

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAWE COLLEGE

(the "College")

-and-

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the "Union")

AND IN THE MATTER OF grievance # 611378 – P. Musson and #71102 – Union.

BOARD OF ARBITRATION: D. D. Carter, Chair
P. Munt-Madill, Union Nominee
E. C. Zabek, College Nominee

APPEARANCES FOR THE UNION:
K. Hughes, Counsel
P. Musson, President Local 110
D. Bedford, Acting Chief Steward
K. Tamasi, First Vice-President

APPEARANCES FOR THE COLLEGE:
R. J. Atkinson, Counsel
S. Wilson, Employee Relations Consultant
T. Boyd, Dean
Faculty of Arts, Media and Design

A hearing of this matter was held at London, Ontario, on March 5, October 8, and November 4, 2008.

AWARD

These two grievances- an individual grievance and policy grievance - arose from a three-day suspension imposed on Paddy Musson, a Professor at the College since 1976 and President of Local 110 for the past twenty-five years. The suspension was imposed by Terry Boyd, the College's Dean of the Faculty of Arts, Media and Design, in a memorandum dated December 5, 2006. The reasons given for the suspension were the grievor's refusal to use her Outlook e-mail out-of-office auto reply only for the purpose of providing a message to e-mailers when she was out of the office, and her refusal to comply with Dean Boyd's directive to use the text that he had provided earlier to her for the message on her out-of-office reply.

The individual grievance alleges that the College violated article 3.02 of the collective agreement by interfering in her activities as President of Local 110. It also alleges a breach of article 14 by denying her three days pay and a breach of article 31 by imposing unjust discipline and not following the proper procedure for issuing discipline notices. As a remedy, this grievance seeks a rescission of the disciplinary notice, reimbursement of three days pay with interest, an order that the College cease and desist its wrongful treatment of the grievor, a declaration that the College not

further interfere with the grievor's union activities, and punitive damages for unwarranted harassment.

The policy grievance alleges that the College violated articles 3.02, 6.02, 14 and 21 of the collective agreement when it imposed the three-day suspension on Paddy Musson as President of Local 110. It seeks a declaration and cease and desist order similar to that sought in the individual grievance, and reimbursement to Paddy Musson of the three days pay lost as a result of the suspension. In addition, it seeks an order directing the College administrators involved in this matter to take training in the Freedom of Information and Privacy Act in relation to the use of internet/e-mail in the workplace and training in effective union-management relationships in the workplace; punitive damages from the College for their actions against the Union Local and its President; and a public apology to the members of Local 110 for the College's interference with their rights as union members.

Underlying these two grievances was a longstanding dispute between the grievor and the College over the grievor's use of the out-of-office reply feature in the Outlook e-mail system provided by the College to its employees. The dispute began in November of 2004 when the College discovered that the grievor had created a recurring out-of-office reply on

her College Outlook e-mail account. The text of that reply was as follows:

“For security reasons, I invite you to send any email to me at local110.opseu@sympatico.ca.

I do not use this email address since I learned that the Vice-President Academic read emails sent to and received by an employee, including his correspondence with this union local.

I apologize in advance for any inconvenience.

Paddy”

The grievor was then invited to a meeting with Linda Ballantyne, the College’s Director of Human Resources, and Dean Boyd. The meeting was held on November 11, 2004, at which time the grievor’s use of the out-of-office reply was discussed. At this meeting, the College took the position that the grievor’s current use of the out-of-office reply was inappropriate. The grievor’s position was that, as President of the Local, she had an obligation to warn her members that the College’s e-mail system was not a secure method of communication. However, she did indicate that she was prepared to work with the College to resolve the problem.

On November 17, 2004, Dean Boyd sent a memorandum to the grievor following up on this discussion. The memorandum instructed the grievor to delete the message in her out-of-office reply by November 19.

The reasons for this direction were set out in the following paragraphs from that memorandum:

“As part of the College’s commitment to provide high-quality educational services to its students and the community, the College provides an email system in order to enhance communications among members of the College community and between the College community and the public. It is an important expectation that College employees will use the College email system for College-related business. It is College policy that employees do so in a professional and business-like manner.

Your message is contrary to College policy and is inappropriate for communications both within the College community and to persons in the larger community. Furthermore, suggesting to people who are trying to communicate with you through the College email system that they should not utilize that system is inconsistent with the goal of encouraging the use of the email system in order to promote better service to students and the public.”

