

IN THE MATTER OF AN ARBITRATION

BETWEEN:

The University of Ontario Institute of Technology

and

The University of Ontario Institute of Technology Faculty Association

(Policy Grievance re: BOG)

Before: William Kaplan
Sole Arbitrator

Appearances

For the University: George Avraam
Ajanthana Anandarajah
Baker & McKenzie
Barristers & Solicitors

For the Association: David Wright
Ryder Wright Blair & Holmes
Barristers & Solicitors

The matters in dispute proceeded to a hearing by Zoom on August 27, 2020.

Introduction

This case concerns an April 2018 policy grievance filed by the Faculty Association at the University of Ontario Institute of Technology (hereafter “the Association” and “the University”). Summarily stated, the dispute arose for the following reason: The University took the position that otherwise eligible faculty members who were on, or who would be applying for, a research leave – a cohort of only tenured members – could not seek election and serve on the Board of Governors (hereafter “the BOG”) if their research leave would overlap with part of their three-year BOG term. Three faculty members were excluded from running for election.

The explanation for the restriction advanced by the University was that pursuant to Article 28 of the collective agreement, faculty members on research leave are to devote 100% of their time to research. The University also takes the position that the grievance was not arbitrable as election to the BOG does not involve the collective agreement but is an independent process governed by BOG rules. For its part, the Association took the position that the collective agreement was fully engaged as the BOG was the employer and was bound by the terms and conditions of the collective agreement. In the Association’s submission, the effect of the prohibition was to potentially exclude tenured faculty members from ever serving on the BOG as they are eligible for a research leave every three years (although, as noted below, a new less strict policy was promulgated in the aftermath of these events). The dispute proceeded to mediation on May 26, 2020, and then to a hearing by Zoom on August 27, 2020.

The Collective Agreement

Article 4 – Management Rights

4.01 The Employer retains the exclusive right to manage the University which includes policy formulation and execution, except to the extent modified by the terms of this Agreement and provided this right is exercised in a fair, reasonable and equitable manner.

Article 14 – Academic Freedom

14.02 Academic freedom of Faculty Members resides at the core of the University's mission....

Article 16 – Academic and Professional Career/Workload

...

- b) Faculty Members have the right and responsibility to engage in an appropriate combination of the following activities:
- i. Research: Whereby Faculty Members make original contributions to their fields of learning.
 - ii. Teaching: Whereby Faculty Members convey information and techniques to students and foders critical and creative thinking.
 - iii. Service: Whereby Faculty Members contribute to the governance of the University through active and engaged participation on its collegial and administrative bodies....

Article 28 – Leaves of Absence

...

28.03 Research Leave

- a) Faculty Members with tenure are eligible for Research leave for a period of up to, but not exceeding, twelve (12) months, after completing six (6) Appointment Years of full-time Research, Teaching and Service, unless a period of less than six (6) Appointment Years is specified in the Faculty Member's letter of appointment.
- b) For clarity the workload of a Faculty Member on Research Leave is 100% Research, 0% Teaching, and 0% Service. Any variation from this must be documented and have the mutual agreement by the Faculty Member and the Dean.

Some Background Facts

Elections to the BOG were held in late winter/early spring 2018. There was no specific policy or by-law in place, at the time, restricting faculty members eligible for a research leave during their prospective BOG term from seeking election – although there was some contested extremely limited anecdotal evidence about a past practice to the effect. There was also some contested extremely limited anecdotal evidence to the contrary. Given its nature and scope, none of this is of any legal or factual significance.

In any event, five faculty were nominated for two faculty positions on the BOG. Prior to the election, all five were contacted and asked if they intended to take a research leave in the next two years, i.e., the first two years of their three-year term. They were asked to complete a form providing this information. While forms had been used in the past, this was the first time the research leave question was asked. Three faculty members who expressed interest in taking a research leave during the BOG term were deemed ineligible to stand for election because of Article 28.03. Two of the five faculty were deemed eligible and they were acclaimed. A grievance was filed. The BOG also convened a subcommittee to look into the matter and it adopted a policy – not a by-law – addressing eligibility issues for faculty members on research leave, but one that still imposes significant fetters on tenured faculty.

Submissions

In the Association's submission, the starting point was with applicable legislation, the *University of Ontario Institute of Technology Act, 2002* (hereafter "*the Act*"). *The Act* – which Association counsel extensively reviewed – made manifest that the BOG was the employer, it was the University, and it was bound by the collective agreement. Indeed, when faculty members were told they were ineligible to serve, their attention was drawn to Article 28.03 affirmatively establishing the collective agreement's application to this dispute and, accordingly, conferring arbitral jurisdiction. Other collective agreement provisions, in the Association's view, confirmed this conclusion.

Under the Management Rights clause the University had to exercise its functions in a fair, reasonable and equitable manner. Moreover, faculty members enjoyed academic freedom and it was axiomatic, and widely accepted, that academic freedom includes the right to participate in collegial governance. Indeed, in the Association's view, this entitlement was unequivocally set out in Article 16.01(b)(iii). An arbitrary rule that effectively excluded tenured faculty members from BOG service was completely inconsistent with the Management Rights provision, Academic Freedom and the right of faculty members to participate in collegial governance. This conclusion was reinforced by the fact that no other faculty members were prohibited from service – including those on a variety of other leaves such as maternity, parental or professional development.

