

Date: 20070829

File: 561-02-89

Citation: 2007 PSLRB 92



*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

MARC S. PERKA, EDWARD H. RINN AND CANADIAN FEDERAL PILOTS
ASSOCIATION

Complainants

and

DEPARTMENT OF TRANSPORT AND TREASURY BOARD

Respondents

Indexed as

Perka et al. v. Department of Transport and Treasury Board

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Barry D. Done, Board Member

For the Complainants: Phillip G. Hunt, counsel

For the Respondent: Karl G. Chemsy, counsel

Heard at Edmonton, Alberta,
March 20 to 22, 2007.

REASONS FOR DECISION

I. Complaint before the Board

[1] On December 15, 2005, Marc S. Perka, Edward H. Rinn and the Canadian Federal Pilots Association (CFPA) filed an unfair labour practice complaint (Exhibit E-1) in which the Department of Transport and the Treasury Board are named as respondents. The CFPA is the bargaining agent for the Aircraft Operations Group bargaining unit. The complaint alleges that the respondents

...

. . . have contravened sections 186(1)(a), 186(1)(b), 186(2)(a)(i), 186(2)(b), and 186(2)(c) of the Act by threatening, disciplining and intimidating employees represented by the Complainant because they have exercised their rights as union representatives. By engaging in such activities, the Respondents are unlawfully interfering with the rights of members of the Complainant to be represented and to represent employees, advocate their interests and ensure proper hiring practices are being followed by the Respondents.

...

[2] At the time of the incidents that gave rise to the complaint, both Mr. Perka and Mr. Rinn were CFPA representatives: Mr. Perka was the CFPA's Regional Vice-Chairman of the Prairie Northern Region (PNR) and Mr. Rinn was CFPA's Regional Chairman for the PNR. Their position titles were Civil Aviation Inspectors, classified as AO-CAI-02, and their collective agreement was one between the Treasury Board and the CFPA for the Aircraft Operations Group (Exhibit G-3) that expired on January 25, 2004.

[3] The complainants request the following corrective actions:

A. A declaration that the Treasury Board of Canada and Transport Canada have failed to comply with section 186 of the Act;

B. That an Order be issued requiring the Treasury Board of Canada and Transport Canada to cease and desist from any and all intimidation of CFPA members and to rescind the illegal disciplinary measures taken against the two CFPA members for having investigated the hiring practices of the Respondents;

C. That an Order be issued requiring the Treasury Board of Canada and Transport Canada to cease and desist from any

and all requests of CFPA members to refrain consulting with CFPA union representatives.

[4] On February 1, 2006, the respondents objected to the timeliness of the complaint and to the Board's jurisdiction to hear it.

[5] The hearing of this complaint was held from March 20 to 22, 2007. The parties were not available prior to those dates.

[6] At the hearing, the respondents withdrew their objections to timeliness and jurisdiction.

II. Summary of the evidence

[7] A chronology of the events that generated the complaint follows.

[8] In 2002 and 2003, Dean A. Zimmer, Superintendent of Aerodromes Safety for the PNR at the Department of Transport was involved in staffing a civil aviation safety inspector position (Exhibit G-5B). Mr. Rinn, in his CFPA representative capacity, questioned that staffing action (Exhibit G-5A). In particular, Mr. Rinn was concerned that a candidate had been screened in for an interview who did not meet the minimum Public Service Commission (PSC) standard for occupational certification, as he lacked a valid Group 1 instrument flight rating (IFR). Mr. Rinn's concern was proven to be correct (Exhibits G-1B and G-5B).

[9] In June 2005, Mr. Zimmer was about to conduct another, similar competitive process. Apparently anxious to avoid any further concern about qualifications, Mr. Zimmer approached Mr. Rinn to inquire as to what were the minimum selection standards. Mr. Rinn accessed the PSC website and showed Mr. Zimmer the selection standards.

[10] Stéphane Demers, who had been recruited by Mr. Zimmer, was screened in, interviewed and offered a civil aviation safety inspector position. He began in the position on July 4, 2005.

