Date: 20110816

File: 569-02-91

Citation: **2011 PSLRB 106**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Bargaining Agent: Aleisha Stevens, Public Service Alliance of Canada

For the Employer: Christine Diguer, counsel, and Jeff Laviolette, Treasury Board Secretariat

Heard at Ottawa, Ontario,
June 8 and 9, 2011.
Written submissions filed July 19 and 21, 2011.

I. Policy grievance referred to adjudication

[1] The Public Service Alliance of Canada ("the bargaining agent") presented a policy grievance to the Treasury Board ("the employer") on March 10, 2010. The grievance alleges that the employer contravened the "Use of Employer Facilities", the "No Discrimination" and other relevant provisions of several collective agreements by issuing a directive on February 26, 2010, prohibiting the bargaining agent's campaigning activities against changes to public service employees' pension plans.

[2] The employer's directive was sent to the heads of human resources and labour relations of all organizations for which the Treasury Board is the employer. The relevant parts of that directive read as follows:

. . .

> *As you are likely aware, a number of bargaining agents representing public service employees have embarked on a campaign against making changes to public service employees' pension plans. Bargaining Agents are, amongst others, distributing information to their members before and after work and during lunch hour, encouraging them to wear stickers, sign petitions, forward campaign emails, or joining a social network. Furthermore, some departments have received requests from union representatives to put petition sheets up on bulletin boards or to distribute them electronically.*
>
> *The Treasury Board Secretariat, in its role in representing the Employer, considers the posting of petitions on bulletin boards and their circulation in the workplace to be adverse to its interests in accordance with the Use of Employer Facilities provision included in many collective agreements.*
>
> *Accordingly, the following direction is provided in order to ensure a consistent approach across the Core Public Administration:*
>
> - *all requests to post petition sheets should be denied;*
> - *all requests to distribute petitions via the Employer's electronic networks should be denied;*
> - *other than the actual petition, requests to post literature, such as general information on pensions, should not be unreasonably denied;*
> - *the wearing of stickers should be permitted as long as the employee is not directly serving the public;*

- *the placing of stickers on the Employer's property or equipment should not be permitted.*

. . .

[3] The bargaining agent requested a declaration that the employer's directive of February 26, 2010 contravenes several collective agreements and that it is discriminatory. The bargaining agent also asked that the employer comply with the collective agreements and address any impacts of its conduct.

[4] For the purpose of this hearing, the parties agreed to use the collective agreement between the employer and the bargaining agent for the Program and Administrative Services Group bargaining unit (expiry date: June 20, 2011) ("the collective agreement"). However, in the grievance, the bargaining agent indicated that the grievance also related to the following collective agreements: Operational Services Group bargaining unit (expiry date: August 4, 2011); the Technical Services Group bargaining unit (expiry date: June 21, 2011); the Education and Library Science Group bargaining unit (expiry date: June 30, 2011); the Border Services Group bargaining unit (expiry date: June 20, 2011); the Canada Revenue Agency Program Delivery and Administrative Services Group bargaining unit (expiry date: October 31, 2010); the bargaining unit composed of all employees of the Parks Canada Agency (expiry date: August 4, 2011); and the bargaining unit composed of all employees of the Canadian Food Inspection Agency other than those represented by the Professional Institute of the Public Service of Canada (expiry date: December 31, 2011).

[5] The specific clauses of the collective agreement directly related to this grievance read as follows:

. . .

ARTICLE 12
USE OF EMPLOYER FACILITIES

12.01 *Reasonable space on bulletin boards, in convenient locations, including electronic bulletin boards where available, will be made available to the Alliance for the posting of official Alliance notices. The Alliance shall endeavour to avoid requests for posting of notices which the Employer, acting reasonably, could consider adverse to its interests or to the interests of any of its representatives. Posting of notices or other materials shall require the prior approval of the Employer except in the case of notices related*

> *to the business affairs of the Alliance, including posting of the names of Alliance representatives, and social and recreational events. Such approval shall not be unreasonably withheld.*
>
> . . .
>
> ***ARTICLE 19***
> ***NO DISCRIMINATION***
>
> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*
>
> . . .

