

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(THE EMPLOYER)

A N D :

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCE OF DANNY VINCENT

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR
SHERRIL MURRAY, UNION NOMINEE
R. GALLIVAN, EMPLOYER NOMINEE

APPEARANCES FOR THE EMPLOYER:

R. Dunsmore, Counsel
M. Fogel, Dir. ER

APPEARANCES FOR THE UNION:

E.J. Holmes, Counsel
Ted Montgomery, Local Pres.
Josef Stavroff, Chief Steward
Danny Vincent, Grievor

INCUMBENTS

Geri Agney
Neilia Sherman
Sue Cohen

A HEARING IN THIS MATTER WAS HELD AT TORONTO ON OCTOBER 7, 1997.

AWARD

The grievance dated October 28, 1996 arises under the provisions of a collective agreement in effect between the parties at all material time in which the Grievor claims as follows:

“The College is in violation of the Collective Agreement in that it has failed to place me in a vacant full time position or in a position currently occupied by a person or persons whose duties include teaching in the following areas: Human Relations, Philosophy, Interpersonal Skills, Communication Skills, Psychology, Humanities or Social Sciences; or counselling of students. The remedy required is that the College shall place me into a full time regular position without loss of salary, benefits or employment status.”

At the hearing, the Employer raised a preliminary objection as to the jurisdiction of the Board to deal with this grievance which it claims that as the Grievor did not follow the mandatory requirements of the collective agreement applying to a grievance of this issue, he cannot proceed with the grievance. Those employees potentially affected by the outcome of the grievance listed above were given notice and attended at the hearing. The Board received the evidence and submissions of the parties concerning the Employer's preliminary position and reserved its decision without dealing in any way with the merits of the grievance.

As a result of a reinstatement of an employee, a notice of layoff was given to the Grievor on September 24, 1996 which in part sets out as follows:

“This will confirm that the College has had to effect a reduction in staffing requirements.

In accordance with the provisions of the Collective Agreement for Academic Employees, the College Employment Stability Committee has met for the purpose of discussing the planned staff reduction, the circumstances giving rise to the reduction, and the employees affected.

It is with regret that the College must now advise you that at the present time no position has been identified for you beyond your current assignment. As a result, the College is proceeding to provide you with ninety (90) calendar days' written notice of layoffs required in accordance with Article 27.05(vii) of the Collective Agreement. In the event that the College identifies another position for you, the College shall provide you with written notice of reassignment in lieu of layoff. John Struthers, Chair, School of Comity Services, is available to meet with you to discuss the basis of your selection for layoff, if requested."

Following receipt of this notice, the Grievor met with John Struthers after which the grievance was filed. It is the Employer's position that the Grievor was required to specifically identify particular positions who the employee claims entitlement to displace, which he did not do and failed to comply with the requirements of Article 27.08, the terms of which are as follows:

"Lay-Off Grievances

27.08 A An employee claiming improper lay-off, contrary to the provisions of this Agreement, shall state in the grievance the positions occupied by full-time and non-full-time employees whom the employee claims entitlement to displace. The time limit referred to in 32.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

27.08 B If the grievance is processed through Step 2, the written referral to arbitration in 32.03 shall specify, from the positions originally designed in 27.08 A, two full-time positions, or positions occupied by two or more partial-load or part-time employees (the sum of whose duties will form one full-time position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the

grievance thereafter under only one of (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of 27.06.”

The response of the Employer at Step 1 of the grievance procedure held on November 15, 1996 set out in a letter of that date to the Grievor sets out in part as follows:

“It is the Union’s position that the College has violated the Collective Agreement in that it has failed to place you in a vacant full-time position or in a position currently occupied by a person or persons whose duties include teaching in the areas of Human Relations, Philosophy, Interpersonal Skills, Communications Skills, Psychology, Humanities or Social Sciences or a person responsible for counselling of students. The Union also questioned whether or not the College had followed all of the steps required under article f27.

