

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

- and -

THE UNION OF NORTHERN WORKERS

**Regarding the grievance of
Paul McAdams**

AWARD

BEFORE:

John Moreau, Q.C. - Arbitrator

APPEARING ON BEHALF OF THE EMPLOYER:

Sheldon Toner - Counsel
Jami Semenoff - Sr. Labour Relations Advisor
Kim Hurley - Labour Relations Advisor

APPEARING ON BEHALF OF THE UNION:

Michael Penner - Counsel
Roxanna Baisi - Director, Membership Services

The Hearing in this matter was held in Yellowknife, NWT on February 12, 2008.

AWARD

1. INTRODUCTION

The grievor received a letter of reprimand on June 19, 2006 for breaching confidentiality in relation to a management studies competition. The grievor had a meeting with the Employer over the matter on June 9, 2006. The Union claims a violation of article 37.07(d) because the grievor was not advised in advance that the meeting was disciplinary in nature and that he should be accompanied by a union representative. The Employer, by way of preliminary objection, submits that the arbitration board is without jurisdiction because the subject matter of the grievance, a letter of reprimand, is not arbitrable under the collective agreement. The parties agreed that the preliminary objection would be addressed prior to dealing with the merits of the grievance.

2. AGREED STATEMENT OF FACTS

The parties filed the following Agreed Statement of Facts:

WHEREAS Paul McAdams is employed by the Aurora College, Thebacha Campus, and occupies the position of Senior Instructor, Management Studies/Office Administration, and is a member of the Public Service of the Government of the Northwest Territories;

AND WHEREAS the Union of Northern Workers is authorized to enter into this agreement on behalf of Paul McAdams;

AND WHEREAS the parties have reached an agreement as to certain facts in relation to grievances # 06-111 of Paul McAdams;

NOW AND THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises and the following terms and conditions, the parties mutually agree to the following facts:

1. Kathleen Purchase, Campus Director of Aurora College, issued a letter of reprimand against Paul McAdams on June 19, 2006, for breaching confidentiality by speaking to one of the applicants about the results of a job competition. (attachment #1)
2. The letter of reprimand is disciplinary in nature, and a copy of it was placed on Mr. McAdams' personal file.
3. Prior to issuing a letter, on June 9, 2006, Ms. Purchase met with Mr. McAdams and discussed his conversation with the applicant.
4. Mr. McAdams was not given 24 hours notice and an opportunity for union representation prior to the meeting on June 9, 2006.
5. Mr. McAdams challenge the letter of reprimand by initiating grievance #06-111, by letter to Maurice Evans, President of Aurora College, dated June 23, 2006. (attachment #2)
6. Margaret Imrie, Acting President of Aurora College, responded to grievance #06-111 by letter dated July 7, 2006. (attachment #3)
7. The Union of Northern Workers pursued #06-111 by letter to Mr. Evans dated July 14, 2006. (attachment #4)
8. Ms. Imrie responded to the Union of Northern Workers regarding grievance #06-111 by letter dated August 19, 2006 (attachment #5)
9. The Union of Northern Workers pursued grievance #06-111 by letter to the Lynn Elkin, Deputy Minister of Human Resources, dated August 17, 2006. (attachment #6)
10. Ms. Elkin responded to the Union of Northern Workers regarding grievance #06-111 by letter dated August 31, 2006. (attachment #7)
11. The Union of Northern Workers indicated its intention to refer to grievance #06-111 to arbitration, by letter to Ms. Elkin dated September 18, 2006. (attachment #8)
12. The Collective Agreement (attachment #9) and the Human Resource Manual – 701 - Employee Discipline (attachment #10) include provisions dealing with progressive discipline and the resolution of disputes.

Dated at Yellowknife, Northwest Territories, this 12th day of February 2006.

Michael H. Penner
Legal Counsel on behalf of the Union of Northern Workers

Sheldon Toner
Legal Counsel on behalf of the Government of the Northwest Territories

3. RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

ARTICLE 37 ADJUSTMENT OF DISPUTES

- 37.01 (1) The Employer and the Union recognize that grievances may arise in each of the following circumstances:
- (a) By the interpretation or application of:
 - (i) a provision of an Act, or a regulation, direction or other instrument made or issued by the Employer dealing with terms or conditions of employment;
 - (ii) a provision of this Collective Agreement or Arbitral award.
 - b) Disciplinary action resulting in demotion, suspension, or a financial penalty.
 - (c) Dismissal from the Public Service.
 - (d) Letters of discipline placed on personnel file.
- (2) The procedure for the final resolution of the grievances listed in (1)(a) above is as follows:
- (a) Where the grievance is one, which arises in circumstances outlined in (1)(a)(i) or in (d), the final level of resolution is to the Minister responsible for the Public Service Act.
 - (b) Where the grievance is one which arises out of the interpretation or application of the Collective Agreement the final level of resolution is to arbitration.