Dean Boyd also indicated in this memorandum that the grievor’s name had

been left off the global address list on the College's e-mail system but that it had been reinstated "so people will have full access to your Fanshawe email address". Subsequently, on November 22, 2004, Dean Boyd e-mailed the grievor, indicating the deadline for the removal of the out-of-reply had been extended to November 24, 2004, in light of the fact that the grievor had recently been away from the College for medical reasons.

The grievor replied by e-mail on November 30, 2004, that she was prepared to modify the message but that she would be doing so voluntarily "as that message is from me as Local Union President and not as a professor or employee of the college". In that e-mail message she also expressed concern that her name had been added to the global address list since "I asked to be left off the Global Address list in an effort to limit the reading of my automatic message to members of my bargaining unit and not to have it read any more broadly than necessary to protect my members".

The grievor then followed up with a memorandum dated December 15, 2004. In this correspondence, the grievor took the position that she was prepared to remove her warning "if we can develop a policy that requires cause to be established before administration accesses the emails of the employees in my bargaining unit". She also stated that she had

made some revisions to the warning, but also indicated that they were unlikely to satisfy.

Dean Boyd replied in an e-mail dated December 31, 2004. In this e-mail he took the position that the College e-mail account was provided to the grievor in her capacity as a faculty member and employee of the College and that, as a faculty member, the grievor was expected to monitor this account on a regular basis. In that communication he also asked the grievor for the text of her revised message. On January 16, 2005, the grievor sent that text. It reads:

“To Members, Local 110

As President of Local 110, for security reasons I invite you to send any email to me at local110.opseu@sympatico.ca. Do not use this address or local110@fanshawec.ca. The College has access to both.

I do not use this email address since I learned that a senior college administrator read emails sent to and received by an employee, including his correspondence with his union local.

I apologize in advance for any inconvenience.

To anyone else who might access this email address, please note that I do not check this email regularly when I am away

from the College. If you need immediate attention do not hesitate to email me at pmusson@yahoo.ca.

Paddy”

Dean Boyd replied to this e-mail in a memorandum dated January 4, 2005. In this memorandum Dean Boyd reiterated the position that the grievor was not using the College e-mail system properly and the message itself was unprofessional and un-business-like. He also provided guidelines as to the content of the out-of-office auto reply. At the end of this memorandum he stated:

“The College expects you to use the auto-reply feature for the business purpose for which it is intended and to create a message each time you are away from the College which conforms with the guidelines set out in this memorandum and my previous communications to you regarding this matter.

Your failure to comply with my instructions by January 28th will result in further action being taken.”

The grievor replied with her own memorandum dated January 27, 2005, rejecting the points made by Dean Boyd, emphasizing the need to protect the privacy of her members, and reiterating her right to communicate with her members. Dean Boyd then replied with another

memorandum dated February 8, 2005, reiterating the College's position and indicating his expectation that the grievor would reply to the earlier directive.

This exchange of memorandums was then followed by an equally unproductive exchange of e-mails. The grievor sent an e-mail dated February 9, 2005, indicating that she was happy to comply with the directive provided that she had written assurances that "no college administrator or agent will read emails sent by me or received by me". Dean Boyd replied by e-mail on February 16, 2005, that the "College's Computer Use Policy 1-F-08 addresses the issue of email monitoring". The grievor replied by email on February 22, 2005, reiterating her position set out in the earlier e-mail and suggesting a meeting to discuss the matter. Dean Boyd replied by e-mail on February, 28, 2005, indicating that there was no need to discuss the matter further and setting out his expectations that the grievor must comply with his previous instructions.

The next correspondence on this matter occurred on May 9, 2005. In an attempt to bridge the impasse, Dean Boyd sent a memorandum to the grievor proposing that the matter could be resolved by the grievor using the following message on her out-of-office reply:

"I am currently away from the College. Please note that I do

not check this email regularly when I am away from the College. If you need immediate attention do not hesitate to email me at pdmusson@yahoo.ca.

For members of Local 110 who wish to contact me regarding any employment matters, for confidentiality reasons I invite you to send an email to me at Local110.opseu@sympatico.ca.

I apologize in advance for any inconvenience.”

Dean Boyd also indicated in this memorandum that he expected that the grievor would use the message and that “failure to do so would result in further action being taken”.

