In the Matter of an Arbitration Under
Labour Relations Act, 1995, S.O. 1995, C. 1

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3903
(CUPE)

(the "Union")

-and-

YORK UNIVERSITY
(YORK)

(the "Employer")

RE:	Grievance of Union, dated Feb. 5/13, alleging violation of 2, 13, 23, 24 re in class teaching assessments for LSTAs
DATES AND LOCATION OF HEARING:	June 17, 2014
SOLE ARBITRATOR:	Brian Etherington
APPEARANCES FOR THE UNION:	Tracey Henry, Counsel Raj Virk, Staff Rep Mohan Mishra, Staff Rep Greg Flemming, Gr. Officer
APPEARANCES FOR THE EMPLOYER:	Richard Charney, Counsel Ted Panagiotoulias, St. at Law Barry Miller, Exec. Dir. Fac. Rel. Rob Lawson, Assoc. Dir. Fac. Rel.

AWARD

This award deals with a union grievance filed on Feb. 5/13 alleging that the employer violated articles 2, 13, 23 and 24 of the collective agreement by requiring in class teaching assessments to form part of a review of teaching required for renewals of LSTA appointments. The initial grievance alleged a number of other employer actions were in violation of the agreement but the parties were in agreement that I should only address the issue of whether the requirement for an in class assessment of teaching for the renewal of an LSTA appointment was contrary to the relevant provisions of the collective agreement.

Facts

The union represents three bargaining units at York: the graduate tutorial assistants' unit; the graduate research assistants' unit; and the unit for contract or sessional faculty. This grievance concerns the latter unit. The current collective agreement was ratified and came into force on April 20/12 and expired on April 30/14. The agreement contains several provisions concerning seniority for sessional members and the unit contains many members who have very long service, including approximately one hundred who have 10 or more years of service within the unit. Over the course of several agreements the union has negotiated several different programs that give recognition to seniority in appointments. For example, there is a program known as a conversion or affirmative action pool dealt with under article 23 that provides opportunities for an agreed upon number of long serving members of the sessional bargaining unit to be eligible for conversion into members of the full time faculty unit represented by YUFA. In addition there is a program allowing long-term members of the sessional unit to be appointed as Long Term Teaching Appointments (LSTAs) under article 24 of the agreement.

All sessional appointments at York are made on a per course, per term, basis but an LSTA appointment ensures a certain number of course appointments for each year of a three year term. In addition, employees with LSTA status are paid at an enhanced rate for each course, beginning at an additional $1600 in 2011 and rising to $2000 per course in 2014.

This grievance concerns the interpretation and application of the provisions of article 24 that provide for a review of the teaching of those who hold an LSTA appointment. The LSTA appointment provisions were first included in the 2008 to 2011 collective agreement. Article 24.01 of that agreement stated that only persons who had been in the Unit 2 Affirmative Action Pool for at least 5 years and had taught an average of 2.5 FCEs over the three previous years were eligible to apply for an LSTA. Because of the eligibility requirements for the Affirmative Action Pool this meant that sessionals had to have close to 10 years of service with a fairly high degree of intensity before they could apply for an LSTA. This is confirmed by a chart of LSTA eligible members compiled by the union for the hearing (exh. 4) that showed that all members of the pool had at least 11 years of service and the average was 18 years. The approximately 33 current holders of LSTA positions averaged 22 years of service.

This dispute centres on the proper interpretation and application of articles 24.06 and 24.10 concerning the review of teaching of those holding LSTAs. There is no dispute concerning the application or appointment process for those applying for an initial LSTA appointment. The relevant provisions of the agreement are as follows:

ART. 24 – LONG SERVICE TEACHING APPOINTMENTS (LSTAS)

> ...
>
> 24.05 LSTAs will be awarded on the basis of hiring unit teaching needs, quality of the applicants (sic) teaching file, and the applicant's number of years in the Affirmative Action Pool.

24.06 *Employees who are awarded an LSTA will have their teaching reviewed by a member of the full time faculty in the hiring unit(s), which review will encompass the course syllabus and teaching materials, over the term of the LSTA.* The hiring unit will consult with the employee who may suggest one or more names for consideration in the selection of the reviewer. The employee's suggested names will not be unreasonably denied. (italics added)

...

24.10 Employees holding an LSTA may submit a written application to renew the LSTA
for another three-year term. Written applications must be submitted no later than January 31 of the third year of the LSTA (eg, no later than January 31, 2013 for an
LSTA that expires August 31, 2013).

For the current 7 LSTAs which are scheduled to expire on August 31, 2012, their LSTAs will, on an exceptional one-time-only basis, be extended to August 31, 2013. If they apply for and receive a renewal LSTA the renewal shall be for a two-year period.