It is the College’s position that appropriate notice to the Union was given on September 13, 1996 followed by a meeting on September 16, 1996 in compliance with article 27.05. Therefore any grievance at this time concerning matters under article 27.05 would not be within the grievance time limits.

With regard to article 27.06 the College followed all of the steps necessary to try to find an appropriate placement for you. At this point in the process it is your responsibility to provide positions and the names of faculty in those positions who you feel you can replace.”

On November 25th, the Grievor gave notice of proceeding to Step 2 which is as follows:

“The College’s reply to my grievance at Step One is unsatisfactory. I wish to proceed to Step Two.

With respect to the College’s assertion that my grievance was not filed within the required time limits, notice of

layoff to the Union is not notice to me. I received written notice of layoff on September 27, 1996 and have been in full compliance with the time limits specified under article 27.05.

With regard to the final paragraph of the memo of November 15, 1996 concerning my grievance, the College has not involved me directly in any effort to find an appropriate placement nor have they provided me with the information necessary to identify positions I could be placed in.”

On December 3, 1996, the Grievor was:

“reassigned to a sessional position in the School of Community Services as a temporary replacement for David Sernick who has requested a parental leave of absence. Accordingly, your layoff notice period shall be extended until completion of the sessional assignment on April 25, 1997 and your current assignment on April 25, 1997 and your current salary and benefits shall be maintained for the duration of the sessional assignment...”

A Step Two grievance meeting was held on January 6, 1997, the report of which is as follows:

This was followed by the Grievor’s notice to the College that the answer was unsatisfactory and the matter was referred to arbitration and further stated:
“Also, I do not accept that the position I am now in is a sessional position.”

On February 6th, the Union advised the College that the reply to the grievance was not satisfactory and it was being referred to a Board of Arbitration.

On April 28, 1997, the Grievor wrote to Mr. Quinlan, President of the College, as follows:

No grievance was filed concerning the reassignment of the Grievor to a sessional position but it is the Union's position that this issue was rolled into the grievance and dealt with at the Step Two grievance meeting in January.

It is the submission for the Employer that pursuant to Article 27.08(a), the Grievor must identify positions and names of the employees who the Grievor claims to displace in the grievance and on reference must identify two employees from that group. These are mandatory obligations of the employee who violates his responsibilities under the collective agreement when he chooses not to be responsive and therefore eliminates the Board's jurisdiction to deal with the grievance. Failure of the College to provide information to the Grievor is not relevant to the Grievor's responsibilities under this Article. The Grievor referred only to areas of teaching and not positions without identifying the occupants which must be done in accordance with the time limits of Article 32.02 yet the Grievor did not identify a position and employee until his letter dated April 28, 1997 to Mr. Quinlan well beyond the time requirements of this Section. The Grievor had previously been put on notice by the College of his requirements and could have remedied that concern at Step Two of the grievance procedure which he did not do. Article 27.08(b) requires specificity in the written referral to arbitration which was not provided.

In its submission, the grievance is improperly filed under this Article and neither the referral to arbitration by the Grievor or by the Union identified two full-time positions as the subject matter of the arbitration. Therefore, the procedure is fatally flawed when the selection was made six months after the requirement of the time set out in Article 27.08 (b) which limits the processing to 20 days from the date of notice of layoff given to the Grievor on September 24, 1996. The Grievor's failure to comply with these terms therefore means that the grievance has been abandoned and that process cannot be

rectified by the Board which does not have jurisdiction to hear the grievance on its merits as a result of the non-compliance with the mandatory terms of the collective agreement.

Reference in its submission was made to the following awards: Re Fanshawe College and Ontario Public Service Employees Union (Weatherill, June 17, 1987); Re The George Brown College of Applied Arts and Technology and Ontario Public Service Employees Union (Burkett, December 29, 1995); Re Conestoga College and Ontario Public Service Employees Union (O'Shea, January 20, 1978); Re Humber College and Ontario Public Service Employees Union (H.D. Brown, February 18, 1992); Re Fanshawe College and Ontario Public Service Employees Union (Simmons, August 12, 1997).

