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IN THE MATTER OF AN ARBITRATION

BETWEEN

ALGONQUIN COLLEGE
(Hereinafter referred to as the "Employer")

AND

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(Hereinafter referred to as the "Union")

RE: Grievance of Janet Mullins

INTERIM AWARD

BOARD OF ARBITRATION

Loretta Mikus, Chair
Robert Gallivan, Employer Nominee
Ron Cochrane, Union Nominee

APPEARANCES FOR THE EMPLOYER

Ms. Delores Barbini, Counsel

APPEARANCES FOR THE UNION

Mr. Gavin Leeb, OPSEU Grievance Officer

DATE OF AWARD

June 28, 1998

The grievor, Janet Mullins, was hired by the College on August 14, 1995 as a full-time Professor for the Environmental Technology Program (hereinafter referred to as "Program"). She was subsequently terminated, which precipitated the instant grievance. The parties provided the Board with the following Agreed Statement of Facts.

In the MATTER of an Arbitration
on behalf of J. Mullins

BETWEEN:

ALGONQUIN COLLEGE
(the "College")

- and -

OPSEU
(the "Union")

AGREED STATEMENT OF FACTS

1. Janet Mullins (the "Grievor") was hired by the College effective August 14, 1995 as a full-time Professor for the Environmental Technology Program (the "Program").
2. From August 14 through August 18, 1995, the Grievor attended the "Eastern College Teacher Development Program" training seminar in Kingston, Ontario, at the direction of the College.
3. Accordingly, the Grievor did not commence teaching at the College until August 28, 1995.
4. The Environmental Technology Program was a new program introduced in September of 1994. The Grievor was the only full-time Professor employed by the College for this Program.
5. The Grievor taught from August 28, 1995 through to December 4, 1995. Thereafter, she was on pregnancy leave until March 29, 1996 and on parental

leave from April 1, 1996 to May 3, 1996. The Grievor was again on parental leave from June 10, 1996 through to July 2, 1996 and then on vacation from July 12, 1996 to August 9, 1996. The Grievor returned to work thereafter and commenced teaching on August 26, 1996.

6. Between May 3, 1996 and June 10, 1996, the Grievor attended Professional Development courses and prepared for her classes, but she did not teach during this period.
7. The Grievor marked student exams while on pregnancy leave in December 1996.
8. From August 28, 1995 to December 4, 1995 the College was satisfied with the grievor's performance and there had been no concerns raised by anyone at this time regarding her performance as a Professor.
9. Sometime in late November or early December 1996, the Chair of Chemical and Health Technology (Pierre de Champlain, hereinafter the "Chair") who is responsible for the Program and the Grievor's performance, received a complaint from a student of the Program. The Chair advised the Grievor of this complaint and it was agreed that they would wait until the Course Assessments from the students were received and then the matter would be discussed further. The Grievor does not recall this conversation however she does not dispute it occurred.
10. The Course Assessments were received from the students enrolled in the Program at the end of January 1997. In the interim, further complaints from students enrolled in the Program had been received by the Chair regarding the Grievor.
11. In attendance at the February 12, 1997 were the Chair, the Grievor and two representative students from the Program. The students raised their concerns regarding the Grievor and the Program. The Grievor was given an opportunity to respond to the concerns raised at the meeting. The Chair and the Grievor met with the entire class (approximately 16 students) on February 20, 1997 at which time numerous concerns were raised by the students about the Grievor and the Program.
12. The Chair provided the Grievor with a Memorandum, subject "Your Evaluation" and dated March 26, 1997 (attached as Exhibit #4).
13. The Grievor provided the Chair with the attached memorandum dated March 30, 1997 (attached as Exhibit #5).

The Exhibit 4 referred to in the Agreed Statement of Fact refers to a memorandum dated March 26, 1997 from the Chair of the Chemical Environmental and Safety Department, Pierre de Champlain. That memo made reference to a conversation between the grievor and Mr. Champlain of that same date during which she was told that her students had formally presented the College with some criticisms of her teaching. The memo went on to note that since those criticisms, they had met with class representatives and the class as a whole and included the following comment:

Their comments warrant immediate action on your part so that a noticeable change is obvious between now and the end of the semester."