- (c) Where the grievance arises as a result of disciplinary action resulting in demotion, suspension, or a financial penalty or dismissal from the Public Service, the final level of resolution is to arbitration.
- 37.07
- (a) The Union shall have the right to consult with the first level of management as part of processing the First Level Grievance.
 - (b) The Union shall have the right to consult with the designate of the Deputy Head prior to the Union presenting a grievance at the Final Level.
 - (c) The Union shall have the right to consult with the Financial Management Board Secretariat with respect to a grievance at each or any level of the grievance procedure.
 - (d) Where an employee is required to attend a meeting with the Employer or a representative of the Employer to deal with matters that may give rise to the suspension or discharge of an employee, that employee shall be advised 24 hours in advance of the meeting of his/her right to have a representative of the union at the meeting. At the employee's request, the meeting will be postponed for a maximum of three (3) working days.
- 37.22
- The arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement, or to increase or decrease wages.

4. RELEVANT POLICY PROVISIONS

Human Resources Manual-701- Employee Discipline

Guidelines

- 17. Prior to any disciplinary action taking place an employee who is a member of the union of northern workers (UNW) must receive 24 hours advance notice of a meeting and of the right to union representation if:
 - a. it may result in suspension, discharge or dismissal; and

- b. a letter of suspension or dismissal is delivered and the issue is to be discussed with the employee.
22. The progression of disciplinary measures for the government of Northwest Territories (GNWT) is as follows:
- a. Verbal warning;
 - b. written reprimand;
 - c. one-day suspension;
 - d. five-day suspension;
 - e. 10 day suspension; and
 - f. Dismissal

5. SUBMISSIONS OF THE EMPLOYER ON THE PRELIMINARY OBJECTION

The Employer first pointed out that the issue of the arbitrability of a written reprimand has already been decided in a previous arbitration between these parties. Counsel referred to the expedited award of *The Union of Northern Workers v. Government of Northwest Territories (Kobelka)* (December 14, 1995) where Arbitrator Beattie states:

“Clause 37(2)(a) of the collective agreement provides that for grievances involving "letters of discipline... the final level of resolution is the Minister of Personnel.

Accordingly, although letters of reprimand are grievable, they are not arbitrable. I have no jurisdiction to hear this grievance.”

The Employer acknowledged that a written reprimand is part of the disciplinary chain, as set out in article 22 of the Human Resources Manual. However, a letter of discipline can only be grieved to the level of the Minister

responsible for the Public Service, as set out in article 37.01(2)(a), and not to arbitration.

The Employer further noted that an employee like the grievor is not without recourse if, as alleged, a procedural infraction occurs such as a flawed meeting due to improper notice where the subject matter of the grievance is a letter of discipline. The matter is grievable and the issue will be addressed-but only to the level of the Minister responsible for the Public Service. The fact that the letter of discipline may be relied on in future disciplinary proceedings is an incentive to the Minister to ensure that the grievance is dealt with fairly, including making sure that the grievor is given a full opportunity to be heard.

The Employer also cited *Re: MacMillan Bathurst Inc. and IWA* (1996) 44 C.L.A.S. 121 where the arbitrator was also faced with a jurisdictional objection involving her right to hear a grievance involving a written reprimand. There was a “no discrimination” provision in the collective agreement, grievable to arbitration, but the Union did not allege discrimination in that case. The arbitrator nevertheless found that she had jurisdiction to deal with the written warning, but only on the basis that it was arbitrable within the context of a suspension grievance, which the parties had put before the same arbitrator. By contrast, the Employer submits that the only matter at issue here is the letter of warning of June 19, 2006 which the collective agreement precludes from being heard at arbitration.

The Employer then referred to *Re: Treasury Board (Government Services Canada) and Topping* 36 C.L.A.S. 392 where the grievor filed a number of grievances. A preliminary objection was raised by the Employer on the grounds that the arbitrator was without jurisdiction because the grievances did not involve disciplinary action resulting in a suspension or financial penalty as required under s. 92 of the *Public Service Staff Relations Act*. The arbitrator upheld the preliminary objection and denied the grievances. Counsel also cited *Re: Boone* [1981] N.B.J. No. 161 where the Court of Appeal of New Brunswick made a similar finding with respect to a letter of reprimand.

In conclusion, the Employer submits that the Union should not be permitted to expand the grounds of what is arbitrable under the collective agreement. The provisions of the collective agreement reserve arbitration for the more serious disciplinary matters of suspension or dismissals. Issues involving representation and proper notice can only be addressed in cases of written warnings as far as the Minister responsible for the Public Service.

