01C017

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the "Union")

- and -

SAULT COLLEGE

(the "College")

OPSEU Grievance #01C017

(Phil Brannen)

Before:

M.G. Mitchnick	- Chair
S. Murray	- Union Nominee
D. Cameletti	- College Nominee

Appearances:

For the Union: Mary MacKinnon

For the College: Doug Gray

For the Grievor: Phil Brannen

AWARD

As noted in an earlier Interim Award, this board was appointed by the College and the Union, under the Colleges' Academic collective agreement, and the *Colleges' Collective Bargaining Act*, to hear OPSEU Grievance #01C017, filed November 29th, 2000 by Mr. Phil Brannen. The issue is whether the board continues to have jurisdiction over that grievance, in light of its "settlement" by the College and the Union.

Mr. Brannen was part of a down-sizing at the College in 1997, and grieved at that time against his lay-off. That grievance was resolved, with Mr. Brannen's concurrence, by a Memorandum of Settlement dated January 28th, 1998. The Memorandum read:

> <u>Memorandum of Settlement</u>
>
> Between:
>
> Sault College
>
> (the "College")
>
> \- and -
>
> Ontario Public Service Employees' Union
>
> (the "Union")
>
> \- and -
>
> Philip Brannen
>
> ("Brannen")
>
> Whereas Brannen was laid off from the College, effective November 17, 1997, and he filed a grievance which was pursued to arbitration by the Union;
>
> And Whereas the parties wish to resolve all outstanding matters concerning the grievance on the following terms:
>
> 1. Brannen shall be recalled as a Professor as soon as possible, and in any even no later than February 9, 1998.
>
> 2. While Brannen shall receive no compensation for the period between his date of layoff and the date of recall, he shall not suffer any break

in his seniority and shall be credited with seniority for the period of layoff.

3. If permitted by the terms of the pension plan, Brannen shall be permitted to purchase credit for service under the plan for the period of layoff.

4. Upon his recall and thereafter, Brannen shall be subject to the terms and conditions of the Collective Agreement.

5. Brannen agrees to retire from the College on March 31, 2001, if he is still in the College's employ on that date.

6. The foregoing is without prejudice or precedent to the position of either party.

7. The grievance is withdrawn.

Dated this 28th day of January, 1998.

For the College | For the Union | Phil Brannen

There was, at the time that Memorandum was entered into, an Early Retirement Incentive Plan in place at the College, with a closing date for applications of March 31, 2000. Notwithstanding the Memorandum's silence on the matter, Mr. Brannen maintains that he had made it clear to representatives of the College that he was intending to apply for that Incentive Plan. Unfortunately, as Mr. Brannen now asserts, delays by the College in processing matters arising from the 1998 Memorandum of Settlement caused him to apply for the Incentive Plan after its closing date. Mr. Brannen takes the position that the College's delay in processing those pension matters was done deliberately by the College to thwart his ERIP application, in retribution for the fact that he had grieved his lay-off in the first place.

It might be noted that the acceptance of any Early Retirement application on the College's part was solely a matter within the College's discretion. In denying Mr. Brannen's application, however, the College made specific reference to, among other

things, the fact that he had applied out of time -- a point particularly galling to Mr. Brannen, given his view of the College's actions to that point. The College response read:

> MEMORANDUM
> TO: Phil Brannen
> RE: Application for Participation in the Early Leaving Assistance/Restructuring Plan
> DATE: November 8, 2000
>
> Your application for participation in the Early Leaving Assistance/ Restructuring Plan that you submitted directly to the President has been forwarded to me for response.
>
> The Early Leaving Assistance/Restructuring Plan was in effect for a three-year period that ended on March 31, 2000. It is unfortunate that you did not submit your application within the timelines of the Plan.
>
> The Memorandum of Settlement between you and Sault College, dated January 28, 1998, addresses only your agreement to retire on March 31, 2001 and does not carry a provision for any alternate form of Early Leaving arrangement.
>
> Your application is therefore not approved.
>
> Tony Hanlon
> Vice-President, Academic

Mr. Brannen as a result of all of this filed the grievance that is the subject matter of the present proceedings, alleging:

> "1. Violation of settlement agreement re early retirement.
> 2. Bad faith.
> 3. Violation of Article 3.02 of Academic Collective Agreement."

