

ARBITRAL AWARD

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Loyalist College,

College,

- and -

Ontario Public Service Employees Union,

Union

BEFORE: Michael Bendel, Chair
Robert J. Gallivan, College Nominee
Cam Masse, Union Nominee

APPEARANCES: For the Union:

Richard A. Blair, Counsel
Garry Warren
Richard Spence, Grievor

For the College:

D.K. Gray, Counsel
D. Butler, Vice-President, Human Resources
M. Piercy, Vice-President, Academic

Hearing held in Belleville, Ontario, on April 24, 1996; March 3, 4 & 5, and April 7 & 8, 1997.

INTRODUCTION

The grievances of Mr. Richard Spence, a professor in the Business and Computer Studies Department, challenge the employer's decision to impose two suspensions without pay on him, for a total of eight weeks, for the alleged sexual harassment of two students.

In an interim award dated July 19, 1996, we explained the process followed by the College in investigating the harassment complaints and in deciding to suspend the grievor. In brief, the College established Boards of Hearing, pursuant to its policy on discrimination and harassment. The Boards heard the grievor, the complainants and other witnesses, concluded that the complaints were well-founded, and decided what the appropriate penalty should be. The College implemented the Boards' decisions. In our interim award, we decided (with board member Gallivan dissenting) that, while we would admit the reports of the Boards of Hearing for the purpose of establishing the process followed by the College, we were "not prepared to give any weight to the findings of the Boards of Hearing in deciding whether the suspensions imposed on the grievor were for just cause."

Following the issuing of our interim award, we held further hearings to receive evidence and arguments on the substance of the grievances.

The grievor denies any wrongdoing on his part. There is a sharp conflict between the grievor's version of events and the complainants'. The union does not dispute that, if the events were as described by the complainants, the grievances would have to be dismissed.

The grievor, it might be noted, was 51 years old at the time he gave his testimony.

COMPLAINT OF "STUDENT C"

Student C's version of events

Student C, whose date of birth is August 20, 1974, registered in the Business Sales Program at the College in August 1994. It was a two-year program. She lived in residence at the College.

Student C testified that there were about 28 students in the first year of the program, of whom only four or five were women. The grievor taught most of the first-year courses.

The first significant contact between the grievor and Student C occurred after the term was a couple of weeks old. Student C walked out at the end of a class one day at the same time as the grievor. The grievor sat down to have a cigarette, and Student C sat down next to him to chat. Student C was wearing a new outfit which her mother had just bought for her. The grievor had recently been talking to his students about appropriate business attire. Student C asked the grievor whether her new outfit would be suitable for sales visits and presentations. The grievor responded that it would be suitable provided she was not wearing work-boots (which is what she was wearing at the time). Student C said that, if she were to wear it for work, it would be with dress-shoes and nylons. The grievor replied: "That sounds nice; I'm getting excited already!" Student C testified that she thought this was a weird thing for her professor to say. It made her feel uncomfortable.

A few days later, on the afternoon of Monday, September 19, 1994, the grievor and Student C encountered each other at the same location, following one of the grievor's classes. The rest of the first-year students were going to a Computer class. The grievor asked Student C why she was not going to the Computer class, to which she replied that she did not think she was learning a lot there. The grievor said to her: "Well, if you're not going to

Computers anyway, would you like to go and have a drink?" Student C accepted. She testified that she knew the grievor was in the habit of having lunch and drinks with his students. They went, in the grievor's car, to a bar called O'Toole's. It was perhaps 3:00 p.m. when they arrived. They ordered drinks. They talked about Student C's absence from the Computer class and about other students' opinions of the class. According to Student C, it was common knowledge among the students that the grievor returned every week-end to his home in Toronto and lived in Belleville during the week. In the course of their conversation at O'Toole's, the grievor told her he had thought about her over the week-end. He said he had tried a new wine and had thought that she would have enjoyed it. He added that the previous week (when they had been talking about her new outfit) he had felt something between them. They had two or three drinks each. The conversation turned to Student C's financial situation: she was essentially broke. The grievor asked her if she would like to have dinner with him that evening. She agreed. She testified that she did so for two reasons: firstly, the grievor was her teacher and she did not want to get on his bad side, particularly as she was not a particularly strong student; and secondly, in view of her financial situation, she did not want to turn down a free meal.

