



Ontario

Ministry of  
Colleges and  
Universities

Ministère des  
Collèges et  
Universités

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Queen's Park  
Toronto, Ontario  
M7A 1L2

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Édifice Mowat  
Queen's Park  
Toronto (Ontario)  
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**MEMORANDUM TO:** Presidents  
Senior Personnel Officers  
Colleges of Applied Arts & Technology

**FROM:** I.L. McArdle  
Manager  
Staff Relations/Benefits Section

**DATE:** April 11, 1991

**SUBJECT:** GRIEVANCE AWARD - Humber College

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**O.P.S.E.U. #:** 90C923/4; 90C926; 90C956/7; 90C959

**M.C.U. #:** 91-13 a to f

**Bargaining Unit:** Academic

**Grievance Classification:** Group

**Grievor:** Garrels et al

**Subject/Nature  
Grievance:** Discrimination on basis of sex & age

**Preliminary Procedural  
Matters:**

- 1) Exclusion of Witnesses
- 2) Subpeona issued by Board regarding consulting report
- 3) Demand by College for particulars

**Chairperson:** R. McLaren

**College Nominee:** R.J. Gallivan

**Union Nominee:** S. Murray

**Date Of Hearing:** March 19, 1991

**Date Of Award on Preliminary  
Procedural Matters:** March 28, 1991

**Decision:**  
**Preliminary Procedural Award**

Parties agreed that the five grievances ought to be heard as a single matter.

- 1) Board set its own procedure on exclusion of witnesses:
  - Exclusion of Witnesses
  - Grievors will be excluded until they have given testimony.
- 2) Board requires production of the Consultant's report but orders:
  - It becomes documentary evidence
  - Restriction on the use and production of the report.
- 3) College is well aware of circumstances, therefore, Board makes no order as to particulars but will entertain adjournment on being satisfied.

College did not have the required evidence prior to the hearing or knowledge of the situations involved.

Hearing to continue.

**Addendum:**

Management Nominee

IN THE MATTER OF AN ARBITRATION

BETWEEN:

STAFF RELATIONS

APR 02 1991

BENEFITS SECTION

ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES OF APPLIED ARTS  
AND TECHNOLOGY IN THE FORM OF HUMBER COLLEGE  
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(FOR ACADEMIC EMPLOYEES)  
(hereinafter called the "Union")

GRIEVANCE OF GARRELS ET AL  
(hereinafter called the "Grievors")

90C 926; 90C 956/7; 90C 923/4  
90C 959

BOARD OF ARBITRATION:

Richard H. McLaren

Sherril Murray, Union Nominee

R. J. Gallivan, College Nominee

COUNSEL FOR THE COLLEGE:

Brenda Bowlby

COUNSEL FOR THE UNION:

Raj Anand  
Mark. A. Wright

A HEARING IN RELATION TO THIS MATTER WAS HELD AT TORONTO, ONTARIO, ON  
MARCH 19, 1991.

PRELIMINARY PROCEDURAL AWARD

There are four Grievors involved in this matter raising five grievances. Four of those grievances allege a violation of Article 27 of the collective agreement on the basis that the Grievors were discriminated against on the grounds of sex. One of these Grievors also has a further grievance alleging a violation of the same Article for discrimination on the grounds of age. (Exhibit 2A).

1 of the grievances desire the following settlement:

1. That the College, and particularly Arthur Lockhart, Chair, cease and desist forthwith from discriminating against me on the grounds of [age or sex].

(Exhibits 2A through 2E)

Each of the sexual discrimination grievances requests further common settlements in the following form:

2. That I report to a different supervisor, while retaining my position in the School of Social and Community Services.
3. That the College write me a letter apologizing for the personal and professional damages caused by the sexual discrimination against me.

(Exhibits 2B through 2E)

Specific individual relief on the sexual discrimination grievances are as follows:

In the grievance of Dolores D. Radcliffe, Exhibit 2B, additional settlement of the grievance is required in the following form:

4. That all performance appraisals, letters of Counsel, disciplinary letters and actions done by and/or in collaboration with Arthur Lockhart since September 1989 be stricken from my record.

5. That all sick leave days used between February 1, 1990 and March 26, 1990 be restored to my bank of accumulated sick leave days.

In the grievance of Jane McBride, Exhibit 2C, additional settlement of the grievance is required in the following form:

4. That I be reinstated to my position and all of my teaching responsibilities in the Developmental Service Worker Program with written assurances of no further sexual harassment.