The remedy sought, effectively, was for the pension and benefits of the Early Retirement Incentive Plan. In a decision dated October 28th, 2002, this board, while noting the problems that might exist with respect to that remedy, found that, under the terms of

Article 3.02 of this collective agreement, it had express jurisdiction to entertain the allegation of retribution for filing a grievance. The board, at the request of the Union, accordingly scheduled hearing days for the matter beginning November 3rd, 4th, and 5th, 2003.

By letter dated October 27th, 2003, however, the Union advised the board as follows:

> We are writing to advise that the Union and Employer have reached a resolution of this matter. Accordingly, arrangements for the hearing dates of November 4th and 5th may be cancelled.
>
> The parties have agreed to jointly advise the Board that there is no dispute between the parties. They have also agreed to request that the Board convene a teleconference call on November 3rd at the time that the matter was originally scheduled to commence, to permit Mr. Brannen to make representations to the board, if he wishes.

The settlement so referenced was executed by the College and the Union and reads as follows:

MEMORANDUM OF SETTLEMENT

BETWEEN:

SAULT COLLEGE

(the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the "Union")

WHEREAS a grievance was filed on behalf of Phil Brannen, which was pursued by the Union to arbitration and which is scheduled to be heard on November 3, 4, and 5, 2003:

AND WHEREAS the parties wish to fully and finally resolve the grievance, without prejudice or precedent, on the terms hereafter set out;

NOW THEREFORE the parties agree as follows:

1. The College shall pay to Phil Brannen the sum of $20,000 dollars, subject to statutory deductions required by law, provided that the College will cooperate in allowing Mr. Brannen to roll over the maximum allowable by law into an RRSP, subject to the provision of any relevant documentation in that regard by Mr. Brannen.

2. The grievance is withdrawn, and is considered fully and finally resolved without prejudice or precedent.

The reason for the opportunity for Mr. Brannen to make submissions, the board was advised, was that Mr. Brannen was not in agreement with the parties' settlement, and wished the board to proceed with the arbitration. The board accordingly scheduled a teleconference to allow it to confirm Mr. Brannen's position, and to establish a procedure for receiving written submissions as to whether, in the face of the Union's October 27th letter and the settlement, the board still had jurisdiction to continue with the grievance.

As a settlement between the parties who appointed it normally would bring an end to the jurisdiction of an arbitration board to proceed, Mr. Brannen was invited to present his submissions to the board first. Mr. Brannen did so, in the following letter (*sic*):

Enclosed please find a copy of my written representation why the board has jurisdiction to proceed with this case.

> The Labor Relations Act Sec. 44 (1) That the arbitration board will act in a Patently Reasonable manner.
>
> Judicial reviews based on whether the arbitrator exercised that jurisdiction in a Patently Unreasonable Manner. Please note we all have difficult hurdles to overcome in terms of a remedy of this case, more so now after a lapse of several years.
>
> As stated by you in your Interim Award 1 this grievance can only be dealt with under Article 3.02 of said collective agreement, Article 3 Relationship. I say Article 6.02 must be included Management Functions.
>
> The Court of Appeal of Ontario established these four rules.

Rules, Loyalist College Applied Arts - OPSEU Mar 6 2003.

Rule (1) Similarly situated employees in a bargaining unit are governed by identical terms of employment. When the college imposed a condition that was different from co-workers the college violates this rule.

Rule (2) A condition determining whether an employee retains their job is a condition of employment and conditions of employment that governs job retention must be in the collective agreement.

Note – My conditions are not in the collective agreement, the college violates this rule.

Rule (3) When there is a collective agreement, anything more than the bare offer and acceptance of a job is invalid.

Note – By putting a condition on my Memorandum of Settlement the college violates this rule.

Rule (4) Individual employees have no authority to negotiate on their behalf and individual contracts are invalid.

My essential character of dispute is rooted in the employment relationship as it relates to early retirement incentive.

I state the college negligently failed to take the steps necessary to enable me to receive the early retirement incentive. The employer has an obligation to "Act Reasonably".

The whole contents in the Memorandum of Settlement that was signed by the college, union, and myself dated 28 Jan 1998, are seen by me now as a reprisal for having an arbitration case against the college. The college had but two things in mind (1) Find a way to be rid of me, (2) At no cost to the college.
Please note from my Mem of Set,
Brannen laid off
Resolve all outstanding matters,
#1 Brannen recalled as professor (not returning from Leave Without Pay)
#2 Brannen shall receive no compensation for lay off,
#3"IF" permitted . . . . . terms of pension plan. Brannen shall be permitted . . . . .
Period of lay off.
NOTE – You cannot purchase pension credits for period of lay off. I have tried before after lay off,

#4 Brannen upon recall and thereafter . . . . . under terms and conditions of the collective agreement.

