



ONTARIO LABOUR RELATIONS BOARD

Colleges Collective Bargaining Act, 2008

OLRB Case No: 0805-17-R
Certification (Industrial)

Ontario Public Service Employees Union ("OPSEU"), Applicant v College
Employer Council, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - August 30, 2017 and French Translation

DATED: September 01, 2017

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

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ONTARIO LABOUR RELATIONS BOARD

THIS IS AN OFFICIAL NOTICE OF THE BOARD

OFFICIAL NOTICES OF THE BOARD MUST NOT BE REMOVED, DEFACED
OR DESTROYED

ALL NOTICES MUST IMMEDIATELY BE POSTED BY THE EMPLOYER (IN
LOCATIONS WHERE THEY ARE MOST LIKELY TO COME TO THE
ATTENTION OF EMPLOYEES OR OTHER INDIVIDUALS AFFECTED BY THE
APPLICATION) NEXT TO THE APPLICATION, THE BOARD'S NOTICE TO
EMPLOYEES OF APPLICATION, AND/OR THE BOARD'S DECISION

NOTICES MUST REMAIN POSTED FOR 45 BUSINESS DAYS



COMMISSION DES RELATIONS DE TRAVAIL DE
L'ONTARIO

Loi de 2008 sur la négociation collective dans les collèges

N° de cas de la CRTO : 0805-17-R
Accréditation syndicale (secteur industriel)

Syndicat des employés de la fonction publique de l'Ontario ("SEFPO"), requérant
c Conseil des employeurs des collèges, intimé

LETTRE D'ACCOMPAGNEMENT

À L'ATTENTION DES PARTIES INDIQUÉES À L'ANNEXE A :

La Commission joint à la présente le ou les documents suivants :

Décision - rendue le 30 août 2017 et la traduction en français

FAIT LE : 01 septembre 2017

Catherine Gilbert
Greffière

site Web : www.olrb.gov.on.ca

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doivent être adressées à :

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COMMISSION DES RELATIONS DE TRAVAIL DE
L'ONTARIO

CET AVIS OFFICIEL DE LA COMMISSION
NE DOIT PAS **ÊTRE ENLEVÉ**, **ALTÉRÉ** OU **DÉTRUIT**

L'EMPLOYEUR DOIT AFFICHER IMMÉDIATEMENT CETTE DÉCISION (AUX
ENDROITS **OU** ELLE EST LE PLUS SUSCEPTIBLE D'ATTIRER L'ATTENTION
DES EMPLOYÉS ET AUTRES PERSONNES TOUCHÉES PAR LA REQUÊTE), **À**
CÔTÉ DE LA REQUÊTE, DE L'AVIS DU **DÉPÔT** DE LA REQUÊTE **DONNÉ** PAR
LA COMMISSION AUX EMPLOYÉS ET/OU DE TOUTES LES AUTRES
DÉCISIONS DE LA COMMISSION.

LE **PRÉSENT** AVIS DOIT RESTER AFFICHÉ PENDANT 45 JOURS
OUVRABLES.



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0805-17-R**

Ontario Public Service Employees Union ("OPSEU"), Applicant v **College Employer Council**, Responding Party

BEFORE: Matthew R. Wilson, Alternate Chair

DECISION OF THE BOARD: August 30, 2017

1. This is an application filed by the Ontario Public Service Employees Union ("OPSEU") for certification under the *Colleges Collective Bargaining Act, 2008*, S.O. 2008 c.15 (the "CCBA") for the part-time academic staff employed by the College Employer Council ("the Council").

2. The application was filed on June 23, 2017. In a decision dated July 14, 2017 the Board determined that a representation vote would be held in the fall, commencing October 2, 2017. The Board also invited the parties to make submissions about two additional issues: the Council's notice under s. 31 of the CCBA and the temporal scope of the voting constituency. The parties filed submissions with the Board.

