

Crown Employees
**Grievance Settlement
Board**

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GSB# 0001/03
UNION# 2003-0999-0012

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Union Grievance)

Grievor

- and -

The Crown in Right of Ontario
(Management Board Secretariat)

Employer

BEFORE

Susan L. Stewart

Chair

FOR THE UNION

Paul Cavalluzzo
Cavalluzzo Hayes Shilton McIntyre & Cornish
Barristers and Solicitors

FOR THE EMPLOYER

Christopher Riggs
Hicks Morley Hamilton Stewart Storie LLP
Barristers and Solicitors

FOR THE INTERVENOR

Lorne Richmond
Sack, Goldblatt Mitchell
Barristers and Solicitors

HEARING

April 15, 2003.

DECISION

This decision deals with an application for interim relief in relation to the Employer's intention to implement a process for employee security checks on Thursday, April 17, 2003. The application was made by OPSEU, in connection with a Union grievance dated April 1, 2003. AMAPCEO intervened in this proceeding, in connection with a grievance dated April 9, 2003. The Unions seek an order prohibiting the Employer from proceeding with this process until such time as the Grievance Settlement Board has disposed of the grievances on their merits. The Employer opposes such an order.

I will deal with the circumstances giving rise to the grievances in a summary manner. On January 23, 2003, the Employer presented the CERC committee with a document entitled "Bargaining Agent Consultations Employee Security Checks", which is described as a "Proposal for Discussion and Consultation Only" attached to which is a document entitled "Employee Security Checks Operating Policy" which is described as a "Confidential Working Draft for Discussion Only". Ms. M. Simmons, who testified on behalf on OPSEU in this proceeding, and is Co-Chair of the CERC committee, stated that this was the first formal notification of this initiative, although she was aware that the Employer had been considering such an initiative. The Union

put the matter on the agenda for a subsequent MERC meeting, however the Employer advised that it would not be discussed there. Arrangements were made for a discussion of this matter between OPSEU's general counsel, Mr. T. Hadwen, and an Employer representative to be held on April 9, 2003. At a multi bargaining agent information session on March 26, 2003, the OPS bargaining agents were presented with a document entitled "Personnel Security Checks Bargaining Agent Disclosure" as well as a "Questions and Answers" document, described as a "Confidential Draft". At this time the bargaining agents were advised that the process would commence within two weeks, although the disclosure document indicates that "consultation meeting[s] are planned for April 2003 to discuss bargaining agent feedback to proposed policy and its implementation". Ms. Simmons was unchallenged in her testimony that implementation was presented on March 26, 2003, as a "fait accompli". Ms. Simmons was also unchallenged in her testimony that a "final" operating policy has not been presented by the Employer.

Security checks of various kinds have been in place in certain ministries for some time, particularly and most understandably in ministries such as corrections. The rationale for expansion is expressed in some of the material prepared by the Employer and articulated by Mr. Riggs at the hearing as arising from heightened security consciousness throughout the world, particularly in light of the extent to which the business of the province is conducted electronically and the importance of protecting

the integrity of identity documentation. In connection with the integrity of identity documentation, reference was made to “cross certification”, that is providing the same level of security certification of employees as that existing federally in connection with information that is exchanged between these levels of government.

The implementation process in connection with this initiative is scheduled to commence April 17, 2003, affecting about 2,000 employees. It is to affect two groups in Management Board, those who operate and support the Public Key Infrastructure system, the system that supports the electronic delivery of government services and those in corporate systems security. These employees will be subject to CPIC (Canadian Police Information Centre) checks as well as a credit check. It is also to affect employees in the Ministries of Health and Long Term Care, Consumer and Business Services and the Ministry of Transportation where identity documents such as drivers’ licences, birth certificates and health cards are created. These employees are to be subject to CPIC checks, local police checks to “identify whether the employee is known to the police”, fingerprint checks, national security checks and credit checks. The rationale for credit checks is expressed in the March 24, 2003 disclosure document as follows:

a satisfactory credit rating will indicate that employees/
prospective employees have no serious financial circumstance
that might make them vulnerable to using sensitive, private
identity information for personal financial gain or to be in a
position to be coerced into providing confidential identity
information

The first step in implementing this initiative is the execution of a consent form by the employee. In the absence of the consent form the Employer would not be able to obtain the checks. If an employee refuses to execute a consent form, the draft policy indicates that the employee will be removed from the position designated as requiring a security clearance. Similarly, if the security clearance is not granted, the employee will not be able to remain in the position.

