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File: 561-02-767

Citation: 2019 FPSLREB 45

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

CANADIAN MILITARY COLLEGES FACULTY ASSOCIATION

Complainant

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
Canadian Military Colleges Faculty Association v. Treasury Board (Department of National Defence)

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

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Christopher Perri, counsel

For the Respondent: Caroline Engmann, counsel

Heard at Kingston, Ontario,
August 9 to 11 and September 5, 2017.

I. Summary

[1] The Canadian Military Colleges Faculty Association ("the Association" or "the complainant") and the Treasury Board ("the respondent") were in the midst of collective bargaining as their previous collective agreement expired in June 2014. The complainant is also a party to a series of local agreements or memoranda of agreement (MOAs) at the Royal Military College of Canada in Kingston, Ontario (RMC).

[2] The complainant alleged that, during the period of collective bargaining, the respondent has refused to abide by and has varied its bargaining position with respect to the MOAs. That, in its view, has violated the respondent's duty to abide by the statutory freeze provision, which prohibits changes to terms and conditions of employment that were in force at the commencement of collective bargaining until a new agreement is in place. It further alleges that the respondent's actions amount to a violation of its duty to bargain in good faith.

[3] The Board has consistently held that the proper time to file a complaint regarding a violation of the statutory freeze provision is when the alleged term or condition of employment is actually altered, not when a statement of intention to alter it is announced. The evidence established that no benefits or rights were denied to the Association collectively or individually to its faculty members. I received conflicting testimony as well as documentary evidence alleging the employer communicated that benefits provided by the MOAs were to be denied. I conclude those communications were at worst declaratory statements of intention or bargaining positions only. Further, such statements did not amount to a proposal or a rigid stance and did not amount to a violation of the duty to bargain in good faith.

[4] For the reasons that follow, I find that the complaint is unfounded.

II. Background

[5] The complainant is the bargaining agent certified to represent the employees in the university teaching ("UT") group at RMC, as well as UTs at various other colleges across Canada. The complainant and the respondent are parties to the agreement between the Treasury Board and the Canadian Military Colleges Faculty Association, which expired June 30, 2014 ("the collective agreement"). Notice to bargain was given on February 28, 2014.

[6] The complaint was filed on September 21, 2015. On June 19, 2017, *An Act to*

amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures (S.C. 2017, c.9) received Royal Assent, changing the name of the PSLREB and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations and Employment Board Act*.

[7] The parties commenced collective bargaining in October 2014. At the time of the hearing in August 2017, the parties stated that the last bargaining session was held in August 2015, and that they had not concluded a collective agreement.

[8] Jean-Marc Noël, President of the Association, provided evidence as to the history of negotiations between the parties, prior to the current round of bargaining. He testified that he was active at the bargaining table for the collective agreement negotiation in 2007, in which a series of MOAs between the Association and the RMC were concluded. He was asked to explain the purpose of the MOAs. He testified that they were agreements between the Association and RMC's local management that refine and define terms of the collective agreement. He added that they assist in the implementation of those terms.

[9] When asked if the MOAs were connected to the collective agreement, Mr. Noël replied that there was a connection as he did not think there would be a collective agreement without the MOAs. He admitted that the Treasury Board says the MOAs are not part of the collective agreement and said that is fine. But he added that the parties need to deal with the MOAs at the bargaining table to add credibility to the collective agreement. In his view the MOAs are enforceable; otherwise, he would not waste his time on dealing with them.

[10] Mr. Noël explained that those MOAs were renewed at the conclusion of the 2011 round of collective bargaining. He testified that the 2011 bargaining was expedited and that the parties agreed that whatever was not formally tabled for negotiation, which included the MOAs, was to be deemed renewed without amendment. Mr. Noël testified that once the bargaining of the items tabled for negotiation was concluded he asked the Treasury Board negotiator, Josée Lefebvre, and the then RMC principal, Joel Sekolski, if the MOAs would be automatically renewed and that they both agreed they would.

[11] Mr. Noël testified, and the hearing received the following documentary evidence

found in a letter dated November 20, 2015, and signed by Mr. Noël, about what he says is the full set of MOAs:

- Memorandum #1: UT Annual Evaluation in the Three Years Prior to a Scheduled Retirement (July 1, 2007);
- Memorandum #2: Letter Regarding Language Training (June 27, 2008);
- Memorandum #3: Letter Regarding Quotas for Performance Ratings (June 27, 2008);
- Memorandum #4: Letter Regarding Article 13.08 of the Collective Agreement (faculty member work for a faculty association is a form of service to the academic community that will be taken into consideration in the assignment of teaching and administrative duties) (June 27, 2008);
- Memorandum #5: Letter Regarding Assigned Performance Ratings (June 27, 2008);
- Memorandum #6: UT Leave Policy (January 29, 2007);
- Memorandum #7: Professional Development Allowance (May 12, 2008) and Carry-over (December 12, 2005);
- Memorandum #8: Negotiation for University Teaching (UT) Collective Agreement related to Workforce Adjustment Directive (April 25, 2008) (both parties stated that they believe this MOA is now outdated and as such is of no force or effect);
- Memorandum #9: Scheduled Duties – UT Group (certain types of work are not to be scheduled on December 23 and 24 of each year) (December 6, 2005); and
- Memorandum #10: Bereavement Leave (explaining administration of article 20.04(a) of the Collective Agreement) (December 12, 2005).

[12] The initial complaint stated that there were three MOAs at issue:

i. "UT Annual Evaluation in the Three Years Prior to a Scheduled Retirement", dated July 1, 2007 ("Retirement Evaluation MOU");

ii. "Language Training", dated June 27, 2008; and

iii. "Explanation of the distribution of double and triple increments", dated June 27, 2008.

