

Employer and union in violation of order, OLRB rules

Both the employer and the union have been ruled in violation of a March 14 Ontario Labour Relations Board (OLRB) order regarding provision of essential services in correctional facilities.

OLRB Vice-Chair Brian McLean has ruled that both parties were in violation of his previous order, and must “cease and desist from engaging in activities which contravene the decision.” He has also directed that any searches in the 18 institutions listed that were not completed yesterday (March 15) must be completed on Saturday, March 16. McLean also ruled that employees must return as per the **employer’s** schedule. Scheduling disputes are to be referred to an expedited mediation/arbitration process. Health and safety disputes are to be referred to an expedited OLRB process.

McLean reminded both parties that being found in contempt of the Board decision could result in “substantial penalties, including incarceration and/or monetary fines.” These penalties would also apply to the employer and/or individual managers who refuse to allow employees to return to perform essential or emergency work.

Below is the text of McLean’s decision.

ONTARIO LABOUR RELATIONS BOARD

3556-01-M The Crown in right of Ontario, as represented by the Management Board of Cabinet, Applicant v. The Ontario Public Services Union et al., Responding Parties.

3567-01-U The Ontario Public Services Union, Applicant v. The Crown in right of Ontario, as represented by the Management Board of Cabinet, Responding Party.

BEFORE: Brian McLean, Vice-Chair

Decision of the Board; March 16, 2002

On March 14, 2002, the Board issued a decision respecting these applications. That decision was amended by decision of the Board dated March 15, 2002. (Together these decisions are referred to as the “Decision”.)

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POST AND CIRCULATE

By letters dated March 15, 2002, the parties requested the Board convene a hearing on 6 hours notice pursuant to paragraph 9 of the Decision. The Board did so. Each party asserts that the other party(s) violated the Decision.

Background

These applications occur in the context of a Province wide strike by OPSEU which commenced on March 12, 2002. Under the Crown Employees Collective Bargaining Act (CECBA) the parties were required to, and have, negotiated an Essential Services Agreement (ESA). The purpose of the ESA is to ensure that essential services are maintained during the term of a labour dispute. This serves an important public policy objective of ensuring that the public is not placed in danger as a result of the labour dispute. As a result, persons who are designed to perform essential services during a labour dispute are not entitled to strike or be locked out.

These dangers are readily apparent on the facts before me. Due to the absence of the Correctional essential services workers the inmates at several institutions have been locked in their cells for a protracted period of time since the commencement of the strike. This may have led to a riot at one institution. Legitimate concerns have been expressed about the welfare of young offenders in some institutions.

These applications concern the activities of Corrections essential services employees and the management of the correctional institutions at which they work. The Decision determined that the relevant ESAs were violated. The Board in the Decisions also ordered all Correctional essential service employees in the Province of Ontario to return to work and the employer to allow all such essential services employees to return to work.

The Board established a scheme to ensure that the return to work would be as smooth as possible. Under the scheme, any disputes about health and safety which allegedly contributed to the removal of essential services by a work refusal under the Occupational Health and Safety Act were to be referred to this panel of the Board on an expedited basis. Other disputes, including scheduling disputes, were to be referred for resolution in accordance with the Mediation / Arbitration Protocol Concerning essential Services.

The other part of the Board's scheme to provide for a smooth return to work was a Search Order. That Order allowed the Correctional Officers the opportunity to satisfy themselves that the workplace they returned to would be a safe one. Essentially, the union was to provide "emergency workers" to conduct a search of certain specified areas of the facilities. That search as to be conducted during certain specified hours. In the meantime, the essential services workers were to perform their essential duties.

Regrettably, the return to work did not go smoothly. As a result these applications were filed.

DECISION

There was agreement about many of the factual circumstances which are before the Board. I have carefully considered these factual circumstances and the skillful arguments which were advanced by

counsel. After careful consideration it is apparent that there was widespread disobedience of the Decision by the Corrections essential services employees and, to a lesser degree, the union. I am also that there were some violations of the Decision by the employer.

In particular I find that Correctional essential services employees violated the decision by:

- Not returning to work as scheduled in accordance with paragraph 4 of the decision.
- Insisting that searches be conducted prior to the resumption of essential services and that they be conducted by persons other than emergency workers.
- Continuing work refusals that ought to have been determined in accordance with paragraph 5 of the Decision.

It may be that some of these breaches were inadvertently caused by the way in which the Decision was released and brought to the attention of the affected individuals. However, I am satisfied that much of the activity was a deliberate attempt by Corrections essential services employees and local union officials to subvert and frustrate the Board's Decision.