Note – This puts me under the full terms and conditions of the collective agreement and co-workers.
#5 Brannen agrees to retire 31 Mar 2001 . . . . If he is still in the colleges employ on that date.
Note – This is early retirement, and an employment condition of recall.

Arbitrators are entitled to review a case if the decisions are made in bad faith or is based on an illegal or invalid consideration.
I ask for leave and reconsideration.

In my Mem of Sett I was laid off
Definition of layoff – There must be a cessation of work to be a layoff.
I submit there is no extrinsic evidence which could possibly justify a departure from the plain meaning of definition of layoff.
Note – I was not on a leave of absence par 3 of Mem of Sett. The college added this statement "treat as leave of absence for pension purposes".

I state that by the college changing from layoff to "treat as Leave Without Pay for pension purposes." Under the Employment Standard Act – the college embarked upon a strategy which constitutes an illegal and improper appropriation of pension funds and illegal scheme to defeat the Employment Standard Act, all contrary to Sec 51 of the Act.

Also note – when a workers entitlement to pension benefits has been reduced, the entitlement to severance compensation arises because the worker upon electing to retirement would receive a reduced pension benefit.
The college has a responsibility for early retirement.

Labor Relations Act S.48 (12) (j) Arbitrator has the power to enforce rights.

Therefore a collective agreement may not contain provisions contrary to any Human Rights or Employment Related Statute.
By declaring employee is ineligible for early leaving incentive is discrimination.

The absence of a separation package in the collective agreement does not translate into an employers right to implement such a package when it affects matters covered by the collective agreement. The silence of a

> collective agreement on an issue does not give the employer carte blanche to negotiate with employees on this issue.
>
> My final argument "Reasonable Contract Administration" the employers discretion has to be exercised reasonably, honestly and in good faith.

The response of the Union was that the case law, including that under the *Colleges Collective Bargaining Act*, makes it clear that the sole right to decide whether any grievance on behalf of members of its bargaining unit should proceed, or what appropriate terms of settlement might be: *St. Lawrence College v. Ontario Public Service Employees' Union (Bishop)*, decision of Gail Brent issued January 5th, 2000; *Pathways for Children and Youth v. Ontario Public Service Employees' Union (Ecclestone)*, decision of Felicity Briggs issues August 25th, 1999; *Amalgamated Transit Union, Local 1587 and The Crown in Right of Ontario (Francis)*, decision of the Grievance Settlement Board issued June 11th, 1987; *Fanshawe College and OPSEU (Gurofsky)*, decision of R.O. MacDowell dated September 21, 2000. The College made similar submissions, referring in particular to section 46(1) of the *Colleges' Collective Bargaining Act* (which will be set out shortly). Since the parties to the arbitration are the College and the Union, the College noted, it is the Union, and not the grievor, who has the right to withdraw or settle any grievance: *Re Governing Council of the University of Toronto and Service Employees Union, Local 204* (1974), 5 L.A.C. (2d) 304 (Weatherill); *Re Bilt-Rite Upholstering Co. Ltd. And Upholsterers' International Union of North America, Local 30* (1979), 24 L.A.C. (2d) 428 (Rayner); *Cambrian College v. Ontario Public Service Employees Union*, (January 27, 1982, Brent); *St. Clair College v. Ontario Public Service Employees Union*, (July 13, 1992, Shime); *Re A.G. Simpson Co. And Canadian Auto Workers, Local 222* (1996), 58 L.A.C. (4th) 411 (Kennedy); *Re Sudbury District Roman Catholic Separate School Board and Ontario English Catholic Teachers Association* (1997), 61 L.A.C. (4th) 223 Kaplan; *Re Province of Manitoba and Manitoba Government Employees' Union* (1997), 68 L.A.C. (4th) 321 (Freedman); *Re W. Ralston (Canada) Inc. and Communications, Energy and Paperworkers Union of Canada, Local 819* (2000), 90 L.A.C. (4th) 47 (Shime); *Re Air Canada and Canadian Auto Workers Local 2213* (2002),

