MPA/N 901432

IN THE MATTER OF AN ARBITRATION BETWEEN:

THE UNIVERSITY OF WINDSOR

AND

WINDSOR UNIVERSITY FACULTY ASSOCIATION

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GRIEVANCES OF DENISE GHANAM AND DEBBIE AMARO

ARBITRATOR
TED CRLJENICA

APPEARING FOR THE EMPLOYER
NANCY JAMMU-TAYLOR COUNSEL

APPEARING FOR THE ASSOCIATION
JAMES RENAUD COUNSEL

PRELIMINARY AWARD

By way of preliminary motion, the University of Windsor has challenged the jurisdiction of the Association to grieve, and therefore an arbitrator to adjudicate, a dispute relating to an alleged failure of the University to comply with procedural requirements relating to a temporary appointment made by the University. An "appointment" is the hiring of a new staff member. The appointment process is set out in University of Windsor Bylaw 20. Bylaw 20 is not specifically referred to in the collective agreement.

In addition, one of the grievances alleges that the University has interfered with the Association's right to represent a grievor in regard to an appointment. The University's position is that the Association does not have representation rights in regard to an applicant seeking an appointment. The issue is complicated by the fact that the unsuccessful applicant was working at the University pursuant to a temporary appointment when she applied for the temporary appointment in issue.

Bylaw 20 was enacted pursuant to section 21 of the *University of Windsor Act, 1962-63* 11-12 Elizabeth II, 1962-63. The relevant portions of section 21 read:

21 (1) Except in such matters as are assigned by this Act to the Senate and the boards of federated and

> Councils and the executive of the other academic body, if any, does not have a quorum present at the time of the vote, there shall be a mail ballot conducted by the office of the Dean. The office of the Dean shall provide both a paper and electronic ballot. Members may cast their votes using either form, within the time prescribed. A simple majority of votes cast is required to endorse the named candidate.
>
> 2.2.4 A Dean shall negotiate with the candidate and recommend terms of appointment to the Provost and Vice-President Academic.

Article 39 of the Collective Agreement identifies three types of grievances that can be filed against the University. They are:

> (a) Individual Grievances – a grievance by a member, who is affected, *that the terms and conditions of this Agreement* have been violated, misapplied or misrepresented. (my italics)
>
> (b) Group Grievance – a grievance by more than four (4) members who are affected, *that the terms and conditions of this Agreement* have been violated, misapplied or misinterpreted. (my italics)
>
> (c) Policy Grievance – a grievance arising directly between the Association and the University concerning the interpretation, application, administration or violation of the provisions *of this Agreement* which has implications generally for Association members. (my italics)

Thus, only those disputes that arise from the collective agreement can be grieved and referred to arbitration, which would appear to exclude bylaw 20 unless the parties incorporated it into the collective agreement.

The Association argued that the bylaw is incorporated into the collective agreement by way of article 12.01. The University's position is that it is not.

> ARTICLE 12 APPOINTMENT OF MEMBERS
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> I. Appointments (General)
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> 12:01 In accordance with Section 21(1)(c) of the University of Windsor Act, the Board of Governors shall continue to have power to appoint members of the academic staff, but all such appointments made by the Board of Governors shall be made in accordance with the rules and regulations,[1] *with respect to qualifications for appointment*, as may from time to time be adopted by the Senate, and the President shall, before making such recommendations for appointment, consult with the appropriate committee of the Senate regarding such appointments. (my italics)

The italicized clause in article 12.01, "with respect to qualifications for appointment" was, along with the majority of article 12.01, copied directly from section 21(1)(c) of the *University of Windsor Act*. The commas surrounding this clause complicates its interpretation. The Association argued that the clause within the commas and the clause preceding it can be read independently. Thus, on the Association's interpretation, when the University makes

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[1] I was advised by the parties that there are no other "rules and regulations" that deal with appointments.

appointments, such appointments:

> . . . shall be made in accordance with the rules and regulations as may from time to time be adopted by the Senate

Alternatively, the Association argued that the word "qualifications" includes the procedural matters set out in the bylaw.