Mr. Dunsmore further submitted that the Employer had not waived its right to object to the jurisdiction of the Board but had made a timely objection to the deficiency in the grievance as set out in the Step One response by the Dean and continued in its response to the Step Two meeting by Mr. Fogal. Thereby, the Employer put the Union on notice of the deficiency and its objection to the grievance. Re Canadore College and Ontario Public Service Employees Union (MacDowell, December 12, 1996).

In its submission, whatever occurred with regard to the Grievor's assignment in December 1996 is not relevant to the jurisdictional issue the College raised with regard to this grievance under Article 27.08. The Employer did not ignore the rights contained in Article 27.08 but the Dean alerted the Grievor to the objection to the grievance and did not indicate at any time that it would not rely on the requirements of Article 27.08 with which the Grievor had not complied and knew that he had not done so which was the College's position as communicated to the Grievor that the grievance was considered to have been improperly filed.

The submission of the Union is that the grievance is clear on its face in that it identified positions or persons teaching in those positions in the divisions or departments and could not be clearer than reference to counselling of students. Counsellors are included in the collective agreement which is the position the Grievor sought. It was submitted that the response to the grievance at Step One dated November 15, 1996 amounts to a waiver by the Employer of the requirements of Article 27.08 (a) in that the Grievor was told that it was his responsibility to provide the positions and names of faculty and by doing so, indicated that the College was not relying on any failure to comply with that Article. The Union did not at any time indicate it would only supply the names at arbitration and it is its position that the College was required to provide the names of employees to add to the positions claimed in the grievance.

It was further submitted that there was no provision for the Employer to assign a full-time professor to replace another full-time professor on a sessional basis as occurred in December 1996 by which the 90-day training rights were denied and extended the notice period from January to April 25th which in essence revoked his layoff. This issue in its submission forms part of the grievance and was dealt with at Step Two by the College and therefore even if Article 27.08(a) is found to apply, a remedial issue arises from this assignment of the Grievor who did not accept a sessional position.

It was submitted that the naming of two full-time positions and employees under Article 27.08 (b) was not complied with but it was overcome when the Union took a fresh step in the reference to arbitration without response by the College that there had been a violation of this term. The two claims were identified by the Grievor in his letter dated April 28th before which there had been no correspondence from the College to the Union that it had not met the terms of Article 27.08 (b). In its submission, the College waived its reliance on Article 27.08, the Grievor indicated that he needed more information to

make the decision required which was not provided to him and waited until the hearing to object to the form of the notice of referral to arbitration and had not made a prompt objection to the grievance but its silence became acceptance and waived its reliance on Article 27.08.

In the Canadore decision, (*supra*), the board dealt with the grievance including a claim under Article 27.08(a) in which the Employer objected in that the Grievor failed to identify the potential positions occupied by others the Grievor claimed entitlement to displace and that he breached the mandatory provisions of this Article. The grievance was dismissed by the Board in which both the previous awards of Arbitrator Shime and Arbitrator Weatherill were referred to in the context that the provisions of Article 27 as presently constituted in the agreement are mandatory and that failure to comply is fatal to the success of the grievance. At page 10, the board stated:

“These are admittedly old cases. But they are precisely on point, no contrary authorities were cited to us, and the language in question has been maintained, without material change, since 1987, over several rounds of bargaining. Had the parties wished to change the contract language to avoid the interpretation given by arbitrators Shime and Weatherill, they could easily have done so. But they did not. On the contrary, Article 27.08(b), as currently framed, merely reinforces the mandatory thrust of Article 27.08(a); because 27.08B narrows the number of positions which can ultimately be the subject of arbitral review. The matters that can proceed to arbitration are a subset of the positions identified in Article 27.08(a) which make it all the more important for the grievor to identify the field from which the arbitrable subset is selected.

