

Ontario Labour
Relations Board

505 University Avenue
2nd Floor
Toronto, Ontario M5G 2P1
Tel.: 416 326-7500
Fax.: 416 326-7531

Commission des relations
de travail de l'Ontario

505, avenue University
2^e étage
Toronto (Ontario) M5G 2P1
Téléphone: 416 326-7500
Télécopieur: 416 326-7531



Our File Number/Numero de dossier

3771-09-R

April 16, 2010

TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

**Public Service Alliance of Canada, v. Queen's University,
v. Queen's University Faculty Association**

I enclose herewith a copy of the Board's Decision dated April 13, 2010 in the above matter, together with the Certificate issued by the Board.

Sincerely,

A handwritten signature in black ink that reads "Tim R. Parker". The signature is written in a cursive style with a large, sweeping initial "T".

Tim R. Parker
Registrar

TRP/lj
Enclosures

APPENDIX "A"

Cavalluzzo Hayes Shilton McIntyre & Cornish LLP
Barristers & Solicitors
474 Bathurst Street
Suite 300
Toronto, Ontario
M5T 2S6
Attention: Mr. Patrick Groom
eMail: pgroom@cavalluzzo.com

Public Service Alliance of Canada
90 Eglinton Avenue East
Suite 608
Toronto, Ontario
M4P 2Y3
Attention: Michelle.Sweeney
Regional Organizer
eMail: sweeneyshell@psac-afpc.com

Cunningham, Swan, Carty, Little & Bonham LLP
Barristers and Solicitors
City Place II, Suite 201
1473 John Counter Blvd
Kingston, Ontario
K7M 8Z6
Attention: Ms. Andrea Risk
eMail: arisk@cswan.com

Queen's University
Human Resources
Fleming Hall, Stewart-Pollock Wing
78 Fifth Field Company Lane
Kingston, Ontario
K7L 3N6
Attention: Mr. Rod Morrison
Vice-Principal (HR)
eMail: hradmin@post.queensu.ca

Queen's University
Human Resources
Fleming Hall, Stewart-Pollock Wing
78 Fifth Field Company Lane
Kingston, Ontario
K7L 3N6
Attention: Lorna Baxter
eMail: lorna.baxter@queensu.ca

Queen's University
99 University Avenue
Kingston, Ontario
K7L 3N6

ONTARIO LABOUR RELATIONS BOARD

3771-09-R Public Service Alliance of Canada, Applicant v. Queen's University at Kingston, Responding Party v. Queen's University Faculty Association, Intervenor.

BEFORE: Mary Anne McKellar, Vice-Chair.

DECISION OF THE BOARD: April 13, 2010

Introduction

1. This is an application for certification filed under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").
2. The style of cause is hereby amended to reflect the correct name of the responding party: "Queen's University at Kingston".
3. A representation vote has been held. Post-vote representations have been filed, requesting that a new vote be held. In this decision I set out my reasons for declining to order a second representation vote, and for certifying the applicant without the necessity of a hearing into the matters raised in the post-vote representations.

The Representation Vote and the Ballot Count

4. By decision dated March 19, 2010, a representation vote was directed to be held on March 23, 2010. Both the applicant trade union and the responding party employer had scrutineers in attendance at the representation vote. At the conclusion of the representation vote, representatives for each of these parties and for the intervenor signed the "Certification of Conduct of Election", thereby agreeing to the following statement:

WE the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the date and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

5. At the time that the parties signed off on the "Certification of Conduct of Election" they were aware of the following: (a) the Officer conducting the vote had declined to require voters to present photo identification before casting a ballot; (b) one voter ("KK") who attended with photo identification had her ballot segregated and not counted because the voter's list indicated that she had already cast a ballot; and (c) the applicant union had been actively campaigning in the vicinity of the polling station(s).
6. There was an initial dispute between the applicant and the responding party respecting whether a number of ballots had been cast by individuals in the bargaining unit and whether or not they should be counted. Ultimately, these parties agreed that 807 of the ballots cast should be

counted. 92 ballots remain uncounted, all but one of which were cast by individuals who were not on the voter's list prepared in advance of the vote. Of the 807 ballots counted, 454 were cast in favour of the applicant, so that it had obtained more than 50% of all ballots cast even if the 92 uncounted ones were included. On the Certification Worksheet, the applicant and the responding party agreed that a final certificate should issue to the applicant. That agreement immediately follows this statement on the worksheet:

AT THE VOTE OR POST-VOTE WHERE THE BALLOTS HAVE BEEN COUNTED:

*****The parties acknowledge that their agreement to dismiss this application for certification, or their agreement that a final certificate will issue, means that they will not be able to rely on any information they knew, or ought to have known, up to the date of the agreement, in order to request another representation vote, to certify the union, or to dismiss the application under subsections 11(1) or (2) of the LRA, 1995 or sections 11 and 11.1 of the *Labour Relations Statute Law Amendment Act, 2005* [Bill 144].**

