

IN THE MATTER OF AN ARBITRATION

BETWEEN

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

• and •

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

GRIEVANCE OF ROBERT GREGORY
OPSEU FILE NO. **98C117**
(hereinafter called the "**Grievor**")

BOARD OF ARBITRATION:

Richard H. **McLaren**,

C. Arb., Chair

Sherril Murray,

Union Nominee

Robert J. Gallivan,

College Nominee

COUNSEL FOR THE COLLEGE:

Ross **Dunsmore**

COUNSEL FOR THE UNION:

Nick Coleman

A HEARING IN RELATION TO THIS MATTER WAS HELD AT TORONTO, ONTARIO, ON
SEPTEMBER 1, 1998.

AWARD

Bob Gregory was employed by the College for many years and discharged on June 30, 1993. At that time he was an employee in its Redirection Through Education Program (R.T.E.) working as a counsellor. He was the Co-ordinator of Program Development for Disabled and Special Needs **within the** R.T.E. a position he had held for most of the period since 1986. The allegations justifying discharge in the view of the College **centred** on professional misconduct; breach of trust as a teacher, counsellor and co-worker to staff and students; all of which was fundamentally caused by violation of the College's policy on discrimination and harassment.

The actions of the College were grieved and arbitrated. A board of arbitration chaired by Arbitrator Keller reinstated Mr. Gregory on September 1, 1996 in an interim oral decision followed by a written one reported at 57 L.A.C. (4th) 343. A majority of the Keller board found that there had been misconduct sufficient to have warranted a suspension without pay for three years and two months but without loss of seniority.

An issue arose between the College and Mr. Gregory following the rendering of the decision. By letters dated August 27 and September 13, 1996 {**Exhibit #1** Tabs 3 & 5} the College reinstated him to a teaching position; not his former **counselling** job. In so doing, the College imposed a further condition on reinstatement and continuing employment of Mr. Gregory. By letter of October 11, 1996 {**Exhibit #1** Tab 9) the College required that Mr. Gregory "attend counselling sessions" **with a person specified** by it stating that "reinstatement and your continuing employment is contingent upon your attendance at such sessions".

The Keller Board of Arbitration stated at p. 355:

The grievor appeared, during the hearing, to recognize the nature of his behaviour. That is a start. We are of the view that further counselling in this area would be advisable to fully ensure such behaviour does not reoccur itself. {Underlining that of this Board}

The parties asked the board to interpret the underlined *obiter dicta* remarks about counselling contained in its award. The board by a letter from the **chair** dated January 27, 1997 refused to state that **counselling** was a condition of reinstatement (Exhibit #1 Tab 25). Prior to this clarification the College had changed its position of insisting upon the counselling sessions as an issue of its reinstatement. Bather, it had become an issue of continuing and **future** employment. {See Exhibit #1 Tab 11).

The College had reinstated the Grievor but not as a counsellor. Evolving out of the reinstatement was an on-going issue of the College insisting upon counselling by a person of its choice; and an issue by the Grievor that he be reinstated in his former position as a counsellor and not as a teacher. {See Exhibit #1 Tab 7}. The Grievor's counsel put into contention an additional matter in a letter dated October 29, 1996 {Exhibit #1 Tab 10}. The letter objected to the College making **the** selection as to whom Mr. Gregory was to see for counselling. This state of affairs eventually lead to a suspension of Mr. Gregory as of January 6, 1996.

Following objections from the Union and the Grievor, the College and the Union agreed on a solution which enabled him to go back to work as of April 21, 1997 having been suspended since January 6th. {See Exhibit #1, Tab 40}. **In** the intervening period of employment from September 1, 1996 through suspension, and from January 6 to April 21, 1997 the issues arose which give rise to the present grievances before this Board of Arbitration.

Throughout the autumn of 1996 the issue of the counselling and the position to which reinstatement would occur continued to fester between the College and the Grievor. In a letter of December 2, 1996 the College reviewed its two former letters demanding the Grievor attend counselling before the commencement of the teaching assignment in January. The College then advised that if Mr. Gregory did not attend, it would have to replace hi, resulting in a suspension without pay. **Furthermore**, the letter warned that:

... your continued failure to comply with the College's directives concerning your attendance at counselling sessions constitutes insubordination and a refusal to carry out a work-related order, and will result in further discipline up to and including dismissal.