The grievor, however, did not change the message on her out-of-office reply and this fact came to the attention of Dean Boyd a few months later. As a result, on November 10, 2006, Dean Boyd set another memorandum to the grievor setting out the College’s expectations.

The memorandum concluded with the following words:

“As your Dean, I am therefore once again directing you to delete your “Out of Office Reply” message by Friday, November 17, 2006 and not use that message or a similar inappropriate message again.

If you fail to comply with this direction, you will be subject to

disciplinary action.”

The grievor replied by e-mail on November 14, 2006, repeating her concern that members be warned that the College had the right to access their emails and indicating that she was prepared to comply if the College would limit their access to these e-mails to circumstances where there was cause. She then offered to modify her message to read as follows:

“As President of Local 110, for security reasons, I strongly advise members and part-time faculty to send me emails at pmusson@opseu110.ca or union@opseu110.ca. The College has access to both pmusson@ and local110@ if the fanshawe.ca system is used.

Since I learned that the College read emails sent to and received by an employee, including his correspondence with his Union Local, I have strongly discouraged the use of the College’s email system for any union-related business.

I apologize in advance if this is an inconvenience. To anyone else who might try to access me through the college system, if you need immediate attention do not hesitate to send be a message pmusson@opseu110.ca. I check this address more frequently and I check it when I am away from the College on

provincial union business.”

Dean Boyd then replied in a memorandum dated November 17, 2006, that he regarded this suggestion as “a move in the right direction” but still inappropriate. He then directed the grievor to use the following message:

“Thank you for your email. I am currently away from the College. If you are contacting me in my capacity as President of Local 110, for confidentiality reasons I strongly recommend that you contact me at pmusson@opseu110.ca or union@opseu110.ca.

I apologize in advance if this is an inconvenience. To anyone else who might try to access me through the college system, if you need immediate attention do not hesitate to send me a message at pmusson@opseu110.ca. I check this address more frequently when I am away from the college on provincial union business.”

Dean Boyd also indicated that he had extended his deadline for compliance to November 22, 2006.

The grievor replied by an email dated November 23, 2006, rejecting Dean Boyd’s wording because it was not a sufficiently strong warning, and

because it suggested that she was out of the college when she was not.

She then indicated that she had posted the following message:

“It is with the strongest urging that I ask you not to leave messages for me at this e-mail address.

I would like to explain the serious tone of this statement but I have been directed by the college under threat of discipline not to reveal the reason.

You may send messages to me at pmusson@opseu110.ca or union@opseu110.ca.

Thank you I apologise for any inconvenience that this may have caused you.”

Dean Boyd’s response was a memorandum dated November 29, 2006. This memorandum acknowledged the fact that the grievor had “struggled” to comply with the directive, but made it clear that the grievor’s most recent out-of-office reply was not compliant. It then continued in the following terms:

“It is clear from your most recent emails that you are not using the “out-of-office” reply for the purpose of informing emailers that you are out of the office. Instead you are using this tool to broadcast to anyone who contacts you what you allege to be

the College's behaviour regarding the reading of emails, and in your most recent email to me (dated November 23, 2006) personnel issues between you and the College. Both are clear misuses of the "out-of-office" reply.

It is also clear from your most recent emails that you are not using your Outlook email account for the purposes of conducting College business. In your capacity as a faculty member, you are expected to read your email regularly as emails are a key method by which the College communicates with its employees. You have clearly stated that you do not read your College email account on a regular basis. As a faculty member, you are expected to read your emails regularly because important communications necessary in the conduct of your work are communicated to you via your email account. Consequently, I now have three directives. First, please read your email on a regular basis. Second, use your "out-of-office reply" only when you are away from the College. Third, when you use your "out-of-office auto reply" please use the statement I provided to you in my last correspondence with you (memorandum dated Nov 17, 2006) and which I repeat below:

Thank you for your email. I am currently away from the College. If you are contacting me in my capacity as President of Local 110, for confidentiality reasons I strongly recommend that you contact me at pmusson@opseu110.ca or union@opseu110.ca.

I apologize in advance if this is an inconvenience. To anyone else who might try to access me through the college system, if you need immediate attention do not hesitate to send me a message at pmusson@opseu110.ca. I check this address more frequently when I am away from the college on provincial union business.

I expect you to comply with these directives upon receipt of this memorandum.”

