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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**PUBLIC SERVICE ALLIANCE OF CANADA**

Bargaining Agent

and

**TREASURY BOARD**

Employer

and

**THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA**

Intervenor

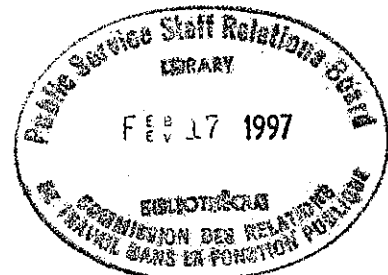
**RE: Request for Review under section 27 of the Act**

**Before:** Yvon Tarte, Chairperson  
Philip Chodos, Deputy Chairperson  
Marguerite-Marie Galipeau, Deputy Chairperson

**For the Bargaining Agent:** Derek Dagger, Counsel

**For the Employer:** Keith Willis

**For the Intervenor:** Dan Butler



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Heard at Ottawa, Ontario,  
January 21, 1997.

## DECISION

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By letter dated December 9, 1996 Mr. Keith Willis on behalf of the employer requested that the Board review three of its decisions (Board files: 181-2-344, 345, and 350) respecting the determination of designated positions in the Educational Support Group, the Drafting and Illustration Group, and the Ship Repair (Chargehands) Group. The three Board decisions in question gave effect to the agreement by the parties concerned as to the positions within the respective bargaining units that had safety or security duties, in accordance with section 78.1 of the Public Service Staff Relations Act. In its decisions, which were rendered without a hearing, the Board directed the employer pursuant to section 78.5 of the Act "*... to inform the employee occupying the position in question (and all subsequent occupants of that position) of the designation of that position. By such authorization the employer is required to inform the employee within the time limits and pursuant to the procedure specified in subsection 60(1) of the Regulations.*"

In respect of the Educational Support Group designation decision, the employer had made written representations requesting that the Board, pursuant to section 6 of the Regulations, extend the time limit set out in subsection 60. (1) to a date to be agreed upon by the parties. The Board considered that request and addressed it in its decision in respect of that Group (i.e. Board file: 181-2-344). In that decision the Board expressed concern about extending the time limit for notification for what may be an indefinite period, and for the reasons indicated therein denied the application to extend the time limit. It was this conclusion that precipitated the current requests for review under section 27 of the Act.

Prior to the commencement of the hearing of this matter, the Board was informed by letter dated December 23, 1996 that the Federal Government Dockyard Chargehands Association did not wish to proceed with a review of the decision bearing Board file: 181-2-350, as the notices pursuant to section 78.5 (i.e. Form 13) had already been distributed to incumbents of the designated positions identified in that decision. The Treasury Board representative advised the Board at the commencement of this hearing that the employer wished to withdraw its request in respect of Ship Repair (Chargehands) decision. Accordingly, the Board notes that the request for review of that decision has been withdrawn.

Mr. Willis outlined the problems that the employer has faced in the past with respect to notifying employees of their designated status. In particular, Mr. Willis noted the difficulties arising from the implementation of the designation process in 1991 when vast numbers of designated employees were required to be notified by various means. Mr. Willis proposed that the Board order that employees be notified within a reasonable period after either party formally requests conciliation under section 76 of the Act. He observed that typically conciliation board reports are issued some three or four months following the request for conciliation. Mr. Willis noted that the notices can be in place at the work site prior to that date and that the employer would then be in a position to deliver the notices as soon as possible after a formal request for conciliation is received. Mr. Willis also pointed out that such notification would inform employees of the fact that they occupied designated positions at a time closer to a possible strike situation, when the notices would be more meaningful. He noted as well that if notices were deferred until that time it would minimize the need to re-issue notices resulting from changes in incumbency, which are likely to be numerous, given that 32 bargaining units containing 130,000 positions will be the subject of the designation process. This would reduce the amount of time and cost associated with providing notices under section 78.5. It was also submitted on behalf of the employer that the Act now contemplates the designation of positions, not persons; the notification of persons is required only on an as needed basis to inform employees of the fact that they occupy designated positions where there is a real possibility of a strike. In the absence of a strike situation the employer has no interest in notifying an employee occupying a designated position.

