

Nov 11, 2011

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF A UNION GRIEVANCE;  
OPSEU GRIEVANCE NO. 2006-0560-0002; OPSEU FILE NO. 656002;

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR  
SHERRIL MURRAY, UNION NOMINEE  
JOHN PODMORE, COLLEGE NOMINEE

APPEARANCES FOR THE COLLEGE:

Timothy P. Liznick, Counsel  
and others

APPEARANCES FOR THE UNION:

John Brewin, Counsel  
and others

A HEARING IN THIS MATTER WAS HELD AT TORONTO ON  
NOVEMBER 3, 2011.

INTERIM AWARD

The Board is now proceeding with the evidence and submissions of the parties with regard to the School of English and Liberal Studies (SELS) and the evidence in chief of the Union was completed at the hearing on October 27, 2011. Before proceeding with the evidence for the College, a request by Union Counsel for particulars of the College's case was filed with the Board and Counsel for the College as follows:

- “1. On or before December 12, 2011, the College will provide the Union with the Particulars of the College's case re SELS, including the following:
  - a. a detailed outline of the material facts which the College will advance in response to the evidence adduced by the Union in its case;
  - b. a detailed outline of the operational requirements on which the College will rely for the hiring of Partial-Load faculty and the material facts it will advance in support of its position in each case.
  
2. Three weeks before each scheduled hearing day, the College will identify for the Union two witnesses it will be prepared to call on the scheduled day and will provide the Union with will-say statements setting out their evidence, together with the documents the College intends to introduce through those witnesses.
  
3. The evidence-in-chief of each witness will be limited to the will-say statement and related documents. Upon affirmation or swearing in of the witness and the introduction of the will-say statement and documents, the witness will then be

subject to cross-examination. The Board may permit the College to introduce all or part of the witness' evidence-in-chief viva voce on application by the College and if the College establishes that it is necessary for the evidence to be heard via voce."

With regard to the Union's position in the above matter, the Board heard the submissions of both Counsel on this issue which we find requires the Board's decision before receiving the evidence to be presented by the College to the Board. After receiving the submissions of both Counsel, the Board reserved its decision and adjourned this hearing. Subsequently, the Board has given careful consideration of the Union's submission as set out above as well as the objection of the College to this demand of the Union.

The Board was properly referred to its decision dated March 2, 2009 in which it dealt with the parties' submissions as to the "future procedure to be followed in dealing with the issues in the grievance" and in which the Board directed as follows:

"The Board further directs that particulars of the material facts applicable to each segment of a school or centre which will be referred to the Board shall be provided by the Union to Counsel for the Employer not later than two weeks before the next scheduled hearing date in the continuation of the hearings as scheduled by the Board."

That direction continues in application to the circumstances of this issue and therefore to require the Employer to provide particulars of material facts in response to

the Union's evidence now presented to the Board which is consistent with the procedure the Board has directed as indicated above and which is properly responsive to the Union's demand in paragraph 1 of its submission.

As to the balance of the Union's request for particulars including will-say statements of witnesses to be submitted by the College before calling its evidence, the Board finds that while such procedure might have been acceptable to the Board at the start of these proceedings and hearings to produce such witness statements before any evidence was advanced by the parties, but to now require the Board to amend or add to its previous decision as to the procedure to be used by the parties as set out above in the circumstance where the Union's evidence in chief has been completed, is not acceptable.

For the Board to alter its previous decision to require the College prior to entering ~~its evidence in chief in response to the Union's evidence now completed at SEL by~~ directing will-say statements and thereby limit such evidence would clearly be such a distinct and substantial change in the method of presentation of the evidence that would not be in conformity with the requirement of the Board to provide a fair hearing for both parties and as well, would be contrary to the principle of natural justice which is applicable to these proceedings.

The following cases were presented to the Board in support of the College position:

- Communications, Energy and Paperworkers Union of Canada 209 DLR(4) 208
- Woolworth Canada Inc. v. Newfoundland (Human Rights Commission) S.C. Newfoundland (1994 No. 12)
- Manitoba (of Harvey General) and Canada (National Energy Board)

It is clear from the above references that parties must be treated equally and fairly within the principles of natural justice. As stated in the Manitoba case at para. 100:

“That being so the application for a license and the opponents thereto must be treated on an equal footing with no discriminatory advantage being bestowed on one side or the other.”

In the present matter, to alter the procedure applied in the presentation of the Union’s evidence to accord with its request for will-say statements of the College, would clearly be a discriminatory advantage and contrary to a fair hearing as stated in the Communications’ decision at para. 15:

“I consider I can do no better than to say that in my view natural justice requires that the same rules must apply to all parties in this matter...”

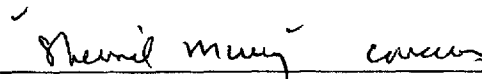
Having regard to the above as the evidence of the Union in chief was presented and completed within the Board's earlier direction as to particulars, we find it would be unreasonable and unfair to now allow the Union's demands set out in paragraphs 2 and 3 above and require the College to provide in advance of the next hearings will-say statements of witnesses to be called by the College in response to the Union's evidence in chief and to thereby limit such testimony. For these reasons, the Board rejects the submissions of the Union set out in paragraph 2 and 3 set out above. The Board will not agree to a change in the procedure of presentation of the evidence at this point of the hearing and denies these submissions of the Union.

DATED AT OAKVILLE THIS 11<sup>th</sup> DAY OF NOVEMBER, 2011



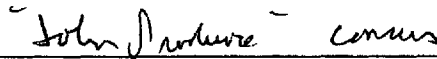

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HOWARD D. BROWN, CHAIR




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SHERRIL MURRAY, UNION NOMINEE




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JOHN PODMORE, COLLEGE NOMINEE