There were specific criticisms about the high proportion of lecture hours that had been cancelled due to a lack of speakers. Mr. de Champlain pointed out that he had assigned the course to the grievor early enough that she should have been able to identify topics and find speakers. He reminded her that the ultimate responsibility for the course was hers and said "I insist that you review your plans for this course and ensure that the students get a meaningful learning experience out of this course and that no more lecture hours are cancelled."

Another criticism concerned the impression that the students had gained during the environmental audit course of the current semester and the hydrogeology course of the previous semester that the grievor was not qualified to teach. Mr. de Champlain reminded her that she had been assigned those courses based on her own identification of her specialty.

Additional criticisms included a comment that the Current Topics Course was not well organized and that the grievor was unfamiliar with the subject matter of the Environmental Audit-Theory

Course. Finally, on the Quality of the Environment-Water Course, he noted that the lab manual had been prepared the previous year by another professor and that she had the support of a technologist. Nevertheless he had received complaints that she knew little about the methods or equipment used and that often the technologist had to come to her rescue. Mr. de Champlain commented on the fact that during the meeting they had discussed the Course Assessment Forms for her courses. Mr. de Champlain requested the following:

1. A copy of the final exam for the Hydrogeology Course she taught last fall. I asked for a copy of that exam a few weeks ago but had not received it as yet. I want this copy by March 31 at the latest.
2. A written document outlining the specific steps you will be taking to address the student concerns that I raised above.
3. A follow-up meeting at the end of April to review the situation.

He also advised her that he would be visiting one of her theory classes over the next week to observe her teaching and concluded with the following comment.

You must improve the situation considerably in order to be an effective teacher. I advise you to take steps to correct the discrepancies with your courses immediately. You assured me that you have the skills and experience needed to teach the courses that you were assigned. You will have to take steps to improve your teaching and to transmit the knowledge in such a way to your students that they develop more confidence in you. I am afraid that some of the students I have seen over the last month have all but lost this important confidence in you as a teacher.

The Exhibit 5 referred to in the above Agreed Statement of Facts is dated March 30, 1997 and is the grievor's response to Mr. de Champlain's memorandum of March 26, 1997. It outlined the specific steps she had taken since the middle of February and would be taking over the last four weeks of the term to address the students' concerns. The memo was lengthy, seven pages in total, and contained her future plans for her courses. Rather than repeat all of those plans, the content of the memo is summed up under the heading of General Comments and reads as follows:

In the last six weeks since the students' concerns were first raised, I feel that I have put a great deal of effort and time into increasing m(sic) effectiveness as a teacher while addressing their concerns. I have tried several different formats with the current topics course, I have created six new environmental auditing laboratories, and reorganize the format of the environmental auditing lectures.

I hope that the above outlined my course of action since the middle of February and for the month of April and has addressed these concerns. I am continuing to make changes as I have outlined above, for those remaining classes in April which are not taken up by oral presentations.

I have also reviewed the comments and scoring on the Course Assessment Forms with the view to improve my effectiveness as a teacher. I also look forward to you (sic) comments on my lecturing style and any suggestions you may have.

I am looking forward to discussing these issues at the end of April, so that I can make effective use of my time in May and June to implement changes for next year as well. I would also request that we sit down with Dr. Kroeger and discuss the scheduling of the proposed course changes with a view to (1) update the course outlines, so they are not misleading for the students and do not create unrealistic expectations on their part, and (2) to determine which courses I will be teaching next fall and winter.

