

1999-0560-0003

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**SENECA COLLEGE**

(the "College")

-and-

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION**

(the "Union")

**AND IN THE MATTER OF** the grievance OPSEU No. 00A364.

**BOARD OF ARBITRATION:**

D. D. Carter, Chair

S. Murray, Union Nominee

M. Ridell, Employer Nominee

**APPEARANCES FOR THE UNION:**

S. B. D. Wahl, Counsel

E. Montgomery, President Local 560

L. Olivio, Vice-President Local 560

J. Stavroff, Chief Steward Local 560

**APPEARANCES FOR THE EMPLOYER:**

C. G. Riggs, Q.C., Counsel

C. S. Rix, Counsel

D. Chan, Seneca College

S. Vallance, Seneca College

M. Fogel, Seneca College

A hearing of this matter was held at Toronto, Ontario, on September 26, 2000, April 2, June 25, June 27, 2001, August 29, 30, 2001, April 10, 11, 2002.

**AWARD**

The grievor, a Professor at the College, was discharged on March 5, 1999. At the time of his discharge he had been an employee of the College for over eighteen years and, up until the events leading to his discharge, had an unblemished employment record with the College. The reason given for his discharge was that he had "used College equipment and facilities to access, download, and store images defined in the Criminal Code of Canada as child pornography".

On January 25, 1999, the College first became aware of the activities that form the basis of the grievor's discharge. On that day two students working in the computer laboratory at the College's King Campus briefly noticed images of naked children in sexual poses on the screen of the monitor of a laboratory computer terminal being used by the grievor to download these images to floppy disks. The two students then reported what they had observed to another College professor who then brought the incident to the attention of the College's security department. An incident report was filed by that department and it was at this point the College began a formal investigation of the incident. On February 17, 1999, while this investigation was being pursued, the grievor was again observed in the computer laboratory downloading to disk images of naked children in sexual poses.

On February 23, 1999, the grievor was notified by letter that, because of

these incidents, he was suspended with full pay and benefits pending the outcome of the College's internal investigation and at the same time directed to remain off College property unless required to attend a meeting dealing with these incidents. On March 5, 1999, he was notified by the College by letter that its investigation of the matter had led it to conclude that he has "used College equipment and facilities to access, download, and store images defined in the Criminal Code of Canada as child pornography" and that he had used "an open access student laboratory to carry out these actions in order to avoid identification and incrimination" and, on the basis of these conclusions, it was terminating his employment at the College. On March 27, 2001, the grievor entered a guilty plea to possessing child pornography in contravention of s. 163.1(4) of the Criminal Code of Canada and was given a suspended sentence and placed on probation for two years, one of the conditions of that probation being that he not use the internet on any computer at any time.

The union in this case did not dispute the fact that the grievor used the College's computer lab to download to disk images of naked children in sexual poses and that he later viewed these images in the privacy of his office at the College. It argued, however, that the grievor's difficult personal circumstances led him to suffer from a mental disorder that had manifested itself in the form of pathological internet use. This mental disorder, according to the union, could be

considered a disability under Ontario's Human Rights Code, imposing upon the employer a duty to provide some form of accommodation to the grievor. The union argued that the appropriate employer approach in this case should have been a response that recognized the seriousness of the grievor's conduct but fell short of termination of employment. The union argued that the grievor had already paid the penalty for his anti-social conduct in the criminal courts so that, in the employment context, a less punitive approach was required. It submitted that, at least by September 11, 2000, the grievor should have been reinstated to his employment with restrictions on his use of the internet, since by that time it had become clear that the grievor was well on his way to recovery. In the alternative, the union argued that, even if the grievor's condition could not be considered to be a disability as that term is understood in the Human Rights Code, discharge was still an excessive response by the employer in light of the grievor's personal circumstances and his nineteen years of good service at the College.

