92D627 BAILEY VS CAMBRIAN COLLEGE

IN THE MATTER OF AN ARBITRATION

B E T W E E N:
CAMBRIAN COLLEGE
(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF G. BAILEY - #92D627

BOARD OF ARBITRATION:	Kenneth P. Swan, Chairman D. Cameletti, College Nominee W. Majesky, Union Nominee
APPEARANCES:	
For the College:	Douglas K. Gray, Counsel Susan Pratt, Staff Relations Officer
For the Union:	Pamela Munt-Madill, Counsel Peter Selecky, Steward John Closs, Chief Steward G. Bailey, Grievor

AWARD

At the hearing in this matter, the parties were agreed that the board of arbitration had been properly appointed, and that we had jurisdiction to hear and determine the matters at issue between them, subject to four preliminary objections raised by the College to the arbitrability of the grievance. At the hearing, we heard evidence and argument on the first of these objections; argument on the other three objections was provided subsequently in writing by counsel. Thereafter, the board of arbitration met in executive session in Toronto.

The grievance in this matter was filed by Mr. Glen E. Bailey on September 11, 1992. The grievance is in the following form:

Statement of Grievance

Unjustly denied a position as full-time faculty at Cambrian College.

Settlement Desired

Re-instatement to full-time status without probation. Return of lost wages and benefits plus interest since Sept. 1988.

It is common ground that the facts from which the grievance arises refer to a competition for a full-time teaching position, for which the grievor unsuccessfully applied, in July 1988. The disparity between the date of the facts from which the grievance arises, and the date of the grievance itself, leads to the first preliminary objection of the College, that the grievance is inarbitrable on the basis that it is beyond the mandatory time limits set out in the collective agreement.

The time limit provisions of the collective agreement, which are well-known to all of those familiar with the relationship between these parties, are set out in Article 11 of the collective agreement which was in operation at the time. There has been no change in any material section at any time since the events of July 1988. The relevant provisions are as follows:

11.01 Sections 11.01 to 11.05 inclusive apply to an employee covered by this Agreement who has been employed continuously for at least the preceding four (4) months.

11.02 Complaints

It is the mutual desire of the parties hereto that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate Supervisor within twenty (20) days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate Supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate Supervisor unless mutually agreed to have other persons in attendance. The immediate Supervisor's response to the complaint shall be given within seven (7) days after discussion with the employee.

11.03 Grievances

Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under Section 11.12(c)) in the following manner and sequence provided it is presented within seven (7) days of the immediate Supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College written decisions at each step shall contain reasons supporting the decision.

11.05 General

(a) if the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned;

(b) if an official fails to reply to a grievance within the time limits set out at any Complaint or Grievance Step, the grievor may submit the grievance to the next Step of the grievance procedure;

It is well-known, and the voluminous authority need not be cited since the parties were essentially in agreement at the hearing, that these provisions are mandatory, and that a board of arbitration has no jurisdiction under the Colleges Collective Bargaining Act to relieve against the effect of these time limits. The first, and fundamental, objection by the College to our jurisdiction to hear this matter on the merits is therefore that a grievance dated September 11, 1992 relating to events which took place in July 1988 is out of time, and must therefore be deemed to be void for all purposes and not arbitrable before us.

The facts on which this matter are to be resolved are not really in dispute, and may be relatively briefly summarized. The grievor holds a Ph.D. in Exercise Physiology, which he earned in 1975. After a period of time working in the Physical Education Department at Laurentian University, he was hired at Cambrian College in a new program in Physical Fitness and Leisure Management on July 28, 1986 as a Partial-Load Teaching Master to develop course outlines and to assist with students along with the Program Coordinator. This position lasted until August 1987, at which time he was appointed as a Sessional Professor on an appointment expiring in April 1988. From May to August 1988, he was retained on a further partial-load appointment to assist with the development phase of the program.

In July 1988, during the grievor's appointment as a partial-load teacher, a regular full-time position was posted which, the grievor testified, was essentially the job he had been performing since July 1986. The grievor applied, was interviewed but was not appointed to the position. When he learned of this outcome, he immediately made an appointment to see his direct supervisor on July 21, 1988, at which time he asked for an explanation for his failure to be selected, but did not receive any information satisfactory to him.

That interview took place on July 21, 1988, and on July 25, 1988 the grievor wrote a letter to the President of the College, effectively demanding an explanation for his non-selection. A written response was received from R.C. Hurly, Director of Personnel on behalf of the President, under date of August 9, 1988, to the effect that he was satisfied that the selection had properly been carried out.

The grievor next wrote a letter to all members of the Board of Governors of the College under date of September 12, 1988. A reply to this dated September 30, 1988 was subsequently received, effectively upholding the selection.

Finally, after an unsuccessful attempt to raise the matter through his member of the Ontario Legislative Assembly, the grievor made a complaint to the Ombudsman of Ontario on March 1, 1989. Following a lengthy investigation, the Ombudsman issued a report dated January 28, 1992 recommending certain revisions to the College's competition procedures, and also that the College pay the grievor the sum of $10,000 "to compensate him for the loss of livelihood he suffered as a result of the competition's outcome".

It appears that the College complied with the Ombudsman's recommendation, and paid that sum of money to the grievor. The grievor, however, remained unsatisfied, and pursued his complaint with his member of the Ontario Legislature by letter dated March 23, 1992; with the Chair of the Ontario College of Regents for the Colleges of Applied Arts and Technology by letter dated March 19, 1992; with the Secretary of the College's Board of Governors by letter dated May 5, 1992; and with the Chair of the Board on May 11, 1992. Finally, on August 20, 1992, the grievor raised the matter with every individual member of the Board of Governors by sending copies of all the documentation directly to them.

