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MILLS WIPSON

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NIAGARA COLLEGE

(The Employer)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF M. MILLS - #87P55

BOARD OF ARBITRATION:

Kenneth P. Swan, Chairman  
R.J. Gallivan, Employer Nominee  
Jon McManus, Union Nominee

APPEARANCES:

For the Employer:

C.C. White, Counsel  
G.R. Pevere, Director of Personnel  
J. Balasak, Personnel Officer

For the Union:

Cindy Wilkey, Counsel  
Joan Hastings, Local President  
Joe Brandy, Steward  
Sheri Rosen  
Marie Mills, Grievor

## A W A R D

This arbitration involves the grievance of Marie Mills, a Teaching Master at Niagara College, dated May 12, 1987. At the outset of the hearing, while the parties were agreed that the board of arbitration had been properly appointed and that we had jurisdiction to hear and determine this matter, a number of preliminary issues were raised by counsel for the College to the effect that the grievance does not, in its own terms, raise an arbitrable issue.

The grievance is as follows:

The performance evaluation prepared for me for the period November 1, 1986 - March 26, 1987 is neither representative of my positive contributions for the success of the O.B.S. program nor reflective of my conscientious efforts for meeting the requirements of my teaching and complementary functions.

The following remedies were requested in the grievance:

1. I request that the March 26, 1987 evaluation be removed from all my personnel files.
2. I request that I be given another evaluation and that such evaluation will provide due recognition of (a) the working environment which was one of planning and development and (b) the positive contributions made by me for the success of the O.B.S. program and (c) my conscientious efforts for meeting the requirements of my teaching and complementary functions.

The following provisions of the collective agreement are of concern in this arbitration:

**Article 7  
MANAGEMENT FUNCTIONS**

7.02 It is the exclusive function of the Colleges to:

- (a) maintain order, discipline and efficiency;
- (b) hire, discharge, transfer, classify, assign, appoint, promote, demote, lay-off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in this Agreement.
- (c) to manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.

7.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.

**Article 11  
GRIEVANCE PROCEDURES**

. . .

11.04 (d) The Arbitration Board shall not be authorized to alter, modify or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith nor to deal with any matter that is not a proper matter for grievance under this Agreement;

. . .

**Article 26  
PERSONNEL RECORDS**

26.01 Performance appraisals, including written progress reports referred to in Section 8.01 which are to be filed on the employee's record, shall be shown to the employee in advance. The employee may add the employee's views to such appraisal before it is filed. It is understood that such appraisals do not in themselves constitute disciplinary action by the College against the employee.

26.02 Each employee shall receive a copy of any disciplinary notice to be placed in the employee's file. Where the College or a Board of Arbitration determines that any suspension or written disciplinary notations were indeed without cause, such suspension or written disciplinary notation and grievances arising thereunder shall be removed from the employee record.

26.03 An employee shall be given access to the employee's record and shall, upon request, be given a copy of any documents contained in the employee record.

**Article 27  
NO DISCRIMINATION**

27.01 (a) The parties agree that, in accordance with the provisions of the Ontario Human Rights Code, there shall be no discrimination against any employee by the Union or the Colleges, by reason of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin.

(b) It is understood that nothing contained in (a) above limits the right of an employee to grieve in accordance with the grievance procedure as set forth in Article 11 hereof.

Put simply, the Employer's main preliminary objection is that the content of a performance appraisal (an expression which both parties treated as identical in meaning with the expression "performance evaluation" used in the grievance), as opposed to the process of evaluation, is not arbitrable. The purport of clause 26.01, in the College's submission, is that the performance

appraisal does not of itself constitute discipline, and that the remedy for a performance appraisal with which the employee does not agree is the right set out in clause 26.01 to add the employee's own views to the appraisal before it is filed.

The College also observes that the grievor had resigned by the time of the hearing in this matter, and that the issue was therefore moot. At the hearing, the College offered to stipulate that the performance appraisal in question was not in any way disciplinary, and that the College would undertake not to disclose the contents of the appraisal to any third party. These stipulations did not satisfy the grievor, however, and so it becomes necessary to deal here with the preliminary issues raised in argument.

