

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

(the "Union")

- and -

ST. LAWRENCE COLLEGE

(the "College")

RE: GROUP GRIEVANCE 341702

Before:

M.G. Mitchnick	-	Chair
Ronald Kelly	-	Union Nominee
John Podmore	-	Employer Nominee

Appearances:

For the Union:

Susan Ballantyne	-	Counsel
Mary Ann White	-	Chief Steward Local 417

For the College:

J. Lynn Thomson	-	Counsel
Cindy Bleakney	-	Human Resources
Amanda Holmes	-	Student-at-law

Hearing held in Kingston, Ontario on October 1<sup>st</sup>, 2003.

## AWARD

The College has long had a practice of providing hand-completed survey forms to students for course and professor feed-back. In the fall of 2002 the College announced that it had engaged a web-based private contractor in Kingston to design and implement a computer-software system whereby the evaluation forms could be accessed and completed by students, and then compiled, electronically. A number of announcements and explanations were communicated to the staff in connection with this new on-line program. A November 19<sup>th</sup> memorandum, from Pennie Carr-Harris, the Executive Director of Human Resources, for example, read:

**TO: All full time faculty in post secondary programs**

**This is survey week - November 18<sup>th</sup> - 22<sup>nd</sup>**

With the introduction of this new electronic process, there are bound to be questions! We have endeavoured to answer the ones that we are aware of! If you have a question which we have not answered here, please do not hesitate to contact me. I will ensure that you get an answer! Please encourage your students to go to the College website and respond to the surveys for your courses.

### **FREQUENTLY ASKED QUESTIONS by FACULTY:**

#### **What is Cyberera.ca and how does the feedback process work?**

Cyberera.ca is a web based organization, based in Kingston, Ontario, offering secure data collection services in the industry, government and education sectors. Students log-on to the cyberera.ca secure website and access individual WebPages listing the courses they are taking. The student will answer a series of evaluation questions and add comments as warranted. The data is collated into a database. Faculty may access the aggregate results for only the courses they are teaching at the end of the semester and for their School and campus.

**Is the service secure?** The service is secure as it has the following: SS: secure socket layers, a firewall and all ports are blocked with only two exceptions. In addition ftp is not available. These tested measures provide us with a secure service.

**Why is the College not doing this internally?** The College chose to seek the services of an external supplier to expedite the provision of this electronic service for students and faculty. Overall, this service will be more effective and efficient than that provided by the previous supplier.

**When may I review the results of surveys completed by the students in my courses?** Immediately after the semester has officially ended. And no, other teachers will not be able to see your results! Access is through your employee number and is security protected.

**How do I log-on?** Go to [www.sl.on.ca](http://www.sl.on.ca), click on Student Services and then click on Student Course Feedback. Simply use your first and last name coupled with your employee number from your pay stub upon first log-in. Then you will be asked to create a secure private password. You may log-on now and Cyberera will send you an e-mail reminder if you would prefer.

**If a course is taught by more than one faculty, how will I get my own results?** Each student will have access to a survey for each of their courses. If they have more than one teacher for the same course, the course will be listed separately for each teacher. That way separate results will be available to each teacher.

**What prevents students from completing a number of surveys for the same course?** Students will only have access to surveys for courses they are enrolled in. Once the survey is completed and submitted, it can not be accessed again.

**What prevents a student from getting a number of their classmates student numbers and completing the survey for them?** Well first, their integrity! Second, access to the surveys is password protected. Third, they are advised that if they complete the survey for anyone other than themselves, it will be treated as a major violation under the student code of conduct and they will be subjected to severe academic penalty.

**What will the student feedback be used for?** As a teacher, this feedback will offer you some insights into the perceptions of your students. Over time, you will know what works well and what you might want to change. Formal student feedback provides an opportunity for your Director to gain some perspective on what goes on in your classroom. In discussions with

your Director, recognition of good teaching and best practices can occur! Also, resources can be identified for areas needing change or improvement.

**Why wouldn't we just do our own in-class solicitation of student feedback?** Most of you do . . . and are encouraged to continue to do so! However, students want an opportunity to provide formal feedback to the College. Also, the College believes that formal student feedback is an integral part of maintaining academic standards of teaching excellence.

**Can other questions be added to surveys?** On-going consultation with faculty will take place to improve the survey itself . . . Yes, more questions can be added.

**What do I do if I can't log-on?** At the log-in page, insert your e-mail address in the 'forgot your password?' Section and Cyberera will assist you.

Cyberera, the contractor engaged for the program, put out information as well, describing the initiative for example in the following terms:

Why course evaluations?