The first matter to be addressed is the Board's authority to issue the interim order requested. On behalf of the Employer, Mr. Riggs argued that the Board has no such authority. This argument was previously advanced before the Board in Ontario Human Rights Commission & OPSEU (Fox et al) 0507/01 (Stewart), in connection with an analogous matter and was rejected. In that decision, reference was made to the fact that the Board's authority in this regard has been addressed in judicial review. The Board has established a consistent body of jurisprudence in this regard, in accordance with the Court's ruling, including an order for interim relief in connection with a major government policy initiative relating to divestment. The arguments advanced by Mr. Riggs do not provide a basis for a departure from the established jurisprudence of this Board. I do not view the order sought here as within the realm of an "anticipated breach", referred to in Ministry of Labour & OPSEU (Nield), 1471/96, (Roberts), as suggested by Mr. Riggs. As of March 26, 2003, the initiative which gives rise to the

grievances was in effect, a “fait accompli”. Accordingly, I reject the submission of the Employer that this Board is without jurisdiction to issue the order requested. Given this conclusion there is no need to address Mr. Richmond’s submission in relation to the Statutory Powers Procedure Act.

I turn now to the merits of the interim relief application. The granting of interim relief requires me to be satisfied that the applicant has an arguable case and that a balance of convenience or harm favours the applicant.

There are a number of bases upon which OPSEU and AMAPCEO take issue with the Employer’s initiative. These include the contentions that it does not meet the test of a reasonable rule pursuant to the management rights provisions of the Collective Agreements, that it does not accord with the provisions of the Freedom of Information and Privacy Act, and that it violates certain Charter rights. The Employer’s position is that the arguments raised by the Unions are without merit. The merit of any and all positions advanced by the Unions is, of course, to be determined after full evidence and argument. However, my review of the authorities and the submissions of counsel thereon compel me to the conclusion that there is an arguable case.

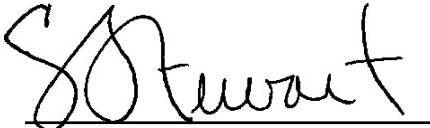
I turn now to the issue of the balance of convenience and potential harm. The Employer has identified security considerations as the rationale for its actions. The

Employer is clearly desirous of proceeding with dispatch, to the extent that it decided to proceed with the initiative notwithstanding the fact that the level of consultation contemplated in connection with this initiative had not transpired and the policy pursuant to which these security checks remained in draft form. However, on the information before me, concrete, immediate concerns are not readily apparent. In particular, in relation to the matter of “cross certification”, there was no indication the province’s ongoing relationship with its federal counterparts is in any way in jeopardy if the status quo that has existed for many years in these Ministries continues pending the resolution of this dispute. In contrast, if the initiative is allowed to proceed, there is potential harm that could not be remedied by an award of damages, should the Unions ultimately be successful. There is no way to actually reverse a fingerprinting exercise. The displacement of employees removed from their jobs because of a refusal to consent to a security check or because of an unsatisfactory security check can be remedied on a going forward basis but not retroactively. The questioned integrity of those who may be displaced because of an unsatisfactory credit rating could not be undone. It is my conclusion, in balancing the interests in relation to this branch of the test for interim relief, that the privacy interests of the employees represented by the Unions clearly outweigh the interests of the Employer in the particular circumstances of this case.

Accordingly, it is my conclusion that the applicants are entitled to interim relief and the Employer is hereby directed to refrain from proceeding with its Personnel

Security Checks initiative until such time as the grievances have been disposed of by this Board. The hearing on the merits will be scheduled by the Registrar in consultation with the parties.

Dated at Toronto, this 17th day of April, 2003.

A handwritten signature in black ink, appearing to read "S.L. Stewart". The signature is written in a cursive style with a large initial "S".

S.L. Stewart, Chair