107 L.A.C. (4th) 250 (Saltman). There is, in the College's submission, no longer a "difference" here as contemplated by section 46, such as would give this board any continuing jurisdiction, and Mr. Brannen is required to seek relief elsewhere, if any relief is appropriate at all. To these positions taken by the College and the Union Mr. Brannen responded as follows:

> Enclosed please find a copy of my final reply to the submissions.
>
> Since being a member of a union I have been bound by the Arbitration Act, I have had to rely solely on this even though some of the issues raised in my case may have been better resolved in another forum. I was not able to proceed another route, and I have tried, Ministry of Employment, my M.P., Ottawa, and Ombudsman, only to be told sorry not while you are under Arbitration.
>
> As I am now without counsel and as I do not have the luxury of resources that would enable me to find comparable cases to cite. The fact is with my limited research I have not been able to find any comparable cases to mine, dealing with illegal issues, alteration to signed documents, manipulation of facts to pension funds, violation of Employment Act change from lay-off to Leave Without Pay, it makes me wonder if I am in the correct forum for my case.
>
> Both lawyers Ms. MacKinnon and Gray have went to great lengths to tell you what you cannot do, even quoting a case that you were involved in. It is interesting to note that none of my submission issues were addressed.
>
> Mr. Gray uses expressions "Submissions appear to reflect", "The college has a much different view of the merits of this case Mr. Brannen appears to have', "The Arbitration Board is NOT the Appropriate Forum to grant him a remedy", "He must seek relief elsewhere", "The union has settled the matter, and presumably taken into account many different factors in arriving at a decision to settle the case. "Of course, it would not be proper for Ms. MacKinnon to disclose in this forum what those factors are although they maybe relevant in another forum"
>
> I ask do you know something that I do not know? What other forum?
>
> Mr. Gray insults your intelligence, after you have made the decision to allow this case to proceed to arbitration, he states "The arbitration board is

not the appropriate forum". I submit arbitration was the only forum I could take by virtue of being a union member raising a grievance.

I have the greatest respect towards arbitration that is why I asked you at the end of the tele-conference, not just once but twice, was this settlement final, to which you answered no. Please do not allow this to become an exercise in futility on my behalf.

The union and the college are equally responsible to how this case has transpired from "Bribe", manipulating of factors, cover up, non properly prepared advocate, and no explanation what the settlement that they both signed was for.

Please tell me that arbitration is above transgression, but if you feel that it is your duty to tell me I am no longer under the jurisdiction of arbitration, then so be it, I rely on your judgement.
Once I'm free of arbitration I strongly believe, in whatever forum, my case shall be heard in its entirety, the pen is mightier than the sword.

And in response to two cases filed by the Union under separate cover, Mr. Brannen wrote:

Please find my enclosed comments on the two belated decisions from the Union's original mailing.

Confusion Abounds, Content or intent?

Bearing in mind that both parties have a "shared understanding" union and the college, do I read the lines for content or in between for intent? At what stage of my case are we at, grievance, arbitration or settlement? Obviously both parties do not know either. They state one thing and argue another against themselves. Take the two issues as a classic example.

First: amalgamated Transit. This deals with the word grievance and The Crown Employees Collective Bargaining Act.
Section 30 of the Act puts upon the employee organization a duty not to "act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees whether members of the employee organization or not".
Section 18(2) provides that where a grievance is not resolved in the grievance procedure it may be processed to the Grievance Settlement

Board in accordance with the procedure for final determination application under Sec. 19.
Under Sec. 19 the board has the jurisdiction where the "parties", that is the employer and the union, have not been able to Effect a Settlement of the Matter.
I submit that both parties do not have a settlement of the matter in effect, if they had I would not be writing this, rather I would have from both parties a settlement of the matter in effect, this I do not have.
Consequently, as long as there is not a current "settlement in effect", you have the jurisdiction to hearing the Grievance.

Second: the oversight issue Fanshawe College (Gurofsky)
Ms. MacKinnon statement. The Union wishes to rely on the enclosed case for the proposition that the union, as exclusive bargaining agent, also has the exclusive right to determine whether or not a grievance may proceed. Interesting two exclusives.
Relying on Article 32.05(H) of the collective agreement. (The Preliminary Issue)
Page 6 of issue last paragraph, The parties to the collective agreement assert a shared understanding of the meaning and impact of Article 32.05(H). Article 32.05(H) is only available where the union consents to an employee proceeding on his own. The union and employer also submit that: where, as here, the parties to a collective agreement agree on its interpretation, (in this case the meaning of Article 32.05(H).

