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Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

TREASURY BOARD

Employer

and

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

RE: Post-Certification Identification of a Managerial or Confidential Position -
Head, Ministerial Correspondence Unit - AS-3
Fisheries and Oceans Canada

Before: [Jean-Pierre Tessier, Board Member](#)

For the Employer: [Raymond Dionne, Treasury Board](#)

For the Bargaining Agent: [Rachel Dugas, Public Service Alliance of Canada](#)

Heard at Ottawa, Ontario,
May 26, 2000

DECISION

[1] On April 24, 1998, the employer proposed to identify the position of Head, Ministerial Correspondence Unit¹, Document Management, Planning and Information Management Branch, Information Management and Technology Services Division, Corporate Services Section, Headquarters, Fisheries and Oceans Canada as a managerial or confidential position pursuant to the provisions of paragraph (a) under the definition of “managerial or confidential position” in subsection 2(1) of the *Public Service Staff Relations Act* (Act) and paragraph 5.1(1)(d) of the Act.

[2] On May 13, 1999, the bargaining agent objected to the identification of this position.

[3] The Board authorized an examiner to meet with the employer and the bargaining agent in order to hear the relevant evidence and information with respect to the functions of the position and to submit a report to this effect. The examiner submitted her report on December 13, 1999 and the parties accepted its contents. As a result, I am incorporating this report into this decision by reference.

[4] At the outset, the employer indicated that it was prepared to argue only the identification of the position pursuant to paragraph (a) under the definition of “managerial or confidential position” in subsection 2(1) of the Act and that it wished to defer the submission of its evidence pursuant to paragraph 5.1(1)(d) of the Act; the Alliance objected to this.

[5] I granted the employer’s request, although I found it unfortunate that this information was not provided to the bargaining agent and the Board before the hearing. For practical reasons, it is preferable to deal immediately with the identification of the position pursuant to paragraph (a) of the definition of “managerial or confidential position” in subsection 2(1) of the Act, with the understanding that all the issues under paragraph 5.1(1)(d) remain pending. Paragraph (a) under the definition of “managerial or confidential position” in subsection 2(1) of the Act reads as follows:

¹For reference purposes, the term “Head, Ministerial Correspondence Unit” is equivalent to “responsable de l’Unité de la correspondance ministérielle”.

“managerial or confidential position” means a position

(a) confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada or the Federal Court, the deputy head of a department or the chief executive officer of any other portion of the Public Service,

[6] The employer sought to introduce evidence about issues that postdated the identification. This was rejected and I asked that we limit ourselves to the facts that existed at the time of the identification and the examination, which resulted in the filing of the examiner’s report.

Evidence and arguments

[7] The employer examined one witness only, Ms. Wells, the incumbent of the position. The substance of the testimony focused on clarifying certain points that were included in the examiner’s report and highlighting the following issues.

[8] The organizational charts included in the file indicate that, hierarchically, the position reports to that of Manager, Document Management, Planning and Information Management Branch, Information Management and Technology Services Division, Corporate Services Section, Headquarters, Fisheries and Oceans Canada (see *Document Management Services Division* organizational chart dated March 5, 1999). However, Ms. Wells explained that, on a functional level, the position reports to the Departmental Assistant, Headquarters, Fisheries and Oceans Canada.

[9] Furthermore, Ms. Wells indicated that her office is located in the same building as the Minister and his main assistants.

[10] Ms. Wells receives and records all the correspondence addressed to the Minister. Referring to paragraph 20 of the examiner’s report, she explained that she has a multi-faceted position: on one hand she serves the Department and on the other hand she serves the Minister and his assistants. For various reasons, the Ministerial Correspondence Unit reports to the Document Management Services Division (see *Document Management Services Division* organizational chart). However, in “functional terms”, Ms. Wells is in regular contact with the staff in the Minister’s office and looks after the Minister’s “political” correspondence, which is directed to his office at the House of Commons. Afterwards, her comments essentially reiterated the following points in the examiner’s report: she reads all correspondence (political and departmental), memoranda from the Department and the Deputy Minister, press

clippings; she has access to all information pertaining to the Minister and Deputy Minister; the Ministerial Correspondence Unit is continuous to the Minister's office; Ms. Wells and her staff have (unlimited and full) access to the Minister's office and she knows its security access code; the offices of the Deputy Minister and Assistant Deputy Ministers are on the same floor; she receives Cabinet documents, they are kept in a safe in her office; since she has access to his office she occasionally runs into the Minister; but she receives her work instructions from the Departmental Assistant or the Minister's Executive Assistant.