At the commencement of the hearing the Union raised a preliminary issue with respect to Article 27.02 C of the collective agreement which reads as follows:

During the probationary period an employee will be informed in writing of the employee's progress at intervals of four months continuous employment or four full months of accumulated non-continuous employment and a copy given to the employee. Also, it is understood that an employee may be released during the first five months of continuous or non-accumulated employment following the commencement date of the employee's employment upon at least 30 calendar days' written notice and during the remainder of the employee's probationary period upon at least 90 calendar days written notice. If requested by the employee, the reason for such a release will be given in writing.

It was the position of the Union that the College's failure to comply with the requirement to provide progress reports at four month intervals renders the dismissal null and void. It argued that the only appropriate and meaningful remedy would be to void the termination.

Mr. Leeb, for the Union, stressed the importance of performance appraisals, particularly during the probationary period. They are of fundamental importance to an employee. They allow for an

improved performance level by ensuring that employees know and are committed to achieving what is expected of them. They assist employees to develop their job skills through coaching, counselling and training. They improve communications and working relationships between employees and managers and provide for a better understanding of organizational objectives. Performance appraisals, asserted the Union, provide a clear indication of an employee's strengths and weaknesses. The corollary is that employees are then in a position to know their shortcomings and to take the appropriate steps to improve their performance.

Performance appraisals during a probationary period are even more important given that the employee is new to the position and the organization. The Union asserted that the parties to this collective agreement have recognized the importance of performance appraisals during the probationary period by incorporating a mandatory requirement for regular reviews in Article 27.02 C. A failure to follow those mandatory procedural requirements must be viewed very seriously by this Board.

It was pointed out that the grievor commenced employment with the College on August 14, 1995. She marked exams while on a maternity leave that commenced on December 4, 1995. She returned to work during May and June of 1996, for approximately five weeks. Accordingly, it was argued, Ms. Mullins first appraisal or progress report was due, at the latest, in June of 1996. She returned to work following a vacation that ended on August 9, 1996 and a second appraisal was due in December of 1996. The Union argued that the College objectively failed to comply with its obligation to provide the grievor with progress reports at either the four or eight month interval.

The Union submitted that since the College had concerns about the grievor's performance as early as November of 1996, its failure to provide her with a written appraisal at or about that time deprived her of an opportunity to respond to those concerns until it was virtually too late. The College did not document its concerns and therefore the grievor could not respond by altering her teaching methods.

The March 26, 1996 memorandum refers to conversations that took place more than one month earlier about criticisms of her work. Again, because she was not advised in a prompt fashion about those concerns she did not take steps to address them until her memo of March 30, 1996. In that memo she outlines in great detail the actions that she had taken since the middle of February and intended to take for the rest of the semester. Notwithstanding the significant efforts made by the grievor and without any subsequent complaint or feedback to her, the College terminated her employment.

The Union took the position that Exhibits 4 and 5 are indicative of the behaviour of both the College and the grievor throughout the entire episode. It submitted that the College did not take any steps towards ensuring that the grievor had a fair opportunity to complete her probationary period. It waited until it was almost too late to provide Ms. Mullins with virtually any feedback until March 26, 1997 and there was no subsequent feedback about that memo. On the other hand Exhibit 5 indicates that the grievor was determined to correct any deficiencies that had been brought to her attention. It was the Union's position that it is obvious that if concerns had been raised with the grievor earlier, as should have been the case, she would have taken steps to obtain any necessary

assistance to overcome those concerns. The College's failure to provide timely progress reports deprived her of an opportunity to do so. It was submitted that the grievor should not have to bear the consequences of the College's failure to comply with the Collective Agreement.

The Union took the position that "it is a common place of the law that the existence of a right implies the existence of a remedy." (**Re Ontario Public Service Employees' Union and Carol Berry et al and the Crown in Right of Ontario (Ministry of Community and Social Services)** March 12, 196), unreported, (Divisional Court). Mr. Justice Reid recognized that unless there is an appropriate remedy, a right is rendered nugatory. The provision for written reports at intervals of four months are mandatory requirements under the Collective Agreement and if the Employer chooses not to comply with those requirements, it does so at its peril.

