

**Union**

AND IN THE MATTER OF A GRIEVANCE  
OF JUDY NISBETT

**Grievor**

BEFORE:

C. Gordon Simmons, Chairperson  
Mr. Richard O'Connor, Employer Nominee  
Ms Sherrill Murray, Union Nominee

APPEARANCES ON BEHALF OF THE EMPLOYER:

Ms Carolyn Kay-Aggio, Counsel  
Ms Sherry Taylor, Human & Organizational Development Consultant  
Ms Karen Sjolín, Director, Learning Resource Centres

APPEARANCES ON BEHALF OF THE UNION:

Mr. Gavin Leeb, Grievance Officer  
Ms Marilyn Hinds, Chief Steward  
Ms Betty Cree, Local President  
Ms Judy Nisbett, Grievor

APPEARANCES ON BEHALF OF THE INCUMBENT:

Ms Gayle Ferguson

Hearings into this matter were held on May 25, June 8, August 24, and August 30, 1999 in Peterborough, Ontario, followed by written correspondence among Members of the Board culminating in an Executive Session in Toronto on March 7, 2000.

The issue before this board involves a competition grievance for a newly-created position entitled “Prior Learning Assessment/Print-based Course Facilitator – Atypical Support Services Officer”. There were three full-time employees who applied for the position along with several part-time employees. None of the part-timers were selected. Ms Judy Nisbett, the grievor, with approximately 22 years seniority was the most senior candidate. She was considered to be unqualified by the Selection Committee. She commenced her employment as a Receptionist as well as being Clerical Assistant to the Director of Admissions. From there she moved to the Finance Department where she was employed for approximately three years in accounts payable. In the early eighties she was classified as a Support Services Officer (A) and was transferred to the Registrar’s Office where she reported to Mr. Paul Rochetta, the registrar, for whom she worked approximately 13 years. A change occurred in the mid-1990s whereupon the grievor began reporting to Ms Pat Bronson, the associate registrar, for a period of approximately two years. In 1998 the grievor became Operations Officer in the academic services area where she began reporting to Ms Kim Van Bruinessen, the operations manager. The grievor reported to Ms Van Bruinessen for approximately one month when Ms Van Bruinessen left for sabbatical leave. In August 1998 the grievor applied for the above contested position and was unsuccessful in her application. She stipulates in her grievance that she be offered the position.

Ms Dayle Ferguson was the successful applicant for the position. She had approximately 2½ years seniority at the time she applied for the position. Ms Ferguson attended these proceedings and was given a full opportunity to participate therein. Her employment information with the employer is contained in her resume submitted into evidence (Exhibit 1; Tab 4). Ms Ferguson’s resume reveals she worked as secretary in the Human Resources Department from January to April 1989.

She then left the employer until January 1995 when she returned to become employed in the position of Office Assistant, Student Advising Centre, School of Business where she continued to work until July 1996 at which time she became classified in the position of Office Assistant, Centre for Community Development and Health where she remained until she was appointed to the present position.

Ms Tracey Bell applied unsuccessfully for the position. Ms Bell, like Ms Ferguson, did not testify and her employment information is gleaned from her resume which was submitted into evidence (Exhibit 1; Tab 21). She first became employed in September 1986 as an Office Clerk and Switchboard Operator where she continued until January 1987 on a part-time basis. Between 1987 and 1989 she was employed in Accounts Receivable as a Clerk & Cashier. She was employed in Financial Reconciliation between 1989 and February 1991 and returned to that position in January 1992 where she remained until December 14, 1996. Between February 1991 and December 1991 she was employed as an Accounting Supervisor. In December 1996 she became Marketing/Community Relations Officer, the Fleming Group, where she remained until July 1998. She then transferred to Accounts Payable in July 1998 where she remained until this present position became available. Ms Bell did not file a grievance.

There were four members on the selection committee. The committee consisted of Ms Karen Sjolín, director, learning resource centres, who was the person to whom the successful applicant would report; Ms Dianne Moldaver, director of training and development services; Ms Helen Knibb, a member of faculty and a specialist in the Bell Institute for learning design; Ms Sherry Taylor, human organizational development (HOD) consultant. That is to say she is a Human Resources Officer in the HOD office.

Ms Taylor's role on the committee, as explained to the board through her testimony, was to pay particular attention to the process to be followed in selecting a candidate for the position. She began with Ms Sjolin in preparing the job description; developing the job posting; acting behind the scenes in recruitment within human resources; walking the selection committee through its tasks; and acting as a resource person to the director. Ms Taylor informed the board she is familiar with the collective agreement and uses it daily for general staff issues and is likewise familiar with job competition language. Her role, as she sees it, is to ensure the collective agreement is strictly followed in job application competitions.