To be eligible for renewal applicants must have had their teaching reviewed by a member of the full-time faculty in the hiring unit(s) pursuant to Article 24.06 above over the course of their current LSTA. (italics added)

Applications will be assessed on the basis of the *quality of an applicant's teaching, evidence of which will include the review pursuant to Article 24.06* above. Applications will also be assessed on the basis of the unit's academic planning needs. All applications must also include a current CV. Applications shall not be unreasonably denied. (italics added)

The total number of LSTAs in any contract year will not exceed fifty-one.

The focus of the dispute is on the interpretation of the phrases highlighted in italics above in article 24.06 and 24.10. In essence the dispute is about whether the language concerning a "teaching review" by a member of full time faculty contemplates or allows the employer to require an in-class assessment of an LSTA's teaching as a component of the review that is called for in those two sub articles. The union contends that when given their plain ordinary meaning in a properly contextual interpretation, the language used does not contemplate or allow for in

class teaching assessments. The employer contends that the plain ordinary meaning of the language used, does not prohibit, and in fact contemplates, such an in-class assessment as forming a part of the teaching review called for by the provisions. It issued a memorandum on January 10/13 to all members of the LSTA indicating that the teaching review required for applications for renewal under article 24.10 would "include scrutiny of the course syllabuses and teaching materials as well as in-class instruction." (exh. 5).

Other provisions of the agreement that the union urged me to consider as part of a contextual interpretation are as follows.

Article 13 – EVALUATIONS

13.01.1
The employer and the union agree that a primary purpose of evaluations is to improve the quality of teaching by assisting the employee to develop her teaching skills. *An evaluation of an employee's work and/or performance which does not conform to the provisions of this article shall be null and void.* (italics added)

13.01.2 INFORMAL EVALUATIONS

(i) Normally, the employer will evaluate informally, such evaluations to be assessments of performance by someone of the employee's choice in the hiring unit or another hiring unit who is acceptable to the hiring unit, of the various duties and responsibilities of the position based on reasonable academic criteria consistent with Article 12.02.1. Such assessments will not normally be done for a person more than once per fall/winter session (September to April) and once per summer session (May to August).

(ii) Prior to an informal evaluation of an employee in a teaching situation, the employer shall consult with the employee concerning the time and criterion for such evaluation.

(iii) The result of the informal evaluation shall be discussed with the employee after appropriate notice.

(iv) An informal evaluation may result in recommendations to the employee for improvement of teaching skills/professional development, or may result in a recommendation to the hiring unit that a formal evaluation be conducted, or

where permitted by article 12. 09. 2 of the Unit 2 agreement, may result in establishment of a Competence and Ability Review Period for cause. Where informal evaluation results in recommendations, those shall be made in writing and dated with a copy to the employee and placed in her professional performance and service file. Such recommendations shall be removed from the file after two years, except where a Competence and Ability Review Period is established in the interim, in which case the recommendation shall be retained in the file until the review period is completed.

(v) An informal evaluation shall not be used as a source of information in hiring decisions.

13.02.1 FORMAL EVALUATIONS

The employer shall undertake formal evaluations of an employee's performance of the various duties and responsibilities of a position only if one or more of the following conditions is present:

- employee request
- mutual agreement of hiring unit and employee
- recommendation arising from informal evaluation
- decision of Chair, Dean, Director or designate resulting from the processing of a complaint in accordance with article 8.

13.02.2

All formal evaluations of an employee's performance of the various duties and responsibilities of a position shall:

(i) use reasonable methods and criteria of evaluation appropriate to the hiring unit and the position in question; and
(ii) be in writing.

13.02.3

All formal evaluations must comply with the following procedures.

(i) The evaluator will be someone of the employee's choice in the hiring unit or another hiring unit at York University who is acceptable to the hiring unit.
(ii) The hiring unit shall inform the employee in writing of the pending evaluation and of the methods and criteria to be used at least 14 days (pro-rated for sessions other than fall/winter but not fewer than three working days) in advance of the start of a formal evaluation period.
(iii) Where there is to be a formal evaluation of classroom teaching, the hiring unit shall give at least 14 days' notice (pro-rated for sessions other than

fall/winter but not fewer than three working days) of class visitation. (Such notice may be coincident with (ii) above.)

(iv) Any formal evaluations shall be discussed between the employee and her immediate supervisor, with a union representative present if the employee so wishes, and shall be given to the employee at least three working days before that discussion. The employee shall sign the evaluation to acknowledge the fact that such discussion took place, and the employee may add her written comments to the evaluation within three weeks of the discussion if she so wishes.

...

13.04

Written formal evaluations may be kept only in an employee's professional performance and service file and shall provide a source of information in reaching decisions on hiring in accordance with this article.

13.05

All copies of any formal evaluation demonstrating incompetence, inability or negligence shall be destroyed after the employee in question has received a formal evaluation in the same or a subsequent session in a similar position in the same hiring unit which fails to demonstrate incompetence, inability or negligence.