[13] Specifically, in Schedule "B", appended to the complaint form, the complainant set out its position as follows:

> …
>
> *7. The CMCFA takes the position that the Employer has breached s. 107 of the* PSLRA *in the following way:*
>
> *(i) By failing to observe the terms and conditions of employment set out in Memoranda of Understanding ("MOU") renewed during the previous round of bargaining; and in particular,*
>
> *(ii) By denying CMCFA member, Dr. Michael Hurley, access to the benefits set out in the MOU dated July 1, 2007, titled "UT Annual Evaluation in the Three Years prior to a Scheduled Retirement."*
>
> *8. The CMCFA takes the position that the Employer has also breached its duty under s. 106 of the* [Public Service Labour Relations Act], *to bargain in good faith and make every reasonable effort to enter into a collective agreement when, during the last bargaining session, it unilaterally declared that all existing MOUs will not be renewed and no additional MOUs will be entered into.*
>
> …

[14] The complaint was later expanded to include all the MOAs between the parties.

A. The Retirement Evaluation MOA and the Hurley grievance

[15] As set out above, the parties were in the midst of the collective bargaining process. They had exchanged proposals and had held three bargaining sessions between November 2014 and February 2015. In those sessions, there had been no discussion of the MOAs.

[16] Mr. Noël testified that after the third session, he became aware of an issue with the MOAs, when Professor Hurley, a member of the UT bargaining unit at RMC, expressed his interest to Harry Kowal, the principal of RMC, to give notice of his retirement.

[17] For background, Mr. Noël described at the hearing how he had negotiated the Retirement Evaluation MOA in 2007. He testified that the motivation behind

it was the recognition that the average performance of faculty members diminishes in the three years before retirement as they decline in energy, ease off in voluntary activities, and are reluctant to take on new or unfamiliar tasks. Under this MOA, if a faculty member has signed the forms establishing a retirement date within three years, the member is guaranteed a performance rating of superior, and accordingly, a double pay increment, in each of their final three years of work. That rating is guaranteed as long as their work in teaching and research continues to be of at least satisfactory quality.

[18] In his grievance alleging denial of his retirement benefits as contained in the previously noted MOU, Mr. Hurley states as follows:

> *In the meeting of 27 April, Dr. Kowal said that he would not abide by past practice and would ignore the three-year retirement plan endorsed by his predecessors at RMCC, thus deviating from established practice and the documented terms and conditions of employment at the College currently in force.*

[19] Mr. Noël testified that he received a letter dated June 16, 2015, from the College, VP Academic, which provided the first level response to the Hurley retirement grievance. The reply states that "[t]he grievance is based on a verbal statement allegedly made by the Principal during an informal meeting on 27 April 2015 [emphasis added]." The letter continued by reciting Treasury Board policy as follows:

> …
>
> *The Treasury Board Secretariat Policy on Terms and Conditions of Employment (ref C) established the sources of terms and conditions of employment. Pursuant to paragraph 3.2 of this policy, "Terms and conditions of employment for persons appointed to the core public administration are as set out in the relevant collective agreements and other legislation and as supplemented by other related policy instruments." The employer therefore did not contravene section 107 of the Public Service Labour Relations Act (ref D) as the provisions that are subject of this grievance are contained in a local memo rather than the aforementioned instruments.*
>
> …

[20] As a remedy, the grievance requests that "… the Principal comply with the CMCFA collective agreement and the *PSLRA* by upholding past practices and abiding by terms and conditions of employment as outlined in the 1 July 2007 MOA [Memo of Agreement] and all related policies and documents."

[21] I did not hear any direct evidence from Mr. Hurley as he did not testify. Instead,

only his grievance form was submitted at this hearing. While the resolution of this complaint is not dependent upon the Hurley retirement grievance's outcome, I note that his grievance was denied at adjudication before the Board (*Hurley v. Treasury Board (Department of National Defence)*, 2018 FPSLREB 35). While the Board did declare the MOA effective July 7, 2007, a past practice, which is incorporated into the 2011 collective agreement under article 8, it denied the grievance as it found a condition precedent to the entitlement claimed had not been met (see paras. 521 and 522).

[22] Given the backdrop of this Hurley grievance, at the next scheduled bargaining session in August 2015, Mr. Noël raised the issue of the MOA in a sidebar discussion with the Treasury Board negotiator, Ms. Lefebvre. On August 5, he shared with Ms. Lefebvre his concerns that RMC had taken the position that the MOAs were not binding and enforceable. He testified that she replied that the Treasury Board had requested a legal opinion about whether the MOAs were terms of employment.

B. The pronouncement by RMC Principal Mr. Kowal at the collective bargaining table

[23] After Mr. Noël's brief conversation with Ms. Lefebvre, he returned to the bargaining table. Mr. Kowal was present at the table; he is not only the principal of RMC but also one of the respondent's bargaining representatives. Mr. Noël testified that Mr. Kowal addressed the negotiating teams, saying that in order to set up the parties for success, he wished to inform them that he did not consider the MOAs as terms and conditions of employment, that they would not be renewed, and that no new ones would be agreed to.

[24] Mr. Noël testified that he was "very upset" to hear from the principal that the RMC does not recognize the MOAs as terms and conditions of employment. He replied to the negotiating teams that he was extremely disappointed to hear this statement as the Association saw MOAs as the only way to resolve local issues. He added that he then told the group that in light of the employer's pronouncement, the bargaining agent would have to re-examine all of its proposals and then led his team in departing the bargaining table. Mr. Noël stated that the parties had not returned to the bargaining table since that August 5, 2015, session.

