Date: 20050606

File: 561-2-49

Citation: 2005 PSLRB 50

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND DISTRICT LODGE 147, NATIONAL ASSOCIATION OF FEDERAL CORRECTIONAL OFFICERS

Complainants

and

CORRECTIONAL SERVICE CANADA, TREASURY BOARD AND DON GRAHAM

Respondents

Indexed as
International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Workers v. Correctional Service Canada, Treasury Board and Don Graham

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

REASONS FOR DECISION

Before: D.R. Quigley, Board Member

For the Complainants: Susan Ballantyne, Counsel

For the Respondents: Harvey Newman, Counsel

Heard at Kingston, Ontario,
February 21 and 22, 2005.

Complaint before the Board

[1] On August 4, 2004, the International Association of Machinists and Aerospace Workers (IAM&AW) and District Lodge 147, National Association of Federal Correctional Workers (Officers) (NAFCW/NAFCO) filed a complaint with the Public Service Staff Relations Board, pursuant to section 23 of the *Public Service Staff Relations Act* (*PSSRA*), alleging, under paragraph 23(1)(a) of the *PSSRA*, that the Correctional Service Canada (CSC) had contravened subsection 8(1), paragraph 8(2)(a), and subsections 9(1) and 10(1) of the *PSSRA*. These subsections read as follows:

> ***8.****(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *(2) Subject to subsection (3), no person shall*
>
> > *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> […]
>
> ***9.****(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.*
>
> […]
>
> ***10.****(1) Except with the consent of the employer, no officer or representative of an employee organization shall attempt, on the premises of the employer during the working hours of an employee, to persuade the employee to become, refrain from becoming, continue to be or cease to be a member of an employee organization.*
>
> […]
>
> ***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;*
>
> […]

[2] The right being asserted under paragraph 8(2)(a) is contained in section 6 of the *PSSRA*:

> ***6.*** *Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which the employee is a member.*

Summary of the evidence

[3] The complainants contend that members of the IAM&AW and District Lodge 147, NAFCW(NAFCO), are being discriminated against by being prohibited from wearing NAFCW(NAFCO) baseball caps and pins at the workplace. The complainants also submit that this prohibition constitutes an interference with the IAM&AW and District Lodge 147, NAFCW(NAFCO), contrary to subsection 8(1) of the *PSSRA*.

[4] They further contend that by prohibiting the wearing of NAFCW(NAFCO) baseball caps and pins, the respondents have unreasonably withheld the consent contemplated in subsection 10(1) of the *PSSRA*.

[5] Attached to the complaint, as Appendix 1, was an e-mail dated May 15, 2003, from Don Graham, of the CSC, which seems to be the root cause of the complaint. It reads as follows:

> *To:* *401-REG-Wardens; 401-REG-Deputy Wardens*
> *Cc:* *401-REG-CHRMS; Lajoie Lynn (ONT)*
> *Subject:* *Activity by NAFCO-National Association of Federal Correctional Officers*
>
> *As many of you are aware, there have been employees going around seeking support from their CX colleagues for the "National Association of Federal Correctional Officers (NAFCO)". They have been asking colleagues to sign membership cards presumably to build a case that NAFCO should be certified as the Bargaining Agent for Correctional Officers.*
>
> *NHQ Staff Relations was asked for direction. After consultation with TB, the Acting Director, Labour Management Policy and Planning, Mr. Pierre Frechette provided the following advice:*

> *-inform the individuals to cease and desist any activities on CSC premises related to the signing of cards, information sessions, etc.*
>
> *-reinforce that they are not permitted to sell cards, distribute pamphlets on CSC premises.*
>
> *-advise that they are not authorized to wear any pins, buttons or any apparel (baseball caps, etc.) with NAFCO crest on CSC premises.*
>
> *-remind them not to utilize CSC equipment or material to promote their association (i.e. not authorized to use E-mail system and bulletin boards).*
>
> *-should they not comply with these orders they would be subject to disciplinary action.*
>
> *The above advice is based on Section 10(1) of the Public Service Staff Relations Act which states:*
>
> *"Except with the consent of the employer, no officer or representative of an employee organization shall attempt, on the premises of the employer during working hours of an employee, to persuade the employee to become, refrain from becoming, continue to be a member of an employee organization."*

[6] The complainants request that the Board issue the following order:

> *A. A declaration that the directive prohibiting the wearing of NAFCO hats and pins is contrary to subsection 8(1), paragraph 8(2)(a), subsection 9(1) and subsection 10(1) of the Act.*
>
> *B. An order requiring the employer to post the declaration, prominently in each workplace/ institution, together with a statement to the effect that employees have the right to wear IAMAW or NAFCO hats and/or pins during working hours and on employer premises.*
>
> *C. Such other remedy as counsel may advise and the Board sees fit to grant.*

[7] Prior to the scheduled hearing, by letter dated January 24, 2005, the Treasury Board submitted that the CSC "is not a 'person' within the meaning of Sections 8 and 9 of the *Public Service Staff Relations Act* (*PSSRA*) and is therefore not an appropriate respondent".

[8] In reply, by letter dated January 28, 2005, counsel for the complainants stated:

> *…the complaint…was filed on August 4, 2004. The respondent has not raised any concern about the description of the respondent until now, some five months later…*
>
> *Section 16 of the* P.S.S.R.B. Regulations and Rules of Procedure, 1993, *provides that any replies to a complaint must be filed no later than ten days after receipt of the complaint. As the respondent failed to raise these concerns in any timely fashion, it is the complainant's position that the respondent is precluded from doing so now. The respondent has waived its right to rely on these points and it now simply attempting to delay the hearing of the complaint on its merits.*
>
> […]

[9] The complainants then sought leave to amend the complaint by adding the Treasury Board and Don Graham as respondents.