[11] Subsequently, it was suggested to Mr. Rinn by Fred Burrows, Director of the Aircraft Services Division, PNR, Department of Transport, that Mr. Demers did not, when interviewed, possess the required civilian IFR. Mr. Rinn discussed Mr. Demers'

situation with Mr. Perka, and the two accessed the computer database (DAPPLS) to determine Mr. Demers' qualifications.

[12] At noon on August 19, 2005, Mr. Perka and Mr. Rinn went to Mr. Zimmer's office and requested to speak with him on a labour relations matter. They explained that the matter involved the recent hiring of Mr. Demers and whether he met the minimum PSC standard to be granted an interview. Mr. Zimmer invited them in and requested that Mr. Demers also attend the meeting. Mr. Perka and Mr. Rinn asked to see and to take away a copy of Mr. Demers' license, medical rating and IFR documentation, which was permitted. The meeting concluded with Mr. Perka and Mr. Rinn advising Mr. Zimmer that they would be asking the PSC to investigate the hiring of Mr. Demers.

[13] Mr. Zimmer called his supervisor Roger Beebe, Regional Director, Civil Aviation, PNR, Department of Transport, about his meeting with Mr. Perka and Mr. Rinn, complaining about their conduct. Mr. Beebe sent an email (Exhibit E-4A) to Mr. Perka and Mr. Rinn advising them that Mr. Zimmer had filed a complaint against them, which required an investigation, and that they were entitled to their bargaining agent's representation during the investigation of the complaint.

[14] Mr. Zimmer followed up his oral complaint with an email (Exhibit E-3) to Mr. Beebe requesting that Mr. Perka and Mr. Rinn be investigated for having harassed him.

[15] Mr. Rinn requested particulars of the complaint (Exhibit E-4B). Mr. Beebe emailed Mr. Perka and Mr. Rinn (Exhibit E-5) on August 22, 2005, about the purpose of his investigation, which had the following objectives:

- determine what, if any, misconduct occurred; and
- to take immediate action to resolve the harassment complaint.

[16] Mr. Beebe met with Mr. Rinn on August 24, 2005, and with Mr. Perka on August 25, 2005, and took notes of their explanations (Exhibit E-7). Mr. Beebe also met with Mr. Demers to ensure him that his job was not in jeopardy.

[17] Finally, Mr. Beebe wrote to Mr. Perka and Mr. Rinn on September 16, 2005 (Exhibit E-2), outlining the conclusions of his investigation. It was in large part, this correspondence that generated the complaint. In this correspondence Mr. Beebe

expressed his concern with how Mr. Perka and Mr. Rinn had conducted their inquiry, the fact that they had used the DAPPLS system to check Mr. Demers' qualifications and the impact that all of this had on Mr. Demers. The correspondence was copied to the personnel file of both Mr. Perka and Mr. Rinn.

A. For the respondents

[18] As the respondents bear the onus of disproving one ground of the complaint, the parties agreed that the respondents proceed first. Mr. Beebe was Regional Director of Civil Aviation, PNR, at the Department of Transport, when Mr. Perka and Mr. Rinn met with Mr. Zimmer. He was aware that there was a long-standing issue concerning Civil Aviation Inspector (CAI) positions being supervised by incumbents occupying Technical Inspection (TI) positions. He was concerned that the incident between Mr. Zimmer, Mr. Perka and Mr. Rinn might create problems with a previous agreement that he had reached with the CFPA on this very issue (Exhibit E-8).

[19] In addition, Mr. Beebe also had concerns with Mr. Perka and Mr. Rinn accessing the computer system in their CFPA representative capacity and the fact that their initial approach had been made to Mr. Zimmer and not to a Human Resources representative, the Division Manager or Mr. Beebe himself.

[20] Mr. Beebe denied having instructed Mr. Demers not to speak to either Mr. Perka or Mr. Rinn about this matter. He said, "I have a lot of experience and it's not something I could do."