On behalf of the Alliance, Mr. Dagger supported the employer's request for an extension of time. He suggested that the 30 day period noted in subsection 60 (1) of the P.S.S.R.B. Regulations and Rules of Procedure should run either from the date of the request for the establishment of the conciliation board or, in the event that no conciliation board is to be established, within 30 days of the decision not to establish a conciliation board. Mr. Dagger submitted that there was a clear legislative intent manifested in the 1993 amendments to the Act to provide an ongoing, fluid process of identification of designated positions which is separate and distinct from the matter of notification of employees. Mr. Dagger maintained that insistence by the Board on

immediate notification would not address the mischief which the amendments were designed to resolve, but rather would exacerbate for all the parties the problems associated with the designation process. He also submitted that the phrase in section 78.5 "... within such time..." can subsume a reference to an event such as a request for a conciliation board.

The representative of The Professional Institute also joined with the employer and the Public Service Alliance in urging the Board to extend the time limit for the issuance of notices pursuant to section 78.5. The Professional Institute proposed that notification should take place within 30 days following a request for a conciliation board. Mr. Butler noted that the bargaining agents have an interest in ensuring that every employee occupying a designated position be properly notified in a sufficiently timely fashion so that no employee is in doubt as to his or her status. He also noted that the determination of designation does not occur when the notices are sent out but when the decision is made by the Board.

Both bargaining agents expressed concern about the delegation of responsibility to the employer to complete the Form 13 notices to employees. In essence, it was their position that the integrity of the notifications may be put in doubt, and questions may be raised as to the *bona fide* of the notices, if the employer were seen to be in control of the notification process. They questioned whether under section 78.5 the Board can authorize the employer to do anything more than deliver the notices to employees. The Professional Institute's representative recognized the practical necessity of having the employer identify on the notices the actual names of persons who are incumbents of the designated positions; however, the bargaining agent representatives urged the Board to complete as much of the Form 13 notices as possible prior to having the employer deliver them to the incumbents of the designated positions. The employer advised that in light of the bargaining agents' concerns, it was not adverse to having the Board complete the Form 13 notices, with the exception of the names.

#### Reasons for Decision

The matters at issue here have been brought before the Board pursuant to a request for review under section 27 of the Act. At the outset the Board wishes to note

that in its view this is a proper subject for review under section 27 for the following reasons. The decisions in question concern provisions and procedures in the Act that were substantially revised by the 1993 amendments to the Act, and which previously have not been addressed by the Board. The safety and security designation procedure is of critical importance for the proper functioning of the Act; accordingly, the Board wishes to ensure that the process operates effectively. Finally, the Board is sensitive to the fact that both union and management have come to an agreement as to what they perceive as a more efficient process.

The resolution of the issues which the parties have asked the Board to address turns on the interpretation and application of section 78.5 of the Act, which states as follows:

*78.5 The Board, or if authorized by the Board, the employer, shall inform an employee occupying a designated position of the designation within such time after the position is designated or occupied, as the case may be, and in such manner as the Board may prescribe.*

The following provisions are also relevant in considering this matter:

*78. (1) The Chairperson shall not, pursuant to a request under section 76 in respect of a bargaining unit, act under subsection 77(1) or (2) until the position of each employee in that bargaining unit, in accordance with section 78.1 or 78.2,*

*(a) has been designated as having duties consisting in whole or in part of duties the performance of which at any particular time or after any specified period is or will be necessary in the interest of the safety or security of the public; or*

*(b) has been determined as not having the duties described in paragraph (a).*

...

*78.1 (1) In this section and sections 78.2 to 78.4, "safety or security duties" means the duties described in paragraph 78(1)(a).*

...

*(6) Where the parties determine that some or all of the positions have safety or security duties, the employer shall, not later than two months before notice day, notify the Board*

*of those positions and the Board shall designate those positions as having those duties.*

...

*(10) Where, after considering the recommendations of a designation review panel,*

*(a) the parties determine that none of the positions in dispute have safety or security duties or that some do not, the employer shall, not later than notice day, file a statement of the determination with the Board; or*

*(b) the parties determine that some or all of the positions in dispute have safety or security duties, the employer shall, not later than notice day, notify the Board of those positions and the Board shall designate those positions as having those duties.*

...

*78.2 (4) Where the Board determines that some or all of the positions in dispute have safety or security duties, the Board shall designate those positions as having those duties and the Chairperson shall send a notice of the designation to the parties.*

....

*78.4 (1) A designation that a position has, or a determination that a position does not have, safety or security duties under section 78.1, 78.2, 78.3 or this section remains in effect until it is changed pursuant to this section.*

...