Page 8 of same issue last paragraph. In the union's submission, Article 32.05(H) provides a vehicle, which may permit individual employees to proceed on their own in some limited circumstances. But, access to that mechanism depends upon the union's consent -- and in effect, its "delegation" to the grievor/employee of the right to proceed independently. The union submits that an individual employee only gets to proceed by himself, if the union withdraws from the process and permits him to do so. Article 32.05(H) has no application where the union has assumed carriage of the case.
I state the union relinquished their exclusive rights in regards to my case, when they asked me to participate in the tele-conference, this was set up by them and with their consent. This was after they had reportedly said they had effected a settlement. The college agreed to take part in the tele-conference along with other persons interested in listening. Not any of the parties objected before, during, or after I had spoken. As far as I can see the union and college by mutual consent put my arbitration case into my hands they had a shared understanding.

> My main concern now is that the original issues of my grievance are being obscured and reasons forgotten, being overshadowed by legal wrangling. Not of my doing, but by parties who are more concerned with past cases and objections, so much so, that they are now scrambling to find ways to justify their actions, or lack of. They were not then at the start, nor are they now not fully prepared for the implications of my case. Both parties should be held accountable for their actions.
> Both parties are going to great lengths to say there should not be a third party, for once I totally agree. The union and college should both withdraw by mutual consent, and allow this case to proceed, or send this case back to the original issue.
> In closing, the union by its action has relinquished carriage of my case, surely a shared interpretation is the end of the matter.

The board has set out the submissions of Mr. Brannen in full because they contain certain points that it is important to address. Respecting the lattermost letter, it is, of course, the position of the College and the Union that there *is* a settlement in effect; it is only Mr. Brannen who wishes to repudiate that settlement, and have his grievance proceed to arbitration. The parties' invitation to Mr. Brannen to make his views known to the board, along with any submissions, was done only out of respect for his contrary opinion; the parties at no time "put [Mr. Brannen's] case into [his] hands", but rather at all times have made it clear that having settled, they were opposing his wish to proceed. What Mr. Brannen asked of the Chair in the teleconference was whether the teleconference marked an end to the matter. The chair advised Mr. Brannen that it did not, but rather, since the teleconference had been arranged on short notice, its only purpose was to arrange a procedure whereby everyone concerned could put forward their full submissions. The *Loyalist College* case, decided recently by the Court of Appeal, does not assist Mr. Brannen. It was precisely *because* of the Union's exclusive bargaining rights that the College's negotiations with the individual directly were struck down: exactly the opposite of the situation here.

It is the issue of a Union's exclusive bargaining rights that is at the core of the matter here. The case law has long made clear that, so long as a Union lives up to the standards of the common law or statutory "duty of fair representation", its role as exclusive bargaining agent carries within it the right to decide which matters pertaining to the members of its bargaining unit ought to proceed to arbitration, as opposed to being withdrawn or settled. As the Ontario Labour Relations Board noted in *Mirza Alam and CUPE Local 1000,* [1994]OLRB Rep. 627:

> A union would be remiss in its obligations to the membership if it proceeded to litigation with claims that were unlikely to be successful. Indeed, there are good labour relations reasons for *not* doing so. In *Catherine Syme*, [1983] O.L.R.B. Rep. (May) 775, the Board described the situation this way:
>
> > Section 68 [now 74] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so . . .
>
> Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

As the College notes, it is not within the jurisdiction of a board of arbitration to decide, in any given case, whether the standards of the duty of fair representation have been met. The board did find, in its award of October 28th, 2002, that it had the jurisdiction to inquire into the "merits" of Mr. Brannen's allegations against the College under the collective agreement's article 3.02; since that award, however, the College and the Union have entered into a settlement of the grievance, and it is the effect of that settlement on the board's continuing jurisdiction over the grievance that the board is now required to assess.