[21] The intent of Mr. Beebe's September 16, 2005, correspondence (Exhibit E-2) was to inform Mr. Perka and Mr. Rinn of his conclusions concerning potential discipline. He considered as mitigation the fact that, as CFPA representatives, they were acting under the direction of Greg Holbrook, the CFPA National Chairman. There was no real case for discipline, but as there were some serious issues, Mr. Beebe was not happy to say that there was no fault found.

[22] Mr. Zimmer later withdrew his harassment complaint, as he believed it had been adequately dealt with informally.

[23] In cross-examination, Mr. Beebe said that he was advised by a Human Resources representative that he had the right to go forward with the meeting with Mr. Rinn despite the fact that Mr. Holbrook, Mr. Rinn's chosen representative, was unavailable.

Mr. Beebe's behaviour in that meeting was neither combative nor adversarial. That was not his style, and he described the meeting as cordial.

[24] Regarding Mr. Beebe's concern with ". . . the costliness of the administrative activity . . ." that Mr. Perka and Mr. Rinn had caused (Exhibit E-2), no costing had been done. However, he was concerned with the diversion from operational activities and the number of people involved. Mr. Beebe agreed that there was nothing in his previous agreement with the CFPA (Exhibit E-8) to suggest that CFPA representatives should not raise issues with Mr. Zimmer. In fact, Mr. Beebe said, "It's encouraged." Mr. Perka and Mr. Rinn should not have gone over Mr. Zimmer's head.

[25] It is important that employees be properly qualified. Mr. Beebe agreed that in accessing the DAPPLS, Mr. Perka and Mr. Rinn were doing their homework before approaching Mr. Zimmer.

[26] The September 16, 2005, correspondence (Exhibit E-2) was placed on Mr. Perka's and Mr. Rinn's personnel files.

[27] Mr. Zimmer's position is classified at the TI-07 group and level. Following his meeting on August 19, 2005, with Mr. Perka, Mr. Rinn and Mr. Demers, Mr. Zimmer had gone to ask Mr. Perka: "Is this about me and my position as a TI?" Mr. Perka assured him that it was not. However Mr. Zimmer was aware that the CFPA was unhappy that pilots (CAIs) were now being supervised by non-pilots (TIs) and he believed that the "CFPA wanted me out of that position." He had withdrawn his harassment complaint (Exhibit E-14B), since "my point had been made that I was not going to be harassed as a TI by CFPA." He had assured Mr. Demers that there was nothing to worry about, since "this process was about me, and my position as a TI, and not about him."

[28] Mr. Zimmer had accompanied Mr. Demers to a meeting with Mr. Beebe, and at that meeting, Mr. Beebe told Mr. Demers not to confront either Mr. Perka or Mr. Rinn about the incident.

[29] In cross-examination Mr. Zimmer acknowledged that he had asked Mr. Rinn for advice on the PSC qualifications for a civil aviation inspector position before hiring Mr. Demers, since Mr. Zimmer wanted to avoid another situation like the previous one where the staffing of a pilot was challenged. There was no reference in Mr. Zimmer's email requesting Mr. Beebe to investigate Mr. Perka and Mr. Rinn for harassment

(Exhibit E-3) to any concern over a TI supervising a CAI nor to his advising Mr. Perka that he felt harassed.

[30] At the August 19, 2005, meeting Mr. Zimmer neither refused to discuss the staffing issue nor chose to terminate the meeting once Mr. Perka's and Mr. Rinn's agenda was known. At the meeting he attended with Mr. Beebe and Mr. Demers, it was clear that Mr. Demers was not to speak to Mr. Perka and Mr. Rinn.

[31] In Mr. Zimmer's opinion, his meeting with Mr. Perka, Mr. Rinn and Mr. Demers was cordial — both he, Mr. Perka and Mr. Rinn behaved cordially. However, after the meeting it occurred to Mr. Zimmer what was really happening was that “they were collecting evidence” and he felt “why do we have to justify ourselves?”