C. Exchange of positions

[25] On September 21, 2015, as outlined above, the bargaining agent filed this complaint. In its reply on October 30, 2015, the respondent provided its position on the

three MOAs that were initially identified as having been violated. The respondent agreed to maintain the terms and conditions of the Retirement MOA until a new collective agreement is signed. The respondent disputed that that Language Training letter was an MOA, and asserted that the letter, "… [did] not create a legal obligation that is covered by s. 107 of the *PSLRA*." Finally, it noted that the letter of explanation of the distribution of double and triple benefits was in fact only a letter explaining the understanding at that time of the practice for the performance ratings quota. It was not a practice that continued to be applied as detailed in the letter. The respondent concluded by stating that the letter's provisions do not constitute terms and conditions protected by s. 107 of the *PSLRA*.

[26] Mr. Kowal also sent a letter to the complainant on October 30, 2015 ("the Kowal letter"). The Kowal letter set out:

> …
>
> *I am writing to you as a follow-up to your e-mail query of May 28, 2015 and to our discussion on August 5, 2015 as I was not prepared at that time to provide you the Employer's position regarding memoranda and letters of understanding (LOUs) on various issues with respect to the University Teaching (UT) group.…*
>
> …
>
> *Thank you for bringing these to my attention and I apologize for the length of time it has taken me to respond, but I have also been made aware there were other such documents and I wanted to take the opportunity to review and understand them all.…*
>
> …

[27] The Kowal letter then proceeded to set out ten documents and the employer's position on each one. The documents listed are described as follows:

1. UT Annual Evaluation in the Three Years Prior to a Scheduled Retirement (July 1, 2007);

2. Letter Regarding Language Training (June 27, 2008);

3. Letter regarding Quotas for Performance Ratings (June 27, 2008);

4. Letter Regarding Article 13.08 of the Collective Agreement [faculty member work for a faculty association is a form of service to the academic community that will be taken into consideration in the assignment of teaching and administrative duties] (June 27, 2008);

5. Letter Regarding Assigned Performance Ratings (June 27, 2008);

6. UT Leave Policy (January 29, 2007);

7. Professional Development Allowance (May 12, 2008) and Carry-over (December 12, 2005);

8. Negotiation for University Teaching (UT) Collective Agreement related to Workforce Adjustment Directive (April 25, 2008);

9. Scheduled Duties – UT Group (certain types of work not to be scheduled on December 23 and 24 of each year) (December 6, 2005); and

10. Bereavement Leave (explaining administration of article 20.04(a) of the Collective Agreement).

[28] The Kowal letter cited each of the MOAs along with the respondent's position on whether it felt that the MOA was a binding term and condition of employment. The Kowal letter stated that item numbers 2, 3, 6 and 8 were not considered to be terms or conditions of employment, and, therefore was not binding on the respondent. It then stated as follows:

…

> *This letter serves as formal notice that the memos and LOUs outlined above and identified as being protected under section 107 of the PSLRA will be maintained until a new collective agreement is signed and will end at that time. Therefore you may wish to take the opportunity during this round of bargaining to propose amendments to the collective agreement that pertain to matters covered in the documents above.*

…

[29] The Kowal letter concluded by noting, "Please be informed that any memos or MOAs not listed above which may exist and for which I have no knowledge of at this time, will be deemed to be of no force and effect."

[30] The complainant provided a response to the Kowal letter. The complainant submitted that the Kowal letter constituted a further and continuing breach of s. 106 and s. 107 of the *Act* and that it amounted to the following:

…

> *… a change to terms and conditions of employment contrary to the statutory freeze provided in the PSLRA. Further, by waiting until the current advanced stage of bargaining to set out its position regarding existing memoranda and letters of understanding, the Employer has breached its duty to bargain in good faith and make every reasonable effort to reach a collective agreement.*

…

[31] The complainant also objected to the position that any other MOAs not listed in the Kowal letter would be deemed to be of no force and effect. It submitted that, "… the Employer must clearly identify any terms or conditions of employment that it intends to vary, in addition to providing proper notice of such an intent sufficiently in advance of bargaining…".

[32] At the hearing, the complainant and the respondent provided witnesses to testify as to what was said by Mr. Kowal at the August 5th negotiation session. The witnesses' testimony on the issue was inconsistent.

[33] The testimony brought by the Association suggests that Mr. Kowal stated his intention to disavow himself of all MOAs as of that date and not to enter into any more MOAs going forward.

[34] The testimony of the respondent's witnesses provided a different perspective. It suggests that Mr. Kowal did not state an intention to disavow himself of the MOAs as of that date but rather stated that he did not know about their future, as he was waiting for a legal opinion on the matter and that he thought the Association should consider making a proposal to put the content of the MOAs on the negotiating table for inclusion in the collective agreement.

[35] When asked about his comments at the bargaining session in question, Mr. Kowal testified that he had been asked by Mr. Noël about the MOAs' status in light of the alleged problems that had arisen with the Hurley retirement grievance, as the CMCFA said it would withdraw from the bargaining table if the MOAs were not confirmed.

[36] Mr. Kowal testified that he replied to Mr. Noël by saying that he had requested a legal opinion after learning there may be as many as 10 MOAs, and that when pressed further about the MOAs' status and the potential to sign new ones he stated "I don't know what I don't know." He also testified that he told the bargaining group, "why not take the approach that there will be no more MOUs and no new MOUs?" When asked to clarify that statement, Mr. Kowal testified that he replied by stating "I don't know what I don't know," as he was waiting for the legal opinion.

III. Issues

[37] There are two issues to decide, as follows:

A. Is there evidence that the respondent has violated section s. 107 by failing to observe a term or condition of employment?

B. Did the employer breach the s. 106 duty to bargain in good faith?

[38] The complaint is filed under the authority of s. 190(1)(b) and (c) of the *Act*, which states:

> ***190 (1)*** *The Board must examine and inquire into any complaint made to it that*
>
> …
>
> ***(b)*** *the employer or bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> ***(c)*** *the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions).*

[39] Sections 106 and 107 of the *Act* states:

> ***106*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> ***(a)*** *meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> ***(b)*** *make every reasonable effort to enter into a collective agreement.*
>
> ***107*** *Unless the parties otherwise agree, and subject to subsection 125(1), after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day on which the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> ***(a)*** *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
>
> ***(b)*** *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

A. Is there evidence that the respondent has violated section s. 107 by failing to

observe a term or condition of employment?