The job posting reads, in part, as follows (Exhibit 1; Tab 2):

Reporting to the Director of Learning Resource Centre, the Prior Learning Assessment/Print-Based Course Facilitator is responsible for researching, developing, coordinating, promoting, and monitoring mechanisms, policies, and systems for the Prior Learning Assessment (PLA) and Print-Based Course processes throughout the College.

The duties generally are: to develop, review, and communicate college-wide PLA policies and procedures; to provide direct advice, assistance, and support to students and faculty engaged in the PLA process; to liaise with Academic Centre, T&DS, and others within and outside the College community about PLA; to develop policies, procedures, and systems for the operation of print-based courses throughout the College; to work closely with faculty and BILD staff to implement guidelines on the layout, design, and format of print-based course packages; to act as the primary internal and external point of contact for print-based courses; to develop appropriate support mechanisms for staff, faculty, and students involved with print-based courses; to develop related communications strategies using a variety of media; to meet various deadlines, offer orientation and training, ensure appropriate tracking of students, and develop regular reports on print-based activity; to handle student complaints related to print-based distance education; to maintain appropriate records and procedural documentation for all PLA and print-based course activity; and other related duties as assigned.

**Qualifications:** Post-secondary education combined with relevant experience in an educational environment, or equivalent, knowledge of the prior learning assessment process, solid understanding of experiential learning and authentic assessment, knowledge of the College's programs and Admissions & Records policies and procedures; theoretical understanding of learning outcomes, and practical understanding of course outlines; excellent facilitation, negotiation, and team skills; superior oral and written communications skills; creativity as well as research and systems/process development skills; exceptional interpersonal skills, including sensitivity and an ability

to respond effectively to meet the individual needs of students; and proficiency in a technology-based environment.

While the contents of the job posting are extensive the job, in essence, involves negotiations with the teaching faculty about new courses to be offered to off-campus students. This required, *inter alia*, that materials for courses would be available on time for certain distribution deadlines. It was anticipated the position would require the incumbent to be an excellent facilitator and negotiator with faculty in having faculty members getting on board and working diligently in their commitments to providing a successful program.

Article 17.1.1 of the collective agreement directs how successful candidates are to be determined for a vacant position. The article reads:

**Consideration - Bargaining Unit Employee**

When a vacancy occurs and employees within the bargaining unit at the College apply, the College shall determine the successful candidate based on the qualifications, experience and seniority of the applicants in relation to the requirements of the vacant position. Where the qualifications and experience are relatively equal, seniority shall govern, provided the applicant has the necessary qualifications and experience to fulfil the requirements of the position.

The employer asserts the article is a relative ability clause with seniority becoming a factor only where experience and qualifications are relatively equal. The previous article did not require seniority to be the governing factor if the applicants were relatively equal. The article before its revision read:

**Consideration - Bargaining Unit Employee**

When a vacancy in the bargaining unit occurs and employees within the bargaining unit make application for such vacant position, the College will give proper consideration to the qualifications, experience, and seniority of all applicants in relation to the requirements of the vacant position. Notwithstanding the foregoing, where there is no increase in the complement of bargaining unit employees in the Department within which the vacancy arose, the College may forego posting and fill such vacancy by appointing a qualified bargaining unit applicant from the Department.

The employer maintains that because of the amendment seniority has now been relegated to a tie-breaking role. That is to say, while the first sentence in the article states the successful candidate shall be determined based on the qualifications, experience and seniority of the applicants in relation to the requirements of the vacant position it continues with a qualifier in the next sentence specifying how seniority is to be applied. The employer asserts the qualifier is two-fold in its application. One, seniority only applies when qualifications and experience are relatively equal; and two, seniority and indeed art. 17.1.1 in its entirety does not apply in situations where applicants do not have the necessary qualifications and experience to fulfill the requirements of the vacant position. The employer goes on to say that in the latter circumstance the employer is free to appoint any candidate it chooses without regard to seniority.

Thus, to state the employer's position as we understand it, there has been no violation of the collective agreement. The relative equality clause (art. 17.1.1) was not triggered because none of the candidates was qualified. In the alternative, if the relatively equal clause was triggered then the incumbent, Ms Ferguson, was the superior candidate and the grievance ought to be dismissed.

