Jan 5/01

IN THE MATTER OF A WORKLOAD RESOLUTION ARBITRATION

BETWEEN:

FANSHAWE COLLEGE
(the "College" or the "Employer")

-and-

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION, LOCAL 110
(the "Union")

Complaints of Robert Darling, Alfred Messenger, Gary Miller, Hugh Orchard, Raymond Smith and Walter Van Boven

Bram Herlich, Workload Resolution Arbitrator

George Vuicic and Gail Rozell for the College

Gary Fordyce and Tom Geldard for the Union

INTERIM AWARD
(A hearing was held in London on December 7, 2000.)

In mid-October, 2000, I was appointed as the Workload Resolution Arbitrator in this matter. A hearing was scheduled to take place on December 7, 2000. A few days prior to that scheduled hearing date, the parties exchanged correspondence.

First, the College advised that it would be represented by counsel (something which, it did not dispute, has never previously happened in any workload resolution arbitration proceedings between these parties) and that it intended to argue, as a preliminary matter, that the proceedings before me be deferred pending the disposition of certain Article 32 grievances.

The Union responded by expressing its surprise at the proposed use of counsel, indicating that it would, if necessary, ask that I rule that the College not be permitted to appear by way of counsel. And raising the spectre of an infinite regression of legal arguments, it asserted that in advancing any argument about the use of counsel, the College ought not to be permitted to employ counsel. It also indicated that, in its view, there was no meaningful obstacle to proceeding to the merits of the complaints at issue.

As we shall see in a little more detail shortly, the process the parties have constructed for the resolution of workload complaints is clearly designed to be informal and expeditious. It is not the territory where one might typically expect to find recourse to preliminary objections and technical legal argument. That is not to say, however, that these kinds of issues may not arise from time to time during the course of a workload resolution arbitration.

In view of the number of preliminary obstacles apparently obscuring any immediate determination of the merits of the issue before me, I suggested to the parties that, prior to formally convening the informal proceedings of a

workload resolution arbitration, some discussions aimed at resolving the procedural issues might be in order. Those ensued but, despite some substantial progress and good faith efforts, were ultimately unsuccessful. In hindsight, of course, that use of the parties' time was not the most efficient of approaches. Indeed, by the time the informal workload resolution arbitration proceeding formally convened, the only issue the parties were able to address was the question of whether the College ought to be permitted to be represented by counsel. I permitted College counsel to advance the employer's argument on this point. The decision which now follows is restricted to that issue.

The positions of the parties were relatively straightforward. The Union explained that the process the parties have constructed for the resolution of workload complaints is intended to be informal and expeditious. Perhaps even more significant than being merely expeditious, it is designed to, in effect, be proactive. The various explicit and short timelines integrated into the process are meant to maximize the likelihood that workload issues will be resolved before the implementation of the impugned Standard Workload Form (SWF) which is the subject of the teacher's complaint. These are matters which are difficult to adequately remedy after the fact. Solving these problems in advance satisfies the affected teacher and limits the employer's exposure to liability in the event the teacher might otherwise have suffered compensable damages. Expedition is in everyone's best interest. The collective agreement explicitly acknowledges that value in (the first sentence of) Article 11.02G which provides:

> It is recognized that speedy resolution of workload disputes is advantageous to all concerned. Therefore the College and the Union Local committees... have the authority to agree to the local application of Article 11, Workload, and such agreement may be signed by them and apply for the specific term of this Agreement as currently in effect...

The use of lawyers in these types of proceedings is inimical to the goal of expedition. Indeed, in all of the 49 workload resolution arbitrations that have preceded the instant one, neither of the parties has ever retained counsel for the purposes of appearing at the hearing. That, the Union asserts, is because the collective agreement, at least effectively, prohibits the participation of counsel in these proceedings. The portion of the agreement cited in this regard is Article 11.02 F 5 which provides:

> A WRA [Workload Resolution Arbitrator] shall determine appropriate procedure. The WRA shall commence proceedings within two weeks of the referral of the matter to the WRA. It is understood that the procedure shall be informal, that the WRA shall discuss the matter with the teacher, the teacher's supervisor, and whomever else the WRA considers appropriate.