[10] By letter dated February 4, 2005, the Board informed the parties that the complainants' request to amend the complaint by adding the Treasury Board and Don Graham as respondents was granted.

[11] At the hearing, counsel for the respondents again raised this issue as a preliminary objection, stating that the original complaint identified only the CSC as a respondent, which is not a person within the meaning of sections 8 and 9 of the *PSSRA*. In support of his argument, he cited the following Board decisions: *Schmidt v. Lang,* PSSRB File No. 161-2-145 (1979) (QL); *Professional Institute of the Public Service of Canada v. Treasury Board*, 2000 PSSRB 5; *Union of Canadian Correctional Officers v. Costello,* 2003 PSSRB 54; and *Economists, Sociologists and Statisticians Association v. Treasury Board*, PSSRB File No. 161-2-168 (1978) (QL).

[12] Mr. Newman then argued that the Treasury Board is not defined in section 2 of the *PSSRA*. Therefore, pursuant to sections 8 and 9, it cannot be named as a respondent. Although section 10 mentions the "employer", there is a caveat that explicitly states: "Except with the consent of the employer"; the employer is implicitly mentioned.

[13] In reply, counsel for the complainants stated that the reason for adding Don Graham and the Treasury Board as respondents was that the e-mail from Mr. Graham was sent to all workplaces and the remedy sought involves the employer. The e-mail quotes subsection 10(1) of the *PSSRA*. It is the complainants' belief that the employer has unreasonably withheld consent.

[14] I decided to proceed to hear the merits of the case. I will address counsel's preliminary objection in my reasons for decision.

[15] A request for the exclusion of witnesses was requested and granted.

[16] Counsel for the complainants called four witnesses and filed four exhibits; counsel for the respondents called one witness and filed two exhibits.

[17] David McIntosh, who is currently a CX-02 at Collins Bay Institution, has been in the employ of the CSC for approximately 29 years. He stated that before the Union of Canadian Correctional Officers-Syndicat des agents correctionnels du Canada-CSN (UCCO-SACC-CSN) was certified as the bargaining agent for the Correctional Services (CX) group on March 13, 2001, he was the Secretary/Treasurer of the Union of Solicitor General Employees (USGE), a component of the Public Service Alliance of Canada (PSAC), which was the certified bargaining agent for the CX group.

[18] The witness noted that prior to certification, UCCO-SACC-CSN organizers canvassed members of the PSAC in the workplace during working hours to buy membership cards ($2.00) and distributed baseball caps, belt buckles and pins that bore the name and insignia of the UCCO-SACC-CSN.

[19] The witness stated that he filed a complaint at the time with the then Warden of Collins Bay Institution, Fred Sissons, objecting to having UCCO-SACC-CSN organizers campaign at the workplace during working hours. The Warden's response was, "We are not to get involved", and the campaigning continued.

[20] Mr. McIntosh identified Exhibit G-1 as his personal baseball cap. The crest of the NAFCO is embroidered on the front of the cap with "I.A.M.&A.W." embroidered directly underneath. He testified that when he wore this baseball cap at Collins Bay Institution, two Correctional Supervisors (Goldfinch and Gray) ordered him to remove it. He was advised that he was not allowed to wear anything that bore the NAFCO logo or insignia while he was at the Institution. He was also advised that if he refused to

obey this order, he would be subject to disciplinary action. The witness stated, "I can wear any other baseball cap with any other logo, but not a NAFCO cap". "You see baseball caps with many logos or crests, such as Queen's University, USGE, Fire Department and Police Department, openly worn by CXs in Collins Bay". When asked by counsel for the complainants why he wished to wear the NAFCO baseball cap, he replied, "To show support to the union and our movement".

[21] In cross-examination, the witness stated that he ceased his duties as Secretary/Treasurer of the USGE when the UCCO-SACC-CSN was certified as bargaining agent.

[22] Although he was not able to recall if the USGE had filed a complaint with the Board regarding the UCCO-SACC-CSN organizing campaign, it was his belief that Lynn Ray and John Edmonds, both USGE officials, had done so.

[23] When asked why he was concerned enough to register a complaint with the then Warden, the witness stated that as a union official representing the USGE, he found it upsetting that the UCCO-SACC-CSN organizers were attempting to displace the USGE and the PSAC.

[24] When asked if he had approached the UCCO-SACC-CSN organizers about their distributing baseball caps, pins and belt buckles, the witness stated, "They ignored me and I didn't like it".

[25] The witness confirmed that he is aware of Exhibit E-1, the "Employee Clothing Reference Manual". He agreed that the Manual's objective is to portray proper attire to be worn by CSC employees. He agreed as well that correctional supervisors have a duty to enforce the Manual. The witness confirmed that baseball caps with the CSC crest on them are available and that other baseball caps are not considered part of the official CSC uniform; neither are belt buckles with any logo or insignia on them.

