

**IN THE MATTER OF AN ARBITRATION  
PURSUANT TO THE LABOUR RELATIONS CODE**

BETWEEN:

**COLLEGE OF NEW CALEDONIA**  
(the "Employer" or "College")

AND:

**FACULTY ASSOCIATION OF THE  
COLLEGE OF NEW CALEDONIA**  
(the "Union")

**COUNSELLOR WORKLOAD GRIEVANCE**

ARBITRATOR:	WAYNE MOORE
COUNSEL for the EMPLOYER:	BRUCE GRIST
COUNSEL for the UNION:	LEO McGRADY Q.C.
DATE of HEARING:	OCTOBER 7 & 8, 2008
PLACE of HEARING:	PRINCE GEORGE, B.C.

### *Introduction*

This case focuses on the interpretation of Article 12.3.5 of the parties' Collective Agreement, which provides:

No full-time or regular faculty employee shall have a teaching assignment between Boxing Day and New Year's Day. However, all full-time and regular faculty employees without duly approved vacation or professional development time are on duty and on call. For the purpose of this clause, on duty and on call shall mean that the faculty employee is performing College business within the College region, unless other arrangements have received the prior approval from the appropriate Dean/Director/Regional Director.

As the actual working days between Boxing Day and New Year's Day may change from year to year I will, for ease of reference, call that period the "Christmas Break". In support of their respective positions, both parties rely on the plain and ordinary meaning of the language of the Collective Agreement. The Union also presented alternative arguments based upon past practice and estoppel.

### *Facts and Circumstances*

The Employer is a college, located in Prince George, British Columbia, that provides a variety of programs, including academic courses for university transfer, trades training and a baccalaureate in nursing. The Union represents the faculty of the College. The term "faculty employee" is defined in Article 1.10.1 of the Collective Agreement as follows:

"Faculty Employee" denotes all teaching faculty, librarians, counsellors, study skills instructors, and laboratory demonstrators as included in the certification of the Faculty Association of the College of New Caledonia as a trade union.

There are seven different types or classifications of faculty employees. At the risk of over-generalization and largely based on the evidence of Jan Mastromatteo, the Union's Vice President and Chief Shop Steward, the employee types are as follows: Type 1a employees teach the university transfer courses; Type 1b teach business and social services courses; Type 1c teach healthcare related courses; Type 1d teach in the Baccalaureate Nursing Program; Type 2 teach Adult Basic Education; Type 3 teach trade

related courses; and, Type 4 are non-instructional faculty (including, amongst others, counsellors, librarians and curriculum developers). Each type or classification has specific workloads and responsibilities delineated in the Collective Agreement. The issue in this case involves Type 4 counsellors. The workload of full-time counsellors requires them to be available for a maximum average of 30 hours of student contact time per week. This compares to 12-15 hours per week of instructional time for Type 1 instructors, approximately 24 hours of teaching or practicum instruction for Type 2 faculty, and 28 hours of classroom time for Type 3 faculty.

The responsibilities of counsellors are specified in Article 4.4 of the Collective Agreement as follows:

4.4 Responsibilities of Counsellors

- 4.4.1 To offer professional services in educational and career planning, in orientation to post-secondary education, in identifying vocational goals and resources, and in intensive counselling for personal problems, where appropriate.
- 4.4.2 To provide counselling services to College students, faculty employees, and to members of the community at large.
- 4.4.3 To undertake, in accordance with procedures developed by the counsellors and approved by the Dean/Director/Regional Director, testing and interpretation for students and prospective students in the areas of aptitude, vocational interest, intelligence and personality.
- 4.4.4 To maintain professional competence and qualifications in the appropriate fields, and to keep up-to-date with developments in those fields.
- 4.4.5 To fulfill individual or collective responsibilities in furthering the aims and objectives of the College. This is meant to include when requested by the administration, faculty participation and assistance in recruitment, public relations, College committees, registration, curriculum and budget preparation and student job placement. For the purpose of evaluation, these responsibilities (4.4.5) apply only to full time and regular part-time faculty employees.