[40] The Hurley grievance was presented as relevant background to the matter of the MOUs being raised by Mr. Noël. Counsel for the complainant argued that it was not necessary for me to make a finding on the Hurley retirement matter to uphold the complaint. As such, I make no finding on the retirement matter.

[41] In further argument on this aspect of the complaint, counsel for the complainant stated that the October 30, 2015, letter from Mr. Kowal, on its own, was sufficient for me to uphold the statutory freeze violation complaint, as that letter clearly sets out three MOAs that the respondent said it would no longer honour. Counsel also relied upon the testimony of the Association witnesses who stated that at the August bargaining session, Mr. Kowal said that MOAs would no longer be recognized. Counsel suggested that I make adverse findings of witness credibility given what he said were the self-serving aspects of Mr. Kowal's testimony.

[42] Counsel for the complainant then provided detailed submissions on how each of the three MOAs the respondent contested should be found to be a term and condition of employment and therefore binding upon the respondent once collective bargaining began, in support of the submission that the letter and the bargaining declaration were violations.

[43] I note with importance that none of these submissions point to any evidence adduced before me that shows a benefit was actually denied to a member or to the Association collectively. Rather, the complainant argues that the statements allegedly made at bargaining, as well as the previously noted letter, amount to a crystallization of the respondent's position with respect to the respective MOAs and that I should find that the s. 107 statutory freeze has been violated.

[44] The complainant relies upon a Board decision that found that even if some aspects of a grievance are anticipatory or prospective, if "a real difference between the parties has crystallized, and elements of certainty in implementation exist, the matter will not be considered premature."

[45] A difference will have crystalized if the employer's actions suggest a breach of the collective agreement. That could be an active statement of intent to implement or a notification of a change in shift schedule (see *Barr v. Treasury Board (Department of National Defence)*, 2006 PSLRB 85 at paras. 126 and 127, citing, in the case of the shift schedule, *Leger v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-18740

and 18616 (1989)).

[46] *Barr* considers a matter of alleged gender- and age-based discriminatory fitness testing standards for firefighters that had been newly created. The adjudicator in *Barr* had evidence that in the past some firefighters had suffered injuries and death related to heart and blood pressure illnesses during testing as they tried to comply with the fitness standards (see paras. 10 to 13). In considering whether he could accept the human rights case, the adjudicator noted the practice of "obey now and grieve later", a standard practice that would require the firefighters in the matter before him to undergo the fitness testing and then grieve it afterwards. However, the adjudicator accepted jurisdiction to hear the human rights complaint based upon the new fitness standards being published, finding that it was in the greater interests of both parties to accept the case before any firefighter was subjected to what might later be found to be discriminatory testing standards prohibited by law (see paras. 132 and 133).

[47] In *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68, Adjudicator Homier-Nemé found that the unilateral alteration of removing Parliamentary translators' ability to change their work schedules when Parliament is not sitting, while keeping their pay supplement, was a violation of the s. 107 statutory freeze. The Adjudicator found that it is irrelevant that a practice is not included in a clause of the collective agreement, as the determining factor is whether a term or condition of employment was in force at the time bargaining commenced that could be in a collective agreement. She also found that the *Act* and relevant case law provide for preserving the employer-employee relationship for reasons of business as usual, even if that contradicts the collective agreement. She also noted the very wide interpretation of what constitutes a term and condition of employment and cites the Federal Court of Appeal decision in *R. v. C.A.T.C.A.*, [1982] 2 F.C. 80, which held that after consultation, a term or condition of employment can take the form of an agreement or unilateral exercise of management authority and also that terms that may be included in a collective agreement are also protected by the statutory freeze provisions of the statute (para. 72).

[48] Counsel for the respondent submits that the evidence before me at the hearing does not show that any Association member or the Association collectively was denied a benefit and also submits that its actions during the events before me were at all times lawful pursuant to the management rights granted under the *Financial Administration Act*.

[49] Specifically, counsel states that the alleged term and condition of a specific sum of money being provided for language training in MOA #2, dating back to 2008, simply referenced that one year's budget allocation and that budget allocations are in no way controlled by the RMC. Counsel further stated that faculty members do indeed have the right to apply to language training but that is pursuant to an NJC directive and the *Official Languages Act*.

[50] I accept the respondent's submission that a budget allocation is not a term and condition of employment and does not properly form a part of a collective agreement. More importantly, it has not been shown in the evidence before me that any faculty member was denied language training. Therefore I conclude that allegation has not been proven by the complainant.

[51] Counsel for the respondent replied to the allegations that Mr. Kowal stated he did not follow MOA #3 about quotas for performance ratings by stating that, regardless of Mr. Kowal's statements, the evidence showed that in fact, the performance ratings were granted in such a manner as to comply as much as was possible (given the fact that the number of staff already at the most senior step of increments made the precise percentage of the target unattainable) with the quotas allegedly in place under that MOA so that no faculty member was denied her or his performance rating and related pay increment.

[52] Counsel for the complainant argued that the fact that the precise quota could not be granted as most of the faculty were already at the highest pay increment should not allow the respondent to argue that the MOA was frustrated and of no force and effect. Counsel for the complaint did not argue that any faculty were denied their proper performance rating or increment, but rather that the MOA was still valid and in force at the time of collective bargaining, as the MOA stated that the award of performance ratings and salary increments was dependent upon available quota.

[53] Given the evidence and arguments, I conclude that no benefit was denied.

[54] Finally I note that counsel for the respondent argued that MOA #6 governing the cap on leave carry-over was no longer in force, as it was not being followed by either party as faculty members had large volumes of leave accumulated that went far beyond the cap stated in the MOA, and further, that management had not been forcing staff to use up accumulated leave, nor had any accumulated leave been struck from any staff's entitlements.