5. That I be supplied with a written explanation of the reasons for my transfer out of the Developmental Service Worker Program.

In the grievance of Dianne Garrels, Exhibit 2D, additional settlement of the grievance is required in the following form:

4. That all performance appraisals, letters of counsel, disciplinary letters and actions done by and/or in collaboration with Arthur Lockhart since September 1988 be stricken from my record.

In the grievance of Mary Dean Samanski, Exhibit 2E, additional settlement of the grievance is required in the following form:

4. That I be reinstated to my position and all of my teaching responsibilities in the Developmental Service Worker Program with written assurances of no further sexual harassment.

5. That I be supplied with a written explanation of the reasons for my transfer out of the Developmental Service Worker Program.

Mary Dean Samanski is also the Grievor in the age discrimination grievance. In that grievance, Exhibit 2A, she requires specific individual relief in the following form:

2. That the College and its personnel cease and desist from further negative implications regarding my age and the state of my health as they relate to my job performance.

3. That I be reinstated to my position and all of my teaching responsibilities in the Developmental Service Worker Program with written assurances of no further harassment on the grounds of age.

At the time of the convening of the Board of Arbitration in connection with this matter it was agreed between the representatives of the parties that the Board was properly constituted. These matters have been properly processed through the grievance procedure. The Board has jurisdiction to deal with the grievances. The Board was advised that one of the grievors is no longer an employee of the College. Counsel for the College submitted that this grievance was moot. However, Counsel advised that she was content to argue it as a matter affecting the remedy in that particular grievance.

At the time of convening the Board of Arbitration to commence the hearings in this matter it became necessary for the Board to make a series of procedural rulings before the matter could proceed forward to arbitration. The purpose of this preliminary procedural

award is to record in a summary fashion the three preliminary issues and their oral disposition at the hearing. They relate to the exclusion of witnesses, a subpoena which was issued by the Board of Arbitration with respect to the production of a consulting report; and, a demand by the College for particulars.

Counsel for the parties advised the Board that they were in agreement that these five grievances from the four Grievors ought to be heard together rather than seriatim. The reason for doing so is the allegation of the Union that there is a pattern or course of conduct which is common to each of the grievances. It is this pattern that forms the basis of the allegations of a violation of Article 27. This agreement of Counsel gives rise to the first preliminary issue of the College surrounding the order for the exclusion of witnesses.

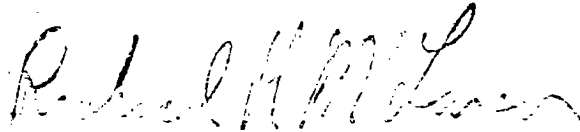
1. Procedure Associated with the Order Excluding Witnesses.

It was the request of the College that all of the Grievors other than the one testifying be excluded throughout the examination in chief and cross-examination of any one of them. After each had given their own evidence they would proceed to sit in at the hearing in the usual fashion associated with arbitration hearings. It was submitted on behalf of the Union that such a procedure was both unruly and unfair. It was further submitted that the evidence of one grievance is evidence in the other grievances. Therefore, the Grievors ought to be able to be present throughout.

The parties have agreed that the five individual grievances ought to be heard as

a single matter. If these grievances had been heard at five individual separate arbitration hearings then an order excluding witnesses would include the grievors not associated with the particular individual grievance being arbitrated. They would be treated no differently than any other witnesses in that particular individual single proceeding. There is on this basis some justification for excluding the Grievors until they have given their testimony.

The Board wants to ensure that the best evidence comes forward through full cross-examination. The nature of the allegations demands a full cross-examination to further that evidentiary process. In order to ensure this, there must be a full and effective cross-examination of each of the grievors. The Board is using its power to set its own procedure to amend the order excluding witnesses. Therefore, the Board in ordering the exclusion of witnesses is also ordering that each of the Grievors will be excluded during the testimony of any other Grievor unless the particular excluded individual Grievor has testified.



