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Citation: 2017 PSLREB 7

*Public Service Labour Relations
and Employment Board Act and
Public Service Labour Relations Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

AJAY LALA ET AL.

Applicant

and

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 401

Respondent

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Intervenor

Indexed as

Lala v. United Food and Commercial Workers Canada, Local 401

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

Before: David Olsen, a panel of the Public Service Labour Relations and Employment
Board

For the Applicant: Himself

For the Respondent: Kelly Nychka, counsel

For the Intervenor: Adrian Scales

Decided on the basis of written submissions,
filed November 2, 14 and 16, 2016.

INTERIM DECISION

I. Respondent's Motion before the Board

[1] Section 22 of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides that the Public Service Labour Relations and Employment Board (“the Board”) may decide any matter before it without holding an oral hearing. Having reviewed all the material on file, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without holding an oral hearing.

[2] On November 2, 2016, United Food and Commercial Workers Canada, Local 401, (“respondent” or “bargaining agent”) brought a motion for an order from the Board that it disregard and void the results of a representation vote and that it destroy the ballots without counting them. Further, the union asked that an application for revocation of certification be dismissed. It had been filed by Ajay Lala (“the applicant”) and had led to the vote.

[3] It requested that in the alternative, if the Board was not prepared to disregard the vote and destroy the ballots, a revote occur on the Canadian Forces Base (CFB) in Edmonton, Alberta, where eligible voters would cast their votes in person so that the respondent would have the opportunity to scrutinize the vote.

[4] The basis for the motion was twofold, as follows:

(a) Not all eligible voters received their voting packages and were able to exercise their vote at the representation vote, which occurred on October 17-21, 2016. According to the respondent's information, the voters that were able to exercise their vote do not appear to represent all eligible voters interested in casting a ballot. As a result, the vote does not fairly represent the interests of members.

(b) Further, the respondent has received information from Rebecca Fan Joy and Serena Van Hees which indicates that Mr. Ajay Lala was approaching members on the CFB Edmonton base asking them for their proxy votes so that he could vote on their behalf in the representation vote. Even though Mr. Lala may not have voted on members behalf at the vote members may have believed that because they signed over their voting rights and they could not exercise their own vote at the representation vote that eventually occurred. Mr. Lala's actions of soliciting employees for their proxy vote and obtaining proxies confused members and makes the results of the vote less reliable and less reflective of members' true wishes.

[5] The respondent included the affidavits of Vinko Zigart, Rebecca Fanjoy, and Serena Van Hees in support of its motion.

[6] Mr. Zigart, a senior labour relations officer for the bargaining agent, stated that he was contacted by some members who had experienced difficulty exercising their votes during the period of October 17 to 21, 2016, as follows:

- On October 17, 2016, he received an email from Joanna Paciorkowska, who advised him that she had not received a letter in the mail about the vote.
- On October 20, 2016, he received a phone call from Michael Kouksin, who advised him that he had had difficulty voting. Mr. Zigart was not certain whether Mr. Kouksin did not receive a package via registered mail or whether his personal identification number (PIN), which was issued to eligible voters to allow them to vote using the telephone or Internet, did not work properly.
- On October 21, 2016, he received an email from Tyler Williams, who indicated that he had not received his voting package. He provided Mr. Williams with the helpline phone number. He understood that when Mr. Williams called the helpline, he was told that he was not on the registered voter's list even though he had been hired on February 11, 2015, and has remained an employee since then.
- On October 21, 2016, he received an email from George Rattai, who was in Ottawa, Ontario, while the vote was occurring. He did not receive his voter information in the mail as it was sent to his home in Edmonton. He advised Mr. Rattai to call the voter helpline. Mr. Rattai subsequently advised him that when he attempted to call the helpline, he reached an answering machine, and thus, he was not able to exercise his vote.

[7] Mr. Zigart also states that in or about May and June 2016, Mses. Van Hees and Fanjoy advised him that Mr. Lala was soliciting proxy votes.

[8] In her affidavit, Ms. Fanjoy stated that in or about June 2016, her supervisor,

Geraldine Arey, asked her to come to the base post office. Once there, she was approached by Ms. Arey, Mr. Lala, and Ms. Turenne-Semegen. She was asked to sign a three-page document, which she was told would allow Mr. Lala to vote on her behalf. She also stated that she felt pressured to sign the document given that her supervisor was asking her to.

