

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAWE COLLEGE

(the "College/Employer")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the "Union")

AND IN THE MATTER OF GRIEVANCE #01C054

BOARD OF ARBITRATION

**Paula Knopf, Chair
R. J. Gallivan, College Nominee
John McManus, Union Nominee**

PRELIMINARY AWARD

APPEARANCES

For the College

**Margaret Szilassy, Counsel
Linda Ballantyne, Director Human
Resources
Linda Skinkle, Human Resources
Horace Knight, Human Resources**

For the Union

**Gavin J. Leeb, Student-at-Law
Gary Fordyce, Chief Steward
Tom Geldard, Steward**

The hearing in this matter was held in London, Ontario on September 11, 2002

This is a "Union" grievance alleging that the College has violated the collective agreement by failing to provide credit on the SWF to several bargaining unit members who delivered non-credit classes or workshops. At the outset of the proceedings, the College raised a preliminary objection with respect to the arbitrability of the grievance, asserting that this is not properly a Union grievance under Article 32(10) of the collective agreement. The parties agreed to make submissions on the issues arising from the objection and asked the Board of Arbitration to resolve the matter by way of an award. This Preliminary Award addresses the jurisdictional objections raised by the College.

Some background is helpful. Members of the College community are provided a wide range of non-credit courses and workshops throughout the year. These are called Professional Development Opportunities (PDOs). The PDOs range from one hour in duration to a series of related seminars that may run over the course of a few weeks. The topics cover a wide spectrum, including facilitation, teaching fundamentals, curriculum, computer skills, pension and benefits, first aid, gardening, health, and self-protection and awareness for women. For the most part, members of this bargaining unit deliver these programmes. The people who take the programmes are not evaluated or given credit. The people who deliver the programmes are not given credit on the Standard Workload Form (SWF) for their preparation or delivery. Some programmes are offered by non-faculty members. However, the Union clarifies that the grievance does not include a claim that the PDOs are exclusive bargaining unit work.

The Union grievance filed on November 2, 2000 reads as follows:

Local 110 grieves that the College has violated Articles 1, 6.02 and 11 when they failed to provide credit on the SWF for the facilitation work performed by Ruth Rodgers, Yvon Dupuis, Suzanne O'Neil.

Dana Morningstar, Otto Rozenkrantz, David Belford and David Gillis.

The above individuals have not referred their SWF's to the Workload Monitoring Group and have not raised this matter as a complaint. The Union believes this to be a patent violation of the collective agreement that adversely affects the rights of employees.

As remedy, we seek that the College cease and desist from this patent violation and immediately amend the individuals' SWF's to provide credit for this work. We also seek a written declaration that work of this nature will be credited on individual SWF's in the future.

In the presentation of its case, the Union asserted that the "specific concern giving rise to the grievance" is that the "College cannot engage the services of bargaining unit members without compensating them for the performance of their services." It was submitted that under the scheme of the collective agreement and Article 11 in particular, "it is simply not possible for the College to utilize the services of bargaining unit members without compensation.... on the SWF." The Union's position is that the delivery of PDOs constitutes "teaching" or "complementary functions" and should therefore be credited on the SWFs. The Union also asserts that the College is effectively negotiating with individual bargaining unit members to "work for free" contrary to the terms of the collective agreement. The Union submits that the College should deal directly with the Union on these matters as it is the exclusive bargaining agent for those employees. Therefore, the Union characterizes this aspect of the case as being one of "general concern" to the Union with respect to its recognition rights under Article 1 of the collective agreement.

The remedies the Union seeks are as follows:

- A declaration that the College must include "work of this nature" on bargaining unit members SWFs.

- Bargaining unit members who taught PDOs in the fall of 2000 should be credited on their SWFs for the time involved
- A cease and desist order
- A declaration that "work of this nature" will be credited on individual's SWFs in the future.

The Union clarified that it was withdrawing the grievance with respect to Suzanne O'Neil, one of the seven named people in the grievance document. She is a librarian and member of the bargaining unit who does not have an SWF. When she provided the PDOs, she was paid her regular salary and not required to work any extra time. The Union views this as "compensation" within her regular workday. The Union is seeking "similar" compensation for the other members of the bargaining unit who provided the PDO programmes.

The Employer objects to the arbitrability of this matter, arguing that the original grievance is, in essence, a grievance for six individuals, not a Union grievance within the meaning of Article 32(10) of the collective agreement. Article 32(10) provides:

The Union or Union Local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees.

The Employer also objected strenuously to the way the Union presented and characterized the grievance at this hearing because the Union's submissions contained allegations concerning Union recognition and sought a

remedy far beyond the six individuals and issues covered in the original grievance. The College asserts that these are matters that were not addressed during the grievance meetings. Therefore, the College asks that the Union be restricted to the grievance as originally filed and as it was processed through the grievance procedure.

However, the College's primary objection is that this is not properly a Union grievance and that the Board of Arbitration is without jurisdiction to hear this case. It is asserted that the individuals named in the grievance were entitled to grieve individually and did not do so. Therefore, the College maintains that the grievance does not fit within the first criterion of Article 32.10. The College also asserts that the Union cannot demonstrate that there is "an unreasonable standard or a patent violation" as is required to satisfy the exceptions within Article 32.10. The College relies upon *Loyalist College of Applied Arts and Technology and OPSEU Local 420*, unreported decision of Kathleen O'Neil dated May 29, 2001 and *Fanshawe College of Applied Arts and Technology and OPSEU*, unreported decision of A. Kruger dated September 16, 1997.

