

CAAT (A)
99C029

IN THE MATTER OF a union grievance

AND IN THE MATTER OF the arbitration of the grievance

BETWEEN:

Loyalist College

-and-

Ontario Public Service Employees Union

PLACE AND DATE OF HEARING: Belleville, Ontario, September **22, 1999**

BOARD OF ARBITRATION:

Jacqueline Campbell
Ed Seymour
Stanley Schiff, chairman

APPEARANCES FOR THE EMPLOYER:

David Butler, vice-president, staff and student services
Douglas K. Gray, counsel

APPEARANCES FOR THE UNION:

Bernard Boulanger, president
Harry Plummer, chief steward
Kristen A. Eliot, counsel

AWARD AND REASONS

Brian Scharf had held a series of partial-load and sessional appointments in the Automotive **Services** Technician Program of the School of Access and Skills. After the last of them ended, a posting for a full-time position as an instructor in the program went up on June **22nd**, 1998. Scharf applied **for** the position and got it. He began teaching in the fall term that started on August **31st**. On **October** 26th the union formally grieved that the position "is improperly classified and should be that of a professor." The claim is for reclassification as full-time professor. Although not mentioned in the grievance form, the reclassification would carry a higher salary scale.

The College took two objections to the grievance, repeated at the opening of the hearing: the grievance is untimely and, in any event, it is not properly one the union may bring.

The timeliness objection is governed by the second paragraph of art 32.10:

32.10

....
[A] grievance [by a union local] shall be **submitted...within** 20 days following the **expiration** of the 20 days from the occurrence or origination of the circumstances **giving** rise to the grievance...

In light of the union's argument on this objection, to allow easy comparison we also set out relevant parts of art. 32.02, defining the **time** limit for grievances by individual employees:

32.02 . . . [T]he employee shall discuss [the complaint] 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...

The College says that the union put in the grievance after the time limit in art. 32.10 had expired. The parties agree that the time limits are mandatory and cannot be extended by the board.

As we count back from **October 28th**, for the grievance to get **within** the **40-day** limit of art. 32.10 "the occurrence or origination of the circumstances giving rise to the grievance" must have happened on or after September **18th**. On the face of the grievance form and in substance, **this** is a grievance against the College's conduct in **classi-**

fying the position as that of an instructor. The conduct of classification is "the circumstances giving rise to the grievance". Did the College do that on or after September 18th?

Our answer must be no. On the evidence we find that **Scharf's** Standard Workload Form was created on August 28th. It shows the **courses** he would teach in the fall term of 1998. The union says that only when they got the SWF could they know what the courses would be. Mainly the union complains that they include Theory. We see that, according to the class definitions, Theory is something an instructor would not teach but that a professor might. Since the SWF shows such an assignment the College must have decided on and made the classification before the SWF was created. Indeed, although there is no specific evidence on the matter, we think we can infer from the agreed facts that the College decided on both the course assignments and the classification before drafting the posting. The vacancy occurred because the previous incumbent, classified as a professor, had retired. At that point the College rethought the requirements of the position and decided that the replacement teacher should be **classified** as instructor. Whether we choose some date shortly before June 22nd or shortly before August 28th, "the **circumstances**" of the College's conduct in classifying the position as that of an instructor "**occurred**" well before September 18th. Under the wording of art 32.10, that is so even if the union did not know and could not reasonably have known what the College had done when the College did it. **Article** 32.02, governing individual grievances, contains specific alternatives for measuring time: **the** days may run from when the individual learns or might reasonably have learned of the circumstances giving rise to the grievance. Article 32.10 sets out no such alternatives. The grievance here is accordingly out of time.

The union has three answers. First, the grievance is continuing and therefore the complaint might be grieved at any time. Then, we should hold that "the circumstances ..."**occurred**" when **Scharf** actually taught the assigned courses. Finally, we should read the **40-day** time limit "subjectively".

