



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):

FRENCH DECISION TO FOLLOW

Decision - July 14, 2017

DATED: July 14, 2017

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

Address all communication to:

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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



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, Vice-Chair

DECISION OF THE BOARD: July 14, 2017

1. This is an application filed by the Ontario Public Service 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. This decision deals with, among other things, the timing of the representation vote. OPSEU seeks to have the vote held over a period of 9 business days starting on July 17, 2017. The Council asserts that the vote should be held during the fall semester commencing at the beginning of October. The parties filed submissions with respect to this issue pursuant to the Board's decision of June 30, 2017.
3. For the following reasons, the Board determines that the representation vote shall be held in the fall, commencing October 2, 2017.
4. It appears to the Board on an examination of only the information provided in the application and the information and membership evidence filed by the applicant (see section 30(2) of the CCBA) (some cards transferred from Board File No. 3313-16-R), that not less than 35% of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made.

5. The bargaining unit is defined by the CCBA and is the basis for the voting constituency. The Board directs that a representation vote be taken of the individuals in the following voting constituency:

Part-time academic staff bargaining unit:

2 (1) Subject to subsection (2), the part time academic staff bargaining unit includes all persons employed by an employer as,

- (a) teachers who teach for six hours or less per week;
- (b) counsellors or librarians employed on a part time basis; and
- (c) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than 12 months in any 24-month period.

(2) The part time academic staff bargaining unit does not include,

- (a) chairs, department heads or directors;
- (b) persons above the rank of chair, department head or director;
- (c) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;
- (d) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity; or
- (e) a person employed outside Ontario.

5 In this Schedule,

“person employed in a managerial or confidential capacity” means a person who,

- (a) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
- (b) spends a significant portion of his or her time in the supervision of employees,
- (c) is required by reason of his or her duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (d) is employed in a position confidential to any person described in clause (a), (b) or (c),
- (e) is employed in a confidential capacity in matters relating to employee relations,
- (f) is not otherwise described in clauses (a) to (e) but who, in the opinion of the Ontario Labour Relations Board, should not be included in a bargaining unit by reason of his or her duties and responsibilities to the employer.

Vote Directions

6. The vote will be held commencing on October 2, 2017 in accordance with a Schedule which will follow. Other vote arrangements will be determined by the Registrar.

7. The voting constituency will be addressed at the conclusion of this decision.

8. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

9. The responding party is directed to post copies of this decision adjacent to each of the posted copies of the "Notice to Employees of Application for Certification". These copies must remain posted for 45 business days.

10. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for certification, other than status disputes, including any matters relating to the representation vote, must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within five days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

Analysis

11. The CCBA governs the certification and collective bargaining process in the college sector. There are 24 colleges, that are independent employers of different sizes operating over 100 campuses in locations across the province. Pursuant to section 24 of the CCBA, the Council has the exclusive responsibility for all collective negotiations on behalf of the employers conducted under the CCBA.

12. The CCBA contemplates four bargaining units: full-time academic staff, full-time support staff, part-time support staff and part-time academic staff. The full-time units negotiate separate central collective agreements. The part-time units were added to the CCBA in 2008.

13. An application, filed by OPSEU, to certify the part-time support staff unit is currently before the Board (Board File No. 0625-16-R). In that application, the Board determined when the vote would be held (See *Ontario Public Service Employees Union ("OPSEU") v College Employer Council*, 2016 CanLII 37832 (ON LRB) ("the support staff vote decision"); (judicial review application dismissed in *Ontario Public Service Employees Union v College Employer Council*, 2015 ONSC 3426 (CanLII)). I will have more to say about the Board's decision in that matter, but it is first helpful to start with the statutory framework.

