IN THE MATTER OF A WORKLOAD ARBITRATION

BETWEEN:

SIR SANDFORD FLEMING COLLEGE
- The Employer

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION,
LOCAL 352
- The Union

AND IN THE MATTER of the workload complaints of Andrew Bohart and George Fogarasi

Workload Resolution Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Timothy P. Liznick	- Counsel
Sonia Crook	- Vice President, Human Resources and Student Services
Shelley Mantik	- Human Resources Consultant
Silvana MacDonald	- Associate Dean, School of General Arts and Sciences

On behalf of the Union:

Liz Mathewson	- President Local 352
Audrey Healy	- Chief Steward, Local 352
Victoria Maystruk	- Member, Workload Monitoring Group
Andrew Bohart	- Complainant
George Fogarasi	- Complainant

Hearing held March 22, 2018, in Peterborough, Ontario.

AWARD

INTRODUCTION

Two Sir Sandford Fleming College teachers teach three sections of the same introductory English course. Both Complainants said that teaching this course in the Winter 2018 session required much more time than in previous years because of the presence of an unusually large number of international students for whom English was a second language. The Union asked that one section of this course be removed from the teaching assignment for each Complainant for the Winter 2018 session.

BACKGROUND

The collective agreement between the College Employer Council for the Colleges of Applied Arts and Technology and the Ontario Public Service Employees Union (OPSEU) regulates the employment of teachers in all Ontario Colleges. The collective agreement contains detailed provisions for assigning teaching duties and for calculating the work involved in performing those duties.

Andrew Bohart and George Fogarasi, the Complainants, teach at Sir Sandford Fleming College, which is the Employer. OPSEU Local 352 is the Union representing the Complainants.

The parties agreed that both complaints raised the same issue and should be dealt with together. The parties outlined the facts and made their submissions in an informal arbitration hearing.

The Complainants were each assigned to teach three sections of the introductory English course called Communications I in the Winter 2018 semester and their complaints relate to that course. Other teachers also teach sections of Communications I.

The workload for the Complainants for the Winter 2018 session was assigned in November 2017. Each Complainant agreed to his assignment.

Communications I requires considerable written work. Students sometimes work in groups and assist one another by doing "peer editing" of drafts of other group members' writing. The final product is evaluated by the teachers who provide feedback.

In the Winter 2018 session there was a large and unanticipated increase in the number of international students. For many of those students English was not their first language, although all the international students had passed the test used by Fleming College and other Ontario Colleges for ensuring adequate English language skills. Nevertheless, the large number of international students for whom English was a second language created difficulties particularly for the teachers in this Communications I course. The Employer accepted that there were problems requiring a response from the Employer and it offered a number of additional supports, such as hiring more international staff, hiring markers and graders, providing Educational Assistants or English as a Second Language support employees to assist in class and/or in labs, etc.

Notwithstanding this additional help, the Complainants estimated that they spent six or seven additional hours per week in teaching these courses in comparison with the time required in previous years.

Each Complainant filed a workload complaint in February, 2018.

UNION POSITION

The Union first raised an objection to the Employer being represented by Counsel. The collective agreement calls for an informal arbitration process and the Union said the use of Counsel changes that informal process. However, the Union acknowledged that the Winter 2018 semester was more that half completed and, rather than taking time at the arbitration hearing to deal with this issue of the presence of lawyers which could necessitate a delay in the hearing, said it wanted to move to the substance of the two workload complaints. The Union said it was prepared to proceed with Employer counsel present but that it would like its objection noted so that it would not be estopped in the future from raising this issue. The Union's objection to the use of counsel in a Workload Resolution Arbitration hearing is noted.

The Union said this situation was an atypical one. It said that Article 11.01 G 2 (below) provides that, where there are atypical circumstances, additional hours may be added. However, the Union said that if six or seven extra hours were added, both Complainants' assigned workload would be above the maximum hours permitted under the collective agreement, even allowing for the permissible voluntary overtime.

