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*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

SCOTT BYHRE

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Byhre v. Public Service Alliance of Canada

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

Before: Brian Russell, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Kayla Minor

Decided on the basis of written submissions,
filed September 23 and October 9, 2024.

I. Complaint before the Board

[1] The complainant, Scott Byhre, is a border services officer (BSO) classified at the FB-03 group and level and working with the Canada Border Services Agency (CBSA).

[2] On August 27, 2024, he made this complaint against the respondent, the Public Service Alliance of Canada (PSAC or “the bargaining agent”), alleging a violation of s. 187 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), which deals with unfair representation by a bargaining agent.

[3] The nature of the complaint is that the respondent has allowed the CBSA to use a policy to violate provisions of the Border Services (FB) collective agreement (which expires on June 20, 2026; “the collective agreement”). He alleges that the CBSA requires detector dog handlers to take on duties and responsibilities that are outside their normal work hours and work duties and that it does not compensate them in accordance with the collective agreement. He asked the respondent to file a policy grievance, and it has not done so. As corrective action, he asks that the respondent file a policy grievance with the Federal Public Sector Labour Relations and Employment Board (“the Board”) contesting the CBSA’s policy and the violation of the collective agreement because the respondent has a responsibility to ensure that the collective agreement is respected and followed.

[4] The respondent requests that the Board summarily dismiss the complaint on the basis that the complainant has provided no particulars to show that the PSAC acted in a manner that was arbitrary, discriminatory or in bad faith.

[5] Per s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide any matter before it without holding an oral hearing. I have exercised that authority to decide this case based on the parties’ written submissions.

[6] For the reasons that follow, I uphold the respondent’s preliminary objection and dismiss the complaint on the basis that the allegations do not disclose an arguable case of a breach of s. 187 of the *Act*.

II. Summary of the submissions

A. The alleged violations of the collective agreement

[7] I note that the complainant used the word “policy” in his complaint but that he is referring to the “Part 5: Canine Care and Maintenance, Chapter 3.0: Care and Maintenance Time”, and “Appendix B: Policy on Requirements for DDH Functions” of the CBSA’s *Detector Dog Service Manual*.

[8] The complainant alleges that the policy circumvents the collective agreement for the following reasons:

- by creating a new type of paid leave not found in the collective agreement.
- by requiring an employee to perform the duties of the position seven days a week, with no days of rest.
- by creating hours of work outside contiguous shifts.
- by removing the bargaining agent from participation in negotiating care and maintenance time for its members.
- by allowing the CBSA to use the policy to not compensate for hours worked according to the collective agreement.
- the CBSA is abusing its authority and violating the collective agreement by requiring BSOs to perform work outside their regular scheduled hours and by not paying them in accordance with the collective agreement.

[9] According to his complaint, the CBSA requires detector dog handlers to establish a work location at their personal residence and then perform the work required of the position at their personal residence.

[10] The work that the complainant is referring to is care and maintenance activities, which include the following:

- picking up and disposing of dog waste.
- cleaning and disinfecting kennels and the vehicle.
- grooming and bathing the dog.
- feeding and exercising the dog.
- applying medicine and taking the dog to appointments.
- acquiring dog-related supplies.
- any other activities related to its care.
- maintaining the detector dog as agreed to by the detector dog handler and management.

[11] The complainant alleges that these activities are not performed during regular scheduled hours. They occur before and after scheduled shifts and after returning home from work. They also occur on days of rest, on multiple different occasions.

[12] Part 5: “Canine Care and Maintenance”, Chapter 3.0: “Maintenance Time” of the *Detector Dog Service Manual* indicates that the detector dog handlers are provided maintenance time at a ratio of 1 hour for every 7.5 hours worked during each shift in appreciation of the fact that the care of the detector dog is an ongoing daily process.

[13] The complainant asserts that the detector dog’s care and maintenance is an ongoing and continuing collective agreement violation.

B. Circumstances leading to the complaint

[14] On August 5, 2024, the complainant submitted his application to an appointment process for a detector dog handler position. He indicates in his complaint that if he does not agree to the care and maintenance time compensation of five hours per week, then he believes that he will be eliminated from the process.

[15] The expectations of the detector dog handler position are such that the handler has the responsibility to properly care for the detector dog. Only those able to meet and maintain those expectations can be assigned to detector-dog duties.

