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*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

DANNY PALMER

Complainant

and

CANADIAN SECURITY INTELLIGENCE SERVICE EMPLOYEES' ASSOCIATION

Respondent

Indexed as

Palmer v. Canadian Security Intelligence Service Employees' Association

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Sylvie Matteau, Vice-Chairperson

For the Complainant: Himself and Gaétan Couturier, counsel

For the Respondent: Louise di Stephano, Canadian Security Intelligence Service Employees' Association

Decision rendered without a hearing.

REASONS FOR DECISION

Complaint(s) before the Board

[1] On September 28, 2004, Mr. Danny Palmer, a former employee of the Canadian Security Intelligence Service, filed a complaint under section 23 of the *Public Service Staff Relations Act (PSSRA)* against the Canadian Security Intelligence Service (CSIS) Employees' Association. He alleges that the Employees' Association (EA) failed in its duty of fair representation as required under subsection 10(2) of the *PSSRA*.

[2] A preparatory conference was held on September 30, 2004, and was followed by a request from the Board dated November 25, 2004, for written submissions regarding the following question:

Does the Public Service Staff Relations Board have the jurisdiction to hear a complaint made under subsections 10(2) and 23(1) of the Act against the CSIS Employees' Association?

[3] The Employees' Association provided its response on December 6, 2004. The Board received comments on the part of the employer on December 15, 2004, and received the complainant's answer on January 14, 2005.

[4] Subsection 10(2) and paragraph 23(1)(a) of the *PSSRA* read as follows:

...

10. (2) No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit.

...

23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed

(a) to observe any prohibition contained in section 8, 9 or 10;

...

[5] Section 2 of the *PSSRA* defines "bargaining agent" and "bargaining unit" as follows:

...

“bargaining agent” means an employee organization that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked;

“bargaining unit” means a group of two or more employees that is determined, in accordance with this Act, to constitute a unit of employees appropriate for collective bargaining;

...

[6] The Act also excludes from the definition of “employee”:

...

(f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature.

...

[7] On April 1, 2005, the *Public Service Labour Relations Act* (the “new Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 39 of the *Public Service Modernization Act*, the Board continues to be seized with this complaint.

Summary of the arguments

[8] The Employees’ Association submitted the following arguments:

I refer to the Board, subsections of the Public Service Staff Relations Act under Interpretation that define both “bargaining agent” and “employee”. “Bargaining agent” means an employee organization that has been certified by the Board as the bargaining agent for the employees in a bargaining unit and the certification of which has not been revoked; The Employees’ Association of CSIS is not a bargaining agent under the terms of the Public Service Staff Relations Act since it has not been certified by the Board as the bargaining agent for the employees in a bargaining unit.

The Employees’ Association is sanctioned by the employer, the Canadian Security Intelligence Service, as the employer bears all administrative costs related to the Employee’s Association, including the salaries of three full time employees in the National Office of the Employees’ Association, including myself. The Employees’ Association does not have legal representation and not legal fund to

support members in their external complaints against the employer. The Employees' Association can lend assistance, however, to "employees" in presenting their grievances to an external review body; which leads me to the definition of "employees" in the Public Service Staff Relations Act.

An "employee" under the Public Service Staff Relations Act means a person employed in the Public Service, other than

- (a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in the Act,
- (b) a person locally engaged outside Canada,
- (c) a person whose compensation for the performance of the regular duties of the position or office of the person consists of fees of office, or is related to the revenue of the office in which the person is employed,
- (d) a person not ordinarily required to work more than one third of the normal period for persons doing similar work,
- (e) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under the terms and conditions substantially the same as those of a member thereof,
- (f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature,

Mr. Palmer, did not perform duties of a clerical or secretarial nature while employed in CSIS. Consequently, he was not a unionized employee and was not represented by a bargaining agent. In accordance with subsection 92[(1)c)] of the Public Service Staff Relations Act, the only grievances that non-unionized employees of CSIS can refer to the Public Service Staff Relations Board for adjudication are grievances related to a disciplinary action resulting in termination of employment, suspension, or a financial penalty, and the grievance has not been dealt with to the satisfaction of the employee.