The employer submitted that the medical evidence presented at the hearing did not support a conclusion that the grievor was suffering from a disability at the time that he engaged in the behaviour that led to his discharge. The employer argued that, since the grievor had no difficulty restraining from engaging in this behaviour outside of the place of his work and was able to refrain from this

behaviour totally once he had been caught, the evidence did not support a conclusion that the grievor was suffering from any form of impulse control disorder. The employer also noted that any signs that the grievor might be clinically depressed occurred after he was caught and these symptoms were only transitory at best. In the employer's view, this was a clear case of the grievor engaging in criminal conduct at his place of work and this criminal conduct was of such a serious order that it had irreparably damaged the bond of trust between the grievor and the institution for which he worked. The employer further argued that, even if the grievor could be considered to be disabled, his disability still could not excuse conduct that had such serious repercussions for the College, making any form of accommodation inappropriate in this case.

The issue before this board is whether the College had just cause for terminating the grievor's employment. At the time he gave his testimony in this case the grievor was 49 years old, unmarried, and still living with his parents. Prior to his employment with the College, the grievor had worked as a technician dealing with the repair and maintenance of lawn care equipment. In early September of 1980 he was hired by the College as a technician for its new Golf Course Technician program. As this program grew so did the grievor's role in the program and in 1988 he obtained an appointment as a Professor in the program. The grievor

testified that he did well as a Professor, receiving better than average teaching evaluations and enjoying the respect of both current students and graduates of the program for his teaching abilities.

The grievor, however, did not experience a similar success in his personal life. He testified that he grew up in an evangelical Christian home ruled by a domineering mother. Many social restrictions were imposed on him as he was growing up and, even later, when he had finished secondary school and had entered the workforce but continued to live in his parents' home. In 1981 he finally moved out of his parents' home and began to enjoy greater social freedom. In 1987, he purchased a larger house in Richmond Hill and at this point his parents decided to sell their condominium in Scarborough and stay with the grievor for the two one-month periods that they were not spending either in Florida or at their summer cottage. These short visits did not pose too great a problem for the grievor's social life, but the situation changed in 1994 when his parents for health and financial reasons were no longer able to take their six-month sojourn in Florida and became permanent residents in the grievor's home. As the grievor described it, at this point he was back to living under his parents' social rules. To compound his problems, his mother's moods became very volatile with the onset of Alzheimer's disease in 1995.

This change of living arrangements for the grievor eventually led to his

social isolation. His relationships with women did not meet with success and he eventually gave up socially since his parents would become upset when he invited his own friends to his house. In the evenings and weekends the grievor would retreat to the basement of his home, doing some woodworking or mechanical work, or sometimes just listening to the radio by himself.

In 1996 the grievor found a new interest - the internet. He began to use the computer facilities at the College, choosing to use the student computer lab for this purpose as the computer facilities in his own department were limited. The grievor established a regular pattern of visiting the student computer lab in early afternoon once he had finished classes and staying there until the lab closed at 4:30 p.m. These visits to the student computer lab began to occupy three or four afternoons in his work week. It should be noted that in the student computer lab access to the internet can be obtained without a personal password.

The grievor testified that, initially, he had used the internet to obtain useful material for his courses. He candidly admitted, however, that his activities in the student computer lab developed into a form of escape as he began to discover other kinds of material on the internet. By September of 1997, his surfing of the internet has led him to pornographic sites and by late 1997 he was accessing pornographic web sites featuring children. The grievor testified that he had become intrigued by a

wide variety of sexually explicit material and only some of the pornographic sites that he visited involved children. He further testified that he had never paid for pornographic material on the internet, confining himself to the free samples offered by pornographic web sites. He also testified that he had never participated in a pornographic chat line, posted a message on a pornographic bulletin board or uploaded any pornographic material. What he had been doing was to use the computers in the student lab to access pornographic web sites, minimize the images there displayed, and then download these images to disk for later viewing in the privacy of his own office once other employees had left for the day.

The grievor testified that he was not happy about what he was doing but his desire triumphed over his determination to give up this activity. He candidly admitted that he succumbed to this desire because the search for internet pornography offered him excitement, intrigue, and mystery. The excitement came from the sexual aspect of the material; the intrigue came from searching out the material as he was constantly seeking new material; and the mystery came from the unknown nature of the material being sought. He testified that his internet activities served to relieve the sadness he felt about the rest of his life, offering him escape from the realities of his home life.

The grievor testified that he was in shock after the College advised him that he

was suspended from his duties. Initially he sought counselling through the College's Employee Assistance Program but was advised by the program provider that they could not accept him as a client since, as it was very likely that his employment would be terminated, they would not be paid for their services. In the course of this conversation he was advised that he should consult a criminal lawyer as soon as possible.