The Union also said that, under Article 11.02 A 1 (b) (below), "where a change in circumstances requires it" the Employer may amend a teaching assignment. The Union said there had been a change in circumstances requiring a workload amendment and that the Employer had wrongly failed to make an amendment to either Complainant's assigned workload.

For remedy, the Union asked that one section of the course Communications I be removed

from each Complainant's Winter 2018 workload assignment.

EMPLOYER POSITION

In response to the Union's preliminary submission objecting to the presence of counsel, the Employer said it was within its right to be represented by counsel and that there were a number of Workload Resolution Arbitration decisions supporting its position.

The Employer then made three alternative submissions on the substance of the Complaints:

1. In November 2017 each Complainant had agreed to the workload assignment so the issue had been settled.
2. In any event, if the Complainants' were entitled to complain, this collective agreement has a clear time limit of five days from the time of the assignment and both complaints were out of time.
3. While the circumstances may be unusual they are not atypical in the sense used in the collective agreement. "Atypical circumstances" in Article 11.01 G 2 is directed to elements of an assignment not otherwise addressed in the collective agreement. Evaluation and feedback and out of class assistance to students are specifically addressed in the agreement.

The Employer reviewed the provisions of the collective agreement and said assignments were not intended to capture what an individual teacher actually did. The collective agreement provides an abstract negotiated way to deal generally with all teachers' workloads.

The Employer reviewed the process of making the teaching assignments for each Complainant and said it had followed the collective agreement. The collective agreement

specifically addresses the issues of preparation, evaluation and feedback, and out-of-class assistance to students - the Employer followed the collective agreement in each area. The Employer applied the formulas which generate the agreed time for various teaching duties. The formulas may well not reflect what actually happened but the use of the formulas was the parties' agreement.

On the merits of the complaints the Employer referred to the following Workload Resolution Arbitration awards: *Seneca College and OPSEU, Local 560, (Group Complaint)* unreported, October 23, 1987, (Farr); *Seneca College and OPSEU, Local 560, (Stavroff)* unreported, February 18, 1988 (Farr); *Northern College and OPSEU, Local 563 (Hutchinson)* unreported, April 10, 2015 (Nicholls); *Northern College and OPSEU, Local 563 (Schaffer)* unreported, June 9, 2017 (Anderson); *Northern College and OPSEU, Local 563 (Schaffer)* unreported, June 14, 2016 (Wayck); *Fanshawe College and OPSEU, Local 110 (Morgan)* unreported November 22, 2014 (Parmar); and *Algonquin College and OPSEU, Local 415 (Sumitro)* unreported January 29, 2003 (O'Neill).

For remedy, the Employer asked that the two complaints be dismissed

PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the key provisions of the parties' 2017-2021 collective agreement:

Article 11
WORKLOAD

11.01 A Each teacher shall have a workload that adheres to the provisions of this 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.

. . .

11.02 A 1 (b) The College may, where a change in circumstances requires it, amend assignments provided to a teacher after the original assignment, subject to the teacher's right to refer any matter ...

...

11.02 A 6 (a) In the event of any difference arising from the interpretation, application, administration or alleged contravention of 11.01, 11.02, or 11.09, a teacher shall discuss such difference as a complaint...

CONCLUSIONS

There were suggestions at the hearing that it would have been better academically for the Employer to have removed a course from the Complainants' workload assignments rather than to have made the other changes such as the additional ESL help, markers and graders. Whether that is true or not, my role does not involve making decisions based on what I perceive to be academically preferable. My role is a more limited one. The question for me as Workload Resolution Arbitrator is this:

> Did the Employer violate the workload provisions of the collective agreement by not removing a section of the Communications I course or otherwise altering the workload assignments for both Complainants?

I begin with the collective agreement.

For over 30 years essentially the same workload limits and the same formula-based system for calculating and assigning workload hours have been used in some 20 colleges in the province.

The workload provisions for teachers are set out in Article 11.01 and 11.02 and those provisions are lengthy (over ten pages of the agreement). The workload itself is largely based on limits and formulas.

In general, Article 11 limits the amount of teaching a teacher may be assigned. The key limit here is the maximum workload assignment of 44 hours in a week.

