Date: 20101110

File: 550-14-8

Citation: 2010 PSLRB 122

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

LUDOVIC SILVESTRE

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Silvestre v. Public Service Alliance of Canada

In the matter of an application for revocation of certification under section 94 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Applicant: Himself

For the Respondent: Krista Devine, Public Service Alliance of Canada

Decided on the basis of written submissions
filed August 3, September 10 and October 1 and 8, 2010.

I. Application before the Board

[1] In *Office of the Auditor General of Canada v. Public Service Alliance of Canada*, PSSRB File No. 125-14-91 (19990728), the former Public Service Staff Relations Board ("the former Board") certified the Public Service Alliance of Canada as the bargaining agent for a bargaining unit described as follows:

. . .

> *all employees of the Employer classified in Bands 1 through 6 of the Legislative Audit Category, Audit Services Group who perform clerical, administrative, technical and professional duties in support of legislative auditing, except for those employees who are classified in information technology positions.*

[2] The bargaining unit is known as the Legislative Audit Category, Audit Professional Group.

[3] The former Board's decision resulted from a request by the employer, the Office of the Auditor General of Canada, to consolidate four existing bargaining units (initially certified by the former Board on February 6, 1978 in PSSRB File Nos. 145-14-166 to 169) into two bargaining units to reflect changes to the classification structure in the workplace.

[4] On August 3, 2010, Ludovic Silvestre ("the applicant") applied to the Public Service Labour Relations Board ("the Board") for a declaration that the Public Service Alliance of Canada ("the respondent") no longer represents a majority of the employees in the bargaining unit. The application was supported by a quantity of forms signed by persons identified as employees in the bargaining unit who favour the revocation of the existing certification, on whose behalf Mr. Silvestre purportedly acts.

[5] The Board considers the application to have been made under subsection 94(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act")*, which reads as follows:

> ***94.*** *(1) Any person claiming to represent a majority of the employees in a bargaining unit bound by a collective agreement or an arbitral award may apply to the Board for a declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of the employees in the bargaining unit.*

[6] The applicant also placed the following request before the Board:

> [Translation]
>
> *Pursuant to section 102 of the* Public Service Labour Relations Act*, we request on behalf of our members, that the terms and conditions of our current collective agreement, which expires on September 30, 2010, continue to apply after revocation of the certification of the PSAC (if it is approved by the Labour Relations Board) until a new collective agreement is negotiated and signed with our new certified bargaining agent.*

[7] On August 6, 2010, the Board acknowledged receipt of the application and copied it to the respondent and to the employer.

[8] As required by section 37 of the *Public Service Labour Relations Board Regulations*, SOR/2005-79 ("the *Regulations*"), the Executive Director of the Board fixed September 10, 2010 as the closing date for the application.

[9] Pursuant to section 38 of the *Regulations*, the Executive Director of the Board directed the employer to post notices provided by the Board in its workplace to bring the application to the attention of employees. The employer subsequently confirmed in writing that it had complied with the posting requirement on August 11, 2010.

[10] The Board received no statements of opposition to the application from any employee by the closing date.

[11] On September 10, 2010, the respondent filed a statement opposing the application.

[12] On September 21, 2010, I invoked paragraph 40(1)(*f*) of the *Act* to authorize an officer of the Board's Registry Operations and Policy section to undertake certain tasks relating to the application, including examining the evidence of support for revocation of the certification filed by the applicant, and to report to me.

[13] On September 23, 2010, the Board, acting under the authority of section 44 of the *Regulations*, directed the employer to provide it a list of all employees in the bargaining unit as of August 3, 2010, no later than October 4, 2010. The Board also directed the employer to copy the required list to the applicant and the respondent, both of which were given 15 days from the date of receiving the list to file their

comments with the Board concerning the list or concerning any other question relating to the application. The Board also sought by the same deadline the submissions of the employer, the applicant and the respondent on the applicant's request, under section 102 of the *Act*.

[14] The employer filed the list of employees on October 1, 2010.

[15] The respondent did not file a written submission by the deadline set by the Board.

[16] On November 1, 2010, the respondent asked the Board to exercise its discretion to extend the deadline for filing submissions to accept comments that it provided to the Board on that date.