[55] On that point, counsel for the complainant argued that it was the duty of management to enforce terms of employment and that the non-observance of the cap did not allow for deeming the MOA no longer in force. Counsel did not point to any evidence of a faculty member being denied any leave or having their volume of carry-over reduced.

[56] Counsel for the respondent argued that given the lack of evidence that any benefit was denied, I should find the statutory freeze provisions of s. 107 were not violated. She points to the Board decision in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 ("*PSAC* 1") at para. 69, which found as follows:

> ***[69]*** *I find compelling the argument that the triggering event for the complaint is the date that the terms and conditions of employment that are frozen are no longer observed. There can be no contravention of the* [Public Service Labour Relations Act] *until the terms and conditions of employment are changed.*

[57] More recently, the Board cited *PSAC* 1 with approval in *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11, aff'd 2019 FCA 41 ("*PSAC* 2"), and *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16, aff'd 2019 FCA 41 ("*PSAC* 3"), both of which state that there can be no contravention of the *Act* until the terms and conditions of employment are changed and that the triggering event is the new policy's implementation date (see para. 37 in *PSAC* 2 and para. 10 in *PSAC* 3). Those 2017 cases also note the same finding of the Board in *CSN v. Treasury Board*, 2016 PSLREB 47.

[58] In conclusion on the allegation of a breach of the s. 107 statutory freeze, I listened to oral testimony, reviewed documentary evidence, and carefully considered well-prepared arguments citing jurisprudence about the matter of what is a term and condition of employment and whether the various MOAs at issue in this matter were binding upon the respondent.

[59] After careful consideration of all the evidence, arguments, and jurisprudence, I accept the respondent's submission on this matter that there is insufficient evidence for me to conclude that the respondent failed to observe any or all of the terms and conditions of employment at issue. The statements and letter by Mr. Kowal do not in themselves, amount to a violations of the statutory freeze provisions – they are not in and of themselves a triggering event, as described above. Further, the complainant

did not lead any other evidence to demonstrate that one of its members had been actually denied any of benefit provided by the MOAs.

[60] I conclude that the bargaining agent has not met the burden of proof upon it to adduce clear, cogent, and convincing evidence upon which I can find on a balance of probabilities that the employer committed acts which amounted to a failure to observe terms and conditions of employment, which would have breached the statutory freeze.

B. Did the employer breach the s. 106 duty to bargain in good faith?

[61] The Association argued that the oral and later written statements by the employer, indicating that MOAs would no longer be honoured and that no MOAs would be agreed to in the future, show intent to not seek a new collective agreement. The Association also argued that by making such statements well into the collective bargaining process, the employer undermined the Association's bargaining effort, as it would be required to re-do its preparation to consult members and consider new bargaining proposals.

[62] The Association submits that the MOAs (save for one that it admitted at the hearing is now out of date and is no longer of any force or effect) are terms and conditions of employment, and that if explicit notice is not given at the outset of bargaining that a party wishes to table new proposals for negotiations, the terms are then binding through the duration of the next collective agreement.

[63] The Association adduced evidence that it used to argue that the collective bargaining process was well advanced when it learned of the employer's position on the MOAs.

[64] The respondent argued that the Association was in fact told in the notice to bargain that the subject matter of one of the MOAs was proposed for amendment and that they had constructive notice of another MOA being an issue, as witnessed by the Hurley retirement grievance. The respondent also noted that each party's notice to bargain expressly reserved the right to make new proposals.

[65] The employer also argued that the bargaining was at most at the halfway stage, and that the Association had been invited to make new proposals if they wished items from the MOUs to be considered in collective bargaining as potential new text in the collective agreement.

[66] On February 28, 2014, employer transmitted a notice to bargain to the Association, as required under s. 105 of the *Act*, thereby initiating collective bargaining. Mr. Noël testified that the parties agreed to an initial series of four bargaining sessions as follows:

- November 3 to 5, 2014 — Mr. Noël testified that the employer began by tabling a list of proposals and supporting justifications. The Association presented and explained their proposals on the second day. He said that the employer was "obsessed with Article 19 - sick leave". He added that nothing was agreed to at the first session.

- December 10 to 12, 2014 — Mr. Noël testified that the employer remained preoccupied with sick leave and that workload was also discussed at the bargaining table.

- February 10 to 12, 2015 — leave provisions were negotiated.

[67] Mr. Noël testified that there was no mention of the MOAs during those first three bargaining sessions. He also stated that there were 11 proposals agreed to during those first three sessions, nine from the employer.

[68] Mr. Noël explained that problems arose at the next scheduled bargaining session in August 2015. He testified that in a sidebar discussion with Ms. Lefebvre, the issue of the Retirement MOA arose with Professor Hurley and his interest to give notice of his retirement. Mr. Noël testified that before that August conversation, he had previously shared with Ms. Lefebvre his concerns that RMC's position was that the MOAs were not binding and enforceable.

[69] He testified that the matter arose from Professor Hurley's proposed retirement and his resulting grievance, dated June 1, 2015, of this matter. Mr. Noël described how he had negotiated a retirement MOA in 2007 that provided the College with three years notice of a faculty member's desire to retire.

[70] In his grievance, Mr. Hurley states as follows:

> …
>
> *In the meeting of 27 April, Dr. Kowal said that he would not abide by past practice and would ignore the three-year retirement plan endorsed by his predecessors at RMCC, thus deviating from established practice and the documented terms*

and conditions of employment at the College currently in force.

…

[71] As a remedy, the grievance requests that "… the Principal comply with the CMCFA Collective Agreement and the *PSLRA* by upholding past practice and abiding by the terms and conditions of employment as outlined in the 1 July 2007 MOA and all related policies and documents."