- Allows students to provide valuable feedback.
- Helps each faculty member evaluate teaching style and content relevancy.
- Helps directors identify guidance and assistance.
- Helps the College identify opportunities for growth and improvement.
- Course evaluations are performed to help learning institutions do the best job they can.
- Course evaluations provide comparative data and identify opportunities for improvement.
- Course evaluations can provide guidance for both individual teachers as well as each college in seeking the best courses, delivery style and content.
- Course evaluations are also one important manner in which students can reflect and provide opinions regarding quality and integrity.

Notwithstanding the various efforts to allay faculty concerns, however, there *were* concerns over the notion of an outside contractor conducting this survey and posting the responses on its web, and the Union ultimately filed a “Group Grievance” which provided as follows:

**Statement of Grievance:**

That the College is violating Article 6 of the academic collective agreement and the Freedom of Information and Protection of Privacy Act specifically but not exclusively in that the student feedback information is not restricted to the individual and is being shared without the express permission of the member.

**Settlement Desired:**

- a violation be declared
- a cease and desist
- a reversal of any discipline or penalties resulting from this process.

The College’s Step 2 Reply to the grievance, essentially re-iterated before the board at the hearing, indicated:

**RE: Group Grievance dated February 18, 2003 - Student Feedback**

Thank you for meeting with Ian Wilson, Cindy Bleakney, Mary Ann White and me at Step 2 of the grievance process on Monday, March 3, 2003, to discuss your grievance dated February 18, 2003, that states:

**Statement of Grievance:**

That the College is violating Article 6 of the academic collective agreement and the Freedom of Information and Protection of Privacy Act specifically but not exclusively in that the student feedback information is not restricted to the individual and is being shared without the express permission of the member.

**Settlement Desired:**

- a violation be declared
- a cease and desist
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At the grievance meeting, Mary Ann White spoke on behalf of all of the grievors and asked that violation of Article 31 be added to the grievance:

My understanding of the substance of the Union's argument is faculty members are being denied natural justice; that a record is being established contrary to College Policy regarding personnel files in that files are being created outside the auspices of the personnel file; and that the College is in violation of the Freedom of Information and Protection of Privacy Act, specifically, S.21(1)(a), S.21(2)(d), S.21(2)(e), S.21(2)(g), S.21(2)(i), S.21(3)(d), S.21(3)(g), S.39(1), S.39(2)(a), S.39(2)(b), S.39(2)(c), S.40(2), S.41(a), S.41(b), S.41(c), S.47(2)(a), S.60(1)(a) and S.61(1)(b). I am attaching a copy of S.21(1) through S.21(3), S.39(1) through S.39(2), S.40, S.47(2) and S.61(1) of the Freedom of Information and Protection of Privacy Act for your reference.

With respect to the claim of a violation of S.41(a), (b) and (c), it was stated that this claim was, in particular, in relation to the comments section of the feedback form.

The Union claims the form is unreliable and the process has no validation. It was stated that, although there has been no adverse impact on any bargaining unit members yet, there is no formal method for the individual to counter any of the comments because the file is in the possession of another organization and is not part of the personnel file. The Union is concerned about the security of the information because the Web-Site where the information resides is not covered by the Freedom of Information and Protection of Privacy Act.

First, let me assure you that, regardless of the physical location of this information, it is considered to be College property and it will be treated as such. Any legislated requirement that applies to the College with respect to the care and protection of this information extends to organizations that are contracted by the College to provide this service on its behalf. The fact that this information resides in a location that is not under the College's direct

control does not reduce any legislated responsibility the College may have with respect to its collection, maintenance and use.

“Article 6”, the Article in the collective agreement upon which the Union rested its grievance, is simply the “Management Rights” Article. That is a good indication of the difficulty that the Union has in finding a contractual basis for challenging the action of a College in implementing, at least in some form, a process by which feedback from students on the courses and professors they have experienced can be obtained. And the general management right of a College to do so has been affirmed long ago by the case law: *Seneca College*, November 11, 1977 (H.D. Brown); *Mohawk College*, November 15, 1984 (A. Kruger). As that award noted, at pp. 5-6:

Under the collective agreement the faculty had no way of preventing the Employer from using the SRI's for purposes of evaluating the faculty. This is not to deny the right of faculty members who are disciplined from grieving in cases where the SRI's play a role in the decision to impose discipline. But this is not the issue before us.