I do not accept either of these two submissions. The clause between the commas cannot stand independently. If it was read as proposed by the Association, it would leave a six word clause with no grammatical context. Further, if the clause was intended to be an additional requirement, it would likely have included words such as "as well as", "in addition to" or "along with". Further, the commas in this article do not conform to other recognized uses of commas, such as listing of adjectives or examples to clarify an adjoining phrase, to insert a phrase in apposition to an adjoining phrase, or to insert an incidental, non-essential clause. It is therefore, my conclusion that the clause within the commas is not independent of the preceding clause, and that the first comma, if not both, were inserted in error.

Nor do I accept the Association's submission that the word "qualifications" includes procedural matters. In labour relations parlance, the word "qualifications" is used to denote attributes, training or education that would "qualify" an applicant to perform the duties of the position. There is nothing in article 12 to suggest that the parties intended to strain the definition of "qualifications" so as to have it include "procedures".

Further, there are "qualifications" in bylaw 20 to which this clause of article 12.01 probably refer. Although the bylaw does not contain any "qualifications" for temporary appointments, section 1.3 of the bylaw, entitled "Special Appointments", contains "qualifications" relating to other appointments. For example, an appointment as a University Professor requires that the appointee be a member of the faculty of the rank of professor who has distinguished achievements in teaching and wide national and/or international reputation for scholarship or creative or professional accomplishment. There are also qualifications for Emeritus/Emirita Professors, Librarian IV, Associate Professor or Librarian III, Honorary Professor and Visiting Professor.

In regard to the balance of article 12.01, the collective agreement also requires that:

> . . . the President shall, before making such recommendation for appointment, consult with the appropriate committee of the Senate regarding such appointments.

Article 12.01 is not structured in such a way to restrict this requirement to the rules and regulations with respect to qualifications for appointment, and in my view is independent of that clause. Committees were established pursuant to bylaw 20 and the President must consult with the appropriate committee prior to making an appointment recommendation to the Board of Governors.

By making specific reference to rules and regulations with respect to qualifications for appointment and to the obligation of the President to consult with the appropriate committee, rather than referencing the bylaw itself or referencing the entire appointment process from the bylaw, it is my conclusion that the parties only intended to incorporate these specific elements of

bylaw 20 into the collective agreement.

This conclusion is supported by comparing article 12.01 to article 13 which is entitled "Renewals of Appointments, Promotion and Tenure/Permanence". Articles 13.02, 13.04 and 13.07 provide:

> ARTICLE 13 RENEWAL OF APPOINTMENTS, PROMOTION AND TENURE/PERMANENCE
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> I. Renewal of Appointments, Promotion and Tenure of Faculty Members
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> . . . . .
>
> 13:02 The criteria for renewal of appointment, promotion, and granting of tenure of faculty members shall continue to be as adopted and applied by the Senate. . . .
>
> . . . . .
>
> 13:04 Subject to clause 13:02, renewal of appointment, promotion and granting of tenure and renewal of faculty members, shall continue to be by action of the Board of Governors on the recommendation of the President who shall, before making such recommendations, consult with the appropriate committee of the Senate. *When a time limit is stipulated in a procedure as outlined in the Senate Bylaws or this Agreement for promotion and tenure, the administration and all persons and/or bodies bound by the time limit will take appropriate steps to ensure that the time is adhered to strictly.* Nevertheless, where good and sufficient reasons are demonstrated, the time limits may be extended in order to accommodate such reasons. However, the body or person initiating any such extension shall give due advance notice of the extension and the reasons therefore to the body or person directly affected by the extension. (my italics)
>
> 13:07 The recommendation of the President, or his/her failure to make a recommendation to the Board of Governor under clause 13:04 of this Agreement, shall be subject to the arbitration procedures set forth in Article 39 of this Agreement.
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> Recourse to arbitration shall normally be related to the following, but not limited to them in cases where the Faculty Association can demonstrate a justifiable reason for requesting Arbitration on some other ground:
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> . . . . .
>
> (c) involves procedural irregularity or defect in the application of, or failure to apply, the appropriate Senate procedures sufficient to justify quashing the decision,
>
> . . . . .

