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CAAT (A)  
Local 558

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

**CENTENNIAL COLLEGE OF APPLIED ARTS AND TECHNOLOGY**

(the "College/Employer")

- and -

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 558**

(the "Union")

**AND IN THE MATTER OF THE GRIEVANCE OF CHRISTOPHER ROBERTSON**

**A W A R D**

**BOARD OF ARBITRATION**

**Paula Knopf, Chair  
Michael Riddell, Employer Nominee  
Sherril Murray, Union Nominee**

**APPEARANCES**

***For the College***

***Amanda J. Hunter, Counsel  
Mel Fogel, Director, Labour Relations  
Carolyn Ferreira, Acting Dean – School  
of Business  
Gail Beagan, Chair, School of Applied  
Health Sciences***

***For the Union***

***George Richards, Senior Grievance  
Officer  
Jacques O'Sullivan, Chief Steward***

**Hearing in this matter took place in Toronto on November 4 and December 9,  
2002**

This case involves the termination of a probationary teacher. The Union concedes that misconduct occurred when the grievor wrote an inflammatory E-mail denouncing the administration of his department. The parties also agree that this Board of Arbitration only has jurisdiction to intervene in the termination of a probationary teacher if there was bad faith involved in the College's decision. Therefore, the issue in the case is whether the Union has established that there was bad faith in the College's decision to terminate the grievor's employment.

There is little dispute about the relevant facts. The grievor is a highly trained and experienced paramedic. He holds the highest credentials attainable in this field. He also has an undergraduate degree in psychology as well as general and child abuse certificates in social work. He is currently working towards a Master's degree in Applied Professional Studies in Education and Training. After working for fifteen years as a paramedic, the grievor was hired by the College in September 2000 to teach in the Paramedic programme. He joined the faculty because he saw this as a "career move and an opportunity to be involved in something new."

It is clear from his evidence that the grievor approached his teaching responsibilities seriously. The College has made it clear throughout these proceedings that it had no concerns about his teaching abilities or his classroom performance. However, the grievor experienced a growing sense of frustration about his department's lack of supplies and its academic administration. This is what ultimately led to him writing the offending E-mail. Therefore, his testimony focused upon the conditions and concerns that prompted the situation that led up to his termination.

The grievor's evidence initially dealt with what he called the "woefully inadequate" equipment and supplies available for the courses that he was teaching.

He was very concerned about the fact that significant pieces of equipment that were necessary for skills development and which were referred to in the Programme Standards for the courses were either not available or were "extremely obsolete." The grievor felt passionately that the lack of sufficient and/or adequate equipment prevented him from "doing his best" as a teacher and from properly preparing students for their professional responsibilities upon graduation.

The details of the grievor's criticisms about lack of equipment need not be recounted in this award. Suffice it to say that he listed his perceptions of the inadequacies and how this negatively affected his teaching mandate. He also explained how he and other teachers supplemented the College's equipment by taking equipment from ambulance services and bringing them into the classrooms. In some cases, this would involve small items such as bandages. In other cases, this involved expensive equipment. The grievor believes that the ambulance services turned a "blind eye" to the loss of the smaller items. However, the grievor asserted that the larger or more expensive items were essentially stolen from ambulance services in order to provide adequate learning resources for the students. The grievor was unaware of any arrangements that had been formally made with any ambulance service and simply assumed that he and his colleagues were effectively "stealing" the equipment to subsidize the programme. He described this as a "Band-Aid solution."

The College's evidence acknowledged that its paramedic teachers use equipment and materials from ambulance services. The College's witnesses asserted that this has been a long-standing practice and has been done with the knowledge and consent of co-operating services. The College administration denies any knowledge or acquiescence of the practice of unauthorized borrowing or "stealing" from any ambulance services in order to supplement the equipment needs of the programme. The Dean responsible for the paramedic program, Carolyn

Ferreira, was aware of the College's practice of using equipment from the Toronto Ambulance Service in order to supplement the equipment purchased by the College. Indeed, she felt that any discontinuance of that practice would "undermine the programme." She explained that there are simply inadequate funds available to purchase and/or maintain the level and sufficiency of equipment necessary for the paramedic programme without the assistance of the co-operating ambulance services. Therefore, the College relies on the assistance of ambulance services to supply and/or lend equipment for teaching purposes. No one in management has ever considered this to be "stealing" as the grievor alleged.

It is interesting to note that Dean Ferreira was aware of a formal arrangement made with one ambulance service for the use of its equipment in the programme. However, the grievor testified that equipment was being taken from another ambulance service in a different community. The Dean had no knowledge of any arrangements with that service as the grievor alleged. On the other hand, the grievor was unaware that formal arrangements had been made with the service mentioned by the Dean. Therefore, it is clear that there was a significant gap between the knowledge and perceptions of the grievor and the Department.

The grievor's frustrations about the lack of equipment prompted him to speak to his Program Co-ordinator on a number of occasions. The Co-ordinator advised the grievor to articulate his concerns to management. He did this in various ways, such as submitting a proposal for a new course and putting together several detailed inventories of existing and lists of required equipment. The grievor felt that his department did not responded adequately, if at all, to these efforts.