[32] Mr. Demers is a Department of Transport civil aviation safety inspector for heliports, aerodromes and air navigation in the PNR. His position is classified as A0-CAI-02. He began in that position on July 4, 2005. He did not have a civilian IFR and felt put on the spot and interrogated at his meeting with Mr. Perka and Mr. Rinn, which “stems from my own baggage.” He told the selection board at his interview for the CAI job that he had no civilian IFR, and Mr. Zimmer told him not to worry. Mr. Demers wrote his exam two weeks later and got his civilian IFR.

[33] Two to three weeks after the August 19, 2005, meeting, Mr. Beebe assured Mr. Demers that he was not concerned about the IFR situation, and Mr. Demers said that Mr. Beebe told him that “it was probably best if I didn't discuss those events with Mr. Perka or Mr. Rinn.” Mr. Demers would have liked to speak personally to them.

[34] Mr. Demers was asked to provide a statement concerning his hiring process, so he wrote a letter dated August 26, 2005 (Exhibit G-1B). In this letter he made it clear that he did not, when interviewed, possess the civilian IFR. As well, he wrote in an email dated October 17, 2005, that he was frustrated to have been “. . . instructed not to engage Ed [Rinn] or Marc Perka in any fashion about this matter . . .” (Exhibit G-1A).

[35] In cross-examination Mr. Demers said that he wrote the email submitted as Exhibit G-1A, and that it was an honest and accurate description of events. There was no reference in Exhibit G-1A to his being told by Mr. Beebe that he could speak to other CFPA representatives. On October 17, 2005, he was still of the opinion that he could not discuss this situation with either Mr. Perka or Mr. Rinn (Exhibit G-1A).

B. For the complainants

[36] Mr. Rinn's position is classified as AO-CAI-02. On August 19, 2005, he was the Regional Chairman, CFPA, PNR West. Mr. Perka was then Regional Vice-Chairman. In June or July 2005, Mr. Zimmer asked Mr. Rinn about the qualifications for a helicopter pilot, as Mr. Zimmer wanted to avoid repeating a mistake in a previous hiring board. Mr. Rinn looked up the required qualifications on the Internet and showed Mr. Zimmer that a Group 4 IFR was required for screening purposes. A brief discussion followed where the two discussed the screening requirements.

[37] At the August 24, 2005, meeting with Mr. Beebe, Mr. Rinn felt that Mr. Beebe was combative and that he treated the meeting like a trial. Mr. Rinn felt that he was being reprimanded. He requested to see, but was not shown Mr. Zimmer's email requesting Mr. Beebe to investigate Mr. Perka and Mr. Rinn (Exhibit E-3) before or at the meeting in order to prepare. As he had been formally thanked by Human Resources in 2003 for raising a similar concern, he could not understand why he was being criticized in this instance and provided a copy of the 2003 email of thanks (Exhibit G-5C) to Mr. Beebe. He had raised his concern in that case with Mr. Zimmer. He had previously been instructed to raise the concern with the hiring manager, which was Mr. Zimmer in this case.

[38] Finally, Mr. Rinn indicated in his testimony that this whole incident, including the discipline, was "not worth it and was too frustrating."

[39] In cross-examination Mr. Rinn said that he had been a CFPA officer for 12 to 13 years and had attended 10 to 12 disciplinary meetings. He felt that his August 24, 2005, meeting with Mr. Beebe was serious and requested the attendance of the CFPA Chairman, Mr. Holbrook, as his representative. He felt that the September 16, 2005, correspondence by Mr. Beebe (Exhibit E-2) was disciplinary.

[40] When asked whether he was ever discouraged from questioning staffing practices, he pointed out that in his email advising him that Mr. Zimmer had filed a complaint (Exhibit E-4A), Mr. Beebe used the words: ". . . you visited his office to challenge the qualifications" Also, in his correspondence of September 16, 2005 (Exhibit E-2), Mr. Beebe characterized Mr. Rinn's meeting with Mr. Zimmer as an "intervention." These words, to Mr. Rinn, were intended to discourage further questioning.

III. Summary of the arguments

A. For the respondents

[41] There are only two issues raised by the complainants:

- the September 16, 2005, correspondence (Exhibit E-2); and
- the instruction to Mr. Demers not to speak to two CFPA representatives.