On the first point we again look at exactly what the grievance **is** about: in the Statement of Grievance in the grievance form the union complains about the College's conduct in classifying the position as one for an instructor and not for a professor. That

discrete event of classification happened at a specific time. it did not continue and it was not repeated. What we have before us is therefore not a continuing grievance. *E. g., Re Fanshawe College and OPSEU, Dobos grievance (1991)*, at 22 (Swan, chairman). A college's exclusion of an employee from the bargaining unit would be conduct raising a continuing grievance, as rightly held in *Re Seneca College end OPSEU, Union grievance (1998) (MacDowell, chairman)*, cited by the union. But that did not happen here and is not the subject of the grievance. A board chaired by Howard Brown has held that a grievance against a college's **classification** of particular employees is not continuing even though there will be pay consequences of what **the** college has done. *Re Niagara College and OPSEU, Union grievance (1993)*, at 20. The relevant facts there were substantially the same as those here. We agree with the reasoning in the award and the result.

The union then says that **Scharf's** actual teaching of the assigned courses is the "**occurrence...of** the circumstances giving rise to the grievance". As we read the Statement of Grievance in the grievance form that is not so. The union does not grieve against what Scharf is teaching: as we have said, the union grieves against the alleged misclassification of the position in light of what he is teaching. Apparently content with the courses Scharf was assigned to teach, or at least indifferent to them as such, the union complains only about the College's attempt to couple the assignment with the instructor classification.

For the sake of the argument, we now assess when "the circumstances giving rise to the **grievance...occurr[ed]** or **originat[ed]**" in the light of a "subjective" interpretation of **art. 32.10**. We assume that such an interpretation requires our pinpointing the starting time of the count in much the same way as that directed in the alternative for individual grievances by **art. 32.02**. We might then find that the union satisfied the 40 day limit if the union's responsible officers knew or might reasonably have known of the occurrence or origination of the circumstances no earlier than September 18th. So, what we must determine is when precisely they knew or might reasonably have known.

We must confess at this point that we may have misunderstood the union's argument about measuring the time from when Scharf taught the courses. Perhaps the union was saying that the nature of the courses Scharf was assigned is "the **circum-**

stances giving rise to the complaint " and that, for the purpose of a subjective interpretation, only when he was actually teaching the courses could he or the union have known their nature. On this argument time begins to run when he had done enough teaching to allow him **the** knowledge. The difficulty with the argument is that the SWF — all we have before us showing **Scharf's** duties — is decisively against it. The SWF says that the term starts on Monday, August **31st**, and that **Scharf** has the job of teaching Theory as one of the assigned courses for twelve hours each week. Surely we can infer that he would have known as soon as he began preparing to teach **the** assigned courses or, at the least, began teaching them during the week of August 31 st what they factually required him to do. We do not think that he would reasonably have needed until September 18th or later to realize what the **substance** of the Theory course was nor, having the realization, to bring in the union. Therefore, even if we thought that actually teaching the assigned courses was necessary, we could not find on a subjective interpretation of art. 32.10 what was needed for the count to start on or after September 18th.

To show very early starting times for the count, the College points to the posting, a copy of which came to the union in June, and to the Calculation of initial Starting Salary, a copy of which the union got in **August.** The College argues that the union knew enough about the position and the previous incumbent at least to have prompted some inquiry when each of the documents came in. We know, and we take it that the union knew in June, that the previous incumbent had been classified as a professor. But there was no evidence or agreed facts allowing an inference that the posting said enough about the duties to put the union on notice that the position's content was to remain substantially the same. The Calculation document on its face does not say anything about the nature of the position and the parties added nothing about it at the hearing. We therefore cannot hold that the subjective reading of **art.** 32.10 makes the count start in June or August.

The College **also** argues that the time should at the latest run from the date the union got their copy of the SWF. That date, the College says, is September 4th or earlier. We agree.

On the union's own argument, the **SWF's** content is enough to show me alleged misclassification or at least to make further Inquiries important. According to Bernard

Boulianger, the **local** union president, he first saw the SWF in the union office some time between the middle and the end of September. He does not know when **it** first got there. He said, however, that the chief steward, **Cecelia** Reilly, sometimes picked up and examined the union's mail before he saw it **Reilly** herself was not called to testify.