14. The certification process under the CCBA differs materially from the Ontario *Labour Relations Act* ("the LRA"). As one example, which is pertinent to this decision, the CCBA does not specify when the representation vote should be held. Unlike the LRA, which stipulates

that a vote must be held within five days, the CCBA states that the "...representation vote shall be held in a timely manner, within a time period determined by the Board". The CCBA further states that in determining when the vote is to be held, the Board is to 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." There are other differences, but not as pertinent to the issues to be decided at this time. The sections of the CCBA which deal with the timing of the vote are as follows:

29 (1) Where no employee organization is certified as bargaining agent of the members of a bargaining unit and the members of the unit are not bound by a collective agreement, an employee organization may apply at any time to the Ontario Labour Relations Board for certification as bargaining agent of the members of the unit.

...

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 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).

15. Thus, it can be said that when the Legislature decided not to proscribe a time period for the vote (as it did with the LRA), but rather to use the more general descriptor - "timely manner" - the Legislature recognized that the temporal nature of the employment relationship within the college sector may impact the timing of the vote. In determining when precisely a "timely manner" falls under s. 30(4) of the CCBA, the Board is required by s. 30(5) of the CCBA to conduct an examination of whether persons eligible to vote are substantially representative of persons likely to be substantially affected by the result of the representation vote. The CCBA does not stipulate the factors to be considered in this analysis.

16. In the support staff vote decision, the Board set out its analysis in reaching a determination under s. 30(4) of the Act. The relevant excerpts of that decision are as follows:

22. I have no doubt that the use of the word "timely" means something different than the words used in the LRA. At a minimum, as a practical matter, given the number of employees and workplaces that are involved in an application for certification in this sector, the Board does not have the resources to hold a representation vote within five days of an application being filed. The word "timely" may also involve other factors as the Council suggests. It is not necessary to set out all the factors which the Board may apply in determining when a "timely" vote might be held in any particular case.

23. That being said, the word "timely" also involves an element of speed. For example, I doubt anyone would suggest that a representation vote ordered to be held in the spring of 2018 would be a "timely" vote regardless of the practicalities associated with it.

24. Moreover, there are provisions in the Act which require that there be no hearing held in determining whether to hold a vote (s. 30(3)), provide for the sealing of the ballot boxes (s. 30(7)), and preclude challenges to the information provided as part of the application (s. 29 (17)). These provisions are all suggestive of a system designed to have a vote quickly, subject to the practical realities of holding a vote in a bargaining unit of this size and which is so dispersed.

25. In addition, in my view, the issues raised by the Council regarding whether a vote is "timely" are specifically dealt with in s. 30(5) of the CCBA. The Council has suggested, in effect, that the statutory requirement of a "timely" vote has no particular meaning other than to underscore the requirement that the vote be held at a time when it is "representative". In my view, this is not the case. The Legislature cannot be taken to have intended "timely" to have no meaning independent of the "representativeness" requirement - such an interpretation would inject a redundancy into the wording of the statute, and rob the "timely" requirement of its meaning. The reference to a "timely" vote must be given the meaning normally accorded to that term in the context of a representation vote - that is to say, quickly enough to avoid the various adverse labour relations consequences of delay.

26. I therefore find it unlikely that the Legislature was concerned with the issues raised by the Council in using the word "timely". In my view, the combination of sections 30(4) and 30(5) means that the representation vote should be held at a suitable time as quickly as possible when the persons eligible to participate in the vote are substantially representative of those likely to be substantially affected by the result of the representation vote. In other words, the real issue before the Board is not whether a vote held in June or October for that matter would be timely, (in my view either could be in the right circumstances) but whether the conditions of s.30(5) have been met.

17. The Board then set out its analysis with respect to s. 30(5) of the CCBA as follows:

27. Section 30(5) is a complicated provision. The first complication arises out of the words "eligible to participate in the vote". The problem is, at least at this point, that there is no clear answer about who is eligible to participate in the vote. There may almost certainly be disputes about who is eligible to vote. These disputes could range from the micro level, as to whether an individual employee is in the bargaining unit, to the macro level, including whether employees who were not employed on the application date are eligible to vote. The difficulty is that all of these determinations will be made later in the process, but the Board must now decide when the vote will take place.