[72] Mr. Noël then described how after the employer stated in response to the Hurley retirement matter that in its view the MOAs were not binding or enforceable, he raised the issue with Ms. Lefebvre. He testified that she replied that the Treasury Board had requested a legal opinion about whether the MOAs are terms of employment.

[73] Upon returning to the bargaining table that same day after this brief conversation with Ms. Lefebvre, Mr. Noël testified that Mr. Kowal addressed the negotiating teams and stated that, in order to set-up the Association for success, he wished to inform them that he did not consider the MOAs as terms and conditions of employment. Mr. Noël further testified that Mr. Kowal also stated that the MOAs were not considered to be terms and conditions of employment, they would not be renewed and that there would be no new MOAs agreed to.

[74] Mr. Noël testified that he was "very upset" to hear from the College principal that the employer does not recognize the MOUs as terms and conditions of employment, and he replied to the negotiating teams that he was very disappointed to hear that as the Association saw MOAs as the only way to resolve local issues. He added that he then told the group that in light of the employer's pronouncement, the bargaining agent would have to re-examine all of its proposals and then led his team in departing the bargaining table. Mr. Noël stated that the parties never returned.

[75] Mr. Noël testified that after August 5, 2015, the employer had not indicated that they will renew MOAs as either stand-alone documents or as part of the collective agreement.

[76] Mr. Noël also testified that the Treasury Board "is adamant" that collective agreements are standardized across the country. He shared his opinion that that standardization risks the Association's ability to address locally relevant issues for its members. He stated that the MOAs can address such issues that fall outside of the Treasury Board's negotiating mandate. He added that the Treasury Board is at the table as an observer to the MOA negotiations but that they are not a party as the MOAs

are local agreements struck between the Association and the College principal. Mr. Noël opined that he could not envision a collective agreement without MOAs, as he said almost every college in Canada has them.

[77] Mr. Noël explained that the MOAs are dealt with at the bargaining table to give them credibility. He would not waste his time discussing them if they were not enforceable. He also stated that the MOAs' substance was not negotiated into the collective agreement as it was his understanding that the Treasury Board had no mandate to allow it, thereby making that idea unfeasible. Mr. Noël then testified that in his view the MOAs were the only tool available to address local issues.

[78] In discussing the MOAs' negotiation history, Mr. Noël testified that he had been at the bargaining table in 2007 and that the employer had tabled a proposal before bargaining to eliminate severance for voluntary resignations. He added that he had never seen the employer table a new proposal mid-way through collective bargaining, but acknowledged that both parties' written proposals used to begin the current round of bargaining stated, "The Association reserves the right to present other proposals…and table counter proposals…" (p. 4 of 94 of the Association proposal dated October 22, 2014). Mr. Noël added that in his view, this right to present other proposals was limited to the articles of the agreement that had already been identified.

[79] Mr. Noël added that if in fact, the employer now commits to honour the Retirement MOA until a new collective agreement is signed, that this still causes the Association a major problem as it will then have to reconsider its negotiating proposals and again canvass members for their input as the value that would be lost by this MOA expiring would need to be built into new proposals for the collective agreement to ensure members don't lose that benefit or that they be compensated for the same value in another part of the new agreement.

[80] Mr. Noël described how in the Association's view, each of the other MOAs remains in force and is of great importance to the faculty, except for MOA #8, which it concedes was of limited temporal application that has now passed. Each would take considerable work by his negotiating team to prepare proposals to table for negotiation in the bargaining sessions, if that was required.

Mr. Noël acknowledged in cross examination that the MOA is a tool to be able to channel an issue of importance to the faculty into their collective agreement. He also confirmed that, in fact, the parties successfully negotiated a professional development allowance

that had been the subject of a previous MOA dated May 12, 2008, into a new clause of the collective agreement in the 2011 bargaining. He added in re-direct testimony that while this MOA was indeed transitioned into the collective agreement, it was done so as part of the proposal tabled at the outset of bargaining.

[81] Ms. Barbara Falk, a CMCFA legal officer, testified that while she could not remember Mr. Kowal's exact words in the August bargaining session, she was left with the clear impression that as of that moment the employer would no longer honour any of the MOAs and that no new ones would be considered in the future. Ms. Falk added that she understood that to mean that as of that moment, the MOAs were no longer in effect.

[82] Ms. Falk also added that once Mr. Kowal's October 30, 2015, letter was received, the bargaining agent believed that it would have to re-do all the preparatory work to survey its members to seek their input and re-evaluate bargaining options and seek legal counsel to inform new bargaining positions if it were to consider making proposals to incorporate some, or all, of the subject matter of the MOAs into the collective agreement.

[83] In her cross-examination, Ms. Falk stated that she was not aware of the Association approaching the Treasury Board to ask if it was possible to have the MOAs' subject matter negotiated into the collective agreement.

[84] The employer called Ms. Lefebvre to testify. She was the lead negotiator representing the Government of Canada through the Treasury Board, and the client department, in the collective bargaining process. She testified that she had first been assigned to work on the negotiations between the parties in 2006 and that this matter's round of bargaining was her third.

[85] Ms. Lefebvre testified that the Treasury Board has no policy with respect to local agreements or MOAs as they fall outside of the collective agreement. She said that she had no knowledge of the MOAs' existence in 2006, when she joined the employer's negotiating team, but became aware of the RMC principal at that time working on MOAs himself. She said that there was no mention of the MOAs in the preparations for collective bargaining. When asked if she had ever agreed to a union request to renew the MOAs, she replied that she had not.

[86] Ms. Lefebvre testified that in 2011, the parties had agreed to hold an expedited

round of bargaining that was limited to a brief and finite list of items, and at the end of bargaining Mr. Noël said "what about the MOAs?" and she replied that they were not a part of the collective agreement and that she would not comment upon them. However, she testified that the then principal, Mr. Sokolsky, replied to Mr. Noël that he would agree to renew all the MOAs. Ms. Lefebvre added that she was not aware of the issue being discussed again after that.