In other words, the current structure of the agreement reinforces the interpretations advanced by arbitrators Shime and Weatherill ten years ago.

It follows, we think, that Mr. Mueck’s grievance is fundamentally defective and therefore is not arbitrable...”

The Grievor in the instant matter referred to areas of duties in which he requested a full-time vacant position but did not state in his grievance those positions within those areas that he claimed to be able to displace. The only specific position which he referred to is counselling of students and there is a counsellor classification included in the collective agreement, the incumbent of which is responsible for assisting students. Even if that reference in the grievance satisfied a description of a position for the purposes of Article 27.08(a), the requirement is stated in the plural in identifying the field as indicated in the above, from which two full-time positions being the subset referred to above are required by Article 27.08(b). The grievance does not, on its face, comply with that requirement and was not dealt with in the manner required by Article 27.08 until the Grievor's letter dated April 28, 1997. That statement exceeds the time limit set out in Article 27.08(a) which has reference to Article 32.02 which has been held to be applicable from the date of notice of layoff to the Grievor. In that regard, we have reference to the Fanshawe College award, (supra), the most recent award on this issue referred to this board and which deals with the same issue arising out of Article 27.08 and inter alia as to the time-limit requirement. The Board at p. 17 stated:

“The decision by the College on the one hand, following notice to the employee of a layoff, and the ‘effective date of the layoff’ are two separate and distinct dates. The notice to layoff is, for our purposes, contained in art. 27.08 a which limits the time following notice to present complaints and that is the time when the complaints must be referred to the College. It is also at that time that the employee must state in her complaint that she is being improperly laid off...”

The Board in that case dealt with a grievance of improper layoff in which the College as in the present matter, took the position that the grievance was not arbitrable because the Grievor failed to identify positions that she was seeking to displace pursuant to Article 27.08 and that failure was fatal to the arbitration of the grievance which the majority of

the board dismissed. We are advised that this award has been moved by the Union for juridical review but not yet dealt with. The award however, may be considered in the context of the same issue between the parties in the present matter and in which the board applied the ratio of the Canadore award. As a result, it was found that the failing to name vacant positions which may have been available to the Grievor was a fatal flaw to the grievance and referred to the previous decisions which made it clear that the employee must designate certain persons or positions that the Grievor was competent to perform which she had failed to do throughout the grievance procedure. At p. 15, it is stated:

“We do not regard the Union’s allegation that the College must provide information to the Grievor as to what vacant position she seeks to be placed into but instead it is up to the Grievor when claiming a vacant position to set out what position she is claiming...”

and at p. 18:

“When the Grievor filed her grievance on April 15, 1996 alleging improper layoff, she was obligated to look around on April 15th for a vacant position then existing pursuant to Art. 27.06 (i or name employees who held full-time positions pursuant to Art. 27.06(ii) or (iii) or name partial load, part-time and sessional employees pursuant to the remaining subparagraphs of Article 27.06.”

Thus, following that direction, the Grievor was required to identify positions, in the context of the notice of the Grievor’s layoff on September 24, 1996 at which time within the time requirements of Article 27.08 (a), the Grievor did not follow what is clearly the mandatory provisions of Article 27.08. The Board held the view that failing to name vacant positions that may have been available to her is a total flaw to the grievance.