To begin with, we observe that the proposition advanced by the College, that the rights of employees in relation to performance appraisals are entirely set out in clause 26.01, and that there can be no grievance relating to performance appraisals which is not grounded in a breach of that provision, has become virtually a commonplace in arbitration awards between these parties. In Re Georgian College of Applied Arts and Technology and Ontario Public Service Employees' Union (Simpson), unreported, 1983 (Brown), the board of arbitration considered a number of earlier cases, all of which were to the same effect, and concluded:

There is no provision in the collective agreement which could be applied by the Board, to deal with the issue raised in the grievance. Consequently, we conclude the subject of the grievance falls within the exclusive function of the College as set out in Article 7.01(c)

application of which is beyond the Board's jurisdiction, for the reasons set out above. This situation is distinguishable from the Board of Education for Scarborough case where there was a specific evaluation requirement, which could then be viewed by the Board, where here the right is only that the employee must be informed of his progress. A challenge to the nature and content of that information as filed on the employee's record, is not specifically made a right under the collective agreement, but rather only those conditions set out in Article 26 apply. Those factors having been met, which we find occurred in this case, there is no further right to the employee to complain about the evaluation made by the College. Once he is told of his progress, required in Article 8.01(c) and has had an opportunity to be shown that progress report and to add his views, there is nothing further in the collective agreement on which he can rely to challenge that information. The grievor obviously seeks to upset or change a progress report made during his probationary period, but that is a claim not referable to any provisions in the collective agreement. The Board by Article 11.04(d) is precluded from amending the agreement or making any decision inconsistent with its terms. As there is no provision contained in the collective agreement to permit an employee to challenge the context of a progress report and as the Board cannot imply such a term in either Articles 8.01(c) or Article 26, the Board must find that the College acted within its rights under Article 7.01. As the requirements of those articles have been met by the College and those rights accorded to the grievor, there is no issue to be determined by this Board.

Similarly, in Re Seneca College of Applied Arts and Technology and Ontario Public Service Employees' Union (O'Neill), unreported, February 28, 1984 (Brent), the board of arbitration made the following observations which, although not central to its decision, give the flavour of the generally accepted interpretation of Article 26:

The evidence before us does not show that there has been a breach of Article 26.01. That article simply provides for certain documents be shown to the employee before they are placed on his file, and for the employee to have

the right to respond to those documents so that both the documents and the replies can be placed on his file. In the case before us the grievor was given a copy of the performance appraisal before it was placed on his personnel file. Mr. Tait's evidence makes it clear that the Personnel Department never places the appraisals on the employee's file until it has received all rebuttals or additional information and that that procedure was followed in this case. There is no requirement on the College in Article 26.01 to do anything but to follow certain procedures in relation to the filing of documents. The Article does not address itself to the uses which the College must or must not make of those documents.

Based on this jurisprudence, it would appear that the grievance in this case, which is on its face related only to the correctness of the appraisal complained of, would not be arbitrable. The Union, however, raises two grounds on which, in its submission, we ought to take jurisdiction over the substance of this appraisal.

The first of these is the argument that the appraisal is discipline in disguise, and therefore ought to be arbitrable as a disciplinary notice, arbitration of the substance of which is contemplated under clause 26.02. The Union argues that the appraisal was clearly designed to lay the groundwork of future discipline, and that its negativity, lack of balance and lack of care concerning the sources of information upon which it relies is at odds with the proposition that this is a mere performance appraisal and not a disciplinary notice. The Union therefore argues that we should hear all of the evidence on the merits in order to decide whether this really does constitute an evaluation, or whether it is rather so incorrect as to constitute a disciplin-

ary notice in disguise.

The single element which, as we read the performance evaluation, might possibly convey a disciplinary intent is the provision at the end of the appraisal that a re-evaluation meeting was to be held one month after the meeting at which the appraisal was presented to the grievor to review five particular facets of the grievor's performance. The precise words in relation to this re-evaluation meeting specified that it would be held "to look for improvement to meet the objectives outlined below". We observe that no disciplinary consequences are specified for a failure to meet those objectives, nor is there any particular reason to infer such a threat. On its face, what seemed to have been planned was to specify goals for the grievor to aim at, and to reassess the extent to which she was progressing toward achievement of those goals. This seems to constitute merely a supervisory approach to an employee whose performance is considered wanting. It may be, of course, that a continued failure to make progress toward attaining the goal specified might ultimately lead to a disciplinary notice being placed on the grievor's file. If that occurred, of course, then other provisions of the collective agreement would immediately come into play, and the grievor's right to present a grievance and pursue it to arbitration would be guaranteed by those other provisions of the collective agreement.