Had the parties wished to incorporate into the collective agreement all of the procedural requirements relating to appointments, they could easily have used the same or similar language as appears in article 13.

The Association also relied on *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 , to argue that if the entirety of bylaw 20 is not subject to the grievance and arbitration provisions of the collective agreement, applicants for appointments would have no recourse arising from the University's failure to comply with the bylaw. This submission was premised on the assumption that a Court

would decline to entertain an action or application regarding any such violation, deferring to the jurisdiction of a labour arbitrator.

In *Weber v. Ontario Hydro* the majority stated: (my italics throughout)

> 51. . . . Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> 52. In considering the dispute, the decision-maker must attempt to define its "essential character" . . . . The fact that the parties are employer and employee may not be determinative. . . . . *not everything that happens on the workplace is may arise from the collective agreement.* In the majority of cases, the nature of the dispute will be clear; either it had to do with the collective agreement of it did not. Some cases, however, may less than obvious. *The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.*
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> 53. Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of cases that will fall into the exclusive jurisdiction of the arbitrator.
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> . . . . .
>
> 67. I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with *all disputes between the parties arising from the collective agreement. The question is each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement* . . .

Not every dispute arising within a collective bargaining relationship arises from the collective agreement. Only those that do are subject to the grievance and arbitration provisions, and therefore within the jurisdiction of an arbitrator. What a court may or may not do does not bestow jurisdiction upon an arbitrator. Here, not only were the parties very specific in drafting article 39 so as to limit the grievance and arbitration procedure to disputes arising from the collective agreement, their specificity in drafting article 12.01, when read on its own and/or in contrast to article 13, is very strong evidence that in regard to appointments, they only intended to bring into the collective agreement the matters specifically set out in 12.01. Thus, an alleged violation of bylaw 20 that is not in regard to the rules and regulations with respect to qualifications, or the failure of the President to consult with the appropriate committee, is not subject to the grievance and arbitration procedure, and not within the jurisdiction of an arbitrator.

The Association also based a submission on article 6 of the collective agreement. That article is entitled Management Rights:

> 6.01 The Association recognizes the rights, powers and responsibilities of the Board of Governors to manage the University as provided for in the University of Windsor Act. Such rights, powers and responsibilities shall be exercised in a just and equitable manner consistent with the provisions of this agreement.

It submitted that it would not be just and equitable for the University to make an appointment without complying with bylaw 20.

A canon of contractual interpretation is that a specific clause or article takes priority over a general clause or article. Article 6 is general and is not sufficient to override the intent of the parties as evinced by the very specific language they used in articles 12, 13 and 39.

In addition to this, the reference to "just and equitable" in article 6 is not freestanding; it is in reference to the provisions of the collective agreement. It is my interpretation of article 6 that the University's obligation thereto is in regard to matters dealt with in the collective agreement. This article does not require that the University exercise its rights, powers and responsibilities in a just and equitable manner *and* consistent with the collective agreement.

As for the University's position that the Association does not have the right to represent applicants who wish to challenge the appointment process, the University's concern was that an applicant who was working in an existing temporary appointment seeking a new appointment would have an advantage over non-bargaining unit applicants. The first sentence of Article 3.01 provides:

> The University recognizes the Association as the exclusive bargaining agent of *all* the employees in the bargaining unit. (my italics)

An applicant who is in a temporary appointment is a member of the bargaining unit and the Association is his or her exclusive bargaining agent. The Association has an interest in the appointment process to the extent reflected in article 12.01. A bargaining unit member who applied for a new appointment has an interest in seeking to overturn an unfavourable decision. I was not provided with any authority or labour relations principle to support the proposition that a bargaining unit member can be deprived of his or her right to union representation, or that the Association cannot represent him or her. The University's motion regarding this issue is dismissed.

The parties may contact me to arrange additional hearing dates, if required.

December 11, 2009

Ted Crljenica-Sole Arbitrator