Although the subject of earlier rumors, the issue giving rise to this grievance first surfaced in an e-mail written by Catherine Wishart, the Employer's Vice President - Community and Student Services, to "everyone in

Counselling and Advising”. Headed “thoughts on vacation scheduling for 07-08” and dated August 21, 2007, it included the following paragraph:

As the College is “open” around Christmas and New Years (this year that includes four working days of December 24, 27, 28 and 31), operational staff can request vacation, or can come in for their regular working hours. These four days are not part of instructional assigned time for faculty, therefore they need to be scheduled as PD or vacation time. With three faculty, this will ensure we have an additional 12 days instructional time during times when students require counselling support. I know this is a change from past practice, but is based on realistic student service requirements.

As noted, the direction in the e-mail was a change in the practice relating to time worked over Christmas Break for counsellors. However, consistent with the existing practice, the counsellors submitted a vacation schedule that did not identify the days in question as either vacation or professional development (“PD”) days. This, in turn, led to a November 22, 2007 meeting between the Union and the Employer; but, no resolution was attained. By e-mail, dated December 10, 2007, Wishart advised Mastromatteo that the College was standing by its decision that counsellors must take vacation or PD time during Christmas Break. The Union’s response was the following grievance dated December 18, 2007:

The Faculty Association formally grieves with the violation of articles 12.1, 12.3.5, 10 18.3 and any other relevant articles of the Collective Agreement. The union’s position is that the College shall not assign vacation nor professional development time to counselling faculty during the December-January break. Further, the union argues that scheduled vacation and professional development time cannot be altered except where a regular faculty employee has made a request to alter the annual schedule.

Counselling faculty may request a vacation or professional development time over the December-January break period. If they do not request this time, they are on duty and on-call under the provisions of Article 12.3.5 of the Collective Agreement.

Remedy:

The College will withdraw its request to the Counselling faculty wherein the faculty have been asked to take vacation or professional development time over the December-January break period.

On the advice of the Union, the three counsellors affected amended their schedule to include either vacation or PD on the days in question.

Bob Harris has been a counsellor at the College since 1992. He testified that, in the past, counsellors were only expected to apply for vacation or PD if they planned to be out of town during the Christmas Break. The application process by which this was done is called "green sheeting". During the Christmas Break period, he would not have any teaching assignments and did not counsel anyone. He did not indicate on his voicemail message how he could be contacted, but assumed, if his services were required, the College would contact him. During this period, he did professional readings and preparation for the second half of the year, which could have included student orientation for a couple of departments. He was not aware of how scheduling was done for this period in the trades area.

George Davidson has taught at the College since 1990 and is the President of the Union. He, Marta Tejero, the Union's Assistant Chief Shop Steward, and Mastromatteo attended the meeting with Wishart on November 22, 2007 to discuss the Union's concerns about the scheduling of the counsellors. Davidson viewed the counsellors as amongst the busiest of the faculty and was of the opinion that, if the Employer wished to schedule them as if they were hourly employees, then the Employer could hire hourly employees. Under cross-examination, he agreed that, during the Christmas Break, the counsellors did not have thirty contact hours. He noted, however, that as a Type 1 faculty member, he did not have fifteen hours of teaching contact during the same period. Davidson acknowledged that Article 12.3.5 makes no reference to December 24<sup>th</sup>. He also agreed that counsellors, like all other full-time or regular employees, did not get teaching assignments during the Christmas Break. Davidson stressed, however, the second line of Article 12.3.5 and its reference to being on duty and on call. He noted that the history of the provision pre-dated unionization and applied to counsellors. He further agreed that, with respect to the Christmas Break, Wishart had told the counsellors that they could take vacation or PD. However, he observed that managers do not ordinarily assign vacation and that the usual practice was that faculty put in requests for vacation or PD if they are not going to be in the area. He did not know if vacation was assigned by managers in Adult Basic Education.

