The Negotiation of Institutional Policies

There is an increasing tendency on the part of employers to bypass collective bargaining and to impose new or altered terms and conditions of employment by means of institutional policies. These policies treat matters ranging from no-smoking enforcement to privacy in electronic communications. Such policies fall into two basic categories: 1) policies that are seemingly outside or beyond the scope of collective agreements because they specify duties not described in the agreements; and 2) policies that run counter to or overlap the terms and conditions of employment described in the collective agreement.

What both sorts of policies have in common is that they challenge the exclusive bargaining agency of the academic staff association. There are two dangers in allowing such policies to stand unchallenged. Allowing the policy to be implemented without raising association concerns about its impact on terms and conditions of employment may well be interpreted by an arbitrator as consent to the policy, preventing the association from raising a challenge later. The second danger is more general: the creation of a workplace in which the employer is encouraged to look for ways around negotiating with the association. It is far easier to declare a policy than to win the same sort of changes to terms and conditions of employment at the bargaining table.

The negotiation of an article restricting the scope of institutional policies is the most effective protection. Such an article ought to contain the following elements:

- a statement that no policies will be implemented that introduce or affect terms and conditions of employment without the consent of the academic staff association;
- recognition that the policies and their application will be subject to grievance and arbitration;
- recognition that any discipline arising from the policies and their implementation will follow the procedures and, if necessary, the disciplinary actions described in the discipline article; and
- a further claim that any policies will be consistent with the terms of the agreement and demonstrate respect for due process.

A declaration that any new policies affecting terms and conditions of employment must be agreed to by the parties as a condition of implementation protects the academic staff association's exclusive bargaining agency. The phrase "terms and conditions of employment" will normally be taken to include what is described elsewhere in the agreement or special plan. It will also include new duties or responsibilities introduced by any policy.

The University of Victoria Faculty Association has a "New Policies and Procedures" article:

> *7.4*
> *New Policies and Procedures*
> *The University will not adopt new policies or procedures that affect the terms and conditions of employment of Members, as defined in this Agreement, without the prior agreement of the Association.*[1]

The recognition that institutional policies are subject to grievance and arbitration is necessary to protect members from any abuse in the application of a policy, and to protect the academic staff association's legal recourse for addressing such abuse. The collective agreement should explicitly recognize the right of the association to grieve on behalf of members or the association itself if an employer's policy is administered or applied unfairly. If the employer acknowledges that the grievance rights of the association are fully protected with respect to university or college policies, there will be less incentive to try to work around the collective bargaining process.

Recognition of the authority of the discipline clause for any disciplinary action arising from the application of institutional policies is necessary to protect members from employer sanctions that are private, more severe, and/or absent the protections of natural justice and due process. The collective agreement should specify that any discipline of a member of the association can only proceed under the provisions of the discipline clause in the collective agreement.

The University of Manitoba has combined this point and the necessity of negotiating policies in one clause, which does not ensure members the protection of the discipline clause but rather precludes the employer implementing new policies that might have disciplinary implications:

> *4.4*
> *For greater certainty, but without restricting the generality of the protections in this article provided for Members and the Association, this article precludes the University from:*
>
> > *4.4.1*
> > *establishing any new guidelines, by-laws or policies or changing any existing guidelines, by-laws or policies where the policy has disciplinary consequences for Members or which affect the rights, duties, and responsibilities of Members as set forth in sections 17.A.1, 19.A.2 and 34.1, without previously consulting the Association.*[2]

An even stronger clause is found in the Ottawa and Queen's collective agreements, which makes the test of consistency with the agreement as a whole a condition for any discipline following from a university policy.

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[1]The Framework Agreement between the University of Victoria Faculty Association and the University of Victoria (2004-2008)

[2]Collective Agreement between the University of Manitoba and the University of Manitoba Faculty Association (2007-2010)

This is the language at Ottawa:

> *39.1.3: A member may not be disciplined for violation of a rule or regulation unless that rule or regulation:*
>
> *(a) is reasonable and does not contravene the provisions of this agreement, and*
>
> *(b) has been promulgated and communicated by the appropriate authority.*[3]

Queen's clause is as follows:

> *20.1.4*
> *A Member may not be disciplined for violation of a rule, regulation or instruction unless that rule, regulation or instruction has been promulgated and communicated by the appropriate authority, and does not violate this Agreement.*[4]

A final objective is a statement that any policies developed must be consistent with the collective agreement and demonstrate respect for due process and natural justice. The scope of such a clause would go beyond those policies affecting terms and conditions of employment, and establish a broader harmonization of ancillary policies with the workplace defined in the agreement. Such clauses are often used in management rights articles, which seek to limit the exercise of management rights in a manner that is consistent with the rest of the agreement or plan.
The Faculty Association of the University of St. Thomas have used their management rights clause to cover policies:

> *2.10.3*
> *Where an Employer policy conflicts with, is inconsistent with, or interferes with any of the terms and conditions of this Collective Agreement, this Agreement shall be followed.*[5]

Conclusion

The academic staff association has the duty to protect its members against attempts by the employer to introduce policies, outside of collective bargaining, that affect terms and conditions of employment. In the process, the association is protecting its own exclusive bargaining agency.

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[3]Collective Agreement between the University of Ottawa and the Association of Professors of the University of Ottawa (2004-2008)

[4]The Collective Agreement between Queen's University Faculty Association and Queen's University at Kingston (2005-2008)

[5]The Collective Agreement between St. Thomas University and the faculty Association of the University of St. Thomas (2003-2007)