As noted, the general state of the law is that the decision whether to settle a grievance, and on what terms, is for the statutory bargaining agent, the Union, to make. If there is to be a departure from that general law, it must be explicitly provided by the terms of the governing statute, or the collective agreement. Mr. Brannen has pointed to nothing in that regard. Indeed, as the College notes, the *Colleges' Collective Bargaining Act*, which governs this matter, specifically provides:

> s. 46(1) Every agreement shall provide for the final and binding settlement by arbitration of all differences *between an employer and the employee organization* arising from the interpretation, application, administration or alleged contravention of the agreement including any question as to whether a matter is arbitrable.
>
> (emphasis by the College)

It is the statutory definition of a "difference", it is apparent, that underlay the decision of the board of arbitration in the January 5, 2000 award of Arbitrator Brent in *St. Lawrence College and OPSEU (Bishop)*. In response to a similar desire to proceed by an individual grievor, the board wrote:

> ¶17 The Blake case raises the same issue as the one before us, albeit under a different collective agreement and legislative regime. In deciding that case, the Grievance Settlement Board (hereinafter referred to as the GSB) had to interpret s. 18(2) of the Crown Employees Collective Bargaining Act which is reproduced at page 3 of the award. That provision said, in essence, that "an employee claiming" certain things set out in the section "may process such matter in accordance with the grievance procedure in the collective agreement, and failing final determination under such procedure, the matter may be processed in accordance with the procedure for final determination applicable under the arbitration provisions. In that case the GSB cited with approval one of its earlier

decisions in Amalgamated Transit Union, Local 1587 and the Crown in Right of Ontario (GSB file 1528/86). That case involved a situation where the Union had decided not to process the grievance to arbitration and had withdrawn it. In the passages quoted at pages 5 and 6 of the Blake decision the GSB found as follows:

> We agree with the. submission that, by reason of the settlement of this matter between the Union and the Employer, the matter cannot he brought independently to the Board by the grievor . . .
>
> Nor is this conclusion inconsistent with the statutory policy reflected in Section 18(2) by which employees are given a statutory right to grieve independently of the Union. At first glance it may appear that this statutory right is significantly compromised if it can be barred by a prior settlement of the grievance by the Union. However, it is important not to lose sight of the fact that the Act as a whole is an Act designed to regulate collective bargaining in the public sector. Primarily the employment interests of public sector employees are intended to be protected through collective bargaining. We do not regard the collective interests to be protected only at the negotiation stage of collective bargaining. They are also protected at the stage of contract administration. This view is well established in the private sector where Labour Relations Boards have frequently stated that a union enjoys a discretion to determine whether or not, in the interests of the collectivity an individual grievance should be settled or withdrawn. A useful account of the relationship between contract negotiation and contract administration may be found in Rayonier Canada Ltd. v. IWA (1975), 2 Can. LRBR 196 (B.C.).

In our view the statutory language considered by the GSB is similar to the language used by these parties in Article 18.7.

¶18 Let us then examine the language of this collective agreement in greater detail. Article 18.3 defines types of grievances including a "Union Grievance" in 18.3.3. It is trite to say that grievances are generally initiated by employees who consider that the collective agreement has been violated as it has been applied to them. Article 18.3.3 limits the Union's right to grieve where an individual employee could have grieved but has chosen not to. In our view, its very presence and the limitation imposed strengthens the view that the parties did not intend to create a regime where the individual would have carriage rights at arbitration. The implication to be drawn from that article is that but for the limitation on the Union it would have the right to grieve and process a grievance through to arbitration even

though the individual employee did not wish to do so. Article 18.3.3 is consistent with the notion that the Union is responsible for the administration of the collective agreement in the interests of the collective rights of the bargaining unit as a whole.

¶19 Of all of the provisions Of the collective agreement cited to us, Article 18.7.3 is the one which lends the greatest support to the grievor's position. That article makes no mention of the Union whatsoever and simply refers to the grievor referring the matter to arbitration "as provided in this Agreement". However, 18.8.1 and the rest of the Arbitration Procedure set out In Article 18.8, as well as that set out in Article 18.7 as a whole, is what is "provided in this Agreement". When those provisions are read it is not at all clear that what the parties to the collective agreement intended to create was an arbitration procedure between an individual employee and the College. Quite the contrary, the provisions are clearly consistent with an ultimate dispute resolution mechanism for disputes between the parties to the collective agreement. In our view Article 18.7 does not confer upon the individual the right to control the arbitration procedure.

¶20 It has long been recognized that the grievance procedure and the arbitration procedure are separate. In order to discharge its obligations to the bargaining unit as a whole the Union must retain the right to refuse to arbitrate a grievance where it has determined that the position the grievance takes is inconsistent with the collective agreement. It would be ludicrous to expect a Union to carry a grievance through to arbitration where it considered that the College had not misinterpreted or misapplied the collective agreement. Surely the parties themselves must be the ones to decide if there is an issue between them. In this case, the Union having withdrawn the grievance, there is no longer an issue between the parties for us to determine, and we are without jurisdiction to consider the merits of the grievance which the grievor has filed. We find the reasoning adopted in the Blake case to be compelling and applicable in this case.