In re-examination, Davidson testified that he had been at the collective bargaining table since 1992 and that the issue of vacation or PD during the Christmas Break was never discussed.

Cathy Conroy was a counsellor at the College from 1975 to 2004, with the exception of a three year period during which she was the President of the Union's provincial umbrella organization. She testified that, while she was at the College, it was the practice during the Christmas Break for counsellors to be on duty or on call. They would only go through the green sheet application process of requesting vacation or PD if they were going to be away from the area.

Conroy was able to identify Dr. Fred Speekman, the then Employer's Principal, and John Waters, the then Faculty Association President, as the persons referenced in a number of documents dating back to the 1970's. The documents related to the use of vacation time during the Christmas Break. The general thrust of the documents was that the Christmas Break was not to be used for vacation, unless requested by the employee.

Conroy agreed that she had not read any of the documents around the time of their publication but stated that their contents were in accord with her understanding of the situation. She further agreed that Article 12.3.5 referred to teaching assignments but stated that teaching is what counsellors do - in the sense that one-to-one counselling is teaching.

Catherine Wishart has occupied the position of Vice President - Community and Student Services since July 2006. It was in that role that she took on responsibility for counselling services. Prior to that position, she had been both a Director and Regional Manager for the Employer since her employment commenced in 1989.

Wishart described the function of counsellors as threefold; academic advising, career development and decision making, and personal counselling. She stated that there was a fair amount of interplay between these three roles. Academic advising includes advising new students about how the College works and how it fits within their career goals. This can be done in person, on the telephone, or by e-mail. Career counselling can be done either in groups or individually. It can involve testing and assessment or assistance in personal decision making, based upon individual life

assessments. Finally, there is personal or clinical counselling that addresses life issues, including personal crises as well as stress or time management.

Under the Collective Agreement, full-time counsellors are scheduled for 30 hours per week. This includes time for student contact, department meetings and coordinator functions (performed by Tami O'Meara, one of the counsellors), meetings with faculty, policy work on behalf of the College, and educational committee meetings. Wishart acknowledged that not all of this was done within the 30 hours per week.

Wishart testified that because she was not able to attend a meeting with counsellors in August of 2007, she sent the e-mail dated August 22, 2007. She also sought input from the counselling coordinator with respect to the trends of counselling services demands. It was in this process that she was advised by O'Meara that the Union had concerns about her direction that the counsellors take vacation or PD for the Christmas Break. In November, at the Union's request, she met with Davidson, Tejero, and Mastromatteo, who identified the Union's concerns and the provisions of the Collective Agreement upon which it relied. Wishart discussed the Union's position with others in management and, in mid-December, advised that the Employer was maintaining its position that either PD or vacation be used for the Christmas Break. In 2007, O'Meara sought and received approval to use one of the Christmas Break days to do coordinator work at home. No other counsellor advised Wishart that they would be performing work during this period. As noted above, all three counsellors submitted, under protest, requests for either PD or vacation during this period. Wishart testified that: generally, students were not on campus during the Christmas Break; the Employer does not require counsellors to be either on duty or on call during this time; and, other than the coordinator's work, she was unaware of any work for counsellors to do during this period. As far as the College was able to determine, the voice mail messages in counselling advised that the office was closed and would not reopen during the Christmas Break period. The support staff, including academic advisors, are members of the Pulp, Paper and Woodworkers of Canada and are covered by a different collective agreement. Wishart testified that they traditionally took vacation during this period but, under their collective agreement, could be working at the College doing assigned duties.

Two Disability Support Workers work in the same area. One of them has historically applied for vacation during Christmas Break, while the other

applied for vacation for the first time for the 2007 Christmas Break. In the Library, faculty used either vacation or PD. Finally, in the Trades, the faculty used their preparation days as there are no unassigned days in that area.