[16] On the same date, the complainant also contacted a local Customs and Immigration Union (CIU) labour relations officer about filing a policy grievance related to the CBSA’s requirement for detector-dog care and potential collective agreement violations. CIU is a component of the PSAC.

[17] The next day, the complainant was advised of the following:

- Filing a policy grievance requires the approval of CIU National President Mark Weber and PSAC’s national president.
- His request to file one would be passed on to Mr. Weber.
- Part III of the *Canada Labour Code* (R.S.C., 1985, c. L-2) does not apply to CBSA employees.
- Clause 25.13 of the collective agreement applies to employees on a shift schedule and does not apply to variable-shift-schedule-arrangement workers, including detector dog handlers.
- Mr. Weber would have to consider whether there was any potential negative impact to detector dog handlers if the CIU decided to file a policy grievance and that the CIU would likely contact some detector dog handlers, to test the water.

[18] On August 7, 2024, the complainant asked the respondent whether there was a time frame in which to receive a response and asked to be advised within 10 days about its decision on his request to file a policy grievance.

[19] The respondent asked the complainant to explain his concern about timeliness and explained that the CIU might want to meet with the CBSA to discuss before it decided to file a policy grievance. The complainant advised it that his concern related to his application for a detector dog handler position in the CBSA's Pacific region and the August 7, 2024, deadline to submit his application.

[20] On August 27, 2024, the complainant followed up with Gus Kontagianis, 4th National Vice President, CIU, about his request to file a policy grievance.

[21] On September 6, 2024, Mr. Kontagianis emailed the complainant and shared the same information that was provided to him in August 2024. He also advised the complainant as follows:

- The policy that is administered is flexible, and each detector dog handler has autonomy.
- Pushing this issue forward would enable the CBSA to come up with a uniform standard for scheduling, which it would likely monitor, and would remove all autonomy from individual detector dog handlers.
- The CIU would not want to negatively affect the detector dog handler community at large.
- He asked whether the complainant:
 - had support from the community and whether the other detector dog handlers felt the same as he did; and
 - would be able to obtain names and signatures of support from others, to move forward.
- He stated that without broad support from the dog-handler community, it might not be prudent to file a policy grievance.

[22] I note that the respondent's response on September 6, 2024, came after the complaint was made, but it provides context.

C. The respondent's motion to dismiss

1. For the respondent

[23] The respondent argues that the complainant did not establish a *prima facie* case that it acted in an arbitrary, a discriminatory, or a bad-faith manner and submits that the complaint should be dismissed without an oral hearing.

[24] It argues that the duty of fair representation does not require a bargaining agent to file a policy grievance at a member's demand. The bargaining agent has the right to file a policy grievance, not an individual member.

[25] It contends that a disagreement with the complainant over not filing a policy grievance does not give rise to a breach of the duty of fair representation.

[26] According to the respondent, its representatives diligently considered and responded to the complainant's request to file a policy grievance. They advised him that they had to consider the potential negative consequences if they filed one and that broad support from other detector dog handlers would be required.

[27] In addition, one of the representatives for the respondent requested additional information from the complainant including names and signatures of the other dog handlers who would support this policy grievance. According to the respondent, the complainant has not provided this information to date.

2. For the complainant

[28] The complainant argues that a policy grievance is appropriate in this case because the respondent has the exclusive right to file one, and he cites the policy-grievance clause of the collective agreement to support his position. He argues that the exclusive right of the respondent to file a policy grievance creates an obligation for it to file a policy grievance because of a policy that directly assumes authority and contradicts the collective agreement. He contends that the policy itself will provide *prima facie* evidence of the violation of the collective agreement.

[29] He argues that he has an arguable case. Part 5: "Canine Care and Maintenance", Chapter 3.0: "Maintenance Time", and Appendix B: "Policy on Requirements for DDH Functions" of the CBSA's *Detector Dog Service Manual* violates the collective agreement because it requires employees to work outside contiguous hours in their mornings, evenings, and weekends and because it provides them with care and maintenance time that is not based on the collective agreement's provisions.

III. Reasons

[30] The issue before me is the respondent's request to dismiss the complaint without an oral hearing. To decide that issue, I must determine whether, by taking the complainant's alleged facts as proven, there is an arguable case that the respondent breached its duty of fair representation. I have considered proven all the facts that he alleged, and I find that he has no arguable case that the respondent violated its duty of fair representation to him.