The Association did not dispute that the University had the legal right to determine aspects of BOG eligibility – but it had to do so in a proper way – and that meant compliance with *the Act* through passage of a proper by-law. That also meant that while doing so it had to respect its obligations under the collective agreement. Significantly, there was no policy or by-law in place in the late winter/early spring of 2018 restricting faculty on 100% research leave from BOG service. Nevertheless, the University took unilateral steps and prohibited tenured faculty members from putting themselves forward for election.

It was also noteworthy, in the Association's view, that when the BOG considered this issue in the aftermath of the spring 2018 election, it promulgated a new policy, instead of passing a by-law as it was legally required to do. The new policy continued to breach the collective agreement, just like the old one, the Association argued, but making matters even worse, it was of no legal force or effect in the Association's opinion because a by-law was not passed as is categorically required.

The BOG certainly had the right to pass a proper by-law setting out competencies, qualifications, expertise and responsibilities for service, but it could not do so if it violated negotiated provisions of the collective agreement. Likewise, it could not do so where the result was completely discriminatory: intentionally or not, the restrictions targeted tenured faculty members to the exclusion of everyone else. It was also worth mentioning, the Association argued, that virtually everyone else who served on the BOG was either fully employed at the University or elsewhere, and it

was nowhere suggested that these full-time activities somehow interfered with BOG service. Simply because a faculty member was fully engaged with research did not mean that she or he could not fulfill BOG duties. The former did not preclude the latter, nor was it inconsistent with it. The Association asked that the grievance be allowed, appropriate declarations issued, and that I remain seized should any implementation issues arise.

For its part, the University took the position that the BOG was fully entitled to determine eligibility for membership, and that included its good faith determination that someone who was 100% engaged in research should not be allowed to serve. To whatever extent faculty members could decide on their University service, that did not give them the right to serve on the BOG or otherwise. Collective agreement references to the BOG were scant, and BOG members were excluded from coverage during their term. The fact of the matter was that a BOG member who took a 100% research leave would be unavailable for many months depending on the length of their leave. In determining that such persons should not, because they could not, serve on the BOG, the BOG was properly exercising its statutory powers.

The University also took the position that there was nothing in the collective agreement that entitled the Association to challenge or contest the BOG's determination of its membership. The BOG was separate and apart from the University. The latter was bound by the collective agreement; the former was not. BOGs act through by-laws, reflected in turn by more detailed policies giving effect to

those by-laws. And that is exactly what happened here. The decisions that were taken were reflected in past practice, fully lawful, appropriately authorized and made in good faith for legitimate operational reasons. Whether earlier nomination forms asked about current or future research leaves or had evolved over time, was neither here nor there and was immaterial to the threshold jurisdiction issue. There was, in any event, ample rationale for the decision that the BOG reached, one that was not subject to arbitral review. The University asked that the grievance be dismissed.

Decision

Having carefully considered the evidence, I conclude that the collective agreement is engaged, has been breached, and the grievance is, therefore, allowed.

In my view, following a thorough canvass of the legislative framework and the collective agreement, the conclusion is inescapable that the collective agreement applies. Under section 2(2) "The University....shall consist of members of the board." Under section 9.1 of *the Act*, the BOG is responsible for governing and managing the University. The University acts through the BOG. There are numerous references to the Board in the collective agreement. Under section 8(1) of *the Act* the composition of the BOG is prescribed. But under section 8(2) the BOG may "by by-law determine the manner and procedure for election of members....and eligibility requirements for election to the board" and it can amplify that in policies, provided that doing so does not violate negotiated entitlements in the collective

agreement. There is no power to set *ad hoc* election eligibility requirements, even if well intentioned.

In this case, not only has no by-law been passed, but the policy that was promulgated subsequent to the grievance infringes on the collective agreement. It is true enough that a faculty member who is elected to the BOG is no longer covered by the collective agreement for the period of their term. However, in seeking election to the BOG, a faculty member may rely on the terms and conditions of the collective agreement and the corollary of this is that the University cannot infringe on them. Management Rights, Academic Freedom and Article 16(b)(iii) are directly engaged by this grievance conferring jurisdiction and making this grievance arbitrable.

There is nothing in Article 28.03 that could be reasonably interpreted to preclude BOG service during a 100% research leave. Put another way, experience indicates that the purpose of provisions such as this are to limit what other duties *can be assigned* during the period of the research leave: namely, none (emphasis mine). This overall conclusion is reinforced by the discriminatory effect of the rule with its unfortunate effect of largely precluding tenured faculty from collegial governance. Faculty members enjoy academic freedom and that includes the right, as provided for in this collective agreement in Article 16(b)(iii), to stand for election to the BOG. There is nothing about being on a 100% research leave that is inconsistent with BOG service. The actions in the late winter/early spring of 2018 precluding tenured track faculty members with already approved research leaves, or faculty members

who were entitled to a research leave and who anticipated taking one, from BOG service was not fair, reasonable or equitable. To the extent the BOG has legitimate concerns about competencies, attendance and engagement, they can be addressed separate and apart from this restriction on eligibility. To the extent a faculty member fails to accomplish their research leave objectives by failing to properly dedicate themselves during that leave, that too is something that the University can address.

Conclusion

Accordingly, and for the foregoing reasons, the grievance is allowed and a declaration of collective agreement breach, together with a cease and desist, is issued. At the request of the parties, I remain seized with respect to the implementation of this award.

DATED at Toronto this 3rd day of September 2020.

“William Kaplan”

William Kaplan, Sole Arbitrator