II. Preliminary issue

[6] When the employer rendered its decision on the grievance in May 2010, it did not raise any issues with the fact that it is not the employer for the bargaining agent's collective agreements with the Canada Revenue Agency, the Parks Canada Agency and the Canadian Food Inspection Agency. Nor did the parties raise any such issue at the hearing before me. After the hearing, I asked the parties to make submissions on whether the Canada Revenue Agency, the Parks Canada Agency and the Canadian Food Inspection Agency collective agreements should simply be taken off the grievance because the Treasury Board is not the employer for those three collective agreements. In its July 19, 2011 submissions, the bargaining agent asked that those three collective agreements be removed from the grievance. The employer made the same request in its July 21, 2011 submissions. Considering those submissions, I find that this grievance does not relate to the Canada Revenue Agency, the Parks Canada Agency and the Canadian Food Inspection Agency collective agreements.

III. Summary of the evidence

[7] The bargaining agent adduced 13 documents in evidence. It called Rose Touhey, Karl Lafrenière, Glen Whalley and Patricia McGrath as witnesses. The employer did not adduce any documents in evidence. It called Don Graham as a witness. Ms. Touhey and Mr. Lafrenière are full-time employees at Passport Canada in Gatineau, Quebec. Both

are members of the Program and Administrative Services Group bargaining unit and are local representatives for the bargaining agent. Mr. Whalley and Ms. McGrath are full-time employees at the Department of National Defence in Gatineau. Mr. Whalley is a member of the Technical Services Group bargaining unit, and Ms. McGrath is a member of the Program and Administrative Services Group bargaining unit. Both are local representatives for the bargaining agent. Mr. Graham is an executive director in the Labour Relations and Compensation Operations Branch of the Treasury Board Secretariat.

[8] In early 2010, the bargaining agent conducted a national campaign to protect pension benefits and retirement security for its members. Public debates were held about the appropriateness of reducing pension benefits for federal public service employees. The bargaining agent had concerns that the federal government might decide to reduce those benefits. Among other actions, that campaign included the creation and mass signing of a petition to the Prime Minister, the wearing and posting of stickers, and the distribution of material, all promoting the maintenance of public service pensions.

[9] As a result of the bargaining agent's pension campaign, Mr. Graham testified that he and his colleagues received enquiries from departments about what to do with the posting of union materials related to the campaign. They were looking for directions from the employer. As a result, Hélène Laurendeau, the Assistant Deputy Minister for Compensation and Labour Relations at the Treasury Board Secretariat, issued the employer's directive of February 26, 2010. Mr. Graham was not involved in drafting it. He was not present at the internal grievance hearing and did not participate in writing the employer's decision on the grievance.

[10] The bargaining agent's witnesses testified about what was permitted in their workplaces before and after the employer's directive.

[11] At Passport Canada, the bargaining agent's representatives were first allowed to set up a table in the entrance hall of the building to distribute their pension material and to gather signatures for the petition to the Prime Minister. Many union members stopped at the table, took the material and signed the petition. After the employer's directive, the bargaining agent's representatives were no longer allowed to distribute material or gather signatures in the building. They had to move outside the building in very cold weather to do their union work. They were also told by the employer's local

representatives to remove all material related to the bargaining agent's pension campaign from the union bulletin board.

[12] At the Department of National Defence, the situation was comparable to that at Passport Canada. The bargaining agent's representatives were at first allowed to set up a table in the entrance of the building to distribute material and to gather signatures for their petition. After the employer's directive, they were no longer allowed to distribute material or to gather signatures in the building. They were also told by the employer's local representatives to remove all material related to the bargaining agent's pension campaign from the union bulletin board.

[13] For those local bargaining agent's representatives, the employer's directive had a detrimental impact on the pension campaign. It became very difficult to gather signatures for the petition and to disseminate information to union members. The employer's directive prevented them from performing their union roles.