Richard H. McLaren  
Chairman

I concur/~~dissent~~

Signed "R.J. Gallivan"  
R.J. Gallivan, College Nominee

I concur/~~dissent~~

Signed "Sherril Murray"  
Sherril Murray, Union Nominee

2. The Subpeona Duces Tecum

At the request of Mr. Wright, one of the Counsel for the Union, a subpoena was signed and transmitted to the Union Counsel on March 15, 1991, in the following form:

TO: Mr. Robert A. Gordon  
The President  
Humber College (A)  
P.O. Box 1900  
205 Humber College Blvd.  
Rexdale, Ontario  
M9W 5L7

You are hereby summoned and required to attend before an arbitration board at a hearing to be held at the J. P. R. Arbitration Services, 111 Richmond Street West, Suite 502, Toronto, Ontario on Tuesday the 19th of March, 1991, at the hour of 10 o'clock in the forenoon, and so from day to day until the hearing is concluded or the board otherwise orders, to give evidence on oath touching the matters in question in the proceedings, and to bring with you and to produce:

- a) a copy of the report prepared for and submitted to the College by Mr. John T. Harries.

DATED this 15th day of March, 1991.

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Mr. Richard H. McLaren

Counsel on behalf of the College submits that the consulting report by Mr. Harries is privileged by way of an agreement between the parties to keep its contents confidential. The College, therefore, sought the quashing of the subpoena which was served upon the President the day prior to the commencement of the arbitration hearing.

Mr. Harries was apparently a Consultant who was retained in May and June of 1990 to conduct a study at the Lakeshore Campus of the College where each of the Grievors works. The report was prepared at the request of the President and copies of the report were given to himself, the Director of Human Resources for the College and one other. The College initially submitted to the Board that there was a written understanding between the parties that it would be confidential. It subsequently turned out that the request for confidentiality may have originated at the Union's behest and at best there has been a mere oral indication of such treatment on behalf of the College. Mr. Harries' memorandum to the President of the College, Exhibit 4, confirms the terms of reference to include, in number 5, that the written report would be held in confidence. That memo was dated May 25, 1990.

On June 1, 1990 the President of the Union wrote to the Faculty at the Lakeshore Campus a memorandum covering a variety of matters related to a "number of concerns and conflicts" in the Department of Social and Community Services. The relevant portion for this proceeding reads as follows:

In order to maintain the integrity of both the President's review and of the faculty members' grievances, I have requested that the College undertake in writing that information gathered by the consultant will not be used in any current or future legal proceedings related to these

matters. I have also requested that information be provided by faculty on a strictly voluntary basis, and be reported to him without the use of names. Identifiers such as gender, program, etc. would be included in the report only where such are relevant to understanding and evaluating data.

This is a difficult and painful process for all of us. I believe we have the personal and professional resources in the department to go through it with integrity and respect for each other.

The other piece of documentary evidence submitted in connection with this preliminary objection is the first step response to the grievance which was filed as Exhibit 5.

That response reads as follows:

#### RESPONSE

The issues raised at the Step 1 grievance meetings were complex and serious in that the grievors and the Union outlined a history of actions and events back to June, 1988 in an effort to establish a pattern of discrimination on the part of College administrators.

It would be premature for the College to recommend a resolution to the grievances without an extensive review of the issues raised at the meetings.

The College takes Human Rights complaints very seriously and wishes the opportunity for a complete review of the issues raised. In light of the College President engaging a consultant to review staff issues in the entire Human Services cluster, it would be prudent on both our parts to review the consultant's report. That report is due by the end of June.

At this time we would recommend that this memorandum be considered a Step 1 response in the grievance process and that a Step 2 meeting be delayed until after the consultants report has been tabled in June.

The Freedom of Information and Protection of Privacy Act now covers personal

information of individuals at the College. The Counsel for the College conceded that this Board of Arbitration's power to subpoena would override the provisions of the statute as it is specifically provided that this may occur. The College seeks not to produce the report on the basis that it was agreed between the parties to be confidential and that confidentiality ought not to be breached by an order for production. It was conceded that the overriding interests of justice could be a reason for this Board to order its production despite the parties' desires of confidentiality. If the Board ordered production it was submitted that the report must go directly into evidence. In support of its position reference was made to the text by Messrs. Gorsky and Steinberg, Evidence and Procedure in Canadian Labour Arbitration (Richard De Boo Limited, 1978) at page 60 and subsequent.

Counsel on behalf of the Union submits that no agreement was entered into between the parties as to the confidentiality of the report. It was submitted that the Union was shut out of the process. The report was contemplated as part of the steps of the grievance procedure as is indicated by Exhibit 5. It was further submitted that interests of justice override the concerns of confidentiality which might attach to the report because the information was given in confidence. In support of its position the case of Re Ontario Hydro, 34 L.A.C. (3d) 97 (Brent, 1988) was submitted for consideration.

