

97B 789  
CAAT (A)  
Local 657

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**CANADORE COLLEGE**

*(The College)*

*- and -*

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION**

*(The Union)*

**AND IN THE MATTER OF THE GRIEVANCE OF S. SETO-DENNY - #97B789**

**BOARD OF ARBITRATION:**

Kenneth P. Swan, Chairman  
Barry Matheson, College Nominee  
W. Majesky, Union Nominee

**APPEARANCES:**

**For the College:**

D.K. Gray, Counsel  
S. Taus, Dean

**For the Union:**

Ursula Boylan, Counsel  
Dean Barner, President, Local 657  
Peggy Morrison, Chief Steward  
Sue Seto-Denny, Grievor

## A W A R D

A hearing in this matter was held in North Bay, Ontario on January 23, 1998, at which time the parties were agreed that the board of arbitration had been properly appointed, and that we had jurisdiction to hear and determine the matters at issue between them. That agreement as to our jurisdiction was, however, limited by a preliminary objection raised by the College to the effect that the Union was estopped from proceeding with the present grievance.

The grievance here at issue is that of Ms. Sue Seto-Denny dated October 10, 1996, to the effect that she was improperly laid off from her position as a Professor in the Correctional Worker Program at the College. There is no dispute as to the facts on which this matter is to be resolved, and they were entered on consent as a part of the submissions of counsel.

The issue began on June 11, 1996 with notice of lay-off to Professor Paul Condon, a Professor in the School of Law and Justice in the College. The letter announced a permanent lay-off effective June 14, 1996. On June 28, 1996, Professor Condon filed a complaint alleging that he had the competence, skill and experience to displace another full-time employee.

Complaints and grievances are dealt with in Article 32 of the collective agreement, the relevant provisions of which are as follows:

### **Article 32 GRIEVANCE PROCEDURES**

**32.01** Articles 32.02 to 32.05 inclusive apply to an employee who has been employed continuously for at least the preceding four months.

#### **Complaints**

**32.02** It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or

have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the employee.

### **Grievances**

**32.03** Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under 32.12C) in the following manner and sequence provided it is presented within seven days of the immediate supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College's written decisions at each step shall contain reasons supporting the decision.

#### **Step One**

An employee shall present a signed grievance in writing to the employee's immediate supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought. The immediate supervisor shall arrange a meeting within seven days of the receipt of the grievance at which the employee, a Union Steward designated by the Union Local, if the Union Local so requests, the Dean of the Division of the immediate supervisor and the immediate supervisor shall attend and discuss the grievance. The immediate supervisor and Dean will give the grievor and the Union Steward their decision in writing within seven days following the meeting. If the grievor is not satisfied with the decision of the immediate supervisor and Dean, the grievor shall present the grievance in writing at Step Two within 15 days of the day the grievor received such decision.

#### **Step Two**

The grievor shall present the grievance to the College President.

The College President or the President's designee shall convene a meeting concerning the grievance, at which the grievor shall have an opportunity to be present, within 20 days of the presentation, and shall give the grievor and a Union Steward designated by the Union Local the President's decision in writing within 15 days following the meeting. In addition to the Union Steward, a representative designated by the Union Local shall be present at the meeting if requested by the employee, the Union Local or the College. The College President or the President's designee may have such persons or counsel attend as the College President or the President's designee deems necessary.

In the event that any difference arising from the interpretation, application, administration or alleged contravention of this Agreement has not been satisfactorily settled under the foregoing Grievance Procedure, the matter shall then, by notice in writing given to the other party within 15 days of the date of receipt by the grievor of the decision of the College official at Step Two, be referred to arbitration.

Not having achieved satisfaction at the complaint stage, the grievor filed a formal grievance on July 18, 1996, in which he identified two faculty members in the Correctional Worker Program whom he asserted he was entitled to displace. The junior of those two employees was Professor Seto-Denny. The Step One meeting occurred on July 25, 1996, and the grievor attended with Professor Mike deMoree, his Union Steward. On August 7, 1996, Dean Sylvia Taus, Dean of the School of Law and Justice, wrote to Professor Condon allowing his grievance in the following terms:

In my opinion, you do possess the skill, competence, and experience to fulfill the requirements of the positions you designated in your grievance, and I have requested that your lay-off notice be rescinded.

The result was that, pursuant to paragraph 27.06(ii), Professor Condon displaced the grievor, who herself was unable to displace any one else. She was therefore laid off, and filed the grievance which is now before us.

