

## ONTARIO LABOUR RELATIONS BOARD

**2724-08-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:** January 6, 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 academic staff.

2. There are a number of issues which the Board must consider before deciding whether or not to order a representation vote. The parties have filed useful submissions.

### Transfer of cards

3. OPSEU filed an application for certification in April 2008 pursuant to the predecessor to the CCBA 2008. It was common ground in that application that the statute provided no obvious means for OPSEU, or any union, to acquire bargaining rights for part-time employees nor a means for collective bargaining once bargaining rights were gained. The Board entertained oral submissions about OPSEU's request that the Board order a representation vote. The Board decided not to order a vote at that time. That Board File, 0167-08-R did not progress any further. On December 2, 2008, OPSEU filed this application for certification, pursuant to the new CCBA 2008. In a letter accompanying the application, OPSEU asked the Board to transfer the membership evidence it had filed in Board File 0167-08-R ("the old application") to this application. The Board acceded to that request, without seeking the submissions of the College Compensation and Appointments Council (the "Council"). The Council objects.

4. The Council submits that the Board ought not to take into account the membership evidence filed in the old application when the Board is considering the percentage of individuals in the unit who appear to be members of OPSEU at the time this application was made (section 31(5)4 of the CCBA 2008). The Council asserts that at the time cards were collected in support of the old application, the CCBA 2008 did not exist. There was no mechanism for acquiring rights, no collective bargaining structure, and no indication of who any bargaining agent would be bargaining with. In the face of such uncertainty, the Council argued, no employee contemplating signing a card would have known what they were signing up for. More significantly, they could not have signed a card anticipating that it would be part of this application, brought under the CCBA 2008, because neither the new statute, nor the mechanism for acquiring bargaining rights and exercising those rights existed at the time. The Council argued that the Board has typically been concerned that membership evidence demonstrate an interest in being represented in bargaining relationship with a specific employer. Because the membership cards were collected before the new regime was established the Board can have no confidence that individuals who signed the cards were seeking to be represented by OPSEU in a Province-wide bargaining relationship with the Council.

5. I have reviewed the form of the membership cards that were filed in both the old and new applications. The cards state: "I hereby apply for and accept membership in, and authorize OPSEU, its agents or representatives, to act for me as my exclusive representative in collective bargaining, in respect to all the terms and conditions of my employment and to negotiate contracts with my employer, covering all such matters". There is no space for the individual to indicate the identity of his or her employer. The Board, acting under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, has not typically required that union membership cards identify the name of the employer in respect of whom the application is to be brought.

6. Ironically, if the cards OPSEU used had identified any of the colleges where the employees work as the "employer", the result would have been arguably misleading. Whoever might be the employer, the CCBA 2008 designates the Council as the employer-side bargaining partner. In any event, the Board, acting under the *Labour Relations Act* has not typically gone "behind" the card, to ensure that trade union organizers have supplied potential members with a sophisticated understanding of how bargaining rights are acquired and exercised in the Province of Ontario. We have been more concerned that employees do not believe, for example, that they are signing up to join a lottery pool. We want to make sure that employees understand that they are agreeing to have a trade union represent them in their employment relations. The cards used by OPSEU in both the old and new applications demonstrate that individuals were provided that information. The structure for acquiring and exercising bargaining rights under the CCBA 2008 is not much different from the outcome OPSEU sought in the old application, so I have no reason to assume that individuals signing cards prior to April 2008 thought they were signing up for something substantially different from the regime under which this application is brought.

7. If individuals believe that the bargaining regime under the CCBA 2008 is not the arrangement they wish to be governed by, they can exercise their vote accordingly. The membership cards in the earlier file can be relied on by OPSEU in this file, subject to the caveats set out below.