Section 31 Notice

3. The parties are in agreement that for the purposes of determining the section 31 issue, the Board must determine if the Union has provided evidence of support of at least 35% of those who had an employment relationship as of June 23, 2017 ("the application date") and who worked at some point during the spring semester. This agreement is consistent with both s. 31 of the Act and the jurisprudence of the Board on this issue (See *Ontario Public Service Employees Union v College Compensation and Appointments Council*, 2011 CanLII 29353 (ON LRB)).

4. There may be outstanding production issues with respect to the information needed to determine the challenges made to the list of employees by OPSEU. OPSEU has set out its production request in its letter of July 28, 2017.

5. This is not the first time that these parties have dealt with these issues. The parties are strongly encouraged to make every effort to agree on the production of documents. Thus, the Council is directed to reply to the production request of OPSEU, and to produce all documents it does not object to producing within 30 calendar days of this decision (unless otherwise agreed to by the parties). If the Council objects to producing the requested documents, it should advise OPSEU, with its reasons. If OPSEU seeks a further production order from the Board, it may make such a request.

Voting Constituency

6. The temporal scope of the voting constituency remains in dispute and the parties have taken polar opposite positions.

7. OPSEU submits that any person who was employed in a position falling within the scope of the bargaining unit at any time in 2017 by the start of the voting period on October 2, 2017, should be included in the voting constituency. It submits that this will ensure that the vote is representative of the bargaining unit and also ensure that all those persons who supported the organizing drive have an opportunity to vote. It would also, according to OPSEU, be appropriate in light of the college semester system which lends itself to cyclical and seasonal hiring patterns. It further relies on the objectives of s. 30(5) of the Act, which states as follows:

30. (5) In determining the time period under subsection (4), the Board shall ensure that the vote is held during a time period when the persons eligible to participate in the vote are substantially representative of persons likely to be substantially affected by the result of the representation vote.

8. The Council contends that only persons employed in the bargaining unit at the start of the voting period – October 2, 2017 – should be included in the voting constituency. It relies on the Board’s jurisprudence under the Labour Relations Act (“LRA”) to argue that only employees with a stake in the future of collective bargaining should have a controlling voice in the choice of the bargaining agent. The Council

refers to the following statement of the Board in *Madeira Residential & Counselling Services Glendonwynne House*, [1999] OLRB Rep. January/February 66:

17. The Board should be wary about permitting voting by employees who may never face the consequences of their choice, because they will never return to the workplace. For these reasons, the Board's typical decision ordering representation votes sets "... a reasonable expectation of their return to employment" as a condition of voter eligibility for those absent from work on the application date.

9. The Council points to a line of cases prior to the amendments of the LRA in 1995 where the Board determined that the voting constituency was restricted to employees who were employed both on the application date and the voting date. The Council argues that these parameters are too restrictive since the majority of employees on the vote date (commencing October 2, 2017) would not have been employed on the application date (June 23, 2017). The Council also points to a line of cases dealing with casual employees following the amendments to the LRA in 1995. In the cases cited by the Council, the Board examined whether the prospective votes had a sufficient connection with the employer to be entitled to vote. The Council argues that individuals previously employed by the College do not have a sufficient connection to be entitled to cast a ballot in the instant application.

Analysis

10. The parties seek to define the voting constituency at polar opposite ends. In my view, neither extreme position is appropriate. A more preferable approach to defining the voting constituency lies somewhere in the middle.

11. The parties agree that the Board has the discretion to define the parameters of the voting constituency under the CCBA. The CCBA does not prescribe the temporal scope of the voting constituency. Unlike, the LRA, the CCBA provides for broader scope. The relevant portions of section 10 of the LRA read as follows:

10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the **ballots cast in**

the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the **ballots cast in the representation vote by the employees in the bargaining unit** are cast in favour of the trade union.

(emphasis added)

12. The language of s. 10 of the LRA points directly to employees in the bargaining unit as casting ballots.

13. In contrast, the equivalent provisions of the CCBA read as follows:

32 (1) The Ontario Labour Relations Board shall certify an employee organization as the bargaining agent of the members of a bargaining unit if more than 50 per cent of the ballots cast in the representation vote are cast in favour of the employee organization.