Under cross-examination, Wishart indicated that, as of the Fall of 2006, she was aware of the practice of counsellors being on duty or on call during the Christmas Break. She could not recall discussing the direction contained in her August e-mail with the Union prior to it being sent and could not recall reviewing the Collective Agreement with respect to this issue. She asked O'Meara, the Coordinator, what counsellors did during the Christmas Break and was told they were either on duty or on call, in case they were needed in an emergency. Wishart asked O'Meara when the last such emergency occurred and was told that it was at least 20 years ago.

Wishart testified that she wanted the counsellors to be available when students were on campus and that the College had the right to schedule employees in that manner.

### *Position of the Parties*

#### *Union*

Relying on the plain and ordinary meaning of the Collective Agreement in support of its interpretive position, the Union points to a number of provisions. First, it notes in Article 1.10.1 "faculty employee" is defined to include counsellors. Next, it observes that Article 4.4, read in its entirety, shows that counsellors have a wide variety of duties. It submits that this range of duties is inconsistent with and contrary to the Employer's "single-minded focus" on student contact as the justification for its unwillingness to assign duties in the absence of students. In this regard, the Union also relies on O'Meara's report, which was prepared at the request of the Employer, which shows the variety of duties required that do not involve student contact. While recognizing that a focus on students may be a legitimate Employer consideration, the Union submits that these duties have been bargained into the Collective Agreement and it is contrary to the Collective Agreement to ignore them. While the Union recognizes the focus on student contact time for full-time counselors identified by the maximums set out in Article 10.8.2, it argues that other job duties also have Collective Agreement recognition. In particular, it notes that Article 10.18.2 contains an obligation



on faculty to “identify and act upon their own professional development needs”. With respect to vacation time, the Union notes that under Article 12.1(a), it is the employee who prepares the vacation schedule.

Article 12.3.5 is the focus of much of the Union’s submission regarding the plain and ordinary meaning of the language of the Collective Agreement. It notes that any question that may arise with respect to the concept of a “teaching assignment” in the context of the duties of counsellors was addressed by Conroy’s unchallenged evidence. More importantly, however, is the plain meaning of the second sentence of that provision which states that, during the period between Boxing Day and New Year’s Day, full-time faculty employees are on duty and on-call unless they are on approved vacation or PD. This plain meaning is further reflected in the uncontradicted practice of counsellors. The Union does not quarrel with the Employer’s ability to assign other duties during the Christmas Break as Article 12.3.5 only prohibits teaching assignments during that period. However, absent any such assignments being assigned, the work being performed is being on duty and on-call.

The Union’s first alternative argument is that if the Employer’s interpretation of the Collective Agreement is correct, it ought to be estopped from enforcing its rights until the conclusion of bargaining for a new Collective Agreement. The Union submits that the evidence of Mastromatteo, Harris, and Conroy showed a consistent practice, over a considerable period of time, that the days over the Christmas Break were considered on call and on duty days, unless the counsellor planned to be out of the area. If the counsellor planned on being away, the days would then be scheduled as vacation or PD, at the request of the employee as opposed to the direction of the Employer. It notes that in her August 2007 e-mail, Wishart acknowledged the past practice. The Union submits that this evidence of practice is a compelling basis for the application of the estoppel principle.

The Union’s third argument relates to past practice as extrinsic evidence to provide assistance in interpreting the Collective Agreement, if it is found to be ambiguous or unclear. Although argued separately and in this order, I have included the arguments relating to extrinsic evidence as part of the Union’s initial argument with respect to contract interpretation.

*Employer*

The starting point of the Employer's submission is Article 12.1(b), which opens "[v]acation time will normally be taken when instructional services are not required". This, says the Employer, describes the norm under which Wishart's direction must be considered. The College points to the analysis carried out by Wishart in making this scheduling decision. She started with the determination of the demand for the services of counsellors and, then, considered the amount of counselling services available. This led her to the conclusion that the existing scheduling practice did not work and, in turn, to her direction that PD or vacation time be scheduled during the Christmas Break. The Employer stresses that this result is consistent with the wording of Article 12.1(b), where vacation is normally taken when instructional services are not needed. Moreover, the Employer notes that Wishart's August 2007 direction was made prior to the setting of the schedules. Despite this, the counsellors ignored Wishart's instruction and submitted schedules that did not include PD or vacation. The Employer says that these schedules were rejected due to the operational needs of the College.