To come to a pretty solid conclusion about the time range of the **SWF's** arrival in the union's office, we look to the evidence of witnesses the College called. John **Mercer**, the program coordinator, was clear that **Scharf** and the dean, Thomas **Smith**, signed the SWF on Friday, August **28th**, as shown on its face. It then went to Smith. While Smith does not remember when, according to College procedures, he sent **it** to the Staff and Student Relations office, his usual practice was to forward all **SWFs** immediately upon receipt. Louise Bowry, the executive secretary to the Vice-President Staff and Student Services, confirmed that Smith always got **SWFs** to her as soon as they were signed. We therefore find that Smith put Scharf's SWF into the inter-office mail some time on August 23th. Since the mail schedule gets things delivered in one-half day to a day, the SWF arrived in Bowry's office on Monday, the 31st. Bowry does not remember when she sent it on to the union, but she told us that her practice was to copy any SWF and then immediately put it into inter-office mail, addressed to the union. The union's office is only one floor up in the same building and its mail box is not far away. On the evidence we find that Scharf's SWF went from Bowry into the mail on or around the **31st**, arriving in the union's mail box on or around Tuesday, September 1st. On the evidence we could not find that it got there later than Wednesday, the 2nd. Perhaps Reilly or Boulanger took it from the box shortly after it arrived. Since there is no evidence on **that**, we make no finding. What we find is that it was there for them to get it.

The result is that the union's president or its chief steward had a reasonable opportunity to read the SWF no later than early during the **first** week of September. Had either done so, the course assignments and especially the assignment of Theory would immediately have been apparent. That, we think, would reasonably have been enough to make them aware of the facts to bottom a complaint that the position had been misclassified. But even if not, it would have been enough, as the union said during argument, to make them check further by comparing the **SWF's** content to that of others **with** similar **SWFs** classified as professors. So, either by reading the SWF when it arrived in the union's mail box or by that and also checking others' **SWFs** against it, the union's

president or the chief steward and, for the purpose here, the union would have learned of "the occurrence or origination of the circumstances giving **rise** to the grievance". We cannot think that the checking would reasonably have taken from September 1st or 2nd until September 18th or beyond. On a subjective reading of art 32.10, then, the "circumstances" still "**occurred**" before September **18th**, that is, more than 40 days before the grievance was put in.

The result is that, whether we Interpret art. 32.10 the way its specific wording directs in contrast to that of art. 32.02 or we give it a subjective reading the union asks for, the outcome is the same. The grievance was not brought in time.

The College's timeliness objection is allowed. We therefore need not deal with the other objection.

The grievance is dismissed.

DATED at Toronto, Ontario, this 25th day of October, 1999.


Jacqueline Campbell


Stanley Schiff, chairman

Ontario Public Service Employees Union
File 99-C-209
and
Loyalist College
Classification Grievance
DISSENT
Ed Seymour, Union Nominee

I have read the Majority Award and, with respect, **I** must dissent.

The Majority did not address the question of whether this constituted a proper union grievance. In my view, the language of the Collective **Agreement** is quite specific on this issue, and the matter clearly falls under what would **constitute** a proper union grievance. Mr. **Scharf** was obviously not entitled to file an individual grievance in that his circumstances did not comply with Article 32.01, which reads:

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

Mr. Scharf was not employed continuously for the four months prior to the events giving rise to his grievance.

With respect to the other preliminary matter, the issue of timeliness, **I** disagree with the Majority decision. While this is a **preliminary** matter, there is ample jurisprudence which supports the view that evidence should be clear and cogent. Certainly in this situation the evidence is far from clear and **cogent** as to exactly when the time limits

commenced, and absent that clear, cogent evidence, we should have heard the merits of the case.

The Majority have erred, in my view, because I placed far too much emphasis on the fact that the SWF was dated August 28, and ruled that the time limits commenced at that **point**, or thereabouts. The evidence on that crucial point was not at all clear. Because the time limits in this Agreement are mandatory, and because the onus rests with the Employer to prove that the grievance was untimely, the evidence should be **conclusive**.

The clearest evidence on when the SWF was received comes **from** Mr. Boulanger, who testified the **SWFs** are completed by the Dean when they can then go to the **Secretary** to the Vice President of **Staff** and Student Services, and from there they are sent to the Union **office**. They are supposed to be **received** six (6) weeks before the commencement of the new semester. In actuality, however, **SWFs, according** to Boulanger, come in dribs and drabs. Some are received on time, some late, some later, and others not at all. While he could not **recall** with any degree of **certainty**, it was his view that he **first** saw this particular SWF some time between mid to the end of September which, if true, would have placed the **grievance** well within the time limits. Mr. Boulanger was asked several times in **direct** examination about when he **first** saw the SWF, and his answer was always the same. He was not questioned on this point in cross-examination.