The Union points to the required informal procedure, to the parties' uniform practice and to statements it claims were made by a member of the (central) Council of Regents negotiating team some 15 years ago. All of these are said to support the legal assertion that the parties have prohibited the participation of counsel in these expedited proceedings.

And while I am required to, at least for the extent necessary for the purposes of these proceedings, determine the legal merits of that claim, I cannot ignore the fact that (whether or not it is properly grounded in the collective agreement) the Union presented a reasoned and compelling policy basis to exclude the participation of counsel. For the manner in which these proceedings have and may continue to unfold is perhaps testament to the Union's concerns about their undue prolongation.

Nothing that transpired during the hearing is more concretely demonstrative of the Union's concerns than its response when counsel filed a casebook with 13 entries (not all of which pertain to the issue currently being

considered). With something of a fine rhetorical flourish, the Union representative protested that this was the introduction of precisely the type of complexity the parties' expedited process had been designed to avoid. Indeed, this, we were told, was the first time any preliminary or jurisdictional issues had been raised in a proceeding of this sort between these parties.
The expedited process has served the parties well and has been able to resolve even cases involving claims to significant amounts of money.

For its part, the College firstly signals that it is not its intent to retain counsel as a matter of course in these types of proceedings. Apparently, it too has some ongoing desire to maintain the expeditious process which has evolved without the use of counsel. It merely wishes to do so now because it is of the view that an issue emerges in this case which, while it obviously includes, also transcends the immediate interests of the teachers involved in the instant case. Although the parties have perhaps succeeded in little else, I have, so far, been largely insulated from the merits of this case. In its broad outlines, however, I am told that an issue arises largely because of recent legislative changes. As a result of those changes and new entry requirements which now include grade 12 for certain students, a question arises as to whether certain teachers ought to now be viewed as "in" or "not in post secondary programs". The distinction is material to certain workload protections under the collective agreement.

The College asserts that this is not the "garden-variety" workload resolution case and an issue needs to be determined which will have impact on more teachers than those involved in the instant matter. (It is for that reason that the College also asks that these proceedings be deferred until a more authoritative ruling can be had on the legal question by way of the more formal Article 32 arbitration route – but, of course, that is the next preliminary issue.) In view of the complexity of the issue involved, the employer asserts

that, even if its right to be represented by counsel may be otherwise proscribed, this is an appropriate case for the exception to prove the rule.

Having said that, however, it should be noted that the College also clearly and forcefully advanced the proposition that, whether as a matter of natural justice or pursuant to the terms of the Statutory Powers and Procedures Act (the "SPPA") which it asserted applies to these proceedings, it has an absolute right to be represented by counsel in these proceedings.

I was also referred to two decisions of WRAs who came to opposite conclusions on the question of the entitlement of a party to be represented by counsel. In George Brown College of Applied Arts and Technology, unreported, April 27, 1998, WRA Snow decided that the collective agreement did not preclude the participation of counsel and that the WRA had no power to impose such an exclusion. In a more recent case (which did not consider the earlier decision) WRA Turner (in Centennial College, undated decision) did not permit the College to be represented by counsel.

As one would expect in the expedited process involved, neither of the decisions includes overly elaborate reasons and those of WRA Turner are particularly brief. Of course, in the WRA scheme, neither of these decisions is binding upon me, just as my decision will have no precedential value beyond its immediate impact on the present parties. I do, however, look to these decisions for guidance on the issue and find the reasoning of WRA Snow the more compelling of the two.

In its broadest terms the conflict which needs to be resolved is a competition between the "right to counsel" on the one hand and the kind of procedural direction the parties have embraced, indicating, at some level, a

preference for the expedition of "rough justice" perhaps at the expense of the technical formalities generally associated with a legal proceeding.

For the purposes of this decision, I accept the general proposition that whether as a matter of natural justice, the application of the SPPA, or even considerations of corporate capacity and identity (the latter factor adverted to by the Divisional Court in Re Men's Clothing Manufacturer's Association of Ontario et al. and Arthurs et al. (1979), 26 O.R. (2d) 20 and relied upon by WRA Snow), the starting point must be a general presumption in favour of the right of a party to a legal proceeding to be represented by counsel or, indeed, by any agent of its choice. And while the distinction may be somewhat subtle, the issue I must decide is not so much whether such a general right exists, but rather whether the contractual arrangement binding upon these parties and the procedural shape outlined for this type of proceeding confer upon either of them the right to insist that the other not be represented by counsel.

