

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND  
TECHNOLOGY IN THE FORM OF SAULT COLLEGE  
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(FOR ACADEMIC EMPLOYEES)  
(hereinafter called the "Union")

GRIEVANCE OF JOHN THEIL  
OPSEU FILE NOS. 96D612 and 91/94-SC-A-59  
(hereinafter called the "Grievor")

BOARD OF ARBITRATION:  
Chair

Richard H. McLaren, C. Arb.,

Wally Majesky, Union Nominee

Barry Matheson, College Nominee

COUNSEL FOR THE COLLEGE:

David W. Brady

COUNSEL FOR THE UNION:

Michael G. McFadden

A HEARING IN RELATION TO THIS MATTER WAS HELD AT SAULT STE. MARIE,  
ONTARIO, ON APRIL 18, 1997.

PRELIMINARY AWARD

Professor John Theil has been employed at the College for the past 14 years teaching in the Environmental Water Resources and Civil Engineering Technology areas. He is a qualified professional engineer. Certain student teaching concerns arose out of a course known as Water 226, taught to second year students in their third semester. That course is a prerequisite for certain certificates which the College grants.

The bare facts in this matter are not in dispute. The parties set out a Statement of Facts, not by way of agreement, but by way of simply providing the background for the jurisdictional argument dealt with in this Preliminary Award. The parties have also agreed that the original grievance and a subsequent grievance ought to be heard and dealt with together by this Board.

The relevant grievances read as follows:

STATEMENT OF GRIEVANCE:

Failure by management to follow student appeal procedure. (see attached memorandum to R. Cook from J. Theil dated March 27/96)

STATEMENT OF GRIEVANCE:

See attached letter of November 18, 1996 to B. Punch; specifically  
(1) Failure to accommodate student collaboration re Late Policy (A-1, B-2).  
(2) Failure to accommodate resolution of the decisions by the President (A-1, A-2, B-1, B-2)  
(3) Failure to follow the Academic Appeals Process (B-4)

- (4) Allegation of the use of sub-standard Course Outline (A-2)
- (5) Discrimination B-7. Unethical/unprofessional evaluation practice B-3.

SETTLEMENT DESIRED:

- (1) Unconditional withdrawal of the memorandum of Nov. 8/95 from R. Cook.
- (2) Compensation of \$10,000. or the equivalent SWF time of eight (8) weeks.
- (3) Punitive damages of \$20,000

DATE March 27, 1996

Exhibit 1, Tab 9

SETTLEMENT DESIRED:

- \$5000 in lieu of time spent
- \$100 expenses (to date)
- \$20,000 in punitive damages
- Apology in writing from College

DATE November 18, 1996

Exhibit 1, Tab 23

The events behind these grievances relate to a student concerned with the fact that he received a zero for not doing a title block page in the manner desired by the Professor. Another student had concerns regarding the Late Policy which was used by the Professor for class attendance and assignments. The policy stated that following two occurrences there would be a 100% loss of the mark.

The College has published a document entitled "Student Rights and Responsibilities" which was filed at Tab 1 of Exhibit 1 in this proceeding. That document is a statement of student rights and responsibilities which contains a statement of values and a code of ethics, and deals with a variety of topics related to the

academic processes in which the student is involved. The College, through its professors, reserves the rights of imposing college penalties and there is a process for dealing with those kinds of penalties including a section in the handbook on appeals.

The complaining students raised their concerns with College officials. The Director of Student Affairs explained to these students their rights and responsibilities as set out in the "Students Rights and Responsibilities" manual. One student filed an academic appeal under these provisions with respect to Professor Theil's teaching and evaluation methods. Professor Theil met subsequently with his class and advised the College officials that the issues were resolved. Unfortunately, they were not from the students' perspective who then activated the appeal process. The informal second level of that process was utilized and subsequently the Dean conducted a meeting. Without belabouring the steps in the process which are set out in the parties' background facts filed with the Board at Tab A of Exhibit 1, the Vice-President, Mr. R.C. Cook issued what is described as an academic contract under the internal provisions (Tab 2, Exhibit 1). Professor Theil refused to sign the academic contract in November of 1995. Instead he submitted a written appeal, found at Tab 3 of Exhibit 1. Under the internal rules of the process, the appeal proceeds to a College Hearing Board who make recommendations to the College President. The College President then issued his response based on the findings of the Board. The Academic Vice-President subsequently

requested that Professor Theil take action to implement the President's directions.