From the grievance here, however, the concern does not appear to be about the obtaining of “student feedback” in itself. That has been a College practice for years. The concern, one can see, is really about the security of the data, and the possibility of improper dissemination (i.e., beyond the professor and her or his Director). And to either terminate or at least add more controls to this new electronic program, the Union invokes the provisions of the *Freedom of Information and Personal Privacy Act*, relying as well on the recent pronouncement of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] SCC 42. The Court in that decision, with an eye at least in part on the language of section 48(12)(j) of the *Ontario Labour Relations Act*, mandated boards of arbitration to treat as part of the collective agreement under which they are appointed the provisions of the *Human Rights*

*Code* “and other employment-related statutes”. There is no provision comparable to section 48(12)(j) in the *Colleges Collective Bargaining Act*, but the College acknowledges that the Supreme Court in *Parry Sound* did not rest its findings exclusively on that provision. The response of the College, rather, is that the *Freedom of Information and Personal Privacy Act* is not in its essence an “employment-related statute”, and that in any event this kind of record, involving labour relations or employment-related matters, is expressly excluded by the *Act* itself from its scope (via section 65(6)(3)).

As noted by Arbitrator Mikus in *Crown in Right of Ontario and O.P.S.E.U., Re: Binkley*, (1996) 61 L.A.C. (4<sup>th</sup>) 284, while, for example, the *Elections Act* is not generally-speaking an “employment-related” statute, specific provisions of it may nonetheless have an “employment-related” application. In terms of the *Freedom of Information and Personal Privacy Act*, a review of its broader terms reveals the possibility that the kind of student comment on “record” at issue here may well be thought to fall within its terms. Consideration of some of its operative provisions, however, at the same time highlights some of the difficulties that would exist in applying those provisions to this kind of student “opinion” and feedback; and at the end of the day, there appears to be no obvious basis for disagreeing with the College’s submission that this particular kind of “record” is excluded from the coverage of the *Act* expressly.

The provisions referred to by the parties are as follows:

“personal information” means recorded information about an identifiable individual, including:

(g) the views or opinions of another individual about the individual, and

“record” means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise

38. . . . .
- (2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.
39. (1) Personal information shall only be collected by an institution directly from the individual to whom the information relates unless,
- (a) the individual authorizes another manner of collection;
  - (b) the personal information may be disclosed to the institution concerned under section 42 or under section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*;
  - (c) the Commissioner has authorized the manner of collection under clause 59(c);
  - (d) the information is in a report from a reporting agency in accordance with the *Consumer Reporting Act*;
  - (e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;
  - (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or tribunal;
  - (g) the information is collected for the purpose of law enforcement;
- or
- (h) another manner of collection is authorized by or under a statute.
40. (2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.
41. An institution shall not use personal information in its custody or under its control, except,
- (a) where the person to whom the information relates has identified that information in particular and consented to its use; . . . .
65. (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or *communications about labour relations or employment-related matters in which the institution has an interest.*

(emphasis added)

Undoubtedly, the comfort level with even a new electronic system would have remained higher had the College elected to implement the system on a purely “internal” basis. However, it might be mentioned that the individuals behind “Cyberera” are part-time employees of the College, and (given their special expertise) might well have been the persons entrusted with this task by the College in any event. Be that as it may, this is all about “control”, and confidentiality. There is no way that a College could ever ensure that statements by individual students about a course are “accurate” (even as a matter of “opinion”). The College recognizes that, and acknowledges that any such statements need to be taken with a grain of salt. But it is precisely *because* of that lack of control over what a student might choose to say that maintaining control over “publication” becomes such a sensitive issue.

As a matter of law, however, the Ontario Court of Appeal in *Solicitor General of Ontario et al. v. Mitchinson et al.* (2001), 203 D.L.R. (4<sup>th</sup>) 538 chastized the Information and Privacy Commission for giving section 65(6)(3) other than its plain meaning. And the instant “communications about . . . employment-related matters” (from OPSEU’s point of view, how the teacher is doing his/her job) would seem to fall squarely within the language of the exclusion. The responses of the students are not viewable, according

to the College, by even the contractor providing the service; under the plan they are accessible, in a very controlled way, only by the professor and his/her Director/manager. If the College turns out to be wrong about that, there may, as discussed, be legal repercussions (somewhere) that the College will have to deal with.

That said, however, there being no apparent violation at this point of the collective agreement, and the *Freedom of Information and Personal Privacy Act* appearing by its terms to expressly exclude from its scope this kind of “communication”, the board finds that it has no basis in law to do other than dismiss the grievance before it.

The grievance is so dismissed.

Dated at Toronto this 19<sup>th</sup> day of January, 2004.



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M.G. Mitchnick

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“Ronald Kelly”

Ronald Kelly

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“John Podmore”

John Podmore