Student C testified that, after leaving O'Toole's, they

drove back to the College. The grievor told her he had to set up a computer for "Harvey", a colleague, and so they went to the grievor's office. He showed her a computer program he had that suggested which wines should accompany different foods. While she sat at his computer he talked on the telephone. He then came up behind her, put his hands on her shoulders and kissed the top of her head. She stood up and announced she had to go to the residence to change. As she walked towards the door of his office, he again kissed her, this time on the mouth. She pushed him away, and said she was going to change.

Student C met the grievor outside her residence that evening at about 6:30. He was in his car. He told her he had a bottle of wine in the car and he thought they might do some tasting before dinner. She agreed, and they decided to go to Zwick's Park. Once there, he parked his car, they got out, and he removed from the trunk a bottle of wine and two crystal glasses in a box. They walked to a bench near the water, sat down, and started tasting the wine and talking about wines. As the temperature dropped, Student C accepted the grievor's offer of his jacket. He put his arm around her shoulder. He kissed her on the mouth. Student C said they should go to dinner. The bottle of wine was finished by now.

They drove from Zwick's Park to the Lobster Trap

restaurant. They ordered food, as well as a bottle of wine. The conversation during dinner was mainly on matters having to do with the College and the Business Sales Program. They left the restaurant at about 10:30 p.m.

When they got back into the grievor's car, Student C said she had to return to her residence as she had an 8:00 a.m. class the next day. She testified that she was tired and had drunk more than her usual limit of alcohol. The grievor put a cassette in the deck and asked her if she could identify the singer, adding it was someone famous. The singer was in fact the grievor himself. As he drove away from the restaurant parking lot, he did not take the road that would be the most direct route back to the College. She told him he was going the wrong way. He replied that he thought they should go back to Zwick's Park for a few minutes.

The grievor drove to Zwick's Park, and parked his car. He started to kiss Student C. He undid her jacket and fondled her. He said he wanted to have sex with her, and that he wanted to see her have sex with another woman. She pushed him away. He told her to relax. She started to cry. He again told her to relax. She pushed him away a second time and told him she could not do this. The grievor stopped his advances. He drove her back to her residence. Outside the residence, he asked her to go out to dinner

with him again the next week. He added that he wanted to spend the night with her and that maybe they could get a hotel room. She replied that they would have to see about that, and she got out of the car and went into her residence. It was by now about midnight.

She testified that she felt "kind of sick" after getting out of the car. She wondered whether she had just blown her entire college career, and whether she would ever be able to go back to one of the grievor's classes.

Student C testified that, once in her residence, she went to see Mr. Scott Seward, a fellow student who was a Residence Assistant. She was crying and shaking, she testified. They talked about what had happened. He said he would talk to someone at the College so as to advise her what to do. She insisted he not use her name, since she was concerned about the consequences of making a complaint against her teacher. The next day, she was introduced to Ms. Nancy Rabb, a counsellor, with whom she discussed the grievor's attentions to her. She was told of the possibility of pursuing a formal complaint, but took no decision at the time.

Student C testified that, following that evening, she was too uncomfortable in the grievor's presence to attend his classes. She tried a couple of times, but left before he even

showed up. She started getting depressed. Her doctor prescribed an anti-anxiety drug (lorazepam), but it only made her feel worse. She was crying a lot.

On October 4, 1994, a class party was held at a local bar, the Samba Caf!. Student C decided to attend, accompanied by a male student from another program. The grievor was also there. He talked to her a couple of times. He asked her to dance, but she refused. He asked her again, and she reluctantly agreed. The grievor bought her a drink, as he did for some other students. At one point in the evening, while the grievor was sitting at a small table talking to other students, Student C came to the table as she wanted to talk to one of the other students there. She sat down briefly on the grievor's knee, facing away from him. She testified: "I was an idiot to sit on his knee!" Later, while Student C was talking to some other students, the grievor came up behind her and put his hand on her buttocks. She turned around. Nothing was said between them. The grievor walked away.