[26] Paragraph 14, Section III, of the "Employee Clothing Reference Manual" states:

> ***MIXED UNIFORM AND NON-UNIFORM DRESS***
>
> *14. Visible items of non-uniform clothing shall not be worn with the Correctional Officer uniform except where specifically authorized in this document. Conversely, articles of uniform clothing, with the exception of baseball hats, shall not be mixed with*

> *civilian attire except where specifically authorized in this document.*

[27] Paragraph 19, Section IIII, states:

> ***SERVICE PINS***
>
> *19. The Correctional Service of Canada lapel pin, years of service pins representing up to 30 years of service, a PIPS/USGE/PSAC pin or a mother of pearl brooch may be worn on the left lapel of the uniform blazer.*

[28] The witness agreed that the Manual states that pins from other bargaining agents, such as the Professional Institute of the Public Service of Canada (PIPSC), the USGE and the PSAC, are allowed to be worn. He noted, however, that nowhere is the UCCO-SACC-CSN mentioned.

[29] The witness stated that he does not wear any pins on his uniform. The wearing of the NAFCW(NAFCO) baseball cap, however, symbolized his support to displace the UCCO-SACC-CSN as bargaining agent for the CX group.

[30] When asked if the wearing of a NAFCW(NAFCO) baseball cap might offend other members of the UCCO-SACC-CSN bargaining unit or correctional officers as a group, he stated that he did not know. As far as the potential for violence among correctional officers and inmates not witnessing solidarity, he stated, "No matter what our differences are, we [correctional officers] all look after one another. It's our job".

[31] In reply, the witness stated that although he recognized and accepted Exhibit E-1, at other institutions (such as Bath, Frontenac, Pittsburgh and Beaver Creak) correctional officers are not required to wear a uniform. He noted, as well, that during the organizing campaign by the UCCO-SACC-CSN, many correctional officers openly wore baseball caps and pins that displayed the UCCO-SACC-CSN logo contrary to the "Employee Clothing Reference Manual" and without threat of discipline.

[32] Ron Fontaine is a Grand Lodge representative of the IAM&AW. He is the National President and Directing General Chairperson of District 140. Mr. Fontaine testified that the IAM&AW has approximately 55,000 members in Canada, and District 140 represents approximately 18,000 of those members. The IAM&AW has been in existence for over 100 years.

[33] Exhibit G-2 is the IAM&AW Constitution, dated January 1, 2001, and is binding on all local components within the IAM&AW. The Constitution is amended as required and voted on by delegates of the IAM&AW at their national convention, which is held every four years. District Lodge 147 was the result of an application by a group of correctional officers who wanted to be represented by another union. Following several meetings, it was agreed that the IAM&AW would be their choice and under the platform of the IAM&AW Constitution, their request was granted. The By-Laws of NAFCO, District 147 of the IAM&AW (Exhibit G-3) were sanctioned and approved by Dave Ritchie, the Canadian General Vice-President, and the IAM&AW National Executive in July 2004.

[34] There was no cross-examination of this witness.

[35] Nelson Hunter, who is currently working at Joyceville Institution as a CX-1, has been in the employ of the CSC since 1991.

[36] The witness stated that since the inception of the NAFCW(NAFCO) in July 2004, he has been actively working with the IAM&AW to displace the UCCO-SACC-CSN as bargaining agent for the CX group. The witness applied for and was granted one year of personal leave to pursue his desire.

[37] Mr. Hunter testified that when he entered Joyceville Institution wearing a NAFCW(NAFCO) baseball cap, he was approached by Correctional Supervisors John Pelleren and Ken Keating and Unit Manager Dave Finucany and was ordered to remove his baseball cap. He was advised that if he chose not to obey their order, he would be subject to disciplinary action.

[38] The witness confirmed that he was aware of the e-mail sent by Don Graham on May 15, 2003, to all Regional Wardens and to Lynn Lajoie, Chief Human Resources Manager. He stated that he had seen it before on several occasions.

[39] The witness testified that the wearing of a NAFCW(NAFCO) baseball cap was his way of showing support for that organization. He noted that correctional officers wear baseball caps with different logos and crests on them, such as from the Toronto Maple Leafs, Montreal Canadians, Green Bay Packers, Nike, RCMP, etc. They are permitted to wear these baseball caps with their uniforms but are prohibited from wearing a

NAFCW(NAFCO) baseball cap. He stated that he was never given a reason as to why he could not wear a NAFCW(NAFCO) baseball cap within the Institution.

[40] The witness recalled a conversation that he had had with Cecil Vriesbnick, the Deputy Warden at Joyceville Institution. The conversation concerned his options for applying for leave to campaign on behalf of the IAM&AW and covered Mr. Graham's e-mail of May 15, 2003, which Mr. Vriesbnick stated was the direction he had with respect to the wearing of NAFCW(NAFCO) baseball caps and pins. Mr. Vriesbnick stated that the soliciting of membership by the UCCO-SACC-CSN in 1999, 2000, 2001 was a hands-off approach with no interference. He stated as well that as a result of Mr. Graham's e-mail, there was to be no soliciting of membership and the wearing of baseball caps and pins associated with the NAFCW(NAFCO) or the IAM&AW was not permitted. This conversation with Mr. Vriesbnick occurred in mid-July 2004.

[41] In cross-examination, the witness stated that management changed its practice following the UCCO-SACC-CSN campaign to displace the PSAC.

[42] The witness also stated that he did not consider the UCCO-SACC-CSN campaign offensive but rather as rivalry between two competing unions. When asked if he was given permission to campaign on behalf of the IAM&AW at Joyceville Institution, he stated that he was not given permission.

[43] In reply, the witness confirmed that in the previous campaign by the UCCO-SACC-CSN, no disciplinary action was taken against any of the organizers, nor were they refused permission to campaign during working hours.

