

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCE OF DIANE MEAGHAN;
OPSEU FILE NO. 2003-0560-0003-5

ARBITRATOR: HOWARD D. BROWN

APPEARANCES FOR THE COLLEGE:

W.M. LeMay, Counsel
Natasha Monkman, Student-At-Law
Maureen Dey, Dean, Faculty of Business
Kavita Chhiba, Director, ER

APPEARANCES FOR THE UNION:

Gavin Leeb, Counsel
Howard Doughty, Steward
Diane Meagher, Grievor
and others

HEARINGS IN THIS MATTER HAVE BEEN HELD ON OCTOBER 30 AND
DECEMBER 12, 2006 AT MARKHAM

INTERIM AWARD

At the hearing on October 30th, the College raised a preliminary objection concerning the hearing of three grievances arising from an incident on July 5, 2002 at the College. It is not necessary for the purpose of this award dealing with procedural issue between the parties to set out and consider this position of the College. I decided however, that I would hear the evidence and representations of the parties on the preliminary issue on which a decision would be issued before dealing with the merits of the grievances. The evidence lead by the parties on October 30th therefore concerned this preliminary issue only.

The College called Ms. Monkman as a witness and the Union's witness was the Grievor whose testimony was completed at that hearing. As there was insufficient time left in the day to receive the submissions of Counsel which were indicated to be lengthy in substance, the hearing was adjourned to the next scheduled day which I understood would involve the arguments of Counsel in that the evidence relating to the preliminary issue had been completed. At the outset of the second day of hearing however, Mr. Leeb proposed to call additional witnesses as well as recalling the Grievor for further examination.

Mr. LeMay objected to the calling of any further witnesses as in his submission, the evidence had been completed at the prior hearing and he was prepared to make his submissions on the preliminary issue. Mr. Leeb said that his understanding was that the evidence had been completed unless he advised counsel otherwise and said that he sent a message by voice mail to Mr. LeMay on November 13th that the Union may seek to

reopen the Grievor's testimony and/or adduce additional evidence and maintained that the Union had not closed its case on October 30th. Copies of emails between counsel in this matter were sent to the Arbitrator following this hearing.

I ruled orally at the hearing that I would hear submissions of Counsel as to whether further evidence of the Union would be allowed and admitted for the purposes of the preliminary objection of the College and would issue my decision prior to proceeding further in this matter as the result could extend the time required to complete the preliminary issue by a number of further hearings.

Mr. Leeb submitted that the Union did not agree that its evidence had been completed at the hearing on October 30th and seeks to call additional witnesses which was not a surprise to the College as to its intention and had informed Counsel of the identity of its witnesses. Following the first hearing, Mr. Leeb said that he had been advised of the Grievor's desire to call additional evidence relating to the background and circumstances leading to the delay in proceeding with her grievances as well as the author of the letter dated July 29, 2002 from Mr. Gershman (Exhibit 31) to Kavita Chhiba. It was submitted that such testimony is within the reservation of both parties of their right to call further witnesses which was kept open at the first hearing. It was asserted that there was no affirmative positive statement by Counsel for the Union that its evidence on the preliminary issue was completed at the first hearing.

Alternatively, it is the Union's submission that the Arbitrator should exercise his discretion to allow the Union to reopen its case and call the evidence indicated in that there is no prejudice to the College that cannot be remedied through reply evidence and therefore the parties have full opportunity to make full submissions on the issue. The Union's position is that it should be allowed the opportunity to continue to present additional evidence.

The position of the College is an objection to the additional evidence requested to be called by the Union on the preliminary issue which will substantially increased the time required to complete the hearings on this issue. In circumstances where evidence had not been previously available, it might be allowed to now be called but Mr. Gershman was available at the first hearing but not called. The Union however, in the meantime changed its mind about the calling of more witnesses which is not the test to reopen the hearing of evidence. Reference was made to: Re MCL Motor Carriers Ltd. and Teamsters Union, Local 938 (1981) 30 L.A.C.(2d)389 (H.D. Brown).

The Grievor was called as the Union's witness at the hearing on October 30th and her testimony was completed that day both with examination in chief and cross examination in which she had the full opportunity to respond and explain her position with regard to the issue of delay involved in the preliminary issue. To subsequently have in effect, second thoughts about her testimony which she now seeks to expand is not a sufficient or acceptable base to allow the Grievor another opportunity to testify on this issue. I am not persuaded to exercise my discretion to allow additional evidence of the

Grievor on the preliminary issue. Therefore, the Union's request to recall the Grievor on this matter is denied.

With regard to the Union's intent to call further witnesses on the preliminary issue, while both Counsel for the College and the Arbitrator were of the view that the evidence had been completed on the first day of hearing concerning the preliminary issue, there was doubt raised by Mr. Leeb as to that conclusion that he had kept his option to call further witnesses open upon giving notice to Counsel for the College of such intent. Upon doing so, he was advised by Mr. LeMay that there would be an objection on the basis that the Union had closed its case which positions are set out in the emails. At the first hearing, following the completion their evidence given that day, I did not request an agreement of Counsel that they had completed their evidence nor did I give any oral ruling to that effect but I understood in the circumstances that the evidence was in and argument would proceed on the second day of hearing.

Clearly, the hearing has not been completed either on the preliminary issue or depending on the result of that matter, on the merits of the grievance so that there has not yet been any decision of the Arbitrator concerning the matters at issue. These facts differ from those in the MCL Motor Carriers case where evidence was not available to the Company until after the hearing but before the Board had made its decision on the preliminary issue raised in that case. In the result, the Board exercised its discretion to allow the Company to present the further evidence in support of its position. The Board's

consideration of the issues in that case is relevant to the conclusion which I find I must apply in the present circumstances.

Having regard to the submissions of counsel, I am satisfied that there is sufficient doubt that the Union had completed the presentation of its evidence at the hearing on October 30th as supported by Mr. Leeb's notes at the hearing and subsequent email to Mr. LeMay that I cannot conclude in fact that the Union had completed its evidence on this issue. Therefore in these circumstances, I am persuaded to exercise my discretion to allow the request of the Union to adduce further evidence bearing on the specific matter at issue in order to allow a fair procedure consistent with the application of natural justice for the parties.

As was stated in the above-cited award, at p. 392:

“... Since there is such a possibility and in view of the nature of the present dispute concerning the application of Art. 5.3(e) as to the timeliness of the grievance, it is our opinion that to deny the company's request would be an improper use of the board's discretion by refusing to hear all of the pertinent facts relevant to the very issue which it is called upon to determine.”

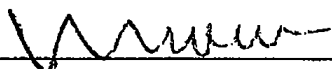
I am satisfied that there is no prejudicial effect to the College arising from the Union's submission to call additional evidence by persons who may be cross examined on their testimony and if necessary, reply evidence can be submitted by the College.

Consequently, the balance of procedural fairness supports the Union's position and

satisfies the grounds for its request to call additional evidence concerning the preliminary issue.

The Union will therefore be provided the opportunity to call further evidence at the next hearing of the parties as scheduled.

DATED AT OAKVILLE THIS 8TH DAY OF JANUARY, 2007.



HOWARD D. BROWN, ARBITRATOR