#### Stale cards

8. Some of the cards relied on by OPSEU are dated more than 15 months prior to the application date. OPSEU has asked the Board to include those cards in determining whether OPSEU has established an appearance that 35% or more of individuals in the bargaining unit are members of OPSEU. The Council has asked the Board to give no weight to cards signed more than one year ago, and further, to give no regard to cards signed before the CCBA 2008 came into force. OPSEU argues that it began its organizing campaign in September 2007, a campaign that has been challenging because of the turnover in employees. The issue of turnover is one acknowledged by both parties. OPSEU argues that although the Board has applied a one year rule for cards in applications brought under the *Labour Relations Act*, it is Board-made law, with no obvious reasons for application under the CCBA 2008. Moreover, since a representation vote will be held, there is an appropriate opportunity for anyone who signed a card to make a fresh decision.

9. Deciding when cards are "stale" is to some degree arbitrary. Concerns about stale cards were particularly compelling when representation votes were not routinely held and certification was based solely on the cards. The Board has typically permitted unions to rely on cards that were signed not more than one year before the application date. However, this is the first time the Board has had to consider the issue under the CCBA 2008 and in the context of

organizing a statutorily-mandated Province-wide bargaining unit. I will defer the issue because it is a new one that need not be decided before ordering a representation vote.

Other card issues

10. OPSEU identified that some of the cards it filed came to it by mail or facsimile transmission. In most cases, OPSEU asserts it made telephone contact with the card signers and verified the cards. In respect of a few cards, OPSEU has not been able to make the verification. The Council asserts that the Board ought not to rely on those cards where verification was not made. I note that the number of non-verified cards is not large enough to be significant to the determination of whether OPSEU appears to represent 35% or more of the employees in the bargaining unit.

The section 31(1) notice of disagreement

11. 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. The Council disagrees with OPSEU's estimate of the number of persons in the bargaining unit. OPSEU asks that the notice of disagreement be dismissed, or alternatively, that the issue be determined after a representation vote is held. The Council has requested that the section 31 issues be determined as soon as possible, and before a representation vote is ordered. The Council submits that the holding of a representation vote in this matter will consume a significant amount of the parties' and the Board's resources. Consequently, it would be preferable to determine whether OPSEU has met the threshold of filing membership evidence on behalf of 35% or more of the employees in the bargaining unit before a vote is held. Moreover, the Council argued, because there will be significant issues about who is eligible to vote, sorting out these issues in advance of ordering a representation vote would be preferable.

12. Although this is the Board's first experience in ordering a vote pursuant to the CCBA 2008, we have significant experience in ordering votes under the *Labour Relations Act*. That statute has a similar regime, requiring trade unions to establish a threshold appearance of membership to be entitled to a representation vote, with a provision allowing employers to give notice that they disagree about the number of employees in the bargaining unit (see section 8.1 of the *Labour Relations Act*). The Board has consistently ordered representation votes based on the threshold appearance of membership, always reserving the employer's right to require the union to establish an actual threshold of membership before the Board will give effect to the representation vote.

13. Although it would be tempting to try to conserve the Board's and the parties resources by holding a consultation to determine if OPSEU has filed membership on behalf of 35% or more of the employees in the bargaining unit, I am not convinced that we could accomplish that task in a timely way, even with the best efforts of all. The parties have helpfully identified a number of criteria they would each ask the Board to consider in determining which employees are part of the bargaining unit and so, whose cards should be considered in deciding if OPSEU actually represents 35% or more of the employees, and who ought to have an opportunity to participate in a representation vote. Because the Board has never had to consider what this new statutorily defined bargaining unit should include, nor who is eligible to vote, all of these issues would take time to argue and for the Board to decide. To put it another way, while it would be preferable to sort out all of these issues in advance, to determine if OPSEU has met the threshold,

and then if it has, to order a vote only among those people we are certain will fall into the bargaining unit, I do not think we can do that in a timely way.

14. In the last number of years, the Board has developed a reputation for ordering speedy votes so that employees have an opportunity to express their choice as close a possible in time to when the application for certification is made. Based on our positive experience with speedy votes, I am inclined towards process choices that encourage expedition. Because of the size of the "workplace" in this case, somewhere around 10,000 employees spread around more than 100 worksites in the Province, "speedy" is a relative term. It will take three weeks to conduct a representation vote in any event. I am disinclined to delay that process any further. I decline the Council's request that the Board convene a consultation to determine the section 31 issues before ordering a representation vote.