[17] On November 2, 2010, the authorized officer of the Board's Registry Operations and Policy section reported to me. Her report contained the following summary of her comparison of the evidence submitted by the applicant to the list of employees provided by the employer:

. . .

> *. . . According to the employer, there were 301 employees in the subject group as of August 3, 2010. A comparison of the employer's list against the cards submitted by the application showed one discrepancy: A card for "Hai Jou Su" was submitted but this name was* ***not*** *found on the employer's list. All other cards submitted correspond to names on the employer's list. Therefore, of the 301 employees listed by the employer, the applicant has provided signed cards of 196 employees who support the application, representing 65.11% of employees.*
>
> . . .
>
> [Emphasis in the original]

II. Reasons

A. Application for revocation of certification

[18] I have examined all submissions on file and have considered the report made to me by the responsible officer of the Board's Registry Operations and Policy section. In my view, the record indicates that the applicant has complied with the procedural

requirements for an application for revocation of certification established by the *Act* and by the *Regulations*.

[19] The Board's authority in this matter is established by section 96 of the *Act*, which reads as follows:

> ***96.*** *If, after hearing the application, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization, it must revoke the certification of the employee organization as the bargaining agent.*

[20] The only substantive determination required under section 96 of the *Act* is whether I am ". . . satisfied that a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization . . . ." If I am satisfied to that effect, revocation of the certification is mandatory.

[21] In its September 10, 2010 reply to the application, the respondent offered a number of comments to contest the concerns and criticisms about the respondent that supporters of the application had purportedly expressed during the period leading up to the application. The respondent maintained that, as a large bargaining agent equipped to provide a wide range of services, it was best positioned to continue to represent the interests of employees in the bargaining unit. It stated that it was prepared to enter into discussions with employees who supported revocation to address their concerns.

[22] The respondent concluded, in part, as follows:

> [Translation]
>
> . . .
>
> *From the start of the process, meetings were disorderly, which prevented certain individuals from speaking, and there were irregularities. In particular, solicitation was made for the revocation of certification at the workplace, and all APG employees were sent emails to their work addresses. Certain members were asked to speak to the issue of revocation of certification without receiving all the information necessary for making such a decision.*
>
> *The PSAC is of the opinion that the only way to ensure the integrity of the process is through a secret ballot to*

> *determine the true level of support of the members of the bargaining unit.*
>
> . . .

The respondent cited *Union of Canadian Correctional Officers — CSN v. Treasury Board (Correctional Service Canada) and Public Service Alliance of Canada*, 2000 PSSRB 106, for support for the proposition that the Board's practice in revocation applications has been to conduct a representation vote unless there are exceptional circumstances.

[23] In its late submission of November 1, 2010, the bargaining agent's comments were limited to the following:

> . . .
>
> *. . . We received yesterday a response to the issue of the employer's list of employees. Please be advised that the Alliance is in agreement with this list, with the exception of two names . . . .*
>
> *Given the presence of employees across the country in regional offices, the Alliance would request that a mail-in ballot be ordered.*
>
> . . .

[24] Section 95 of the *Act*, which reads as follows, is clear to the effect that the Board's authority to order a vote is discretionary:

> ***95.*** *After the application is made, the Board may order that a representation vote be taken in order to determine whether a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization that is the bargaining agent for that bargaining unit. The provisions of subsection 65(2) apply in relation to the taking of the vote.*

[25] The respondent's submission of September 10, 2010 briefly alleges, without offering any supporting evidence, that there were irregularities in the revocation campaign during the period leading up to the filing of the application. While its allegations about the use of the employer's facilities by supporters of revocation might be given some weight had they been supported by some *prima facie* evidence, it strikes me that the respondent's submissions reveal that its primary reason for opposing the application lies elsewhere — its view that, with "all the necessary information," some

employees who supported revocation might take a different view. In my opinion, that argument is entirely speculative. It does not provide me with a clear reason to suspect that the evidence of support filed by the applicant is technically flawed or otherwise unrepresentative of the sentiments of employees in the bargaining unit. In particular, I note that the Board did not receive a single statement of opposition to the application from any employee after the employer posted the required Board notice in the workplace. On balance, I believe that it is reasonable to conclude that the respondent seeks a formal vote principally as a means of securing more time to try to convince employees to change their minds than as a necessary precaution to ensure the integrity of the evidence of support already submitted.