Further, the College asserts that there can be no "patent violation" asserted in this case because Article 11.08 constitutes the complete answer to the grievance. Article 11.08 provides:

In keeping with the professional responsibility of the teacher, non-teaching periods are used for activities initiated by the teacher and by the College as part of the parties' mutual commitment to professionalism, the quality of education and professional development.

Such activities will be undertaken by mutual consent and agreement will not be unreasonably withheld.

Such activities will neither be recorded nor scheduled except as in accordance with 11.01 G.1.

The Union responds to the College's objections by asserting that there is no change or expansion of grounds here and no reason to dismiss the grievance on a jurisdictional basis. The Union stressed that the original grievance raised the Union recognition issue by alleging a violation of the recognition clause, Article 1. This is the clause that recognizes the Union as the exclusive bargaining agency for all academic employees of the College. The grievance also makes references to the management rights clause (Article 6.02) that obliges management to exercise its functions "in a manner consistent with the provisions of the collective agreement." The Union also points out that the violation of Article 1 was particularized on September 9, 2002 in a letter to counsel for the Employer as follows:

It is the Union's position that deliverance of the aforesaid PDO courses constitutes work performed for the benefit of the College and as such the College must negotiate with the Union in respect thereto irrespective of the characterization of the work, i.e. whether it is bargaining unit work.

With respect to the alleged violation of Article 1 as referenced in the grievance, it is the Union's position that by virtue of failing to recognize the Union, the College has, in effect, contracted or bargained with individual bargaining unit members regarding the terms upon which the PDO work will be performed.

The Union argues that the grievance can and does cover more than the individuals named in the grievance. The Union asserts that those names should simply be seen as examples of "specific concerns" that were listed in response to the College seeking names when the issue first arose between the parties at a Workload Monitoring Committee meeting. The Union argues that the College has known from the outset that the essence of the Union's complaint was the College's failure to credit work involved with the delivery of the PDOs. The Union concedes that the discussion during the grievance process focused on the named individuals' SWFs. However, the Union stresses that it discussed its concerns about its recognition

rights and its complaint about the College dealing directly with individuals at the Workload Monitoring Committee stage. Therefore the Union asserts that the recognition aspects of this grievance were well known to the College. The Union asserts that it should not be restricted in the presentation of its case at arbitration if the College failed to explore the Articles 1 and 6 allegations during the grievance meeting.

Turning to the Article 32.10 objections, the Union submits that this case fits within the criterion of clause. It was asserted that this case is not one an individual could properly grieve. It is conceded that an individual could grieve that s/he did not receive SWF credit for the work of providing a PDO. However, it is asserted that an individual cannot grieve the fact that the College has a general practice or policy of engaging people for PDOs without creating SWFs. Further, it was said that an individual could not obtain the requested cease and desist remedy. The Union acknowledges that it is also seeking a remedy for the six remaining people named in the original grievance and that the form of a Union grievance may have some implications on the remedies available to the individuals. However, the Union maintains that individuals are entitled to a remedy under a Union grievance. The Union also argues that success in this case would mean that the individuals would receive compensation that would trigger the Union's entitlement to their corresponding dues. Therefore, the Union submits that its entitlement to dues also makes this an appropriate Union grievance.

In the alternative, the Union argues that if all the issues raised within the grievance could have been subject to an individual grievance, this case still falls within exceptions contained in Article 32.10. The Union argues that the "unreasonable standard" test is met by the College's request that people "work for free." The Union also asserts that the allegations reveal "a patent violation" of the recognition clause in that the Employer is dealing with individuals concerning terms and conditions of employment and thereby undermining the Union's authority to

represent members of the bargaining unit. The Union relies on *Humber College of Applied Science and Technology and OPSEU* (1999), 80 L.A.C. (4th) 108 (Schiff).

Further, the Union asserts that Article 11.08 does not answer the grievance because the PDOs are non-regulated and may affect a person's promotion or advancement opportunity. The Union relies on *Fanshawe College of Applied Arts and Technology and OPSEU*, unreported decision of H.D. Brown dated June 28, 1996, wherein it was found that the College violated the collective agreement by entering into arrangements with individuals to teach continuing education courses outside of the collective agreement. The Union asserted it can call relevant evidence showing that people volunteer or are elected for many activities akin to what the College is asserting would fall within Article 11.08 and yet are still credited on their SWFs for this work. The Union argued that if there is any question about whether the grievance reveals a "patent violation" of the collective agreement, this Board of Arbitration should reserve on that question. The Union relies on the *Seneca College and OPSEU* decision dated June 5, 1998 (Devlin) wherein the Board of Arbitration determined that whether the Union could establish a patent violation is a matter most appropriately decided on the merits, rather than at the stage of the preliminary objection. Therefore, it was argued that if there is any question of whether there is a patent violation in this case, the Board of Arbitration should reserve on this matter.

