

ONTARIO LABOUR RELATIONS BOARD

1201-09-R Ontario Public Service Employees Union ("OPSEU"), Applicant v. **College Compensation and Appointments Council**, Responding Party.

BEFORE: Mary Ellen Cummings, Vice-Chair.

DECISION OF THE BOARD: September 2, 2009

1. This is an application for certification brought pursuant to section 29 of the *Colleges Collective Bargaining Act, 2008*, S.O. 2008, c. 15 (the CCBA 2008). The Ontario Public Service Employees' Union ("OPSEU") seeks to represent a bargaining unit of part-time support staff of the Province's colleges of applied arts and technology.

2. In this decision, I will set out a list of issues, most of which need not be addressed at this time, and order a representation vote.

Form C-2

3. The Board has prepared a modified Form C-2 for posting, in both French and English. The College Compensation and Appointments Council (the "Council") is directed to request that all of the colleges post the Form C-2, and this decision, in locations where they are most likely to come to the attention of the affected employees.

The Parties' Procedural Agreements

4. A letter from counsel for the applicant, dated August 14, 2009, helpfully set the procedural agreements the parties had reached to facilitate the management of this application. Those agreements include how material will be delivered and filed, when responses will be delivered and filed and how the lists of employees will be organized. To the extent necessary, the Board endorses those agreements.

Notice Pursuant to Section 31(1) of the CCBA 2008

5. In its application, OPSEU asserted that it has filed membership evidence on behalf of 35% or more of the individuals in the bargaining unit. The Council has filed a notice of disagreement, pursuant to section 31(1) of the CCBA 2008. The Council has indicated that there are more persons in the bargaining unit than OPSEU has estimated. Assuming (without deciding) that the appropriate date to make the section 31(1) determination is the application date and assuming that both OPSEU and the Council filed their lists based on who was in the bargaining unit on July 23, 2009, the application date, the section 31(1) notice is numerically relevant. When the membership evidence provided by the applicant is compared against the information provided by the Council, the difference is numerically relevant. Pursuant to section 31(4) and the request of the Council, the ballot boxes will be sealed, until the section 31 notice is resolved, the Board otherwise directs, or the parties agree.

Card Issues

6. A few of the membership cards relied on by the applicant were signed more than one year before the application was brought. OPSEU also indicated that a few of the cards it filed came to it by mail or facsimile transmission, and so the originals were not filed with the Board. The number of older or photocopied cards is not significant and does not play a role in the Board's determination around section 31, set out above. However, I did want to flag the issues.

When Should the Representation Vote be Held?

7. On the basis of the agreement of the parties, the Board directs that a representation vote be held commencing October 5, 2009. Detailed voting arrangements will follow shortly.

Voting Constituency and Vote Arrangements

8. It is not possible nor appropriate to definitively determine who falls within the bargaining unit at this point. Instead, the Board will order a representation vote among the broadest number of people who might fall within the bargaining unit. This is typically how the Board determines the voting constituency. Any person who believes that he or she is a part-time employee or employed for a project of a non-recurring kind is entitled to cast a ballot. The vote will be conducted among all such individuals with an employment relationship on July 23, 2009 including those who were not at work on that date, so long as there was a reasonable expectation of their return to work. Those eligible to vote include persons who are in the bargaining unit on the day that they vote, even if they did not have an employment relationship on July 23, 2009.

9. Because the Board cannot yet determine definitively who falls in the bargaining unit, all of the ballots will be segregated.

10. The Board will conduct a representation vote among the part time support staff. Part time support staff includes:

(a) all persons regularly employed by an employer for not more than 24 hours a week in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff; and

(b) all persons employed by an employer for a project of a non-recurring kind in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff.

The part time support staff bargaining unit does not include:

(a) foremen or supervisors;

(b) persons above the rank of foreman or supervisor;

(c) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college or of a constituent campus of a college, including persons employed in clerical, stenographic or secretarial positions;

(d) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;

(e) students employed in a co-operative educational training program undertaken with a school, college or university;

(f) a graduate of a college during the period of 12 months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement;

(g) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practice in Ontario and employed in a professional capacity; or

(h) a person employed outside of Ontario.

“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.

11. The vote will commence on October 5, 2009. Vote arrangements will be detailed on the “Notice of Vote”. Eligible voters will be able to vote at any location. In other words, they do not need to vote at the location where they normally work. However, employees who work at more than one location may only vote once.

12. The Council has requested that voters be required to provide photo identification. The Council noted that many of the voters will be new employees, and it is not reasonable to expect

either party's scrutineer to be able to identify many or most of the voters. OPSEU opposes the request. The Board's practice has been to decline requests that voters provide photo identification unless both parties agree. We see no reason to depart from that practice. Voters will not be required to provide picture identification.

13. The Council has requested that mail-in ballots be permitted. It notes that a number of potential voters live in remote areas, with a two hour or more drive to a polling station. The union objects to the mail-in ballot suggestion, citing concerns with the administration of the process and authentication. I decline to order the option of mail-in ballots. The Board's limited experience with mail-in ballots does not convince me that the benefits outweigh the risks.

14. Persons who are not on the voters' list will still be eligible to vote. They will be asked to identify what college, campus and department they normally work in.

15. The Council is directed to make available to the Board a sufficient number of classrooms, or other appropriate rooms that can be secured by the Board Officer conducting the vote, at each of the voting locations.

Post Vote

16. 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, 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 ten (10) days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the last date on which the vote is taken.

17. This matter is referred to the Registrar.

"Mary Ellen Cummings"
for the Board