1. The September 16, 2005, correspondence

[42] The complainants' main allegation is that this letter is an attempt by the respondents to intimidate employees into not questioning hiring practices. The intent of the letter was to advise the CFPA representatives of the findings of the investigation. Mr. Demers characterized his being questioned as an inquisition. Mr. Zimmer said that he felt intimidated. Mr. Beebe considered the following issues: Mr. Demer's qualifications, the complainants' access to the DAPPLS and Mr. Zimmer's harassment complaint. The "Personal Licensing Procedures Manual" (Exhibit E-9) prohibits use of the DAPPLS for bargaining agent purposes. The DAPPLS contains personal information on 100,000 individuals.

[43] No discipline was imposed — the correspondence was advisory only, even though the respondents acknowledge that some words used were harsh and a little strong.

2. The instructions to Mr. Demers not to speak to two CPSA representatives

[44] Mr. Demers was an extremely credible, candid and neutral witness while Mr. Rinn was not, and a negative inference should be drawn concerning the latter's exaggeration of the facts.

[45] An employee's right to speak to his or her bargaining agent is extremely important, and Mr. Beebe only told Mr. Demers not to speak to two of the CFPA's representatives on this one occasion.

B. For the complainants**1. The instructions to Mr. Demers not to speak to two CFPA representatives**

[46] The *Public Service Labour Relations Act (PSLRA)* contains a reverse onus in subsection 191(3): the respondents bear the burden of proving that the allegations are untrue, which they failed to do. The issuing of the correspondence of September 16, 2005, itself is intimidation, a reprisal for the August 19, 2005, meeting.

[47] Mr. Demers was instructed not to consult with Mr. Perka and Mr. Rinn, two CFPA representatives, and he believed that this instruction was still in effect on October 17, 2005 (Exhibit G-1A), two months later.

2. The September 16, 2005, correspondence

[48] Mr. Perka and Mr. Rinn went to Mr. Zimmer's office on August 19, 2005, on a matter of mutual interest to the CFPA and to the employer. They asked to speak to Mr. Zimmer. They advised that they were there on a labour relations matter. There was no subterfuge or hidden agenda. Mr. Zimmer invited them in. There is no evidence of rude behaviour or behaviour that went beyond the norm.

[49] The September 16, 2005, correspondence (Exhibit E-2) is in breach of the *PSLRA*:

- it is a disciplinary notice;
- it was placed on Mr. Perka's and Mr. Rinn's personnel files;
- its tone is punitive when read as a whole;
- its content is intimidating; and
- after 12 years as a CFPA representative, Mr. Rinn considered that the correspondence and the investigative process were enough to cause him to resign his CFPA position.

[50] Although the respondents say that there was no intent to discipline, the evidence is that there was. The email by which Mr. Beebe informed Mr. Perka and Mr. Rinn that Mr. Zimmer had filed a complaint against them (Exhibit E-4A) contains a clearly disciplinary message: ". . . you visited his office to challenge . . ."; ". . . there may be some irregularities in your conduct . . ."; "[t]his is notice in accordance with your

contract . . .”; and “[y]ou are entitled to Union representation at any future meetings. . . .” The tone of the September 16, 2005, correspondence (Exhibit E-2) and the fact that it was included in personnel files are trappings of a disciplinary process.

[51] The respondents should have commended the complainants for having brought the matter forward, as had been done in 2003 (Exhibit G-5C).

[52] The focus on the matter of TIs supervising CAIs is a red herring: there was no reference to this issue the respondents’ reply to the complaint (Exhibit G-2); the September 16, 2005, correspondence (Exhibit E-2); Mr. Zimmer’s email requesting Mr. Beebe to investigate Mr. Perka and Mr. Rinn (Exhibit E-3); nor was it put to Mr. Rinn in cross-examination.