Clause 27.06(ii) provides only two conditions to be met to displace another full-time employee:

Failing placement under 27.06(i), such employee shall be reassigned to displace another full-time employee in the same classification provided that:

- (a) the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned;

(b) the employee being displaced has lesser seniority with the College.

The grievance is based on a denial that Professor Condon had the competence, skill and experience to fulfill the requirements of the grievor's position, from which he bumped her, and requests her reinstatement to her former position.

There is no evidence before us as to what was said in the course of the Step One meeting on Professor's Condon's grievance, nor properly should there be; there are sound policy reasons to preserve the traditional privilege of grievance procedure discussions. There is an agreement between the parties, however, about what was not said. There was no reference whatsoever to the possibility that Professor Seto-Denny might file a grievance if she were displaced on the basis of a settlement of Professor Condon's grievance; that possibility was simply not adverted to, and there is nothing to indicate that the parties turned their minds to the result if such a thing should happen.

The College asserts that the Union is estopped from taking the present case to arbitration. It argues that by seeking the result which it sought at the Step One meeting on Professor Condon's grievance, it must be held to have disqualified itself from now seeking what is in effect exactly the opposite result from the present grievance.

In most cases, parties dealing with the settlement of a grievance which could have an impact on other employees, possibly even a serial impact on more than one employee, will discuss the implications of the settlement and try to agree on a global solution. In those circumstances, the settlement would normally dispose of all of the other possible claims at the same time. This case involves the unusual situation where no such global solution was attempted, and raises the difficult

question as to which party bears the risk when such a settlement takes place.

The parties were only able to refer us to two reported cases dealing with this issue, *Re Toronto Hydro and Canadian Union of Public Employees, Local 1* (1987), 28 L.A.C. (3d) 223 (H.D. Brown) and *Re Boeing of Canada Ltd. and Canadian Automobile Workers, Local 2169* (1990), 12 L.A.C. (4<sup>th</sup>) 118 (Schulman). We have been unable to find any other awards which deal directly with this issue. Both of these awards are, however, based on fact situations which are sufficiently different from that before us to call into question their applicability here.

The *Boeing of Canada Ltd.* case involved a job posting and the grievances of two unsuccessful applicants. In the course of settlement discussions, the Union convinced the Employer that the successful applicant was ineligible for the posted position, and the Employer offered to settle the matter by appointing one of the two grievors to the position. This offer was made in writing, including an agreement that "this resolves the above-named grievances". The Union, because of provisions in its constitution, was without authority to withdraw the second grievance without the consent of the grievor, and although it was thought to have little chance of success, the Union indicated to the Employer that it would not withdraw the grievance, and amended the settlement offer to refer only to settlement of the grievance of the employee who was next awarded the position. On that basis, the Employer went ahead and awarded the position to the other employee and returned the initial successful applicant to his own position.

Subsequently, the Union took a different view of the chances of success of the other grievance, and processed it through to arbitration. The Employer raised the matter of estoppel as a preliminary objection, and the arbitrator dealt with the issue in the following terms:

Counsel for the company and for Mr. Salkeld take the position that the settlement between the company and the union of Mr. Salkeld's grievance renders Mr. Ans' grievance inarbitrable. They rely on the principle that where in the course of a grievance procedure the parties have dealt with a particular grievance so that it is settled, that would be a bar to the arbitration of another grievance which deals with the same subject-matter. The position is that the two grievances are "virtually identical". There was one job at stake. Only one of the two grievors could have been awarded it. When the union signed ex. 4 and participated in Mr. Salkeld being awarded the position and back pay, it became estopped from proceeding with Mr. Ans' grievance. Counsel for the union takes the position that nothing happened which prevents the union from proceeding with the grievance. The union at no time said or reduced to writing expressly or by implication that Ans' grievance was to be withdrawn.

I have read the authorities which were cited to me and the references which are set out in those authorities. The following principles appear to apply where several grievances are filed disputing the award of a job after a posting:

1. Members of the union have under the collective agreement the right to grieve and proceed to arbitration in connection with a complaint that the company has breached a provision of the collective agreement unless and until the company can show that the union is precluded from proceeding with it.
2. The union has conduct of the grievance, although it may arise from the impact of a company's action on an individual member of the union.
3. The union may process any number of complaints either jointly in one grievance or by separate grievances.
4. The union need not make an election as to which grievance it wishes to proceed on and may set down for hearing the claims of several claimants to one position.
5. The different claims of the one position should be heard together.
6. The settlement by the union of one grievance will be a bar to the arbitration of a second grievance which deals with the identical subject-matter.
7. The fact that a union misapprehended a fact will not excuse it from being bound by the terms of the settlement which it has made.
8. An employer need not concern itself with the constitutional requirements of a union. If a settlement is made, it will bar a second grievance, irrespective of the internal requirements of the union.