In addition, it should be noted that during the 2008-2011 collective agreement, which was the first agreement that provided for LSTAs, there were no teaching reviews done under article 24.06. Thus there is no past practice to assist in the interpretation of the teaching review provisions. The version of 24.06 found in the 2008 agreement contains the first sentence of the current article 24.06, the sentence that provides for all LSTAs to have their teaching reviewed by a member of the full-time faculty in the hiring unit, which review will encompass the course syllabus and teaching materials, over the term of the LSTA. However it does not contain the second and third sentences of the current article 24.06 which were added for the first time in the negotiations for the 2012 to 14 collective agreement. And of course, article 24.10 was added for the first time in the 2012 to 14 collective agreement to deal with the renewal of those who hold an LSTA appointment. There was no such provision in the 2008- 2011 agreement.

Argument

The union began its argument by asserting that the language of article 24.10 and 24.06 was clear on its face in terms of the review of teaching and encompassing only the review of course syllabuses and teaching materials. It argues that its interpretation is supported by looking at other clauses in the collective agreement which do refer to in class teaching assessments. In addition the union argued its interpretation was supported by other elements of the context, including the fact that persons holding LSAT positions are high seniority members with lots of teaching experience. In addition, it noted that there are several other means by which an employer can arrange for an in class teaching assessment in order to evaluate a member's teaching under other provisions of the collective agreement, most notably article 13. At the same time, it noted that those other provisions found in article 13 provide for several important procedural protections that protect the interest of the member in the manner in which the assessment is conducted and the possible uses of the assessment.

The union asked me to look very closely at the provisions found in article 13 providing for informal and formal evaluations of a member's performance, including teaching performance. It noted that this article provided ongoing opportunities for the employer to assess a member's teaching using in class assessments. Perhaps even more importantly, it noted that for both types of in class assessment, article 13 provided procedural safeguards to ensure fairness to the members, the safeguards that are simply not present under article 24 provisions dealing with the assessment of LSTAs. In particular, it noted that for an informal evaluation the employee gets to choose the person who will do the evaluation and employer has to consult with the employee

concerning the time and criteria for that evaluation. While the informal evaluation can result in a decision by a chair or dean to do a formal evaluation, the purpose of the evaluation is to provide positive comments with a view to improving the person's teaching. The union noted that the language in article 24.10 is not as strong in terms of an employee having a right to determine who will do the teaching review. The union noted that both article 13.0 1.2 (ii) dealing with informal evaluations and article 13.0 2.3 (iii) dealing with formal evaluations make express reference to the in class assessment of teaching, while article 24.06 and 24.10 do not contain any such explicit reference. The union also noted that article 13.0 2.2 protects the employee's interest by requiring that all formal evaluations must use reasonable methods and criteria of evaluation that are appropriate to the hiring unit and the position in question. In addition, article 13.0 2.3 provides extensive procedures regarding notice of the time of evaluation. In addition, the provisions in article 13 on informal evaluation make it clear that the results are not to be used in hiring decisions.

The union submits that article 13 is written in the manner of a complete code concerning the use of in class evaluation or assessment of teaching under this collective agreement. In addition, article 13.04 to article 13.06 place significant procedural limitations on the use of formal evaluations and subsequent assessments. In addition, the union points out that article 12.09.2 provides for the use of intensive evaluation that may be imposed on members during the first two years of their appointment where they might be required to undergo a competence and ability review period after a formal or informal evaluation identifies a significant problem. The union argues that the latter provision indicates that it's presumed that if you can make it through the first two years of sessional appointments then subsequent evaluation should only be done

under article 13. But the Union submits that the collective agreement does not contemplate in class review of teaching beyond what is found in article 12 and article 13.

The Union submitted that it did not negotiate the LSTA program with a view to allowing the employer to undermine or avoid the greater protections for fairness to members that are set out in article 13 to regulate all forms of in-class assessment of teaching.

Returning once again to the language used in the agreement, the union noted that the parties chose to use different terms in article 13 to refer to in class teaching assessments when they used the term teaching "evaluation" as opposed to a "review" of teaching that is referred to in article 24. It urged me to find that these words should not be seen as being synonymous and that I should find that when two different words are used in this fashion the parties intended that they would have a different meaning. In this respect it noted that article 24 used the term review or teaching review quite consistently throughout this article. At the same time, the union pointed out that article 13 refers to evaluation or evaluations of teaching to refer to instances of in class assessment. The Union submits that the term evaluation under article 13 is the only use of that term under the collective agreement that can entail the use of in class assessments with the express procedural protections set out in that article.

The union argues that the different language used in article 24 creates a presumption that it means something different and that a teaching review only contemplates a review of course syllabi and teaching materials as those are the only terms that are expressly referred to in the article. In this respect it noted that article 24.10 expressly refers to article 24.06. As a result it

submits that as long as the review under article 24.06 is limited to syllabi and course materials then a review under 24.10 must also be limited to that type of assessment. In addition, it submitted that the further reference under 24.10 in paragraph 4 to the quality of teaching, including a review under 24.06, does not open up the nature of the review to include in class assessment. Instead it suggests that the use of the term "include" was intended to refer to whatever information might be found in the employee teaching file when it came time to assess the teaching for the purpose of renewal. It suggested that the use of the term include was simply done to make room for the material found in the candidate's teaching file. In this respect, it noted that article 24.05 made reference to the quality of the applicant's teaching file.