For the general "right to counsel" is not absolute. Indeed, even the SPPA which, in section 10 contemplates the right of a party to be represented by counsel, also contemplates the ability of parties to waive its procedural requirements. Section 4(1) of the SPPA provides:

> Any procedural requirement of this Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal.

Thus, it would appear that even in proceedings subject to the application of the SPPA, it would be open to the parties to agree to prohibit the participation of counsel. That, of course, is precisely what the Union asserts these parties have done in fashioning the workload resolution process. Further, it appears that the SPPA has no application to these proceedings in any event. For although section 3(2) of the SPPA does not preclude its application to these

proceedings (as it does arbitrations under the Labour Relations Act), section 46 of the Colleges Collective Bargaining Act, which governs rights arbitrations such as the instant one under that Act, clearly provides:

> 46(8) The Arbitrations Act and the Statutory Powers Procedure Act do not apply to arbitration proceedings under this section.

Thus, the SPPA can have no direct application here.

However, the need or power to prohibit the participation of counsel must be grounded in the parties' agreement. Like WRA Snow, I am not persuaded that the collective agreement reference to informal procedure is sufficient to lead to the conclusion that the parties have thereby agreed to prohibit the participation of counsel. Neither does the uniformity of the practice between the instant parties (even if the collective agreement language might otherwise be described as ambiguous), lead inexorably to the conclusion advanced by the Union. The issue of the contractual right of one or other of these parties to insist on the non-participation of counsel has simply not previously been tested – in those circumstances it is difficult to ascribe any particular significance to the uniformity of the parties' practice. I note as well that, despite the provisions of Article 11.02G, it was not suggested that these parties have executed any relevant protocol which might support the position advanced by the Union (in that regard, this case may also be distinguished from the Centennial College case in which there had been some history of past such protocols). Finally, neither am I persuaded that because the (central) Union may have understood the central negotiating employer body to be favouring or even proposing the non-participation of counsel when this process was first negotiated some 15 years ago, that that is sufficient to negate the parties' failure, either in the collective agreement or in the local protocols contemplated therein, to explicitly codify the prohibition.

The concerns expressed by the Union in advancing its position are manifestly legitimate. The parties have fashioned an expedited process which would undoubtedly be severely hampered in its efficiency by the regular use of counsel. The conduct of these proceedings is perhaps in itself emblematic of that concern. Rather than having their concerns addressed and determined prior to the implementation of their timetables, the affected teachers may now begin to count the number of school terms which will pass prior to a final determination of their complaints.

But while that result may well be unfortunate, I am simply not persuaded that the parties have clearly and explicitly agreed to the extraordinary step of a blanket exclusion on the participation of counsel in these proceedings. Finally, even if I were persuaded that the parties had conferred a discretionary power upon me to exclude counsel as part of my ability to "determine appropriate procedure", I am satisfied, based on what the parties have advised me of the merits of this case, that this is not the typical or "garden-variety" workload resolution case. There is clearly a legal issue which will potentially impact on more teachers than simply those who are the subject of the instant proceedings. And while the question of whether a potential patchwork of determinations on the issue is to be preferred to some more binding or influential decision perhaps moves us too prematurely into the second (as yet unheard) preliminary objection, I am of the view that there is a discrete legal issue of wider application. The parties should not be prevented from retaining the services of counsel in those circumstances.

Thus, the College (and the Union) will be permitted to be represented by counsel when these matters resume on Monday April 16, 2001.

There is a further preliminary issue to be heard when the hearing reconvenes. I may rule on it at the hearing or I may reserve my ruling. However, when the hearing reconvenes, the parties should, in the absence of any contrary agreement between them, be prepared to proceed with both the preliminary issue and the merits of the case.

DATED AT TORONTO THIS 5th DAY OF JANUARY 2001

Bram Herlich
Workload Resolution Arbitrator