I find that the company has failed to satisfy the onus which lies on it to prove that by virtue of ex. 4 the union is barred or estopped from proceeding with ex. 2 (grievance No. 473). If Mr. Salkeld and Mr. Ans had jointly filed a grievance the settlement would have prevented Mr. Ans from proceeding with the matter. If the settlement agreement (ex. 4) had been signed in its original form and without ex. 8 being written

and if the union had clearly led the company to believe that the Ans grievance was in fact being withdrawn, so that the company had acted to its detriment when it awarded the position to Mr. Salkeld and indemnified him for back pay, the union would be estopped from proceeding with the Ans grievance. The union, however, made it clear that the committee did not have the authority to withdraw the Ans grievance. The committee thought that the Ans grievance was doomed to fail, but did nothing which prevented it from changing its mind and proceeding with the grievance. In order to establish an estoppel the company was required to prove that the union gave an express or implied assurance that the Ans grievance would be withdrawn. The evidence falls short of establishing this. Moreover, although the two grievances are similar they are not identical.

The obvious distinction between that case and the one before us is that the issue of the continuing existence of the second grievance was raised in the course of settlement discussions, and the Union expressly declined to agree that it would be settled or withdrawn. The Employer nevertheless went ahead with part of the proposed settlement, although it had clearly been put on notice that the other part, the withdrawal of the second grievance, was not accepted by the Union. In such circumstances, the Employer could hardly argue that it had been induced to act in reliance upon a representation by the Union, when that very representation had been repudiated by the Union when it was sought by the Employer.

The *Re Toronto Hydro* case is somewhat closer to the facts before us. There, a posted job was awarded to one employee, and a junior employee grieved, claiming superior qualifications. In the course of a grievance meeting, the Employer accepted that proposition, and awarded the position to the junior employee, returning the initially successful employee to her previous position. That employee promptly filed her own grievance, to the arbitration of which the Employer objected on the basis that the Union was estopped from proceeding. At pp. 227-230, the arbitrator deals with this issue as follows:

Both parties agree that under this collective agreement the union has carriage or, in other words, the right to initiate and proceed with a grievance under the grievance and arbitration provisions of the agreement. The reference in art. 41.03 is a "grievance *for* an unsuccessful applicant" [emphasis added]. The fact of proceeding with a grievance in that respect and resolving the grievance directly with the employer in satisfaction of that grievance, does not preclude the union from proceeding with another grievance for an unsuccessful applicant under art. 41.03, even though the second grievance deals with a complaint about the employer's action concerning the same posted job, as indicated in the facts of this matter. To support the employer's proposition would be to deny the right of an employee to refer a grievance to the union steward under art. 19.03 and to have the union steward initiate the grievance, or pursuant to art. 41.03, deny the union's right to proceed with a grievance at Step 3 where that employee is an unsuccessful applicant for the posted job. The company's position therefore is, in my opinion, in direct conflict with art. 41.03 and the grievance procedure which allows for a grievance from an unsuccessful applicant.

Clearly the grievor became an unsuccessful applicant after being removed from the position which she had been awarded by the employer under the posting, in the same way as Ms. Cowan became an unsuccessful applicant when that position had been awarded by the grievor. Had there not been a settlement of the Cowan grievance by the parties, it could have been submitted to arbitration on the issue arising under art. 41.01 concerning the competition between two applicants for the job. The fact that the Cowan grievance was resolved by the parties, which meant that the incumbent was removed, cannot preclude that employee from disputing that action, which right is provided, specifically art. 41.03. Otherwise the parties could subvert individual rights of complaint by agreement in the grievance procedure, without any right of challenge, in circumstances where the agreement provides for a right to grieve as an unsuccessful applicant. That surely is not the meaning and intent of art. 19 of the collective agreement, or those provisions in conjunction with art. 41.03, which provides the mechanism for a complaint concerning a job promotion.