In support of the principle that the use of different terms must indicate the parties intended a different meaning in the two articles, the union provided the cases of *Carillion Services v. SUPE,, Local 942 (Morley grievance)*, [2011] O. L. A. A. No. 109 (Goodfellow) and *Kingsville (Town) v. I. B. E. W., Local 636 (Marques grievance)*, [2014] O. L. A. A. NO. 177 (Crljenica). The union submits that if the parties had contemplated an in-class assessment of teaching as part of the review provided for in article 24 it would have used the term "evaluation" and would have made reference to in class evaluation or assessment as was done in article 13.

The union also notes that if the employer feels that an LSTA is in need of an in class assessment of teaching it can take measures to have one done under article 13, while observing the procedural protections set out in that article. The union also notes that if the parties had intended in class assessment to be a mandatory requirement of the teaching review under article 24 it should have been clearly and expressly set out in the collective agreement. Article 12 and 13 demonstrate that the parties had clearly set out the circumstances for in class teaching assessments where that is what they intended. The union offered the case of *Southern Railway of*

British Columbia LTD. v. C. U. P. E., Local 7000 (Two-man crews grievance), [2010] B. C. C. A. A. A. No. 138 (Germaine) to support the principle that the agreement must contain clear and unequivocal language to create a mandatory requirement under the agreement.

Finally, the union asked me to apply the principle of *expressio unius exclusio alterus* to the language used in article 24. It noted that it refers to several items to be used in the review of teaching, particularly course syllabus and teaching materials, but does not refer in any provision to the use of in-class assessment of teaching as part of the teaching review. The union argued that under the principle of *expressio unius exclusio alterus*, I can draw the inference that the parties did not intend to require an in-class assessment as part of the review, otherwise they would've made express reference to it as they did for other forms of assessment. In support of this principle of agreement interpretation, the union provided the case of *St. Michael's Hospital v. O. N. A. (Job posting grievance),* [2013] O. L. A. A. No. 355 (Stout). The union pointed to the last sentence contained on page one of Exhibit 5, the memo sent by the employer to all members who held LSTA appointments concerning the need for in class assessments of teaching as part of their application. The union submitted that if the parties really intended this type of assessment to be part of the teaching review then article 24.06 would have been worded in the manner in which the employer has worded the last sentence in the memorandum to include all three devices for assessment, including the in class assessment. The fact that the collective agreement left out the last form of evaluation means that they intended the other two devices to be sufficient for the teaching review exercise. In addition, the union asked me to also apply the presumption against redundancy in the collective agreement, on the basis that the collective agreement already provides in article 12 and 13 for in class assessments to be done where employers have concerns about teaching abilities and it does not contemplate them being imposed under the management

rights article. The suggestion here was that if management retains some broad right to impose in class teaching assessments at their discretion, there would be no need for provisions set out in article 12 and 13 providing for circumstances in which such assessments can be conducted.

The employer began by encouraging me to look very carefully at the wording and apply a purposive approach to its interpretation. It suggested that the union's approach was an attempt to get me to rule that the agreement included wording that the union wanted to be there. Instead, the employer asked me to focus on the language of article 24.06 and article 24.10. In particular, it asked me to focus on the language found in the third and fourth paragraphs of article 24.10. It noted that the third paragraph of article 24.10 created a mandatory obligation on the employer to conduct a review of the teaching of current LSTAs in order for them to be eligible for reappointment. It noted that the fourth paragraph indicated that for an applicant to be assessed it would should be on the basis of the quality of his or her teaching, the evidence of which will include the review done under article 24.06.

The employer then discussed the purpose of the provisions providing for review of teaching for the reappointment of LSTA applicants. It noted that bargaining unit members normally had their contracts considered and granted on a single course by course basis. It suggested that this was the primary purpose of article 12 and 13 assessments of teaching that could result in the non-hiring of a bargaining unit person for individual courses. However, the LSTA program allows employees to be given three courses per year for a three year term and it is in that context that the provisions at issue appeared to require a more rigorous process for the review of teaching. The employer noted however that it was not a condition of any employment in the unit to have this review done under article 24. It noted that employment wasn't at risk here,

but rather an LSTA type of appointment was what was at risk under article 24.