[44] Michael Boyd, currently a CX-02 at Workworth Institution, has been in the employ of the CSC for approximately 13 years. He applied for and was granted one year of personal leave, effective August 2004, to campaign on behalf of the NAFCW(NAFCO).

[45] He testified that he was ordered by Correctional Supervisor Phil Gottlieb to remove his NAFCW(NAFCO) baseball cap when he entered the Institution, as it did not form part of the dress code. He noted, however, that correctional officers are allowed to wear other baseball caps displaying team logos, beer company logos, race car insignias, etc., with their uniforms. When he refused to obey Correctional Supervisor Gottlieb's order, he was sent to the Deputy Warden, Rob Arbuckle. The order to

remove the NAFCW(NAFCO) baseball cap was repeated. He was also advised that if he chose not to remove the baseball cap, he would be sent home without pay.

[46] The witness testified that when the UCCO-SACC-CSN was campaigning at Workworth Institution to displace the PSAC, membership cards were sold within the Institution for $2.00 and baseball caps, belts and pins with the UCCO-SACC-CSN logo were openly worn, and no action was taken by management. However, this is no longer the case, as management does not allow the wearing of any items that display support for the NAFCW(NAFCO).

[47] In cross-examination, the witness stated that as the local president of the USGE, he registered a complaint with the Warden while the UCCO-SACC-CSN was campaigning at Workworth Institution. The Warden, however, did not support his complaint.

[48] The witness stated that he can and does wear other baseball caps, such as a firefighter one, when he does his rounds. When asked by counsel if he ever wore a CSC baseball cap, he replied that he did, from time to time, but mentioned that a CSC baseball cap is not issued with the official uniform; correctional officers have to purchase one if they wish to have one.

[49] Don Graham, has been in the employ of the CSC for approximately 10 years and is currently the Regional Chief Staff Relations Officer. Prior to joining the CSC, he was a Human Resources Officer at the Department of National Defence (DND) for 20 years. He reports to Lynne Lajoie, who, in turn, reports to the Assistant Deputy Commissioner of Corporate Services at the CSC. Mr. Graham provides staff relations advice to managers in the Ontario Region, interprets collective agreements, deals with excluded and designated positions and provides advice with respect to disciplinary matters.

[50] The witness acknowledged that he sent out an e-mail on May 15, 2003, to regional wardens and to Ms. Lajoie. He explained that his e-mail framed a discussion that managers had in 2003 with respect to employees who solicited other employees to sign membership cards on behalf of the NAFCW(NAFCO). When he became aware of this campaign, he sought advice from National Headquarters. The advice he received came from Pierre Fréchette, Acting Director, Labour Management Policy and Planning,

following consultations Mr. Fréchette had with Treasury Board officials. The advice Mr. Graham was given is reflected in the five bullets of his e-mail.

[51] The witness stated that although he issued this e-mail, it was not his job to enforce it, as this is a managerial function. He agreed, however, that he expected that management would comply with it. He noted that the reference to subsection 10(1) of the *PSSRA* was a direction received from Mr. Fréchette. He also stated that the advice came from Mr. Fréchette and that he was only conveying it to managers at institutions across the country.

[52] The witness stated that he was not aware that correctional officers were wearing non-conforming baseball caps within the institutions and that he had no personal knowledge that management was not complying with his e-mail.

[53] The witness identified Exhibit E-2 as an e-mail sent out on March 29, 2000, by Robert Desilets, Director General, Staff Relations and Compensation, NDHQ. This e-mail was sent to Region Department Commissioners in each of the five regions in Canada, as well as to the Regional and National Human and Staff Relations Officers and to him. It provided similar advice to that given by Mr. Fréchette.

[54] With respect to the "Employee Clothing Reference Manual" (Exhibit E-1), the witness confirmed that the wearing of bargaining agent pins is reflected therein. He also stated that although the Manual should be updated regularly, this has not been done since 1995.

[55] Mr. Graham noted that it is his belief that the reason correctional officers are not allowed to wear non-conforming baseball caps is to avoid debates, conflicts or the decertification of bargaining agents. As well, it is to prevent the inmates from sensing weaknesses within the ranks of correctional officers. He noted that in a prison environment, inmates are continuously looking for ways to cause disruptions or gain advantage over correctional officers.

[56] In cross-examination, the witness confirmed that he has not visited either Collins Bay Institution or Workworth Institution in the last several years.

Summary of the arguments

For the complainants

[57] Counsel argued that the wearing of NAFCW(NAFCO) baseball caps and pins is permitted pursuant to section 6 of the *PSSRA*, which gives every employee the right to participate in the lawful activities of an employee organization. Members of the IAM&AW and the NAFCW(NAFCO) are being discriminated against. They are allowed to wear baseball caps with different logos or crests of other unions, sports teams, etc., but are not allowed to wear NAFCW(NAFCO) baseball caps. This is contrary to paragraph 8(2)(a) and subsection 9(1) of the *PSSRA*. The respondents are interfering with the lawful activities of an employee organization, and this is contrary to subsection 8(1) of the *PSSRA*.

[58] Counsel further argued that, pursuant to subsection 10(1) of the *PSSRA*, the respondents are withholding consent from the IAM&AW to persuade employees to become, refrain from becoming, continue to become or cease to become members of an employee organization. The employer, however, did not withhold consent from the UCCO-SACC-CSN during its campaign to displace the PSAC.