{**Exhibit #1** Tab 12)

Mr. Gregory replied the same day, {Tab 14) that he was proceeding with a grievance of the matter noting that he is doing so "without prejudice to having the matter resolved by the Keller Arbitration Board". This is what is described in this proceeding as the first ***grievance***. The Step One grievance meeting occurred on December 17, 1996 and was followed up with a written **confirmation** of the College position by memo dated December 18, 1996 {Tab 19) in which it denies the grievance

That same day in a separate letter the College confirms that it is replacing the Grievor and suspending him without pay for the teaching term January 6, 1997 through April 18, 1997 {Exhibit **#1** Tab 21). That action invokes what is referred to herein as the second ***grievance*** on January 10, 1997 {Tab 22) alleging unjust discipline.

A Union Vice President writes the College President on January 22, 1997, Exhibit **#1** Tab 23, proposing that the second ***grievance*** ". . . proceed directly to arbitration" citing

Article 32.02 of the Collective Agreement **in** support of that request. The College reply comes the next day from the Director of Employee Relations, Mel Fogel, who indicates that "on a without prejudice and without precedent basis" that the second grievance Step One meeting be waived and the parties proceed directly to Step Two.

In the meantime, the Step Two meeting on **the first grievance** had been held on January 16th, and the formal written reply was issued on January 29th {see Exhibit #1 TAB 26}. This reply is two days after Arbitrator Keller wrote a letter to counsel for the parties advising them about the Board's interpretation of its *obiter dicta*; and, one day before the College apparently received the letter {see Exhibit #1 Tab 26). The College raised in its reply the mandatory time limits for grieving matters arising from its actions and thus the arbitrability of the **first grievance**.

The **second grievance** reply being unsatisfactory to the Grievor, he writes the Director of Employee Relations on February 10, 1997 advising that: ". . . I am requesting that this matter be referred to arbitration as expeditiously as possible". **He** gives as his reasons for the request:

At the Step II meeting, and in the presence of the others, you responded to my concerns about being treated unfairly, as a result of my having won my previous dismissal grievance, by indicating that the College had, in fact, only intended to obtain a long suspension rather than my dismissal. You indicated that the College had no reason to be malicious, at this time, in their treatment of me, because, and I quote:

"You (Bob) don't understand how these things work. When the College wants to impose a lengthy suspension we know that Arbitration Boards rarely uphold a long suspension so we dismiss the employee, go through a long arbitration hearing, and when the employee is not compensated for lost wages, us in your (Bob's) case, we got what we wanted in the first place."

{Exhibit #1 Tab 29}

The President of the Union writes to the President of the College on February 12, 1997 proposing that the second grievance "be arbitrated by a single arbitrator as set out in Article 32.04 of the Collective Agreement". He also advises that the Union is prepared to consolidate the grievances in one hearing or deal only with the second *grievance*. *The* College was not agreeable to having either or both of the grievances heard by a single arbitrator. As a consequence the matters have proceeded before this Board of Arbitration which is duly constituted and has the jurisdiction to determine the arbitrability of the second grievance.

The sequence of what lead up to the Board holding a hearing is important. **The first** grievance is not before this Board of Arbitration and need not concern us here. The second grievance was initially grieved in a timely fashion four days after the College imposed the suspension and is the one under consideration herein.

On February **12, 1997** the President of the Union wrote the President of the College proposing that the grievance be heard by a single arbitrator dealing with either, both, or, merely the second *grievance* {Exhibit #1 Tab 30}. Union counsel submits that this document constitutes the referral to arbitration in which case it would be timely. The College alleges that the referral to arbitration is over a year **after** the grievance when Mr. George Richards, a Union Grievance Officer, writes the College President advising that the reply to the captioned grievances is not satisfactory and referring the matter to arbitration {Exhibit #3}. Union counsel submits that this correspondence is one of scheduling the hearing and not a referral to arbitration.

The day after the February 1997 letter alleged to refer the matter to arbitration, is a letter to the Grievor confiiing the results of a step two meeting held on January 28, 1997 {Exhibit #1, Tab 31). College counsel alleges this is a positive indication that the letter of the Union President the day before can't be a referral to arbitration because the results of the step two grievance was unknown at the time of writing.

The College Counsel submits that even if there is a referral to arbitration this Board of Arbitration ought to find that there is no issue remaining before the Board as a result of the settlement of the **counselling** issue and the remm to work of the Grievor on April 21, 1997. Furthermore, even if there is a matter referred to arbitration and an issue before the Board, the settled grounds of the suspension **cannot** now be litigated. Therefore, the Board is without jurisdiction for all or any one of the foregoing reasons.