This Board of Arbitration was not asked to determine whether faculty members have been improperly purloining equipment from any ambulance services, albeit for the good of the paramedic programme. Whether actual theft or

unauthorized "borrowing" occurred need not be determined in this Award. What is important is that the College concedes that the grievor had a rational basis to be concerned about the quality and sufficiency of equipment available for the students. He was vocal and articulate about these concerns and was encouraged to make detailed proposals about the department's needs. Indeed, the Department Chair, Gail Beagan, passed these details on to Dean Ferreira. Dean Ferreira explained that these concerns helped to persuade her to prioritize the allocation of budgetary funds for the paramedic programme. As a result, approximately \$50,000 was obtained for the purchase of equipment in the spring of 2001. Further funds were allocated for the spring of 2002. Therefore, the Department was able to purchase many of the needed items that the grievor had identified. However, the grievor was unaware of the budgetary process and the fact that significant funds had been channeled to address the equipment concerns that he had brought forward. He was also unaware that significant purchases could not be made until budgetary approval had been formalized in May or June of each academic year. While he was aware that certain pieces of equipment that he had requested had arrived in the spring of 2001, he remained concerned about the lack of other materials that he believed were also needed. Therefore, as his probation progressed, he remained frustrated by what appeared to be a lack of equipment and a lack of foreseeable improvement to the situation.

The grievor also became frustrated in December 2001 about the way his department handled what he perceived to be academic misconduct by students. While the evidence at the hearing began to delve into the details involving the two students concerned, the parties ultimately agreed that this Board of Arbitration need not determine the merits of the allegations of academic misconduct. However, the nature of the allegations is germane to the case.

Student A submitted a document that purported to have a faculty signature affirming that the student had completed a required element of a course. The grievor immediately noticed that the purported faculty signature was spelled incorrectly and did not appear to be in his colleague's handwriting. The grievor believed that the purported signature was a "forgery" and he was convinced that the student had not completed the course requirement. The grievor reported this to the department Co-ordinator and recommended that Student A not be credited with completion of the assignment. That assignment was a pre-requisite for taking the final practical examination in the course. The grievor also recommended that this be treated as "academic dishonesty" and that the student be sanctioned in accordance with the College's established procedures. The grievor was later told by the Department Co-ordinator that the issue had been investigated and that the Chair had concluded that the student had not committed forgery. Therefore, the grievor was instructed to make arrangements for Student A to take her final practical examination. The grievor was also told that Student A was made to sign a contract of "academic honesty" regarding her future conduct. The grievor did not agree with this result. He was convinced that forgery had occurred, but he followed the instructions and rescheduled the examination. However, he ensured that he would not be involved in the marking because he recognized that he could not assess her in an unbiased way.

The parties agree that when the grievor took his concerns about Student A to the Department Co-ordinator, the grievor had an honest belief that the faculty signature had been forged and that the student had not completed the course requirement. The parties also agree that the Chair formed an honest belief that the student had completed the required work and that the document was not a forgery. Therefore, the parties chose not to bog down this case with evidence that would establish whether Student A was guilty of academic transgressions or not.

Around the same time the grievor also had concerns about the Department's treatment of Student B. Her situation involved a course requirement of arranging a placement with an ambulance service. The Paramedic Programme required that this be arranged in the fall term. By December of 2001, student B had not completed the necessary documentation to facilitate the placement and therefore could not complete the customary number of hours in the placement by the end of December. As a result, the Department Co-ordinator advised the grievor that Student B should receive a failing mark for the course. Student B appealed this failure to the grievor. The grievor perceived this situation as one where the student had simply failed to complete the necessary paper work. The grievor promised Student B that he would discuss the matter with the Co-ordinator. The Co-ordinator then instructed the grievor to refuse the appeal and told the grievor that if he refused, the Co-ordinator would herself deny the appeal. In either scenario, the matter would then proceed to the second stage of the appeal procedure. In that context, the grievor reluctantly complied, confirming the failing grade, believing that ultimately the appeal would go in Student B's favour. But he did this before the situation with Student A arose.

When the grievor saw how Student A was treated in comparison to Student B, he became very frustrated by what he viewed as a serious inequality of approach. He felt Student B was only guilty of a documentary transgression and yet was issued a failing grade and had to endure the appeal process. On the other hand, the grievor felt that Student A had been guilty of forgery, had not received any significant sanction, nor was she forced to deal with a failing grade and launch an appeal.

The grievor was so frustrated by these events that he wrote to the Department Chair on December 6, 2001 stating his objections to the department's handling of the two situations and requesting that his signature on Student B's denial

of appeal be withdrawn. The next day, he discussed these matters with Ms. Beagan in her office. She described the discussion as being “diplomatic on both parts.” However, it clearly ended with disagreement between the two about how the students ought to have been treated. The grievor took offence when he understood Ms. Beagan to tell him that he was taking “too military an approach” towards his expectations of the students. During the meeting, the grievor also reiterated his continuing concerns about the lack of equipment. Ms. Beagan responded by trying to explain the department’s budgetary limitations. The meeting ended with the two of them in disagreement about the approach the College should be taking to these matters. However, Ms. Beagan and the College had no concerns about the grievor’s conduct during this meeting. Both Ms Beagan and Dean Ferreira agree that it is not inappropriate for faculty members to disagree and debate how policies are applied.

The third source of the grievor’s frustration towards the College concerned what he perceived to be a lack of formal appraisal of his teaching. A quarterly performance appraisal system for probationary teachers is mandated by the Collective Agreement. However, he was not receiving feedback on a quarterly basis. He acknowledged that this was sometimes the result of busy schedules, particularly in December of 2001. Further, he did not suggest that the feedback was being deliberately withheld. However, the appraisal system was important to him because he felt that his relationship with his Department Chair, Ms. Beagan, was “strained.” He believed that the formal setting of an evaluation would give him an opportunity to present his comments and criticisms about the programme in a safe and “controlled professional forum” that would create a “written record.”

From the College’s perspective, Dean Ferreira described the system as being designed to appraise teaching effectiveness and skills. Since the College had no concerns about the grievor’s pedagogical abilities, the College saw no

disadvantage in the grievor not having the precise schedule of appraisals that the collective agreement may mandate.