The union asserts art. 17.1.1 requires three factors be considered when assessing candidates for positions. The three are qualifications, experience, and seniority. The uncontradicted evidence of Ms Taylor was none of the applicant's seniority was raised at the conclusion of or during the interview process for fear of having done so would cause the committee to lose focus on its task. That is, had Ms Taylor apprised the other committee members that seniority ought to be considered in their deliberations during or at the conclusion of the interviews, she had concern the other members would place undue weight on seniority and relegate the other factors to a less than

acceptable role in the process. The union maintains this was a wrong approach. Seniority ought to have been a consideration along with qualifications and experience at the outset of the committee's deliberations. Accordingly, having failed to do so then on this basis alone the selection process, according to the union, was flawed.

Both parties filed a number of previous arbitration decisions in support of their respective positions. The union filed the following cases: *St. John's Training School for Boys and OPSEU (Sneyd)*, May 30, 1996 (Kaplan); *George Brown College and Ontario Public Service Employees Union (Yip)*, September 30, 1995 (Brown); *Re Bank of Montreal, Tweed Branch and Commercial Workers Union, Local 486* (1982), 6 L.A.C. (3d) 289 (Carter, ch.); *McMaster University and Canadian Union of Public Employees/Syndicat canadien de la fonction publique, Local 3906, Unit 2*, April 30, 1999 (Devlin); *Re Fairview Home Inc. and Fairview Nurses M.N.U., Local 21* (1991), 21 L.A.C. (4th) 223 (Cherniack); *Re Fleet Industries and International Association of Machinists, Frontier Lodge 171* (1990), 14 L.A.C. (4th) 151 (Brent); *Re Elisabeth Bruyere Health Centre and Ontario Nurses' Association* (1982), 6 L.A.C. (3d) 119 (Saltman); *Re Board of School Trustees of School District No. 68 (Nanaimo) and Canadian Union of Public Employees, Local 606* (1985), 19 L.A.C. (3d) 176 (Germaine); *Re Wellesley Hospital and Ontario Nurses' Association* (1989), 5 L.A.C. (4th) 55 (Weatherill); *Re Bridge and Tank Co. of Canada Ltd. and United Steelworkers, Local 2537* (1975), 9 L.A.C. (2d) 47 (Weatherill); *The Crown in Right of Ontario (Ministry of Health) and OPSEU (Poole)*, September 27, 1988 (Samuels); *Re Province of Manitoba and Manitoba Government Employees' Union (Jackson)* (1993), 32 L.A.C. (4th) 339 (Schulman); *Re Calgary General Hospital and Canadian Union of Public Employees, Local 8* (1986), 23 L.A.C. (3d) 25 (Beattie); *Re Sydenham District Hospital and Service Employees Union,*

*Local 210* (1992), 29 L.A.C. (4th) 370 (Brandt); *Re B.C. Rail Ltd. and United Transportation Union, Locals 1778 and 1923* (1984) 17 L.A.C. (3d) 402 (Munroe); *Re Ontario Jockey Club and Restaurant, Cafeteria and Tavern Employees Union, Local 254* (1977), 15 L.A.C. (2d) 273 (Schiff); and *Re Religious Hospitallers of St. Joseph of Hotel Dieu (Kingston) and Ontario Public Service Employees Union, Local 465* (1994), 43 L.A.C. (4th) 155 (Simmons).

The employer filed the following cases: *Durham College and Ontario Public Service Employees Union (Smith, Job Posting), March 25, 1988 (Samuels)*; *Canadore College and Ontario Public Service Employees Union (Milne)*, November 28, 1989 (Samuels); *George Brown College and Ontario Public Service Employees Union (Quarthey)*, October 25, 1990 (Picher); *Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1* (1992), 25 L.A.C. (4th) 87 (Marszewski); *Niagara College and Ontario Public Service Employees Union*, September 24, 1991 (Carter); *St. Clair College and Ontario Public Service Employees Union*, March 25, 1989 (Samuels); *Inco Limited and United Steelworkers of America, Local 6500 (Ilnitski)*, October 2, 1992 (Simmons); *The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU (Coulter/Charleau)*, April 2, 1991 (Watters); *Re University of Toronto and Canadian Union of Public Employees, Local 3261* (1995), 52 L.A.C. (4th) 387 (Burkett); *Re York University and York University Staff Association* (1992), 27 L.A.C. (4th) 403 (Dissanayake); *George Brown College and Ontario Public Service Employee's Union (Taurozzi)*, undated, 1991 (Kruger); *Fanshawe College and Ontario Public Service Employees Union (Ross-Wright)*, March 16, 1992 (Devlin); *George Brown College and Ontario Public Service Employee's Union (Gocool)*, May 24, 1994 (Bendel); and *Sir Sandford Fleming College and Ontario Public Service Employees Union (Scanlan)*, November 3, 1988 (Brown).