*PRELIMINARY OBJECTION OF **THE** COLLEGE*

It is submitted by the College that the Board is without jurisdiction to determine the **first grievance** because it was out of time and must be considered abandoned. In any event, it is submitted that the **first grievance** is not before this Board of Arbitration. The second grievance is before this Board but it is submitted that the referral to arbitration is over one year late and, is therefore, outside the mandatory **time** limits of the Collective Agreement. It is further argued that even if the matter is properly referred to arbitration, then the resolution by which the Grievor went back to work means that the basis of the suspension is now settled. Furthermore, it is submitted that if the matter does proceed, the Union will have to accept the fact that whatever the grounds

of the case it **cannot** argue the settled grounds of the suspension and the other issues before another board of arbitration on **the first** grievance.

In reply the Union submits that the Board is within its jurisdiction because the matter was properly referred to arbitration on February 12, 1997. It is submitted that it makes for good **labour** relations if the two grievances are heard together. However, in the event that they are not, the second **grievance** ought to be heard by this Board as it is **within** the jurisdiction of it to hear the matter. It is further submitted that the matter is not settled because there is a claim for lost wages which was not resolved in the return to work.

The relevant provisions of the Collective Agreement read as follows:

Article 32
GRIEVANCE PROCEDURES

...
Complaints

32.02 It is the mutual desire of the parties 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 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 days after discussion with the employee.

Grievances

32.03 Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under 32.13 C) in the following manner and sequence provided it is presented **within**

seven 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's written decisions at each step shall contain reasons supporting the decision.

Step Two

The grievor shall present the grievance to the College President.

The College President or the President's designee shall convene a meeting concerning the grievance, at which the grievor shall have an opportunity to be present, within 20 days of the presentation, and shall give the grievor and a Union Steward designated by the Union Local the President's decision in writing within 15 days following the meeting. In addition to the Union Steward, a representative designated by the Union Local shall be present at the meeting if requested by the employee, the Union Local or the College. The College President or the President's designee may have such persons or counsel attend as the College President or the President's designee deems necessary.

In the event that any difference arising from the interpretation, application, administration or alleged contravention of this Agreement has not been satisfactorily settled under the foregoing Grievance Procedure, the matter shall then, by notice in writing given to the other party within 15 days of the date of receipt by the grievor of the decision of the College official at Step Two, be referred to arbitration. [underlining by Board]

32.04 A Any matter so referred to arbitration, including any question as to whether a matter is arbitrable, shall be heard by a Board of three arbitrators composed of an arbitrator appointed by each of the College and the Union and a third arbitrator who shall be Chair. The Chair shall be selected from the following panel:

G. Brent	R. MacLaren [sic]
H. Brown	M. Mitchnick
K. Burkett	M. Picher
D. Carter	P. Picher
J. Devlin	S. Schiff
R. Howe	O. Shiie
P. Knopf	M. Teplitsky

R. MacDowell

Representatives of the Council and the Union shall meet monthly to review the matters referred to arbitration and agree to the assignment of a Chair to hear each of the grievances. The Chair shall be assigned either by agreement or, failing agreement, by lot. The parties may from time to **time**, by mutual agreement, add **further** names to such panel. Also, the parties may agree to a supplementary list of persons to act on a single or number of occasions. Following selection of a Chair, the College and the Union shall each appoint its arbitrator within ten days and forthwith notify the other party and the Chair. However, the College and Union may mutually agree, prior to selection of a Chair, to arbitration by a sole arbitrator. The sole arbitrator shall be selected from the panel as in the case of a Chair and the other provisions referring to an arbitration board shall appropriately apply.

[underlining by Board]

32.05 A If the grievor fails to act **within** the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandon.

RULING

The impact of the Keller Board award was clarified at the request of the parties by letter dated January 27, 1997. The counselling issue was declared "**obiter**" by the Board and was said not to be ". . . a requirement of this Board that Mr. Gregory enter **into** counselling as a condition of his reinstatement". The counselling matter has been resolved. He has had the counselling as a result of the arrangements set out **in** the letter of May 6, 1997 {Exhibit #1 Tab 40} and a report of successful counselling has been filed by the Psychologist on July 28, 1997 {Exhibit #1 Tab 41} and accepted by the College by correspondence on August **14, 1997**. Implicit

in those steps is a recognition on the part of the College that the psychologist be someone who was mutually acceptable. The person selected to do the work was suggested by the Grievor and accepted by the College. The matter of a unilateral right to selection of a **counsellor** is moot as a result of the "without prejudice . . . agreement . . . to move matters ahead positively". The Keller Board has no jurisdiction over those matters by its own clarification and they are not matters in dispute before this Board.