In the instant case it was submitted that the Employer's obligations in this regard are part of a negotiated agreement between the parties. They agreed that the Employer would do certain things for the grievor. A remedy of anything less than reinstatement, with full compensation, would render the grievor's rights meaningless and the language in Article 27.02C, worthless. That is not what the parties intended. Boards of Arbitration have regularly held that failure to comply with the stipulated process results in the Employer's actions being voided. The reason for such findings is that the language of the parties' bargain must serve a purpose. Contractual obligations cannot be ignored, otherwise the parties' agreement is meaningless and serves no purpose. The Union submitted that the grievor should be reinstated with full compensation.

In support of its position the Union relied on the following cases: **Re Canada Post Corp. and Canadian Union of Postal Workers (Gibson)** (1992), 29 L.A.C. (4th) 7 (Burkett); **Re Government of Province of British Columbia (Personnel Services Division) and British Columbia Government Employees' Union (Canham)** (1991), 21 L.A.C. (4th) 325 (Bird); **Re Management Board of Cabinet and OPSEU** (September 1, 1993), unreported (O.B. Shime); **Re George Brown College and Ontario Public Service Employees Union (Ellis)** (November 14, 1990), unreported (Mitchnick Herbert Guptill); **Re Ministry of Transportation and OPSEU (Dadula)**, 1993 GSB #1089/92; **Re Centennial College and OPSEU (Prentice)** (August 2, 1983), unreported (Weatherill, Switzman, Gray); **Re Ministry of Natural Resources and OPSEU (Augustine/Spaans)** (1996), GSB #428/96 (Briggs); **Re Ministry of Solicitor General and Correctional Services and OPSEU (Metcalf/Mercer)** (1997), GSB #926/96 and 927/96 (Dissanayake).

Ms. Barbini, counsel for the College, took the position that the preliminary issue should be decided in favour of the College. The grievor was hired on August 14, 1995 as a probationary professor and commenced teaching on August 28, 1995. She taught for the first three months of the fall semester (September, October and November) and during that time there were no concerns about her performance and ability as a professor. Since she had not completed four months of continuous service with the College a written review was not due. Even if the College had performed a written evaluation at the time, it would have been positive.

The grievor did not teach at all during the 1996 winter and summer sessions. From December 4,

1995 through to May 3, 1996 the grievor was on pregnancy and parental leave. Although she did return to work at the College from May 3, 1996 through to June 10, 1996, she attended professional development courses and did not teach. It was not until she returned to the College in September of 1996 that she resumed teaching. It was the College's submission that during the earlier part of the 1996 fall session the College was satisfied with her performance and there were no complaints or concerns with her teaching. It was not until late November or early December of 1996 that the Chair of her department received a complaint from a student. The Chair immediately advised the grievor of the complaint and it was agreed that they would wait until the course assessments were received from the students before discussing the matter further. The College submitted that the grievor was immediately apprised of the students' concerns as soon as they were brought to the Chair's attention.

The Course Assessments were received from the students at the end of January, 1997. In the interim the Chair had received further complaints from other students about the grievor's teaching and the program. A meeting was scheduled for February 12, 1997 between the Chair, the grievor and two representative students to discuss the situation. At that meeting concerns were discussed and the grievor was given an opportunity to respond to those concerns. The grievor denied some of the allegations and explained others. The Chair and the grievor decided to meet with the whole class the next day. Ultimately the Chair visited the class alone, with the grievor's consent. The students' comments at that meeting led the Chair to conclude that the grievor had to take immediate steps to improve her performance and the program, otherwise her continued employment with the College was in jeopardy. It was at that point that the Chair provided the grievor with a written evaluation

outlining all of the concerns (Exhibit 4). The Union concedes that these concerns had been raised with the grievor at least one month prior to the written evaluation. The grievor's response dated March 30, 1996 proved that she had been immediately made aware of the concerns by the College and recognized that she was able to rectify some of them on her own.