By December 17, 2001, all the grievor's mounting frustrations led him to compose an E-mail to his department Co-ordinator and another teacher in his department. He describes this as a "private venting" of his frustrations. He said he did not intend to make his concerns public. The Co-ordinator is a member of the bargaining unit and had been his professional development mentor. However, she was also the department's liaison with management. Upon receipt of this E-mail, the Co-ordinator passed it on to the department Chair who, in turn, passed it on to the Dean. The grievor was not surprised that this happened. The relevant portions of the E-mail read as follows:

Student A<sup>1</sup> gets a supplemental practical after lying, doing virtually nothing all semester long, and failing her practical exam. Student B is a "U" . . . . [sic] not that I have any particular sympathy for her case, but in hindsight, she would have gotten a supplemental too if she had only turned in forged documents . . . . [sic] and thus been able to complete her preceptorship hours. If she had actually done the hours, even by dishonesty, it is evidently a separate issue. We are sending out a good message to our students that as long as you can prove you had the opportunity to learn, even through fraud, we can't withhold the opportunity to give you a test or even a supplemental "privilege."

Apparently I am being too "military" in my expectations of students, (that was the term that was used) . . . . [sic] But on it's [sic] merits alone, Student B was lazy but honest. and failed (by my signature denying her appeal), while Student A was lazy and dishonest and is treated the same way as any other student (through discussions with Gail [Beagan] without my being privy to the details). I signed Student B's appeal form and denied her appeal . . . . . [sic] I won't sign one again. When her appeal is inevitably granted by Gail, it will appear to her that Gail was the fair one . . . . [sic] while it was I who signed and denied her Step 1 appeal. . . . [sic] In hindsight, and relative to

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<sup>1</sup> The students are named in the grievor's letter, but shall continue to be referred to as A and B in this Award.

others in her class, it was an unjust decision . . . . [sic] For the record, I wish to withdraw my signature and offer her terms for an academic contract.

I can't wait until Karla Homolka violates her parole, changes her name, applies to our ECE program undetected and then asks for her final exam, a supplemental exam if needed, and finally her Centennial Diploma. .... [sic] as long as she is on a contract promising not to lie again.

Gail said the January intake was requested by the faculty, but was a one time affair . . . . [sic] she hinted that our Fall 2002 intake will be larger than 60 students though.

She said we had no new budget for any new equipment. . . . .

She said I am the only faculty member in the program who has mentioned equipment shortcomings as a problem.

She said that unless the entire program "faculty" raised equipment as an issue, it wouldn't really be an issue.

She wants an inventory of what we have and when it was last replaced. . . . [sic]. Until we obtain MOH required equipment, I will show our Semester IV students videos on these pieces of equipment and hope that it is sufficient. I will not be "borrowing" from Peterborough any longer, and will suggest to all of our techs that similar "borrowing" from Toronto cease immediately.

I must be a budget idiot . . . . . [sic] we increase our enrollment and tuition base by an extra 30 students (25%), but get 0% more budget? I hope the under-enrolled business programme like their new Pentium 4's. . . . [sic] we are paying for them through the success of the Paramedic Program.

No No No. . . . . [sic] is it summer yet?

The grievor testified that he wrote this E-mail because he had "serious disagreement" with management's decisions. However, he stressed that he does not feel contempt for management or for their authority. He apologized for his "choice of words." He described himself as being "confused and angry" at the time,

but “meaning no disrespect.” His apologized for writing this E-mail, but not for the “intentions underlying the actions.”

Management’s reaction to the grievor's E-mail was dramatic. The Department Chair described the grievor’s references to the student as “getting away with fraud” as “appalling.” She said that the College aims to deal with students “fairly and justly” and that the focus of the College is on students’ “accomplishments.” She views the way the grievor described the students as “disgusting.” She also read the E-mail as an expression of the grievor’s refusal to participate in the College’s academic appeal process in the future. Ms. Beagan felt it indicated that the grievor was “disgruntled” with her and the College. Accordingly, she immediately forwarded it to the Dean.

Dean Ferreira testified that she was “shocked and appalled” by the E-mail, particularly in the way it characterized the student as being “lazy and dishonest” and the College as being “foolish and incompetent.” She also perceived the E-mail to be an expression of contempt of Ms. Beagan and the programme. Further, she read the comments about “borrowing equipment” as an indication that the grievor would discourage his colleagues from doing this in the future. This was a cause of concern because the programme depended upon the ability to obtain outside resources. Finally, she was very disturbed by the Homolka reference. As a result of this E-mail, Dean Ferreira felt that termination was the appropriate response. She conceded in cross-examination that if a member of the permanent faculty had written this E-mail, she would have disciplined, rather than terminated the author. She also acknowledged that the grievor was a good teacher and that some of his accusations may be based on truth or motivated by his honest beliefs. However, she chose to terminate because, as she said: “I don’t want someone in the classroom with my students who characterizes them this way.”

While the College's administration's first reaction was to want to terminate the grievor immediately, the matter was put over for consideration until the New Year. Upon the resumption of classes in January, the Dean met with the Department Chair and the Director of Human Resources, Mel Fogel. After discussion, it was confirmed that the grievor would be terminated. A letter of termination was drafted and Ms. Ferreira called the grievor into her office on January 3rd, advising him that he may want to have a Union steward present. He chose to proceed to the meeting without the assistance of the Union steward. Ms. Ferreira handed him the termination letter and did not seek an explanation of his conduct. The letter reads:

Your e-mail entitled "The Future" has been forwarded to me. The College considers it to be contemptuous of both students and your immediate supervisor, and constitutes conduct which is incompatible with continued employment with the College.