28. A second complicating fact in the section is the term "substantially affected by the result of the representation vote". This is complicated because it is unclear what that phrase means in the context of these workplaces. The difficulty arises because it is acknowledged that many of the part-time employees are students. For many programs, students will only be at a College for two years and may be employed as a part-time employee for less than that. It is also likely that if the Union is successful in the vote some significant time will pass before the parties reach a collective agreement. This is so both because there may be lengthy litigation before a certificate is issued to the Union (at a minimum to determine who is eligible to vote) and then following certification, the process of reaching a collective agreement may also be lengthy. It is not difficult to imagine a circumstance where many, or all, of the student employees who vote on whether OPSEU should be certified, will not cast a ballot on whether a first collective agreement should be ratified. In these circumstances, there is an argument that few of the student employees will be "significantly affected" by the results of the vote since by the time the effects of the vote occur (i.e. a concluded collective agreement) the students employed as part-time employees who voted will no longer be employed.

29. For this latter reason, in my view, the Council's emphasis in its submissions on student employees is incorrect. In addition, the use of the phrase "substantially affected" in s.30(5) is a clear indication that the legislature intended the Board to draw a distinction between those employees who will be "affected" by the result of the representation vote and

those who will be "substantially affected". Student-employees will be affected by the results of the representation vote, but, for the reasons discussed, the vast majority, and perhaps all of the currently employed ones, will not be substantially affected.

30. Nevertheless, it is clear there is a legislative intent that there are times when it would not be appropriate to hold a vote because the persons eligible to participate are not substantially representative of persons likely to be affected. The question about whether a vote in June is one of those times turns largely on the meaning of the phrase "substantially representative".

31. The phrase "substantially representative" is not unfamiliar to the Board. It arises in connection with a body of Board jurisprudence around a concept called "build up". A "build up" occurs when a union applies for certification at a time when there are fewer employees at work than it is anticipated there will be in the near future. If there is such a "build up" the Board may not certify the union based on membership cards (which was the case in much of the Board's build up jurisprudence), or hold a representation vote within five days of the application, but would hold a representation vote after the build up had taken place.

32. In *Kids Come First Child Care Centre of Vaughan and Canadian Union of Public Employees*, [1994] OLRB Rep. September 1235 the Board stated:

20. The Board has exercised its discretion to order a representation vote where the employees employed in the bargaining unit on the application date do not constitute a substantial representative number of employees in the ultimate bargaining unit. The policy behind the exercise of this discretion is summarized in the case of *Northland Power Partnership*, [1991] OLRB Rep. June 768 at paragraph 8:

The Board has recognized that there are circumstances in which it is appropriate to defer consideration of an application for certification. Where, for example, the Board is satisfied that an application is premature because a significant build-up of the workforce will take place within a reasonable period of time, *the Board may defer consideration of the application, and order that a*

vote be taken at a time when a substantial representative number of employees are at work. This "build-up principle", as it is come to be known, represents an attempt to reconcile the right of present employees to exercise their rights under the *Labour Relations Act* and the right of future employees to do so (see for example, *R. ex rel. United Steelworkers of America et al v. Labour Relations Board (Saskatchewan)* and the *Random Mines Ltd.* [1970] (7d) L.R. 3rd 1, 69 CLLC para. 14,205 (SCC); *Champlain Forest Products Limited* [1972] OLRB Rep. May 399; *Inco* [1973] OLRB Rep. March 172). This principle has been applied in limited circumstances (see, for example, *Emile Frant and Peter Waselovich* 57 CLLC para. 18,057; *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846). More specifically, if the employees at work do not constitute a substantial and representative part of the workforce which is expected to be employed within a reasonable period, and the build-up does not depend upon factors beyond the employer's control, the Board may defer consideration of an application for certification or order a deferred vote.