In summary, the College took the position that the grievor had taught for a total of only eleven months, three in the fall 1995 semester, four in the fall 1996 semester and four in the winter 1997 semester. For the first five of those months the College had no problems or concerns with her teaching. As soon as it became aware of complaints in late November or early December of 1996 she was immediately advised. Thereafter the concerns were addressed and handled by the Chair and the grievor together. The Chair chose not to take formal written action in the hope of finding a professional resolution. The Chair provided the grievor with an opportunity to rectify the situation and resolve the concerns. The concerns persisted and at that point a written evaluation was provided. The grievor's response to that evaluation, coupled with her failure to improve her performance, led the College to release her from employment during the probationary period.

The College asserted, as well, that the preliminary objection be dismissed on the grounds that it would be an excess of jurisdiction to read into the Collective Agreement a condition that does not exist nor was intended by the parties. In the alternative, and in any event, the College argued that Article 27.02C had been complied with and even if there had been a breach, the College should not be precluded from being able to release the employment of a probationary employee simply on the basis of a technical breach.

The College took the position that this issue has already been addressed and dismissed by at least two other College sector Boards of Arbitration. The basis for dismissing the argument was that, although the College is required to provide written evaluations every four months, it is not a precondition to the employee's release or dismissal. An Arbitration Board could only grant the Union's request if it were prepared to read this condition into the Collective Agreement, which is beyond its jurisdiction.

In the case of **Re Seneca College and OPSEU (O'Neill)** (February 28, 1984), unreported, (Brent), the College did not give a probationary employee written evaluations at the prescribed intervals as required by Article 27.02C. In discussing the effect the College's violation of Article 27.02C would have on its decision to terminate the probationary employee, the Board stated at page 7-8:

We agree that the article can reasonably be interpreted as making it mandatory for the College to give periodic information of progress at the prescribed intervals. The article does not, however, in any way limit the College's right to terminate the employment of a probationary employee upon giving him appropriate notice. In particular, the periodic appraisals are not a condition precedent to the making of any decision about whether or not to continue the employment of a probationary employee. If that were the case, then we would expect the Collective Agreement to state it explicitly.

The College reminded the Board that the parties to this Collective Agreement are educated and sophisticated. This is a provincially negotiated Collective Agreement applicable to all Colleges in Ontario. If these parties had intended Article 27.02C to operate as a condition precedent to the termination of a probationary employee, they would have explicitly so provided. For example, Article 27.02C does not state that the College "shall not discipline or terminate the employment of a probationary employee unless regular written performance appraisals are provided." If this Arbitration Board should find that the College's failure to provide periodic evaluations renders the

grievor's termination void, it would be imposing an obligation on the College that is not created by the wording of the Collective Agreement or negotiated by the parties.

In Re Association of Radio and Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Corporations, [1975] 40 DLR (3d) 1 (SCC), at page 7, the Court concluded that a Board of Arbitration exceeded its jurisdiction when it imposed a condition in respect of a competition for employment for which there was no basis in the Collective Agreement. It said:

In my opinion, the Board had no power to order any remedy which was not contemplated either expressly or impliedly, by the agreement itself, its order was not one which required the Respondent to put the Appellant in the position in which it should have been, save for the breach, by requiring the Respondent to perform its contract. It required the Respondent to do something other than what it was, by contract, obligated to do in making the direction contained in para (b) of the award it acted in excess of its powers.

The College also asserted that the right to release an employee during the probationary period is a significant management right. The probationary period allows the employer to objectively assess a new employee's performance and suitability for the job. The exercise of this particular management right should only be constrained if the Collective Agreement expressly and unambiguously so provides.

The second instance in which a Board refused to vitiate a discharge was that of **Re Fanshaw College and OPSEU (Robson)** (September 9, 1988), unreported, (P. Picher). In that case a probationary employee was not given proper notice under Article 27.02C prior to her termination. The Union argued that the proper notice was a mandatory condition precedent to the effectiveness of the release and that in the absence of due notice the release was void ab initio. The Board, in explicit disagreement with the Union, held at page 9 that:

The Board does not accept the assertion of the Union that the College's release was void ab initio by virtue of its failure to give due notice.