[53] On the other hand, the staffing issue was a very real one, with a precedent in 2003 (Exhibit G-5). It was Mr. Zimmer who sought advice from Mr. Rinn prior to hiring Mr. Demers, so it is a normal extension of that consultation to approach Mr. Zimmer with related concerns. As well, Mr. Zimmer was the senior manager for aerodrome safety and was personally involved in the staffing process.

[54] Mr. Demers’ account of his involvement in the August 19, 2005, meeting (Exhibit G-1A) meets the best evidence rule as it is the only contemporaneous document created by him. His evidence was that his written account was accurate, and in it he clearly wrote that:

- Mr. Zimmer took the matter personally;
- Mr. Demers understood that Mr. Perka and Mr. Rinn were questioning staffing practices;
- Mr. Demers was instructed not to speak to Mr. Perka or Mr. Rinn about this matter.

[55] In closing, I was referred to the following cases: *Shaw v. Deputy Head (Department of Human Resources and Skills Development) et al.*, 2006 PSLRB 125; *Firestone Steel Products of Canada v. United Automobile Workers, Local 27* (1975), 8 L.A.C. (2d) 164; and *Hotel & Restaurant Employee CAW Local 448 National Automobile, Aerospace, Transportation and General Workers’ Union of Canada v. Millcroft Inn Limited*, [2000] OLRB Rep. July/August 665.

C. Respondents' rebuttal

[56] An unfair labour practice complaint is extremely serious and quasi-criminal. As such, there is a reverse onus. Although intent can be inferred, or implied, any reprisal action requires intent.

[57] The respondents are not alleging that Mr. Perka and Mr. Rinn acted in a manner that was malicious or reckless. Nor are they alleging any ulterior motive.

IV. Reasons

[58] The *PSLRA*, at subsection 191(3), reverses the burden of proof where a complaint alleges a failure to comply with the prohibitions contained in subsection 186(2). In this complaint, the complainants allege contravention of subsections 186(1) and (2). The burden, then, rests with the complainants to prove the contravention of subsection 186(1) and on the respondents to disprove the alleged contravention of subsection 186(2).

A. Contravention of paragraph 186(1)(a) of the PSLRA

[59] Paragraph 186(1)(a) of the *PSLRA* provides as follows:

186. (1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer shall

- (a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization;

...

[60] The complaint specifies that the respondents contravened paragraph 186(1)(a) of the *PSLRA* by:

- threatening, disciplining and intimidating employees represented by the CFPA because they have exercised their rights as CFPA representatives;
- interfering with the rights of employees represented by the CFPA to be represented and with the CFPA's right to represent employees for whom it is the bargaining agent;

- attempting to intimidate, threaten and discipline CFPA representatives with a view to preventing them from exercising their rights to represent the interests of employees represented by the CFPA; and
- disciplining representatives of the CFPA for their questioning the respondents' hiring practices by way of correspondence dated September 16, 2005.

[61] There is no doubt that Mr. Perka and Mr. Rinn, at all times relevant to this complaint, were CFPA representatives. There is also no doubt that, at the meeting of August 19, 2005, they were acting as such.

[62] Section 5 of the *PSLRA* gives every employee the right to both join and participate in the lawful activities of the employee organization of his or her choice. There has been no suggestion that asking Mr. Zimmer to discuss a potential staffing problem on August 19, 2005, was an unlawful activity. Indeed, Mr. Beebe said that there was nothing suggesting that the CFPA representatives should not raise issues with Mr. Zimmer. In fact, he said, "It's encouraged."

[63] As well as the right to participate in the lawful activities of an employee organization, the *PSLRA*, in section 187, places an onerous burden on bargaining agents' representatives in the discharge of their responsibilities. That burden is not to act in a manner that is arbitrary, discriminatory or in bad faith in their representation of employees in the bargaining unit. Failure to discharge that burden can be the subject of an unfair labour practice complaint.

[64] Mr. Perka and Mr. Rinn not only had the right to question the respondents' hiring practices but also had a statutory duty to fairly represent the employees in the bargaining unit by questioning these staffing practices.