21. Over the years the Board has developed some guidelines to assist it in balancing the rights of the two groups of employees described above. First, the Board requires that there be a real likelihood that a build-up will take place. Second, the planned build-up must take place within a reasonable period of time. *Third, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If more than fifty per cent of the expected total are then employed, it is normally felt that the group is sufficiently representative and the Board will decline to exercise its discretion to order a representation vote. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and the Board exercises its discretion accordingly.* Fourth, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application (*F. Lepper & Son Ltd.*

[1977] OLRB Rep. Dec. 846 at paragraph 10; *Brick Brewing Co. Limited*, [1985] OLRB Rep. Nov. 1557 at paragraph 6; *Champlain Forest Products Limited*, [1972] OLRB Rep. May 399 at paragraphs 6 and 7; *GSW Inc.*, [1990] OLRB Rep. May 535 at paragraph 3; *Hawk Security Systems Limited*, [1993] OLRB Rep. August 751, paragraphs 19 and 22).

(emphasis added)

33. In my view, the Legislature's use of the phrase "substantially representative" was no coincidence. It is likely a reference to the Board's build-up caselaw, where the Board uses that phrase as its test as to whether a representation vote should be deferred as a result of a build up. That language was used, well known and developed in the jurisprudence well before these amendments to the CCBA and in particular section 30(5). I come to this conclusion because the issue surrounding the timing of the vote in the Board's build up cases and in the CCBA are much the same.

34. If this is the case, as I believe it is, I see no reason why the Board ought not to interpret "substantially representative" in the same way as the Board did and does in its build-up cases. That is, if the number of employees present in the workplace constitutes 50% or more of the employees who will, "within a reasonable period of time" (six months), be in the workplace, then the representation vote ought not to be delayed.

18. I have set out these passages from the support staff vote decision because I accept and adopt the analysis to determine when the representation vote ought to be held. In that decision, the Board determined, based on the Council's information, that 50% or more of employees who would eventually be at work were currently working and that this was a substantially representative number. Thus, the Board determined that it was appropriate to hold the vote in June, rather than as argued by the Council, in October.

19. In the instant matter, the number of employees at the time of the application, at the time of the vote if it were held in July, and the number of anticipated employees in the fall semester support the conclusion that the vote ought to be held in October, rather than as argued by OPSEU, in July.

20. Using the numbers provided by the Council, it states that there were 6,459 individuals in the bargaining unit on the application date (it had earlier estimated that there were 6,802 in its original submissions to the Board). OPSEU's estimate is much lower at 4,793 and the College states that its estimated number will decline further in July to 5,023, but I will use the higher number of 6,459 for this analysis. In March 2016, in the previous application to certify this bargaining unit (Board File No. 3313-16-R) (which was ultimately withdrawn by OPSEU), there were 13,871 employees in the bargaining unit. Considering these figures (6,459 individuals in the bargaining unit on the day of the application and 13,871 individuals in the bargaining unit in March, 2016), there are less than half the individuals working on the application day than employed in March 2016. If the Board were to consider OPSEU's estimate (4,793) or the Council's estimate in July (5,023), it is substantially less than half of the number of individuals. Applying the rationale from the support staff vote decision, and in particular the application of the build-up principles, the persons eligible to participate in the vote are *not* substantially representative of persons likely to be substantially affected by the result of the representation vote. On this analysis alone, the representation vote should be held in October when the number of individuals in the bargaining unit has increased.

21. It may be that the Board should consider the number of individuals in the bargaining unit in the fall, rather than in March of the previous year. The Council stated that the average number of part-time and sessional teachers employed in the fall over the last five years is 11,034. If the Board were to use the number of individuals in the bargaining unit on the day of application (6,459), the calculation is slightly more than half the average number of individuals in the bargaining unit in the fall. If the Board were to use the number of individuals in the bargaining unit on the day of the vote (5,023), it is slightly less than half the average number of individuals in the bargaining unit in the fall. If the Board were to use OPSEU's estimate of the number of employees on the application date (4,793) it is even less. Of course, these calculations take into consideration the average of the last five years. If the Board were to look at the highest employment numbers in the fall (or the lowest), the results vary slightly.

