



ONTARIO
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

GRIEVANCE
SETTLEMENT
BOARD

COMMISSION DE
RÈGLEMENT
DES GRIEFS

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UNION# 01A503, 01A504, 01A505, 01A506, 01A507,
01A508, 02B027, 02B028, 02B029, 02A163, 02A165

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees' Union
(Group Grievance, Sammy et al)

Grievor

-and-

The Crown in Right of Ontario
(Ministry of Correctional Services)

Employer

BEFORE

Daniel A. Harris

Vice-Chair

FOR THE GRIEVORS

Ed Holmes
Counsel
Ryder Wright Blair & Doyle
Barristers & Solicitors

FOR THE GRIEVORS

Peggy Smith
Counsel
Eliot, Smith
Barristers & Solicitors

FOR THE GRIEVOR

Nelson Roland (counsel on record); Mr. Dewar represented himself
Barrister & Solicitor

FOR THE EMPLOYER

Ajamu Boardi
Staff Relations Officer
Ministry of Correctional Services

HEARING

February 19, 2002.

DECISION

THE APPLICATION

This decision relates to a group of grievances that were consolidated on consent. The grievances are with respect to an alleged assault upon an inmate on or about February 2, 2001. Some of the grievors have been discharged from their employment others have been suspended. Some of the grievors face criminal charges as a result of the incident. In addition, the inmate has launched a civil suit against the employer and some of the grievors. In large measure it is this latter fact that gives rise to the instant application by all of the grievors that the hearing of the matters before the Grievance Settlement Board be held *in camera*. That is, that the hearing be closed to the public in whole or in part.

THE SUBMISSIONS OF THE PARTIES

Counsel for the union, representing Messrs. Sammy, Cuthbert, Mcfarlane, Johnson, Collins and Mondesir, relied on section 9 of the *Ontario Evidence Act*, R.S.O. 1990, c. E-23, which reads as follows:

9. (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the

Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature, R.S.O. 1980, c. 145, s. 9.

He also relied upon the following cases: *Ralph* 212/78, *Tyler* 428/78 and *Glover-McCarthy/McCarthy* 1489/93 et al. It was submitted that there is a presumption that Board hearings will be open, with a residual discretion held by the Board to close them for good and compellable reason. It was said that the reason the Board should exercise its discretion to close the hearings in these matters is that the grievors face a civil action which distinguishes these cases from the Board's previous jurisprudence.

It was also submitted that the practice of the civil courts permits previous sworn evidence to be put to a witness as a test of credibility in spite of the provisions of s. 9 set out above. Since Board proceedings are not recorded, there is a danger that any evidence given here may not be accurately put to the witness in a subsequent proceeding. Without a verbatim record, that may be so even with respect to statements attributed to any witness in a Board decision. It was also submitted that these proceedings should be closed to protect the security of the detention centre where the alleged assault was said to have occurred. There will undoubtedly be evidence relating to the layout of the facility, the identity of other

inmates, etc. It was said to be in the public interest to protect such information from publication.

It was also submitted that the grievors and the employer both would benefit from closed proceedings since they will very likely have the same interest in the civil proceedings in their capacity as co-defendants. The request to close these proceedings is being made at this point because counsel for the inmate on the civil proceedings has indicated a desire to audit these proceedings.

Counsel for the union, representing Mr. Blundel and Mr. Dewitt, concurred with the earlier submissions and added that at least two of the grievors had been transferred to other institutions after giving statements to the employer. It was suggested that their anonymity in participation in the investigation ought to be protected. Counsel submitted, in the alternative, that parts of the proceeding might properly be held in camera as required.

Mr. Dewar adopted the proceeding submissions.

The employer took no position.

REASONS FOR DECISION

The *Evidence Act*, supra, specifically provides that a witness shall not be excused from answering a question because it might criminate the witness in a civil action or provincial prosecution. It also provides for the procedure by which prior inconsistent statements might be put to a witness. The issue before the Board is whether additional protections should be given to the grievors by way of *in camera* proceedings.

As has been observed in the GSB's jurisprudence on the point, it is presumed that the Board's proceedings are open unless there is good and sufficient reason to close them. In *Ralph*, supra, the Board rejected a request to close the proceedings to the public. The Board's reasons are summarized at page 4 as follows:

Apart from precedent, however, we think that in principle a heavy onus lies on any party who wishes to close a hearing of a statutory body like this Board. It is the hallmark of procedural fairness that justice manifestly be seen to be done. That can only occur if the public and the press have full access to the proceedings; the best safeguard against the arbitrary use of power or merely careless injustice is the full light of public scrutiny. Public hearings can have their costs, of course, but those costs must be particularly heavy to outweigh the primary public interest in openness.

There the Board specifically held that risks to institutional security and inmate privacy were acceptable costs of public hearings. Accordingly, those concerns expressed by counsel for the union are not persuasive.

In *Tyler*, supra, the Board emphasized the serious and overriding public interest in the outcome of that case which involved allegations of sexual impropriety with clients of the Ministry of Community and Social Services. Similar considerations arise here. In a case such as this, which involves allegations of assault against an inmate by correctional officers, there is a serious, even overriding public interest in the outcome. The public has a right to know that the proceedings are fair, open and subject to public scrutiny, as well as a right to understand, and have confidence in, the process by which the ultimate outcome was reached.

As was concluded in *Glover – McCarthy/McCarthy* (supra), the grievors will be exonerated here or not. What use the civil or criminal courts make of the evidence taken here, without the benefit of a verbatim record, is a matter for those courts. It is not for the Board to circumscribe the procedure of the civil or criminal court. It is those courts which will decide on the proper use, if any, of evidence or decisions taken here. Further, findings and conclusions reached here may well have an impact in other proceedings. On that basis as well there is a compelling need to ensure that these matters are dealt with openly and fairly. The cost of such openness is that the inmate too will have access to the proceedings. The thrust of the union's request is that the grievors might suffer in a civil suit because the inmate will, in essence, have the opportunity here of a form of discovery. Surely, the inmate at the centre of the controversy has the right as much as, if not more

than, anyone else to be assured that these matters have been fairly and openly dealt with. It is an acceptable and necessary cost that such openness may provide the inmate with information that is useful to him in the civil courts. These are adversarial processes. To intervene to protect a party in one proceeding from a party in a different proceeding calls upon the Board to engage in a balancing of interests that is not appropriate. Here we are concerned with the labour relations between the union, as the grievors' bargaining agent, and the employer. To change the usual structure of these proceedings in order to rebalance the advantages in civil proceedings is unreasonable. The civil courts will strike their own balance.

As to protecting the anonymity of those who participated in the investigation, there are many avenues open to protect a witness's identity if necessary. It is not appropriate to give such protection to a witness at the outset, merely because they participated in an investigation, without some elaboration as to why such extraordinary procedures ought to be brought into play. As was observed in the cases relied upon, there may well be matters of confidentiality that can be protected by orders made in the course of the proceedings as such issues present themselves.

THE DECISION

The preliminary request that these proceedings be held *in camera* is denied.

Dated at Toronto, this 6th day of March, 2002.

A handwritten signature in black ink, appearing to read "D. Harris", written in a cursive style.

Daniel A. Harris, Vice-Chair.