In any event, the College asserted, it complied with the spirit of Article 27.02C. Prior to November of 1996 there were no concerns with the grievor's performance or with the program she taught. She was not prejudiced by the fact no written evaluation had been provided. As soon as complaints were received, the Chair ensured that the grievor was aware of them and took immediate steps to resolve those concerns with the grievor and the students. Rather than reducing the concerns to writing in a formal review that would remain on her record, the Chair chose to deal with the situation professionally to maximize the grievor's opportunity to rectify the situation as soon as possible. That was for the grievor's benefit. It was only after it became apparent to the Chair that the concerns could not be resolved and that the situation would not improve that he wrote a formal evaluation. Whether or not this action was in strict compliance with Article 27.02C, the spirit of the provision was surely complied with. The grievor was not prejudiced or adversely affected by not having been provided with reviews at four month intervals. The College should not be restricted from exercising its management right to release her from employment. Even in the cases relied on by the Union it is clear that the parties never intended the requirement to provide written appraisals as a precondition to the release of a probationary employee. In the **Dadula** case (*supra*), the grievor, a probationary employee, was released from his employment. He was not provided with regular written evaluations although he had been verbally apprised of his shortcomings. The grievor in that case was provided with his first written review on the eve of his release. Mr. Leeb represented the Union at that hearing and made the same preliminary argument before that Board; that is, that a failure to provide written evaluations rendered the release null and void. The panel hearing that case

dismissed the argument and said at page 50:

Providing written appraisals is a matter of fairness to the employee and as the Guidelines indicate, they are the preferred manner in which the information should be conveyed, however, we cannot find that the directive requires written appraisals as a precondition to the release of a probationary employee, nor can we find, in the circumstances of this case, that there was any question but that the grievor was not meeting the requirements of the position, and that the directive was complied with in so far as this information was regularly and consistently communicated to him.

In summary, the College took the position that the requirement for evaluations at four-month intervals is not a condition precedent to the release of a probationary employee and for this Board to find otherwise would be an excess of its jurisdiction. Furthermore the spirit of the article was complied with and the grievor suffered no prejudice having been immediately apprised of all of the concerns and problems and having been given a full opportunity to improve. It asks that the grievance be dismissed.

DECISION

As can be seen, there is no dispute concerning the facts of this case. The grievor began teaching at the College on August 28, 1995. She was on pregnancy leave from December 4, 1995 to March 29, 1996, followed by parental leave until May 3, 1996. From December of 1996 to June of 1997 she performed some non-teaching duties but did not return to teaching until September of 1997. In all of that time the College was satisfied with her performance. By late November or early December one student had complained about the grievor and it was agreed that any further discussion about that complaint would take place after the course assessments in January. By then more complaints had been received and, after meeting with the students, the first formal performance appraisal of the grievor was completed.

The College does not dispute the Union's allegation that it failed to comply with the requirement under the collective agreement to inform the grievor of her progress at four month intervals. The issue for this Board is the effect of that non-compliance. The Union has argued that the termination should be voided: the College takes the position that it complied in spirit with the collective agreement and that its right to release a probationary employee should not be interfered with absent clear language to that effect.

As a general statement of principle, an employer's right to release a probationary employee is a significant management prerogative that should not be restricted absent clear and precise language to that effect. Balancing that is a probationary employee's right to be given an opportunity to meet the employer's expectations, which includes the right to be advised of his/her shortcomings in a timely fashion so that changes and/or improvements might be made. In this collective agreement in particular, the parties have recognized both of these principles by clearly defining the length of the probationary period and by requiring written notification of an employee's progress at regular intervals.

