IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE CITY OF LONDON
- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION (CAW – CANADA), LOCAL 302
- The Union

AND IN THE MATTER OF a Union policy grievance regarding the conduct of Employer investigations

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Kelly Dawtrey - Counsel
and others

On behalf of the Union:

Jim Pound - National Representative
and others

Hearing held May 20, 2008, in London, Ontario.

AWARD

I. INTRODUCTION

This award confirms two oral rulings I made on preliminary matters at the above hearing. The two matters were:

1. Could the concerns raised in the grievance be properly dealt with in this Union policy grievance or should those concerns have been raised in an individual grievance? and,
2. Should the hearing of this grievance be deferred to await the outcome of another arbitration?

II. THE EVIDENCE

There was no oral evidence. The rulings on the preliminary matters were based on opening statements and several exhibits. The basic situation was as outlined below.

The National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada), Local 302, the Union, represents a unit of employees who work at the Dearness Home operated by the Corporation of the City of London, the Employer.

The grievance before me was a Union policy grievance resulting from the Employer's investigation regarding Ms Jo-Dee Phoenix, who was then an employee at the Dearness Home. Ms Phoenix had been suspended by the Acting Administrator of the Home while the Employer conducted an investigation. The Union submitted in this policy grievance that the Employer's investigation violated Article 6 - Reservation of Employer's Functions. The Union sought a declaration that the investigation had been unfair and unethical, and a declaration that the Employer should act more quickly when conducting similar investigations in the future.

The investigation complained about in the grievance led to the dismissal of Ms Phoenix. That dismissal was grieved and both parties anticipated that the dismissal grievance would proceed to arbitration. The parties agreed that the issues related to the conduct of the investigation would be raised in the upcoming dismissal arbitration.

III. THE AGREEMENT

The key provisions of the parties' 2004-2007 collective agreement are as follows:

ARTICLE 8 - GRIEVANCE PROCEDURE

Article 8 requires individual employee grievances to follow a three stage process - individual "complaints" are to be discussed initially with the immediate management supervisor, secondly the "grievance" is to be discussed at "Step 1" with the Director of Long Term Care, and thirdly the grievance is to be discussed at "Step 2" with the Director of Human Resources. Article 8.3 (d) is as follows:

> 8.3 (d) Where the differences arise between the Employer and the Union concerning the interpretation or violation of this Agreement, which may be considered as policy matters, the differences between the Parties shall be reduced to writing and entered into the Grievance Procedure in accordance with Article 11.

Article 11 - POLICY GRIEVANCES

Article 11 regulates the processing of policy grievances. Of particular relevance here, a Union policy grievance is "commenced at Step 2 of the Grievance Procedure" (Article 11.1). Article 11.2 then provides a definition of a policy grievance as follows:

> 11.2 Policy Grievance defined as:

> A grievance which alleges an actual violation of a specific provision of this Agreement and which could not otherwise be resolved at lower steps of the Grievance Procedure because of the nature or scope of the subject matter of the grievance. Such grievance is to be submitted at Step 2 of the Grievance Procedure.

IV. EMPLOYER POSITION

Relying upon Article 8.3 (d) and Article 11.2, the Employer submitted that this policy grievance was flawed and could not be processed as a policy grievance. Instead, it should have been filed and processed as an individual grievance.

As the same evidence would be used in the dismissal arbitration, the Employer next said that I should decline to proceed with this grievance. The Employer initially expressed the view that the issues were moot, but abandoned that position. The Employer instead said that sound labour relations meant that I should exercise my arbitral discretion and should, at a minimum, adjourn this hearing until after the arbitration on the dismissal.

V. UNION POSITION

On the issue of the form of the grievance, the Union submitted that it had complied with all the procedural requirements in the collective agreement.

As for deferring the matter until after the dismissal arbitration, the Union opposed that submission and said its grievance was properly before me and that it wanted its grievance heard in advance of the dismissal arbitration.

VI. CONCLUSIONS

1. Form of the grievance

Dealing first with the Employer submission regarding Article 8.3 (d), I noted that the Union's grievance explicitly raised the interpretation or violation of Article 6. As a result, as is required by Article 8.3 (d), the differences raised in the grievance concerned "the interpretation or violation of this Agreement."

Moreover, because the Union's concerns went beyond the particulars of the investigation into Ms Phoenix's conduct and raised more general issues regarding the conduct of investigations, I concluded that the differences between the parties "may be considered as policy matters."

I found no violation of Article 8.3 (d).

Turning to whether the grievance complied with Article 11.2, there were two questions which arose from the language of the Article:

1. Did this grievance allege a violation of a specific provision of the agreement? and, if so,
2. Could the grievance have been resolved before Step 2?

Since the grievance specifically alleged a violation of Article 6, it met the first part of the Article 11.2 definition.

I then considered the second issue under Article 11.2, that is, whether the grievance could have been resolved at the "lower steps" of the grievance procedure. Of necessity, this is a matter of speculation since, by definition, a policy grievance is not considered before step 2 and one can never be certain whether it "could" have been resolved at an earlier step in the grievance procedure.

Many collective agreements provide that certain types of grievances are to begin at the higher levels of the grievance procedure. I note that under this collective agreement, apart from the special procedure for "policy" matters, the parties have agreed that "discharge" grievances are treated in a special way. Discharge grievances are considered at first instance in a meeting between the Union Committee and both the General Manager of Community Services and the City Director of Human Resources (Article 10). The special processes in this and other collective agreements are established by the parties on the recognition that there are certain types of employer decisions which a supervisor simply will not reverse in the grievance procedure, such that it would be of no value to require a meeting to allow the supervisor to reverse the decision.

Returning to the situation here, Ms Phoenix's suspension had been imposed by the Acting Administrator of the Dearness Home. As noted above, individual complaints/grievances are heard first by the immediate management supervisor and then the Step 1 grievance is submitted to the Director of Long Term Care. Since, in the managerial structure of the Home, the supervisors and the Director of Long Term Care are below the Acting Administrator who made the decision, it seems unlikely that either would have found the Administrator to have violated the collective agreement.

Moreover, it appeared from the opening statements that some of the delay in the investigation, and some of the substance of the Union concerns, had occurred due to actions taken at London City Hall and it seemed most unlikely that either the complaint process or the Step 1 process would have resulted in a finding that the senior administrators at City Hall were in violation of the collective agreement.

In sum, I concluded that the grievance before me could not have been resolved at the lower steps of the grievance procedure.

As a result, I ruled that both parts of the definition of a policy grievance in Article 11.2 had been met and that the grievance could be processed as a policy grievance.

2. Defer this hearing until after the dismissal arbitration?

The other preliminary issue was whether I should proceed with the hearing of this grievance or await the outcome of the arbitration regarding Ms Phoenix's dismissal.

I indicated that, while I was sympathetic to the Employer position, it was the Union's grievance and the Union was ordinarily entitled to process its grievance as it saw fit. I indicated that, as a general principle, I did not think I should substitute my view for that of the Union on the grounds of "sound labour relations," except in a very clear situation. The fact that there would be a repetition of evidence in the two grievances was insufficient as the sole reason to override the Union's wishes. In particular, I noted that the Union had expressed its strong desire that the Union policy grievance before me be heard in advance of the dismissal arbitration. Although the reasons for that position were not obvious, I ruled that I would not substitute my judgement for that of the Union on this issue and that I would, therefore, hear the grievance.

Finally, I remain seised to deal with any difficulties which may arise in the implementation of this award.

Dated at London, Ontario this 9th day of June, 2008.

Howard Snow, Arbitrator