The employer submitted that the CUPE approach was factually flawed for several reasons: (1) Article 24.06 speaks of LSTAs having their teaching reviewed by a member of full-time faculty. In the employer's view that should be the end of any issue or dispute about the nature of the review to be done. It submitted that it was not possible to have the candidate's teaching reviewed by a full-time faculty member without having that member review the applicant's actual teaching. It suggested that the union argument was absurd and should be dismissed on that basis alone. (2) The employer argued that the union was conflating or confusing the word "encompass" with the word "consists" or "entails". Article 24.06 stated that the review of teaching was to "encompass" things like course syllabus and teaching materials. It submitted that the term encompass does not mean such a review would be confined to those things because the preamble to that sentence refers to a review. The employer suggested that if the language had stated that the review was "to consist of" or "limited to", then the union might have a case to argue. However, the parties have chosen the term "encompass" which is the same as "includes". Thus, the employer submitted that the reference to teaching materials and course syllabus is not intended to be exclusive but rather inclusive and allowing for the addition of other devices in terms of the review of teaching. It submitted that the terminology used indicated that it went beyond the named items but certainly included those named items. (3) The employer indicated that a purposive approach to the plain simple meaning of the language used would indicate that it would be illogical to attempt to limit the teaching review to the two items named and would be antithetical to common sense and a purposive approach to try to limit it in that fashion. (4) The employer also suggested that if I had any doubt about that interpretation I should

go to article 24.10, paragraph 4, that suggested the application was to be assessed on the basis of the quality of an applicant's teaching, the evidence of which would "include" a review pursuant to article 24.06. Thus the employer contended that even if I was to take a narrow interpretation of article 24.06 as only allowing for a review of teaching materials and course syllabus, article 24.10 contemplated a review of the quality of applicants' teaching that would go beyond the review done under article 24.06. In other words, by stating explicitly that the assessment of teaching was to determine the quality of an applicant's teaching based on evidence which would include the review of teaching materials and syllabus under article 24.06, that still left room for an in class teaching assessment by calling it part of the article 24.10 process of assessing teaching of existing LSTA personnel. (5) Finally the employer suggested that it was difficult to assess the quality of somebody's teaching without actually looking at their teaching in an in class situation.

The employer expanded further on the interpretation of the term encompass and suggested that to attempt to give it an exclusive meaning would create an internal contradiction within article 24.10. It gave several examples of common usages of the word encompass to denote a situation of including items referred to as being encompassed by a particular term or category.

The employer also suggested that the concept of in class evaluations is not foreign to this collective agreement. It suggested that I look more closely at Article 13 concerning informal and formal evaluation of teaching. It contended that there were several reasons why the union's reliance on articles 12 and 13 were not supportive of the union's interpretation of article 24. In

the first place, a contended that the review provided for under article 13 was for a very different purpose than that provided for in article 24. The primary purpose of evaluations under article 13 is stated in article 13.0 1.1 to be an attempt to improve the quality of teaching by assisting the employee to develop their teaching skills. It noted article 24 deals with the appointment of bargaining unit members to LSTA positions, for them to hold a somewhat privileged position in terms of rights to teach a number of courses for number of years, and suggested that was a very different purpose than what is contemplated in article 12 and 13 dealing with assessments of teaching for all sessional members. In addition, the employer noted that there was nothing in article 12 or article 13 to suggest that it applied notwithstanding other provisions or that suggests that its provisions somehow overrode other provisions of the agreement in terms of prohibiting teaching evaluations under those other provisions. Nor was there any language in article 24 to suggest that it was subject to the provisions or requirements of article 13 concerning the conducting of teaching evaluations under those provisions.

In addition, the employer submitted that article 24.06 is not a gentle suggestion but rather is a mandatory obligation for teaching reviews of LSTA members. It noted that the requirement for review was also mandatory under article 24.10, paragraph 3. In addition, the employer contended that I should place some importance on the use of the term evaluation under article 13 as opposed to the use of the term review under article 24. It suggested that an evaluation under article 13 did not have to include an in classroom assessment of teaching as part of an evaluation. However, it asked me to reject the notion that the use of the different terms had the significance suggested by the union such that an evaluation included in class assessment while a review did not. Instead, a possible explanation of the different terms used was that an evaluation was

normally part of an informal evaluation that had a primarily remedial purpose and that could potentially have some hiring consequences if it was turned into a formal evaluation. But it argued that the term review is used in article 24 because that refers specifically to an assessment of LSTA members and not to decisions concerning hiring or decisions concerning remediating a member's teaching.

It also asked me to reject the union's submission that using the term include in article 24.10, paragraph 4, must be seen as referring to the fact that a decision would consider an applicant's teaching file which is referred to in article 24.05, and was not intended to allow for an in class assessment of teaching. It argued that if the parties intended to referred to the teaching file why did they not just refer to consideration of the teaching file expressly as part of article 24.10. It also submitted that this argument tortured the meaning of the word include similar to the fashion in which the union attempted to torture the meaning of the word encompass. And finally, it noted that the parties could have simply referred in article 24.10 to the teaching file under 24.05 if that was their intention.