In response, the Employer asserted that the Union's submissions were "without merit." The Employer submits that there is no factual basis in the particulars to establish that it is asking faculty "to work for free" as the Union alleges. The Employer also dismisses the significance of the fact that the grievance refers to Articles 1 and 6. Counsel for the Employer points out that virtually every grievance mentions the recognition clause and management rights clauses without raising any substantive issues. It is submitted that the Union should be confined to what was discussed by the parties in the grievance procedure and made evident on the face of

the grievance. It was stressed that this Board of Arbitration's jurisdiction must be limited to what was discussed by the parties throughout the grievance process. It was said that the discussions at the Workload Committee stage are irrelevant to the jurisdiction matter. **Counsel for the employer also stressed that the Union had never indicated that it would argue that these discussions were relevant to the presentation of this grievance. Therefore, the College was not in a position of being able to respond to the submissions on this issue. The Union conceded that this argument had not been raised before the hearing commenced. Accordingly, this is not an argument that the Board of Arbitration will refer to or rely upon in this decision.**

Turning to the *Humber College* award, Counsel for the Employer argued that the Union's claim here for "dues" arising out of a compensation award is "too remote." Further, it was stressed that the grievance in the *Humber College* case was allowed to proceed as a Union grievance because individuals had no right to grieve in that matter. The *Fanshawe College* case was distinguished because Article 32.10 was said not to be an issue. The Employer distinguished the *Seneca College* case on the grounds that there was a patent violation in that case, but not in the one at hand.

The Decision

The College's preliminary objection is centred on the allegation that this is not a proper Union grievance under Article 32.10. The requirements of Article 32.10 are ably articulated by the Devlin Board of Arbitration in the *Seneca College* case at page 27

... This Article specifies that the Union shall have the right to a grievance based on a difference directly with the College relating to the interpretation, application, administration or alleged violation of the agreement. Such a grievance shall not include any matter upon which an individual employee would be personally entitled to grieve and the regular grievance for individual or group grievances shall not be bypassed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of the agreement and that adversely affects the rights of employees. There would appear to be no dispute that where the matter is one in respect of which an individual employee could have grieved, all three criteria set out in Article 32.10 must be satisfied in order to find that there is a proper Union grievance: (see *Seneca College and Ontario Public Service Employees Union* January 31, 1991 (P.C. Picher (unreported))).

We shall deal with each aspect of Article 32.10. However, in order to do so, we must determine or define the scope of the grievance because that is what will dictate whether it meets the test of being a proper Union grievance.

The grievance on its face refers to Articles 1, 6 and 11. Therefore, it apparently covers union recognition, management rights and workload matters. **The Union had general concerns about faculty delivering PDOs without receiving credit on their SWFs and without the issues being discussed with the Union.** These concerns evolved into the grievance which is cited above naming seven individuals in response to the Employer's request for specific names. When it was discussed during the grievance meetings, the discussion focused on the facilitation workshops provided by the seven individuals named in the grievance. However, the grievance alleges a "patent violation" that "adversely affects the rights of the employees" and thereby invokes the language in Article 32.10. The remedy requested on the grievance form is a "cease and desist order, credit to the individuals and a declaration that credit should be granted for "work of this nature in the future." Therefore, on the face of the grievance itself, we have a claim on behalf of seven individuals for personal redress, but also an assertion that the College's alleged violation of the collective agreement affects the rights of both the Union and

the employees in general. However, the essence of the grievance remains the complaint that the collective agreement is being violated by the failure to credit work involving PDOs on the SWFs.

Arbitrators long ago stopped confining grievances to the strict words on the grievance forms because of the labour relations community's need to ensure that grievances would not be treated as pleadings would be in a court of law. This would destroy the concept of expeditious dispute resolution and would overly legalize a process that was not meant to involve legal niceties. The seminal decision in *Blouin Drywall Contractors Ltd. and C.G.A. Local 2486* (1975), 57 D.L.R. (3d) 199, 8 O.R. (2d) 103 (C of A at page 204) held:

Certainly, the Board [of Arbitration] is bound by the grievance before it, but the grievance should be liberally construed, so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions....

Arbitration is designed to enable the parties to resolve issues they have identified to each other and discussed in the grievance procedure. The goal is to resolve workplace disputes and avoid procedural unfairness.

In the case at hand, we are troubled by the fact that only the seven named individuals' situations were discussed at the grievance procedure. However, we are satisfied that the parties were aware at all material times that the essence of this case was the Union's complaint about the College's practice of not crediting the PDOs on the SWFs. The Employer sought and received particulars of the Union's case and was given seven names during the grievance process. Then, once counsel got involved, particulars were provided in terms of the specific allegations concerning Article 1. If, as the Union alleges, the practice with regard to PDOs violates Article 11, this could have implications on both Articles 1 and 6 in terms of the exercise of management rights and union recognition. Therefore, the "real complaint" in this grievance is that the use of bargaining unit members to provide

PDOs without SWF credit may violate Articles 1, 6 and 11. It is true and unfortunate that the particulars regarding Article 1 were not offered to the College until the eve of this hearing. This may have added to the parties' inconvenience and costs. But no unfairness results because the case could not have been resolved in one day of hearing in any event. Therefore, the College will suffer no prejudice because it will have ample time to prepare its defence to this aspect of the grievance before the hearing reconvenes. Therefore, having regard to the wording of the grievance, as clarified through particulars and opening statement, we have determined that the "real" scope of this grievance encompasses the following claims:

1. Violation of Article 1 concerning the alleged failure to recognize the Union with respect to the engagement of bargaining unit members to provide PDOs
2. Violation of Article 6.02 concerning management's obligations to exercise its management rights in accordance with the collective agreement, specifically Articles 1 and 11.
3. Violation of the workload provisions in Article 11 with regards to the delivery of PDOs by bargaining unit members.
4. Entitlement to remedies for the six remaining individuals listed in the grievance and the bargaining unit as a whole with regard to cease and desist orders.
5. Entitlement to any Union dues that may be generated as a percentage of any compensation awarded to bargaining unit members.