At a later date, the grievor approached Student C on campus and asked to talk to her. She started crying and said "not now". The grievor walked away. Two of her friends came to comfort her and talk to her. It was then that Student C went to see Ms. Rabb and decided to make a formal complaint against the grievor.

She testified she simply could not deal with the situation any more.

Mr. Seward testified about Student C's visit to his apartment following her dinner with the grievor. He estimated the time of her arrival as between 11:30 and 11:45 p.m. Student C, he testified, was shaking, her voice was hoarse, her eyes were bloodshot, and her make-up was streaked from tears. She was distant and would not look Mr. Seward straight in the eye. It was clear to him that while she wanted to talk and had something to say, she was hesitant to open up. She then told him that she had just been out with one of her instructors, that they had drunk wine in Zwick's Park and had gone for dinner. Student C told him it had started off casually and had then progressed. She said that she should have seen the signs of something happening. She was reluctant to go into details. She said that the instructor had done things to her she did not like. As Student C was explaining the reasons why she was upset, Mr. Seward himself became uncomfortable, and suggested she talk to the Residence Manager, a woman, or to a Counsellor. Student C agreed to see the Residence Manager the next day. Mr. Seward testified that, the next day, he accompanied Student C to the Residence Manager's office.

Ms. Rabb testified that she was asked by the Residence

Manager to go to her office to meet Student C that day. She spoke to Student C alone. She explained to Student C what her options were. Student C, she testified, took no decision at the time as to what she would do about the grievor's advances to her. Thereafter, Student C stopped by Ms. Rabb's office a few times to discuss how she was feeling. Ms. Rabb was concerned about Student C's school work suffering as a result of her interactions with the grievor. On one such visit, Student C told her that she wanted to launch a formal complaint, and Ms. Rabb assisted her. The complaint is dated October 6, 1994.

After the grievor had responded to Student C's formal complaint, she was given an opportunity to make observations on his reply. She concluded her observations, dated November 3, 1994, with the following:

One of the few things that I agree with Richard on is his expectation that the College will bring these complaints to a satisfactory resolution. What would be a satisfactory resolution for me? I would like to see Richard dismissed from his position of Professor at Loyalist College. In addition, I don't think he should be allowed to teach ever again as I would hate to see another person go through the same personal hell that I am enduring right now.

The grievor's version of events

The grievor testified that the relationship between students and faculty in the Business Sales Program was informal. This resulted from a conscious desire on the part of the faculty to foster a particular atmosphere. Faculty members and students frequently socialized with each other, with professors going to restaurants and bars with students and being invited to students' parties. They were all on first-name terms with each other. He frequently put his arms around students and hugged them. Among the things he taught to the students in the Program were business etiquette and socializing, including an introduction to golf, proper attire, and fine wine and food, subjects on which many of the students were quite ignorant.

The grievor testified that he observed Student C in class and with her peers, and noted that she was loud, extroverted and moody. He believed that she had previously taken courses in Hotel Management or Food & Wine, and he knew she had an interest in these things.

He testified that he encountered her outside class one afternoon. She told him the outfit she was wearing was a new gift from her mother, and she asked him if he liked it and if it would be appropriate business attire. He replied that it would be suitable, but not with her work-boots. He felt the fabric. Student

C, he testified, was clearly pleased with how she looked, which prompted him to comment that it was pretty exciting to get a new outfit. He testified that he has a daughter of about the same age as Student C, and he knew how excited she became when she got new clothes.