The Grievor did not accept the response of the Academic Vice-President, complaining that:

...

"During subsequent discussions with the two or three dissatisfied students, you chose to recognize their concerns on the basis of the original petition. This is contrary to established procedures, when considering that the original petition had been resolved to the satisfaction of the majority. A routine follow-up by yourself would have confirmed this.

Failure on your part to exercise discretion in this matter, and to effectively publicize derogatory remarks to the class have had a negative effect on my well being during recent months. I am concerned about my future effectiveness in the classroom. This is compounded by the lack of decisive action by senior management when, last summer, the lives of myself and several students were threatened." ... (Exhibit 1, Tab 7)

The Grievor and the Union's dissatisfactions are what ultimately led to the Grievance filed at Tab 9 set out above. The matter was never further resolved. The additional grievance set out in table format at p. 2 of this award was filed some five months later.

The College in its preliminary jurisdictional issue submits that the matters here under consideration bears no relation to the Collective Agreement and thus cannot form the subject matter of a grievance to be brought before this Board. It was submitted on behalf of the College that the internal dispute resolution process did not result in disciplinary action which is arbitrable under the Collective Bargaining Agreement. The college also argued that the internal procedure designed to resolve disputes between teachers and students are not employee rules contrary to the Collective Agreement.

In support of its position reference was made to the following cases:

An unreported decision between Seneca College and Ontario Public Service Employees Union, In the Matter of a Group Grievance re Evaluation Procedure, by a Board of Arbitration chaired by Arbitrator Brown, and dated November 11, 1977; An unreported decision between Georgian College and Ontario Public Service Employees Union, In the Matter of the Grievance of J. Simpson, by a Board of Arbitration chaired by Arbitrator Brown, and undated; An unreported decision between Mohawk College and Ontario Public Service Employees Union, Grievance of P. Young, by a Board of Arbitration chaired by Arbitrator Kruger and dated November 15, 1984; An unreported decision between Niagara College and Ontario Public Service Employees' Union, In the Matter of the Grievance of M. Mills, by a Board of Arbitration chaired by Arbitrator Swan and dated November 29, 1991; Re Seneca College of Applied Arts & Technology 17 L.A.C. (2d) 113 (Brown, 1978); An unreported decision between Seneca College and Ontario Public Service Employees' Union, In the Matter of the Grievance of W. Quansah, by a Board of Arbitration chaired by Arbitrator Brent and dated August 1, 1989; Re Auto Haulaway Inc. 47 L.A.C. (4th) 301 (Outhouse, 1995); Re

Metropolitan Toronto Board of Commissions of Police and Metropolitan Toronto Police Association et al. [1981] 33 O.R. (2d) 476 (C.A.).

It was submitted on behalf of the Union that the circumstances constitute discipline thus supporting the proposition that the Board has jurisdiction to hear the Grievor's grievances. In the alternative, it was argued that the characteristics of the internal processes when applied are employee rules which cannot be in conflict with the Collective Agreement and are subject to review by this Board. In support of its positions reference was made to the following cases:

Re Fanshawe College 39 L.A.C. (4th) 129 (Swan, 1994); Re Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43 [1990] 69 D.L.R. (4th) 268 (Ont. C.A.); reference was also made to Canadian Labour Arbitration by Brown & Beatty paragraph 4:1500 and subsequent at page 4-13.

The relevant provisions of the Collective Agreement read as follows:

**Article 31  
PERSONNEL RECORDS**

...

31.03 An employee shall be given access to the employee's record and shall, upon request, be given a copy of any documents contained in the employee's record.

