IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 109
(hereinafter called the Union)

- and -

FANSHAWE COLLEGE
(hereinafter called the College)

- and -

CLASSIFICATION GRIEVANCE OF MR. RON KELLY
(hereinafter called the Grievor)

SOLE ARBITRATOR
Professor Ian A. Hunter

APPEARANCES:

FOR THE UNION: Ms. Marg Rae, President, Local 109

FOR THE COLLEGE: Mr. David Michaluk, Counsel

A CLASSIFICATION ARBITRATION HEARING WAS HELD AT FANSHAWE COLLEGE ON JUNE 4, 2009

DECISION ON PRELIMINARY ISSUES

(1) Background

The grievance of Mr. Ron Kelly is dated April 23, 2008 and alleges improper classification.

I convened the arbitration hearing at Fanshawe College on June 4, 2009.

(2) The Preliminary Issues

Pursuant to Article 18.4.3.4 of the Collective Agreement the parties submitted briefs to me more than fourteen (14) days prior to the hearing.

However, the parties did not exchange briefs at the same time that they forwarded their respective briefs to me.

As a result, the parties did not meet and agree on the Arbitration Data Sheet (Exhibit 3). In fact, the Arbitration Data Sheet I received was unsigned.

These are technical issues and, of themselves, would not lead to an adjournment of the hearing. However, on two (2) Job Factors (#2 - Experience, and #6 - Independence of Action) the College mistakenly believed that the parties were in agreement when in fact they are not.

The College rates Experience at Level 4; the Union seeks a rating at Level 5.

The College rates Independence of Action at Level 2; the Union rates this factor at Regular Level 3 and Occasional Level 4.

Mr. Michaluk, College counsel, submitted that the College would be prejudiced if the arbitration hearing went ahead on June 4, 2009. He requested, and I granted, an opportunity for the College to make written submissions defending its evaluation of both factors (Experience and Independence of Action).

Another, and more substantive, preliminary issue was raised by the Union. This issue concerns the interpretation of Article 18.4.3.6 of the Collective Agreement. That Article is as follows:

> **Article 18.4.3.6 - Hearing**
>
> The parties agree that the process shall be informal and that legalistic processes normally used in conventional arbitrations shall not be used. Up to three (3) Management representatives and three (3) Union representatives may attend the hearing. The parties will inform each other no less than five (5) days in advance who will attend. One (1) person from each side will be designated as spokesperson. The arbitrator may ask questions of any of the Union or Management representatives present. The spokesperson for each party may give a summary statement normally not exceeding fifteen (15) minutes at the conclusion of the question period. While it is generally not the intent of the parties to use an outside legal counsel at an expedited arbitration hearing, the parties agree that where they intend to use such counsel at the hearing, they shall notify the other party at least ten (10) days before the date of the hearing. In addition a translator may be present if necessary. The side that requests the translator shall be responsible for the cost involved. By mutual written agreement five (5) days in advance each party may introduce an observer/observers to the meeting.

On June 4, 2009 the following individuals appeared for the College: Mr. David Michaluk, Counsel; Mr. Bert Langendynk, Lab Operations Manager; Ms. Catherine Macdonald, Human Resources Consultant; and Ms. Julie McQuire, Human Resources Consultant.

The Union objected that this violated Article 18.4.3.6; specifically, "up to three (3) Management representatives ... may attend the hearing".

The Union submitted that the parties defined the process in Article 18.4.3.6 and that, as arbitrator, I should require compliance with the agreed-upon process.

For the College, Mr. Michaluk submitted that "Management representatives" as used in Article 18.4.3.6 did not included legal counsel. He told me that this is the first time this issue has been litigated between these parties, and to his knowledge at any College classification arbitration, so that the decision could be a precedent at other hearings.

Mr. Michaluk submitted that close analysis of Article 18.4.3.6 reveals that the parties distinguished between "Management representatives" and "legal counsel". He noted that there are distinct notice provisions: ten (10) days for legal counsel; five (5) days for observers. He noted the "inquiry based" arbitrator-driven model, and submitted that the limitation of three (3) Management representatives was intended to ensure an equal number of witnesses present for each side to speak to issues in dispute; it was not the intent of the parties, he said, to reduce the number of Management representatives by one (1) if legal counsel is also present. Finally, he submitted to me C.B.A. and Law Society Rules of Professional Conduct dealing with lawyers as witnesses (which I hold are not germane to the issue) and a decision of Arbitrator Cummings in a classification case at St. Clair College in Windsor (Decision dated May 28, 2008).

The issue in Windsor was different. In that case, the Union sought to exclude College counsel from the hearing on the basis that the parties had agreed that "... the process shall be informal and that legalistic processes normally used in conventional

arbitrations shall not be used ...". St. Clair College had notified O.P.S.E.U. of its intention to use legal counsel only eight (8) days in advance of the hearing, instead of the ten (10) days required by Article 18.4.3.6.

Ms. Cummings held that any prejudice arising from the inadequate notice could be rectified by an adjournment. On the presence of counsel at classification hearings, she wrote:

> "... Canadians generally have the right to choose to be represented by a lawyer when they are involved in a legal proceeding. Although that principal can be set out quite simply, its importance as a value in our society cannot be overestimated. Put another way, it would be most unusual for a Canadian to be denied the right to be represented by counsel in a legal proceeding. It is, frankly, difficult to imagine that parties to a collective agreement would ever agree that counsel cannot represent them, and I would not readily infer such a result. ..."

I agree with Arbitrator Cummings' decision, but it is not germane to the precise issue before me. The issue before me is not Fanshawe College's right to use counsel at this arbitration hearing, but rather whether or not counsel is a "Management representative", and therefore subject to the limitation "up to three (3) Management representatives ... [who] may attend the hearing".

I have concluded that counsel is a "Management representative" for the purpose of Article 18.4.3.6. I reach this conclusion for two reasons:

(a) If Mr. Michaluk is not a "Management representative", then what is he? He is not a Union representative. Neither he, nor his law firm, have an interest in the outcome apart from the interest of Management. In fact, he is at the hearing precisely for the purpose of <u>representing</u> Fanshawe College in this arbitration.

(b) The clear intent of Article 18.4.3.6 is to ensure informality and expedition, and to avoid making classification arbitrations as legalistic as conventional arbitration has become. This is expressed in the first sentence of Article 18.4.3.6: "The parties agree that the process shall be informal and that legalistic processes normally used in conventional arbitrations shall not be used. ..."

Given that intention, I infer that the parties intended to incorporate a disincentive to the use of outside counsel into Article 18.4.3.6. They did not intend to exclude counsel, but, in effect, the parties have said: "If you use counsel, that person will constitute one of your representatives and, moreover, their function at an expedited arbitration is limited in scope."

As arbitrator I am a creature of the Collective Agreement; I exist (for this purpose) only because of Article 18.4.3.1. I agree with the Union's submission that it is the arbitrator's duty to uphold and enforce the hearing process that the parties agreed to and incorporated into their Collective Agreement. Article 18.4.3.6 envisages no more than three (3) Management representatives and three (3) Union representatives at the hearing. Of course, this number could be expanded with consent. But absent consent, it is my view, and it is my ruling, that the arbitrator should enforce the limits that the parties themselves agreed to.

Accordingly, on resumption, the "Management representatives" at the hearing will be limited to Mr. Michaluk, as counsel, and two (2) other College representatives.

Dated at the City of St. Thomas this 15th day of June, 2009.

Professor Ian A. Hunter
Arbitrator