IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE COLLEGE COMPENSATION AND APPOINTMENTS COUNCIL (FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY)

-AND-

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION (FOR SUPPPORT STAFF EMPLOYEES)

EXPEDITED ARBITRATION FOR JOB EVALUATION
ST. CLAIR COLLEGE, WINDSOR
SUZANNE NORRIS, EMPLOYMENT CONSULTANT

OPSEU File 2007-137-0043

Appearances:

Sue McClelland, Florry Lang, Suzanne Norris, Wayne Pleasant and Silva Stanboulian for OPSEU

Barry Brown, Patti France and Ron Seguin for St. Clair College

Hearing held April 23, 2008 at Windsor, Ontario
Decision released May 28, 2008 at Georgetown, Ontario

AWARD

1. I was appointed by the parties pursuant to Article 18.4.3.1 of their collective agreement, to hear and determine on an expedited basis, a dispute concerning the job evaluation of Suzanne Norris, Employment Consultant.

2. OPSEU raised two preliminary issues. It sought an order that the employer's counsel be prohibited from participating in the hearing. It also sought an order directing that the employer could not rely on an award rendered in another job evaluation case.

Excluding counsel for the employer

3. The collective agreement between the College Compensation and Appointments Council and OPSEU sets out special provisions for the expedited arbitration of job evaluation grievances. Article 18.4.3.6 speaks to the use of legal counsel:

> The parties agree that the process shall be informal and that legalistic processes normally used in conventional arbitration shall not be used…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….

4. St. Clair College notified OPSEU that it intended to use legal counsel but provided the notice only 8 days in advance of the hearing, instead of the 10 days required by the collective agreement. OPSEU submitted that because the College had not provided the required notice, employer counsel should be precluded from participating. Alternatively, OPSEU relied on an August 16, 1995 joint letter from the Joint Classification Committee, sent to arbitrators hearing classification disputes. In that letter, the JCC expressed the following:

> The JCC believes that if either party raises a preliminary objection and that preliminary objection is being relied on to support the party's case, then the grievance should be referred to an Arbitration Board.

5. OPSEU argued that its preliminary issue ought to result in this matter being taken out of the expedited process.

6. After hearing the parties' submissions, I advised the parties informally that I would not be directing the employer's counsel to leave the hearing nor would I be referring this matter to an arbitration board. These are my reasons for those decisions.

7. Essentially, OPSEU is asking me to interpret the collective agreement in a manner that would deny the College the right to be represented by counsel because the College

did not give a full 10 days notice of its intention to use counsel. OPSEU argued that because the provision of 10 days notice is mandatory, a failure to provide that notice means that counsel cannot appear.

8. 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 may not represent them, and I would not readily infer such a result.

9. The notice provision is intended to ensure that no one is surprised by the appearance of counsel in what is normally a less legalistic process. The notice provision is intended to give the other side a chance to consider whether it wants to have its own counsel. If the notice is not given or is too short, then the other side is deprived only of the chance to consider whether it, too, wants to engage counsel.

10. I conclude that the language requiring the giving of 10 days notice may be mandatory, but the result of the short notice is only to give the other side an opportunity to request an adjournment. If an adjournment is granted, then the side who is surprised or got short notice is put in the same position it would have been in had the proper notice been received. An adjournment gives the opportunity to consider whether that party, too, wants counsel.

11. This is not in my view, a preliminary objection that ought to lead to referral to an Arbitration Board. The letter of the JCC talks about preliminary objections that are "…being relied on to support the party's case". While I cannot know what was in the minds of the JCC, I imagine they were thinking of preliminary objections whose determination will decide if the case proceeds to the merits. For example, if one side brought a preliminary objection that the dispute had already been heard and decided and could not be heard again, or had been settled and so should not be heard at all, the arbitrator might well conclude that the preliminary objection "is being relied on to support the party's case" and so should be heard by an Arbitration Board.

12. I find that in contrast, the preliminary objections brought by OPSEU are the sort that regularly arise in the course of a hearing and require an interpretation and application of the collective agreement to the facts. While the preliminary objections are important to OPSEU, their determination will not affect whether or not the grievance is heard on its merits.

13. After advising OPSEU that I would not decide that the College could not be represented by counsel, and that I would not be referring the matter to an Arbitration Board, I asked OPSEU if there was any other remedy they would like to pursue. OPSEU indicated that they would like to seek an adjournment on the basis that the short notice deprived them of the opportunity to consider whether to retain counsel. After the College

heard OPSEU's explanation about how and why it had been prejudiced by the short notice, the College agreed to the adjournment request and I was not required to decide the matter.

Use of authorities

14. In its written brief, the College had referred to and relied on the award in another job evaluation case. The College agreed that the authority was not crucial to its case, but it believed it was useful to see how another arbitrator had dealt with a similar issue, to encourage a consistent approach. OPSEU noted that the award had some elements that were useful to its case too, but asked me to determine that the College could not rely on it. Again, OPSEU referred to the August 16, 1995 letter from the JCC. It reads, in part: "The JCC also believes that if authorities are needed to support either party's case, then the grievance should be referred to an arbitration board". The training material provided to my by the new JCC indicates that one factor to be considered in deciding whether to refer a matter to an Arbitration Board is a party's desire to rely on authorities. But the training material also make clear that the decision to refer or not is mine to make.

15. Because the College did not press its desire to rely on the award, I did not have to seriously consider whether that ought to be a reason to refer the matter to an Arbitration Board. And because the award was not particularly helpful to me, it was a simple matter to tell the parties that I would not rely on it. But in another case, use of prior awards could be helpful. I do not understand the JCC to have precluded the use of prior awards in expedited hearings, nor do I understand that the desire of a party to rely on a previous award is a compelling reason, without more, to refer the grievance to an Arbitration Board. However, I anticipate that this issue may become more significant in the future as more awards are issued in respect of the new job evaluation system and both parties will want to rely on favourable awards and encourage consistent application of the system.

Next steps

16. OPSEU indicated that it would like to see my reasons for these interim rulings before deciding what next steps to take. I will await the parties' advice that this matter should be re-scheduled to hear the grievance on its merits.

Dated at Georgetown, Ontario, this 28th day of May, 2008.

"Mary Ellen Cummings"

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Mary Ellen Cummings