The company's decision that it had wrongly promoted the grievor to the position in the first instance, is a separate and distinct issue from that agreement between the parties, that Ms. Cowan had superior qualifications and should have been given the job. There is no determination of the factors in art. 41.01 with regard to the grievor in comparison with the qualifications of Ms. Cowan through the grievance procedure. It was a unilateral action in the first instance to award the job to the grievor. The company agreed with a subsequent grievance and reversed that decision following representations made by the union and Ms. Cowan at a grievance hearing. That action by the parties, although being an enforceable agreement between them for that grievance, cannot be taken to exclude a complaint by the incumbent whose interest was so adversely affected by that agreement. At the time of the complaint raised by

the incumbent when she was removed from the position, the union was not prohibited from taking that grievance for her as an unsuccessful applicant which she became after being removed from the job. That is not inconsistent with the union's right and responsibility in entering into an agreement to settle a grievance. These facts do not disclose the basis for the application of the principles of *res judicata*, as the matter at issue has not been adjudicated upon. The parties cannot foreclose the right of an affected employee to use the grievance procedure provided in the agreement pursuant to the *Labour Relations Act*, R.S.O. 1980, c. 228, to obtain a final and binding award of the issue. I find that the agreement to settle the Cowan grievance does not bar the union from proceeding with a subsequent grievance under art. 41.03, for another applicant for that job whose interest has been adversely affected by that agreement.

Article 4.05 of the collective agreement is:

- 4.05 The successful applicant, directly affected by a promotion grievance may attend, at no loss in straight-time pay, the directly related arbitration hearing.

That reference indicates that there is a right concerning a promotion grievance, which is consistent with art. 41.03 and the provision for arbitration under art. 4.02 of a difference not otherwise resolved between the parties.

The grievance of Ms. Engblom has not been resolved and contains an issue, albeit concerning the same job now awarded to Ms. Cowan which is different than previously dealt with by the parties in that the grievor has claimed the job under art. 41.01 and is therefore entitled to have her claim under that article proceed to arbitration for determination of whether she is entitled to the job as against Ms. Cowan. If the grievor's rights have been violated under the provisions of the collective agreement then she does have the right to claim relief which she has done in her grievance. I cannot find that the settlement of the Cowan grievance was intended or did in fact settle any issue raised by the grievor as a result of the effect of that agreement between the parties concerning the Cowan grievance.

I find that an employee whose employment interest is obviously adversely affected by such an agreement concerning her promotion to the job posting, cannot be denied under this collective agreement, with a particular reference to art. 41.03 her right to complain of her removal from the job awarded to her. Nor can the union be denied the opportunity to initiate her grievance as an unsuccessful applicant which she became on being dispossessed of the position following the settlement of the Cowan grievance.

The union had one grievance to process with the company for an unsuccessful applicant after the appointment of the grievor to the position and it processed that

grievance under art. 41.03 that was settled with the company in favour of that grievor (Cowan). The grievor could not at the same time, act for the interests of the then incumbent as she only had a complaint and became a grievor after she was removed from the job in question in the Cowan grievance. Upon her request the union was required to initiate a grievance for her as an unsuccessful applicant and even though both grievances deal with the same job, the union is not precluded by the resolution of the Cowan grievance, from initiating and proceeding with a complaint from another employee who became the unsuccessful applicant. To do so would be contrary to art. 41.03 and be a denial of a substantive right under the collective agreement.

The unique facts in this case distinguish it from the facts and resolutions reached in the cases referred to above. The general principles set out in those cases concerning the responsibilities and rights of the parties to a collective agreement and to enter into agreements to settle grievances between them is not at issue, nor does it bear on this matter. As stated in the *Zehrs* case, once a grievance is settled a further grievance on the same matter cannot be entertained. In my opinion this case does not involve the same matter of the grievor's entitlement to the job in comparison or against the right of Ms. Cowan who has been appointed following the employer's initial action to appoint the grievor to that job. The settlement of the Cowan grievance did not settle that issue. The discussion and conclusions with regard to the processing by a union of multiple grievances, has been dealt with and is found in the *Labatt's* case, *supra*.

Very simply and directly, I find that the grievor can challenge through the grievance procedure in the collective agreement, the action of the employer in removing her from a position to which she had been promoted, after being notified that through a settlement of a grievance to which she was not personally a part or otherwise involved, was settled by the parties. While the union acts as agent for all employees in the bargaining unit and can bind their interests by agreement with the employer, that does not extend in these particular circumstances to preclude the right of an unsuccessful applicant for a job promotion to grieve under art. 41.03 in the particular circumstances from which this issue arose as set out above. The parties have agreed to a separate procedure in promotion disputes, the use of which cannot be found to be an abuse of the grievance procedure.