15. That said, I also decline OPSEU's request that the section 31(1) notice of disagreement be dismissed. The Council has made a timely notice of disagreement with OPSEU's estimate of the number of employees in the bargaining unit. After comparing the membership evidence provided by OPSEU against the information provided by the Council, I find that the numerical difference is significant. The notice of disagreement is relevant. Accordingly, the ballot boxes will be sealed until the parties agree or the Board directs otherwise.

16. However, section 30 of the CCBA 2008 requires the Board to order a representation vote if we determine that 35% or more of the individuals in the bargaining unit referred to in the application for certification appear to be members of the applicant. Section 30(2) requires the Board to make that determination with reference only to the material filed by the applicant. On the basis of the material filed by the applicant, I find that OPSEU appears to represent 35% or more of the individuals in the bargaining unit. Consequently, I direct that a representation vote be held.

#### Voter eligibility

17. Schedule 1 of the CCBA 2008 defines the positions that fall within the academic part-time bargaining unit. But the statute offers little guidance about the period of time over which the Board should look to determine if an employment relationship exists. I hasten to add that, at this point, I am not seeking to interpret the definitions in Schedule 1, but only to determine who should be part of the voting constituency. The Board has typically determined a voting constituency large enough to encompass the positions of all the parties, or if that is not practical, large enough to include the probable outcomes of the case. OPSEU has asked the Board to determine voter eligibility on its typical test; persons who were employed in the bargaining unit on the application date, December 2, 2008, including those not at work on that date, but who have a reasonable expectation of their return to work. The Council notes that because of the significant amount of turnover among staff, those teaching in the winter semester will not be the same as those who taught in the fall semester, when this application was brought. If the Board limits voter eligibility to those who were in an employment relationship on December 2, 2008, we will be disenfranchising those who will be most affected by the application. The Council suggests that eligible voters include those persons 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.

18. The Council relies in part on the language of subsections 30(5) which requires the Board to conduct a vote "...during a time period when the persons eligible to participate in the vote are substantially representative of persons likely to be substantially affected by results of the representation vote...". The Council argued that not only is a representative time period

important for the taking of the vote, but equally so, a representative group of employees is required. With respect, it is equally possible to read subsection 30(5) as an acknowledgement that due to turnover, it is quite likely that the persons eligible to vote will not be the same persons who will be affected by the outcome of the ballot.

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.

20. The Board will conduct a representation vote among the part time academic staff. Part time academic staff includes all person employed by an employer:

- (a) as 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.

The part time academic 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 the Schedule, which will be set out below;
- (d) 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
- (e) 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 labour 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 responsibilities to the employer.

21. The vote will be conducted among all such individuals with an employment relationship on December 2, 2008, 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 December 2, 2008.

#### Voting Arrangements

22. The vote will commence on January 19, 2009. Vote arrangements are detailed on the attached "Notice of Vote". Eligible voters will be able to vote at any location at any time. 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.

23. 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. Votes cast by persons not on the voters' list will be segregated unless the parties otherwise agree.

24. 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. The Council is directed to arrange for the posting of this decision and the "Notice of Vote" alongside the earlier Board directed postings.

#### Post Vote activities

25. OPSEU has asked the Board to direct that the Council disclose certain employment information to assist the parties in determining who is entitled to vote. Some of the information sought is the sort that the Board would typically order disclosed to enable parties and the Board to sort out status disputes. The Board sees no need to order the Council to arrange for the disclosure of that information before the representation vote. However, to assist all parties and the Board to resolve what will no doubt be a daunting number of status disputes, the Board orders the Council to deliver to OPSEU, and file with the Board by no later than March 9, 2009 the following information in respect to any person whose status remains in dispute:

- work location: college(s) and campus(es)
- department(s)
- course(s) taught
- contract start and end dates.

26. 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.

27. A Regional Certification meeting will take place on March 24, 2009. The parties will be expected to discuss status issues and any other matters that may be in issue, with a view to resolving or limiting what is in dispute. After the Regional Certification meeting, the Board will provide further direction about the management of the litigation, if necessary.

28. This matter is referred to the Registrar.

“Mary Ellen Cummings”  
for the Board