With respect to the plain meaning of Article 12.3.5, the Employer asserts that it provides the right for counsellors not to receive teaching assignments. However, beyond that, unless a counselor is on scheduled PD or vacation, he or she is required to be on duty and on-call, which, the Employer says, means that the counsellor is working. As no teaching assignments were made during this period, there can be no breach of Article 12.3.5.

Alternatively, on this point, the Employer also argues that the reference to a "full-time or regular faculty employee" in Article 12.3.5 does not necessarily include counsellors. In that regard it references Article 1.10.1 which defines "faculty employee" as "teaching faculty, librarians, counsellors, study skills instructors, and laboratory demonstrators". Thus, the Employer submits that there is a distinction drawn between teaching faculty and other types of employees.

The Employer's focus on ensuring that services are available for students is also consistent with the Collective Agreement. The maximum average of 30 hours per week of student contact contained in Article 10.8.2 demonstrates this focus. So too, does the responsibility of counsellors set out in Article 4.4. The types of student contact described in Article 4.4 are also different from the instructional duties for other members of the faculty. This

distinction is reinforced by the lack of prescribed amounts of preparation time for counselling faculty members.

Taking all of this into account, the Employer says that it agrees with the Union that article 12.3.5 is clear and unambiguous. The disagreement is simply over what it plainly means.

Further, the Employer submits that the extrinsic evidence does not assist in either creating or resolving any *bona fide* doubt as to the meaning of Article 12.3.5. Much of the extrinsic evidence relates to communications which predate the Collective Agreement. In addition, the Employer notes that the provision in question was not even in the first Collective Agreement between the parties.

With respect to the Union's estoppel argument, the Employer submits that the fact that some faculty were permitted, on occasion, not to take PD or vacation during the Christmas Break does not amount to a representation (see *West Fraser Mills Ltd. -and- USWA, Local 1-425*, BCLRB No. B199/2006). There, the B.C. Labour Relations Board determined that consistent practice, by itself, is equivocal and, therefore, insufficient to found a representation. In order to rely on a representation to seek the protection of the equitable doctrine of estoppel, it must be reasonable to do so. Further, there is no evidence of a detrimental reliance which is an essential element of the doctrine of estoppel (see *Harbour Cruises Ltd. -and- PPWC, Local 3*, BCLRB No. B181/2004). Finally, where the relied upon representation is conduct alone, the need for proof of actual detrimental reliance is greater (see *Fibreglass Canada Inc. -and- ECWU, Local 914*, unreported, July 30, 1987 (Barton - Ont.)).

The Employer also asserts that because the Union's interpretation would confer a monetary benefit upon its members, the Union bears an onus to show clear and express language in the Collective Agreement conferring such a benefit (see *BCIT -and- BCITSS*, [1983] BCCAAA No. 640 (Greyell - BC), *Cardinal Transport -and- CUPE, Local 561*, (1997) 62 LAC (4<sup>th</sup>) 230 (Devine - BC), *Northwest Community College -and- NCCFU*, unreported, July 27, 1979 (Gall - BC), *Wire Rope Industries -and- USWA, Local 3910*, (1982) 4 LAC (3d) 323 (Chertkow - BC)).

### *Discussion and Decision*

The issue in this case is whether the Employer can require counsellors to take vacation or PD time over Christmas Break because, in the Employer's view, there is no need for their services at that time of the year and their services in the form of student contact are of greater priority or utility to it. This issue lies to be determined through a consideration of the language of the Collective Agreement, although the conduct of the parties may, in certain circumstances, be of assistance.