We are of the opinion, however, that the language of this collective agreement does not support that Union's claim. We come to that conclusion from a review of the clause itself and from the collective agreement as a whole. Article 27.02C reads as follows:

During the probationary period an employee will be informed in writing of the employee's progress at intervals of four months continuous employment or four full months of accumulated non-continuous employment and a copy given to the employee. Also, it is understood that an employee may be released during the first five months of continuous or non-accumulated employment following the commencement date of the employee's

employment upon at least 30 calendar days' written notice and during the remainder of the employee's probationary period upon at least 90 calendar days written notice. If requested by the employee, the reason for such a release will be given in writing.

In the first instance, the clause refers to a written statement of the employee's progress. The requirement is not for a formal performance appraisal but simply some written notification of the employee's ability and suitability for the job. That notification could take the form of a comprehensive appraisal or a brief comment on the performance. If the parties had intended to obligate the College to provide a probationary employee with the former, they could have and would have stated so explicitly.

As well, it is clear that the College could release a probationary employee before he/she reached the four month threshold providing it gives that employee the requisite notice. That, in our view, is another indication that the parties did not intend this provision to operate as a condition precedent to the release of a probationary employee.

Finally, we note that the parties used the word "will" as opposed to "shall", which has been interpreted by arbitrators as being permissive, not mandatory.

There have been disagreements between these parties in the past about the interpretation and application of these provisions. The College took the position that this matter has been dealt with by other Boards of Arbitration and this Board's decision should be consistent with those decisions.

We believe that our ruling in this matter is consistent with the cases provided to us.

The College referred us to the **Seneca College** case, (*supra*), and took the position that the Board in that case specifically found that the performance appraisals mentioned in article 27.02C were not a condition precedent to a decision to release a probationary employee. The grievance in that case alleged that the College had failed to show the grievor his performance appraisals or give him an opportunity to respond to them contrary to article 26.01 which read as follows:

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 his views to such appraisal before it is filed. Each employee shall receive a copy of any disciplinary notice to be placed in his personnel file. Access of an employee to his file containing performance appraisals, records of educational achievement and disciplinary notices shall be the subject of discussion under Section 14.02 if requested.

At the hearing the union raised an issue that the Board characterized as "an entirely different and separate cause of action which was never raised in the original grievance"; namely that the College had failed to make timely appraisals as required under article 8.01, which is virtually identical to article 27.02C. The Board's comments, in full, on that article read as follows:

Because we heard a fair amount of argument concerning the meaning of Article 8.01(c) and in the event that we are wrong in considering that it expanded the grievance to include an entirely new cause of action, perhaps we should make some remarks concerning that article. We agree that the article can reasonable be interpreted as making it mandatory for the College to give periodic information of progress at the prescribed intervals. The article does not, however, in any way limit the College's right to terminate the employment of a probationary employee upon giving him the appropriate notice. In particular, the periodic appraisals are not a condition precedent to the making of any decision about whether or not to continue the employment of a probationary employee. If that were the case, then we would have expected the collective agreement to state it explicitly. Therefore, while we would agree that if the College failed to make the evaluations as required, the grievor could be entitled to a remedy, we would not agree that the appropriate remedy would always necessarily be the grievor's reinstatement. In assessing whether a remedy ought to be given at all, we would have to consider and give weight to the College's argument that the grievor's failure to complain about the evaluations not being done should be taken as evidence of his having waived his rights to those periodic assessments. Under the circumstances of this case, we would consider that a declaration that the collective agreement had been breached would be the only remedy which could be considered.

We begin first by noting that the Board's comments regarding article 8.01 are obiter. It had

dismissed the grievance on other grounds and added these comments only as alternative grounds to dismiss the grievance. In any event, we interpret the Board's decision to be that, while the requirement to give periodic appraisals could be mandatory, an employer's decision to release a probationary employee is not contingent on those appraisals. We also interpret the decision to say that the appropriate remedy for a breach of this article will depend on the individual circumstances of each case.