It may be that the failure of individuals to file individual grievances and the characterization of the claims may affect the nature of remedial jurisdiction if the

grievance succeeds. But the submissions of the parties and the factual background lead to the conclusion that the essence and the scope of this grievance cover the matters listed above.

This takes us to Article 32.10 and the analysis of whether this is a proper Union grievance. All aspects of that article must be addressed. Previous Boards of Arbitration offer assistance.

In the *Humber College* case, *supra*, the Union alleged work was not being assigned to bargaining unit members and that the Union was not receiving dues. It was launched as a Union grievance with 27 individuals listed. The College objected arguing, *inter alia*, that this was not properly a Union grievance under Article 32.10. A board of arbitration chaired by Professor Schiff considered the fact that both the Union and the individuals may have "a different collection of interests" arising out of the same factual foundation (page 112). It was concluded that the Union's grievance focused not on the individuals, but "on the work that they were doing. . . . the scope of agreement coverage and damage to the Union's income" (Pages 112 and 113). This was held to satisfy the requirements for a union grievance within the meaning of Article 21.10.

The *Loyalist College* case, *supra*, involved a Union grievance against the College's "policy" of having individuals as instructors and assigning them teaching duties in contravention of the classification definitions in the bargaining unit. Because of the nature of the individuals' appointments, the individuals had no right to grieve. The College objected to the Union grievance arguing that it did not fit within Article 32.10. The Board of Arbitration chaired by Kathleen O'Neil addressed the *Humber College* decision. Ms. O'Neil agreed that "what classifications fell within the bargaining unit" and the claim for dues are "specific identifiable" remedies that flow to the Union. However, she also noted that the line between individual and Union interest is "less distinct" in disputes about the distribution of work within the

bargaining unit. (See page 12.) The thrust of the Union's argument in that case was that it had a general or broad interest in challenging a College's policy or practice as a whole. The Board of Arbitration determined that a significant aspect or the essence of the grievance could have been grieved by an individual. The Board then asked itself whether "anything of substance" would be left for the Union to grieve thereafter. Having found that no general interest remained, the Board turned to Article 32.10 and applied the threefold test within the Article with the following clarification.

The words "patent violation" have been held to create a high standard (*Seneca College and OPSEU*, P. Picher, January 31, 1991), to mean the violation has to be crystal clear (*St. Sanford Fleming and OPSEU* (Brent), April 25, 1988) or "leap from the page" (*Centennial College and OPSEU* (M.G. Picher) January 20, 1992). In *Fanshawe College and OPSEU* (Kruger), (September 16, 1997), the Board decided that a case that was arguable on both sides was "not a patent violation"

In the *Seneca College* case, the arbitration board chaired by Ms. Devlin considered a Union grievance alleging that the college improperly assigned workloads in excess of 47 hours per week contrary to Article 11. The board of arbitration followed the Burkett award in *Fanshawe College v. OPSEU* dated March 29, 1989 as upheld by the Court of Appeal and held that the matter was arbitrable under Article 32.10. The Devlin Board based the conclusion on the following factors:

1. There was a prior decision in the Union's favour on the same issue.
2. Although an individual could grieve his/her assignment to a workload resolution arbitrator, such an award would have had "limited effect."
3. If the Union was prohibited from filing a Union grievance on the merits, it would have no means of enforcing or ensuring consistent application of standards as set out in Article 11

The Devlin Board of Arbitration determined that whether the Union can establish a patent violation is a question more appropriately determined on the merits than at a preliminary stage (page 30). The Board also felt that the issues raised went beyond the confines of individuals and therefore amounted to one of general concern to the union. Therefore the case was allowed to proceed under Article 32.10 of the collective agreement.

Turning to the case at hand, this is a grievance arising directly with the College. The primary allegation is that the College's practice may violate the workload and Union recognition clauses. These issues raise questions about the interpretation and application of Article 11.08. The interests of the Union in its recognition rights are also direct Union interests. Therefore, the basic aspect of Article 32.10 has been satisfied. However, the question becomes whether the limitations to Article 32.10 apply to this case.

Is this a matter where the employee could be personally entitled to grieve? Each bargaining unit member who provides a PDO could have grieved about receiving credit on his/her SWF. This would entitle that individual to a ruling about the nature of his/her work and potentially could have triggered compensation flowing from the SWF adjustment if the grievance succeeded. While that ruling would apply only to that individual grievor, the ruling would be applicable to any other faculty member in a similar situation. Either party would be hard pressed to argue that such a ruling did not provide direction on a College-wide basis. Therefore, if any individual had grieved the lack of SWF credit for a PDO, this would have resolved the most significant aspect of the conflict between the parties. The only aspect of the current grievance that might not be dealt with in such an individual grievance could have been the Union recognition issues. However, arguably even that aspect of the complaint could have been addressed in an individual grievance and arguably, a finding on the primary matter would have resolved the recognition issue. For example, if the grievance failed because of Article 11.08 or for any other

reason, dealing directly with faculty members would not violate Article 6 because it would be outside the scope or purview of the collective agreement and the Union's interest. Therefore, it has to be concluded that for all intents and purposes, the essence of this grievance is one that an individual could have been personally entitled to grieve.