We have quoted so extensively from this award because, whether or not it correctly captures the meaning of the collective agreement there at issue, it appears to raise a number of serious concerns of principle. The first of these is that, if the reasoning in the *Toronto Hydro* case is carried to an extreme, no grievance relating to the competing rights of two or more employees could ever

be resolved by settlement between the parties. As a matter of public policy, arbitration ought to encourage settlement, not to discourage it.

In that light, we reject the observation in *Re Toronto Hydro* that there can be separate and distinct issues involved in circumstances where two employees are in competition for the same job under one provision of the collective agreement. It seems obvious to us that, in the circumstances of *Re Toronto Hydro* as in the circumstances of the case before us, the correct application of the collective agreement to the facts must lead to a result which favours one employee, and that the other employee will necessarily be disappointed with that outcome; it is a classical zero-sum situation. Where there are more than two employees, there still can only be one correct outcome.

What the *Toronto Hydro* case seems to say is that the disappointed employees must always have the right to grieve, even where they are disappointed by a decision in which both the Employer and the Union concur. Otherwise, the award says, “the parties could subvert individual rights of complaint by agreement in the grievance procedure, without any right of challenge, in circumstances where the agreement provides for a right to grieve as an unsuccessful applicant”.

It may very well be that, given the language of that particular collective agreement, the right to grieve is guaranteed. But the right of an individual employee to file a grievance is a very different right from the right of the Union to require arbitration of that grievance, and it is in the equation of these two rights that, with respect, the award goes astray.

As noted in the excerpt set out above, both parties in the *Toronto Hydro* case agreed that the Union had carriage of the grievance, the right to initiate and proceed with it under the collective agreement. But the right to proceed with the grievance must also include the right not to proceed. Arbitrators have always held that right, in most circumstances, belongs to the Union: see

Brown and Beatty, *Canadian Labour Arbitration (3d Edition)* ¶ 2:3230, at page 2-103:

Unless there are specific provisions in a statute or a collective agreement that vests the right to arbitrate in the individual employee, that right belongs to the parties, the union and the employer, and it is accepted that it is an incident of that right to be able to settle, compromise or withdraw a grievance. Thus, where the union withdraws or denies a grievance, it has been held not to be arbitrable at the instance of individual grievors nor by an employer.

To do this is not to “subvert individual rights of complaint by agreement in the grievance process, without any right of challenge”. It is the obligation and the right of the Union, as a party signatory to the collective agreement, to enforce an interpretation of the language of the collective agreement that benefits the collectivity. If an employee disagrees with the particular outcome determined between the Union and the Employer, the employee’s right is not to require the Union to go to arbitration of a grievance challenging that outcome, but to make a complaint based on a breach of the duty of fair representation by the Union.

In the present case, the Union argues that, if the College’s argument is accepted, the grievor would have been better off if Professor Condon’s grievance had not been allowed, and had gone to arbitration. In those circumstances, the grievor would have been entitled, the Union asserts, to notice of the hearing and independent representation as an employee potentially affected, pursuant to *Re Bradley et al. and Ottawa Professional Fire Fighters Association et al.* (1967), 63 D.L.R. (2d) 376, [1967] 2 O.R. 311 (Ont. C.A.).

Whatever may be the status of an employee at an arbitration hearing, where the rules of natural justice are applicable (and it is fair to say that the question of the rights of an employee where there is only a qualifications threshold applicable before seniority rights apply, as here, is open

to considerable debate) such rights do not apply in the grievance procedure, where the only obligation on the Union is to act in a way which is not arbitrary, discriminatory or in bad faith. The only arbitration award that hints at the possibility that employees may have a right to block a settlement of a dispute to which they do not consent is *Re Pacific Western Airlines and International Association of Machinists and Aerospace Workers* (1985), 22 L.A.C. (3d) 396 (Munroe), but that exception relates to employees who have already been granted independent intervener status in an arbitration which has already commenced. The following observation by arbitrator Munroe, at page 406, is of interest:

I am not suggesting that in every instance of intra-union conflict, an employer is entitled with impunity to abdicate its responsibility to manage the enterprise, e.g., by insisting that the trade union make hard choices between the competing rights or interests of employees in the bargaining unit. But nor should a trade union always be permitted to shuck off *its* responsibilities by passing the problem to an arbitration board. Surely, a point can be reached when an arbitration board is entitled to exercise its remedial mandate in such manner that the prejudicial impact on the employer of the union's internal differences is not undue.