The *first* grievance is not before this Board, as is submitted by the College. This Board does not have to deal with that matter. Evidence surrounding the events associated with that grievance is admissible in this proceeding and any findings of fact made by this Board will, in all likelihood, give rise to issue and factual estoppel. That matter is not being litigated before us but can be the subject of evidence before us. The extensive remarks by both counsel on this aspect of the case have no direct bearing upon the jurisdictional matters herein determined by us.

The only matter remaining is to determine if the second grievance has been referred to this Board of Arbitration in a timely fashion in accordance with the parties Collective Agreement. It is agreed that the grievance was filed in a timely fashion. The grievance takes up the matter of the actual suspension threatened all autumn, but not implemented until January 6, 1997, and grieved immediately thereafter. The College is apparently of the view that the suspension was prospective and prophylactic to ensure that the employee was properly **counselled** before returning to the class room. The Union is apparently of the view that the suspension was disciplinary and discriminatory, having become a condition of continuing employment when on January 27, 1997 it was clear from correspondence of Arbitrator Keller that **counselling** was not

a condition of its decision but merely an oh by the way comment. The Second Step meeting on the second ***grievance*** took place the very next day after the Keller clarification. The results were reported on February 13, 1997, that is one day after the time limits provided for under 32.03 A Step Two. On the very last day for **the** College President to put the decision at Step Two into writing, the document at issue in Tab 30 is forwarded to the College.

This document arises from an earlier request of January 22, 1997 {Exhibit #1 Tab 23) to proceed directly to arbitration on the second grievance. That request was rejected but did cause the matter to go directly to Step Two, avoiding the necessity of a Step One meeting. In rejecting that request the College expressed the hope that following the Collective Agreement procedure at Step Two, would permit discussion and possibly facilitate resolution. The College was thus aware before the Second Step meeting that the Union wanted to arbitrate the matter. It was probably still hoping for some buttressing of its position by the outstanding request to the Keller Board for clarification of its decision. It found out on January 27, 1997 that there would be no such support. Then, the next day the agreed upon expedited Step Two meeting took place. Both sides knew what was discussed although the formal decision was not put in place until one day outside the time limits for so doing by the College President under the Step Two rules. On the last day for the written decision, the Union, through its President, proposes a single arbitrator under Article 32.04 of the Collective Agreement. Also proposed is the possible consolidation of grievances or dealing only with the second ***grievance***.

There is no specific form or content to the stipulated referral to arbitration set out in Article 32.03 A at Step Two. The College already knew in January that the Union was of the

view that the grievance ought to go directly to arbitration. The February 12th correspondence of the Union is not **difficult** to discern in its intent. While there are some choices to be made as to consolidation or a single arbitrator, arbitration it is. The will of the Union is patently obvious and clear that they desired to arbitrate the matter. On failure of all other requests that arbitration would be before a Board of Arbitration in respect of the *second-grievance*.

All that the last paragraph of Step Two refers to is that if the matter has not been satisfactorily settled under the Grievance Procedure then, on written notice ". . . **within** 15 days of the date of receipt by the grievor of the decision of the College **official** at Step Two" the matter be referred to arbitration. The College, in January, had refused to go directly to arbitration because it wanted the benefit of at least Step Two of the Procedure. It had the benefit of that procedure and both sides knew the outcome had not been a satisfactory settlement. The desire of the Union to arbitrate was in writing twice, on January 22nd and again on February 12th. There was no timely written reply by the College President of the results of the Step Two meeting, but the College had the benefits of the Grievance Procedure. There is nothing in the Collective Agreement that precludes expressing an early desire to arbitrate.

It would be unduly technical and, be reliant upon a non-complying written response of the Second Step for the Board to conclude **in** this matter that the document at Tab #30 was insufficient to constitute a referral to arbitration. It is found and declared that there was a referral to Arbitration which was timely and in compliance with the provisions of Article 32.03 A Step Two. The Union knew the outcome of the Step Two meeting, it could wait as long as **the** written reply of the College official plus 15 days, to refer to arbitration or, it could refer the matter

earlier. The Second paragraph of Step Two should not be read as being a necessary precondition to a referral to arbitration, that the time period only begins to run from a written response, which was out of time in and of itself.

It is found that the matter has been referred to arbitration according to the parties Collective Agreement. The matter is not settled by the "without prejudice agreement to move matters ahead positively" set out in the May 6, 1997 correspondence from the College. Each side places a different characterization on the reason for the suspension, If the Union **characterisations** are ultimately accepted on the merits, then the Grievor would have been disciplined without cause and would have entitlement to back pay for the period of the suspension. If the College characterization is accepted then it may be that no pay was appropriate. The Board will have to hear the merits of the case to determine the matter.