The grievor followed up on this suggestion, contacting his family's lawyer to obtain the name of a criminal lawyer to act for him. A recommendation was provided and the grievor met with a criminal lawyer who suggested that the grievor might want to seek psychiatric help. The grievor then contacted his family doctor to obtain a referral. The family doctor advised the grievor that he needed to see him first before a referral could be made and that the grievor would have to wait until the end of the week for an appointment. The grievor testified that at this point he was desperate and considering suicide. Following the advice of Ted Montgomery from the union, he drove to York County Hospital to seek medical help immediately. He was admitted to that hospital on Wednesday, February 24, 1999, and discharged from it on Saturday, February 27, 1999. By the time of his discharge the grievor's mental state had greatly improved and, according to the medical report, "he no longer had any suicidal ideation, nor did he have a particularly depressed mood".

At the time of his discharge the grievor expressed an interest in further counselling and was referred to Malcolm Watts, a social worker at the hospital. The grievor met with Watts on March 29, 1999, then bi-weekly for two months, and then intermittently. In a letter dated September 11, 2000, Watts indicated that the grievor was no longer clinically depressed and was functioning well on a daily basis.

The grievor testified that Watts successfully assisted him in getting his life together and that he no longer had any desire to view pornographic material. He stated that he is now a new person with no wish to return to the destructive behaviour that led to his disgrace and the loss of his position at the College. He testified that his family had been supportive in his efforts to turn his life around and that he is now employed in a business owned by a family member. However, his greatest satisfaction still comes from working with students and he would prefer to return to his position at the College.

The first question we must answer is whether the grievor was suffering from a disability within the meaning of the Human Rights Code at the time of the activities that led to his discharge. It is clear to us that, at the time of the incidents leading to his discharge, the grievor was burdened by very difficult personal circumstances and was leading a very unhappy life. The medical evidence presented to us, however, does not support a conclusion that the grievor was suffering from a any form of

medically recognized mental disorder. The union argued that the grievor was suffering from a type of impulse control disorder that took the form of pathological attraction to internet pornography. The evidence, however, does not support this conclusion. The grievor through his own testimony indicated that his activity in searching out and viewing internet pornography was both selective and controlled, suggesting that he could exercise self restraint if he chose to do so. Moreover, there is no medical evidence that the grievor was clinically depressed when he was engaging in this activity. While the grievor was unhappy about the social restraints that had been placed on his lifestyle by his parents and was seeking a form of escape from these restraints, these factors alone do not support a conclusion that the grievor was suffering from any medically recognizable mental disorder.

The union placed considerable weight upon the grievor's mental state following his suspension from work. The grievor, once he had been suspended from his employment, did exhibit signs of depression and suicidal ideation. This condition, however, did not appear to a pre-existing condition but one that resulted from the disgrace of being caught engaging in illegal conduct and facing the very real possibility that his employment would be terminated. This condition, moreover, did not linger as the grievor was discharged after a short stay at the York County Hospital with a report that he was no longer suffering from a "particularly depressed

mood". On these facts we can only conclude that at all relevant times the grievor was not suffering a mental disorder that would constitute a disability under Ontario's Human Rights Code.

This conclusion still leaves us with the question of whether discharge was too severe a penalty in light of the grievor's previous unblemished employment record and his difficult personal circumstances. In other words, is this a situation where, despite the seriousness of the grievor's misconduct, the employer still should have given the grievor another chance? The union argued that the failure of the College to act more quickly to terminate the grievor's employment after the grievor's activities were first discovered on January 25, 1999, suggests that the College investigation assumed a life of its own that ultimately resulted in the College losing sight of the need to make a balanced decision by taking into account principles of progressive discipline.