I also find that the Union violated the Decision by not making best efforts to provide sufficient emergency workers in accordance with paragraph 4 of the search Orders appendix to the decision. While I have concerns that the Union did not make best efforts to ensure workers were notified of the decision, under the circumstances I am not prepared to make any adverse finding in this regard.

With respect to the employer, I am satisfied that the employer also breached the decision in that it refused to permit certain Corrections essential services employees to return to work. I do not accept that management is permitted to deny a position to an essential services employee who presents himself for work just because the union may have improperly submitted non scheduled employees in an inappropriate effort to demonstrate that it, and not the employer, was entitled to schedule essential services employees.

In my view, these are not appropriate circumstances to rule on any illegal strike / lockout issue. These matters were both brought pursuant to paragraph 9 of the Decision as issues with respect to the implementation of the Decision. They are not applications brought under the illegal strike / lockout provisions of CECBA or the Labour Relations Act.

Having regard to the foregoing the Board hereby:

Declares that certain of the Corrections essential services employees and the Union have breached the Decision;

Declares that certain members of management of the employer have breached the Decision;

Orders that Corrections essential services employees and the union cease and desist from engaging in all activities which breach the decision;

Orders that Corrections essential service employees return to work as scheduled in accordance with the relevant ESAs and in accordance with the Decision. To be clear, Corrections essential services employees must return to work as scheduled by the employer unless ordered otherwise by an arbitrator/mediator in accordance with paragraph 6 of the Decision.

Orders that the employer forthwith cease and desist from engaging in activities which contravene the decision.

Orders that the parties abide by the Search Orders appendix of the Decision. Such searches are to take place on Saturday, March 16, 2002. Searches shall only occur in those institutions listed on Appendix A to the Decision in which Corrections essential workers did not return to work in accordance with the Decision.

The time has come for Corrections essential services workers to return to work (and be permitted to return to work) as ordered. The conduct engaged in is literally placing lives in jeopardy. The parties should also be aware that substantial penalties, including incarceration and/or monetary fines, can result from a finding that an individual or individuals is in contempt of a Board order.

I am seized in accordance with the Decision.

*Brian McLean
For the Board*

SEARCH ORDERS

I have also carefully considered the submissions of the parties with respect to whether the inmates in question should remain on lockdown pending the searches of the institutions. The Board starts from the proposition that the health and safety of the worker is critical. However, there is a disagreement about how that health and safety can best be protected. The employer asserts that to keep inmates locked up will actually increase the likelihood that the correction officers' ("COs") health and safety will be diminished. The COs are less concerned about the risk from inmate unrest than they are about the risk that inmates have either manufactured or attained contraband during the period when the COs have been off work.

Under the circumstances, I accept that the parties would be best served by directing that a search be conducted. That search will occur under the following conditions:

1. The employer will provide for searches of inmates at the institutions set out in Appendix "A".
2. Searches will be confined to inmate living areas.

3. Searches at Adult facilities, excluding Young Offender Units, should be completed by 6:00 p.m. Friday, March 15, 2002. Searches of Young Offender Units facilities and Young Offender Units located in Adult institutions shall be completed by 1:00 p.m. Friday, March 15, 2002.
4. The Union will provide emergency workers. The Union will use its best efforts to provide sufficient emergency workers to complete the searches by the time set out above.
5. Essential service workers will supply medication and meal services to inmates and the escort of inmates from living areas to A&D for Court appearances and/or releases while searches are being conducted.
6. The search will not interfere with the supply of medication and meal services to inmates and the escort of inmates from living areas to A&D for Court appearances and/or release while searches are being conducted.
7. Once the search has been completed in an inmate living area, the inmates will be unlocked, but will not be permitted access to living areas which have not been searched.

APPENDIX A

Metro West Detention Centre
Toronto East Detention Centre
Mimico Correctional Centre
Windsor Jail
Quinte Detention Centre
Stratford Jail
Lindsay Jail
Owen Sound Jail
Elgin Middlesex Detention Centre
Sarnia Jail
Whitby Jail
Maplehurst Detention Centre
Vanier Centre for Women
Ontario Correctional Institute
Millbrook Correctional Centre
Sudbury Jail
Hamilton Wentworth Detention Centre
Sault Ste. Marie Jail

Your corrections team

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On Strike

Day

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The Burn Barrel will be available by fax, by e-mail, and on the OPSEU web site at www.opseu.org. To receive it directly, send your secure fax number to Lesley Williams at (416) 443-1762 or send your e-mail address to lwilliams@opseu.org.

The Burn Barrel is authorized for distribution by Barry Scanlon, chair, Corrections team, and Leah Casselman, president.