What the parties appear to have provided in Article 26 is a procedure for dealing with performance appraisals, which are clearly stated not to be disciplinary "in themselves", and a

further procedure to deal with disciplinary notices, which are subject to grievance and arbitration. There may well be, of course, an arbitrable issue between the parties as to whether a particular document fits under clause 26.01 as a performance appraisal, or whether it fits under clause 26.02 as a disciplinary notice. To a large extent, the College has a certain degree of control over this issue. The clear implication of characterizing a particular document as a performance appraisal, from the College's point of view, is that it may not use that performance appraisal at any time in a disciplinary way. If it attempts to do so, it will be met with the argument that a document specifically identified as having no disciplinary implications does not form a part of the grievor's record for disciplinary purposes.

Here, the College has stipulated the document is not disciplinary in nature, and will never be used for disciplinary purposes. By making such a stipulation, the College at the same time protects the contents of the evaluation from arbitral scrutiny, and precludes itself from ever relying upon the contents of the performance appraisal for disciplinary purposes in the future. In our view, absent special circumstances which do not arise from any of the evidence put before us in this case, such a stipulation by the Employer ought to be regarded as conclusive, binding upon the grievor, the College itself, and also the arbitration board.

As a number of the cases point out, however, performance appraisals have other purposes under the collective agreement which

can have a deleterious impact on an employee although they are not disciplinary in nature. For example, appraisals may be used in dealing with such matters as promotions, merit increases and the like, as well as in assessment of progress during a probationary period, the situation from which most of the cases arise. In our view, when the Employer attempts to rely upon performance appraisals in relation to any matter under the collective agreement which is otherwise grievable, the correctness of those appraisals is automatically thrown into question as part and parcel of the issue between the parties on the substantive right which is the subject of a grievance. Until that time, however, the substance of appraisals is not arbitrable.

The Union's second point is that the contents of this appraisal may be arbitrated on the basis that it was formulated in bad faith. This argument relies upon certain comments in a decision of the present chairperson, Re Seneca College and Ontario Public Service Employees' Union (Hacker), unreported, September 17, 1986 (Swan). That case, among other issues, reviewed the jurisprudence relating to the implication into collective agreements of a requirement that a management discretion be exercised in good faith, and in particular the decision of the Ontario Court of Appeal in Re Council of Printing Industries of Canada and Toronto Printing Pressmen and Assistants' Union, No. 10 et al. (1983), 42 O.R. (2d) 104, as well as the decision of the Divisional Court in Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al. (1981), 33 O.R. (2d)

476. At pp. 21-23 of the arbitration award, the following observations are made:

In our view, that is an incorrect reading of both of these cases. The Metropolitan Toronto Police case simply says, as we read it, that there is no doctrine that management rights clauses must be administered fairly, while the Council of Printing Industries case says that where, as a matter of contractual interpretation, it is a reasonable interpretation of a collective agreement provision that it requires fair administration, the Courts will not interfere. It is the function and obligation of boards of arbitration to inquire, where the issue is raised, whether a particular set of facts establishing bad faith, or the absence of good faith, constitute a breach of a particular clause in the collective agreement. As it happens, it is not here the management rights clause that is asserted to connote a requirement not to act in bad faith, but a provision setting out affirmative obligations upon the Employer in respect of its conduct in relation to probationary employees, clause 8.01(c). While matters of this nature ought not to be decided in the abstract, in the absence of the facts, we think it is a reasonable interpretation of this provision that conduct in bad faith intended to subvert the protections given to probationary employees by this clause, or to avoid the obvious obligations of the Employer under this clause, could be a breach of the clause. Since the grievor has alleged, in her grievance, bad faith in respect of her release on probation, and her counsel has identified, in the course of argument, that the bad faith was in relation to the Employer's obligations under clause 8.01(c), we think that the grievor is entitled to offer her proof of this allegation so that we can assess, in light of all the evidence and in light of the clear words of that clause, whether or not there has been a breach of that clause. In this respect, counsel for the Union also admitted that the onus would lie upon the grievor, and undertook to discharge that onus in the course of a continued hearing.