6. SUBMISSIONS OF THE UNION ON THE PRELIMINARY OBJECTION

The Union noted at the outset that the grievance did not involve simply the jurisdictional issue arising out of article 37.01(2)(d), or as he put it, a letter of

reprimand *simpliciter*. In this case, counsel submits that there are three questions to be determined:

-Are the grievances “in their wholeness” arbitrable?

-If so, is there a breach of the collective agreement as a result of a failure to provide proper notice to the grievors?

-Can relief be awarded for the breach?

The Union submits that the issue of arbitrability encompasses section 37.07(d), and the right of an employee to advance notice and union representation, given that the grievance arose by virtue of the reference to a disciplinary matter i.e. a letter of discipline found in section 37.01(1)(d). In a nutshell, the Union argues that the issue of advance notice and union representation is paramount to the letter of reprimand and triggers the jurisdiction for arbitration.

The Union acknowledges that the arbitrator is without jurisdiction on the letter of reprimand alone. However, the matter of notice and representation is clearly arbitrable and requires that the issues be dealt with in their totality at the final arbitration level. In support, counsel cited *Re Medis Health and Pharmaceutical Services and Teamsters, Chemical and Allied Workers, Loc. 424 (Satar)* 100 L.A.C. (4th) 178 where the arbitrator ruled that union representation was required where the purpose of the meeting was to obtain admissions from the grievor.

Counsel for the Union also noted that the words used in article 37.07(d) “may give rise...”, calls for a discretionary analysis. Union representation protects employees, for example, from making inculpatory statements which may prejudice their case in later proceedings. The right to union representation permits a union representative to proactively address all issues at every stage of the grievance procedure, including arbitration.

The Union also noted that the jurisprudence in this area is consistent that the remedy for failing to provide for proper union representation is to vitiate the discipline. See: *UNW v. GNWT (Bergman)* (1999) 56 CLAS 352 and *UNW v. GWNT (Utye)* (1997) 72 L.A.C. (4th) 80.

DECISION ON THE PRELIMINARY OBJECTION

The main focus of the Union’s submission is that article 37.01(2)(a), which deals with the procedure for final resolution of grievances, must be read in harmony with the union representation provision, article s. 37.07(d). In particular, counsel cited *Medis Health* which sets out the rationale for early union representation at page 191 of the decision:

Arbitrator Brandt in *Re Valdi Foods*, supra, recognized the same right to protection. He stated, at page 326, the reason for the employee’s representation is to protect the employees from engaging in conduct that might reasonably prejudice them in the event that disciplinary action is subsequently taken. An admission once given cannot be cured after the fact.

This is an important statement on an employee's rights at the time of investigation given that discipline might flow from the investigative interview. But the parties intentions as set out in the language of the collective agreement must also be respected, including the occasions where union representation is required. This case, in that regard, is factually similar to the *Boone* decision where the Court commented as follows at paragraph 12:

It is also my opinion that the parties have drawn a clear distinction between the remedies which are available in cases involving discipline by way of oral or written reprimand or suspension with pay, and those involving suspension without pay and discharge and that it is only the latter two cases that adjudication is available.

A reading of the clear language found in article 37.01(2)(d) indicates that both the employer and the union have agreed that minor discipline shall be grieved to the level of the Minister and no further.

Article 37.07(d) mirrors the explicit language of article 37.01(2) by also limiting the right to advance notice and union representation to more serious discipline leading to a suspension or discharge. Had article 37.07(d) read, instead, that the right to union representation is required to deal with matters "...that may give rise to discipline", as a number of collective agreements do, the Employer would then be obliged, in circumstances like the present case, to arrange for proper union representation for the employee and provide timely notice of the disciplinary meeting.

I would add that there is no evidence before me which indicates that the resolution of letters of discipline short of the arbitration level is contrary to any relevant statutory requirement governing the parties or, for that matter, a company policy. In that regard, I note the procedural requirements set out in article 37 for the adjustment of disputes are consistent with the Employer's Human Resources Manual, and in particular the wording of paragraph 17 which requires 24 hours advance notice of a meeting and the right to union representation, but again only where the result may be a suspension or discharge.

To interpret the collective agreement in the manner suggested by the union would, with respect, amount to an alteration or amendment of the collective agreement in contravention of article 37.22. In the end, I agree with the findings of the *Kobelka* case, which also found that the letters of discipline are grievable but not arbitrable under the governing provision of article 37.01(2)(a).

For all the above reasons, the preliminary objection of the Employer is upheld. I am without jurisdiction to hear this grievance.

John M. Moreau QC
March 31, 2008