A few days later, on September 19, he testified, Student C told him, as they exited one of his classes, that she would not be going to her Computer class. She expressed some negative opinions about the Computer class. He said that they should chat about that over a drink. One of them - he could not remember which - suggested going to O'Toole's, which is close to the campus. At O'Toole's, they chatted about Computers and about the experiences of other students with the Program. They discussed school, and how Student C felt about it. They then went into a discussion on Food & Wine. He suggested that she make a presentation to the class on some aspect of Food & Wine. She said she did not have enough money for fine food. They then went on to discuss the cost of food. He suggested that she should look for a part-time job. He then offered to buy her dinner, adding that they could also do some wine-tasting. She agreed, and asked to be driven back to her residence so that she could change. They spent between one hour and one and one-half hours at O'Toole's. He estimated they had two drinks each while there.

The grievor denied telling Student C, at O'Toole's, that he had thought about her over the week-end or that he had felt something between them the previous week. He testified that he may have told her that, the previous week-end, it was his 28th wedding anniversary and that he had been out to dinner with his wife and daughter. He also may have told her that she was mature; this could have been said while they were discussing the age and maturity of students in the Program.

He testified that, after leaving O'Toole's, he drove her back to her residence. They agreed to meet at 6:30 that evening and go for dinner. She gave him her telephone number. He then went to buy some wine, drove home, changed and picked up the wine glasses. He met her, as arranged, at 6:30 p.m.

The grievor denied that they went to his office after O'Toole's. He denied saying anything to Student C about setting up a computer for Harvey. He testified that he had a colleague by that name, but Harvey was a computer expert and in no need of the grievor's assistance to do anything with computers. He acknowledged that he had a computer program that matched wine with food, but stated that he had mentioned it to the students in class.

After picking up Student C at 6:30 p.m., he drove to Zwick's Park. He told her he had picked up some wine for tasting. They sat at a bench in the park, opened the bottle of wine, and started tasting. They discussed wine-tasting, and awareness of senses. The bottle of wine was on the bench between them. Student C said she was feeling cold, so he passed her his jacket. They then returned to his car, and she gave him back his jacket. He denied kissing her or putting his arm around her shoulder in the park.

The grievor testified that they then drove to the Lobster Trap restaurant, where they had, in addition to their meal, a carafe of house wine. Most of the conversation during the meal was about food and music.

As they left the restaurant, the grievor testified, he told Student C that she had an 8:00 a.m. class the next day, so she had better go straight home. She replied: "That's the first time a date has told me I had to get home early." He testified that he thought this was a strange thing for her to say since he did not consider they had been out on a "date". He played the cassette that was in the tape-deck and asked her if she recognized the song and the singer. He added, jokingly, that the singer was someone famous. He then told her that he was the singer. He drove back to Student C's residence. She thanked him, said she had had a good time and

went into her residence. He drove back to his rooms, arriving there at about 10:30 p.m. He remembered the time of his arrival since he was able to change before watching the 11:00 p.m. news on television.

The grievor said that all of Student C's testimony about returning to Zwick's Park C after the restaurant was simply not true. It was he, not she, who said that she had a class the next morning and had to return home early. They did not go to the park. He did not drive in the direction of the park. He did not make any advances towards her after the restaurant. He did not suggest to her a second dinner together as he dropped her off at her residence. He did, however, suggest that she join a group of students who regularly lunched together on Wednesdays, often with him also in attendance. He did not ask her to spend the night with him.

The grievor testified that Student C did not show up for the Wednesday lunch that week. Another student told him that Student C was not feeling well. He telephoned her. She told him she was "confused" and "perhaps being stupid about the whole thing". He wished her well. Over the next few days, he testified, Student C left telephone messages and notes for him. Then, he met her by chance one day on campus. She told him a boy-friend of hers had been in a motorcycle accident. He said that she should not let that

interfere with her studies. He testified that he thought that it was her friend's accident that had been upsetting her.

The grievor testified about the class party at the Samba Caf!. He had been specifically invited to attend by some of the students. He testified Student C asked him to dance. All the dancing was in groups, rather than in pairs. At one point in the evening, while he was sitting talking to a group of students, Student C joined the group. She pulled out the grievor's knee, and sat on it. She smoked a cigarette in that position for three or four minutes, then left. Later, Student C reminded him that he had promised to buy her a drink, and so he bought her a drink.

