IN THE MATTER OF AN ARBITRATION

BETWEEN:

KWANTLEN UNIVERSITY COLLEGE

(the "Employer")

AND:

KWANTLEN FACULTY ASSOCIATION

(the "Union")

(Arbitrability of the Process and Criteria Document flowing from the Letter of Understanding #TBA)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Colin Gibson for the Employer
	Lesley Burke for the Union
WRITTEN SUBMISSIONS:	May 29 and June 5, 2006
PUBLISHED:	August 24, 2006

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The parties agreed I was properly constituted as an arbitrator under the Collective Agreement with jurisdiction to hear and determine the matter in dispute.

The issue before me is a question of interpretation of the "Process and Criteria" document following from the Letter of Understanding #TBA which was agreed as part of the Memorandum of Agreement reached between the parties on March 23, 2005. Specifically, the question in dispute is whether the process and criteria for the selection of applicants for professional development funding forms part of the Collective Agreement and are subject to the grievance arbitration procedure.

BACKGROUND

The parties were not formally part of the Multi-Institutional Discussions (MID) in the post-secondary education sector, but rather reached their own Memorandum of Agreement to renew the Collective Agreement that expired on March 31, 2004. That Memorandum signed on March 23, 2005, incorporated some of the items agreed to at the MID table, including the Letter of Understanding in question:

> 6. The Collective Agreement shall also include:
>
> a. The following changes as contained in the MID memorandum:
>
> vi. The Letter of Understanding on Professional Development.

Letter of Understanding #TBA – Faculty Professional Development Fund was ultimately agreed between the Employer and the Union and signed-off in January, 2006, as follows:

1. PURPOSE

The Faculty Professional Development Fund is in support of various types of professional development activities. Such professional development is for the maintenance and development of the faculty members' professional competence and effectiveness. The purpose is to assist faculty to remain current and active in their discipline and program. This fund is not meant to replace any existing development or educational funds.

2. PROCESS

a) The parties will mutually agree on a process and criteria for the review and adjudication of employee applications to the fund. The process will include the recommendation of adjudicated applications to the applicable senior administrator.

b) A committee of four (2 faculty and 2 administrators) will meet to set out the process and criteria for the review and adjudication of employees applications to the fund.

c) Adjudication: Applications will be made to the applicable senior administrator or designate who will approve applications for funding based on the process and criteria established by the joint committee. The senior administrator is responsible for the final approval of applications.

d) Criteria: To be established by the committee. Examples of activities could include the following:

- Tuition for degree completion
- Industry based or specialty training
- Approved replacement costs for specific training
- Leave from teaching for Research and Scholarship

3. FUND

This Fund's budget for each fiscal year will be set at point six of one percent (0.6%) of regular and non-regular faculty salary for the institution based on the nominal role as on January 1 of the previous fiscal year.

The parties met in September, 2005 to agree on a Process and Criteria document pursuant to paragraphs 2 a) and b). There were some exchanges of proposals and the parties met again on November 7, 2005. At this meeting the Employer indicated that it did not agree that the process and criteria were part of the Collective Agreement or were subject to grievance by the Union. This was the only area of dispute.

The document was provided to the Union by the Employer for signature on January 23, 2006 with the following disclaimer:

> ...This LOU will form part of the Collective Agreement.
>
> The Process and Criteria document is separate and apart from the Collective agreement. In our view it does not form part of the Collective Agreement.

The Union signed the LOU and returned it to the Employer under the following memo:

> Notwithstanding our agreement to the LOU and the provisions flowing from 2.a. of the LOU (Process and Criteria document), KFA is in disagreement with Kwantlen's position on the Process and Criteria document vis-à-vis the collective agreement. In our view this document does form part of the collective agreement, and further, KFA reserves the right to grieve on behalf of faculty members should a dispute arise.

The process and criteria agreed by the parties, subject to this dispute, are as follows:

1. CRITERIA

All proposals will be assessed against the following:

- Degree to which professional development, performance, expertise and/or career plans of the applicant(s) are enhanced.
- Degree to which the proposal is related to applicant's work at Kwantlen University College, including benefits to the applicant, the institution and the students.

Institutional priorities will be considered in the assessment of all proposals. Such priorities will assist faculty to remain current and active in their discipline and program. Priorities will be included in the communication calling for proposals.