But this does not end the matter. The Union may still launch a Union grievance under Article 32.10 if it can demonstrate that the allegations concern an unreasonable standard that is patently in violation of the agreement and adversely affects the rights of employees. This threefold test has been ably addressed by other boards of arbitration as cited above. We can do little to add to their analysis, except to emphasize that it is important to give effect to the intent of Article 32.10. This article was clearly designed to allow a union to mount grievances. But restrictions were placed on this to ensure the Union does not have a free hand to launch cases that more appropriately should be filed by individuals. On the other hand, the clause also recognizes that there may be situations where the Union may have an interest to pursue on behalf of its membership, even if an individual is reluctant to launch the grievance. The whole of Article 32.10 must be read carefully to ensure that the tests are not diluted. It is arguable that the Union has an interest in everything that happens with respect to a bargaining unit. The Union has an interest in the dues and contract interpretation in every discharge and suspension case because "just cause" and compensation issues arise. However, that alone cannot mean that the Union could or should be able to grieve a discharge or suspension case under Article 32.10. That article demands that the Union grievance involves higher matters concerning allegations of patent violations and unreasonable standards that adversely affect the rights of employees generally. Therefore, the question becomes whether this grievance meets those tests.

The Union alleges that the work of providing PDOs without credits on the SWFs violates Article 11. At this preliminary stage of the proceedings, there is

no evidence about how or why bargaining unit members are selected or become providers of the PDOs. Further, there is no evidence about whether they are paid or receive any consideration in return. However, the allegation is that the work includes "teaching" or "complementary" functions within the meaning of Article 11 that must be compensated in accordance with its formula. We are also told that Article 11 is not being applied to those who provide the PDOs. The allegation of a failure to provide compensation in accordance with Article 11 for teaching or complementary activities gives rise to a patent or obvious violation of Article 11 because that clause provides for compensation or credit for teaching and complementary activities. This is not to say that it is obvious that a failure to credit the SWF for PDO work violates the collective agreement. That is a question to be determined on the merits. But the allegation that teaching or complementary activities are not being credited does give rise to a patent, if not proven, violation of the collective agreement.

The Employer has raised a potent defence to the grievance by invoking Article 11.08. However, it is not an answer at the preliminary objection stage to raise Article 11.08. The "activities" within Article 11.08 are exempted from the SWF. The Employer's allegations that the PDOs fit squarely within those types of activities may provide a full defence to the grievance. Therefore, there is a fundamental difference between the parties about whether the PDO work is "teaching" or whether it is "non-teaching periods used for activities initiated by the teacher and by the College as part of the parties' mutual commitment to professionalism, the quality of education and professional development." Resolving this case will require a factual determination or a decision involving questions of mixed fact and law. Determining whether, the Article 11.08 defence can prevail can only be determined after a consideration of all the relevant evidence and arguments. The assertion of a strong defence to a grievance is conceptually different from a jurisdictional objection, even under Article 32.10. The College quite properly asserts

its rights by raising Article 11.08 and signaling that it will be relying upon this language as a defence to the grievance. By raising this defence at this stage, the College puts the Union on notice of the hurdles it must surpass to win this case. However, Article 32.10 demands that the Union assert a "patent violation," not that the Union establish at a preliminary stage that the grievance is unbeatable. The *Seneca College* decision *supra* tells us that the alleged violations must be "obvious, manifest, conspicuous, plain, self-evident, clear on its face and substantially beyond dispute." This is a heavy onus. But it is not so heavy as to demand that the allegations be "beyond dispute," only that they be "substantially beyond dispute." Previous boards of arbitration have been reluctant to allow cases to proceed under Article 32.10 where there are "arguable" positions or "two reasonably possible interpretations" of the contract. [See Sir Stanford Flemming and OPSEU (Brent) as cited in *Seneca College, supra*.] It is not necessarily the quality or the strength of a potential defence that can usurp the Union's right to proceed. It is the fundamental nature of the allegation itself that will determine whether it meets the tests contained in Article 32.10. The quality of the College's defence may well inspire sober second thoughts within the Union about the utility of proceeding. But since most grievances are answered with strong or logical defences, the mere existence of a rational defence will not derail a properly constituted Union grievance at the preliminary stage if the allegations meet the tests contained in the Article. Therefore, it is not sufficient to oust jurisdiction of a board of arbitration by showing that there may be a strong likelihood that the grievance will fail. Article 32.10 simply requires the Union to allege a "patent violation." The Union does not need to prove conclusively during a preliminary objection that the grievance will succeed. As the *Loyalist College* case *supra*, points out, the Union must show that its allegations reveal a violation that must indeed be "crystal clear or leap from the page." Here, the alleged violation is "clearly evident" if the Union can prove its case and if the College's defence does not prevail. If providing PDOs is indeed teaching or a complementary activity it should receive SWF credit, unless Article 11.08 applies. This is not a situation

where the allegations or the competing positions are merely arguable. This is a case that may well turn on factual determinations and may not be confined to being an interpretive exercise. As the *Seneca College* case, *supra*, points out, a Union grievance can proceed even where there is a question about the merits of the case. That decision is consistent with the notion that it is the nature of the allegation that fundamentally determines whether it is a proper Union grievance, not the nature of the defence. In the case at hand, we are faced with a situation demanding a determination of factual and legal matters. If the Union is correct, the allegations suggest a patent violation of the collective agreement. If the College is correct, the grievance will fail. But this can only be determined by looking at the merits of the case. Therefore, we are satisfied that the grievance raises issues involving a patent violation of the collective agreement

Even if I am wrong about this, the Union recognition aspect of the grievance also alleges a patent violation. The allegation is that the College is directly dealing with individuals on matters that fall within the scope of the collective agreement. As in the *Humber College* case, *supra*, the Union's grievance focuses not just on the individuals, but "on the work that they were doing. . . . the scope of agreement coverage and damage to the Union's income." Again, there may well be a strong defence to this allegation and to the remedial relief. But if all the elements of the allegation can be proven, they could establish that the College was negotiating with individuals regarding terms and conditions of employment, rather than dealing directly with the Union. This would amount to a patent violation of Article 1. Therefore, the Union's recognition allegations also reveal allegations involving patent violations.