I would like to refer the Board to three CSIS Human Resources policies which are the following: the Grievance policy (HUM-502), the Adjudication policy (HUM-504) and lastly, the Employees' Association's mandate (HUM-110), which are attached to this submission.

In the CSIS Grievance policy (HUM-502), section 3.4 reads as follows: Throughout the grievance process, non-unionized

employees have the right to be represented by the Employees' Association, while the unionized employees have the right to be represented by their Bargaining Agent.

As far as I know, Mr. Palmer was represented by the Employees' Association when he presented his grievance to the Director of CSIS (Level 3 grievance manager) against his dismissal from the Service in May 2003. My predecessor, Mr. Dennis Richard was the President of the Employee's Association during that period. I was only elected President in September 2003 and took office on September 25th, 2003.

In the CSIS Adjudication policy (HUM-504), section 3.1.3 reads as follows: Non-unionized employees may only refer to adjudication grievances arising out of a disciplinary action resulting in release from the Service, suspension without pay or financial penalty. Section 4.1 reads as follows: Employees who have a right to adjudication (see section 3), must refer their grievances to adjudication within 30 working days after receiving the Director's Level Three grievance response.

In this particular instance, Mr. Palmer did not refer his grievance to adjudication within the timeframes outlined in either the CSIS policy or the PSSRB Regulations and Rules of Procedure. Mr. Palmer states that he was counseled by my predecessor to submit a supplemental grievance to CSIS once he had received the documentation he had requested further to a Privacy request with the CSIS Access to Information and Privacy section. Mr. Palmer, if I am not mistaken, only received this requested documentation at the beginning of 2004. He further states that he had been counseled by Mr. Richard to submit this supplemental grievance if Mr. Palmer could demonstrate at least six incidents of bad faith on behalf of CSIS. This supplemental grievance was submitted to CSIS by Mr. Palmer in March or April 2004, at which time Mr. Palmer requested that I provide this grievance to the Director, which I complied, even though he had already exhausted all avenues internally. The Director had already ruled on his initial grievance. Mr. Palmer was subsequently informed by the Chief, Staff Relations that the Service would not entertain in supplemental grievance because he had not respected the timeframes outlined in CSIS policy. It is unfortunate that Mr. Palmer did not submit his referral to adjudication within the prescribed limits. I would have gladly assisted this former employee in referring his grievance to adjudication in front of the Public Service Staff Relations Board if he had done so.

Section 3.5 of the CSIS Adjudication policy also states: Employees have the right to retain independent legal counsel to represent them during the adjudication process. 3.6 states: Employees are responsible for all expenses incurred in retaining independent legal counsel to represent them during

the adjudication process. 3.7 states: Employees seeking independent legal representation during the adjudication process must ensure that all independent legal counsel possess adequate security clearance. 3.7.1 states: In instances where legal counsel does not possess adequate security clearance, the employee must advise Staff Relations, Personnel Services and the procedures found in HUM-504-1 must be followed.

As mentioned earlier, the Employees' Association does not have legal representation. Costs associated to counsel assigned to represent employees or former employees in front of administrative tribunals must be borne by the employees or former employees.

Finally, the Employees' Association's Mandate (HUM-110) clearly states at 1.1 that: The Employees' Association has the responsibility to provide support to all non unionized employees, in dealing with the senior management of the Service. It also states further that the Employees' Association will represent employees in the resolution of their complaints and grievances, including the application of Human Resources policies, and provide assistance to employees facing disciplinary action.

In summary, Mr. Palmer was provided all assistance possible by the Employees' Association in accordance with CSIS Human Resources policies. Consequently, I am hopeful that the Board will dismiss Mr. Palmer's complaint against the Employees' Association for lack of jurisdiction since his complaint against the Employees' Association of CSIS under subsections 10(2) and 23(1) of the Public Service Staff Relations Act does not apply in this case.

[9] The employer's comments are found in the letter of December 15, 2004. Without expressly taking position in favour of or against the Employees' Association on this particular issue of jurisdiction, and since the employer is not privy to certain allegations of fact made by the Employees' Association, the employer states, however, that it is generally in agreement with the Employees' Association interpretation of the law regarding this matter. Furthermore, the employer submits that:

It is clear from the Service policy HUM-110 that the EA is not an "employee organization" within the meaning given by section 2 of the Public Service Staff Relations Act. As an organization created by the Service itself, it does not have as a purpose the "(...) regulation of relations between the employer and its employees for the purposes of [the Public Service Staff Relations] Act".