2. PROCESS

All faculty members are eligible to apply to this fund, though preference will be given to post probationary faculty.

Applications will be accepted 3 times per year.

Feb 1
June 1
October 1

(NOTE: In the inaugural year, ending March 31, 2006, there will be only one competition with a deadline date for receipt of applications of February 24, 2006.)

Applications may be approved for activities that occur in a subsequent fiscal year(s). Activities that extend over multiple years are subject to the requirement to demonstrate suitable progress on the application approved. Failure to comply will result in denial of committed funds.

Applications will be reviewed by a panel of three members of the senior administration and three faculty members appointed by the KFA. This panel will make recommendations to the Senior Administrators responsible for the final approval of applications.

The Senior Administrators' decisions will be communicated to applicants within one month after the submission deadline date.

3. OTHER GUIDELINES

All applications must include a letter of recommendation from the appropriate Dean. The minimum award will be $1000.

Significant applications are encouraged. Up to one year time release may be approved, in exceptional circumstances.

For applications up to $20,000, two letters of reference from faculty colleagues are required. For applications over $20,000, an additional external letter of reference is required.

For applications involving degree completion or equivalent, evidence is required that the applicant has made demonstrable efforts to obtain funding through the host institution.

Should an applicant funded for full-time release receive a grant, bursary, stipend, salary or other award, Kwantlen will reduce the allocation from this fund so that the total monies received by the faculty members equal the faculty member's full-time salary.

Faculty members receiving funds are expected to continue their employment at Kwantlen University College. If they resign, the funds will be recovered as follows:

- Full recovery if subsequent service is one year or less.
- Fifty percent recovery if subsequent service is two years or less, but greater than 1 year.

Within 2 months of completion of any activity funded through this process, the faculty member must submit a report demonstrating the extent to which proposed outcomes were achieved to the Senior Administrators and to their Dean.

In outlining the agreement on the professional development fund to its members, the Union noted that the parties "agreed to disagree" on whether the process and criteria "will be part of our collective agreement and grievable".

POSITIONS OF THE PARTIES

The Union takes the position that the Letter of Understanding #TBA and the criteria and process negotiated between the parties form part of the Collective Agreement and are subject to the grievance procedure.

On behalf of the Union, Ms. Burke argues that the parties cannot contract out of the provisions of Part 8 of the British Columbia *Labour Relations Code*, which reads:

> 84 (2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

The Union relies on *Tolko Industries Ltd.* [1988] B.C.C.A.A.A. No. 156 (Lanyon) March 12, 1998; *British Columbia Hydro* [2001] B.C.C.A.A.A. No. 96 (Larson) March 28, 2001; *Simon Fraser University and Assoc. of University and College Employees, Local No. 2* [1977] BCLRB No. 43/77 (Weiler) July 14, 1977; *Simon Fraser University and APU* [1998] B.C.C.A.A.A. No. 460 (Taylor) September 2, 1998; and *Forest Industrial Relations Ltd.* [2004] B.C.C.A.A.A. No. 32 (Hall), January 20, 2004 to support its contention that the legal framework for labour relations in the province requires that the parties have access to a dispute resolution provision.

Counsel for the Union further argues that the parties agreed via the March 23, 2005 Memorandum that their Collective Agreement would include the Letter of Understanding on professional development. Having then concluded negotiations on a matter that was part of the Collective Agreement, the Employer cannot then contract out of the grievance arbitration process, either under the Agreement or the Code.

For its part, the Employer argues that the contention by the Union that the process and criteria for the professional development fund forms part of the

Collective Agreement and can be grieved flies in the face of the intent of the fund that was negotiated at the MID table.

Mr. Gibson, on behalf of the Employer, submits that the employers at the MID table were clear that they did not have the ability to offer increases in compensation and that any provisions for professional development funding had to fall within the definition of non-compensation established by the Post-Secondary Employers' Association (PSEA). That definition is contained in an employer document that was provided to the unions at the MID table during negotiations. To be a "non-compensation cost" a professional development fund must meet the following criteria, in the submission of the Employer:

> ...non-compensation costs are for collective agreement provisions that have a bona fide business or operational purpose and that provide for appropriate accountability, tracking, and management discretion in the application of the provisions. These costs must be noted in the PSEA costing template but are not charged to mandate.
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> - professional development (P.D.) funding that meets the following criteria:
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> - The P.D. funding must be allocated to individuals or groups at the discretion of management, i.e., it should not be the individual employee's entitlement to receive specific amount of P.D. funding or even to receive any P.D. funding at all.
>
> - The P.D. funding must be applied to purposes as directed by management, i.e., it is not funding for the employee simply to use as he/she sees fit, and
>
> - The P.D. funding must be subject to the employee subsequently reporting to management's satisfaction on the professional development activity undertaken with the funding.