The Board of Arbitration has concluded that the evidence is insufficient to establish that there was an agreement to treat the report as confidential. There was an understanding that the persons who spoke with the Consultant would have that information and their identity remain confidential. The parties did not perfect to the point of having an

agreement, their understanding that the contents of the report and its use would be confidential. Indeed, the response at Step 1 of the grievance would suggest that there was a greater contemplated use of the Consultant's report than has in fact occurred. The Board does not find the parties did have an agreement that the matter remain confidential. However, this is not the exclusive for the reason for the Board making its order in this matter.

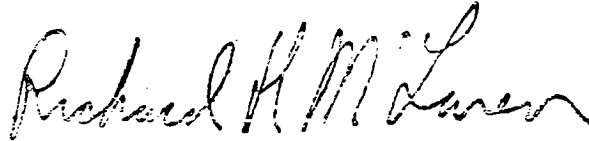
Even if the parties did have an agreement that the contents of this Consultant's report was to remain confidential the interests of justice demand the production of it. This Consultant was engaged in a period following the filing of the grievances to act as an independent third party observer who would assess the situation and make recommendations to the College as to the nature of the problems, if there were any, and what steps might be taken, if needed, to resolve them. The Consultant's report was a direct response to the allegations of the grievances which despite its hearsay nature ought to be put before this Board of Arbitration as a document surrounding the events and assessing them. It does so not in the fashion which a Board of Arbitration would assess evidence but in the fashion of a Consultant examining a human relations problem. Therefore, the Board, pursuant to its powers to set its own procedure, has determined that the overriding interests of justice even if there had been a confidential agreement; which it is found there has not been, requires the production of the consulting report of Mr. Harries.

It was the request of the Union that the report be produced to it. They would examine it with a determination as to whether it would be entered into evidence to be made at a later date. Such is not the consequence of a subpoena duces tecum. As is indicated in

the text Messrs. Gorsky and Steinberg, once subpoenaed this type of document must be entered into evidence regardless of whether it might assist or harm the case of the party who is seeking its production through subpoena. It is unlike a discovery where the document can be examined and then be determined whether it may be relevant in the evidentiary process of civil litigation. Therefore, the Board orders that it become a document in evidence in this proceeding and it will be Exhibit 6. The College is to comply with the subpoena and this award on the date of its receipt.

A further issue arose between the parties as to whether limitations ought to be placed on the production order. The Board of Arbitration recognizes that a number of individuals came forward to the Consultant believing that what they had to say would be pressed with a confidence; and, that they would not necessarily be identified; or, that any consequences would flow directly to them as a result of speaking with the Consultant. In these circumstances it is appropriate as was discussed and indicated in the decision of Arbitrator Brent in Re Ontario Hydro, supra, to place limitations on the production of the Consultant's report. Therefore, it is ordered that a single copy of the Consultant's report be produced to Counsel for the Union. Counsel for the Union is instructed not to make any copies of the report. The oral undertaking of Mr. Wright was given to the Board of Arbitration and the College to that effect at the time of the hearing and the oral orders in this matter. The copy which Counsel for the Union has is available for use of the Counsel in the preparation and prosecution of this matter. In the course of doing so, the document may be shown to the four Grievors in this matter and to the President of the Union. There is to be no other individuals who are to have the opportunity to see or examine the document. If this

order restricting the use of the document on production becomes unworkable, either party is free to seek a further order from the Board modifying this order at an appropriate future time.



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Richard H. McLaren  
Chairman

I ~~CONCUR~~/dissent  
(See Attached)

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Signed "R.J. Gallivan"  
R.J. Gallivan, College Nominee

I concur/~~CONCUR~~

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Signed "Sherril Murray"  
Sherril Murray, Union Nominee

### 3. Production of Particulars

Article 11 of the collective agreement defines the grievance procedure and requires in 11.03 at Step 1 the following:

#### Step No. 1

An employee shall present a signed grievance in writing to the employee's immediate Supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought. The immediate Supervisor shall arrange a meeting within seven (7) days of the receipt of the grievance at which the employee, a Union Steward designated by the Union Local, if the Union Local so requests, the Dean of the Division and the immediate Supervisor shall attend and discuss the grievance. The immediate Supervisor and Dean will give

the grievor and the Union Steward their decision in writing within seven (7) days following the meeting. If the grievor is not satisfied with the decision of the immediate Supervisor and Dean, the grievor shall present the grievance in writing at Step 2 within fifteen (15) days of the day the grievor received such decision.