Having made these general observations of principle, however, we must ultimately return to the collective agreement and the particular fact situation before us. Whatever the Union did in the course of the Condon grievance, it did not expressly deal with the present grievance, which did not even exist at the time. There cannot therefore be said to be a settlement, either express or implied, of the grievance now before us. If the College is to succeed, therefore, it must do so on the basis of an estoppel.

An estoppel requires that there be a representation, which may arise from either words or conduct, intended to be relied upon by the other party, and in fact relied upon to produce a change

in the legal relations between them. Because there is no evidence of any express representation, the representation must arise entirely from the conduct of the Union in attending, through its steward, the Step 1 meeting on the Condon grievance which seems to have induced the College to change its mind.

It is of interest that the present collective agreement does not, as did the collective agreement in the *Toronto Hydro* case, confer carriage of the grievance on the Union. Clause 32.03 provides that a grievance is initiated at Step 1 when “an employee shall present a signed grievance in writing”. The Union Steward’s presence at Step 1 is not mandatory, but is at the discretion of the Union Local. While the decision coming from the Step 1 meeting is to be given to “the grievor and the Union Steward” in writing, it is only if “the grievor is not satisfied with the decision” that the matter proceeds to Step 2 where, once more, “the grievor shall present the grievance”. Only at the arbitration stage, after an unsatisfactory response at Step 2, does clause 32.03 refer to the parties to the collective agreement, namely the Union and the College.

What occurred here therefore arose from a Step 1 meeting initiated by the grievor’s filing a written grievance. The Union attended, but its attendance was discretionary. There is evidence that the grievor took a significant part in arguing his own case, but we do not preclude the possibility that the Union also made supportive submissions. Thereafter, the Dean, on behalf of the College, gave her decision at Step 1 allowing the grievance.

Obviously, the College altered its legal position at that time, but it is simply impossible to conclude from the evidence that it did so on the basis of any representation by the Union that no other grievance would arise. It is common ground that there was no express representation in words. We are simply unable to find that the Union’s attendance through its steward at the Step 1 meeting


from which the College's change of heart ensued constituted a representation by the Union that its presence would bind any other employee to a favourable decision reached by the College. That is simply too much baggage to put on the Union's participation at such an early stage of the grievance procedure.

Therefore, with a great deal of reluctance, since we think that settlements should be encouraged and resort to arbitration discouraged by what occurs in the grievance procedure, we are unable to find that the College's preliminary objection has been made out. There may be other arguments available to the College which could affect the outcome of this matter on the merits, whether based on estoppel, issue estoppel, or some other theory, but the merits are not now before us.

We simply find that, whatever the wisdom or labour relations effect of pursuing this grievance to arbitration, we can find no legal bar to prevent the Union from doing so.

This matter may therefore be scheduled for a hearing on the merits at a time convenient to all of the participants.

DATED AT TORONTO this 13<sup>th</sup> day of October, 1998.

  
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Kenneth P. Swan, Chairman

I dissent; see attached

“Barry Matheson”  
\_\_\_\_\_  
Barry Matheson, College Nominee

I concur

“W. Majesky”  
\_\_\_\_\_  
W. Majesky, Union Nominee

Re: Canadore College and O.P.S.E.U.  
S. Seto-Denny Grievance- #97B789

Oct. 9/98

DISSENTING OPINION of COLLEGE NOMINEE

I have carefully reviewed the Award of the Chairman and with all due respect, I regret that I am unable to concur with the majority award in this matter.

In the summer of 1996 the College issued a lay-off notice to a faculty member, Paul Condon, who subsequently submitted a grievance that he was improperly laid-off. Mr. Condon, with the support of his Union, claimed that he had the competence, skill and experience to teach in the Correctional Worker Program and as he had more seniority he should not have been laid off.

The College, on hearing the arguments put forward by Mr. Condon and his Union Representative, reviewing the situation and withdrew the lay-off notice to Mr. Condon and issued one to the employee with lesser seniority, Ms. Seto-Denny.

Ms. Seto-Denny then submitted a grievance, with the support of her Union, claiming her lay-off was improper. Her argument appears to be that her qualifications are better than Mr. Condon's and thus he shouldn't have been allowed to bump her, the junior employee.

The grievance procedure under Article 32 of the Collective Agreement clearly involves the Union in each step of the process. With the Union's involvement and acceptance of the settlement of the Condon grievance, I would have allowed the College's preliminary objection and dismissed the grievance. As Counsel for the College indicates the Union is trying to "suck and blow" at the same time.



E. Matheson  
College Nominee