IV. Summary of the arguments

A. For the bargaining agent

[14] The employer did not demonstrate that the bargaining agent's material about pensions was adverse to its interests. The employer's representatives implemented the directive in a way that prevented the bargaining agent from posting and distributing any pension campaign material in the buildings in which its members worked. Thus, the employer violated the collective agreement.

[15] In its decision on the grievance, the employer wrote that posting and circulating the petition in the workplace were adverse to its interests because they would have a negative effect on productivity. That was speculation, and the employer used it as a basis for its directive.

[16] The employer did not make a balanced decision when it issued its directive. It should have balanced its own interests against the legitimate interests of the bargaining agent to express itself, inform its members and conduct its legitimate activities. The employer did not, and it ignored the bargaining agent's interests. The employer failed to justify its decision and to show that it was reasonable.

[17] Not only did the employer violate article 12 of the collective agreement, it also violated the no-discrimination clause by preventing the signing of the petition in the workplace and the wearing of stickers by employees.

[18] Section 5 of the *Public Service Labour Relations Act* ("the *Act*") specifies that employees are free to participate in the lawful activities of the bargaining agent. The employer prevented them from participating in a legitimate and lawful campaign to protect public service pensions. The employer clearly interfered with the work of the bargaining agent's representatives by not allowing them to distribute material in its buildings and by asking employees to read materials and sign the petition on their personal time at lunch or while on break.

[19] The employer is responsible for the actions of its managers in its different departments and workplaces. Not only did the employer's directive violate the collective agreement, so did the interpretation of the directive by local management. The employer must assume full responsibility for that interpretation.

[20] The bargaining agent referred me to the following decisions: *Casco Inc. v. United Food Processors Union, Local 483* (2002), 107 L.A.C. (4th) 167; *Quality Meat Packers Ltd. v. United Food and Commercial Workers Canada, Locals 175 and 633* (2003), 115 L.A.C. (4th) 409; *Canadian Union of Postal Workers v. Treasury Board (Post Office Department)*, PSSRB File Nos. 169-02-159 and 160 (19781221); *Public Service Alliance of Canada v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 169-02-508 (19920506); *Public Service Alliance of Canada v. Canada Customs and Revenue Agency*, 2001 PSSRB 103; *Rioux v. Treasury Board (Citizenship and Immigration Canada)*, 2002 PSSRB 68; *Canadian Union of Postal Workers v. Treasury Board (Post Office Department)*, PSSRB File No. 169-02-344 (19810205); *Bodkin et al. v. Treasury Board (Employment & Immigration Canada)*, PSSRB File Nos. 166-02-18108 to 18116, 18183 to 18188, 18190, 18209 to 18217, 18242 and 18243 (19890525); *Quan v. Canada (Treasury Board)*, [1990] 2 F.C. 191 (C.A.); and *Andres et al. v. Canada Revenue Agency*, 2009 PSLRB 36.

B. <u>For the employer</u>

[21] The bargaining agent's witnesses testified that they were denied permission to set up an information table, to obtain signatures on a petition and to distribute material in the employer's buildings. The employer's directive does not include those

prohibitions. They were not raised in the grievance or at the internal grievance hearing. It is too late for the bargaining agent to raise those issues at adjudication.

[22] Clause 12.01 of the collective agreement refers to the posting of notices from the bargaining agent. A petition is not a notice and is not covered by the wording of clause 12.01. Nothing in the collective agreement authorizes the posting of petitions. Furthermore, signing a petition in the workplace generates discussions among employees and negatively affects their productivity. Wearing a button with a sensitive message, such as about pensions, could lead to a confrontation or a debate with the public. The employer's action was justified.

[23] The employer referred me to the following decisions: *MacKenzie and Public Service Alliance of Canada v. Treasury Board (Employment & Immigration Canada)*, PSSRB File Nos. 166-02-21187, 21188 and 21189 and 169-02-501 (19910620); and *Almeida and Capizzo v. Treasury Board (Revenue Canada — Customs & Excise)*, PSSRB File Nos. 166-02-17058 and 17059 (19890125).