[59] Counsel argued that, in the alternative, the wearing of NAFCW(NAFCO) baseball caps and pins is not an attempt to persuade, as contemplated by subsection 10(1) of the *PSSRA*.

[60] As a remedy, the complainants seek an order from the Board stating that the respondents have violated the provisions of subsection 8(1), paragraph 8(2)(a) and subsections 9(1) and 10(1) of the *PSSRA* and that the respondents be ordered to cease and desist prohibiting the wearing of NAFCW(NAFCO) baseball caps and pins. The complainants also request that the Board's order be posted in each institution.

[61] In support of her arguments, counsel referred me to the following case law: *Quan v. Treasury Board* (1990), 90 CLLC 12,039 (FCA); *Independent Canadian Transit Union and Amalgamated Transit Union and Ottawa-Carleton Regional Transit Commission* (1984), 7 CLRBR (NS) 137; *Union of Bank Employees (B.C. & Yukon), Local 2100 and Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches*, [1979] 1 Can LRBR 266; *Public Service Alliance of Canada and Barnowski v. Canada Customs and Revenue Agency, Wright and Corrigal*,

2001 PSSRB 105; *Kuszelewski v. Consolidated Fastfrate Limited v. Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* [1980] OLRB Rep. April 418; *Southern Ontario Newspaper Guild v. Metroland Printing, Publishing and Distributing*, [1994] OLRB Rep. June 738; *Re Wal-Mart Canada Inc. v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 700*, [1998] B.C.L.R.B.D. No. 90; *International Brotherhood of Electrical Workers' Local 636 v. Mississauga Hydro Electric Company,* [1994] OLRB Rep. October 1376.

For the respondents

[62] Counsel argued that neither the Treasury Board nor the CSC is an appropriate party in these proceedings within the meaning of section 8 or 9 of the *PSSRA*.

[63] Although the complaint was amended to add Mr. Graham as a respondent, no argument or evidence was put forward by the complainants as to why Mr. Graham should be held responsible for violating section 8 or 9 of the *PSSRA*. The original complaint identified only the CSC as a respondent. As such, the complaint must fail.

[64] Counsel did not dispute that the IAM&AW is a trade union, and District Lodge 147 a component, and is, therefore, an employee organization within the meaning of the *PSSRA*.

[65] The Treasury Board and the CSC are aware of the NAFCW(NAFCO)'s campaign to decertify the UCCO-SACC-CSN as bargaining agent, as they were aware in 2000 of the UCCO-SACC-CSN's campaign to displace the PSAC. Exhibit E-2 was sent to all senior managers as guidelines to follow during campaigning.

[66] In May 2003, Mr. Graham sent out similar guidelines quoting the relevant sections of the *PSSRA*. There was no hint of anti-union animus or any change to the established rights of accredited unions in the guidelines. The "Employee Clothing Reference Manual" states that no union buttons are to be worn on the employer's premises. However, 30-year service pins and PIPSC, USGE and PSAC pins may be worn. There is no objection to having uniformed officers wear those union pins on their uniforms; that is not at issue.

[67] There is only anecdotal evidence that officers are wearing non-conforming hats. If this were true, it would no doubt be an aberration. Again, there is only anecdotal evidence that the correctional officers who testified at this hearing filed a complaint that they were ordered to remove their NAFCW(NAFCO) baseball caps.

[68] The dress code for officers within institutions has to be at a professional standard, as institutions are considered to be a volatile environment. The wearing of non-authorized baseball caps can create debates or fuel dissension among correctional officers and thus be observed by inmates.

[69] Mr. Graham provides advice to managers; he is not a manager. He was the recipient of advice given to him by Mr. Fréchette following consultations with Treasury Board officials. Mr. Fréchette was not named as a respondent to this complaint. Mr. Graham was only the conduit of that advice; it is part of his duties. He did not contravene section 8 or 9 of the *PSSRA*; he simply did his job. Therefore, he is not a legitimate party to this complaint.

[70] Counsel for the respondents referred to me *Almeida v. Canada (Treasury Board)*, [1991] 1 F.C. 266.

Reply

[71] Counsel for the complainants argued that organizing is the first step in the collective bargaining process.

[72] Counsel agreed that Mr. Graham was not involved with the order informing Messrs. Hunter, McIntosh and Boyd not to wear NAFCW(NAFCO) baseball caps and that he was doing his job. This is precisely why the Treasury Board and the CSC are properly in front of the Board as respondents. It is the employer who is prohibiting lawful union activity and Mr. Graham was its vehicle. As for Mr. Newman's contention that the wearing of pins and baseball caps would create a volatile workplace between rival unions and possibly create problems between correctional officers and be observed by inmates, there is no evidence that this occurred when the UCCO-SACC-CSN and the PSAC were campaigning in 1999, 2000 and 2001.

[73] The evidence by Messrs. Hunter, McIntosh and Boyd to the effect that they were ordered not to wear NAFCW(NAFCO) baseball caps but that other baseball caps are allowed to be worn is not anecdotal or an aberration; it is uncontradicted testimony.

[74] Finally, the suggestion that there is no hint of anti-union animus against the IAM&AW is not a hint; it is, in fact, a statement. No NAFCW(NAFCO) pins, buttons or baseball caps are authorized to be worn on the CSC premises.

Written submissions

[75] As of April 1, 2005, the Public Service Staff Relations Board (the former Board) became the Public Service Labour Relations Board (the new Board). This also means that the *Public Service Labour Relations Act* (the new *Act*) took effect. The *P.S.S.R.B. Regulations and Rules of Procedure, 1993,* were also replaced by the *Public Service Labour Relations Board Regulations* (the *Regulations*).