Despite all of this activity, there is no dispute that the grievor did not file a grievance pursuant to the collective agreement at any time prior to September 11, 1992. The Union advances two explanations for this failure. First, the grievor testified that he did not file a grievance in 1988, after having made a complaint to his immediate supervisor in a timely fashion, because he had spoken with Mr. Bill Kuehnbaum, then the Local Union President, and Mr. Kuehnbaum had told him that he could not file a grievance because he was not covered by the collective agreement as a partial-load teacher. Mr. Kuehnbaum, by the time of this hearing a Vice-President of the Provincial Union, was not called as a witness either to corroborate or refute this version of events.

Second, the grievor says that he learned for the first time from the Ombudsman's report of a number of facts about the way in which the competition had been carried out which "confirmed my suspicions and told me of new information I hadn't been aware of". When asked on cross-examination to identify this new information, the grievor said that his suspicions that a Mr. Barbeau had been directly involved in the selection process, and the nature of his involvement, were clarified. He also learned that certain information was before the selection committee in relation to his application that he had not been aware of before, including his student evaluations, which he thought would not be considered.

On this basis, the Union argues that, in the words of clause 11.02, the time at which "the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee" must be dated from the receipt of the Ombudsman's report, and not from the time of the selection, since the grievor did not possess complete knowledge of the circumstances until the Ombudsman's report was available.

We propose to dispose first of the assertion that Mr. Keuhnbaum may have told the grievor something in the summer of 1988 which stayed his hand from filing a grievance at that time. If indeed the grievor is asserting a complaint against the Union in this regard, this is not the proper forum to do so. We have no jurisdiction to deal with any such question, nor does the College's Collective Bargaining Act provide us with any jurisdiction to waive time limits because of any perceived unfairness which may have arisen from any alleged failure of the Union to give correct advice. At the same time, however, it seems very unlikely to us that Mr. Kuehnbaum would have advised the grievor that he was not covered by the collective agreement, and therefore had no right to grieve. There are a number of reasons why Mr. Kuehnbaum may have told the grievor that a grievance on these facts would fail, including one or all of the other grounds for the preliminary objections in this matter. But the evidence indicates that the Union has grieved on behalf of partial-load employees on other occasions, and that Mr. Kuehnbaum has been involved in grievances by partial-load employees. We think it is much more likely that the advice given to the grievor in the summer of 1988 was that, while he could file a grievance against the failure of the College to select him for a position, the likelihood was that such a grievance would fail for one or more of a number of reasons.

The second point to be made is that, if the new knowledge gained from the Ombudsman's report is the galvanizing factor which made the grievor aware of "the circumstances giving rise to the complaint", then the time limit should begin to run at the latest some time in March 1992, at which time the grievor clearly had that report in his hands and was sending it out to various individuals as the mainstay of his case for political relief against the College. Even on that theory, the grievance is out of time.

We should observe, however, that we do not think that the Union's theory in this regard is correct. While every case must turn on its facts, the circumstances giving rise to a complaint of improper refusal of a posted position are generally known to a grievor as soon as he or she knows that the application has not been successful. The triggering factor is not some piece of evidence or some hitherto concealed machination, but the fact of the denial. Once that is known, a grievor must make up his or her mind whether to file a grievance, and under this collective agreement must do so within stringent and immutable time limits. It is only in a very rare case where the grievor will not be put on notice by learning of the failure of his or her application that the time has come to file a grievance or let the matter drop.

In the alternative, the Union argues that a competition grievance can be considered a continuing grievance as each day going by constitutes a new breach. With respect, we disagree. Arbitrators have

never made such a finding to our knowledge, and Re Seneca College and Ontario Public Service Employees' Union, Chang Grievance, #87P03, unreported, May 13, 1988 (Kates) is persuasive authority both for the proposition that a selection grievance is not a continuing grievance, and for the proposition which we have advanced earlier that the circumstances giving rise to a complaint of non-selection are known as soon as the employee knows that his or her application has been unsuccessful.

Finally, the Union argues that the grievor never received a reply from his immediate supervisor pursuant to his complaint under clause 11.02, and he was therefore at liberty to press the matter on to the formal grievance stage at any time thereafter, thus leaving his grievance rights open up to and including September 11, 1992. In our view, this is provided for in paragraph 11.05(b), which provides that the remedy for a failure to reply within the time limits "at any Complaint or Grievance Step" is to permit the grievor to advance to the next following stage of the grievance procedure. When this is contrasted with the language of paragraph 11.05(a), which says that where the grievor fails to act within the time limits set out in any such step the grievance will be considered abandoned, it is clear that the intention of the parties was to make a failure to reply within the time limits simply the trigger for moving on to the next step of the grievance procedure, with all of the time limits still applicable as against the grievor. Therefore, we cannot accept the Union's final argument in this regard.

As we have already observed, the parties also provided us with written argument on three other preliminary objections to the arbitrability of this grievance. We have considered those arguments, but the parties requested that, if we were to resolve this matter against arbitrability on the basis of any one argument, we should not deal in our award with the others. We should observe, however, that it is obvious to us that there are other substantial barriers to the arbitrability of the present grievance, and that by disposing of this matter on the basis of time limits, we do not wish to suggest that, but for this technicality, the grievance might have succeeded. In the result, therefore, the grievance is not arbitrable, and is dismissed.

DATED AT TORONTO this 18th day of October, 1994.

Kenneth P. Swan, Chairman

I concur "D. Cameletti"
D. Cameletti, College Nominee

I dissent "W. Majesky"
W. Majesky, Union Nominee