(2) The Board shall not certify the employee organization as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote are cast in favour of the employee organization.

14. The notable difference is that the CCBA does not expressly state that the employees must be in the bargaining unit to cast a ballot. It must be presumed that the Legislature deliberately used different language in describing the votes that were to be counted for the purpose of determining the outcome of the certification application. The difference in the statutory provisions means that it is not necessary to be an employee at the time of the vote.

15. As the Board's caselaw under the LRA make clear, in determining eligibility to vote, the Board must balance the interests of the employees with a stake in the future of collective bargaining while also providing some finality in the democratic process when there is regular and predictable employee turnover (See *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. April 461). It is also a balance that should be achieved in certification votes under the CCBA.

16. The provisions of the CCBA that determine when a vote is held also provide guidance on who should be eligible to vote. Section 30 reads as follow:

30 (1) If the Ontario Labour Relations Board determines that 35 per cent or more of the individuals in the bargaining unit referred to in the application for certification appear to be members of the employee organization at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.

(2) The determination under subsection (1) shall be based only on the information provided in the application for certification and the accompanying information provided under subsection 29 (17).

(3) The Board shall not hold a hearing when making a decision under subsection (1).

(4) The representation vote shall be held in a timely manner, within a time period determined by the Board.

(5) In determining the time period under subsection (4), the Board shall ensure that the vote is held during a time period when the persons eligible to participate in the vote are substantially representative of persons likely to be substantially affected by the result of the representation vote.

(6) The representation vote shall be a vote by secret ballot conducted under the supervision of and in the manner determined by the Board.

(7) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.

(8) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to make a decision on the application for certification.

(9) When making a decision on an application for certification, the Board shall not consider any challenge to the information provided under clause 29 (17) (b).

17. Subsection 30(1) of the CCBA states that the vote should "...be taken among the individuals in the voting constituency". Furthermore, pursuant to subsection 30(5) of the CCBA, the vote must be held when "... the persons eligible to participate in the vote are substantially representative of persons likely to be substantially affected by the result of the representation vote." This suggests that the persons voting do not have to be employed at the time of the vote. Rather, eligible voters must be in the voting constituency and be substantially representative of those affected by the vote.

18. There are several unique factors that must be considered in determining the temporal scope of the voting constituency. First, the vote will be held several months after the application date. To complicate this unique circumstance, the number of employees in the bargaining unit on the application date is significantly lower than the number of employees in the bargaining unit when the vote commences. Thus, the Board must consider both the lapse in time and also the large variance in the bargaining unit.

19. Second, the semester system of the colleges necessarily means that employees working in the fall semester – when the vote is scheduled to commence – were not necessarily working in the spring semester – when the application was filed. There may be employees in the bargaining unit who work at various times, in different semesters, at a particular college. There may also be employees who only work in one semester each year. This does not mean that employees in the bargaining unit in the fall semester have any greater stake in the outcome of the application than employees who work in the spring semester (or at any other time for that matter). This is what the Board must balance when determining the temporal scope of the voting constituency.

20. Third, the organizing drive took place at a period of time that is markedly different than the period when the application was filed and is also different from when the vote is being held. The difference means that employees who may have supported (or decided not to support) the organizing drive leading up to the application date may not be eligible to cast a ballot. It must be remembered that it was OPSEU that decided when to conduct its organizing drive and when it filed the instant application. It was in control of the timeline to commence the application.

21. In considering the unique circumstances of the application and in light of the differences in the statutory provisions it cannot be the case that the voting constituency is limited only to those employees who are employed on the vote date as argued by the Council. This would unfairly disentitle employees who may have been regularly employed in previous semesters and have a reasonable expectation that they will be employed again, in the same capacity, in an upcoming semester. It would also risk disenfranchising those employees who supported the union's organizing drive in earlier semesters.