[76] Although the hearing in this matter was held on February 21 and 22, 2005, a decision had yet to be rendered before the coming into force of the new *Act*. By letter dated April 21, 2005, this Board drew the parties' attention to subsection 39(1) of the new *Act:*

> *39(1) Subject to this Division, any proceeding that the former Board was seized of immediately before the day on which section 12 of the new Act comes into force is transferred to the new Board to be disposed of in accordance with the new Act.*

[77] The parties were asked to file written submissions as to their interpretation of "disposed of in accordance with the new Act"; that is, which legislative scheme should be applied when rendering a decision: the legislative scheme under the former *Act* regarding complaints and prohibitions, or the legislative scheme of the new *Act* regarding complaints and unfair labour practices.

[78] On May 9, 2005, Ms. Ballantyne replied as follows:

> *This is in response to your letter dated April 21, 2005 requesting submissions from the parties on the effect of the coming into force of the new* Act.
>
> *The complainant's position is that the matter should be decided in accordance with the former* Act. *If enforcement becomes an issue, enforcement would be pursuant to the new legislation.*
>
> *I understand that the respondents are taking a similar position, and that a letter to this effect will follow shortly.*

> *This is without prejudice to the position that the complainant may take in future cases.*

[79] By letter dated May 10, 2005, Mr. Newman replied as follows:

> *This is in response to your letter dated April 21, 2005 in which the Board requested submissions from the parties on the applications of subsection 39(1) of the* PSMA*, and, in particular, how the new Board is to dispose of this complaint which was made under s. 23(1)(a) of the former* Act*.*
>
> *It is the employer's position that since all that remains to be completed at the time of the coming into force of the new* Act *is the issuance of a decision, that the decision may now be rendered as a decision of the new Board, and may be enforced as such, in accordance with the new legislation.*
>
> *There are no specific transitional provisions in the new legislation with respect to complaints under s.23(1)(a) of the former* Act*. Where Parliament intended that a different scheme apply to the proceeding, it expressly outlined how the matter was to be dealt with (see e.g.* PSMA*, s. 59). However, it did not do so for s. 23(1)(a) complaints. There is a presumption that legislation is not intended to have a retroactive affect nor interfere with vested rights, but procedural provisions may apply immediately. (See* Driedger on the Construction of Statutes*,* 3rd ed.*, pp. 508-549. See also the* Interpretation Act*, s. 43). Section 39(1) of the* PSMA *merely clarifies that the order that will be issued is an order of the new Board.*
>
> *If this submission is not accepted, it would be appreciated if the parties were given an opportunity to make oral representations.*

Reasons

- The applicable legislative scheme

[80] There are some substantive differences between the scheme provided under the *PSSRA* and the *PSLRA*. One such difference affects the party against whom a complaint may be filed: under subsection 8(1) of the *PSSRA*, the complaint may be made against a "person who occupies a managerial or confidential position"; however, under subsection 186(1) of the *PSLRA,* the prohibition applies to "the employer" as well as a "person who occupies a managerial or confidential position". Furthermore, under the *PSLRA*, where a complaint relate*s* to subsection 186(2), which is the

equivalent of subsection 8(2) of the *PSSRA*, the burden of proof is shifted to the respondent.

[81] This complaint, however, was filed under the *PSSRA*. Once the complaint has been filed, the parties' rights, including who may be a party and who bears the onus, crystallized. Absent a clear indication from Parliament, such rights should not be interfered with. (See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 568, and see section 43 of the *Interpretation Act*). For these reasons, I am in agreement with the submissions of the parties and find that section 39 of the *PSMA*, in these circumstances, clarifies that the complaint is to be decided by the Public Service Labour Relations Board, in accordance with the legislative scheme provider under the *PSSRA*.

- The complaint

[82] This is a complaint made pursuant to paragraph 23(1)(a) of the *PSSRA*, which states that "the Board shall examine and inquire into any complaint made to it that the employer…or any person acting on behalf of the employer… has failed to observe any prohibition contained in section 8, 9 or 10".

[83] In the original complaint, the complainants alleged that the CSC violated subsection 8(1), paragraph 8(2)(a) and subsections 9(1) and 10(1) of the *PSSRA*. In reply, counsel for the respondents submitted that the CSC is not a "person" within the meaning of or for the purposes of sections 8 and 9 of the *PSSRA*, and therefore it was not an appropriate respondent. Counsel for the complainants then requested that the complaint be amended to include the Treasury Board and Mr. Graham as respondents. The Board agreed with this request pursuant to section 7 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993,* which states that the Board may direct that any person be added as a party to a proceeding.