[9] In her affidavit, Ms. Van Hees stated that in or around June 2016, Mr. Lala told her that he was seeking proxy votes in relation to the vote. At or about that time, he told her that he had secured Tracy Harvey's proxy vote. On or about June 11, 2016, she witnessed Mr. Lala meeting with Ms. Paciorkowska and asking her to sign papers with respect to a proxy vote. She prepared a statement on June 11, 2016, which she sent to Mr. Zigart.

II. Background

[10] On October 26, 2015, Mr. Lala filed an application that was signed on October 19, 2015, for revocation of certification under s. 94 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act") with respect to a bargaining unit for which the respondent, United Food and Commercial Workers Canada, Local 401, was certified. The reason cited in support of the application was that the employee organization no longer represented a majority of the employees in the bargaining unit.

[11] The former Public Service Staff Relations Board certified the respondent as the bargaining agent for all employees in the operational category employed at CFB Edmonton except "Managers/Category II" employees, on September 26, 1985.

[12] The employer is Her Majesty in Right of Canada as represented by the Staff of the Non-Public Funds, Canadian Forces, at CFB Edmonton ("the employer").

[13] The bargaining unit includes employees who work at the CFB Edmonton mess halls, fitness centre, hockey arena, CANEX Expressmart, liquor and retail stores, and golf and curling clubs.

[14] The bargaining agent and the employer were parties to a collective agreement that commenced on July 1, 2012, and expired on June 30, 2015 ("the collective agreement").

[15] After it reviewed the evidence filed in support of the application for revocation,

the Board was satisfied that at least 40% of the employees in the bargaining unit as of the date the application was filed no longer wished to have the union represent them.

[16] On July 4, 2016, the Board ordered that pursuant to s. 95 of the *Act*, a representation vote be taken in accordance with s. 65(2), which applies in relation to the taking of a representation vote. In the covering letter that accompanied the decision, the Board stated that voting would be done by electronic means and that employees would receive a voting package by registered mail in due course explaining the details of the vote and how they could cast their ballots.

[17] It was also ordered that the ballots cast be sealed and not counted until the Board had dealt with the allegation that the application be dismissed due to the employer's dominance and its inappropriate intervention in the process.

[18] The Board's order also stated that the Board would include in the application those employees who had completed the "Form 5 - Application for Revocation of Certification" and who had signed a statement of support before the date of the application. In addition, the Board would include those employees who were laid off and who were subject to recall as well as the one part-time temporary employee who was a member of the bargaining unit as of October 26, 2015.

[19] The letter that accompanied the decision also directed the employer to provide the Board, by July 19, 2016, a list of all employees currently in the bargaining unit, along with their home addresses. The letter also stated once the Board received that information, it would provide the list of employees to the applicant and the bargaining agent, which would then have an opportunity to respond to the list of eligible voters by no later than August 2, 2016.

[20] On July 11, 2016, the respondent responded to the Board's direction that a representation vote be done electronically. The respondent expressed concern that this method did not provide a mechanism by which an employee's identity could be confirmed. It stated that nothing would prevent employees from handing over their voting packages to another person who could cast their votes, not necessarily in accordance with their wishes, and that permitting such a practice was akin to permitting proxy voting.

[21] The respondent also stated that some employees had advised it that Mr. Lala

was speaking to employees at CFB Edmonton about obtaining their proxy to vote on their behalf and that Ms. Van Hees had advised the respondent that she had witnessed this conduct by Mr. Lala during working hours.

[22] In the end, the bargaining agent submitted that the voting should occur in person at CFB Edmonton rather than by electronic means and that each employee would be allowed to cast only his or her own vote once proper photo identification was shown and verified.

[23] On July 28, 2016, the Board wrote to the parties, acknowledging the concerns that had been expressed by the respondent and stating that in its direction of July 4, 2016, it was implicit that the representation vote was to be conducted by secret ballot, which the Board understood to mean the expression by ballot or otherwise, but not by proxy, of an individual's choice with respect to representation. That vote was to be cast in such a manner that the employee expressing a choice could not be identified with the choice expressed.

[24] The Board advised that the voting company that had been retained had proven to be secure and had been approved by the Department of Public Works and Government Services (PWGSC) and the Government of Canada, had worked with many other tribunals, and was considered reliable and suitable for the purpose of conducting the vote.

[25] The Board put the parties on notice that the vote was to be done by secret ballot, that no proxy voting would be tolerated, and that each elector had to cast an individual ballot. Any allegations of inappropriate conduct or actions that would compromise the integrity of the vote would be taken seriously. The Board stated that it was committed to the integrity and credibility of the voting process and that it would take all necessary steps to safeguard it.