**Article 32  
GRIEVANCE PROCEDURES**

...

### **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 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 at 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.

...

32.04C The finding of the majority of the arbitrators as to the facts and as to the interpretation, application, administration or alleged contravention of the provisions of this Agreement shall be final and binding upon all parties concerned, including the employee(s) and the College.

32.04D The arbitration board shall not be authorized to alter, modify or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith; nor to deal with any matter that is not a proper matter for grievance under this Agreement.

...

### **Definitions**

32.12A "Day" means a calendar day.

32.12B "Union" means the Ontario Public Service Employees Union.

32.12C "Grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.

### **DECISION**

Regardless of any characterization which is to be placed on the facts by this Board, one matter is clear. This Board is only constituted for the purposes of interpreting the Collective Agreement. Article 32.03, Step Two states the jurisdiction to be:

"...Any difference arising from the interpretation, application, administration, or alleged contravention of this Agreement..."

may after unsuccessful resolution in the grievance procedure be referred to arbitration.

Every Professor has a considerable degree of discretion in teaching their class. In so doing, they must manage their class and the students within it. The internal rules and processes are to assist in managing and resolving disputes between students and

their professors. These rules and processes are tools for the use of the professorate. Any professor may well manage their class and students differently but the College rules and processes are to reinforce and support their role in the classroom. The use of these internal rules do not amount to discipline with respect to professors. The difficulty in this case is that the Grievor does not view these internal procedures as such and prefers to see them as a challenge to his role and authority rather than supporting it.

While he may be at liberty to view the procedure as such, he cannot characterize them as a matter which arises under the Collective Agreement thereby extending jurisdiction to this Board of Arbitration to review the use of the procedure and the professors complaints about its alleged misuse.

The complaints of the Grievor as found in the grievances relate to management's failure to follow their own procedures and to accept his point of view and characterisations of the events over those of the students. If the merits of this case were to be dealt with, this Board would be deciding who is correct or incorrect in terms of pedagogy, technique and evaluation of student matters. This is not material for a Board of Arbitration in labour relations matters to determine. The internal workings of the educational process are not within the purview of arbitration unless they give rise to matters of alleged misconduct on the part of the Professor such that discipline is imposed. No discipline

was imposed here. Therefore, there is nothing for this Board to review.

The alternative position is that the process is tantamount to employee rules which are in conflict with the Collective Agreement. If they are in conflict then they are the subject of review by this Board. In a teaching and learning environment it might not be desirable to characterize as employee rules an internal process which is intended to describe student responsibilities and provide a trouble shooting and complaints procedure to assist in class management. This internal process, while involving a degree of stated compulsion by the College, does not amount to employee rules. However, even if they were considered to be such, there must be a conflict between them and the Collective Agreement before a Board of Arbitration has any jurisdiction. None is shown in this case. There is accordingly, in the words of Article 32.03, "no difference arising from the interpretation, application, administration, or alleged contravention of this Agreement." There is a difference of opinion between the College management and one of its professors over the way the internal process has been managed by the College. The Grievor believes that they have not run the process the way it should have been run. The Grievor believes they have not supported and assisted him in his role as a professor. The College believes that the professor has been obstinate and intransigent in his use

of the procedure which was designed to assist him in providing finality of the academic matters at issue between students and professors. They believe he has not used the internal process in a fashion which would have resolved these academic differences. Regardless of either parties position or view of the other, there is no breach of the Collective Agreement which the Grievor or his Union may point to indicating a window of jurisdiction to review these matters by this Board of Arbitration.

For all of the foregoing reasons the Board of Arbitration is without jurisdiction to hear the alleged grievances. It is ordered that they be dismissed.

DATED AT LONDON, ONTARIO THIS

DAY OF JULY, 1997.

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Richard H. McLaren, C.Arb.

I concur/dissent

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Wally Majesky,  
Union Nominee

I concur/dissent

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Barry Matheson,  
College Nominee