7. The applicant and the responding party also signed the Certification Worksheet, immediately under the following statement:

**THE PARTIES ARE ADVISED THAT
THEY ARE BOUND BY THE
AGREEMENTS MADE AND SET OUT IN THIS REPORT.**

Post-Vote Submissions

8. Subsequent to the holding of the representation vote and the parties entering into the agreements noted above, the Board received 8 statements of representations from employees affected by this application. The issues raised in those representations are the following:

- a) Complaints that the applicant was actively campaigning in the time preceding the vote and on the day of the vote and was contacting employees and encouraging them to vote;
- b) complaints that voters should have been required to present photo identification in order to vote, and an assertion that one unidentified individual voted more than once;
- c) the complaint of KK (referred to above) who attended to cast a ballot and discovered that the voter's list indicated she had already done so, such that her ballot was segregated and not counted;
- d) complaints that persons who have been previously employed in the bargaining unit and anticipate being so employed next semester were not allowed to cast a ballot;
- e) a complaint that there was no organized anti-union campaign;

- f) concerns about the amount of notice given of the vote and its location;
- g) a complaint that voters were permitted to mark their ballots in pencil; and
- h) a complaint about the accuracy of the list of eligible voters, specifically an assertion that one ineligible voter was included on the list and one eligible voter was left off.

9. In my view, even assuming the accuracy of the assertions summarized in the preceding paragraph, there is no reason not to dispose of this application in manner previously agreed to by the parties, that is, by issuing a final certificate to the applicant. The reasons for this conclusion can be stated briefly.

10. The Act recognizes that organizing drives and workplace representation votes are “not a tea party” and that vigorous campaigning sometimes occurs on the part of both those employees who support, and those employees who oppose, the trade union. The Board does not generally police the activities and campaigning of employees and it places great faith in the secrecy of the voting process as safeguarding employees from undue influence and ensuring that the representation vote reflects their wishes. Even assuming the accuracy of the descriptions set out in the various statements of representation filed about the applicant’s campaigning, there is nothing about persistently urging individuals to vote or maintaining a visible presence during polling that casts any doubt on the legitimacy of the representation vote. This disposes of the concern noted in paragraph 6(a). Furthermore, if employees who oppose the trade union wish to campaign against it, they are free to do so, but the lack of any such campaign does not impugn the results of the vote. This disposes of the concern noted in paragraph 6(e).

11. The certification provisions of the Act contemplate speedy representation votes. The responding party must file its response to the application including its list of employees in the bargaining unit within 2 days of the delivery of the application. In the normal course, a panel of the Board issues a decision the following day directing that a representation vote be held 2 days later, and issuing a Notice of Vote specifying the times and locations of the polls, which are set after consultation with the parties. The total elapsed time between the filing of the application and the holding of the representation vote is therefore 5 working days, which will be in most instances one calendar week, and which section 8(5) presumptively states is the time within which the vote shall be held. The vote in this case followed the above timelines, and the usual consultation procedure with respect to the time and location of polls. This disposes of the concern raised in paragraph 6(f).

12. It is not uncommon in elections for voters to be asked to mark their ballots in pencil. The individual who raised a concern about this practice expressed a preference that ballots be marked in indelible ink. Presumably the underlying concern was that ballots might be altered, but there are considerable safeguards in place to prevent such an occurrence, principally, the fact that the ballots are counted by the returning officer (a Board officer with no interest in the outcome) in the presence of scrutineers named by each of the parties. As noted, all of those people signed off on the conduct of the vote. Absent some specific allegation of mischief tied to the marking of ballots in pencil, the concern expressed in paragraph 6(g) affords no basis for disposing of this application other than in accordance with the results of the representation vote.

13. In this case, the decision directing the vote indicated that persons employed in the voting constituency on the application date were entitled to cast a ballot, and that this included persons not at work on that date so long as there was a reasonable expectation of their return to employment. Generally speaking, individuals who attend at the vote wishing to cast a ballot fall into one of three categories: (a) individuals whom both the trade union and the employer agree are entitled to vote; (b) individuals whom one of the trade union or employer assert are entitled to vote, but whose status to do so is disputed by the other party; and (c) individuals whom both the employer and the trade union agree are not entitled to vote. The Board does not generally look behind the parties' agreements respecting voter eligibility. In this case, it appears that the parties agreed that individuals who had formerly been employed as teaching assistants but were not so employed this semester were not entitled to vote. There is nothing unreasonable about that kind of agreement. This disposes of the concern noted in paragraph 6(d). It also disposes of the representation referred to in paragraph 6(h) that one ineligible voter cast a ballot, as my review of the vote materials indicate that that individual was agreed by the parties to be an eligible voter.

14. I turn now to the question of whether any of the allegations made respecting actual voting irregularities could impact on the result of the representation vote. It is my conclusion that they could not.