In the instant matter, the grievance was presented in writing at Step One of the grievance procedure and a meeting was held on November 15, 1996 referred to above, the report of which sets out the reasons of the College for rejecting the grievance in compliance with Article 32.03. The Grievor gave notice that the answer was unsatisfactory and proceeded to Step 2 which meeting was held on January 6, 1997 and the reasons of the College for its rejection were set out in its letter dated January 20th. From that, it is noted that discussions were held under Article 27.06 and applied to the Grievor who then can be assumed to have had, for the purposes of compliance with Article 27.08, sufficient information to name the positions which he claims entitlement to displace. Then after Step Two, the notice of a referral to arbitration must specify two of the positions and names of the employees who will be the “subject matter of the grievance at arbitration” pursuant to Article 27.08(b). Neither the reference to arbitration by the Grievor or the Union complies with that requirement of Article 27.08 (b), it was only by letter dated April 28, 1997, that the Grievor named two counsellor positions and the employees he claimed to displace. There are a limited number of counsellor positions in the College of which the Grievor was aware at the time of his layoff and there is no reasonable explanation that the information he provided by this letter, could not have been obtained and provided by him in his grievance as required by Article 27.08(a). We do not accept the Union’s allegation that the Grievor was prejudiced in his presentation of the grievance by lack of information provided by the College as, in these circumstances, within the field of the counselling of students referred to in the grievance, and set out in the Grievor’s letter in April 1997, those positions existed and could have been identified in the referral to arbitration as mandated by Article 27.08(b). The collective agreement is drafted in specific and clear terms that the responsibility rests with the employee who claims an improper layoff to state the positions the employee claims. That follows a very detailed layoff procedure by which such information required by Article 27.08(a) should

be obtained. That procedure involves the CESC and after that consulting process, if required, notices of layoff are sent to the affected employees. Article 27.06 sets out the placement and displacement provisions applying to those affected. In this process, various positions, vacant or occupied by full-time, part-time and sessional employees are considered before a layoff is effected. To complete that process, there must be considerable information used and available which an affected employee may request pursuant to Article 27.05 (vii) to obtain an understanding of the employer's reasons for the selection of the employees and its position as to the skill and experience of an employee to teach in available positions.

Those terms then are consistent with the Grievor's responsibility to set out the precise nature of this grievance within the meaning and intent of Article 27.08 including the mandatory time limit for such action in Article 32.02. The Grievor's complaint in his letter dated April 28th that the College failed to provide him with information cannot be supported and does not relieve his responsibility to comply with the mandatory terms of Article 27.08. The onus is placed by the parties directly on the Grievor to submit a grievance in the required form and substance to allow the College and incumbents, if any, to know what is being claimed to which a response can be made.

There is no evidence that the Employer deliberately or in bad faith withheld pertinent facts from the Grievor which would impair his ability to comply with Article 27.08. The ratio of the Canadore award and the older but relevant decisions settle this issue which places the responsibility of compliance with those terms squarely with the employee. These are substantive requirements of the collective agreement where failure to comply is 'fatal for the success of the grievance' which conclusion reflects the exacting language the parties designated to deal with complaints of improper layoff. Thereby, the parties have put the burden on the complainant to comply in order to have

the issue dealt with by which the input or lack thereof by the College is not relevant to the satisfaction of the employees onus under Article 27.08.

The Board therefore concludes that the Grievor failed to comply with the requirements of Article 27.08 which is his responsibility and that the deficiency cannot be cured by an untimely notification in April of the positions and names of persons which he intends to displace.

The Union submitted in the alternative that if the grievance was found not to be filed in accordance with Article 27.08, that the College had waived its rights to object to such non-compliance by the Grievor as found. The application of waiver was dealt with in the George Brown College award (supra), in which there was an objection of the College that neither the grievance or the referral to arbitration identified any positions under Article 27.08 and the board was without jurisdiction. The Board dealt with the Union's allegation that the College had waived any objection that it otherwise might have had as to the grievance and submitted that the requirements of this Article are procedural which can be waived. Reference in that award was made to the following statement in Collective Agreement Arbitration in Canada (Palmer):

“The term waiver will be used to describe situations where failure to make timely objections to non-compliance with the procedural requirements of the grievance procedure prevents the objection from being raised later.