The grievor replied by email on the next day. That email reads as follows:

“Dear Terry.

First, I do read my account on a regular basis. When there are important communications necessary in the conduct of (my) work”, perhaps they could be forwarded to me at pmusson@opseu110ca. When the Vice-

President Academic announced in a meeting that she read emails sent by and to a member, the college defended its actions by saying that they had a right to read emails. Since some of the communiques to that member had been privileged communications with his union, I asked the college initially to forward everything to our non-college email address. The college refused. I then asked that the email addresses pmusson@fanshawec.ca and local110@fanshawec.ca be removed from the college's list. That request was refused. I then posted a warning to protect Local members. When challenged about my warning, I removed specific reference to the VPA and replaced it with a general reference to senior admin.

I again request that you remove myself and the Local from your lists. I have requested and continue to request hard copies of all communications.

Secondly, you contend that college policy does not allow me to use the Out of Office Assistant. You claim it may only be used if I am physically away from the college and

yet the system allows one to opt for “I’m currently in the office” with a text auto-reply. I can find no college policy that limits use in the manner you have suggested.

Third, I cannot accept the message you have crafted.

Your recommendation does not go far enough. Your directive is interference with my union activity, activity that is enshrined in law’ and in the collective agreement and which has been recorded on my SWF.

This continuing harassment is having a deleterious impact on my health and is motivated by anti-union animus. I have made every effort to be reasonable but the college’s unrealistic and self-serving demands can only be seen either as anti-union acts, personal harassment, a desire to read emails meant only for the union and most certainly all of these motivations.

The harassment must stop. If you insist that faculty read emails on a regular schedule, then provide us with the schedule and put it on every faculty SWF.

Paddy Musson, President. Local 110”

Dean Boyd replied on December 5, 2006, with the following memorandum:

“Paddy,

In your “out of office auto reply” which was in circulation as of November 10, 2006, you clearly state: “I do not use this e-mail address....” Your employee email account is provided to you in your capacity as an employee of Fanshawe College. In your capacity as President of Local 110, the College has provided a separate email account (local10@fanshawec.ca). As an employee of Fanshawe College, you are expected to read your employee email account on a regular basis because important communications necessary in the conduct of your employment are communicated to you via your employee email account.

The “Out of Office auto reply” is what its name clearly states: for use when you are OUT of the office. If you click the radio box entitled: “I am currently in the office” no auto-reply text is sent when someone contacts you. An auto-reply text is only sent when you click the radio box entitled: “I am currently Out of the office”. The “Out of

office auto reply” has one purpose only: to communicate to e-mailers who contact you when you are OUT of the office. Hence, it should be turned off when you are in the office.

My three directives to you have to do with your employee email account which is provided to you as an employee of Fanshawe College. It has nothing to do with you in your capacity as President of Local 110. It is your misuse of the “out-of-office auto reply” with your EMPLOYEE email account that is being addressed.

It would appear from your most recent correspondence that you are prepared to comply with my first directive to read your employee email regularly. I thank you for that. My second directive to use the out of office reply for the purpose for which it is designed (to provide a message to e-mailers when you are OUT of the office) has been, it would appear, rejected by you. Finally, my directive to use in your “out of office auto reply” the text I first proposed on November 17th 2006 and repeated on November 29th has been explicitly rejected by you.

I have been extremely reasonable in trying to come to a resolution of this issue with you: however it is clear to me from your most recent communication that you are not prepared to go there. Of course as you know your refusal to comply with two of my directives constitutes insubordination.

As a consequence of your insubordination, you will be suspended without pay for three days starting December 6, 2006. At the end of this period, I expect you to comply with my two outstanding directives: 1) use your employee email account's "out-of-office auto reply" only when you are away from the college and 2) when you use your 'out-of-office auto- reply" use the text I provided to you in my last correspondence (memorandum of November 29th, 2006) and which I repeat below:

Thank you for your email. I am currently away from the College. If you are contacting me in my capacity as President of Local 110, for confidentiality reasons I strongly recommend that you contact me at pmusson@opseu110.ca or union@opseu110.ca.

I apologize in advance if this is an inconvenience. To anyone else who might try to access me through the college system, if you need immediate attention do not hesitate to send me a message pmusson@opseu110.ca. I check this address more frequently when I am away from the College on provincial union business.”