15. For the union to be certified, a majority of the ballots cast in the representation vote must have been cast in its favour. The mathematical exercise engaged is one of division. The degree of support is the quotient obtained by dividing the numerator (the number of ballots cast for the applicant) by the denominator (the total number of ballots cast by eligible voters).

16. The largest possible number of eligible voters in this representation vote is 899 – the 807 ballots counted and the 92 votes cast by persons whose status to vote may be in dispute. Further, the worst possible scenario for the applicant in this case is that all 92 of the uncounted ballots have been cast by individuals entitled to do so, and all have been cast against it. Even if that were the case, however, so long as 450 ballots were cast for the applicant, it is in a position to be certified. In fact, we know that 454 ballots at least have been cast for the applicant.

17. There are concerns expressed in the representations that certain people who were not entitled to do so cast ballots. There is an unparticularized allegation that one unnamed individual voted twice. There is also a suggestion that a person not entitled to vote (or who had already voted) pretended to be KK and was allowed to cast a ballot. Even if these two allegations could be established in evidence, and even assuming that both individuals cast ballots for the union, discounting their ballots would reduce both the numerator and denominator by which the applicant's degree of support is determined – that is 452 (454-2) ballots would be cast for the applicant out of a total number of 897 (899-2) ballots cast by eligible (or potentially eligible voters). The quotient would still be more than 50%.

18. There is an allegation that an unnamed individual who should have been included was left off the voter's list. It is not specifically alleged that this person was not permitted to cast a ballot. In the normal course, such an individual would be permitted to vote, but his/ her ballot would be segregated and not immediately counted. Even if the allegation is that this individual was not permitted to vote, and assuming he should have been permitted to do so and would have voted against the union, it is clear that the union would still have obtained a majority of the ballots cast.

19. The concerns noted in paragraphs 6(b), (c) and (h), even assuming them to have been properly particularized and provable, could have no impact on the result of the vote.

20. The responding party wrote to the Board on March 30, 2010, requesting that the representation vote held on March 23, 2010 be set aside and a new vote ordered. As indicated, the responding party had previously certified that the vote had been conducted properly and it had agreed in writing on the Certification Worksheet that a final certificate should issue to the applicant. Furthermore, all of the grounds it sets out in its letter as reasons for holding another vote are based on facts that were or ought to have been known to it at the time it executed the above documents: (a) the returning officer had specifically declined to require that voters present photo identification, and this created the possibility of multiple voting or imposter voting; (b) KK had attended to cast a ballot and found her name already crossed off the voter's list; and (c) the applicant had a visible presence and was campaigning near the polling station. There are no specific or particularized allegations in the responding party's submissions of the potential mischief it identifies in point (a) having actually occurred. The Board is not about to order another representation vote on the basis of mere speculation, particularly in circumstances where relevant facts were known to the responding party employer at the time it entered into the agreements noted and set out above. The responding party is bound by its agreements. There is no basis for ordering another representation vote. A final certificate should therefore issue to the applicant.

Disposition

21. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

all persons registered as graduate students at and who are employed by Queen's University, in the City of Kingston, as Teaching Assistants or Teaching Fellows, save and except supervisors and persons above the rank of supervisor, employees for whom a trade union held bargaining rights on March 16, 2010, persons who hold appointments to the Academic Staff of the University as defined by the University's Statement on Adjunct Academic Staff and Academic Assistants, persons who hold appointments to the General Support Staff of the University, research assistants, persons employed under Research, Grant and Contract appointments, full voting members of the Board of Trustees, and members of the legal or medical profession employed in their professional capacity.

22. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

23. A certificate will issue to the applicant.

24. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

25. Meeting and hearing dates set previously are hereby cancelled.

26. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.

"Mary Anne McKellar"

for the Board

The Labour Relations Act, 1995

Before the Ontario Labour Relations Board

Between:

Public Service Alliance of Canada,

Applicant,

- and -

Queen's University,

Responding Party.

Certificate

Upon the application of the applicant and in accordance with the provisions of the *Labour Relations Act, 1995* THIS BOARD DOTH CERTIFY Public Service Alliance of Canada as the bargaining agent of all persons registered as graduate students at and who are employed by Queen's University, in the City of Kingston, as Teaching Assistants or Teaching Fellows, save and except supervisors and persons above the rank of supervisor, employees for whom a trade union held bargaining rights on March 16, 2010, persons who hold appointments to the Academic Staff of the University as defined by the University's Statement on Adjunct Academic Staff and Academic Assistants, persons who hold appointments to the General Support Staff of the University, research assistants, persons employed under Research, Grant and Contract appointments, full voting members of the Board of Trustees, and members of the legal or medical profession employed in their professional capacity.

This certificate is to be read subject to the terms of the Board's Decision(s) in this matter and, accordingly, the bargaining unit described herein is to be read subject to any qualifications referred to in the said decision(s) of the Board.

DATED at Toronto this 13th day of April, 2010.

ONTARIO LABOUR RELATIONS BOARD

Tim R. Parker

Registrar