*102. (1) No employee shall participate in a strike*

*(a) who is not included in a bargaining unit for which a bargaining agent has been certified by the Board;*

*(b) who is included in a bargaining unit for which the process for resolution of a dispute is by the referral thereof to arbitration; or*

*(c) who occupies a designated position.*

*(1.1) No employee who is included in a bargaining unit the bargaining agent for which has elected, pursuant to subsection 61(1), to refer all terms and conditions in dispute to final and binding determination shall participate in a strike in respect of that dispute.*

(1.2) No employee who is included in a bargaining unit the bargaining agent for which has agreed to be bound as described in section 90 in respect of all terms and conditions in dispute shall participate in a strike in respect of that dispute.

(2) No employee who is not an employee described in subsection (1) shall participate in a strike

(a) where a collective agreement applying to the bargaining unit in which the employee is included is in force; or

(b) where no collective agreement applying to the bargaining unit in which the employee is included is in force, unless

(i) a conciliation board for the investigation and conciliation of a dispute in respect of that bargaining unit has been established, or a conciliation commissioner has been appointed for that purpose, and seven days have elapsed from the receipt by the Chairperson of the report of the conciliation board or conciliation commissioner, or

(ii) the Chairperson has notified the parties pursuant to subsection 77(2) or 77.1(4) of the Chairperson's intention not to establish a conciliation board or appoint a conciliation commissioner and seven days have elapsed from the date of the notice.

...

103. No employee organization shall declare or authorize a strike of employees, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike of employees or the participation of employees in a strike, the effect of which is or would be to involve the participation of an employee in a strike in contravention of section 102.

105. (1) Every employee who contravenes section 102 is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

(2) Every officer or representative of an employee organization who contravenes section 103 is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars.

*(3) Every employee organization that contravenes section 103 is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars for each day that any strike declared or authorized by it in contravention of that section is in effect.*

Section 6 and subsection 60(1) of the P.S.S.R.B. Regulations and Rules of Procedure state as follows:

*6. Notwithstanding any other provision in these Regulations, the Board may*

*(a) extend the time specified by these Regulations, or allow for additional time to do any act, provide any notice or file any document; or*

*(b) reduce the time specified by these Regulations to do any act, provide any notice or file any document.*

...

*60. (1) For the purposes of section 78.5 of the Act, the Board, or if authorized by the Board, the employer, shall inform an employee occupying a designated position of the designation by providing to that employee a notice in Form 13 of the schedule no later than on the thirtieth day after the day on which*

*(a) a notice of designation is sent to the employer pursuant to subsection 78.2(4) of the Act, or section 58; or*

*(b) an employee first occupies a designated position.*

The Board has carefully considered the submissions of the parties in this matter. In view of those submissions, all of which urging the Board to extend the time limit for notifying the employees who occupy designated positions, the Board is prepared to reconsider its earlier decisions, and exercise its discretion under section 6 of the Regulations to extend the time limit in question, in the manner outlined below. In so doing the Board is relying on the sense of responsibility and the good faith of the parties to ensure the proper functioning of the designation process. Without the parties' cooperation it is clear that this process cannot work effectively. The Board of course retains its role in overseeing the designation procedure and will be closely monitoring all aspects of its implementation.



In arriving at this conclusion the Board has considered several factors, in addition to the logistical and administrative concerns expressed by the parties. The Board shares the view of the parties that the Act clearly distinguishes between the designation of positions, and the notification of incumbents of those positions. It should be noted that pursuant to subsection 78(1) the restriction on the Chairperson establishing a conciliation board is contingent upon the designation of the positions in the bargaining unit, and not on the notification of the incumbents of those positions. However and whenever the notification is carried out would have no effect *per se* on the predetermination of the positions which are designated. As to the ambit of section 78.5, while the Board is of the view that the time frame should be established with some specificity and without unwarranted deferral, there does not appear to be any legal impediment with respect to the application of section 78.5 which would prohibit a time frame having reference to an *event* such as the request for or the appointment of a conciliation board. The Board would also note that pursuant to subsection 105. (1), the penalties for breach of the strike prohibitions set out in section 102 do not vary according to the designation or non-designation of the position held by an employee.