Therefore, the College is proceeding to terminate your employment effective immediately. . . . In lieu of notice, the College is providing you with 90 calendar days' pay.

### **Submissions of the Parties**

The Union stressed that the grievor has over 14 years of experience in his profession and that he cares passionately about it. The Union asserts that the grievor accepted the mandate to teach students in the paramedic programme and to prepare them for professional life and death situations. The Union asks that the grievor's conduct be seen in the context of him dealing with what he felt was a critical shortage of equipment that seriously impaired his ability to prepare the students for their profession. Therefore, the Union argued that even though there may have been strict budgetary limitations at the College, the grievor was legitimately frustrated about what appeared to be indifference to the equipment

shortage situation. The Union acknowledges that the College did spend substantial amounts of money to try to alleviate the problem. But it was stressed that the grievor was unaware of the impact of the money that was spent. From the grievor's perspective, it appeared that his concerns were not being addressed.

The Union also asserts that the grievor had legitimate concerns about how the College was treating students in terms of academic misconduct. It was asserted that the College failed in its responsibility to vigorously investigate dishonesty and failed to signal that dishonesty would not be tolerated. Therefore, it was argued that the grievor was "properly incensed" by the College's lack of apparent concern about student dishonesty. This was said to be particularly problematic given that the department was dealing with students entering a profession where honesty is critical.

The Union argues that all the grievor's frustration culminated with him sitting down at his computer and sending the critical E-mail. It is suggested that if this had happened before the event of electronic mail, the grievor may not have acted as precipitously if he had been required to go through the physical effort of writing the document out by hand and preparing it for mailing. The Union suggests that "perhaps the grievor is a victim of the technology" that allowed him to send out the document without pausing for "sober second thought." In any event, the Union argues that the contents of the document are not sufficient to justify the College's decision that the grievor would be an unsuitable teacher. The Union argues strenuously that the College itself should have paused before deciding upon the termination and instead should have given the grievor the chance to explain why he wrote the E-mail. The Union argues that the College should have taken the time to discover the grievor's intentions and to understand his legitimate concerns about academic issues. It is argued that if the College had done so, it could have simply "rapped his knuckles" rather than terminating his employment.

The Union made it clear that while the grievor only addressed the E-mail to two people, the Union was not taking the position that this was a "private or personal communication." The Union conceded that a person writing an E-mail must realize that it can easily be forwarded to others. The Union conceded that the grievor was "not entirely surprised" that his communication to the department's Coordinator was forwarded to management. Accordingly, the Union did not argue that the E-mail was privileged.

It is also argued that the College's failure to question the grievor to determine his side of the story is proof of bad faith. It was submitted that it was unfair to make adverse judgments about the grievor's suitability as a teacher without interviewing him before reaching a conclusion about his future. The Union also argues that evidence shows that the grievor would not have been terminated if he were a permanent member of staff. In essence, the Union argues that this was a bad faith release and an unjust discharge. Accordingly, it was submitted that the termination of this probationary employee is unwarranted. While the Union concedes that the grievor's conduct was culpable, the Union also stresses that the College acted in bad faith and overreacted to the document.

Further, or in the alternative, the Union stresses nothing demonstrates that the grievor is incapable of accepting correction. The Union argues that the circumstances leading up to the E-mail should be taken into consideration and that the College's handling of the grievor should be seen as a factor in creating the outburst. It is stressed that legitimate criticism is an accepted factor in an academic institution and the grievor's termination could be seen as creating a "chilling effect" upon free discourse in the College setting.

Further, it was argued that the circumstances in this case amount to a “bad faith release” because the grievor was not given the opportunity to “do his best” as a teacher due to the fact that he was not given the quarterly appraisals mandated by the collective agreement. This was said to amount to a failure to live up to the College’s positive contractual obligations.

In summation, the Union argues that the grievor’s conduct should be considered as warranting minor discipline, such as minor corrective action. It was submitted that the grievor’s conduct should be seen as a “momentary aberration” or outburst prompted by mitigating factors created by the College. As such, the Union argues that the E-mail does not justify the termination of the grievor’s career. In addition, it was argued that the College acted in bad faith. Accordingly, the Union requested that the grievor be reinstated and compensated in full.

In support of its submissions, the Union relies upon the following cases: *Foothills Provincial General Hospital and United Nurses of Alberta, Local 115* (1989), 7 L.A.C. (4<sup>th</sup>) 43 (Ponak) and *St. Clair College and Ontario Public Service Employees Union*, unreported decision of Kenneth P. Swan dated June 17, 1996.

Counsel for the College began her submissions by stressing that this is not a case about whether the grievor is a suitable teacher, whether there has been dishonesty by faculty or students, or whether the grievor’s behaviour can be corrected. It was stressed that this is simply a case about whether any bad faith has been proven against the College by the Union. It was stressed that under this collective agreement the Union has to show bad faith in order to overturn the decision to terminate a probationary employee. It was argued that the College can release a probationary employee for any reason so long as it is done without bad faith. The College argues that there has been no bad faith proven in this case. It

was argued that the decision to release the grievor was based upon his demonstrated contempt and disdain for the College, his supervisors and the students. It was submitted that absent bad faith, the Employer has the negotiated right to terminate a probationary employee. Further, it was said that no fault can be found in this case because the grievor made it clear that he did not like the Employer, did not like his job and was looking forward to the summer when he could stop working. It was argued that his testimony also made it clear that he remains critical of the College and its management. Finally, the College points to the fact that the Union has conceded that the grievor's E-mail comments amount to misconduct warranting some discipline. Accordingly, it was submitted that no bad faith has been established against the College in this case.