[26] Were I to agree to consider the respondent's late submission of November 1, 2010 — which, for the record, I do not, given the absence of any satisfactory explanation for its lateness — my view would not change. That submission provides no further reason to challenge the integrity of the evidence of support submitted by the applicant other than to argue that the geographic dispersion of employees favours a mail-in ballot. On that point, the respondent does not offer any indication that employees in regional locations were somehow prevented from expressing their support, or lack thereof, for the application.

[27] With respect to the list of employees provided by the employer, the respondent's late submission challenges two names. The impact of removing two names from the list, if that were proven appropriate, would not tangibly alter the weight of the evidence provided by the applicant.

[28] That evidence shows that approximately 65 percent of the employees in the bargaining unit as of the date of the application supported revocation of the respondent's certification. Such evidence is sufficient to satisfy me ". . . that a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization . . . ." I so rule.

[29] I take the view that a formal vote is unnecessary in the circumstances of this application with due respect to the Board's decision in *Union of Canadian Correctional Officers — CSN v. Treasury Board (Correctional Service Canada) and Public Service Alliance of Canada*. With demonstrated support for the application in the range of 65% on the basis of the forms already submitted, and without convincing evidence from the respondent to challenge the integrity of that evidence, I judge the likelihood that

employees would instead reject revocation in a formal vote as unsubstantial. Section 95 of the *Act* provides for a representation vote as an option available to the Board. If, within the meaning of section 96, the Board is satisfied that other evidence demonstrates ". . . that a majority of the employees in the bargaining unit no longer wish to be represented by the employee organization . . . .", it clearly lies within its discretion to rely on that other evidence rather than order a representation vote.

B. Request under section 102 of the *Act*

[30] When it filed the list of employees on October 1, 2010, the employer also stated as follows:

> [Translation]
>
> . . .
>
> *In addition, with respect to the request in Appendix 5 of the application for revocation, the employer has no objection to the current collective agreement continuing to apply in the event of the revocation of certification until a new bargaining agent is certified.*
>
> . . .

[31] The respondent did not make submissions on the applicant's request by the date set by the Board or in its late submission.

[32] There is no application before the Board from any bargaining agent to certify the bargaining unit, in whole or in part, which is the subject of this decision. While I have noted in the applicant's submissions reference to the support that some employees may have indicated for a different bargaining agent, that possibility remains hypothetical for the purpose of determining the applicant's request. To be sure, it would be completely inappropriate for the Board to consider such a hypothetical possibility in rendering any decision at this time.

[33] The applicant's request would require that the Board consider whether it has the authority to make the order sought and whether it would be appropriate to do so in the circumstances. The governing provisions of the *Act*, in my view, are the following:

. . .

> ***101.*** *(1) Revocation of the certification of an employee organization certified as the bargaining agent for a bargaining unit has the following effects:*
>
> > *(*a*) subject to paragraph 67(*c*), any collective agreement or arbitral award that is binding on the employees in the bargaining unit ceases to be in force;*
>
> . . .
>
> ***102.*** *If a collective agreement or arbitral award ceases to be in force as a result of the revocation of an employee organization's certification as the bargaining agent for a bargaining unit, the Board must, on application by or on behalf of any employee in the bargaining unit, by order, direct the manner in which any right of the employee is to be recognized and given effect.*
>
> . . .

[34] Given the position taken by the employer, I believe that there is no live issue in dispute before the Board. The employer has, in effect, undertaken to respect and continue the terms and conditions of employment of the relevant collective agreement that, by virtue of paragraph 101(*a*) of the *Act* and the Order that follows, now ceases to be in effect. Without any reason to believe otherwise, I judge that the applicant may reasonably rely on the employer's undertaking. The Board's intervention is not required. Should an issue subsequently arise as to whether ". . . any right of the employee is to be recognized and given effect," an employee, or someone acting on his or her behalf, has the right to refer the matter to the Board under section 102.

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

(The Order appears on the next page)

III. Order

[36] The certification of the Public Service Alliance of Canada to represent the Legislative Audit Category, Audit Professional Group, of the Office of the Auditor General, is revoked.

[37] The Board finds that there is no live issue to determine about the applicant's request under section 102 of the *Act.*

November 10, 2010.

Dan Butler,
Board Member