The grievor denied that he touched Student C's buttocks at the Samba Caf!.

Mr. Barry Smith, a second-year student in the Business Sales Program in 1994-95, testified at the union's request. He stated that, one day in the winter of 1994-95, prior to the sessions of the Boards of Hearing, while he was in the Computer room, he overheard Student C and another female student, named Lois, talking to each other. They, it appears, did not realize he was in the room. He remembered hearing Student C say to Lois: "As long as we keep our stories straight, we'll be O.K."

In rebuttal, counsel for the College called Ms. Lois Rittwage to testify. She denied all knowledge of Student C telling her that they had to keep their stories straight. Ms. Rittwage testified that she had had no involvement with the incidents between the grievor and Student C and had not witnessed any interactions between them. She had not been due to testify at the Boards of Hearing, but was eventually called to give evidence there solely for the purpose of denying the alleged conversation about which Mr. Smith had testified.

COMPLAINT OF "STUDENT A"

Student A's version of events

Student A, 22 years old at the time of her testimony, was a student in the Business Sales Program in 1993-94 and 1994-95. Until the fall of 1994, she felt she had got along well with the grievor.

Student A attended the class party at the Samba Caf! (about which Student C also testified). She went there together with a friend, Nicole Derouchie, a student in a different program. The party was in full swing when she arrived. Everyone was dancing

and drinking, including herself. Nothing untoward occurred until about 1:00 a.m., when she went to say good-bye to the grievor. The grievor said he would see her in class, and they hugged each other. The grievor then kissed her on the mouth, a "French" kiss. Student A pulled away from him, grabbed her friend Nicole, and told her "Get me away! He just stuck his tongue in my mouth!" Student A left with her friend. They sat outside the bar, with other students, for a while. Student A was crying. Then she went home.

The next day, at the College, Student A reported the incident to the Dean of Business, who referred her to Ms. Rabb. The following day, Student A filed a complaint against the grievor. In her written complaint, she stated that "I no longer feel comfortable attending classes as long as Richard is a teacher".

As a result of the incident, Student A's attendance at classes deteriorated. She started drinking and could not be bothered going to class. She became very emotional at times during this period. She saw her family doctor, who referred her to a psychologist or a psychiatrist. She did not graduate from the Program.

Although Student A's complaint was filed at about the same time as Student C's, Student A testified that she did not know

Student C until after filing her complaint. She could not even remember seeing Student C before the time of the complaint.

Student A's testimony about the kiss at the Samba Caf! was corroborated to some extent by Ms. Derouchie. Ms. Derouchie estimated that she was about seven feet away from the grievor and Student A at the time of the kiss. She saw their lips touching. Then, Student A drew back, grabbed Ms. Derouchie's arm, and said: "Get me the fuck out of here! He stuck his tongue in my mouth!" Tears were rolling down Student A's face at the time, and she was shaking. They went outside, where they stayed for about an hour. Student A was crying, repeating that she could not believe what had just happened.

The grievor's version of events

The grievor testified that Student A was dancing in a very animated and extroverted manner at the Samba Caf!, whereas she was normally reserved and quiet in class. At one point, she had a drink in each hand as she danced. He chatted and exchanged comments with her in the course of the evening. Student A came over to where he was, as she prepared to leave the party, and said: "I'm leaving now". She hugged him. It was a mutual hug, he testified. He kissed her on the cheek, or touched his cheek to hers, and said: "See you on Thursday". Student A then turned around, and walked back towards

her friend, without saying anything and without giving any indication that she was upset.

In his reply to Student A's complaint, the grievor stated the following, inter alia:

I see [Student A] as a promising young woman who could do well in the Sales Program. She is not as assertive as she may need to be in a sales career but with continuing growth through the program and a little more experience I am sure she can develop this.

In light of this complaint, and away from the dancing and party atmosphere, I realize it was a mistake to kiss [Student A] and I am truly sorry for any embarrassment this has caused her.

I regret that she feels uncomfortable because of this incident and I hope we can resolve this to her satisfaction.