That was a case of a Union simply deciding not to proceed (as opposed, as here, to achieving what it considers a reasonable settlement). The board in *Bishop* noted as well:

¶16 Neither Hoogendoorn nor Bradley are factually similar to the case before us, in that neither case involves an individual claiming carriage rights where a Union has determined that there is no issue between the parties concerning the proper interpretation or application of the collective

> agreement. Both cases involve bargaining unit members whose interests would be adversely affected if the union succeeded in an arbitration between the union and the employer. At page 651 of the Hoogendoorn decision Mr. Justice Hall, speaking for the majority, defined the issue in both Hoogendoorn and Bradley as follows:
>
> > In both cases the issue was whether an employee whose status was being affected by the hearing was entitled to be represented in his own right as distinct from being represented by the union which was taking a position adverse to his interests.
>
> That is not the issue before us. If the Union is correct, then there would be no hearing and no consequent interpretation of the collective agreement which would affect the grievor's status. While those cases direct us to ensure that interested third parties are given the opportunity to be represented in their own right, they do not direct us to ensure that grievances are heard where the Union has determined that the College has not misinterpreted or misapplied the collective agreement.

Those comments are of some significance, because, as discussed in the *Fanshawe College (Gurofsky)* case made known to us by the Union, the Colleges' collective agreement contains a provision which, after outlining the general arbitration procedure, states:

> **32.05 H** It is understood that nothing contained in this Article shall prevent an employee from presenting personally a grievance up to and including a hearing by the arbitration board without reference to any other person. However, a Union Steward may be present as an observer, commencing at Step One, if the steward so requests.

It was explained to the board in *Gurofsky* by the parties who authored this provision that it was only meant to have application where the Union *consented* to an employee taking over carriage of his grievance on his own; in other words, it was simply an enabling clause allowing the Union party to the collective agreement to delegate its carriage rights to an individual grievor if it so chose. Arbitrator MacDowell accepted that interpretation, writing in emphatic terms:

> As the college submits: Article 32.05 H seems to envisage a scenario in which (at least *prima facie*) the union is missing from the equation. The

> assertion of individual rights under article 32.05(H) occurs in a setting where the union is not participating as a party. The union is merely an observer. What other meaning could be ascribed to the second sentence in article 32,05(H), and why would it be necessary to add that sentence if the union were a party already, or had a party's right to intervene (i.e., not just an observer).
>
> (Page 37)

Here, the Union does not consent to the grievance going forward without it; to the contrary the Union has entered into a settlement of the grievance, and is making a good-faith attempt to ensure that its settlement is honoured. About that Arbitrator Shime in *St. Clair College and OPSEU (French)*, decision dated July 13th, 1992, wrote, in his concluding paragraphs:

> Mr. Roland argued that even if I was to determine that the parties had settled the matter I should permit the grievance to proceed on the merits. However, it is my view to let the matter now proceed would undermine the whole process of dealing with grievances. All collective agreements contain a grievance procedure which is a forum for resolving differences between the parties. The resolution of disputes between parties by negotiation short of formal arbitration is one of the cornerstones of the grievance arbitration process. Good faith bargaining between the parties about grievances it to be encouraged and not discouraged. That bargaining process which begins in the grievance procedure continues right to arbitration and even after the arbitration hearing convenes. Many grievances are resolved by the parties even after some days of an arbitration hearing. To allow a party to resile from an agreement once reached would create uncertainty in the process because a party would never know when a matter had been resolved and accordingly the settlement of grievances would be discouraged. Accordingly, I am not prepared to permit the Union or the grievor to resile from the agreement reached. The matter has been settled and the proceedings are therefore terminated.

For all of the reasons set out, the board comes to a similar conclusion here. The jurisdiction of this board of arbitration over the grievance referred to it is ousted by "the parties"' settlement of that grievance. There is no longer a "difference" between the parties, as defined by the statute, and the proceedings to which the board was appointed are accordingly hereby terminated.

Dated at Toronto this 31st day of March, 2004

M. G. Mitchnick

I Concur "Sherril Murray"

Sherril Murray - Union Nominee

I Concur "David Cameletti"

David Cameletti – College Nominee