The employer also submitted that the principle of *expressio unius exclusion alterus* relied on by the union was not applicable because article 24.06 makes it clear that teaching will be reviewed and that this will encompass syllabus and teaching materials. For that reason the employer suggested it was not appropriate to use the principle of *expressio unius* relied on by the union. It suggested that the *St Michael's Hospital* decision of Arbitrator Stout was distinguishable because it was dealing with a contract clause that simply listed a number of items that were to be viewed as temporary vacancies without any expressly inclusive language such as

we have in the language of article 24.10 and 24.06.

The employer presented some definitions of the term "encompass" from several dictionaries. It noted that in the West legal dictionary, the term encompass is defined as surround, enclose, include, comprehend, or cover. The employer submitted that the term include provided perhaps the best definition of the word encompass. It also noted that in the Miriam Webster dictionary the term is defined as meaning include, or comprehend, or to form a circle about. The employer then presented a number of cases in which adjudicators had used the term encompass or encompassing as an inclusive term. It noted that the Supreme Court of Canada in the case of Committee for the Commonwealth of Canada v Canada, [1991] 1 S CR 139, at paragraph 45, used the terms encompass and include in an interchangeable fashion. In short, the employer submitted that the plain ordinary meaning of the term encompass is inclusive such that a teaching review can include in class observation or assessment and suggests that a review of teaching would be incomplete and would make no sense if it did not include such an assessment.

In addition, the employer argued that there would be no redundancy result from their interpretation of the language of article 24.06 and article 24.10, in that evaluations provided for under article 13 provide for an evaluation for very different purposes than the teaching review that is contemplated by article 24. It argued that article 13 evaluations are applicable only to decision-making concerning the right to be hired, or the right to retain employment, whereas the teaching review contemplated in article 24 deals with the right of LSTA members to retain their privileges in terms of teaching assignments. In addition, it suggested that the union argument ignored the actual language used. Finally, it argued that the fact that Exhibit 4 showed that there are many people in the LSTA pool with a lot of experience in teaching does not mean that the

evaluative process is inconsistent or somehow not needed to ensure that people who hold those positions deserve to hold them. For all those reasons the employer asked me to find that the union has failed to prove any violation of the collective agreement.

The union began its reply by asking that I reject the notion that because LS TA appointments enable a package of courses to be assigned to persons designated with that appointment somehow compels a more rigorous evaluation process. It submitted that that simply ignores what the parties have actually bargained. It suggested this argument is undermined by the fact that the parties have not insisted on any requirements for a review of teaching of applicants prior to their first appointment to an LSTA position. In that instance article 24.05 only refers to a reference to a teaching file. The union submitted that if you do not require the class teaching evaluation for an initial appointment to an LSTA position it makes no sense to require one for their attention of an LSTA position.

The union submitted that the parties have created some form of minimal job security and a slightly enhanced compensation for certain senior members of the bargaining unit by creating the LS TA position. But they submitted there was no need for enhanced scrutiny of the in class teaching of such people after they have 15 to 20 years of experience. The union also submitted there was no evidence that the parties intended to take away the procedural protections concerning the in class evaluation that are found in article 13. Further to that argument, the union submitted that in negotiating the new LSTA positions the union did not waive the other provisions of the collective agreement. For article 13 rights concerning evaluation to not apply to those members, article 24 should have had some express statement to that effect. The union

suggested that the employer was attempting to have me read into article 24 a waiver of employee rights under article 13. In addition, the union asked me to reject the suggestion that article 13 should not apply to the LSTA context because it does not have hiring consequences under article 24. It noted that a decision to not renew an LSTA is in fact a hiring decision that has significant consequences for subsequent sessional appointments for the affected member under the agreement.

The union also asked me to reject the employer's argument that the term teaching review is self explanatory and by its very nature must include in class assessment. It suggested that if this was the case then article 13 would not have to settle the nature and form of an evaluation of performance of teaching for sessional members. It submitted the article 13 makes it very clear that there are different criteria and different methods for assessing someone's teaching. In class assessment or observation is merely one method that could be used. It noted that there are two parts of article 13 that clearly and expressly referred to in class assessment of teaching. Article 13.0 1.2 refers to an assessment done in a "teaching situation". The description of formal evaluation procedures in article 13.0 2.1 and 13.0 2.3 refers to a formal evaluation of classroom teaching. Both of these provisions suggest that a formal evaluation of teaching could occur without an in class evaluation taking place. The union submitted that in the same manner that a teaching evaluation can encompass different methods of evaluation, a teaching review can also encompass different methods for the review of teaching.

The union noted the parties have agreed in article 24 that there will be a review of teaching as part of the renewal appointment process for LSTAs. The parties have set out in some

detail what that review is to be comprised of. The union submitted that if the primary objective of such a review was the in class evaluation of teaching the parties would've stated that clearly, but this is not what they have in fact stated. It noted that two items listed in article 24.06 in article 24.10 are different forms or methods of evaluating teaching. However the parties have not referred to the in-class evaluation or assessment as an item or device to be used under article 24. In essence, the union submitted that the teaching review contemplated by article 24 is limited to a review conducted under article 24.06 that is limited to a review of teaching materials and course syllabus, and under article 24.10 as well a review of the teaching file of the candidate is contemplated. The failure to make any reference to an in class assessment indicates a clear intention of the parties.