In calculating workload within that 44 hour per week limit, a teacher is assigned courses and the number of teaching contact hours is recorded. The two Complainants were assigned 12 and 13 teaching contact hours per week. The teaching contact hours are an accurate reflection of the time actually spent in the classroom.

But the rest of the workload assignment is then "attributed" using various formulas with no attempt to reflect the hours which a particular teacher actually spends on those teaching duties.

Teachers spend time preparing for class. Some teachers engage in more extensive, that is more time consuming, preparation for class than do other teachers. However, under this collective agreement the time for a teacher to prepare for teaching is to be "attributed" based on a formula which has nothing to do with an individual teacher's style of preparation. Instead it depends on whether the course is "new" for that teacher, or is "established" (a course the teacher has taught before), or is a "repeat" section of the same course for that term, or is "special". Unlike new courses, established, repeat and special courses each have two levels within them and the collective agreement provides for a specific number of hours of preparation time to be "attributed" for preparation for each teaching contact hour using the formulas provided. That is, it does not matter how many hours teacher A will actually spend in preparing to teach a class in comparison to the hours Teacher B will spend in

preparing to teach that same class. Instead, the parties have agreed that all the hours for preparation for all teachers are to be calculated and assigned by use of the agreed formulas.

Teachers also spend time in marking student work or otherwise evaluating student performance and in providing feedback to students. Again, some teachers spend more time on this, provide more detailed comments, etc., than do their colleagues. But under this collective agreement, workload time is "attributed" for evaluation and feedback by a formula that has nothing to do with that teacher's work habits. Instead, the agreement contains formulas which vary depending on the type of evaluation used - essay, routine (i.e., short answer), assisted, in-process, etc. - and the number of students.

Teachers also spend time helping students outside formal class hours. Some teachers spend more time on this aspect of teaching than do other teachers. The collective agreement provides that time for "complementary functions" may be assigned and that "Hours for such functions shall be attributed on an hour for hour basis." (See Article 11.01 F (1)). But, of particular relevance here, the collective agreement then specifies that six hours are to be attributed to all teachers covered by this collective agreement "for routine out-of-class assistance to individual students" and "for normal administrative tasks."

Finally, in addition to addressing the workload limits and the calculation of the workload assignments, the collective agreement addresses the manner of assigning workload and the ways a teacher may complain about that workload. A proposed workload must be provided in writing six weeks before teaching begins using the Standard Workload Form in the collective agreement and has to include all details of the proposed assignment. A teacher has five days to accept the assignment or to seek a review, first by the College Workload Monitoring Group and possibly later by a Workload Resolution Arbitrator.

In setting out one method for assigning workload for all teachers in many colleges and many programs, the parties to this agreement did not intend a system of individualised assessment of a teacher's actual work.

I turn now to the details of the two complaints.

As required, the Employer assigned the teaching workloads in advance of the Winter 2018 session. In November 2017 the Employer provided a proposed workload assignment to each Complainant for the Winter 2018 session. As provided in the collective agreement, the Complainants had an opportunity to review the proposed workload and had an opportunity to raise any objections or concerns about the proposed workload. If either Complainant had been concerned about the workload assignment he had five days in which to complain. However, these two complaints were made more that two months later.

I accept that the Complainants are correct that, because of the increase in the number of international students for whom English is a second language, there has been an unexpected increase in the amount of time needed to teach Communications I. That is, I accept that the Complainants are required to spend more hours in evaluation and feedback and in out of class assistance to students in Communications I than they did in previous years, and also more hours than was attributed for these parts of the teaching role in the November workload assignment. Moreover, it appears that the Employer agreed there was an unexpected increase in work and in the hours required since the Employer provided a number of means to assist the Communications I teachers to deal with this issue.

Atypical circumstances?

The Union said that these were "atypical circumstances" and submitted that Article 11.01 G

2 (above) addresses "atypical circumstances" in assigning workload. I accept that these were atypical circumstances as that phrase is commonly understood. Two issues arise:

1. Were these "atypical circumstances" within the meaning of this provision of the collective agreement; and,
2. In any event, were the complaints about atypical circumstances and Article 11.01 G 2 out of time as the Employer submitted?