The **Fanshawe College** case (*supra*), the College did not give a probationary employee the required notice under the collective agreement before terminating her services and, while the Board rejected the union's argument that the termination was *void ab initio*, it compensated the grievor for the breach by awarding her the difference in the notice period, that is 53 day's pay.

Finally, in the **Dadula** decision (*supra*), the comments of the dissenting member of the Board suggest that, had the employer breached the management's Directives as opposed to their Guidelines, the Board would have allowed the grievance and reinstated the grievor. That Board, however, was dealing with the merits of the grievance and was not asked to determine the issue as a preliminary matter going to jurisdiction. In that case, the Board was asked to determine whether the actions of the College in not following its own guidelines constituted bad faith. That is the position of the Union in this case and we will proceed to hear its evidence and submissions on that position at the next day of hearing.

The Union's preliminary issue is therefore dismissed. The hearing will proceed on its merits on a

date to be agreed to by the parties.

Signed this 28th day of June, 1998



Loretta Mikus
Chair

"I concur"

Robert Gallivan
Employer Nominee

Dissent Attached

Ron Cochrane
Union Nominee

UNION NOMINEE'S DISSENT

I have read the draft and cannot agree with the rationale or the decision.

As I understand the Union's submissions, it advanced the argument that the release on probation should be rescinded because the Employer had failed to provide the grievor with the periodic reviews contemplated by the collective agreement.

Article 27.02(c) requires the College to give probationary employees written reports on their progress "...at intervals of four (4) months continuous employment or four (4) full months of accumulated non-continuous employment". The College admits that it breached this provision. It offers the explanation that it had no concern about the

employee's work at that point in time. The language used in 27.02© is not written as a discretionary provision. The parties used the word "will", which has been interpreted by the vast majority of arbitrators to be imperative it is most often interchanged with the word ' shall". The issue therefore at this stage of the hearing is to decide whether a breach of this Article has the impact of nullifying the employee's release.

A close reading of Article 27.02 (c) reveals that an employee can be released "... during the first five (5) months of continuous or non-accumulated employment.." which means that the employee could be released prior to a written progress report contemplated by the Article.

However, as the employee accumulates more employment he/she also accumulates more protection. An employee with less than four (4) months employment could be released with thirty (30) days notice. An employee with four (4) or more months of employment can be released with thirty (30) days notice but the employee is also entitled to a written progress report. If the employee requests he/she is also entitled to reasons for his/her release.

Once the employee accumulates more than five (5) months of employment he/she is entitled to written progress reports, more notice of termination and if requested, the reasons expressed in writing for the termination.

The grievor in this case was well over the five (5) month mark and the College neglected its obligations with respect to the written progress reports. The Employer's obligation in this circumstance can be compared to other cases where the Employer has been found to be in technical breach of the collective agreement. For example, arbitrators have found where the Employer has failed to provide union representation or failed to provide timely written reasons to the employee, the terminations have been rescinded. Unions who have failed to process grievances through the grievance process, where it has been determined that the time limits are mandatory, have had the grievances dismissed without ever addressing the merits. Should we treat this violation any differently? Is it open to the Employer to argue that its too late for the union to raise this as a violation? In my view, the employee could have grieved the absence of the progress reports at four (4) month intervals, but the fact that she hasn't should not be used against her. The reports were meant as a "shield" not a "sword". When an Employer wants to release an employee on probation, its best be sure that is has all of its ducks lined up. If the employee has more than five (5) months of employment, it better come prepared to show that it followed the collective agreement to the tee.

I say this because the standard for review of employees who are released while on probation is considerably less than it is for non-probationary employees.

For all of these reasons I would agree with the union submissions to advance this technical violation as reason to rescind the release rather than advance this argument

later as evidence of "bad faith". By this, I am not suggesting that the Union would be prevented from raising this during a hearing on the merits if it had come to that point in a hearing.

I would uphold the grievance on the grounds that the Employer had violated the collective agreement when it released the grievor, and order her full reinstatement.

R, A. Cochrane