V. Reasons

[24] This policy grievance challenges the legality of the employer's directive issued after the bargaining agent undertook a pension campaign in early 2010. The wording of the grievance clearly expressed that its objection was to the directive issued by Ms. Laurendeau. For the bargaining agent, that directive prohibited its campaigning activities against changes to the public service pension plans and contravened the no-discrimination and the use of employer facilities provisions of the collective agreement. The bargaining agent asked for a declaration that the employer's directive is discriminatory and that it contravenes the collective agreement. The bargaining agent also asked that the employer comply with the collective agreement and address all impacts of the employer's directive.

[25] The bargaining agent witnesses testified that they were ordered not to distribute any material or gather any signatures for their petition in the lobby or the entrance of their workplaces and that they were obliged to do so outside. Arguably, that could be considered a violation of union rights as per the *Act*. In the same way, a blank prohibition against posting any union material about its pension campaign on bulletin boards would be a violation of the collective agreement. However, the grievance is not about what happened in those workplaces but rather is about the legality of the

employer's written directive, issued by Ms. Laurendeau. If the bargaining agent wanted to challenge the actions and decisions of local management at Passport Canada or at the Department of National Defence, it should have used other avenues than this policy grievance. It is clear to me that the issue of this grievance is whether the employer's directive contravenes the collective agreement.

[26] The bargaining agent presented no evidence that its representatives were discriminated against by the employer as employees for their union activities. Instead, according to the witnesses, they were prevented from doing their work as union representatives. However, that does not mean that the employer did not violate clause 19.01 of the collective agreement. I will return to this point.

[27] The employer's directive imposed the following restrictions on the bargaining agent campaign: no posting of petitions on bulletin boards, no distributing of petitions via the employer's electronic networks, no wearing of stickers by employees directly serving the public and no placing of stickers on the employer's property or equipment. The employer added in its directive that requests to post literature on bulletin boards, such as general information on pensions, should not be unreasonably denied. Therefore, the question in front of me is to determine if those restrictions imposed by the employer on the bargaining agent constitute violations of clause 12.01 or 19.01 of the collective agreement. I will examine the four restrictions separately.

[28] The employer's directive to squarely refuse that the pension petitions be posted on bulletin boards is in direct violation of clause 12.01 of the collective agreement, which states that the employer should act "reasonably" when considering what is adverse to its interests and that it should not unreasonably withhold approval to post material. The employer's directive of February 26, 2010 did not contain any explanation as to why the posting of petitions was adverse to the employer's interests. Later, in its decision on the grievance, the employer stated that posting and circulating the petition in the workplace would have a negative effect on productivity. However, no explanation was ever provided by the employer as to how the posting of a petition on bulletin boards could possibly impact negatively on productivity. Certainly, employees might have stopped a few minutes to read the petition, but this is the case for any documents posted on bulletin boards. If employees stop to read a posted document, they lose productive working time. Maybe the employer did not agree with the bargaining agent's pension proposals and with the content of the petition, but to

satisfy its obligation under the collective agreement, at a minimum, it needs to demonstrate how the petition is adverse to its interests. In this case, it did not. As stated in *Casco Inc.*, an adverse interest is more than a merely imaginary or speculative adverse impact.

[29] As stated in *Quality Meat Packers Ltd.*, the content of the message needs to be examined. Further, as stated in *Canadian Union of Postal Workers (19781221)*, valid criteria are required to censure the union, including the illegality of the message, its abusive nature, the inclusion of defamatory or fraudulent statements, and non-compliance with the standards governing labour relations. Obviously, those criteria are far from being met in this case. That petition simply asked, using some fairly soft union rhetoric, for protection for federal public service pensions and improvements to old age security and the guaranteed income supplement for all retirees.

[30] The posting of the petition on bulletin boards did not necessarily mean that it should have been signed by employees during working hours. If the employer's concern was with the loss of productivity, it could have directed employees not to sign the petition during their working hours. The bargaining agent would still have gained from posting the petition, since that action would have informed its members of the petition's existence. The employer illegally denied that gain.

[31] The employer did not violate clause 12.01 of the collective agreement by preventing the use of its electronic networks for circulating the petition. That network is the property of the employer, and it has the lawful right to restrict its use. Furthermore, nothing in clause 12.01 gives the bargaining agent, its representatives or federal government employees the right to use the employer's electronic networks to circulate union material of any sort, including petitions.