[26] It also stated that should the parties witness any such conduct, they could present their allegations and evidence at the hearing, which at that time was in the process of being scheduled. The Board then outlined to the parties the next step in the process.

[27] On August 2, 2016, the applicant wrote to the Board acknowledging receipt of its letter of July 28, 2016. He stated that he understood that the vote was to be done

by secret ballot and that on behalf of all employees who supported the application and were entitled to vote, he intended to follow the voting procedure outlined in the letter.

[28] On July 15, 2016, the employer provided the Board with a file containing the names and addresses of employees currently in the bargaining unit. Mr. Williams' name was on the list.

[29] On July 20, 2016, the Board provided the applicant and the bargaining agent with a list of the names of employees currently in the bargaining unit and eligible to vote and asked them to comment on the list by no later than August 2, 2016.

[30] On August 2, 2016, the bargaining agent wrote to the Board, commenting on that list. It submitted that two employees should be removed from it, that three should be added, and that three others appeared to have been missed and should be added.

[31] On August 2, 2016, the applicant advised the Board of his position vis-à-vis putting together the list of eligible voters.

[32] On August 8, 2016, the Board requested that the employer provide its position with respect to the names of the employees mentioned in the respondent's letter of August 2, 2016.

[33] On August 12, 2016, although it did not take a position on the composition of the list of employees considered eligible to participate in the vote, the employer offered the Board information with respect to the employees named by the bargaining agent.

[34] On August 30, 2016, the bargaining agent made submissions about the effective date to determine the list of eligible voters. It submitted that the following employees should be eligible to vote:

(1) Employees currently working for the employer who were also employed on the date the application was filed. However, those employees who have since the application date left the employ of the employer permanently should not participate as they have no continuing interest in the bargaining unit.

(2) Employees employed on the application date who are currently on long-term disability should be included in the list of eligible voters given that they have a sufficient and continuing interest in the bargaining unit as they are

expected to return to work.

(3) Employees laid off since the application date that currently have retained their rights of recall should be included in the list however if the recall rights have expired or they have not been recalled by the employer and have not returned to work they should not be included.

[35] On September 2, 2016, the parties were advised that the Board had determined that all employees who were employed on the date of the application (October 26, 2015) and who had a continuing interest in the bargaining unit would be eligible to vote. This included employees currently working for the employer, employees on long-term disability, employees on authorized leave, and employees laid off since the application date who currently had a valid right of recall.

[36] The employer was asked to revisit its list of employees and to revise it in accordance with that criteria, following which the applicant and the bargaining agent would be provided with it and would be given an opportunity to respond.

[37] On September 13, 2016, the employer provided a revised list of employees in accordance with the Board's criteria. Mr. Williams' name was not on the revised list.

[38] On September 14, 2016, the revised list of names was provided to the applicant and the bargaining agent and they were asked to provide their comments on it no later than September 21, 2016. The bargaining agent requested an extension of time to comment on the list, which was granted.

[39] On September 28, 2016, the bargaining agent took the opportunity to provide comments on the voter list. It stated that Ms. Arey would be retiring soon, which might impact her eligibility to vote, as she would then no longer have a continuing interest in the workplace.

[40] On September 28, 2016, the applicant stated that the list provided for review was correct with one adjustment, as Mark Gibson had since passed away.

[41] On September 28, 2016, the Board wrote to the parties acknowledging the bargaining agent's and the applicant's submissions and requesting that the employer confirm the information it had provided and that it provide any comments on the eligibility of Ms. Arey.

[42] On September 29, 2016, the Board advised the parties that the polls would open on October 17, 2016, at 8 a.m., Eastern standard time, and that they would close on October 21, 2016, at 4:00 p.m., Eastern standard time.

[43] On October 3, 2016, the employer confirmed that Ms. Arey had provided notice of her retirement effective October 21, 2016, and that Mr. Gibson was deceased.

[44] On October 11, 2016, the Board advised the parties that both Ms. Arey's and Mr. Gibson's names would be excluded from the list of employees eligible to vote.

[45] On October 13, 2016, the Board wrote to the parties with respect to the respondent's concerns about electronic voting, which it had raised again in its letter of October 6, 2016. The Board reminded the parties that the issue had been addressed in the Board's direction of July 28, 2016. It also advised them that it had received a returned mail from one of the voters, Christopher O'Connor, indicating "moved/unknown", and it asked the employer to confirm his current mailing address as soon as possible.