The grievor then grieved this discipline on December 24, 2006, and the union filed its grievance on January 12, 2007, seeking its own remedies.

The College took the position that the grievor had been disciplined in her capacity as an employee for conduct that constituted insubordination. It argued that the College had a right to require its employees to use the College’s e-mail system in an appropriate manner and, in doing so, it had given the grievor a clear direction on the use of that system’s out-of-office reply function. If the grievor had concerns about that direction, she should have complied with the direction and then grieved it. Instead, the grievor had continued to refuse to follow the direction. This refusal to follow the direction amounted to insubordination and the three-day suspension was appropriate given the number of times that the grievor had ignored the

College's direction to use the out-of-office reply function in an appropriate manner. In light of these considerations, the College argued that the individual grievance should be dismissed.

As for the union grievance, the College argued that it was foreclosed by article 32.09 of the collective agreement that provided that a union grievance "shall not include any matter upon which an employee should be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee had not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees". The College also submitted that any argument as to punitive damages should be made a later date once the Board determined if there had been any breach of the collective agreement. The Board indicated at the hearing that this issue could be argued at a later date if it proved necessary to do so.

The Union took a quite different position, arguing that the essence of this case was the College's interference with the union and the activities of the grievor acting as President of the union local. The Union argued that the grievor's use of the out-of-office reply constituted a legitimate warning to union members that confidential employee and union matters should not

be directed to the grievor at her College email address. In this case, the grievor as a union officer was faced with a significant problem relating to the conduct of union business because bargaining unit members naively believed that their communication to her and to the union through the College's email system would remain private and confidential. The grievor had proposed a number of solutions to deal with this issue of confidentiality but the College had not been willing to deal with the issue in a constructive manner. Not only had the College refused to take the grievor off its global address list but it had been unwilling to reach a protocol on the circumstances where it would be appropriate for the College to access an employee's e-mail.

The Union argued that the grievor's actions should not be characterized as insubordination, referring the Board to a number of cases where arbitrators had recognized that union officials should be given latitude when legitimately discharging their union functions. The Union argued that the grievor had always acted in good faith in pursuing the legitimate interests of the union and the members of the bargaining unit. While the grievor and the College might have reached a stalemate on the protection of the privacy of employees using the College's email system, the grievor had a right to continue to resist the employer's direction until the

issue of confidentiality had been resolved. In these circumstances, according to the Union, the stalemate could have been referred to arbitration by the employer. Therefore, any discipline was unjustified and the three-day suspension should be removed from the grievor's record and she should be compensated accordingly. Furthermore, the employer's conduct toward the grievor at a time when she was facing some serious health problems called for an award of damages beyond compensation for the three days lost as a result of the suspension.

This case provides a stark illustration of two of the hazards of using e-mail. The most obvious hazard for employees that use employer provided e-mail systems is that the employer, as the operator of the system, has the ability to access employee e-mails. This reality was present in this case and the College made no attempt to hide it. Article 3.3 of the College's policy manual provides:

"Fanshawe College respects the privacy of its employees and users of its computing resources generally. However, employees should be aware that the College owns all information stored within its computer systems, including but not limited to information stored in personal files or password protected file or e-mail files. The College has a right to access all information stored on College computers.

Authorization to access any such information must first be obtained from the administrators responsible for the content of the information stored and such access will be in accordance with any relevant legislation and College policies. In accordance with these provisions, the College may monitor computer and internet use to ensure that such use is consistent with the purposes, goals and policies of the College and with relevant legal requirements.”

The problem for employees, as the grievor emphasized at the hearing, is that they either had not read this policy or they had naively chosen to ignore it by continuing to use the College e-mail system to communicate with the grievor over sensitive matters that required confidentiality.

A second hazard, common to all e-mail systems, is that email communication is often a breeding ground of misunderstanding. Too often persons using e-mail push the “send” button before they have considered fully the implications of what they have written. At the receiving end, all too often the person reading the message reacts without absorbing the meaning and nuance of the message that has been sent.

In this case, virtually all of the communication between the grievor and the College in relation to the matters raised by these grievances was

carried out by e-mail. What it produced was an unproductive dialogue about a serious labour relation issues. Moreover, it resulted in a situation where serious discipline was imposed on the grievor without a face-to-face meeting to make it clear to the grievor that the dialogue had ended and discipline would be imposed unless the grievor complied with Dean Boyd's directive.