It was also submitted that the performance appraisal issue is not relevant because the decision to release the grievor was not based in any way upon his performance as a teacher. It was argued that the failure to provide the quarterly performance appraisals cannot be considered bad faith in this case because his misconduct and the reasons for termination cannot be related to the lack of the appraisal. Further, it was said that there is no evidence that the College prevented the grievor from "doing his best" as a teacher.

The College stressed the inappropriateness of the negative comments in the December 17<sup>th</sup> E-mail. The grievor was also criticized for using College equipment during the middle of the working day to undermine his supervisor, criticize students and encourage others to act to the detriment of the College.

The College responded to the Union's submissions regarding the importance of free and critical discourse in a College as well as the assertion that there were "reasonable grounds for the grievor to hold his views." The College asserts that contents of the E-mail as a whole cannot be considered as "fair

comment” and that the Union did not attempt to justify many of the extreme comments in the missive. The College denounces the grievor’s claim that “no disrespect was intended” by stressing the inappropriateness of the Homolka reference. The College also stresses that the grievor’s comments demonstrated that he did not know all the facts when he accused the College of stealing from ambulance services or accused the administration of turning a blind eye to dishonesty.

The College acknowledges that in every work place there will be criticism of management decisions and personalities. However, it was pointed out that employees who criticize management do this at their peril. It was submitted that the fact that the grievor articulated his criticisms in an E-mail simply made a “pretty clear record” of his feelings. Further, the fact that it was done by E-mail should have made the grievor aware of how easily the matter could have been forwarded and become vulnerable to scrutiny. In this regard, the Employer relies upon the decision in *Comosun College and CUPE* , [1999] B.C.C.A.A.A. No. 490 (R, Germaine).

The College turned to the Union’s argument that there was bad faith in the decision not to question the grievor about his actions before the decision to terminate was made. It was submitted that there is no obligation to do so under the collective agreement. Further, it was said that the contents of the e-mail *per se*, taken as a whole, justified the Employer’s action. It was also stressed that the College did not act hastily, but instead thought carefully about its decision before exercising its option of terminating the probationary employee. It was acknowledged that other options might have been available to the College. However, because this is not a discipline case, but a case involving a probationary employee, it was stressed that the only reason a board of arbitration could interfere would be if bad faith were established.

It was stressed that the E-mail and its expressions of negativity and contempt towards the administration were the reasons that the grievor was terminated. It was submitted that the E-mail was the only reason for the termination. Accordingly, it was said that the Union has failed in fulfilling its onus of establishing bad faith and that the grievance should be dismissed.

In support of its submissions, the Employer relied on the following cases: *St. Lawrence College and OPSEU*, unreported decision of Gail Brent dated November 8, 1989, *Seneca College and OPSEU*, unreported decision of I.G. Thorne dated December 10, 1998 and *Algonquin College and OPSEU*, unreported decision of Loretta Mikus dated June 28, 1998

By way of reply, the Union stressed that the purpose of the probationary period is to determine an employee's suitability for a job. This was articulated in the *Algonquin College case, supra*. Accordingly, it was argued that the College has a positive obligation to bring its displeasure to the grievor's attention before taking action against his career. Therefore, it was argued that the College should have discussed its concerns with the grievor rather than jumping to the decision to terminate.

The Union also criticizes the Employer for arguing that the grievor "got his facts wrong" in his criticisms of the College's administration. The Union argues that the College itself did not know all the facts and made erroneous assumptions about the grievor's accusations when it decided to terminate the grievor. Finally, the Union argues that while management retains many rights in this collective agreement, it must exercise these rights in a fair and reasonable manner. It was argued that the lack of adequate process in this case supports the Union's claim that the decision to terminate the grievor was made in bad faith.

### **The Decision**

The relevant provisions of the collective agreement are Articles 27.02 A (i), 27.02 D and 27.02 E:

**27.02 A 1** A full-time employee will be on probation until the completion of the probationary period. This shall be two years' continuous employment except as amended in this Article.

**27.02 D** 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.

**27.02 E** A probationary employee may be released during the first five months of continuous or non-continuous 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 release will be given in writing.

The parties agree that the *St. Clair College* decision, *supra*, of Ken Swan summarizes how these provisions apply:

The St. Lawrence College award concluded that this statement of the proper test was intended to convey the meaning of the following paragraph from the Divisional Court in Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43, an unreported decision which is, however, summarized at 9 A.C.W.S. (2d) 347. That decision, which is quoted at pp. 328-329 of the St. Lawrence College case, includes the following sentence

A probationary employee would be entitled to succeed on a grievance in relation to discharge only if he were able to affirmatively establish that the action of the employer was taken in bad faith in the sense that the decision was motivated by unlawful consideration or resulted from

management actions which precluded the probationary employee from doing his best.