At the Service, the Public Service Alliance of Canada is the sole Bargaining Agent pursuant to the Public Service Staff Relations Act (please see Appendix 1 to 36th Annual Report (2002-2003) of the Public Service Staff Relations Board). It represents employees in the Intelligence Support group. Mr. Palmer was not employed in that group.

We therefore submit that the Board is without jurisdiction to hear this complaint.

[10] In his submission, the complete text of which is on file at the Board, the complainant refuted the arguments from the Employees' Association. In his opinion, the fact that the new President was recently elected, and that she was not in office at the time of the dismissal, is irrelevant. Also, the fact that the Employees' Association is financially supported by the employer is not an excuse for its lack of support of the rights of its membership. The cost of independent legal representation should not be an issue in this regard, either.

[11] At the heart of the complaints before the Board is the fact that Mr. Palmer relied on the counsel of the Employees' Association. If he was late in filing his grievance at the final level, it is because of the information he received from the Association. The complainant also argues that he was asked to "censure" his grievances because the Association, which is dominated by the employer, refused to oppose the employer, which is supporting it financially.

[12] With regard to the question of jurisdiction of this Board, the complainant sees no distinction between his association and one which would have status under the *PSSRA*. In his view, there is no formalism as regards the name of such an association, nor as regards the form of its recognition. On the one hand, the *PSSRA* does not require formalism in view of certification. On the other hand, the *Canada Labour Code* recognizes, for example, "bona fide" unions. This Employees' Association should, therefore, be recognized for the full purpose of the *PSSRA* without any further formalities.

[13] Moreover, in his opinion, the Board has an obligation to recognize an "employees' association". Formalities provided for in its law and regulations are there to ensure the seriousness of the association, but they remain just that: a formality.

[14] All parties recognize the existence of the association. Evidently, if the PSSRA allows the Employees' Association to represent the employee in a grievance before the Board, then the Act, *de facto*, recognizes the existence of the Association for the full purpose of the Act. It is, in fact, recognized by the Board as a certified association.

[15] Furthermore, the complainant submits that the prohibition to be "unionized" found in the Act means only that these employees cannot join a "usual" union. Nothing prohibits the existence of a recognized employees' association.

Reasons

[16] The question before the Board, at this stage of the proceedings, is to determine whether or not the Employees' Association is a "bargaining agent for a bargaining unit" and, therefore, is capable of being the subject of a complaint seeking to enforce the statutory duty of fair representation.

[17] The Employees' Association has not been certified by this Board as a bargaining agent for any of the employees of the Canadian Security Intelligence Service and is not, therefore, subject to the Act. Furthermore, the complainant is not an "employee" under the Act, because he was a person employed by the Canadian Security Intelligence Service who did not perform duties of a clerical or secretarial nature. Consequently, he could not be member of a union which would be a bargaining agent under the terms of the Act.

[18] The complainant's right to bring a grievance for adjudication before the Board cannot, in any way, provide him, or the Employees' Association, with a status that the Act denies them otherwise.

[19] The certification process of a bargaining agent is not, as the complainant argues, a simple formality. The rules in place are very important to ensure the real representation of the employees by an independent and representative union. The rules also ensure full and independent participation of the employees in the certification process. Once the Board grants certification to an employee organization, that organization has the exclusive right to bargain collectively on behalf of employees in the bargaining unit for which it is certified, and to

represent employees under the Act. As such, this process is essential to labour relations and the duty of fair representation constitutes the *quid pro quo* for the recognition of this exclusive statutory right to collectively bargain, on behalf of the employees. The Board has no authority to recognise a “de facto” bargaining agent, bypassing this process.

[20] The Employees’ Association is not and cannot be a “bargaining agent for a bargaining unit” under the Act and therefore, the complaint cannot succeed. For all the above reasons, the Board makes the following order:

(The order appears on the next page)

Order

[21] The complaint is dismissed.

May 5, 2005.

**Sylvie Matteau,
Vice-Chairperson**