None of the Management witnesses testified with any certainty about this **particular** SWF.

Ms. **Bowry's** evidence confirmed Mr. Boulanger's to the extent that Deans are not prompt in submitting the **SWFs**, although to be fair, Mr. Smith was more prompt than **others**.

More important to this case, however, is that Ms. **Bowry** could not recall processing the SWF in question nor did she have any systematic method for keeping track of them. In addition, she had no notes regarding this **SWF**, and it was only “her knowledge of Mr. Smith” with respect to his promptness which would lead her to conclude that the **SWF** was forwarded promptly.

She agreed in cross-examination that she had no independent record of either receiving an **SWF** or not. She also said she would have no knowledge if Mr. Smith never forwarded an **SWF**. **except** that he never did that, (but how, based on her **own** evidence, could she possibly know if he did not comply?) She agreed that if **Mr.** Boulanger testified that he sometimes did not receive **SWFs** at all, her evidence on that point would likely be correct.

Mr. Smith, in cross-examination testified he did not personally date the **SWF**, nor did he have any independent recollection as to whether the date was filled in when he signed it. In re-examination he was asked what he meant when he said he did not remember. His response was: “If the question is: *Do I recall signing this on August 28,* then the answer is **No.**”

Mr. **Mercer**, the **final Management** witness who was under subpoena, admitted he would have preferred not to be **testifying**. He also admitted, under **cross-examination**, that he did not specifically recall, nor did he have any written documentation indicating when he referred the document to **Mr.** Smith.

It is quite understandable to this Member that some of the witnesses would not have a vivid recall as to how and when the **SWF** was processed especially given the evidence that the **SWFs** are not always processed: **however**, that is precisely why the document should not be treated as the pivotal document **which** directs the case.

In my **view**, the Seneca College of Applied Arts and Technology decision **by** Mr. R. O. **MacDowell** has relevance in this case. I refer specifically to the following at pages **18/19**, which read:

The point is: while the College raises this as a "preliminary question" going to "**arbitrability**," the timeliness issue is not really "preliminary" at all because its determination depends upon facts • and the characterization of facts • that are part and parcel of the merits of the dispute. **Accordingly**, in the absence of agreement about what the evidence will be, it is neither prudent nor possible to pin down "the occurrence or origination of the **circumstances** giving rise the grievance..." It is open to the union to argue, as it does, that the breach did not occur until on or about October **21, 1996**, or sometime in the **40-day** period immediately preceding October 21, 1996.

It may turn out, as the College says, that there were **never any** circumstances warranting a grievance • which is to **say**, that "**teaching functions**" were **never** performed by lab **monitors**, or were **never** performed to the **degree** that would bring **them** within the unit (arguably, 6 hours a **week**.) However, unless we say that any "teaching" at all brings an individual within the bargaining unit, (which we will no doubt hear argument about,) the facts respecting the "timeliness issue" are completely intertwined with the merits of the case.

In my opinion the above is relevant to this case to **the extent that**, based on the evidence before **us**, we cannot, with any degree of **certainty**, determine precisely when the Union became aware of the alleged violation. As **Mr. MacDowell** suggests, **after** hearing the merits we may conclude that there is no violation+ and must hear the merits to determine that. Consequently, it is grossly unfair to deny the Union its right to proceed to the merits based on what may or may not have happened in the past.

I believe that until we determine **exactly** when the alleged Teaching of **Theory** took place, or whether, indeed, it took place at all, we cannot determine if this matter is out of **timeliness**.

I further believe that the Majority are “nit-picking” when they refer • at page 3 • to:

The union then says that **Scharf's** actual teaching of the assigned courses is the “**occurrence...of the circumstances** giving rise to the grievance.” As we read the Statement of Grievance in the grievance form that is not so. The union does not grieve against what Scharf is teaching; as we have said the union grieves against the alleged **misclassification** of the position in light of what **he is** teaching. Apparently content with the courses Scharf was assigned to teach or at least indifferent to them **as** such, the union complains only about the College's attempt to couple the assignment with the instructor classification.