The first issue to be considered is whether counsellors are "faculty employees" as that term is used in Article 12.3.5. Again, for ease of reference, Article 12.3.5 of the parties' Collective Agreement provides:

No full-time or regular faculty employee shall have a teaching assignment between Boxing Day and New Year's Day. However, all full-time and regular faculty employees without duly approved vacation or professional development time are on duty and on call. For the purpose of this clause, on duty and on call shall mean that the faculty employee is performing College business within the College region, unless other arrangements have received the prior approval from the appropriate Dean/Director/Regional Director.

I conclude that counsellors are "faculty employees", in light of the plain language of Article 1.10 and the use of that term elsewhere in the Collective Agreement.

Article 1.10 provides the following definitions that are relevant to scope of the term "faculty employee":

- 1.10.1 "Faculty Employee" denotes all teaching faculty, librarians, counsellors, study skills instructors, and laboratory demonstrators as included in the certification of the Faculty Association of the College of New Caledonia as a trade union.
- 1.10.2 "Full-time Faculty Employee" denotes any member of the bargaining unit recognized in Article 1.1 whose workload is as described in one of 10.2.1, 10.3.1, 10.4.1, 10.5.1, 10.6.1, 10.7.1, or 10.8.1.

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1.10.20 For full-time faculty employees "Working Day(s)" refers to all days, Monday through Saturday inclusive, of any week of the year, excluding College and statutory holidays....

...

1.10.22 For full-time and regular part-time faculty employees a "Working year" is the twelve-month period from August 1 to July 31. ...

1.10.23 A faculty employee's work schedule shall not exceed five consecutive working days after which he/she shall have 2 consecutive days off.

Article 1.10.1 defines "faculty employee" and Article 1.10.2 defines a "full-time faculty employee" as specifically including counsellors (i.e., the employees with a workload addressed in Article 10.8.1 include counselors, as per Article 10.1.9). Articles 1.10.20, 1.10.22, and 1.10.23 address work days, the work year, and work schedules and all apply to "faculty employees". There are no provisions addressing these matters for other types of employees in the Collective Agreement. In addition, Article 10.8.1 defines a counsellor with 20-30 hours of student contact time as a "full-time faculty employee".

I also note that the language of Article 1.10.1 is consistent with the structure of Article 4 which sets out the responsibilities of various types of faculty employees including Teaching Faculty (Article 4.2), Librarians (Article 4.3), Counsellors (Article 4.4), Study Skills Instructors (Article 4.5), and Laboratory Demonstrators (Article 4.6). All of these types of employees fall within the ambit of the definition in Article 1.10.1.

I have not been directed to any provision in the Collective Agreement where the term "faculty employee" is used in a manner that would indicate the parties intended to distinguish between teaching and non-teaching "faculty employees" and, on that basis, intended to exclude counsellors from the ambit of the defined term. On the contrary, the term "faculty employee" appears to be used as a general term throughout the Collective Agreement to indicate all of the types of employees that are included within the Union's certification. Thus, I find that the definition of a "faculty employee" includes counsellors.

Does my conclusion that counsellors fall within the definition of "faculty employee" mean that they fall within the scope of Article 12.3.5? The Employer argues that the prohibition against "teaching assignments" does

not apply to counsellors, and, thus, the provision, as whole, is not applicable to them. I view that to be an overly technical and narrow definition of teaching assignment. A review of the instructional duties of the various types of faculty employees demonstrates that teaching is viewed more broadly than is suggested by this argument. Further, it is in conflict with the evidence of Conroy and the description of the counsellor's time as "instructional time" in Wishart's e-mail of August 21, 2007.

It is not, however, necessary for me to decide that point as Article 12.3.5 goes on to provide that "all full-time and regular faculty employees without duly approved vacation or professional development time are on duty and on call." So, even if the Employer is correct and the prohibition against teaching assignments during the Christmas Break does not apply to counsellors, the requirement that all faculty employees, who are not on vacation or PD, be on duty and on call does apply to them. The parties could have specified that that element of the provision excluded counsellors or applied only a specific group or groups of the faculty employees, if that was their intention. In the absence of such a limitation to that element of the provision, on its face it applies to all faculty employees.