[84] The first order of business to be addressed concerns the status of the named respondents. With the addition of the Treasury Board and Don Graham as respondents, I must determine if they can be said to be the "employer" or "any person acting on behalf of the employer" within the meaning of subsection 23(1) of the *PSSRA.*

[85] In making a determination, I must examine the language used in subsection 8(1), paragraph 8(2)(a) and subsections 9(1) and 10(1) of the *PSSRA*:

> ***8.****(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *(2) Subject to subsection (3), no person shall*
>
> *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> […]
>
> ***9.****(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.*
>
> […]
>
> ***10.****(1) Except with the consent of the employer, no officer or representative of an employee organization shall attempt, on the premises of the employer during the working hours of an employee, to persuade the employee to become, refrain from becoming, continue to be or cease to be a member of an employee organization.*

[86] Subsections 8(1) and 9(1) limit the application of the prohibitions to persons occupying a managerial or confidential position, as defined in section 2 of the *PSSRA*:

> *Interpretation of a Managerial or Confidential Position*
>
> *(a) confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, the deputy head of a department or the chief executive officer of any other portion of the Public Service,*
>
> *(b) classified by the employer as being in the executive group, by whatever name called,*
>
> *(c) of a legal officer in the Department of Justice or the Canada Customs and Revenue Agency,*
>
> *(d) of an employee in the Treasury Board,*

> *(e) the occupant of which provides advice on staff relations, staffing or classification,*
>
> *(f) the occupant of which has, in relation to staff relations matters, duties and responsibilities confidential to a position described in paragraph (b) or (c), or*
>
> *(g) identified as such a position pursuant to section 5.1 or 5.2, the identification of which has not been terminated pursuant to section 5.3;*
>
> [Emphasis added]

[87] In contrast, paragraph 8(2)(a) is more specific and sets out prohibited activities:

> *(2) Subject to subsection (3), no person shall*
>
> *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> [Emphasis added]

[88] I am satisfied that the CSC and the Treasury Board are not encompassed within the ambit of paragraphs 2(1)(a) to (g). More specifically, I find that the Treasury Board and the CSC cannot be named as respondents, as they do not fall within the purview against whom the prohibitions contained in subsection 8(1), paragraph 8(2)(a) and subsection 9(1) apply. However, I find that Mr. Graham certainly falls within paragraph (e) of section 2 of the *PSSRA*.

[89] Mr. Graham testified that his duties are to provide advice on staff relations matters, including disciplinary issues, and collective agreement interpretations. The language in subsection 23(1) of the *PSSRA* places an obligation on the Board to examine and inquire into any complaint made to it alleging a failure on the part of a respondent to observe the various prohibited activities outlined in section 8, 9 or 10. It is incumbent on the IAM&AW and the NAFCW(NAFCO) to adduce evidence that the respondents' activities had a direct effect or consequence on them.

[90] The IAM&AW and its component, District Lodge 147, NAFCW(NAFCO), meet the definition of an employee organization found in section 2 of the *PSSRA*. I conclude this after the introduction of its duly constituted Constitution and Bylaws (Exhibits G-2 and G-3).

[91] Section 6 of the *PSSRA* states:

> ***6.*** *Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which the employee is a member.*

[92] In *Public Service Alliance of Canada and Barnowski v. Canada Customs and Revenue Agency, Wright and Corrigal* (*supra*), Chairperson Yvon Tarte stated the following, with which I agree:

> *[51] The fundamental importance to be attributed to the right of an employee to participate in the lawful activities of an employee organization was recognized by the Board very early on in* M.M. Stonehouse and Treasury Board *(Board file 161-2-137, at page 35):*
>
> . . .
>
> *The words contained in section 6 are fundamental to the object of the Act. They are the statutory Magna Carta of the rights conferred on every employee within the jurisdiction of the P.S.S.R. Act. In simple, concise language, it provides that every employee may be a member of an employee organization and may participate in the lawful activities thereof. They are rights to be exercised by any and every employee without any fear or restraint whatsoever from or by any person. In the absence of these rights, the balance of the provision of the P.S.S.R. Act regarding certification of a bargaining agent, collective bargaining, mediation, and resolution disputes and grievances would be a mere mockery.*
>
> . . .

[93] The evidence adduced at this hearing does not permit me to conclude that the complainants' witnesses committed any torts or unlawful or illegal activities by wearing NAFCW(NAFCO) baseball caps within their respective institutions. I accept their uncontradicted and unchallenged testimony that correctional officers have worn and still wear an array of baseball caps depicting the logo or crest of various sports teams, universities, fire and police detachments, etc. I also accept their testimony that management ordered them to remove their NAFCW(NAFCO) baseball caps and warned them that if they disobeyed that order, they would be subjected to disciplinary action.

[94] It is evident to me that the "Employee Clothing Reference Manual" is seldom and not evenly enforced. The Manual was last updated in 1995; this speaks volumes as to the importance or lack of importance the CSC places on correctional officers' attire. In

reviewing the Manual I found no indication that the colour, logo or insignia on a baseball cap is prohibited. Paragraphs 14 and 44 state:

> ***MIXED UNIFORM AND NON-UNIFORM DRESS***
>
> *14. Visible items of non-uniform clothing shall not be worn with the Correctional Officer uniform except where specifically authorized in this document. Conversely, articles of uniform clothing, with the exception of baseball hats, shall not be mixed with civilian attire except where specifically authorized in this document.*
>
> [Emphasis added]
>
> ***SUMMER WORK DRESS***
>
> *44. The summer work dress is worn for routine operational and instructional duties when summer dress is authorized. It consists of:*
>
> *- Baseball hat (optional)*
>
> […]
>
> [Emphasis added]

[95] Paragraph 19 concerns "Service Pins" and states that the PIPSC, USGE and PSAC pins can be worn on the left lapel of the uniform blazer. Therefore, in the interpretation of this paragraph, the UCCO-SACC-CSN pin is not permitted to be worn. Again, I accept the complainants' witnesses' testimony that these are in fact being worn by correctional officers. I do not subscribe to the respondents' argument that by wearing rival union baseball caps or pins, the officers jeopardize the safety of the staff at the Institution, the correctional officers and/or the inmates. As it stands today, a number of different baseball caps and pins are worn and I have not been presented with or heard any evidence to convince me that there is or ever has been a legitimate safety concern. I am more content to accept Mr. McIntosh's testimony, a correctional officer with some 29 years' experience. It is my belief that regardless of their union affiliation, correctional officers have a fundamental obligation and duty to look after one another's well-being even if it is not stated in a manual, guideline, policy or directive. As Mr. McIntosh stated, it is their job. I suggest that their raison d'être is to protect one another in what can be a sometimes dangerous and volatile environment.