[46] On October 18, 2016, Kimberly Nixon, an employee at the Edmonton Garrison Memorial Golf and Curling Club, wrote to the Board advising that she had been told by two staff members who were both eligible to vote that they had not received their voting PINs.

[47] On October 19, 2016, the applicant advised the Board that two employees on the list had not received the voting package, Mr. Kouksin and Ms. Paciorkowska.

[48] On October 20, 2016, the Board wrote to the parties, directing them to provide the voter helpline number to any colleagues, members, and employees who had not received a voting package or were having difficulties voting. The number was included.

[49] On November 2, 2016, the union filed this application for an order to disregard and void the representation vote results and to dismiss the revocation of certification application.

[50] The Board's returning officer was in daily contact with the service provider's call centre. The returning officer prepared a report containing information for the Board with respect to employees who allegedly did not receive a voting package identified by the bargaining agent or the applicant. Based on information received from the service

provider, the Board advises as follows:

- Employee name - delivery report.
- Ms. Paciorkowska - Delivered on October 19, 2016.
- Mr. Kouksin - Contacted the helpline and was given a new PIN to vote on October 21, 2016.
- Mr. Williams - Not on list of employees eligible to vote.
- Mr. Rattai - An attempted delivery was made of the voting package, but it was returned unclaimed. The bargaining agent advises that he was in Ottawa during the time of the vote.

III. Discussion

[51] The *Act* provides the Board with broad powers over the conduct of a representation vote. Subsection 65(2) provides as follows:

65 (2) When the Board orders that a representation vote be taken, it must

(a) determine the employees who are eligible to vote; and

(b) make any arrangements and give any directions that it considers necessary for the proper conduct of the vote, including the preparation of ballots, the method of casting and counting ballots and the custody and sealing of ballot boxes.

[Emphasis added]

A. The conduct of the representation vote

[52] I will first deal with the submission that as the applicant approached members of CFB Edmonton asking them for their proxy votes, his actions might have confused them and might have made the results of the vote less reliable and less reflective of their true wishes.

[53] The evidence filed in support of this submission is found in Mr. Zigart's affidavit. He stated that in or about the months of May and June 2016, Mes. Van Hees and Fanjoy advised him that Mr. Lala was soliciting proxy votes. Both Ms. Van Hees and

Ms. Fanjoy filed affidavits attesting to these facts.

[54] On July 11, 2016, in its response to the Board's direction that a representation vote be carried out by electronic means, the union advised it that Ms. Van Hees had told the respondent that Mr. Lala was speaking to employees about obtaining their proxy votes.

[55] As noted, on July 28, 2016, the Board wrote to the parties, stating that it was implicit in its direction that the representation vote be conducted by secret ballot but not by proxy. The Board put the parties on notice that no proxy voting would be tolerated and that any conduct that would compromise the integrity of the vote would be taken seriously.

[56] On August 2, 2016, the applicant advised the Board that on behalf of all employees who supported the application, he would follow the Board's voting procedures. There was no evidence that after that time, any person sought to exercise an employee's vote by proxy.

[57] As identified earlier, a critical part of the electronic voting process involved issuing a PIN to eligible voters, which allowed them to vote using the telephone or Internet. Each PIN could be used only once.

[58] The voting company did not advise the Board's returning officer of any employee who was unable to vote because another person had used his or her PIN.

[59] The suggestion is speculative at best that members might have been confused by Mr. Lala's action in May or June, in light of the subsequent directions and correspondence from the Board for a vote occurring in October 2016, without any specific evidence of such confusion.

[60] The respondent alleged that not all eligible voters received their voting packages and so were unable to exercise their votes. Consequently, the vote did not fairly represent the interests of its members.

[61] In his affidavit, Mr. Zigart attests that some members contacted him and said that they had experienced difficulty exercising their votes. One was Ms. Paciorkowska, who advised him that she had not received a letter in the mail about the vote.

[62] On October 19, 2016, the applicant advised the Board that Ms. Paciorkowska had not received a voting package.

[63] On October 20, 2016, the Board wrote to the parties, directing them to provide the voter helpline number to anyone who had not received a voting package or was having difficulties voting.

[64] The Board's returning officer has confirmed that the voting package was delivered to Miss Paciorkowska on October 19, 2016.

[65] Another employee who contacted Mr. Zigart was Mr. Kouksin, who advised him that he had difficulty voting. Mr. Zigart was uncertain whether Mr. Kouksin had received a voting package or whether his PIN did not work properly.

[66] On October 19, 2016, the applicant advised the Board that Mr. Kouksin had not received a voting package.