[32] The employer did not violate clause 12.01 of the collective agreement by preventing the placement of stickers on its property or equipment. Nothing is wrong with the employer putting in place directives to prevent the deterioration or minor alteration of its material. The property and the equipment belong to the employer, and it is fully entitled to prevent stickers to them. Furthermore, nothing in clause 12.01 gives that right to the bargaining agent, to its representatives or to the employees.

[33] The employer's directive to squarely refuse that employees wear stickers when directly serving the public is a violation of clause 19.02 of the collective agreement.

Those stickers were worded, "*Hands off our pensions!*" and had the bargaining agent's logo at the bottom right. In *Bodkin et al.*, an adjudicator determined that the employer had violated the no-discrimination clause of the collective agreement when it ordered employees, some having contact with the public, to remove buttons with the inscription, "*I'm on Strike Alert.*" For the adjudicator, that constituted a legitimate union activity within the meaning of the no-discrimination clause of the relevant collective agreement. The adjudicator stated, that to determine whether wearing a button constitutes a legitimate union activity while at work, one needs to examine the statement the button bears. If that statement is derogatory, damaging to the employer's reputation or detrimental to its operations, then the button exceeds the permissible limits. In *Quan*, the Federal Court of Appeal completely agreed with the analysis outlined in *Bodkin et al.* That analysis was also used and agreed with by an adjudicator in *Andres et al.*

[34] The analysis presented in *Bodkin et al.* represents a fair balance between the rights of the parties to the collective agreement. A sticker stating "*Hands off our pensions!*" surely does not exceed the permissible limits stated in *Bodkin et al.* It does not carry a derogatory or damaging message against the employer's reputation or its operations. At most, it sends a message to the public that there could be a disagreement between the employer and its employees on the issue of pension benefits. When expressing that message, employees who wear the sticker participate in a union activity, and, if the employer prevents them from doing so, it violates the no-discrimination clause of the collective agreement.

[35] The employer raised the argument that if employees working with the public wore pension stickers, it could have led to a confrontation or a debate with the public. That argument is hypothetical, and employees' rights to participate in union activities cannot be prohibited based on speculation. Had confrontations resulted from the wearing of those stickers, the employer would then have been allowed to take action and make decisions to resolve the issue, possibly even including prohibiting certain employees in certain work locations from wearing buttons.

[36] The employer instructed in its directive that requests to post literature, such as general information about pensions, should not be unreasonably denied. There is obviously nothing wrong with that instruction, which is almost a reproduction of part of clause 12.01 of the collective agreement. It might not have been applied correctly in

all workplaces, but that is not, as I already stated, within the scope of this policy grievance.

[37] The employer referred me to *MacKenzie*. In that decision, an adjudicator dismissed the grievance, which dealt with distributing a union newsletter in the workplace. It is not relevant to my conclusions about posting the petition or wearing stickers.

[38] In *Almeida and Capizzo*, local management ordered customs inspectors to not wear buttons promoting a union campaign because it was concerned that wearing the buttons could lead to a confrontation or a debate with members of the public. The officers refused to take off their buttons, and their employer sent them home without pay. An adjudicator rejected their grievances on the basis that the employer acted properly and within a legitimate exercise of its authority. I find that the logic presented in *Bodkin et al.* is more appropriate to deciding this grievance. Furthermore, contrary to this grievance, the grievors in *Almeida and Capizzo* did not obey the directive given by their superiors. Rather, they were insubordinate and were sent home without pay.

[39] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[40] The policy grievance is allowed in part.

[41] I declare that the employer violated the collective agreement when it issued its directive prohibiting the posting on bulletin boards of the bargaining agent petition about public service pensions and I order the employer to cease such infringement.

[42] I further declare that the employer violated the collective agreement when it prohibited the wearing of pension stickers by employees directly serving the public and I order the employer to cease such infringement.

August 16, 2011.

Renaud Paquet,
adjudicator