Article 11.01, including 11.01 G 2, deals with the assignment of workload and those assignments are to be completed six weeks before the work starts.

Article 11.01 also includes reasons why an assignment will later be modified. The formulas for evaluation and feedback hours rely on student numbers. When assignments are being made six weeks before a term starts student numbers can only be predicted. Because some students may switch classes or withdraw from the course or the College entirely, or there may be an increase in enrollment, Article 11.01 E 4 provides that the number of students shall initially be recorded on a Standard Workload Form based on the College's planning estimates and that the workload assignments will then be revised based on the actual enrollment.

But there is no similar provision in Article 11.01 providing for a revision in a workload assignment because of a change in the makeup of a class, such as here with more international students for whom English is a second language, or other similar reason.

When read as a whole, Article 11.01 addresses only the initial assignment of workload and that process must be completed six weeks before the start of the term. Workload is assigned based on the circumstances at the time of making the assignment. "Atypical circumstances" in Article 11.01 G 2, like all the other provisions of Article 11.01, are to be considered when making those assignments. I find then that the "atypical circumstances" as used in Article

11.01 G 2 were intended as circumstances that were known when making assignments, or perhaps were circumstances which should reasonably have been known at that time. Those are the circumstances which are to be considered at the time of assigning work, and are to be reflected on the Standard Workload Form provided to each teacher in advance of the session. That process was followed here, the workload assignments were made, and accepted by the two Complainants. The circumstances complained of here were not known in November and so the Employer did not violate the agreement by failing to consider them under the "atypical circumstances" provision.

In any event, the collective agreement provides that teachers have five days in which to raise a complaint about a proposed workload and the two Complainants only raised their complaints some two months later. As a result, I conclude that these complaints about a violation of the "atypical circumstances" provision are out of time.

Change in Circumstances?

The Union also said that, with the increase in the number of international students for whom English was a second language, there had been a change in circumstances. Relying upon Article 11.02 A 1 (b) (above) the Union said that because there had been "a change in circumstances" the Employer should have amended the original assignments. Because the Employer had failed to do that, the Union submitted that under Article 11.02 A 6 (above) a teacher may raise a difference arising from "the interpretation, application, administration or alleged contravention of 11.01, 11.02, or 11.09, ..." and take the matter to the Workload Monitoring Group and ultimately to Arbitration.

I note that these complaints about a change in circumstances were timely.

I accept that by February, well after the workload assignments were made, there was a change in circumstances in the Communications I course as that phrase is commonly understood. But not every change in circumstances leads to a amendment of an assignment under Article 11.02 A 1 (b) - there are two other limits in the language used. First, it has to be a change in circumstances that "requires" the Employer to amend the Complainants' workload assignment. Secondly, the Article provides that "The College *may* ... amend assignments..." (my italics). "May" is commonly intended as permissive, that is it suggests that the Employer may amend assignments or it may decide to take other steps to deal with a "change in circumstances." I interpret the Article, especially with the use of the word may, as providing the Employer with a discretion as to how it will deal with a change in circumstances.

In this instance the Employer appeared to agree that there was a change in circumstances with the extra work arising from the increase in the number of international students for whom English was a second language, but to have concluded that there were steps other than altering the assignment of courses which would adequately address this. The Employer provided several other measures to assist the Communications I teachers - it hired more international staff, hired more markers or graders to assist the teachers, and provided Educational Assistants and English as a Second Language employees to assist in class and in labs. These changes lessened teachers' workloads without formally changing the workload assignments.

I am not persuaded that a formal amendment to the Complainants' assignments was required. Instead, I find that the Employer exercised its collective agreement discretion by taking other steps to address the change in circumstances and that, by doing so, it did not violate the collective agreement. I find no violation of Article 11.02 A 1 (b).

Summary

In summary, using the language of Article 11.01 A, I conclude that each Complainant's assigned workload "adheres to the provisions of" Article 11. The two workload complaints are dismissed.

Dated in London, Ontario, this 3rd day of April, 2018.

Howard Snow, Workload Resolution Arbitrator