The Employer argues that, despite objecting to the notion of management discretion over professional development funding, the Unions at the MID table agreed on the basis of the PSEA "non-compensation" mandate. As such, argues Mr. Gibson, the final decision with respect to the allocation of the professional development funds rests with the applicable administrator; otherwise the fund could not have been negotiated.

The position of the Employer is that, as agreed at the MID table, the process and criteria document does not form part of the parties' Collective Agreement. Put another way, the Employer argues that a decision of the applicable senior administrator with respect to professional development cannot be grieved on its merits, except to the extent it is alleged that:

a. the process and/or criteria set out in the Process and Criteria Document were not followed, or

b. in exercising his/her discretion within the agreed criteria the applicable senior administrator exercised management's rights improperly.

In reply, Ms. Burke, agrees that the employees at the MID table felt that professional development funding had to be allocated to individuals or groups at the discretion of management in order to be a "non-compensation" cost. However, the Union submits that the basis of the agreement reached at the MID table was on the total package, and not subject to any agreement about arbitrability. It was never contemplated that what was negotiated would not form part of the Collective Agreement, argues Ms. Burke.

Finally, the Union submits that the distinction being drawn by the Employer between the application of the process and criteria document as grievable, and the merits of an administrator's decision as not, is a distinction without purpose. Ms. Burke argues that there is no difference and, in most

cases, one cannot distinguish between the misapplication of the criteria and the merits of the decision.

DECISION

I have carefully considered all of the submissions and arguments presented to me in this case and determined that the substance of the matter before me is a simple question: whether or not the application of the process and criteria document is subject to the grievance arbitration procedure. Put simply, in view of the bargain struck between the parties, the answer is yes.

On March 23, 2005, the parties agreed to a Memorandum of Agreement that states unequivocally that the Collective Agreement "shall include" the letter of understanding on professional development funding negotiated at the MID table. By way of the Memorandum, it thereby forms part of the Collective Agreement and, subject to any qualification therein, is a matter that can be grieved and adjudicated under the process contained in the contract.

The Employer draws the distinction between the actual LOU and the "Process and Criteria" document, which flows out of section 2 a) of the letter. That section reads:

> a) The parties will mutually agree on a process and criteria for the review and adjudication of employee applications to the fund. The process will include the recommendation of adjudicated applications to the applicable senior administrator.

The Union argues that, by virtue of this section, the process and criteria agreed between the parties is subject to the same dispute resolution procedures as any other agreement flowing from the Collective Agreement. I agree.

In coming to this conclusion, I have also carefully considered the language used in the "adjudication" provision of the LOU, which, the Employer submits, stands for the proposition that the "merits" of a decision on professional development funding is not subject to the grievance procedure. That section reads:

> c) Adjudication: Applications will be made to the applicable senior administrator or designate who will approve applications for funding based on the process and criteria established by the joint committee. The senior administrator is responsible for the final approval of applications.

With respect to the Employer's submission, that provision is not an exemption of this letter or the Process and Criteria document from the grievance-arbitration process, but rather a clarification of the lines of authority over professional development funding. Put another way, while section 2 c) will clearly be a consideration in the assessment of disputes over professional development funding decisions, it cannot be read to take such decisions out of the scope of the negotiated dispute resolution process in the Collective Agreement. To find in favour of the Employer in this case would be to ignore the express language contained in the March 23, 2005 Memorandum of Agreement, LOU #TBA and, as argued by the Union, would run afoul of Section 84 (2) of the *Labour Relations Code*.

In the result, it is my finding that Letter of Understanding #TBA, and the process and criteria agreed between the parties with respect to its application, form part of the Collective Agreement of the parties and are subject to the grievance arbitration process. To be abundantly clear, I have based this decision on my reading of the language of the Memorandum of Agreement between the parties settled on March 23, 2005 and that contained in the Letter of Understanding #TBA.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 24th day of August, 2006.

Vincent L. Ready

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