Against this background, the Board now turns to the issues in dispute. This is a case that requires a balancing of the rights of the employer against the rights of the union. The Board recognizes that the College had a legitimate interest in the appropriate use of its e-mail system but, at the same time, it also recognizes the Union had a legitimate concern that the communications between bargaining unit members remain confidential.

The first issue to be resolved is whether the grievor's actions constituted insubordination. Of particular relevance to this issue is Firestone Steel Products of Canada (1975), 8 L.A.C. (2d) 164 cited by the Union. In that case, Arbitrator Brandt made it clear that in the conduct of union officials in carrying out a legitimate union function should not be considered to be insubordinate unless "there is some intentional and purposeful defiance of a legitimate management order". This approach

recognizes that union officials should be allowed some latitude from discipline for insubordination. However, it does not give them an unrestricted exemption since they still remain employees subject to the employer's authority to regulate the workplace.

Applying this approach to the facts of this case, it is clear that the grievor's actions were motivated by a bona fide concern for the privacy of the e-mail communications of bargaining unit members. That concern, however, could not justify an indefinite resistance to the College's directives on a matter that fell within the legitimate exercise of its management rights – that is the appropriate use of its e-mail system. If the College had made it clear that the dialogue over privacy had ended and that non-compliance would be treated as a disciplinary matter, then the grievor would have been required to comply with the directive but could then grieve that this directive was inconsistent with the collective agreement. At that point, the grievor's continued refusal to comply could be characterized in no way other than "intentional and purposeful defiance of a legitimate management order".

On the facts of this case, however, I am not convinced that the College did make it clear to the grievor that the dialogue had ended. Admittedly, Dean Boyd's memorandum of November 10, 2006, warned that a failure to comply would be subject to disciplinary action. However, he

then resumed the dialogue with the grievor in his memorandum of November 17, 2006, even stating that the grievor had made a “move in the right direction”. What is even more significant about this memorandum is its failure to reiterate the disciplinary warning set out in the earlier memorandum of November 10. Dean Boyd then further continued his dialogue with the grievor in his memorandum of November 29, 2006, again without repeating the disciplinary warning. On these facts, it was reasonable for the grievor to assume that the College wished to continue the dialogue and had backed away from its earlier disciplinary warning. Therefore, I am unable to conclude that the grievor had crossed the line as a union official by an intentional and purposeful defiance of a legitimate management order.

For these reasons, I allow the individual grievance and direct the College to remove the three-day suspension from the grievor’s record and compensate the grievor for the loss of three days wages. However, I do not consider this to be an appropriate case for any additional award of damages. Although the grievor was suffering some health problems while this matter was running its course, there was no evidence that the employer’s actions in any way contributed to these problems nor that the interactions between the College and the grievor in any way exceeded the

normal wear and tear produced by union- management relations. The Board will remain seized, therefore, only to deal with any difficulties that might arise from the implementation of its award to rescind the three-day suspension and compensate the grievor for loss of wages.

As for the union grievance, regardless of the application of article 32.9, its substance appears to have little merit. What occurred here was that the grievor was attempting to use the out-of-office reply function on the employer's e-mail system to warn bargaining unit members that confidentiality would be compromised if they used the system. The union, however, had available to it other more effective methods of communicating with bargaining unit members (such as its own newsletter) to warn them of the perils of using the employer's e-mail system. Moreover, as an effective warning, the out-of- office reply had severe limitations: it would only be received by a member after a sensitive and confidential e-mail had been sent; the member would only receive the warning once where the function was left on continuously (as it was by the grievor) since the reply would not be repeated for subsequent messages from the member; and the out-of-office reply did not warn of the perils of the member using the employer's e-mail system to send a message to the grievor's other e-mail addresses. Moreover, the employer in this case had

a legitimate interest in enforcing the appropriate use of its e-mail system and, in particular, the use of the out-of-office reply.

Taking these considerations into account, I have reached the conclusion that there has been no improper inference with the Union on the part of the College. What occurred here was a protracted dialogue between the grievor and Dean Boyd over issues of employee privacy and the appropriate use of the College's email system. A stalemate was reached and, while I have found that the grievor's conduct did not reach the point of constituting an "intentional and purposeful defiance of a legitimate management order", that finding does not alter the fact that the employer was acting within its legitimate management authority to regulate the appropriate use of its e-mail system. For these reasons the union grievance is dismissed.