This test, which the St. Lawrence College award characterizes as “illegality or obstruction”, appears on the face of it to be a very narrow reading of the “bad faith” concept identified in the Re Seneca College case. However, the narrower test has been applied in other cases including Re Centennial College and Ontario Public Service Employees Union (preliminary award), unreported, December 8, 1988 (Samuels). In that award, the board of arbitration adopted the St. Lawrence College test, and made the following statement in so doing”

“Bad faith” is not simply “unfairness” or “unreasonableness”, but is conduct which goes beyond these two circumstances. Bad faith involves conduct which is inimical to the contractual relationship itself. It involves illegality or obstruction

The St. Lawrence College award, however, was the subject of an application for judicial review. While the decision of the Ontario Divisional Court in that matter is not reported, the following note appears at 41 L.A.C. (4<sup>th</sup>) 128

Upon application for judicial review, the above-noted award was quashed by the Ontario Divisional Court in a decision dated February 17, 1989 (Campbell, Read and O'Brien J.J [unreported]). The Court held that the board of arbitration erred in limiting its jurisdiction to the tests of illegality and obstruction in considering whether the grievor, a probationary employee, had been terminated in bad faith. The Court found that the collective agreement imposed a code of positive obligations on the employer with respect to the treatment of probationary employees; and for that reason it concluded that the board of arbitration had jurisdiction to consider bad faith in a broader sense. The Court therefore remitted the matter to the board of arbitration to determine whether the conduct of the employer had involved bad faith in that broader sense. In a decision dated November 8, 1989 [16 C.L.A.S. 71], the board of arbitration found that the employer’s power to release the grievor on probation had been exercised in bad faith, in that the employer had

failed in its contractual obligation to give reasons for the release.

It would therefore appear that the Divisional Court had simply reminded the board of arbitration in the St. Lawrence College case of the paramountcy of the language of the collective agreement itself. That paramountcy appears to have been recognized in the Seneca College case, which uses the language “conduct in bad faith intended to subvert the protections given to probationary employees by this clause, or to avoid the obvious obligations of the Employer under this clause.” In conclusion, therefore, we are entitled simply to apply here the test of bad faith as set out in the Seneca College award.

Therefore, the question in this case is whether the Union has established that the grievor was terminated in bad faith as has been interpreted above.

It is important to note at the outset that although the grievor sent the E-mail to only two people, the Union does not take the position that this was a private or privileged communication. The Union conceded that the medium of E-mail could create a reasonable expectation that the document could or would be forwarded beyond the originally intended recipients. It was acknowledged that this would be especially so in this case because the document was sent to the Department Coordinator, who is the faculty’s liaison with management. Therefore, there are no privacy or confidentiality issues to resolve in this case.

The Union and the grievor allege that bad faith has been established by the College’s failure to provide the four-month formal performance evaluations to the grievor. These evaluations are mandated by Article 27.02 D and form part of the “positive obligations” owed to a probationary teacher under this contract. However, the Union’s position with regard to the termination and the evaluations cannot be sustained. The failure to provide the required evaluations could be germane to a

probationary employee being terminated for teaching inadequacies because the lack of feedback could inhibit a teacher from doing his/her best. This was established in the *Seneca College* case, *supra*. However, this grievor was not terminated for teaching inadequacies. Nor does he allege that the lack of feedback inhibited his teaching abilities. Instead, he alleges that the infrequency of the evaluation process deprived him of the opportunity to express his concerns and frustrations about the lack of supplies. His evidence does not link the lack of quarterly appraisals to his teaching or pedagogical development. He also admitted that the lack of appraisals was the result of busy schedules at the College and that he primarily wanted the appraisal process to be his forum to document his concerns.

An avoidance of an "obvious obligation" under the Collective Agreement that has a direct relationship to the reason for the termination may well be bad faith. See *Seneca College, supra*. However, on the facts of this case, the lateness of the evaluation process as it applied to the grievor did not impair or even affect his teaching in any demonstrable way. Further, he was not terminated for any reasons that relate to the evaluation process or his teaching. In addition, while he had a desire to use the evaluation process as a forum to safely record his concerns about management, the evidence shows that these concerns were met. Prior to the December 17<sup>th</sup> E-mail, the Department Chair and the Dean noted and took his concerns about equipment and the academic misconduct seriously, without any negative consequences befalling the grievor. Therefore, despite the College's failure to abide by the collective agreement's mandate to provide the quarterly appraisals, it cannot be found that this demonstrates bad faith. Nor can it be concluded that there is any causal link between the lack of appraisals and the grievor's conduct or termination. For all these reasons, the appraisal issue does not demonstrate bad faith in this case.

It should also be noted that the College acknowledged that dissent and critical discussions are appropriate in an academic environment. The College recognizes that the articulation of concerns in an E-mail sent to two people is far different and much less serious than a public broadcast, in the print or visual media. At the same time, the College takes the position that the grievor's conduct was inappropriate and that his comments exceed the boundaries of legitimate criticism and discourse. In response, the Union argues that while the grievor's comments may warrant some form of disciplinary response, termination is excessive in these circumstances, even for a probationary employee.

The Union's argument might have been persuasive if this had been a case involving the discharge of a permanent employee where the College would have to establish just cause, where progressive discipline is expected and where mitigating factors are to be taken into consideration.

However, this is not a case involving the discipline or discharge of a permanent employee. The Board of Arbitration's role is not to decide whether the Employer had just cause for discipline or whether there were mitigating factors. This is a case involving the termination of a probationary employee. The onus is on the Union to establish bad faith in the decision to terminate the grievor. As the *St. Clair College* citation above instructs, bad faith can be found where there are improper or illegal motivations or where the College fails to fulfil a positive duty towards a probationary employee.

No improper or illegal motivations have been established in the evidence in this case. While the grievor may have been persistent and vocal about his frustrations with the department's administration and the lack of important equipment, the evidence also shows that the administration invited and listened to his concerns and comments. In fact, positive actions were taken in response to his

suggestions. His inventories and his identification of specific needs helped to bring about budgetary allocations that significantly augmented the equipment available for the students. While the grievor may not have been aware of the positive impact of his criticisms, the evidence also shows that he suffered no adverse consequences as a result of suggestions he was making. There is also no evidence that the department responded negatively or adversely to any of the grievor's conduct up until the December 17<sup>th</sup> E-mail. For example, the disagreement he expressed in the December 6<sup>th</sup> E-mail to Ms. Beagan about the student appeals was not considered inappropriate. The evidence also shows that he was considered to be a good and valued teacher. Nothing suggests that the idea of terminating his services even arose until his December 17<sup>th</sup> E-mail was received. Therefore, there is absolutely no evidence that there was any improper motive or design behind the decision to terminate the grievor's services.