22. All this is to say, the number of individuals in the bargaining unit on the application date is much lower than the number of individuals in the bargaining unit in the fall and substantially lower than in the spring. The number of individuals in the bargaining unit in July (the time period for a vote as advocated by OPSEU) is much lower and cannot

be substantially representative of persons likely to be substantially affected by the result of the representation vote.

23. OPSEU argues that determining the substantial representativeness of persons likely to be affected by the vote should not be a rigid application of a numerical rule. I agree. As the Board stated in *Kids Come First Child Care Centre of Vaughan, supra*, the Board may look at the proportion of projected classifications that are filled at the time of the application. This is not an issue for the part-time academic staff bargaining unit. Certainly, the Board must also be cognizant that the individuals who supported the organizing drive by signing membership cards are likely to want to cast a vote. Thus, delaying the vote by too much may inadvertently disenfranchise a large group of employees. The temporal nature of the voting constituency may address this issue.

24. It must also be recognized that this case presents a unique circumstance that differs from the traditional build-up cases. The number of individuals in the bargaining unit on the application date significantly varies from the number of individuals in the bargaining unit for the voting period sought by OPSEU and then varies to a greater extent approximately six weeks later. This is not an instance (like the build-up cases) where the possibility of a vote or certification is almost immediately following the application date. Consequently, when determining when to hold the vote under the CCBA the Board must be mindful of the significant fluctuations in the workforce from the application date to the date of the vote. Thus, while a rigid numerical calculation is not appropriate, the numbers carry significant weight.

25. OPSEU argues that in considering s. 30(4) of the CCBA, the Legislature recognized the desirability of a quick vote. There is no doubt that a quick vote is preferred. But, it is subject to the conditions set out in s. 30(5) of the CCBA. The Board addressed this issue in the support staff vote decision, where it stated as follows:

26. I therefore find it unlikely that the Legislature was concerned with the issues raised by the Council in using the word "timely". In my view, the combination of sections 30(4) and 30(5) means that the representation vote should be held at a suitable time as quickly as possible when the persons eligible to participate in the vote are substantially representative of those likely to be substantially affected by the result of the representation vote. In other words, the real issue before the Board is not whether a vote held in June

or October for that matter would be timely, (in my view either could be in the right circumstances) but whether the conditions of s.30(5) have been met.

26. Thus, a quick vote is preferred, but the broad discretion afforded to the Board by s. 30(4) and (5) requires a more in-depth analysis into determining when a timely vote should be held. It is clear to me that a vast majority of employees who are clearly substantially affected by the results of the vote will not be present at work in July. Only a vote held in the fall, and likely in early October, will balance the rights of the individuals who may have signed membership cards with the majority of employees in the bargaining unit.

27. Therefore, the Board determines that the representation vote in this application shall be held in the fall, commencing October 2, 2017.

Further Directions

Section 31 Notice

28. The Council has given notice pursuant to section 31 of the CCBA and has requested that the ballot box be sealed until an assessment of whether OPSEU has met the 35% threshold has been completed. It may be the case that the Board can conduct the necessary examination of the membership evidence prior to the conduct of the vote. The Council is directed to file any submissions it wishes the Board to consider to conduct this analysis within 10 days from the date of this decision. OPSEU shall have 5 days from receipt of the Council's submissions to file a response. Should the Council have any reply submissions, it must file those submissions with the Board, within two days from receipt of OPSEU's submissions.

Voting Constituency

29. There is also the issue of the temporal scope of the voting constituency. While there is no dispute about the description of the voting constituency, some employees who signed cards and were employed at or prior to the application date may not be employed on the date of the vote. I note that section 10 of the LRA contains specific language about the voting constituency that is not reproduced in the CCBA. The parties are invited to make submissions on the temporal scope of the voting constituency. OPSEU shall have 10 days from the date of this decision to file such submissions with the Board. The Council shall have 5 days from receipt of OPSEU's submissions to file a response.

Should OPSEU have any reply submissions, it must file those submissions with the Board, within two days from receipt of the Council's submissions.

30. The matter is referred to the Registrar.

"Matthew R. Wilson"
for the Board

APPENDIX A

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