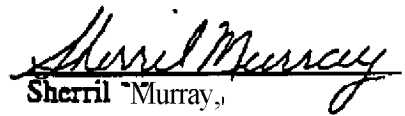
The Board in hearing the merits will hear all evidence associated with the matter and then make any admissibility and weighting of the evidence determinations rather than in advance as proposed by the Counsel for the College.

For all of the foregoing reasons the parties are directed to proceed to arbitration. The merits of the second grievance are to be determined by this Board **in** accordance with its orders and determinations herein.

DATED AT LONDON, ONTARIO THIS 22nd DAY OF OCTOBER, 1998.


Richard H. McLaren, C.Arb.

I concur ~~with~~


Sherril Murray,
Union Nominee

I concur/dissent

dissent attached
Robert J. Gallivan,
College Nominee

SENECA.RHS

DISSENT OF R.J. GALLIVAN

I cannot find that **the** second grievance was referred to arbitration in a timely manner. **On** the evidence **before us**, the referral was over a year late **according** to the contract rules.

Those with practical experience in **labour relations** *know* that every grievance filed **dealing with** an interpretation of the contract has the **potential** to **be** arbitrated. They also know **that many** grievances, *even* though unresolved in the grievance procedure, **are** not pursued **to that final** step. Thus it is incorrect for the Majority to conclude that "**(t)he** college already knew in January (1997) that the union was of the view that the **grievance** ought to go directly to arbitration" and that "**(L)he** February 12th (1997) correspondence of **the Union is not difficult** to discern in its intent". While the College may have suspected the union intended **to arbitrate**, it did not know that for a **fact** on which it could act until the union **formally submitted** the grievance to that **step**. The union did not do so until an OPSEU grievance officer wrote to the College **on March 6**, 1998. over a year after the Chair claims the College knew the union was going to arbitration. The text of that March 6. 1998 letter reads **as** follows:

This is to advise that **your** reply to the captioned **grievance(s)** is **not satisfactory**. **We** are, therefore, referring the matter to a Board of Arbitration.

By copy of this letter, we are bringing this matter to the attention of Human Resources **Secretarial, Ontario Council of Regents** so that the selection of a Chairperson and date for a hearing may **be** arranged. **Please** contact me should you require additional information.

The Majority rely on two **letters** from the union to the College written in January and February 1997. **The** January letter: appears to

be a proposal that the **two** outstanding grievances be consolidated and that (at least) the second grievance be referred directly **to** arbitration, bypassing the grievance procedure steps. The union gave several reasons for its proposal, including **"...to** avoid unnecessary costs.... " The **February 12, 1997** letter **says:** "The **Union** proposes... a single **arbitrator....Please** advise." The **College rejected** the proposals **in both letters. In** the face of those rejections **the** union did nothing more with the second grievance for another year.

As pointed out above, it is well known in **labour** relations that many unresolved grievances do **not** proceed **to** arbitration for a variety **of** reasons. The union may threaten arbitration in order to put **pressure** on the employer to accede to the grievance but may in the **end not** so proceed. **Was** the union in our case only bluffing by its mention **of** arbitration **in** its January **1987** letter? **Was** it **trying** **to** use the threat of arbitration to make the College modify its position? **Was** **the** College's response sufficient to dissuade the union **from** proceeding to arbitration at all? **Was** the union prepared **(for cost or other** reasons - see its January letter **above)** **to** proceed to arbitration only **if** the two grievances were consolidated? Was it not prepared to arbitrate unless the College acceded to a sole arbitrator?

We have **no** evidence by which to answer **those** questions. We do know **that** the contract puts the onus on the grieving party to **proceed** to **arbitration** within **15** days of the Step Two decision. We also know **that if the** union considered its January and February 1997 letters as valid **referrals** to arbitration **it** did nothing **for** over a year to determine **why** the referrals were ignored and the arbitration **not** scheduled. Given the large number **of** grievances which this local **union** regularly **files**, it should be sufficiently familiar with the scheduling procedure **to** appreciate when a grievance it intends to arbitrate is not being advanced through the system.

We thus objectively and logically can infer **from the** union's **March 1998** letter that the union itself did not consider **its 1997**

letters as legitimate referrals to arbitration. If it did, there was no **need for it** to write the March 1998 letter.

Grievance and arbitration procedure **time** limits are mandatory **under** this contract, and **serve** a well **known** purpose. Refusing to enforce them **in** this case puts the College at significant prejudice.

October 20, 1398


R.J. Gallivan