The board has read and considered the cases submitted by the parties.

There are two questions being asked of the board in relation to art. 17.1.1.

1. Is seniority to be a consideration along with qualifications and experience on a first assessment of the candidates to be followed by a second consideration of seniority when qualifications and experience are relatively equal?
2. Assuming none of the candidates is found to be qualified following assessment of his/her qualifications and experience to fulfill the requirements of the position, is the employer free to assign the position to an unqualified bargaining unit member without having any regard to seniority?

In addressing the first question the board turns to the submissions of the employer. Counsel asked what is the appropriate test required by art. 17.1.1 for a job competition? Its answer is the language has been amended to create a true relatively equal ability clause where seniority only becomes a factor when qualifications and experience are relatively equal. Of the arbitration cases submitted above several considered the previous article 17.1.1 before its amendment. A review of those cases reveals that seniority was found to be as dominant a factor as were qualifications and experience: see *Durham College*; *Canadore College*; and *George Brown College*. This was the case even when the employer argued seniority was not needed to be considered if the vacancy did not create an increase in complement: see *George Brown College*.

However, according to the employer, this all has changed with the revision of art. 17.1.1 in the late 80s or early 90s which is evidenced by the comments of the arbitration board in *Niagara College, supra* where, at p. 4 the following appears:

It was not disputed that this provision contemplates a competition between applicants for a posted position. Greater seniority, therefore, only becomes relevant if it can be established that experience and qualifications are relatively equal. On the other hand, as pointed out in the Canadore case, this provision does require that the process of assessing experience and qualifications be carried out in a manner that is fair to all candidates. It is this latter issue that has been placed squarely before this board. What we have to determine is whether the process was unfair to the grievor both because of the emphasis placed by the employer on interpersonal skills and judgement and because of the weight that the employer placed upon the interviews.

Accordingly, the employer's position is seniority no longer plays the role it enjoyed prior to the amendment and the selection committee acted properly in disregarding seniority in the manner which it did. Moreover, since none of the candidates were qualified one must address the second question raised above.

The union asserts art. 17.1.1 compels the employer to make its determination based on three equal factors on who the successful candidate is to be. The three factors remain qualifications, experience, and seniority. It is only when qualifications and experience are relatively equal that seniority is resorted to once again to break the relative equality tie in qualifications and experience. In support of its position on this point, the union relies on *St. John's Training School, supra*; the *McMaster University* case, *supra*; *Bank of Montreal, supra*; and, *Fairview Home, supra*.

The article in issue in *St. John's* read:

- 13.01 ... Employer shall consider the following factors:
- (a) seniority;
  - (b) skill, ability, qualifications and general work record with the employer.
- Where in the judgment of the Employer, the qualifications in factor (b) are relatively equal, seniority shall govern.

The board in *St. John's* ruled seniority must be considered initially and not just in a tie-breaking role.

In *McMaster*, *supra*, the pertinent provision of the posting article reads, at p. 2:

9.01 (d) The parties acknowledge that the criteria which the Employer will use in selecting a candidate for a position shall include: the candidate's academic qualifications, seniority, teaching competence, ability to perform the various duties of the position and previous academic employment experience. When in making a selection decision the employer determines that two or more candidates have equal qualifications the candidate with the most seniority will be selected.

The *McMaster* board commented at pp. 22 and 23 as follows:

Similarly, in this case, Article 9.01 (d) specifies a number of criteria to be used by the University in selecting a candidate for a position, which criteria include seniority. If the submission of the University were to prevail, however, seniority would be considered only in cases in which candidates were found to have equal qualifications which, in our view, is not consistent with the language of Article 9.01 (d). Accordingly, the Board finds that seniority must be considered together with the other criteria set out in the Article and that the University's failure to do so constituted a violation of the collective agreement. ...

The union urged the board to adopt the *St. John's* and *McMaster* approaches. In doing so, the grievance ought to be allowed because it is acknowledged through Ms Taylor's testimony that seniority was not given any consideration during the first pass in assessing the candidates for appointment to the vacant position.

## **DECISION**

We begin by stating what the board considers to be now settled as to how arbitration boards interpreted art. 17.1.1 prior to its amendment. That is, seniority was considered equally along with qualifications and experience of all applicants in relation to the requirements of the vacant position.