P. Munt-Madill, Union Nominee, concurs in the result of P. Musson's grievance and dissents on the disposition of the union grievance. E. C. Zabek, College Nominee, dissents on the disposition of P. Musson's grievance and concurs with the disposition of the union grievance.

Dated at Kingston, Ontario, this 1st day of December, 2008.



D. D. Carter, Chair

Addendum/Dissent of Union Nominee Pamela Munt-Madill

Although I agree with the Chair's conclusion that the individual grievance should be upheld, I disagree with his reasons.

As stated on page 26 of the decision, the conduct of union officials in carrying out a legitimate union function should not be considered to be insubordinate unless, "there is some intentional and purposeful defiance of a legitimate management order". The decision recognizes that the grievor's actions were motivated solely by a bona fide concern for the privacy of the e-mail communications of bargaining unit members. The evidence at the hearing clearly supports the conclusion that the Grievor's actions in challenging management directives were done solely in her capacity as a union representative. There is no evidence that she was attempting to be insubordinate in her teaching role.

The College's main concern was the need to have the ability for

College administration, staff, and students to contact the grievor in her capacity as an employee. This valid concern was totally resolvable by the grievor's suggestion to publish, in the college directory, her alternative e-mail address (which did not have the security concerns). This suggestion clearly demonstrates the grievor's acceptance of the College's demands for access. In addition, this alternative address has been used for years by both Members of the Board of Governors and her students without concern or complaint. There is no evidence, therefore that the grievor was insubordinate in her role as an employee.

Further, the incident which started this chain of events was solely the result of Ms. Musson's position as a union official. It had nothing to do with her teaching role. The confidential e-mails which the Vice President read between Ms. Musson and the employee suffering mental health issues were sent to the grievor in her union capacity. These were not e-mails between colleagues. They were confidential e-mails between a member and their union representative.

Therefore, with regards to the individual grievance, the actions of the grievor cannot be viewed as insubordination. I agree with the Chair that no discipline is warranted and the individual grievance should be fully upheld.

With regards to the union grievance, I believe that the College's

choice to impose such a high level of discipline on a very senior employee with no prior discipline record was outrageous. This combined with the College's attempt to force a particular communication between the grievor and her members constitutes interference with the activities of a trade union. The College employed no progressive discipline at all. Rather it imposed a level of suspension which in law is often viewed as a step towards dismissal.

Although there was no direct evidence at the hearing that it was the intention of the College to intimidate and interfere with the activities of the trade union, the imposition of such an outrageous level of discipline on a very visible member of the union inevitably had this effect. Therefore, the union grievance should be allowed and the parties should be afforded an opportunity of presenting to the Board their submissions on the appropriate remedy.

Dissent of College Nominee Carla Zabek

I concur with the Chair's decision and reasoning with respect to the policy grievance. With respect, I disagree with the Chair's decision respecting the individual grievance for the reasons which follow.

First, the Chair determines that the grievor's actions did not constitute insubordination on the basis that Dean Boyd did not make clear to the

grievor “that the dialogue had ended and discipline would be imposed unless the grievor complied with Dean Boyd’s directive.” (See pages 26 and 27 of the Chair’s award.)

In my view, the grievor understood that she would be disciplined for failure to comply with Dean Boyd's directives. This is clear by her last Out-of-Office Reply dated November 23, 2006 when she states: " ...I have been directed by the college under threat of discipline ...".

In response to the foregoing, Dean Boyd then sent a detailed memorandum dated November 29, 2006 in which he states: "Consequently, I now have three directives." [Emphasis added] He then goes on to list the 3 directives. He ends by stating, “I expect you to comply with these directives upon receipt of this memorandum.”

This is the first time that Dean Boyd used such strong language in terms of directing the grievor in no uncertain terms to do something. In my view, this effectively and clearly brought the “dialogue” to an end.

Notwithstanding the clear directives given, the grievor again refused to comply with the directive to change her Out-of-Office Reply (see her Response at page 15-17 of the Chair’s award.). As a result, Dean Boyd then issued the discipline in a memo dated December 5, 2006.