[87] Ms. Lefebvre testified that she held discussions and exchanged written communications with the Association in preparation of the 2014 bargaining and that the issue of MOAs never arose. She said that going into the August 2015 bargaining meetings she thought the parties were approximately halfway to reaching an agreement.

[88] She testified that the issue of MOAs in the context of the most-recent round of bargaining first came to her attention around the time of the August 2015 bargaining sessions, due to the Hurley grievance being filed. That caused the Association to raise the issue of three other MOAs dating back to 2007 and whether they would be renewed. She testified that once the matter was brought to her attention by the Association, she sought to obtain a legal opinion on the MOAs' status. She stated that when she discussed the issue with Mr. Kowal, he told her that if the legal opinion found that the MOAs were binding until a certain time, he would respect that.

[89] She added that when asked by Mr. Noël, she advised him that the legal opinion would not be finished in time for the August 2015 bargaining meetings and that she would not share it with him when it was ready; rather, the Principal would reply. Ms. Lefebvre testified that Mr. Noël then advised her that the Association would stop negotiations if there was not agreement on the MOAs.

[90] Ms. Lefebvre also testified that it was only due to the Association raising the Hurley grievance issues with her that she thought it was necessary to seek a legal opinion about the status of the MOAs. She added that at the time of the Hurley grievance discussion, and at the August 5 bargaining session's outset, Mr. Kowal told her that he wanted all the agreements with respect to the faculty in the collective agreement, as he did not want to have anything contained in MOAs.

[91] Ms. Lefebvre stated that after the Association left the bargaining table she contacted them several times, starting in August 2015, expressing a desire to resume bargaining. She testified that she told the Association that they could raise the issue of negotiating the MOAs' contents into the collective agreement if they wished.

[92] Her December 7, 2015, email to Mr. Noël to that effect was tabled as an exhibit. In that email she states as follows:

> …
>
> *You have indicated that the CMCFA refuses to resume bargaining until the resolution of its unfair labour practice complaint. While the parties have met for a few sessions of negotiations since the notice to bargain was issued, an agreement was not imminent at the last session in August 2015 and bargaining remains outstanding on a number of proposals.* ***There is still time to discuss the subject-matter of the Letters of Understanding and practices at issue in the complaint at the bargaining table, and the Employer is prepared to consider in good faith to proposals that the CMCFA might want to make on those subjects.*** *The pending litigation is not a valid reason for the CMCFA to refuse to meet to bargain in the circumstances.*
>
> *I trust that we can recommence bargaining in the New Year.*
>
> …
>
> [Emphasis added]

[93] When asked about her authority and mandate in collective bargaining, Ms. Lefebvre testified that her mandate is "always evolving" in a negotiation. In her cross-examination she admitted that by the 2011 negotiation she had seen at least half of the pages of all the MOA text.

[94] However, she was not aware what, if any, role the various MOAs played in the collective agreement's ultimate finalization, as she said she had no role in the content or discussions leading to agreement that related to the MOAs.

[95] Ms. Lefebvre also testified in cross-examination that Mr. Kowal seemed surprised by his discovery of the MOAs' existence, which was due to the Hurley grievance. She said that when the Hurley matter arose, he told her that he was concerned about the possibility that there were more MOAs that he was not aware of and that in the future, he did not want any more MOAs agreed to. Rather, he told her that he wanted all such agreed upon issues to be contained in the collective agreement.

[96] When asked if Mr. Kowal told her that the existing MOAs would not be renewed, she said that was not correct as he had never told her that. Ms. Lefebvre confirmed again in cross-examination that when bargaining broke down she did not have a mandate from the Treasury Board to negotiate the MOAs' content into the collective agreement. She also confirmed that if the Association wanted to keep the MOAs' content alive in an

agreement, their only option was to try to negotiate it into the collective agreement.

[97] Ms. Lefebvre was then asked whether in December 2015, when she emailed the Association as noted earlier, she had a mandate from Treasury Board to include MOA content in the collective agreement. She testified in response that she did not, but she would not have even sought such a mandate as the Association had not yet proposed it, and she would not seek a mandate based upon hypothetical or speculative proposals. She was then asked if it was not unusual to bring entirely new issues onto the negotiating table midway through bargaining, and she replied that no, it was not unusual and that she had seen it done with success in her work with other bargaining agents.

[98] Ms. Lefebvre was asked if specific directions in her mandate on the negotiation of "uniform and streamlined clauses" would preclude her from requesting, or succeeding in any potential request, to have her mandate expanded to include the content of RMC MOAs, and she said that those directions would not preclude her seeking such a revision.

[99] The hearing also took considerable time to hear testimony about discussions that took place away from the workplace where a former RMC principal sought to bring the parties together on matters including the Hurley grievance and possibly in a broader context on MOAs' status and future. Having listened carefully to all that testimony, I do not find it to have any probative value.

[100] Counsel for the complainant argues that by stating it would not consider any further MOAs between the parties at the bargaining table on August 5, 2015, and then again in a letter dated October 30, 2015, after many months of negotiations, the employer breached the statutory duty to bargain in good faith, which began with the employer's notice to bargain dated February 28, 2014.

[101] The complainant points to the notice to bargain and the proposals tabled by the employer as evidence that the MOAs were not included in the list of bargaining topics identified by the employer. The Association also states that the employer cannot unilaterally revoke the MOAs without first providing proper notice of such intent prior to the commencement of collective bargaining.

[102] Counsel for the complainant submits that by the employer's failure to declare such an intention before collective bargaining started, it is now bound by the same MOAs for the entire duration of the next collective agreement.