Isn't what he is alleged to be teaching in fact the alleged **misclassification**?

For the record, I reproduce the grievance in its entirety:

Statement of Grievance

OPSEU Union Local 420 grieves that the Full Time Instructor position in the School of Access and Skills, is improperly classified and should be that of a Professor.

Settlement Required

That the position be reclassified as that of a Full Time Professor.

The Majority state:

For the sake of the argument, we now assess when “the circumstances giving rise to the **grievance...occurr[ed]** or **originat[ed]**” in the light of a “subjective” interpretation of

art. 32.10. We assume that such an interpretation requires our pinpointing the starting time of the count in much the same way as that directed in the alternative for individual grievances by art. 32.02. We might then find that the union satisfied the **40-day** limit **if the** union's responsible **officers** knew or might reasonably have known of the occurrence or origination of the **circumstances** no earlier than September **18th**. So, **what** we must determine is when precisely they knew or might reasonably have known.

Exactly, but that is the major problem with the Majority's decision in that the employer never did with any **certainty**, pinpoint the **"starting** time of the count."

It is not reasonable, on the basis of the information before us, to determine that the Union **knew** on August 28 or September 4. All we know is it knew some time before the filing of the grievance, and we must hear the merits to determine the precise time.

I take issue with the Majority's following assertion:

We must confess at this point that we may have misunderstood the union's argument about measuring the time from when Scharf taught the **courses**. Perhaps the union was saying that the nature of the courses Scharf was assigned is **"the** circumstances giving rise to the complaint" and that, for the purpose of a subjective interpretation only when he was actually teaching the courses could he or the union have known their nature. On this argument time begins to **run** when he had done enough teaching to allow him the knowledge. The **difficulty** with the argument is that the **SWF** - all we have before us showing **Scharf's** duties - is decisively against it. The **SWF** says that the term starts on Monday, August 3 **1st**, and that Scharf has the job of teaching Theory as one of the assigned courses for twelve hours each week. Surely we can infer that he would have known as soon as he began preparing to teach the assigned courses or, at the least, began teaching them during the week of August 31"

what they factually required hi to do. We do not think that he would reasonably have needed until September **18th** or later to realize what the substance of the Theory course was nor, having the realization, to bring in the union. Therefore, even if we thought that actually teaching the assigned courses was necessary, we could not **find** on a subjective interpretation of art. 32.10 what was needed for the count to start on or **after** September **18th**.

Given that Mr. **Scharf learned** late in the day he would be an **instructor**, and given the fact that there is a distinct possibility that this late awareness might have meant that he would have little time to prepare in advance for the semester, and that at best he might only adequately prepare a few lessons in advance of delivery, then it is not unreasonable to assume that a week or two might pass before he fully appreciated the **complexity** of the teaching assignment.

I am astonished that the Majority, based on the evidence of **Bowry, Mercer** and **Smith**, none of **whom** could testify with any certainty exactly when they processed the SW, can assert that it came to a "pretty solid conclusion about the time range of the **SWF's** arrival in the union **office**."

The Majority also state that:

On the evidence we **find** that **Scharf's SWF** went **from Bowry** into the mail on or around the **31st**, arriving in the union's mail **box** on or around Tuesday, September **1st**. On the evidence we could not find that it got there later than **Wednesday, the 2nd**. Perhaps Reilly or **Boulanger** took it from the **box** shortly **after** it arrived. Since there is no evidence on that, we make no finding. What we find is that it was there for them to get it.

I cannot understand how the majority can possibly accept this as the pivotal piece of evidence in the **case**, especially when none of the three witnesses called by **Management** ever recall processing the **SWF** in question.

As far as I am concerned, it is unconscionable that the College, based on such flimsy evidence, and **now** with the blessing of this Board, could possibly, on a continuing basis, be violating the Collective Agreement between the parties because of what amounts to a technicality.

If the mandatory time limits were **broken**, then proving that that is, in fact, **so**, should be based on far more conclusive evidence than that which was placed before this Panel.

I **would** have rejected both of the Employer's preliminary objections, and heard the merits of the case.



Ed Seymour, Union Nominee

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