We must then ask whether the allegations concern "unreasonable standards." It is hard to imagine something that amounts to a "patent violation" that is not also an unreasonable standard. The parties define what is reasonable in the collective agreement. Therefore any practice outside the agreement would almost

by definition be "unreasonable." Certainly a patent violation of a contractual term on a College-wide basis would be an unreasonable standard. Therefore, having found that the allegations concern patent violations of the collective agreement, it is consistent to find that they concern allegations of unreasonable standards. It would be unreasonable to fail to abide by Articles 1 and 11. Again, this is not a finding on the merits. The evidence may not demonstrate what the Union alleges.

Article 11.08 and other aspects of the collective agreement may amount to a full defence and prove that the College's conduct is both reasonable and in compliance with the collective agreement. That can only be determined after a consideration of the merits. All that is being determined at this stage is whether the Board of Arbitration has jurisdiction over a properly framed Union grievance.

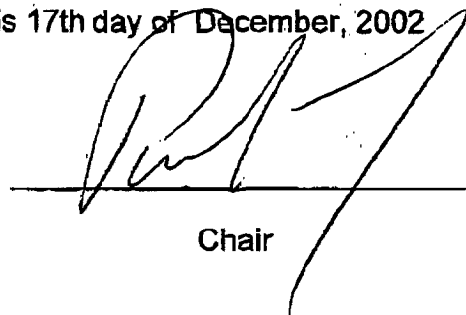
Finally, the third aspect of the test in Article 32.10 must be considered. Is this a grievance over something that adversely affects the rights of employees? The grievance here covers more than one individual or an individual concern. Resolution of this grievance has implications on any members of the bargaining unit who provide PDOs. The crux of the grievance is that the situation giving rise to the grievance has adverse consequences on those who provide PDOs. The remedy being sought is designed to avoid adverse consequences in the future for anyone who does provide PDOs. Therefore, the Union has demonstrated that the allegations concern claims that the rights of employees have been adversely affected by the College's conduct.

In conclusion, the Employer's objection to jurisdiction of the Board of Arbitration on the basis that the grievance is not a proper Union grievance under Article 32.10 is dismissed. We have determined the real issues raised by the grievance and as particularized by the Union amount to allegations that the College is applying unreasonable standards that patently violate the collective agreement and adversely affect the rights of employees. We have not concluded that the College has applied unreasonable standards nor violated the collective agreement.

We have not decided that any employee has been adversely affected. We have simply concluded that the grievance raises arguments that fit within the confines or exceptions of Article 32.10. Accordingly, this Board has jurisdiction over the matter.

We recognize that there are still procedural and production issues outstanding between the parties. We are confident that the parties may be able to resolve these on their own after having received this ruling. We encourage the parties to discuss matters together, to either reach an agreed statement of facts or designate one or two "representative" witnesses to present the case on the merits. This could minimize time and expenses. We remain seized with procedural issues should the parties require further assistance. We will convene for any procedural rulings at the request of either party. The matter can now proceed for determination on the merits of the case.

DATED at Toronto, Ontario, this 17th day of December, 2002



Chair

I dissent – See Attached

R. J. Gallivan
Employer Nominee

I concur

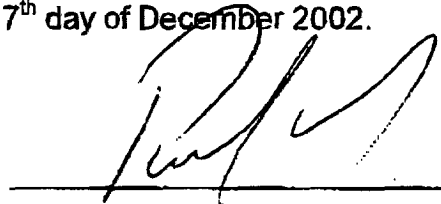
John McManus
Union Nominee

ADDENDUM

The careful and detailed Dissent of the Employer Nominee in this case unfortunately mistakes the meaning and the effect of this Award. Nothing in this Award suggests that the Employer's answer to the grievance is irrelevant. The answers are relevant and that is why so much of the Award is devoted to dealing with it. However, the Dissent seems to try to decide the case on its merits after considering the effect of Article 11.08 on the facts of the case. The merits of a case cannot be decided without evidence. At this preliminary stage of these proceedings the question is not who will win the case. The question is simply whether the Union has succeeded in meeting the requirements of Article 32(10) in order to give a Board of Arbitration jurisdiction over the matter. This article does not require that the Union "establish" the case as the Dissent suggests. Article 32(10) requires that the Union "establish" that the employee has not grieved an unreasonable standard that is patently in violation of the Agreement and that adversely affects the rights of others. In the case at hand, The Union has "established" that the employees did not grieve the fact that they were not paid for their PDO functions. The Union has also established that if this work is "teaching" within the meaning of this contract, this would amount to a patent violation of its terms and it would adversely affect others. Therefore, the Union has satisfied these aspects of Article 32(10).

If the Employer Nominee's approach were adopted, the Union would have to prove the factual aspects of their grievances before any cases could proceed under Article 32(10). Surely, that is not the intent of the article.

DATED at Toronto, Ontario this 17th day of December 2002.