The union also submitted that there are alternative definitions of the term encompass that should be applied to its interpretation in article 24.06. It noted that the definition found in the Oxford Online dictionary gave one possible meaning of the term as "include comprehensively" and that other usages of the term, to mean surround or enclose, attempt to give it a meaning that is more exclusive in nature than inclusive. The union submitted the parties have used the term in this more exclusive manner in its usage in the contested article. In short they submitted it has been used in the sense of covering or surrounding or including comprehensively. It suggested that in article 24.06 the parties have used it in the sense of a review that is enclosed or covered by course syllabus and teaching materials in terms of the assessment of teaching. The employer made additional submissions in response that argued that the other meanings referred to in the Oxford Online dictionary were also more inclusive in meaning when examples of their usage were analysed.

Finally, the union clarified that all they were seeking at this point was a declaration as to the meaning of the provision and whether or not the collective agreement prevented the employer from conducting in class assessments for the purposes of LSTA renewal applications and asked me to remain seized to deal with any other remedial issues in the event the parties are unable to resolve them.

Decision

After careful consideration of the submissions of the parties and the provisions of the collective agreement I have decided that the grievance should be upheld in part. I have concluded that when the language of article 24.06 and 24.10 is interpreted in a properly contextual manner, giving due consideration to other relevant articles in the collective agreement, it allows the employer to consider in class assessments of teaching as part of the review of teaching required by article 24 for a renewal of an LSAT appointment, but such in class assessments of teaching may only be considered as part of the review of teaching for renewal purposes where the assessment has been done in full compliance with the mandatory provisions concerning the evaluation of an employee's work or performance under article 13 of the collective agreement. My reasons are as follows.

First and foremost, I am in agreement with employer counsel that the plain meaning of the language used in 24.06 and 24.10 is not exclusive in nature. Both the everyday ordinary meaning of the term encompass and the express requirement to have teaching "reviewed" by a member of full time faculty are certainly broad enough to include consideration of an in class

assessment of teaching, provided that such an assessment has been done in a manner that complies with, and is consistent with, other provisions of the collective agreement that are intended to regulate the assessment of teaching. While I recognize the union's arguments that some accepted usages of the term "encompass" are less inclusive than others, I agree with the employer that had the parties intended to limit a teaching review exclusively to consideration of the two items listed in 24.06 they would have used more clearly exclusive or limiting language to do so.

However, at the same time I disagree with the contention of employer counsel that the plain ordinary meaning of the language of the two provisions at issue creates a mandatory obligation on the part of the employer to conduct an in class assessment of teaching to be considered in all cases when determining whether an LSTA appointment should be renewed. There is no inherent or natural meaning of the term "teaching review" or "review of teaching" that necessarily includes in class assessments of teaching, either within the collective bargaining environment of these parties or the broader university environment of faculty collective agreements within the province. I take arbitral notice of the fact that it is not uncommon in faculty collective agreements to have reviews or evaluations of a faculty member's teaching, as part of renewal, promotion or tenure application processes, which do not require in class assessments of teaching by peers. I acknowledge that there are some processes of this nature that do provide for in class assessments as a component of some collegial application assessment processes, but there are many that do not. In any event, it is simply not the case that a requirement for a review of teaching by a peer necessarily requires an in class assessment as a mandatory component of such a review. Such reviews are frequently done on the basis of a

review of other teaching related items such as course syllabi, course materials, student evaluations (where their use is permitted for that purpose), participation in teacher training programs, and student complaints, etc.

I am in agreement with the employer's submission that the interpretive principle of *expressio unius* cannot be applied here in a fashion that would result in an implied bar against any consideration of an in class assessment that was done in a manner that was consistent with the other relevant parts of the collective agreement. The problem with the union's argument on this front is that even if a review under 24.06 were seen as limited to the listed items of course syllabi and teaching materials, the language used in article 24.10 concerning reviews done for the purpose of a renewal of an LSTA is broader in its reference to an assessment of the quality of an applicant's teaching, "evidence of which will *include* the review pursuant to article 24.06 above." This language is clearly and expressly inclusive and contemplates the consideration of other evidence of the quality of the member's teaching that goes beyond the mandatory items listed in article 24.06. I am unable to accept the union's argument that this inclusive wording was only intended to apply to the applicant's teaching file and that if this was the case it would somehow exclude any in class assessments that had been done in a manner that complied with the collective agreement. I was not pointed to any definition of the "teaching file" (referred to in 24.05) that would exclude in class teaching assessments that had been performed and filed in compliance with article 13.