[31] *Sganos v. Association of Canadian Financial Officers*, 2022 FPSLRB 30, at paras. 77 and 78 lays out the arguable case analytical framework as follows:

[77] The arguable case analytical framework is similar to the framework adopted in civil actions in preliminary motions to strike pleadings. I draw on the Supreme Court of Canada's analysis in Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), in which it held that the test to be adopted on preliminary motions to strike pleadings is the "plain and obvious" test. In applying this test, courts assume that the facts as stated in the pleadings can be proved; in other words, the bare facts stated in the pleadings are assumed to be true. Upon that foundation, the court must then consider whether it is "plain and obvious" that the pleading discloses a reasonable cause of action.

[78] In Hughes v. Department of Human Resources and Skills Development, 2012 PSLRB 2, the complainant in that case made a complaint against his employer, alleging several violations of s. 186(2) of the Act. The former Board dealt with, among other issues, the respondent's objection that the complainant had failed to demonstrate on the face of the complaints that the respondent was in violation of the statutory provisions. In other words, the complaints did not disclose an arguable case of a violation of the statutory provisions. In addressing this preliminary objection, the former Board framed the issue as follows:

...

86 ... The parties were asked to address whether the three complaints before me reveal, on their face, an arguable case of a violation of the *PSLRA*. **The parties were asked to specifically address whether, if the Board considered all the facts alleged in the complaints as true, there is an arguable case that the respondent contravened the unfair labour practice legislative provisions of the *PSLRA*.**

...

[Emphasis added]

[32] *Gonzague v. Professional Institute of the Public Service of Canada*, 2024 FPSLRB 38 at paras. 60 to 64, outlines what is required to demonstrate an arguable case in a duty of fair representation complaint. The complainant's allegations must suggest that the respondent's actions could be considered arbitrary, discriminatory, or in bad faith. It goes on to state that a complainant's unhappiness or disagreement as to how a bargaining agent handled a grievance is not sufficient to demonstrate a breach of s. 187 of the *Act*.

[33] In this case before the Board, the complainant disagrees with the bargaining agent's decision not to file a policy grievance. That is not sufficient to demonstrate a duty of fair representation breach.

[34] *Gonzague* also states that the Board's role is not to second-guess the bargaining agent by assessing the merits of its actions or its decisions, to determine whether they were appropriate, and that the duty of fair representation should not be used as an attempt to resolve disputes between a complainant and their employer.

[35] The Board's role in this duty-of-fair-representation complaint is not to decide whether the respondent was right or wrong in its decision not to file a policy grievance. The Board's review must focus on the representation that the respondent offered and the process that it followed in reaching its conclusion, specifically whether it made its decision without discrimination, in an objective and honest manner, and after a thorough review of the case, the issues, and its members' interests (see *Payne v. Public Service Alliance of Canada*, 2023 FPSLREB 58 at para. 68).

[36] In this case, the complainant contacted the respondent about filing a policy grievance with respect to detector-dog duties. The respondent explained the process that it follows to file a policy grievance, provided its assessment as to how Part III of the *Canada Labour Code* and clause 25.13 of the collective agreement did not apply, advised that it would have to balance the potential negative impact to detector dog handlers were a policy grievance filed, and indicated that it would likely contact some detector dog handlers, to test the water.

[37] I note that the complainant and the respondent exchanged emails after the complaint was made. It asked him whether he had support from the dog-handler community about filing a policy grievance. He did not provide any information demonstrating that he had secured that support.

[38] Despite the complainant's detailed submissions concerning the alleged merits of a policy grievance, I find that he has not alleged facts that support an arguable case that the respondent breached its duty of fair representation. Aside from claiming that the bargaining agent should file a policy grievance, there is no allegation that he was treated in a way that was arbitrary, discriminatory or in bad faith. Again, the complainant's unhappiness or disagreement concerning whether a policy grievance should be filed is not sufficient to demonstrate a breach of s. 187 of the *Act*.

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

(The Order appears on the next page)

IV. Order

[40] The respondent's preliminary objection is upheld.

[41] The complaint is dismissed.

March 24, 2025.

**Brian Russell,
a panel of the Federal Public Sector
Labour Relations and Employment Board**