Chair

DISSENT OF R.J. GALLIVAN

I disagree with the Chair's decision because in my respectful view it contains three fundamental errors:

- finding as irrelevant any possible College challenge to the validity of a union grievance;
- improperly requiring a hearing on the merits of a union grievance in order to determine whether or not it should be heard at all;
- substituting the words "allege" and "assert" for the word "establish" in Article 32.10 of the collective agreement.

First, the underlying thrust of the Chair's decision to reject the College's preliminary objection that the grievance is not a valid union one is based on her view that "...it is not an answer at the preliminary objection stage to raise Article 11.08". That demonstrably is erroneous. If the College is prevented from pointing to some provision in the contract when arguing that the Arbitration Board lacks jurisdiction to proceed, then it is an inescapable consequence that the College could never successfully object at the outset to an inappropriate union grievance. Every allegation by the union of a contract violation would have to be accepted on its face as a valid union grievance because the College would be precluded from pointing to any contract provision to demonstrate why the alleged violation should not be so categorized.

In the grievance before us the union alleges that Article 11 has been violated because the functions implicit in the Professional Development Opportunities (PDO) program are not included in a SWF. The College responds that Article 11.08, which deals specifically with professional development, exempts those functions from inclusion in a SWF: "Such activities will neither be recorded nor scheduled...." Does "such activities" include time spent on PDO? That is the argument raised by the grievance. But because in the face of 11.08 the issue clearly is "arguable" at best, the alleged violation cannot be a "patent violation" as required to validate its grievance under Article 32.10.

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Obviously if Article 11.08 is ignored and 11.01 read in isolation from it, a patent violation could be assumed. But reading only part of a challenged Article would lead to the same conclusion about any clause in the contract which contains language qualifying its application. For example, Article 8.03A reads:

The College agrees to provide paid leaves of absence for seven employees who are members of the Union's negotiating team. These leaves shall extend from the beginning of bargaining for a new contract until such date as it is completed, not just for the specific times at which direct negotiations are being conducted.

Should the union grieve a College refusal to continue a leave under that Article (assuming the affected employee didn't grieve) then using the Chair's reasoning such refusal would be a patent violation. However, if the College's answer to the grievance was that it had denied further leave because bargaining for a new contract was completed, then at best there would be an arguable case about when the bargaining had in fact finished, an issue amenable to adjudication at the preliminary stage.

To decide, as the Chair does in the case before us, that the College's answer to the grievance is irrelevant and cannot be taken into account in determining the merits of its preliminary objection to the Board's jurisdiction, effectively reads out of Article 32.10 the conditions which the contract requires be met before an Arbitration Board can take jurisdiction over a union grievance. That Article allows union grievance under very limited circumstances - the union itself may grieve only if an eligible employee did not and the union is able to establish each of the following conditions: that the employee "...has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees". By dismissing as irrelevant the employer's answer to the union grievance at the preliminary stage, any allegation of a contract breach must, by definition, be a valid union grievance because the employer is barred from pointing out how the grievance fails to meet the Article's enabling conditions.

That finding leads the Chair to her second error: that the way to determine if the grievance meets the enabling conditions of Article 32.10 is to hold a hearing on its merits in order to decide if it even should have been heard at all! That rather absurd finding flies in the face of the clear wording and intent of 32.10. If all union grievances are to proceed to hearing on their merits then the definition in 32.10 of which union grievances are eligible to proceed before a Board of Arbitration, and which are not, has been read out of the contract. Instead of settling the issue

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of jurisdiction (a purely legal matter) at the preliminary stage, the Chair's decision forces the College to commit time, money and other resources to fully argue every such disputed grievance on its merits before an Arbitration Board which in many cases would lack jurisdiction to even commence such a hearing.

The Chair's decision is also contradictory to a long line of other awards in the College system which have dismissed invalid union grievances at the preliminary stage. See for example the Fanshawe College and OPSEU decision of Arthur Kruger, 16 September, 1997 where the union alleged an improper layoff. Professor Kruger, as other arbitrators consistently have done under this contract, looked at the whole layoff Article before concluding that a "patent" violation couldn't be established by the union because the College showed it could make an argument about the relative qualifications of the retained employees compared to those laid off. He upheld the College's preliminary objection and concluded his Arbitration Board lacked jurisdiction to proceed further because the conditions in 32.10 granting jurisdiction had not been met.

The jurisprudence is also long-standing and consistent on what this contract means by a "patent violation". In Northern College and OPSEU, decision of R. MacDowell, 9 July, 1991 the arbitrator said:

As the cases to which we were referred indicate, to meet the requirements for a union grievance there must be something more than just an "arguable" breach of the employer's contractual obligations. Such breach must constitute a patent violation of the agreement - that is one that is obvious, manifest, conspicuous, plain, self-evident, clear on its face and substantially beyond dispute....

See also Loyalist College and OPSEU, decision of Kathleen O'Neil, 29 May, 2001 and its detailed analysis of the higher threshold implicit in this contract's use of the word "patent" compared to "prima facie" or "arguable".

In Seneca College and OPSEU grievance #89D325, decision of P. Picher, the arbitrator quotes with approval from Sir Stanford Fleming College and OPSEU (Brent):

In our view, in order for a violation of the collective agreement to be called "patent" it must be evident or plain on its face that there has been a violation of the agreement. That is, it is not sufficient that the union can show that arguably it has a case which could be a violation of the collective agreement depending on which of two reasonably possible interpretations are accepted, but rather that there has been a clear, evident and plain violation of the collective agreement.