[65] Mr. Zimmer permitted Mr. Perka and Mr. Rinn to enter his office to discuss a labour relations matter at their request. Mr. Zimmer summoned Mr. Demers to attend the meeting. Mr. Zimmer allowed the production and copying of Mr. Demers' credentials. Mr. Zimmer, in his evidence, characterized the meeting as "cordial," not rude, insubordinate, disrespectful or even aggressive.

[66] Mr. Zimmer could have suggested that Mr. Perka and Mr. Rinn consult with someone other than himself about staffing. He could, at any point in the meeting, have terminated the meeting, which was in his own office. He chose to do neither of these.

Yet, shortly after the meeting, he complained to Mr. Beebe and on the following Monday, requested that Mr. Beebe investigate Mr. Perka and Mr. Rinn (Exhibit E-3).

[67] In his closing remarks, the respondents said that it was not their position that Mr. Perka and Mr. Rinn acted out of malice or some ulterior motive. I am not sure that the same can be said of Mr. Zimmer. He made it perfectly clear to Mr. Demers at the time, and to me in his evidence, that all of his actions following the meeting can be attributed to his own perception, despite being told that he was incorrect by Mr. Perka, that the real issue was that Mr. Zimmer, as a TI, was supervising CAIs who were pilots. The following quotes cannot be taken in any other reasonable way:

...

I went to Mr. Perka to ask him if this is about me and my position as a TI.

...

CFPA wanted me out of that position.

...

My point had been made that I was not going to be harassed as a TI by CFPA.

...

This thinking, in my opinion, blinded Mr. Zimmer to any other explanation for the meeting and to the fact that the gist of the staffing matter being discussed was of equal concern to the employer and to the CFPA.

[68] Mr. Beebe's role in this matter was to investigate and make his findings. His correspondence of September 16, 2005 (Exhibit E-2), advised Mr. Perka and Mr. Rinn of those findings. I must determine whether that correspondence is disciplinary, as the complainants alleged. The respondents say it was merely advisory, with no intent to discipline.

[69] Discipline involves correction both to promote proper conduct and to bring employees under control. In Mr. Beebe's email to Mr. Perka and Mr. Rinn on August 19, 2005 (Exhibit E-4A), there is certainly an appearance of disciplinary elements:

...

It would appear. . . that there may be some irregularities in your conduct. . . .

...

This is notice in accordance with your contract. You are entitled to Union representation at any future meetings. . . .

...

The latter appears to be a reference to clause 49.01 of the collective agreement (Exhibit G-3), which provide for written notice of an investigation that may result in disciplinary action.

[70] Next, I will look at the investigation itself and at Mr. Rinn's testimony. Mr. Rinn said that Mr. Beebe was combative and treated the meeting as a trial, and that he felt that he was being "reprimanded".

[71] The respondents suggest that I should draw a negative inference from Mr. Rinn's exaggeration. I find no reason to do so. Mr. Rinn is a CFPA officer with 12 to 13 years experience. He has attended 10 to 12 disciplinary meetings and so has some basis for comparison of the conduct of this meeting with the conduct of previous disciplinary meetings. I do not find him less than credible in either giving his evidence or replying to questions in cross-examination.

[72] Now, with regard to the September 16, 2005, correspondence (Exhibit E-2), if it was not meant to be disciplinary, why was it copied and placed into the personnel files of Mr. Perka and Mr. Rinn? Mr. Beebe refers in that correspondence to his role as Regional Director ". . . to maintain workplace order and ensure my employees adhere to standards of conduct. . . ." This seems to relate directly to discipline. Further, the correspondence continues as follows in a disciplinary tone: "I have taken note of the consequences of your intervention, including the impact on our new employee, the superintendent involved and the costliness of the administrative activity it created. I have concerns. . . ." The correspondence was also copied to the Human Resources department in Winnipeg.

[73] Considering Mr. Beebe's evidence, he said that "although there was no real case for discipline, I was not happy to say there was no fault found, because there were some serious issues."

[74] At the risk of appearing to make light of the situation, an old adage applies to my deliberations on whether discipline was imposed: “If it looks like a duck, walks like a duck and quacks like a duck, waddles like a duck and swims like a duck, it’s probably a duck.”