Dr. Anthony Tilly, who was Acting President of the College at the time of the grievor's discharge, testified as to the reasons for the College's decision to terminate the grievor's employment. Dr. Tilly stated that, given the open access to a wide variety of material on the internet, it was important for the College to enforce its Information Technology Acceptable Use Policy. That policy which was in force at all times when the grievor was engaged in the conduct that led to his discharge

makes it clear that “all employees, students, and clients” are expected to abide by its terms. It further provides that “[a]ll members of the Seneca Community are responsible for obeying the law and College policy with regards to the use of information technology services, facilities and equipment”. The policy contemplates that the College may take disciplinary action where there has been a violation of the policy, expressly listing as possible discipline “verbal/written warnings, rescinding of e-mail or internet accounts, removal of materials from College computer equipment facilities and network, disciplinary directives, behavioural contracts, suspension and/or expulsion/dismissal from the College”. Dr. Tilly testified that the College had decided that in this case discharge was the appropriate disciplinary response because the grievor had engaged in a continuing pattern of conduct that was in clear violation of the College’s Information Technology Acceptable Use Policy. This conduct, in the College’s view, was of a particularly serious nature and a firm response was needed in order to ensure a proper environment at the College.

There is no question that the College has a legitimate interest in the enforcement of its Information Technology Acceptable Use Policy. The only issue is whether the application of that policy in this case the College imposed too severe a penalty. In answering this final question we do not accept the union’ argument that the employer’s failure to act immediately to suspend the grievor from his

As to the issue of “breach of the employer’s trust” and the higher standard of expectations flowing from his position:

The evidence of the lab monitor was that visits to pornographic sites in the lab were a regular, if not daily occurrence, despite the fact that is “against the rules”. The students who witnessed the event were opposed to the materials but not traumatized or harmed. The attitude expressed was “that’s sick!”

In the circumstances of this grievor, the college should have afforded the opportunity to the grievor to address his aberrant behaviour.

This board, in consideration of the above should have ordered that the grievor deserved to be placed in a position to access benefits owing to him such as leave with pay in order to avail himself of the help he needed.

As to reinstatement, there are a number of issues to be addressed. What is so terribly concerning in this case is the fact that persons in the lab on a continuous basis access this type of material. We heard nothing to suggest that college has attempted to educate staff or students to the fact that every hit on these sites is interpreted as market demand thus perpetuating the degradation and abuse of children.

However, it is this member’s position, that despite the grievor’s record of good service, his use of the employer’s equipment, on the premises and in front of students is behaviour that breach the fundamental responsibility of his teaching position to the extent that reinstatement is not an option. In that respect, this Board should have awarded severance in the amounts contemplated by the collective agreement (similar to lay-off, and the Employment Standards Act) for two reasons. First, in view of the fact that the employment relationship is irreparably damaged he was not reinstated. The second, the grievor cannot reach back into time to access his benefits.

All of which is respectfully submitted, Sherril Murray, Union Nominee

While in no way condoning the actions of the grievor, this member must nevertheless dissent in part from the opinion of the majority.

The grievor's "illness" fell short of the accepted medical model of psychiatric disorders in that the DSM 4 no longer recognizes "addictions" per se, let alone the concept of "internet addiction". Instead the psychiatric community now speaks to "substance abuse", toxic ingestion /intervention into the body. The medical community does however recognize compulsive behaviour and mood disorders.

There can be no doubt that this grievor suffered. The psychological intervention ( as opposed to the psychiatric, medical model, ) clearly recognized the fact that this grievor had massive personal issues to deal with and overcome, the grievor accepting the prescription of counseling instead of drugs.

The evidence of the grievor was that of a man whose life circumstances left him overwhelmed with no "escape" in the foreseeable future. He turned to a vehicle, the internet, that, for a few hours everyday allowed him to escape his own reality. How is that different from those who turn to alcohol, drugs, gambling and other forms of escapism? The difference, this member submits, is our own personal view on the morality of the issue and of course, legality of the issue.

The college has an extensive history of employees who for a number of reasons have had to take time off to fight their own personal demons.

This grievor was not afforded that same opportunity.

After 19 years of unblemished service he is discarded.

The union offered a solution: remove the grievor from internet access. Give him the time to engage in the counseling he so desperately needed. Allow him the opportunity to use the sick benefits he has earned for 19 years.

As to the legality of the issue, the grievor has been dealt with in court.

Dated at Kingston, Ontario, this 13th day of May, 2002.



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D. D. Carter, Chair

"S. Murray

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S. Murray, Union Nominee

I dissent in part

"M. Riddell"

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M. Riddell, Employer Nominee

I concur