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It is clear from such awards that the Colleges concerned were allowed by the arbitrator to show why the union grievance didn't establish a "patent" violation. There cannot be "two reasonably possible interpretations" (Brent above) unless the College is allowed to put forth its own without having its interpretation dismissed as irrelevant at the stage where the Board's jurisdiction to proceed further is being determined. The grievances in the foregoing awards were dismissed at the preliminary stage as invalid union grievances and were not improperly sent on to further hearings to determine whether or not their Boards had jurisdiction. The Chair in our case characterizes that long line of decisions as ones where the arbitrators were "...reluctant to allow cases to proceed under Article 32.10 where there are 'arguable' positions or 'two reasonably possible interpretations'". The only "reluctance" most other readers would see in those awards is an unwillingness by those decision-makers to ignore the contract.

Instead, our Chair chooses to follow the wrongly-decided Seneca College and OPSEU decision of J. Devlin, 5 June, 1998 where the Majority held that "...whether the union can establish a patent violation is a matter more appropriately decided on the merits". For the reasons I have outlined above, that decision clearly is erroneous and should not be followed. By deciding it must first hear the grievance on its merits before determining if the violation is "patent", the Majority there unwittingly acknowledged that the issue was arguable at best. The Arbitration Board's entitlement in law to hear the grievance is a matter to be decided before, not after, a hearing on the merits.

After finding a patent violation of Article 11 by not considering if the College's response might make the case arguable, the Chair appears to agree that no patent violation can be found of Article 6 (management functions) as claimed by the union - which means of course that that part of the grievance should be dismissed. The Chair then goes on to find a patent violation of Article 1 - the clause which recognizes the union as the exclusive bargaining agent for employees covered by the agreement. She says: "Again, there may well be a strong defence to this allegation ...But if all elements of the allegation can be proven, they could establish that the College was negotiating with individuals regarding terms and conditions of employment, rather than dealing directly with the union."

If there "may well be a strong defence" based on the College's answer to the grievance then, by definition, the alleged violation is "arguable", not

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"patent". But once again the Chair dismisses the College's 11.08 defence. Instead she finds it to be a patent violation when the College deals directly with an employee on PDO matters without considering the College's explanation and despite that part of Article 11.08 which reads: "In keeping with the professional responsibility of the teacher, non-teaching periods are used for activities initiated by the teacher and by the College....Such activities will be undertaken by mutual consent and agreement...." Surely in the face of that language the absence of the union from such teacher-College discussions cannot be judged by any objective reader as a patent violation. At its highest the union might tortuously argue that the "mutual agreement" mentioned required its involvement. But as the extensive jurisprudence has established, unless the violation is "crystal clear" or "leaps from the page", it is not a patent violation (see Loyalist College above). By our Chair's reasoning, however, since the union theoretically has an interest in everything that might happen within the bargaining unit, an Article 1 violation would always trump the Article 32.10 threshold requirements for a union grievance. Again, that clearly cannot be what the parties intended in limiting the scope for union grievances, nor is it, as I have demonstrated, a proper interpretation of Article 32.10.

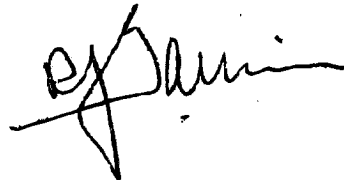
The Chair's misinterpretation of that Article is further exacerbated by the third clear error in her award. She says that: "Article 32.10 simply requires the Union to allege a 'patent violation'"; and again: "...Article 32.10 demands that the union assert a 'patent' violation'...." That is not even close to what the contract says. Article 32.10 allows a union grievance to proceed only after the union "...establishes that the employee has not grieved an unreasonable standard that is patently in violation...." (my emphasis throughout). A simple allegation or assertion of a contract violation is insufficient to meet the requirement that the allegation be established. According to Oxford, "establish" means to "place (a fact etc.) beyond dispute". By choosing to use the word "establish" instead of "assert" or "allege", the parties' intent is clear: the allegation on its face must for all intents and purposes be beyond dispute.

Since the College has a response to the grievance which makes the issues at least arguable, the union falls far short of the threshold requirement that it "establish" that its alleged violation meets the standard in law of being "patent", a test the parties have chosen to have apply under this contract. Those are the words these parties chose to use in the bargain they struck, one consequence of

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which is that an Arbitration Board may hear on their merits only those union grievances which meet the threshold tests contained in Article 32.10. Conversely, it is also a consequence of the parties' choice of words that they intend some union grievances not to be within the jurisdiction of an Arbitrator during the currency of the collective agreement. An Arbitration Board which ignores or changes those words, because it thinks every possible dispute which arises during a contract's term is worthy of the Board's adjudication or in order for whatever reason to generate further hearings beyond its jurisdiction, makes a mockery of the contract and of the jurisdictional limits placed on it by the contract.

As I have demonstrated in the foregoing, the union grievance in this case does not meet the contractual tests which would empower an Arbitration Board to hear it. Thus I conclude that our Board lacks jurisdiction to proceed further. I conclude that Article 11.08 is an explanation of the College's actions (which gave rise to the grievance) sufficient that a patent violation cannot be made out for Articles 1, 6 or 11. At best an arguable case exists under Articles 1 and 6 (and I agree with the Chair that no patent violation of Article 6 has been established). Accordingly, the College's preliminary objection to the Arbitration Board's jurisdiction should be upheld.



R.J. Gallivan