Then the parties agreed to change the wording of the article. Did the change result in demoting the prominence that had been previously devoted to seniority? While the *Niagara* decision addressed the issue as reproduced above, it is obvious the real issue before the *Niagara* board concerned

fairness in assessing qualifications and experience. The board was not asked to determine the role seniority was to play in the scheme of things and its comments relating to the prominence or lack thereof which seniority is to play must be interpreted as being obiter. Indeed, the board was informed that in the instant case seniority in the current art. 17.1.1 has, for the first time, been squarely placed before this board and requires a resolution.

The board recognizes that seniority has been an issue separating unions and management over the decades. Unions pursued a goal of making seniority paramount on their list of sought after rights and benefits whereas employers have traditionally attempted to relegate seniority to less prominent perches, especially in areas of job vacancies and promotions where their uppermost desires have been to have skill and ability the sole criteria to be followed. As years have passed both parties have mellowed somewhat and have gained a measure of appreciation, and perhaps acceptance, of the opposing views.

In keeping with the thoughts expressed in the immediately preceding paragraph we approach the issue from the standpoint of what precisely did the parties intend by their amendment. The board was not informed of the reasons why the article was amended but one can surmise the struggle between skill and ability versus seniority continues to flourish. So what have they accomplished?

Upon reviewing art. 17.1.1 we notice two changes in the first sentence. The first change is the wording which perhaps cleans up the sentence but is otherwise not significant. The second notable change is one from "... the College will give proper consideration ..." to "... shall determine the successful candidate based on ...". What is significant is both include "qualifications, experience and seniority...in relation to the requirements of the position" before and after the amendment. This sentence sets out the requirements for determining who the successful candidate shall be. They have

not dropped seniority from the list of the three requirements. In our view, had the parties intended to alter the requirements for determining the successful candidate they would have done so in clear and unequivocal language. In our view, it takes clear language to take away or lessen the entitlement of an employee or group of employees enjoyed under a collective agreement. This was the view expressed in *Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill & Smelter Workers, Local 598*, 3 L.A.C. (2d) 409 (Weatherill) with which we respectfully agree. So, it must be our conclusion that the parties have not changed the requirements of determining successful applicants in the first sentence of art. 17.1.1 unless the article does so in its later wording.

The second sentence is interesting. The parties have made a significant change to the process which is contained in the second sentence of the article. They have provided for a tie-breaker in the event of a certain happening. That happening occurs when two or more candidates are found to be relatively equal in qualifications and experience. In that eventuality, it stipulates that seniority governs. Without wishing to be flippant the parties could have provided a number of ways to resolve tie-breakers for qualifications and experience. Possibilities are numerous. They could have stipulated a flip of a coin; or the heaviest candidate gets the position; or the lightest candidate gets the position; or the colour of one's hair or eyes. Of course these examples verge on the ridiculous but perhaps best illustrate the point that the selection of seniority is but one option that was available to the parties to break a tie. Of course, we know the parties chose seniority as their tie-breaker. Does that relegate or diminish the seniority factor from those of qualifications and experience found in the first sentence of the article? The answer to this question must be "no". The board is of the view that in order to have relegated or diminished the seniority factor from its treatment in the prior art. 17.1.1 the parties would have had to have expressly and clearly stated that such was to be the case. Or at

the very least, they would have had to have dropped the word “seniority” from the first sentence in the article. This they have not done.

Therefore, it is our conclusion that seniority continues to be a required factor along with qualifications and experience when determining the successful applicant. By omitting to determine the successful applicant based on seniority along with the qualifications and experience of the applicants in relation to the requirements of the vacant position, the employer violated the requirements set out in art. 17.1.1. Consequently, the determination of the selection committee was flawed.

Accordingly, based on all of the foregoing reasons, the determination of the selection committee was flawed and must be set aside. As stated earlier the grievor seeks to be offered the contested position. The board is unable to comply with the grievor’s request. Based on existing jurisprudence the only available remedy open to the board in the existing circumstances is to order the competition be re-run and we so order.

In light of the foregoing reasons it is not necessary to answer the second question raised by the parties and the board declines to do so.

The board remains seized of its jurisdiction to assist the parties in implementing this decision should it become necessary to do so.

Dated at Kingston, Ontario, this 3rd day of May, 2000.

---

C. Gordon Simmons  
Chairperson

I ~~concur~~/dissent

Dissent Attached

---

Richard O'Connor  
Employer Nominee

I concur/~~dissent~~

*“Sherrill Murray”*

---

Sherrill Murray  
Union Nominee