Conduct which has been held to amount to waiver includes allowing a grievance to go through the grievance procedure, failure to object at the first opportunity, not exercising at the time the grievance is first presented, and employer options stipulated in the collective agreement to refuse an untimely grievance, substantial lack of compliance with the grievance procedure by both sides in an attempt to settle the grievance...”

That Board found that the provisions of Article 27.08 can be waived as they establish the procedure to be followed in the filing and processing of any grievance claiming improper layoff. It does not affect the heart of the board's jurisdiction and therefore can be waived in the same manner as a mandatory time limits which are found to be subject to the application of the doctrine of waiver. In that award, it was noted that while the grievance did not identify specific challenged positions, it was allowed to proceed from Step One to Step Two without objection from the College and therefore, it was found that the procedural requirements were waived where the College was advised orally of the positions in issue. It was stated that the College, if relying on Article 27.08(b) should have made a prompt objection upon the referral to arbitration and not eight months later and therefore waived its reliance upon the requirements of Article 27.08(b).

We have considered the findings of the Board in that award but also have reference to the previous awards which clearly indicate that the terms of Article 27.08 are substantial and mandatory and the failure to meet those terms as a matter of substance is fatal to a grievance. That is the position which this Board follows and adopts. Therefore, the doctrine of waiver as described and applied in the George Brown award, does not apply to waive substantial and mandatory requirements of the collective agreement. Apart from that, the Minutes of both Step One and Step Two responses to the grievance clearly indicate the College's objection to the timeliness of the grievance and as stated in the report dated January 20, 1997:

“The grievance has been improperly filed and that Article 27.08 requires that the grievance shall state the positions occupied by full-time and non-full-time employees whom the employee claims entitled to displace.”

We find that an objection was raised at the first opportunity by the College to respond in writing to the grievance and which objection it continued at the second step response to the grievance. The referral to arbitration is a procedure following the Employer's reply at Step Two and under Article 32.04(a), the matter referred to arbitration which was both by

the Grievor and the Union, where it was stated that the College's answer at Step Two was not satisfactory. That Step Response included the College's position with regard to its objection to the grievance. It was therefore, not necessary for the College to further record its objection after the notice of referral to arbitration in order to preserve its objection made initially in response to the grievance. This situation is clearly distinguishable from the facts in the George Brown award and leads to the conclusion by this Board that the College did not in fact waive its right to object to the arbitrability of this grievance. There is no evidence that the College intended or did indicate that it would give up its rights to rely on the strict terms of Article 27.08 as to the claim of the Grievor such as to constitute a basis to apply the doctrine of waiver in the application of contractual terms. The Grievor did not meet his responsibility to provide the details of the specific positions and persons which he intended to displace, which is his responsibility under the terms of Article 27.08 and that failure as indicated in the prior awards is fatal to the arbitrability of the grievance.

The Union further submitted that apart from such a finding, a remedial issue survives with regard to the Grievor's claim that he was improperly assigned to a sessional appointment by the College in the School of Community Services as a temporary replacement for another full-time employee thus his layoff notice period was extended to April 25, 1997. The College responded to that claim at the Step Two meeting of the grievance however, it was not a separate complaint pursued by the Grievor under Article 32.02 nor made by statement of claim in the grievance dated October 28, 1996. If the Board found it had jurisdiction to determine that grievance, that issue might arise as a matter of remedy flowing from the grievance. As however, the Board has declined jurisdiction to deal with the grievance, it has no authority to make any determination under the terms of the collective agreement with regard to a secondary issue which does

not in the alternative to making a determination of the issue of improper layoff survive as an issue when the grievance on which it is based has been dismissed.

For all of these reasons, the Board must find that it does not have jurisdiction under the collective agreement to determine the merits of the grievance.

DATED AT OAKVILLE THIS DAY OF FEBRUARY, 1998.

HOWARD D. BROWN, CHAIR

SHERRIL MURRAY, UNION NOMINEE

R. GALLIVAN, EMPLOYER NOMINEE