As a matter of contractual interpretation, therefore, we have found that the grievor is entitled to pursue her grievance to the extent that it alleges discrimination.

We observe, as a matter of taking notice of facts within the knowledge of the present chairperson, that the Seneca College

case did not proceed on the issue of bad faith but was settled, and that the board of arbitration in that case did not ever have the opportunity to elaborate what it meant by bad faith in the context of the articles there at issue, namely the discretion given to the College to release employees on probation. In a more recent arbitration, however, Re St. Lawrence College and Ontario Public Service Employees' Union, (McDermott), unreported, December 21, 1987 (Brent), the board of arbitration reviewed the award in the Seneca College (Hacker) case, as well as a number of the earlier decisions and awards on which that case was based. In particular, the award in the St. Lawrence College, case traces the concept of bad faith back to a decision in Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43, unreported, July 3, 1981 (Ont. Div. Ct.), where the following observation, which is quoted at page 19 of the Seneca College (Hacker) case is found:

A probationary employee would be entitled to succeed on a grievance in relation to discharge only if he were able to affirmatively establish that the action of the employer was taken in bad faith in the sense that the decision was motivated by unlawful considerations or resulted from management actions which precluded the probationary employee from doing his best.

With respect, we think that the decision of arbitrator Brent has correctly captured the sense of the concept of bad faith as used in the award of the present chairperson in the Seneca College (Hacker) case.

In our view, the Union's assertion that the contents of

this appraisal are arbitrable on the basis of bad faith fails on three separate grounds. First, we observe that there is nothing in the material before us, including the grievance, the replies thereto, and other documents prepared by the grievor in the course of the grievance procedure, to suggest that the grievor has alleged bad faith in the sense in which the expression is used in the Seneca College (Hacker) case. Second, there is nothing on the face of the appraisal itself on which any such inference can properly be founded, nor is there even an assertion of improper motivation, discriminatory animus, obstructive conduct, or any allegation of an attempt to subvert the appraisal process anywhere in the record upon which we might ground a right to the grievor to have such an assertion arbitrated.

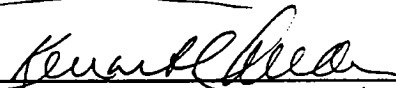
Finally, however, we observe that, as the award in the Seneca College (Hacker) case makes clear, it is in every case a question of interpretation of specific provisions of the collective agreement whether the parties have conferred upon the Employer an absolute discretion, or something less than an absolute discretion fettered by certain implied limitations on that discretion, such as a limitation of reasonableness, fairness or good faith.

We observe that in this case the management rights clause, Article 7, does not specifically deal with the appraisal process, but that the entirety of the specific content of the collective agreement in relation to appraisal is found in Article 26. That Article makes a complete distinction between disciplinary notices, which are grievable and arbitral, and performance evalu-

ations, which are subject to a right of the employee to reply. In our view, based on the provisions of Article 26 read in the context of the collective agreement as a whole, there are no grounds for implying into that provision a possibility of arbitral scrutiny of the appraisal document itself on any grounds, even if bad faith were clearly alleged and consistently asserted. Bad faith may very well be an element of an arbitration of one of substantive rights dependent upon an appraisal, such as release on probation, or denial of promotion, but the concept ought not to be employed as a right of entry into arbitration proceedings that the language of the collective agreement does not contemplate.

In the result, the grievance is not arbitrable, and must therefore be dismissed.

DATED AT TORONTO, this 29th day of November, 1991.

  
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Kenneth P. Swan, Chairman

I concur

"R.J. Gallivan"  
\_\_\_\_\_  
R.J. Gallivan, Employer Nominee

I concur

"Jon McManus"  
\_\_\_\_\_  
Jon McManus, Union Nominee