Article 12.3.5 sets out the parties' agreement about how to address the schedule of all faculty employees during a period where there are few, if any, students requiring services or instruction at the College. It basically provides that faculty employees will not be required to have direct student contact during the Christmas Break, but are on duty and on call unless vacation or PD time is taken.

In this case, the College is taking the position that it has no need for the counsellors to work at all during Christmas Break. Accordingly, it is not scheduling them to be available for any work over that period (even though, from its perspective, Article 12.3.5 gives it the right to require them to be on duty and on call). However, the College is going a step further by requiring them to schedule their vacation and PD time during that period. This brings me to what, in my view, is the real crux of this case – whether the Employer can direct employees to take vacation or professional development time.

The following vacation and professional development provisions are relevant to this issue:

#### 10.18 Professional Development

10.18.1 All full-time faculty employees on probationary or faculty appointment shall receive a minimum of twenty (20) full working days of liaison or professional development time per working year except in the final year of employment (6.5). A regular part-time faculty employee shall have pro-rated professional development. Full-time faculty shall not be required to take professional development time in increments of less than one day. If a faculty employee's appointment, other than sessional, is for a period different from the working year, he/she shall receive pro-rated professional development time.

10.18.2 Upon achieving eligibility for the Non-Regular Seniority List, faculty employees shall be entitled to professional development time.

...

Professional development time shall be non-cumulative from one working year to another, and any unused entitlement shall be forfeited.

10.18.3 Since professional development needs vary greatly between individuals and disciplines, faculty shall be expected to identify and act upon their own professional development needs. A faculty employee may be required by his/her Dean/Director/Regional Director to submit a written proposal for approval regarding his/her professional development activities by a date determined by the appropriate Dean/Director/Regional Director. The faculty employee shall be notified of such approval as soon as possible after the date of the request but in any event within one (1) month of the date determined for submission. The schedule may be changed thereafter at the request of the employee if acceptable to the Dean/Director/Regional Director or Vice President concerned. No reasonable request shall be refused. If the faculty employee has not submitted and had approved a schedule for his/her professional development activities within one (1) month of the date determined for submission, the College reserves the right to schedule the times for outstanding professional development entitlement. Professional development beyond that specified in this Agreement or in the initial letter of appointment shall not be a condition of employment.

10.18.4 The times chosen for professional development shall be submitted, in writing, by the faculty employee for approval by the appropriate Dean/Director/Regional Director. Such approval shall not be unreasonably withheld.

12.1 Vacation Entitlement - Full-time and Regular Faculty Employees

During each working year, a faculty employee shall receive a vacation period of forty-three (43) working days which shall include a period of not less than thirty (30) consecutive working days if requested by a faculty employee. If a faculty employee's appointment, other than a sessional appointment, is for a period different from the working year, he/she shall receive two-twelfths (2/12) of the period of the appointment as vacation time. A regular part-time faculty employee shall have prorated vacation time.

- a. Faculty employees shall prepare a vacation schedule for their area and submit it by a date determined by the appropriate Director/Dean/Regional Director or Vice President. The faculty employee shall be notified of such approval as soon as possible after the date of the request but in any event within one (1) month of the date determined for submission. The schedule may be changed thereafter at the request of the faculty employee if acceptable to the Director/Dean/Regional Director or Vice President concerned. No reasonable request shall be refused.
- b. Vacation time will normally be taken when instructional services are not required and vacation entitlement shall not normally be carried forward from one working year into the next. If a faculty employee has not submitted and had approved a schedule for his/her vacation entitlement within one (1) month of the date determined for submission, the College reserves the right to schedule the times for the outstanding vacation entitlement.

While there is no management's right clause in the Collective Agreement, it is trite that an employer has the right to manage its workplace and schedule its workforce, subject to the language in the Collective Agreement.

Here, the Collective Agreement sets out a specific, and notably, mandatory process, in which the faculty employees "shall" prepare their vacation schedule and professional development proposals and submit them to the College for approval. The Employer may only refuse a vacation or PD request if it is unreasonable. Since neither vacation nor PD entitlements are carried over to the next year, the College has reserved the right to schedule outstanding vacation and PD time if schedules or proposals are not submitted by faculty employees.