22. I am also not persuaded that the voting constituency should be defined so broadly as to capture any employee in the bargaining unit going back as early as January 2017. It must be presumed that OPSEU's decision to file the application in June was a strategic move. It is entitled to make that decision. Whatever the strategic reasons OPSEU may have for the timing of the instant application, it would have known that the employees who signed cards to support the application may not be employed when the application is filed and remain not employed when the vote is held.

23. OPSEU's position is also problematic because it could result in an employee ceasing employment in early January 2017, but being able to cast a ballot some ten months later in October 2017. It is also not consistent with subsection 30(5), which requires the vote be held when the persons eligible to vote are substantially representative of persons likely to be substantially affected by the result of the vote. As noted earlier, the Board seeks to allow employees who have a stake in the outcome to have a say in whether a bargaining agent will be selected.

24. As the Board has stated in a previous application for this same bargaining unit involving the same parties (see *Ontario Public Service Employees Union v. College Compensation and Appointments Council*, 2009 CanLII 228 (ON LRB) at para 19), the purpose of a representation vote is to demonstrate whether an employee organization represents employees in the bargaining unit. The Alternate Chair at the time expressed doubts about whether persons who were not in an employment relationship at the time an application for certification is brought ought to be entitled to vote. I share those same doubts.

25. The Board stated as follows:

19. I have significant doubts about whether persons who were not in an employment relationship at the time an application for certification is brought ought to be entitled to

vote. The purpose of a representation vote is to demonstrate whether an employee organization represents employees in the bargaining unit. Votes are preceded by an organizing campaign, and the collection of cards to establish a threshold entitlement to a vote and an application to the Board. A representation vote is the final step in that process. To permit voting by employees who do not have an employment relationship until after the application has been filed seems to set an impossible task for the union. It is not possible for it to campaign for, collect cards from, and file an application for certification on behalf of persons who do not have an employment relationship until after the application is filed. However, as I have already said on a number of occasions, the CCBA 2008 is a new statute, and this is the first vote that has been ordered. All of the issues are new and neither the parties, nor the Board, have had an opportunity to fully consider all of them. Consequently, the voting constituency will include those employees who are in the bargaining unit on the day that they vote, even if they did not have an employment relationship on December 2, 2008. The ballots of those persons will be segregated.

26. In that case, the application had been filed on December 2, 2008. The vote was scheduled to commence on January 19, 2009. Ultimately, the Board determined that individuals with an employment relationship on December 2, 2008 were eligible to vote and included individuals with an employment relationship employed on the day they vote even if they did not have an employment relationship on December 2, 2008. The Board directed that the ballots cast by persons who were not employed on December 2, 2008 were to be segregated. Ultimately, it was not necessary to determine whether the segregated ballots would be counted.

27. The Council has not requested that employees hired after October 2, 2017, but during the vote period, be eligible to vote. OPSEU has expressly objected to anyone hired after October 2, 2017 being allowed to vote. Given the commonality in these positions, it is clear that the cut off date for voter eligibility is October 2, 2017.

28. After considering the unique circumstances of the application and balancing the interests of the parties, the Board determines that the voting constituency should include any employee in the bargaining unit who had an employment relationship with the employer on or after June 23, 2017 up to and including October 2, 2017 (the date the vote commences). The scope of the voting constituency strikes a balance

between allowing individuals who participated in the union organizing drive to participate in a vote while also ensuring some finality in the democratic process of determining whether a bargaining agent will be supported.

29. All individuals who had an employment relationship with the responding party in the bargaining unit on or after June 23, 2017 up to and including October 2, 2017 are eligible to vote. Should there be any disagreement about an individual's eligibility, either party may raise a challenge at the vote and the challenged ballot shall be segregated unless agreed to by the parties or otherwise determined by the Board.

30. The Council is directed to arrange for the posting of this decision, alongside the Notice to Employees. These copies must remain posted for 45 business days.

“Matthew R. Wilson”
for the Board

APPENDIX A / ANNEXE A

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