This leaves the sole remaining question of whether the failure to interview or question the grievor before deciding upon his termination amounts to bad faith. This is the most troublesome aspect of this case. The grievor was terminated without being asked to explain his E-mail, its contents or its intent. Had he been questioned, he might have been able to moderate the impact of the document by bringing to light some of the substance behinds his rhetoric. It appears that it was only at this hearing that the Dean was given sufficient information to understand why the grievor was accusing one student of lying and why the grievor felt that his colleagues were essentially stealing from some ambulance services. When a career is at stake, the expectations of basic fairness and process are that a person will be given a chance to explain his/her conduct before s/he is terminated. That did not occur in this case. It should have. However, the question for the Board of Arbitration is whether this constitutes bad faith.

Bad faith is a term of art and connotes much more than an imperfect practice. In this context, bad faith connotes a failure to abide by the positive obligations on the employer with respect to the treatment of probationary employees under the collective agreement. See *St. Clair College, supra*. The Employer's failure to interview the grievor in this case prior to deciding upon his termination was unfortunate and inappropriate. The interview could have clarified issues and given the Employer important information upon which to base its decision. The lack of the interview opened the Employer to legitimate criticism and invited the perceptions of unfairness that inevitably give rise to a grievance such as this. However, despite this serious flaw in the Employer's process and conduct, it cannot be concluded that there was bad faith in this case.

First of all, there is no positive contractual obligation to interview an employee before s/he is terminated. Conducting such an interview is basic to good labour relations; however it is not a legal requirement. Second, it is clear from the Employer's evidence that the reasons for the termination were not based on the perceived inaccuracies of the grievor's comments. Rather, the termination was based on the way the criticisms were being articulated in the E-mail. The Dean simply decided that the College did not want to keep someone as a member of faculty who would speak about students and administration in the manner set out in the E-mail. Reasonable people might have had different responses to such an E-mail. An interview with the grievor may have helped to understand why it was written. But it would not have made any difference to the Dean's conclusion that the language and tone of the document itself revealed that the grievor was a person that she would not tolerate on the faculty. Nothing in the extensive evidence of the grievor or the facts revealed in this hearing changed that opinion.

Further, he has not been prejudiced by the lack of questions about his E-mail. The testimony at this hearing revealed that an interview would not have

made any difference to the College's or the grievor's positions. The grievor remains steadfast in his criticisms of the College administration and the College remains steadfast in its concerns about the grievor's comments and attitude. Some of his comments involved a suggestion that the faculty should stop the practice of borrowing equipment from ambulance services. While the grievor may have had legitimate reasons for thinking that this would be a good idea, the evidence also establishes that these practices are long established and in the best interest of the College and the students. Therefore, the grievor's suggestions amount to something that could have undermined the programme. It is significant that this was one of the College's concerns about the E-mail at the time the Chair decided to terminate his services. Similarly, the grievor still maintains his position on this issue. This shows that the lack of questioning before he was terminated has not prejudiced him.

The lack of an interview with the grievor indicates poor practice. But it does not amount to bad faith because it did not deprive him of any contractual protections. Therefore, while it is unfortunate that the decision to terminate was made without any questioning of the grievor, it cannot be concluded that this prejudiced the grievor or amounts to bad faith.

It must also be recalled that the Union acknowledged that the contents of the E-mail warranted some disciplinary response. The College based the termination solely on the E-mail and it has been concluded that there is no other evidence of bad faith. Under this collective agreement, the College has a wide discretion in deciding whether to continue the services of a probationary employee and can only be overruled if the termination is based on bad faith. Here, where the Union acknowledges some misconduct on the grievor's part in sending such intemperate language via the E-mail, it cannot be said that the College reacted without foundation. Therefore, the College had a rational basis for taking action against the grievor.

Finally, it must be noted that debate and critical analysis are integral aspects of a free society. They are especially important and need to be fostered in an educational environment. Employers must be cautious about taking any action that would stifle healthy discussion. Arbitration boards must be careful to protect contractual rights in a workplace. Freedom of speech and expression are valued rights in society. One must be cautious about suggesting that someone could jeopardize a career because of immoderate language. However, in this case the Union has taken the position that the grievor's December 17<sup>th</sup> E-mail was not privileged and was intemperate enough to have attracted some discipline. Indeed, the remarks invoking the Homolka analogy to the College's treatment of the students go beyond the boundaries of propriety. Further, other comments suggested that the grievor would no longer co-operate with some College practices and would encourage others to follow suit.

The fact that the grievor has committed actions that are worthy of discipline must also be viewed in the context of the Union failing to show any bad faith or any improper motivations against the grievor. It has not been established that the failure to provide performance appraisals in any way inhibited the grievor's ability to perform as a teacher. While the College could have and should have investigated this matter more thoroughly before the decision to terminate was taken, the evidence establishes that there was no contractual breach and no prejudice resulting from this. Further, the existence of rational grounds that prompted the termination and the absence of any other evidence of bad faith result in a situation where a Board of Arbitration has no basis to interfere with a decision to terminate a probationary employee under this Collective Agreement.

Accordingly, for all these reasons, the grievance is dismissed.

DATED at Toronto, Ontario, this 5th day of March, 2003



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Paula Knopf - Chair

"Michael Riddell"

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Employer Nominee

"Sherril Murray"

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Union Nominee

I concur

I dissent. See attached

## Dissent

The grievor, had an honestly held belief that he was conducting classes at Centennial College using stolen equipment.