REASONS FOR DECISION

The grievor presented three grievances in all relating to the alleged harassment of Students C and A. In addition to challenging the suspensions imposed on him, he grieved that the procedure followed by the Boards of Hearing not only contravened the College's policy, but also violated his constitutional rights. Although the main focus of the evidence and submissions was on the grievor's interactions with Students C and A, Mr. Blair, counsel for the union, did argue that the College's failure to follow the

policy prejudiced the grievor, since if the College had conducted a full and prompt investigation of the complaints, as required by the policy, the grievor would likely have been able to do a better job of preserving and collecting evidence relating to his interactions with the students.

We express no views on whether the policy was violated by the College. Our task is to determine whether the College violated the collective agreement by disciplining the grievor and, as we noted in our interim award, the policy does not form part of the agreement. We should add that, even if there was a violation of the policy and the grievor was thereby prejudiced, the question would still remain whether he acted inappropriately towards his students.

The principal issue we have to determine is one of credibility, whether to accept the truthfulness of the students' complaints or of the grievor's denials. We are of the view that the appropriate approach to making findings of fact in the circumstances of this case is the one explained by O'Halloran J.A. in Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) at pp. 356-7:

If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend

upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of the witnesses...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions.

Guided by this approach, we have concluded that we cannot accept the grievor's version of events.

First and foremost, we note that the grievor's account would require us to find that two students, independently of each other, fabricated contemporaneous allegations of unwelcome sexual attention towards themselves by the grievor. We heard no evidence to suggest that there was any collusion between the two complainants, or to suggest why either of the complainants might have been motivated to concoct such stories about a teacher who could affect their academic careers. In our view, all this makes the grievor's account quite implausible.

Secondly, both complaints were corroborated in part. In

the case of Student C, there was the testimony of Mr. Seward. She sought him out, upon returning to her residence on September 19, to share with him her distress and confusion following her evening with the grievor. It is difficult to make any sense of this encounter with Mr. Seward if her account of the events of that evening is not substantially true. In the case of Student A, there was the testimony of Ms. Derouchie. She testified that Student A's reaction to the kiss from the grievor was sharp and immediate: Student A was in a state of shock and was shaking and crying for at least the next hour. It is impossible to understand the testimony of Ms. Derouchie if, as the grievor claimed, he merely exchanged a fatherly touching of cheeks with Student A.

Thirdly, there is Student A's failure to complete the Program. Her explanation for this failure was that she was too emotionally upset by the incident with the grievor to be able to attend his classes regularly and that she started drinking as a result of the incident. The grievor himself had described her as a "promising young woman who could do well in the Sales Program" in his reply to her complaint. No explanation was advanced on behalf of the grievor to account for the failure of this "promising young woman" to complete the Program.

We have not overlooked the various inconsistencies,

relied upon by Mr. Blair, between the complainants' testimony and their earlier written accounts of their encounters with the grievor. For example, in the case of Student A, Mr. Blair made much of the fact that she had originally alleged that the grievor approached her as she was about to leave the Samba Caf!, whereas she now accepted that she approached him. In the case of Student C, she made no mention originally, either to Mr. Seward, Ms. Rabb or in her formal complaint, of being kissed by the grievor in his office on the afternoon of September 19, whereas she testified about this before the Board of Hearing and at the arbitration. In our view, these inconsistencies are of no great significance, and do not call into question the truthfulness of the complainants. The inconsistencies are attributable, in our view, to entirely understandable lapses in memory or confusion by the two young complainants, and not to any desire on their part to toy with the truth.

We are satisfied that the complaints made by Students C and A are both well-founded.

Given the positions taken by the parties, it is not necessary for us to examine the question whether an eight-week suspension was called for.

The grievances are hereby dismissed.

DATED at Thornhill, Ontario, this 3rd day of July 1997.

Michael Bendel,
Chair

I **concur**/~~I dissent~~

Robert J. Gallivan,
College Nominee

I **concur**/~~I dissent~~

Cam Masse,
Union Nominee