Taking all of this into consideration I find that the parties have clearly addressed their respective rights around the scheduling of vacation and PD time in the plain language of the Collective Agreement. The Employer does



not have an unfettered right to schedule these entitlements because it has agreed that it is the faculty employees who shall prepare their vacation schedule and their professional development proposals for approval by the College and that no reasonable request shall be refused. Moreover, if the Employer could simply require employees, generally, to take vacation or PD time when it wished them to, the processes set out in Articles 10.18.3 and 12.1 would be undermined. However, the College has specifically maintained rights in two respects: first, it can refuse an unreasonable vacation or PD request; and, second, it can schedule outstanding vacation and PD time that has not been submitted in the processes established in Articles 10.18.3 and 12.1.

The parties have specified, in Article 12.1(b), that vacation time will normally be taken when instructional services are not required. This undoubtedly reinforces the significance and weight of this factor in determining the reasonableness of a request. It does not, in my opinion, create a specific right of the Employer to require that vacation and PD must be taken during Christmas Break.

In any event, while the Employer may refuse an unreasonable request for vacation or PD time; that is not what occurred in this case. The College did not take the position that the counsellors had to amend their vacation and PD schedules because their original requests were unreasonable. Rather, it required the counsellors to make their vacation and PD request on the basis of its own operational requirements.

The parties have used Article 12.3.5 to set out the specific arrangement that, unless a faculty employee is on "duly approved" vacation or PD, they will be on duty and on call over the Christmas Break. In light of that bargain and the fact that the parties have been so careful to address it in explicit detail in the Collective Agreement, it is incongruous for the College to attempt to rely on a statement of general principle with respect to vacation scheduling to, in effect, create a specific right for it to unilaterally schedule vacation or PD time during the Christmas period.

Therefore, assuming that the vacation and PD time is not outstanding after the scheduling process, I find that the Employer is not entitled to direct the employees to take vacation or PD time over Christmas Break. The Employer must bargain the right to do so, given the current language of the Collective Agreement.

Several historical documents, from the 1970s, were put into evidence. Given my conclusion that the parties' have made their intentions clear on the face of the Collective Agreement language, I do not find these documents are necessary to resolve the vacation and PD time scheduling issue. I have also found it unnecessary to consider the past practice evidence relied upon by the Union as I found the collective agreement to be clear on its face. In any event, the practice evidence was both less than perfect in the sense that its details in many instances were not within the knowledge of the witnesses and that it appeared to be anything but consistent across the bargaining unit. Further, in light of my conclusion on the interpretation issue it is not necessary for me to address the Union's alternative estoppel argument.

Finally, one of the days, December 24<sup>th</sup>, included in the factual scenario giving rise to this grievance is not included within the Christmas Break. In argument it was suggested that that fact may be of some assistance in making the interpretive decision but I have not found that to be the case. Moreover, the primary and predominant focus of both parties was the Christmas Break issue. As such my conclusions with respect to the interrelationship between Articles 10 and 12 are not in directly applicable to December 24<sup>th</sup>. That said, I am of the view that given my conclusions with respect to both the operation of Article 12 and the circumstances surrounding the scheduling in this case that the same result applies.

In summary, I conclude that the Union's grievance is allowed. I direct the Employer to refrain from requiring counsellors to schedule vacation or professional development time over the Christmas Break, unless an individual employee submits such a vacation request or professional development proposal, or the College is scheduling outstanding vacation or professional development time, pursuant to Articles 10.18 3 or 12.1(b). The counsellors ultimately submitted requests to comply with the Employer's direction which I have found to be contrary to the collective agreement. I remit the remedial consequences to the parties for resolution but retain jurisdiction if they are unable to reach an agreement in that regard.

Dated at Vancouver, B.C., May 4, 2010




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WAYNE MOORE, ARBITRATOR