

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEORGE BROWN COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

UNION GRIEVANCE

BOARD OF ARBITRATION:

JANE H. DEVLIN CHAIRMAN

RENE ST. ONGE COLLEGE NOMINEE

SHERRIL MURRAY UNION NOMINEE

ANN E. BURKE, FOR THE COLLEGE

GEORGE A. RICHARDS, FOR THE UNION

OPSEU FILE NO.: 93C629

HEARING DATE: November 26, 1993

Written submissions were received on December 15, 1993; January 24 and February 7, 1994.

by Ms. Thomas remain outstanding and are proceeding to arbitration. As well, Mr. Richards suggested that the College afforded preferential treatment in the assignment of work to two other partial load employees who had settled or withdrawn grievances which were filed in December of 1992.

As to the individual grievances filed by Ms. Thomas, it would appear that these grievances allege a violation of Articles 26 and 27 of the collective agreement although the Board was advised that the Union has taken the position that the grievances also encompass a violation of Article 3.02. Nevertheless, it is acknowledged that the facts which gave rise to the individual grievances are different from the facts on which the Union grievance is based.

In this case, Ms. Burke, on behalf of the College, took the position that the issue raised in the grievance is not the proper subject of a Union grievance. In support of this position, she relied on Article 32.10 of the collective agreement which provides as follows:

32.10 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.

It was the submission of Ms. Burke that by virtue of Article 32.10, Union and individual grievances are mutually exclusive and that, in this case, the alleged violation of Article 3.02 could have been the subject of an individual grievance on the part of Ms. Thomas. In these circumstances, Article 32.10 provides that the Union is entitled to grieve only in the event that the employee has not grieved an unreasonable standard that is patently in violation of the collective agreement and that adversely affects the rights of employees.

Ms. Burke contended that, in this case, no "standard" is involved as the grievance does not pertain to an established practice or College requirement which potentially affects all members of the bargaining unit. Moreover, as the College is free to hire and assign work to partial load employees, there is no standard against which the Board can measure the reasonableness of the College's conduct. As well, any consideration of the Union's claim would involve an inquiry into matters such as the seniority, competence and experience of the respective employees and, accordingly, it cannot be said that the decision to assign work to particular employees involved a patent or, in other words, obvious violation of the collective agreement. Finally, it was submitted that the issue raised in the grievance adversely affects only one individual: namely, Ms. Thomas and, therefore, cannot be said to generally affect "the rights of employees". In the result, Ms. Burke asked that the grievance be dismissed as inarbitrable.

While Mr. Richards acknowledged that Ms. Thomas could have filed an individual grievance alleging a violation of Article 3.02, nevertheless, he maintained that the issue raised is the proper subject of a Union grievance. In this respect, Mr. Richards submitted that affording preferential treatment in the assignment of work to employees who resolve grievances is prima facie

evidence of an "unreasonable standard" and that, in this context, a "standard" is simply a rule, custom or practice. Moreover, if the facts alleged were proved, the College's conduct would constitute a patent violation of the collective agreement so as to satisfy the second requirement set out in Article 32.10. However, as the Board would have to hear evidence in order to determine this issue, Mr. Richards requested that we reserve our decision on the preliminary objection and proceed with the hearing on the merits. Finally, as to the third requirement set out in Article 32.10, Mr. Richards contended it is not necessary that the College's conduct affect the rights of all employees or even members of the bargaining unit generally. In any event, it was submitted that Ms. Thomas is not the only employee affected as the practice of affording preference in work assignments to those who settle or withdraw grievances would deter other employees from pursuing grievances to arbitration.

The issue, then, is whether this matter is the proper subject of a Union grievance as provided in Article 3.10 of the collective agreement. In this respect, there is no doubt that the Union has a legitimate interest in ensuring that employees are not discriminated against for filing grievances. Nevertheless, Article 3.10 of the agreement places strict limits on the circumstances under which the Union may grieve a matter which could have been the subject of an individual grievance. In this case, as it was conceded that an individual grievance could have been filed by Ms. Thomas, Article 32.10 provides that the Union may grieve only where it establishes (1) that the employee has failed to grieve an unreasonable standard; (2) that the standard is in patent violation of the collective agreement; and (3) that it adversely affects the rights of employees. As noted in a number of awards, all three criteria must be satisfied and the failure to establish any one of the three will result in a finding that the grievance is inarbitrable: see, by way of example, Seneca College and Ontario Public Service Employees Union January 31, 1991 (P.C. Picher (unreported)).

In the Board's view, there is some question as to whether the alleged violation of Article 3.02 could constitute an "unreasonable standard" within the meaning of Article 32.10. However, given our determination with respect to the third criterion set out in that Article, it is unnecessary to decide this issue. As to the second criterion, we agree with the Union that where, as here, the language of the relevant provision is clear and unambiguous and the dispute concerns the nature of the conduct in which the College engaged, it would be appropriate to hear evidence prior to determining whether there had been a patent violation of the agreement.

Turning then to the third criterion, although the Union contended that there is no necessity to establish that the alleged violation adversely affects the rights of members of the bargaining unit generally, under similar language, boards of arbitration have consistently required the Union to establish that the "unreasonable standard" has application beyond the individual or group of employees who failed to grieve: see Algonquin College and Ontario Public Service Employees Union December 4, 1983 (Weatherill (unreported)) and Niagara College of Applied Arts and Technology and Ontario Public Service Employees Union November 25, 1993 (Brown (unreported)). Moreover, although the Union submitted that this third criterion is intended to discourage the litigation of grievances which are moot, we cannot agree. Instead, we find that this criterion is intended to ensure that the regular procedure for personal and group grievances is bypassed only in respect of matters which impact broadly on members of the bargaining unit.

In this case, the Union submitted that the College has afforded preferential treatment to three employees who settled or withdrew grievances. Nevertheless, the only individual alleged to have been adversely affected by the College's conduct is Ms. Thomas, who admittedly could have filed an individual grievance. Moreover, while the Union contended that the College's conduct would deter other employees from pursuing grievances to arbitration, in our view, this is not sufficient to satisfy the requirements of Article 32.10. This Article entitles the Union to grieve where it establishes that an employee has failed to grieve "an unreasonable standard ... that adversely affects the rights of employees". In this case, the only employee adversely affected by the alleged violation of Article 3.02 is Ms. Thomas. In these circumstances, we find that the third criterion set out in Article 32.10 has not been satisfied and that no proper basis has been established for the Board to reserve its decision on this matter.

In the result, while the Board is cognizant of the restrictive effect of this award, we are bound by the language of the collective agreement. Accordingly, we have no alternative but to dismiss the grievance as inarbitrable.

DATED AT TORONTO, this 8th day of June, 1994.

Chairman

"I concur - Rene St. Onge"
College Nominee

"I dissent - Sherril Murray"
Union Nominee