It was submitted by Counsel on behalf of the College that the grievances do not set out the surrounding circumstances in a fashion which enables the College to satisfactorily prepare for this proceeding. It was submitted that the grievance procedure generated only vague assertions with few specifics. The Counsel for the College requested a discussion of the circumstances, the issue and the remedy sought in respect of each of the grievances by way of an order for production of particulars. In support of its position reference was made to the Evidence and Procedure in Canadian Labour Arbitration textbook, supra at page 576 subsequent.

In response of the Counsel for the Union asserted that the particulars were provided by the grievance procedure. In this case, the Step 1 grievance procedure took five hours with the Grievors giving a lengthy explanation of the basis of their complaints. The members of the College were present and all of them took notes. Thus, the College is aware of the circumstances in which these allegations arose. It was submitted on behalf of the Union that the purpose of particulars was to preclude any surprises. That would not be anything which would occur in this case. In support of its position reference was made to two arbitration decisions:

Re Fabricated Steel Products (Windsor) Ltd., 16 L.A.C. (2d) 148 (O'Shea, 1977) and Re Mansfield-Denman General Co. Ltd., 14 L.A.C. (2d) 229 (Hinnegan, 1977).

It was the unanimous ruling of this Board of Arbitration that there would be no order as to particulars in this case. The obligations of the collective agreement can be considered to be satisfied by an examination of both the allegation and the remedy sought in

the case of each of the individual grievances. The remedies indicate more precisely some of the matters surrounding the allegations. When the grievances are looked at in this light they satisfy the obligation of the collective agreement as to the surrounding circumstances.

As a result of the grievances in the ensuing Step 1 meeting it was determined that there ought to be a Consultant's examination of the situation. That was undertaken and a report was made available to the College. In these circumstances the College can not say to this Board of Arbitration that there is a lack of knowledge as to the surrounding circumstances of these grievances and to the particulars thereof. While the Board of Arbitration has not at this point seen the Consultant's report when the grievances together with that report are examined as a whole the Board has to come to the conclusion that the College is well aware of the surrounding circumstances of the allegations involved in this matter. Therefore, there will be no order as to particulars.

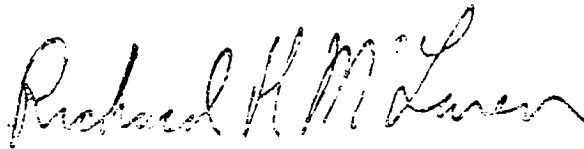
In making the foregoing order the Board is prepared at any time throughout these proceedings to entertain motions on behalf of Counsel for the College for immediate adjournments on the basis that some aspect of the proceeding and the evidence therein is not related to anything which was within the College's knowledge. Therefore, they were unable to have prepared beforehand for the matters about to be testified to. In that event the Board, in light of the order to not require particulars, will grant an automatic adjournment on being satisfied that the College was indeed caught by surprise.

#### 4. Conclusion

All of the foregoing constitutes the Board's orders on the preliminary procedural

matters associated with these grievances. By independent correspondence the parties have determined the continuation hearing dates in this matter. The parties are directed to prepare their case and be prepared to proceed with it at the first day of hearings following the issuing of this award.

DATED AT LONDON, ONTARIO THIS 28<sup>th</sup> DAY OF MARCH, 1991.

A handwritten signature in cursive script, reading "Richard H. McLaren".

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Richard H. McLaren  
Chairman of the Board of  
Arbitration

ADDENDUM OF R. J. GALLIVAN

I disagree with my colleagues that the Consultant's report should be entered into evidence. It is clear that the local Union President, by his letter of June 1, 1990, encouraged his members to cooperate with the Consultant by his assurances to them of anonymity and confidentiality. It is also clear that he was, at least at that time, of the view that the report should not be used in proceedings such as this arbitration. I accept that there was verbal agreement by the College to the facilitating requests by Mr. Huot, and note that good faith labour relations can not be built on written commitment alone. I also note that while I support my colleague's interest in seeing justice done, the evidence gathered by the Consultant from other employees could also be called here by the Union without the risk of bad faith retroactive violation of confidences.

Signed "R.J. Gallivan"  
R.J. Gallivan  
College Nominee