The fact that Dean Boyd did not indicate in his November 29, 2006 memo that discipline would result is in my view irrelevant for several reasons. First, he had previously given the warning which the grievor herself acknowledged in her last out-of-Office Reply. There was no need to repeat the warning. The warning continued to have effect and in fact, the grievor understood this to be the case as evidenced by the wording in her last Out-of-Office Reply (quoted above). As well, one cannot ignore the fact that the grievor is a highly experienced Union Executive member who is well versed in labour relations matters, including defending union members who have been disciplined for insubordination over her 25 years as Union President. In my view, there can be no doubt that the grievor understood the disciplinary consequences for her blatant and continued refusal to follow Dean Boyd's directives.

The Chair states at page 28 that "in these circumstances, it was reasonable for the grievor to assume that the College wished to continue the dialogue and had backed away from its earlier disciplinary warning." I submit that there was no evidentiary basis for the Chair to make that finding; to the contrary. First, in her email response dated November 30, 2006 to Dean Boyd, the grievor openly acknowledges that she was given a "directive" by Dean Boyd. Second, the tenor of the entire message is

openly defiant and hostile. There is no way that one can conclude that there is any “continuation of dialogue”. If Dean Boyd did not end the dialogue in his November 29, 2006 email, the grievor most certainly “ended the dialogue” in her email response of November 30, 2006. In those circumstances, Dean Boyd had no alternative but to take disciplinary action against the grievor.

Moreover, a warning of discipline for insubordination is not a necessary ingredient for discipline to ensue following acts of insubordination. The essential ingredients for insubordination are set out in Brown & Beatty at paragraph 7:3612 as follows:

"Arbitrators have required the employer to prove that an order was in fact given, that it was clearly communicated to the employee by someone with the proper authority and that the employee either refused to acknowledge it or actually refused to comply."

In my submission, there can be no dispute that the above three “ingredients” have been satisfied. Accordingly, the grievor was insubordinate and discipline was justified.

Second, this key finding made by the Chair was not argued by Union counsel at the hearing; nor did the Chair raise this point in his questions during the course of legal argument. Consequently, College counsel was

not given any opportunity to address it and given that it is the “key finding” in the decision, in my view, the College has been prejudiced.

Third, the Chair appears to place some weight on the fact that the grievor’s actions were motivated by a bona fide union concern, although the foregoing was not determinative of the issue. Importantly, the Chair acknowledged that such concern “could not justify an indefinite resistance to the College’s directives on a matter that fell within the legitimate exercise of its management rights – that is the appropriate use of its e-mail system.” (Emphasis added. See page 26 of the Chair’s award.) The Chair refers to the Firestone Steel Products of Canada decision in which arbitrator Brandt “made it clear that in the conduct of union officials in carrying out a legitimate union function should not be considered to be insubordinate unless there is some intentional and purposeful defiance of a legitimate management order.”

In my view, the grievor’s repeated refusal to use the “Out-of-Office” reply function in the manner intended did not constitute “the exercise of a legitimate union function” within the meaning of the Firestone Steel case. This was not a situation where the grievor was representing another bargaining unit member in the grievance procedure or otherwise. In fact, her last “Out-of-Office” Reply was not addressed to bargaining unit

members at all, unlike the earlier messages which were addressed as follows: "To members, Local 110." This case concerns the grievor's personal faculty email account at the College; not her union email account. If the grievor had concerns about the privacy of email communications between her union members and herself, there were other ways for her to communicate those concerns to her members then through her personal faculty email account. Indeed, the grievor testified as to other methods used to communicate those concerns to her members some of which are noted by the Chair in his award at page 29.

However, even if the grievor was carrying out a legitimate union function, her actions did not pass the "Firestone Steel test" as the grievor did intentionally and purposefully defy a legitimate management order. As indicated above, the Chair found that Dean Boyd's directives regarding the appropriate use of the email system fell within the legitimate exercise of the College's management's rights. There can be no doubt that the grievor's actions through her last "Out-of-Office" reply and subsequent mail of November 30, 2006 constituted an intentional and purposeful defiance of a legitimate management order.

Fourth, the Chair does not make any comment about the grievor's last "Out-of-Office" reply. In my view, this last message was clearly

inappropriate, unprofessional and offensive, thereby warranting disciplinary action itself.

Therefore, in my respectful submission, the College was justified in disciplining the grievor for both the last “Out-of-Office” reply and her insubordination in refusing to comply with Dean Boyd’s directives. However, a one day suspension would have been a more appropriate disciplinary response in the circumstances.