In addition, although the designation procedure was significantly modified pursuant to the 1993 amendments to the Act, Parliament saw fit to leave essentially unchanged (except for adding the Board's authority to delegate notification to the employer) the notice provision, formerly found in subsection 78. (6) of the Act, which stated the following:

***78. (6) Within such time and in such manner as the Board may prescribe, all employees in a bargaining unit who are agreed by the parties or determined by the Board pursuant to this section to be designated employees shall be so informed by the Board. (emphasis added)***

Except as noted above, the language of the former provision is essentially identical to the current section 78.5. The relevant provision of the former Regulations stated the following:

***59. (1) For the purpose of subsection 78(6) of the Act, every designated employee shall be informed by the Board, as required by that subsection, within 20 days after the date of the appointment of the persons nominated by the parties to be members of the conciliation board, by sending to each***

*designated employee by prepaid mail a notice addressed to the employee at the address shown for the employee on the list filed pursuant to subsection 58(1) stating that the employee is a designated employee within the meaning of section 2 of the Act.*

While there are major differences between the process for designations under the old provisions and the current process, it is apparent that the proposals for notification put forward by the parties in these proceedings are not inconsistent with the Board's past practice.

The Board will extend the time limit for notifying employees of their designated status. As noted above, the Board believes that the time frame should not be unnecessarily vague or long; it views the Professional Institute's proposal as being the most consistent with these objectives, and with the intent of the Act; accordingly, the Board is directing that notification take place within 30 days following a request for conciliation as indicated below.

The bargaining agents have also urged the Board to fill out Form 13, that is the "Notice to Employee Occupying Designated Position", prior to forwarding these notices to the employer for delivery to the incumbents of designated positions. The employer has advised that it is not adverse to having the Board fill out Form 13 by identifying on that form the position which is subject to designation. The Board remains of the view that it has the authority, pursuant to section 78.5, to direct the employer to complete Form 13 in accordance with the Board's designation decision, which clearly identifies the designated position in each bargaining unit. However, the Board shares the concerns of the bargaining agents as to the importance of ensuring the integrity of the designation notices; as the Board has stated in the past, it is important not only for the designation process, but for the continuing survival of collective bargaining in the Public Service, that designation orders be respected by the employees who are subject to them. Also, we understand that with the current technology the required information may be produced by the Board electronically. Accordingly, the Board will provide the employer with a form 13 containing all the information required, with the exception of the name of the incumbent of the designated position. As a practical matter, it is the Board's conclusion that the employer should continue to have responsibility for identifying on the Form 13s the names of employees who occupy the designated positions at the relevant time. As

well, the employer will fill in the date portion at the bottom of the Form. . Needless to say, the Board will respond to any improprieties that may be brought to its attention.

For the reasons noted above, the request for review is granted; the Board hereby amends the Educational Support Group designation decision (Board file: 181-2-344) by rescinding the final paragraph and replacing it with the following:

*Pursuant to section 78.5 of the Act the Board hereby authorizes the employer to inform the employee occupying the designated position identified herein. For this purpose the Board will provide the employer with a Form 13 containing all the information required, with the exception of the name of the employee occupying the designated position and the "Dated at..." portion of the Form, which is to be added by the employer prior to notification. Also, pursuant to section 6 of the P.S.S.R.B. Regulations and Rules of Procedure (1993), the Board hereby extends the time specified in subsection 60(1) of the Regulations within which the employee is to be informed of the fact that the employee occupies a designated position to a period of 30 days from the date of a request for conciliation pursuant to section 76 of the Act. Thereafter future occupants of a designated position shall be notified within 30 days of the date on which they first occupy the position.*

*In addition, the Board draws the employer's attention to its responsibility under subsection 60(2) of the Regulations that on the notification of an employee who occupies a designated position it is to provide forthwith a copy of the notice referred to in subsection 60(1) to the bargaining agent.*

The request for review of the Board's decision respecting the designation of positions in the Drafting and Illustration Group (Board file: 181-2-345) is also granted. The penultimate paragraph of that decision is hereby rescinded and replaced with the following:

*Pursuant to section 78.5 of the Act the Board hereby authorizes the employer to inform the employees occupying the designated positions*

*identified in Appendices 1 and 2. For this purpose the Board will provide the employer with a Form 13 for each position designated containing all the information required, with the exception of the name of the employee occupying the designated position and the "Dated at..." portion of the Form, which is to be added by the employer prior to notification. Also, pursuant to section 6 of the P.S.S.R.B. Regulations and Rules of Procedure (1993), the Board hereby extends the time specified in subsection 60(1) of the Regulations within which the employees are to be informed of the fact that they occupy a designated position to a period of 30 days from the date of a request for conciliation pursuant to section 76 of the Act. Thereafter future occupants of a designated position shall be notified within 30 days of the date on which they first occupy the position.*

**For the Board**

**Philip Chodos  
Deputy Chairperson**

**OTTAWA, February 11, 1997.**