[67] The Board's returning officer confirmed that on October 21, 2016, Mr. Kouksin contacted the voting company's helpline and was given a new voting PIN.

[68] In his affidavit, Mr. Zigart states that he received an email from Mr. Williams indicating that he had not received his voting package. He states that he provided Mr. Williams with the helpline phone number. However, Mr. Williams was advised that he was not on the registered voter's list even though he was hired on February 11, 2015.

[69] As noted, on July 15, 2016, the employer provided the Board with the file containing the names and addresses of employees currently in the bargaining unit. Mr. Williams' name was included. The list of employees was provided to the bargaining agent and the applicant for their comments.

[70] On August 30, 2016, the bargaining agent made submissions on the effective date to determine the list of eligible voters, as recited at paragraph 34 of this decision, who were employees currently working for the employer who were employed on the date the application was filed. Those employees who had left the employment of the employer permanently since the application filing date were not to participate.

[71] On September 2, 2016, the Board determined that those employees eligible to vote were those who were employed on the date of the application and who had a

continuing interest in the bargaining unit. The employer was asked to revisit its list of employees, revise it in accordance with the criteria outlined in the Board's direction, and provide that revised list to the bargaining agent and the applicant.

[72] On September 14, 2016, the revised list of names was provided to the applicant and the bargaining agent. They were asked to provide their comments. Mr. Williams' name was not on the revised list.

[73] On September 28, 2016, the bargaining agent provided comments on the list of eligible voters. It made no comment with respect to the deletion of Mr. Williams' name.

[74] The integrity and credibility of a voting process is of paramount importance to the Board and to the labour management community. The Board carefully exercised due diligence in canvassing the parties for their input with respect to the criteria to determine the list of eligible voters. The bargaining agent made extensive submissions with respect to the criteria. Taking into account the bargaining agent's submissions, the Board revised its directions to the parties and directed the employer to revisit the list in accordance with the criteria. The bargaining agent was provided an opportunity to comment on the list and in fact made comments with respect to a number of employees but not with respect to Mr. Williams. In this respect, the Board relied upon the parties' input to determine the list of employees to ensure that the vote fairly represented the interests of the employees.

[75] Mr. Zigart deposed that on October 21, 2016, he received an email from Mr. Rattai, who advised him that he was in Ottawa while the vote was occurring and that he did not receive his voter information in the mail as it was sent to his home in Edmonton. He tried to call the helpline and reached an answering machine. As noted, the Board's returning officer advised the Board that the voting company attempted to deliver a voting package to Mr. Rattai and that it was returned unclaimed.

[76] On July 4, 2016, the Board ordered that a representation vote be taken. The parties were advised of the process and in particular that employees would receive a voting package by registered mail. Notices were posted to that effect in the workplace. The Board took all necessary steps to ensure that eligible voters received their voting packages. If they experienced difficulties, a helpline was set up to help them. In the Board's view, if an eligible employee was to be absent from Edmonton during the relevant period, it was incumbent upon that employee to take steps to ensure that he

or she could exercise his or right to vote and that he or she would not wait until the last moment to do it.

[77] The Board is satisfied that appropriate safeguards were taken to ensure that only those employees who were eligible to vote were provided with the opportunity to vote. The Board is also satisfied that all appropriate safeguards were proactively disclosed to the parties; this type of consideration and disclosure is in line with the Federal Court of Appeal's judgment in *Canadian Airport Workers Union v. Garda Security Screening Inc.* 2013 FCA 106 at paragraph 5. Thus, there is no evidence that employees in the application before this Board were confused about their voting rights such that it would make the results of the vote less reliable.

[78] With respect to the allegation that four eligible voters did not receive their voting packages, the Board's returning officer confirmed that Ms. Paciorkowska received her package on October 19, 2016, and that Mr. Kouksin contacted the helpline and was given a new voting PIN on October 21, 2016.

[79] The voting company attempted to deliver a voting package to Mr. Rattai. However, it was returned unclaimed, as he was in Ottawa during the time of the vote.

[80] Mr. Williams was not on the list of employees eligible to vote.

[81] In all the circumstances, the Board is not persuaded that the respondent met its burden of demonstrating that not all eligible voters received their voting packages such that the vote does not fairly represent the interests of its members.

(The Order appears on the next page)

IV. Order

[82] For all these reasons, the application is dismissed for an order that the Board void the results of the representation vote and destroy the ballots without counting them and that the application for revocation of certification be dismissed.

January 16, 2017.

**David Olsen,
a panel of the Public Service Labour
Relations and Employment Board**