[96] I find, therefore, that Mr. Graham is a proper respondent in these proceedings but do not find that he violated subsection 8(1) of the *PSSRA*. No evidence was adduced by the complainants that he interfered with the formation, administration or representation of District Lodge 147.

[97] However, I find that Mr. Graham violated paragraph 8(2)(a) and subsection 9(1) of the *PSSRA* by the issuance of the e-mail advising the CSC to prohibit correctional officers from wearing pins, buttons or baseball caps with the NAFCW(NAFCO) crest on them while on CSC premises, and if they did not comply with this order, they would be subject to disciplinary action.

[98] Subsection 8(2) of the *PSSRA* prohibits a person occupying a managerial or confidential position from discriminating against a person because that person is a member of an employee organization. Messrs. Hunter, Boyd and McIntosh, all members of District Lodge 147, were threatened with disciplinary action, including being sent home without pay, by their supervisors if they refused to remove their NAFCW(NAFCO) baseball cap while on the Institution premises. The memorandum sent by Mr. Graham indicated that only correctional officers wearing NAFCW(NAFCO) baseball caps faced discipline. I believe the correctional officers' testimony that baseball caps depicting various unions, fire and police detachments, sports teams, universities, etc., are openly worn within their respective institutions.

[99] I find that Mr. Graham has violated subsection 9(1) of the *PSSRA* by singling out the wearing of NAFCW(NAFCO) baseball caps; this is discrimination against the IAM&AW and NAFCW(NAFCO), which is an employee organization.

[100] I see no violation, however, of subsection 10(1) – "soliciting membership during working hours" – as the wording is very clear: "Except with the consent of the employer." [Emphasis added] No evidence was led by the complainants that consent was officially applied for and denied by the employer. Albeit there was evidence that the UCCO-SACC-CSN organizers sold membership cards during their campaign, there may have been consent given.

[101] I accept that Mr. Graham was only the conduit between the CSC and Mr. Fréchette. However, I have determined that by sending his e-mail on behalf of the employer, Mr. Graham failed to observe the prohibitions contained in paragraph 8(2)(a) and subsection 9(1) of the *PSSRA*.

[102] I would also note that after reviewing the *Almeida v. Canada (Treasury Board)* (*supra*) *and Quan v. Treasury Board* (*supra*) decisions referred to by counsel, I have reached the following conclusion.

[103] In *Quan v. Treasury Board*, Iacobucci, C.J. (as he was then) adopted the approach and language of the Board in *Canada (Attorney General) v Bodkin*, [1990] 2 F.C. 191, as edited in *Quan*. In considering whether wearing a union button during working hours is a legitimate union activity, one has no choice but to consider the statement the button portrays. As a matter of fact, I have been invited by both parties to do so. And in doing so, my premise is that the employer should not have to tolerate employees wearing union buttons, during working hours, with statements that are derogatory or damaging to its reputation and/or detrimental to its operations.

[104] In this case, I was not presented with any substantial evidence that the employer's reputation or its operations have been detrimentally affected by correctional officers wearing NAFCW(NAFCO) baseball caps or pins.

[105] In *Quan v. Treasury Board* (*supra*), the employees wore buttons that stated, "ON STRIKE ALERT", which pertained to the union's belief that the collective bargaining process was not progressing at a fast enough pace.

[106] The correctional officers in the instant case did not wear union buttons but rather union pins. A union pin simply displays the local or parent union's name and logo. Such a pin does not portray a political statement relating to the collective bargaining process, an employer's policies or practices or Government Bills that may have an impact on labour relations. A union pin is a simple recognition of the union that an employee chooses to affiliate himself/herself with.

[107] In *Almeida v. Treasury Board* (*supra*), the custom inspectors wore union buttons with statements such as "KEEP OUT DRUGS & PORN" and "KEEP OUR CUSTOMS INSPECTORS". These buttons portrayed political statements. The customs inspectors, who are in constant contact with the general public, wore those buttons on their uniform. In this case, the correctional officers are not dealing with the general public. At the institutions referred to by the witnesses, a multitude of baseball caps are worn and management condones a lackadaisical approach to conformity in the correctional officer's uniform. It is for these reasons I do not believe this case applies.

[108] Section 23(2) states:

> *(2) Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*

[109] Therefore, I order that Mr. Graham rescind this e-mail and that it be removed from the workplace, as I have concluded that the wearing of NAFCW(NAFCO) baseball caps and pins is a legitimate lawful activity of a duly authorized employee organization and in no way jeopardizes the safety of inmates, staff and correctional officers in their respective institutions.

[110] I see no reason to order the employer to post the Board's declaration in each workplace/institution.

[111] In closing, I would note that management was lax in updating and enforcing the "Employee Clothing Reference Manual".

[112] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page.)

Order

[113] The complaint is hereby allowed, to the extent stated above.

June 6, 2005.

D.R. Quigley,
Board Member