The grievor, had an honestly held belief that Centennial College is graduating students without meeting the requirements of the Ambulance Act, the regulations and Ministry guidelines.

It is clearly an act of bad faith to release an employee for objecting to these conditions.

The grievor testified that there were several pieces of equipment marked “Property of Toronto” and “Property of Peterborough”. The college did not dispute that.

The Dean testified that she did not understand the grievor’s reference to “borrowed”. With all due respect to the Dean, if that is true, it is extraordinarily difficult to understand why a person who is as well qualified as the grievor, whose extreme moral dilemma drives him to writing an unsuitable email, continues in his release from employment. Once that dilemma was brought to the Dean, during these proceedings, one would think the college would reinstate. The Dean was questioned; when this “new” information was brought to your attention, did it change your mind? She replied, no, not at all.

The outrage of morality and ethics aside, it has long been held in the college system that “bad faith” has been characterized as management actions, which precluded the probationary employee from doing his best. Re: Seneca College and Ontario Public Service Employees Union (Hacker), unreported, September 17, 1986 (Swan).

Management failed to adequately communicate to the grievor that he was not forced to work with stolen equipment. Not until this arbitration hearing was the grievor informed that management believed they have some sort of legal arrangement with ambulance services that permits the use of their equipment. If the “agreement” is in fact true, isn’t it “bad faith” not to tell the grievor of the arrangement and reduce his fears? It was, after all, this “honestly held belief” that created the grievor’s frustration.

Once again, it is extremely difficult to understand why a learning institution would release someone from employment who held such a strong commitment to not working with or exposing students to equipment obtained unlawfully.

We heard evidence from Dean Ferreira regarding the inadequate funds available to purchase or maintain the level of sufficiency of equipment necessary for the paramedic program. But we also heard that the college continues to graduate students from that program.

This is consistent with the grievor’s email, which speaks to the students watching movies of the use of Ministry of Health required equipment rather than having what he believes to be the required experience in the use of equipment.

The grievor’s evidence regarding student “A”, was that she was permitted to write an exam without the required hours prescribed by the Ministry guidelines. Apparently, when the Dean read of that it did not serve to change her mind either, because Student “A” was put on an “honesty contract” and permitted to write an exam. The college did not present evidence that the student in fact had completed the required work; she was just moved on. The Dean didn’t seem to mind that either. In fact she testified that although there was in fact a student policy regarding cheating, there were many exceptions to that characterization.

While one may admire the Dean’s sense of fairness and cultural sensitivities, I hope my family doesn’t require the services of an ambulance attendant from Centennial who skipped or cheated on the practicum on whatever life saving procedure we require.

Of course, the Chairperson of the Board is correct when she states that none of the alleged illegalities or fraudulent actions were in evidence. However, that is really not the issue as far as the determination of this award.

In an attempt to expedite this hearing, it was proffered by the Chair and accepted by the parties that the grievor and management both held their own convictions to be true. The hearing proceeded on the common understanding that the grievor wrote what he did in reaction to his belief. The college reacted to his email and dismissed him asserting that his beliefs were incorrect, but without imparting that knowledge to the grievor. Therein lies the element of bad faith.

It is also true that the Union conceded, as did the grievor, that some form of discipline was warranted for the content of the email. The union quite specifically questioned the Dean as to that aspect, inquiring as to why she did not speak to the grievor, explain the college's position with regards to the events and give him a verbal warning.

Although the collective agreement does not require an exit interview it is indeed an arbitrary decision to release without communicating with the grievor as to his motivation for the email.

It is an act of discrimination against probationers to release a probationary employee without educating the newly hired as to the policies of the institution, the guidelines of the Ministry and the regulations under the applicable Act. This should have been accomplished through **the application of the performance review regime, required by the collective agreement.**

Finally, it is an act of bad faith to require an employee to work in what he believes is a setting of unlawfully obtained equipment and release him for threatening to expose the

practice by writing an email that suggests he will ask his fellow workers to withdraw from the practice of illegal procurement.

All of which is respectfully submitted, Sherril Murray, Union nominee.

DATED at Toronto, Ontario this 5<sup>th</sup> day of March 2003.

## ADDENDUM

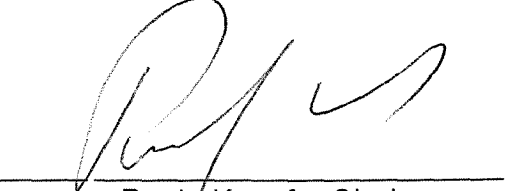
Ms. Murray's dissent accurately sets out the state of the jurisprudence in this sector. Probationary employees are protected under the collective agreement from management actions that preclude them from doing their "best." This is why the "good faith" doctrine has been applied to probationary releases.

The Dissent also highlights the many ways that the grievor could have been treated better and/or had some of his concerns alleviated.

However, the fact remains that the grievor's reaction to all the events at the College was inappropriate. The contents and the nature of his email warranted a disciplinary response. He admits this. While the benefit of hindsight suggests ways that the grievor could have been listened to and mentored more sensitively, this does not mean that the evidence establishes that he was prevented from doing his best. On the contrary, the evidence shows that he taught and communicated effectively.

But most importantly, he was not terminated for what he thought or for his vocalization of his views. He was terminated because of the admittedly inappropriate nature and contents of the email. The collective agreement allows management to terminate a probationary employee who demonstrates unsuitability through culpable conduct. In a nutshell, that is what has happened in this case.

DATED at Toronto, Ontario this 5<sup>th</sup> day of March, 2003.



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Paula Knopf – Chair