I do note however, that while the listing of the two items in 24.06 to be considered as part of the teaching review does not exclude consideration of anything else, it does make

consideration of the two listed items mandatory components of the review, unlike the in class teaching assessment, which is not a required item but a permissible one if an assessment has been done in full compliance with article 13.

I am in agreement with the union submissions that a contextual interpretation also requires consideration of other relevant articles of the agreement and the principle that where possible collective agreement provisions should be interpreted in a manner that is consistent with other relevant provisions of that agreement so that all provisions continue to have meaning, and none are rendered redundant or found to contradict each other. In my view there is only one interpretation of article 24.10 that is consistent with the clear and express language of article 13. The second sentence of article 13.01.1 is clear and unequivocal in expressing the intention of the parties that evaluations of a member's work or performance of their duties must conform to the provisions of article 13 in order for it to be used for appointment or reappointment purposes. I repeat it here for convenience:

> An evaluation of an employee's work and/or performance which does not conform to the provisions of this article shall be null and void.

It is important to note, as the union has emphasized, that the article has several provisions that expressly refer to in class assessments of teaching (13.01.2(ii) and 13.02.3(iii) and by implication the rest of article 13.02.3 as well). The article provides important protections concerning notice of such assessments and the identity of the evaluator, and the possible uses of such assessments for hiring decisions. As noted by the union, there is no language in either article 13 or article 24 that would suggest that evaluations or reviews of teaching under article 24 should be exempt from the requirements of article 13, or that the requirements for evaluations of

work or performance found in article 13 were not intended to be of general application. Nor was there any language in article 24 to suggest that it was to take precedence over the general requirements of article 13.

Employer counsel posited two possible distinctions concerning the language and purposes of the two provisions to attempt to provide some argument for holding that in class assessments under article 24.10 should not be subject to the requirements of article 13, but I am unable to find either to be persuasive. He argued that the purpose of article 13 was to regulate evaluations done for the purpose of hiring decisions, or retaining employment in the unit, or improving a member's teaching, whereas article 24 applications for renewal of an LSTA appointment were somehow not about hiring or retaining employment in the bargaining unit because one could lose LSTA status and still teach sessional courses. In my view there is no question that decisions on LSTA renewal applications are hiring decisions and will have a significant impact on the individual member's job security given the course assignment privileges that are attached to an LSTA position.

In addition, the employer submitted that I should find article 13 not applicable to in class assessments done for the purposes of article 24 on the basis that article 13 applies to evaluations of an employee's work or performance whereas article 24 deals with a 'review' of teaching. In my view the plain ordinary meaning of "an evaluation of an employee's work and/or performance" is broad enough to include a 'review' of teaching by a full time member of faculty, particularly when that same review is expressly referred to as 'evidence' of "the quality of an applicant's teaching" (see article 24.10, paragraph 4). It would require a very tortured reading of

the terms "evaluation of an employee's work and/or performance" to interpret them to exclude an in class review of teaching that was to be used to assess the quality of an applicant's teaching. This point is further strengthened by the references in other parts of article 13 to restrictions on the circumstances under which formal evaluations of the performance of various duties and responsibilities can be undertaken, the duration for which they can be kept on file, regulation of the manner in which they can be conducted, and their potential use as a source of information in hiring decisions. All of these provisions suggest that the harmonious interpretation of the two articles will require that only in class assessments of teaching that have been conducted in compliance with article 13 may be considered as part of a review of teaching that is done for the purposes of renewal of an LSTA appointment under articles 24.10 and 24.06. In this manner the plain ordinary meaning of the language used in both articles is allowed to apply. The employer's proposed interpretation, one that read the provisions of article 24.10 and 24.06 as requiring a mandatory in class assessment for all renewal of LSTA applications without insisting on compliance with article 13, would have rendered the protections of article 13 totally ineffective for a very important hiring decision under the agreement, one that affects a significant number of the most senior members in the unit.

In summary, I have concluded that the language of sub-articles 24.10 and 24.06, when properly interpreted in the context of the express restrictions on evaluation of work or performance contained in article 13, allows the employer to consider in class assessments of teaching by a full time faculty member as part of the teaching reviews required under article 24, but only where such an in class assessment of teaching has been done in full compliance with the restrictions and requirements of article 13. As such, in class assessments are not a required or

mandatory component of teaching reviews done for the purposes of article 24.10 and 24.06, and may often not be available where the circumstances required for such a review under article 13 do not exist. In such cases the review of teaching will be based on the items listed in 24.06 and other relevant items from the teaching file. As such the grievance is upheld in part, to the extent that the employer is not permitted to require or consider in class teaching assessments as part of a review of teaching required under article 24.10 or 24.06 unless such an in class assessment of teaching has been, or can be, conducted in full compliance with the circumstances and requirements for such an in class assessment required under article 13 of the collective agreement.

I thank both counsel for the effective and concise presentation of the issues in this case. I remain seized to deal with any issues concerning implementation or remedies arising from my findings in this award.

Signed in Windsor this 24th day of September 2014.

Arbitrator Etherington