[75] In short, Mr. Beebe is an experienced manager who was in consultation throughout this process with at least one Human Resources officer. That discipline was not intended defies both logic and common sense. For the above reasons, and as all the trappings of discipline are present, I find that Mr. Perka and Mr. Rinn were disciplined. I consider the September 16, 2005, correspondence to be a written reprimand and, as a result, I find that the respondents have interfered with Mr. Perka’s and Mr. Rinn’s representation of employees in the bargaining unit, therefore contravening the prohibition contained in paragraph 186(1)(a) of the *PSLRA*.

B. Contravention of subparagraphs 186(2)(a)(i) and paragraphs 186(2)(b) and (c) of the *PSLRA*

[76] As I mentioned at the outset of my reasons, the respondents must prove that the contravention to subparagraph 186(2)(a)(i) and paragraphs 186(2)(b) and (c) of the *PSLRA* alleged in the complaint did not occur (subsection 191(3)). The alleged contravention is the failure to comply with the preclusions set out in subsection 186(2), not to:

- intimidate or discipline any person, because the person participates in the administration of an employee organization;
- seek to restrain an employee from exercising any right under Part 1 or Part 2 of the *PSLRA*.

[77] I have already found, that both Mr. Perka and Mr. Rinn were disciplined, as CFPA representatives, for the manner in which they questioned the staffing action that resulted in the hiring of Mr. Demers. I must now turn to the second aspect of the complaint, an allegation that Mr. Beebe interfered with Mr. Demers' right, as an employee in the bargaining unit, to speak to a CFPA representative of his choosing.

[78] The evidence is clear that Mr. Beebe instructed Mr. Demers not to speak about the staffing matter with either Mr. Perka or Mr. Rinn. An email that was sent by Mr. Demers two months after the August 19, 2005, meeting (Exhibit G-1A) is unequivocal on this point:

...

The frustrating part of the whole incident was that the CFPA reps I should be able to freely consult with regarding my concerns and questions were now off limits to me. After an interview with Roger Beebe I was instructed not to engage Ed or Mark in any fashion about this matter.

... I did feel very frustrated at not being able to discuss the matter openly with Ed and Mark. While I would not meddle in the personal issues brought up between my supervisor and the CFPA reps I would certainly prefer to speak directly with Ed and Mark to clear the air between the three of us now that I comprehend matters better.

...

[Sic throughout]

[79] In his evidence, Mr. Demers said that his email was an honest and accurate description of the events. He also said that he “would have liked to speak personally to Marc and Ed,” but he said that Mr. Beebe told him that “it was probably best if I didn’t discuss these events with Marc or Ed.” Mr. Zimmer confirmed that “it was clear that Mr. Demers was not to speak to Mr. Rinn or Mr. Perka.”

[80] In their submissions, the respondents said that Mr. Demers was “extremely credible, candid and neutral in his evidence.” They also said that Mr. Beebe “only told Mr. Demers not to speak to Mr. Rinn and Mr. Perka on this one occasion.”

[81] Taken together, Exhibit G-1, the testimonies of Mr. Demers and Mr. Zimmer, and the submissions of the respondents are more compelling than Mr. Beebe’s denial. I find that Mr. Beebe did instruct Mr. Demers not to speak with Mr. Perka and Mr. Rinn and in so doing, Mr. Beebe violated the preclusions in subsection 186(2) of the *PSLRA* not to impose a condition that seeks to restrain an employee from exercising any right under Part 1 or Part 2 of the *PSLRA*.

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

(The Order appears on the next page)

V. Order

[83] I declare that the respondents have contravened the prohibitions contained in paragraph 186(1)(a) of the *PSLRA*. I rescind the September 16, 2005, correspondence (Exhibits E-2) and I order the respondents to remove that correspondence from Mr. Perka's and Mr. Rinn's personnel files.

[84] I declare that the respondents have violated the preclusions in subsection 186(2) of the *PSLRA*.

August 29, 2007

**Barry D. Done,
Board Member**