[103] The complainant argues that the respondent's omission and later declaration at the bargaining table totally undermined the Association's work to bring negotiating proposals to the table and caused it significant harm. If it were to accede to the employer's demand to abandon all MOAs and instead consider negotiating them into the collective agreement, that, would require the Association to incur significant costs of reconsidering its entire negotiating package which in turn would require another canvass for member input and legal counsel etc.

[104] The complainant further argues that the evidence from both Mr. Kowal and Ms. Lefebvre confirm the employer's statement of intent not to even consider concluding any MOAs in the future. That statement is clear evidence of it not wanting to enter into a new collective agreement, thus breaching the s. 106 duty to bargain in good faith.

[105] Counsel for the complainant points to *Maritime Employers Association v. Syndicat des débardeurs, Local 375*, 1999 CIRB 26 at para. 62, which found as follows:

…

> *21. The decision making capability of the parties depends upon not only a full and open discussion of the items which are in dispute but also upon an awareness that the scope of the dispute is limited to those items which have been put into dispute in the early stages of the bargaining process. Decision making does not take place in a vacuum. The parties set the parameters with their early exchange of proposals thereby establishing the framework within which they negotiate. A party which holds back on an item or a number of items and then attempts to introduce these matters into the negotiations as the process nears completion, effectually destroys the decision making framework. A party cannot rationally or properly consider its bargaining position in the absence of absolute certainty that the full extent of the dispute has been revealed. The tabling of additional demands after a dispute has been defined must, in the absence of compelling evidence which would justify such a course, be construed as a violation of the duty to bargain in good faith.*

…

[106] I distinguish *Maritime Employers* on its facts, as Vice Chair Pinard in *Maritime* found that negotiations proceeded quickly, with 12 separate negotiating meetings taking place in a three-month period after the notice to bargain was issued. The parties claimed that up to one-third of all issues had been resolved, with progress made on many others. However, one party felt an impasse had been reached and it subsequently began to table new bargaining requests on several occasions that totalled well over 20 new demands. Such is not the case in the matter before me. In fact, in the contested matter of what was

said by Mr. Kowal at the August bargaining session, he made no new demands or alternately invited the Association to take the matters contained in MOAs and propose that they be drafted into collective agreement clauses.

[107] Counsel for the complainant also noted that the Board had previously relied upon the *Royal Oak* decision in which it found that putting forward a proposal or taking a rigid stance that it should be known the other party could never accept must necessarily constitute a breach of the requirement to bargain in good faith (*Public Service Alliance of Canada v. Canada (Senate)*, 2008 PSLRB 100 at para. 38).

[108] The Board has recently stated on the facts of that case that further evidence would be required to make a finding of bad faith negotiation, such as a party adopting an unreasonably rigid stance or making a counter-proposal that is completely outside acceptable norms, so that concluding a collective agreement would be impossible (*Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19 at para. 71).

[109] In that same case, the Board noted the Supreme Court of Canada's guidance on that matter in determining that the duty to bargain contains both a subjective and objective element. Entering into negotiations is measured on a subjective standard, while making every reasonable effort to reach a collective agreement is measured on an objective standard. "It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable" (*Royal Oak Mines Inc v. Canada (Labour Relations Board)*, [1996] S.C.R. 369 at para. 42). The Supreme Court also stated that collective bargaining is the cornerstone of labour relations in Canada and that as a general rule it should be allowed to function (see para. 98).

[110] Counsel for the respondent points to the fact that the Association was on notice after the Hurley retirement dispute and grievance, and also to the proposal in Article 17.05 dealing with vacation leave, carry-over, and liquidation of vacation leave that was included in the employer's package of negotiating items sent to the Association in the notice to bargain, as evidence that the MOAs were not being left to be re-adopted en masse as in 2011.

[111] Counsel for the respondent also argues that the parties should be allowed the freedom to bargain and that the statement of intent not to conclude any MOAs did

not come near the end of bargaining and that it cannot be construed as receding horizon bargaining.

[112] The employer also suggests the Association is free to propose including some or all of the MOAs' subject matter for potential negotiation into the collective agreement. That renders the Principal's statement that he will not consider having any more MOAs as more of a comment upon their form, not their substance, and as a potential opening bargaining position.

[113] Testimony noted previously shows that the Association convinced itself that an effort to negotiate issues contained in MOAs into the collective agreement could not succeed. However, this view was contradicted by Ms. Lefebvre. Given this testimony of Ms. Lefebvre, I do not find the facts in the matter before me bring this dispute into the realm of the *Royal Oak* case where those parties had a proposal or a rigid stance, which should have been known that the other party could never accept.

[114] Here, it was open to the Association to assert (as they did before me) that the various MOAs of interest to them were terms and conditions of employment protected by s. 107 of the *Act*. Contrary to the October 30, 2015, letter of Mr. Kowal stating "This letter serves as formal notice that the memos and LOUs outlined above and identified as being protected under section 107 of the PSLRA will be maintained until a new collective agreement is signed and will end at that time" (and as the same argued by counsel for the respondent before me) I note that s. 107 would serve to "[continue] in force" each term and condition that "may be included in a collective agreement … **until a collective agreement is entered into in respect of that term** or condition" [emphasis added].

[115] Given the wording of s. 107 that I have just quoted, the employer was indeed open to propose for negotiation the subject matter of the various MOAs if the complainant wished, but each of those terms and conditions would be protected to enure to the benefit of the Association members until, and unless, a new collective agreement is entered into in respect of that term or condition.

[116] The evidence before me suggests the bargaining was, at most, halfway towards concluding a new collective agreement. The complainant was aware of the broad issue of MOAs' status being questioned both by the Hurley retirement dispute and article 17.05 of the employer's original negotiating proposal, as both clearly establish that the employer was not simply going to adopt the full package of MOAs without review

as had been done in 2011.

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

(The Order appears on the next page)

IV. Order

[118] I order the complaint dismissed.

April 17, 2019.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board