[11] In concluding her testimony, Ms. Wells explained how she manages the correspondence:

[translation]

"There are two types of correspondence: political and departmental. In order to process this correspondence (electronic, letters, faxes, telegrams, etc.), Ms. Wells must read and sort it according to whether it is of a political or departmental nature. She must ensure that the responsible political assistant or the appropriate departmental section obtains a copy of the correspondence. She must determine the processing priorities. For instance, she must determine whether a document should immediately be brought to the Minister's attention. The subject must be entered in the automated system for tracking and reporting purposes. She ensures follow-up on the files. In terms of correspondence from other ministers (including the Prime Minister) and Cabinet, everything goes through the Ministerial Correspondence Unit. Ms. Wells ensures that the Minister, the Minister's Executive Assistant and the Special Assistant receive a copy of the documents for Cabinet meetings."

[12] The bargaining agent did not cross-examine the witness.

[13] The parties then presented their arguments, making frequent references to the examiner's report.

[14] The employer argued that Ms. Wells' superiors must be able to trust her because she has access to the Minister's electronic agenda, where his activities are recorded (Cabinet meetings, trips, private and ministerial activities). The Minister's agenda has a direct impact on the functions of the position since Ms. Wells has to prepare the Minister's agenda and gather the documents required for Cabinet meetings. She has to

coordinate the preparation of briefing books and signature books to ensure that they are ready when the Minister is available and present.

[15] In addition, only two people know the password required to access the Cabinet document data bank. Also, only employees of the Ministerial Correspondence Unit and those in the Minister's office have access to "political" correspondence.

[16] The employer pointed out that Ms. Wells has access to the Minister's office and that, as Head, Ministerial Correspondence Unit, she sees documents with highly confidential information. The Minister must be able to fully trust the staff that handles the correspondence. The Minister and his staff trust that procedures are followed and that anything that is confidential, whether political or ministerial, will remain so. The Departmental Assistant believed that this summarized Ms. Wells' role and that of the Registry. The Head, Ministerial Correspondence Unit, is considered as an integral part of the Minister's support team, as an extension of the Minister's office.

[17] Overall, the employer's arguments bore more on the notion of trust and confidentiality than managerial factors.

[18] For its part, the bargaining agent argued that there are neither frequent nor direct contacts between the Head, Ministerial Correspondence Unit, and the Minister, and referred to paragraph 28 of the examiner's report indicating that Ms. Wells occasionally runs into the Minister since she has access to his office; but she receives her work instructions from the Departmental Assistant or the Minister's Executive Assistant.

[19] The bargaining agent admitted that the Head, Ministerial Correspondence Unit, sees documents of a confidential nature and that her functions require great discretion. However, this criterion of confidentiality is covered by the oath of office for public servants performing such functions and does not in any way require that their positions be excluded from the bargaining unit.

Reasons for decision

[20] As previously indicated, the bulk of the evidence rested on the examiner's report, but was completed by Ms. Wells' testimony.

[21] The employer focused its arguments on the fact that the Head, Ministerial Correspondence Unit, sees all the Minister's correspondence, knows his agenda and has access to documents coming from and going to Cabinet.

[22] It would appear from the examiner's report that the Head, Ministerial Correspondence Unit, sits on the Workforce Adjustment Committee; that she has hiring authority and that she has access to labour relations information (e.g. strikes). However, I have no other evidence indicating that the Head, Ministerial Correspondence Unit, has any managerial functions; furthermore, the employer did not pursue this issue; its main argument was that it is a confidential position.

[23] It is clear that the Head, Ministerial Correspondence Unit, has an important position that requires her to exercise full discretion; she has access to all correspondence; she knows the access code to the Minister's office and the safe where confidential documents are kept.

[24] In my opinion, a distinction must be drawn between confidential documents and confidential positions. In a 1984 case, the Board decided not to identify Registry Officers in the Federal Court (Board file 148-2-91):

...

21. *The evidence in the present case does not lead us to a similar conclusion. Mr. Larabie's reference to preliminary "discussions" with the judge does not persuade us that these discussions go beyond a review of technical or procedural points that may have been noted by any one of the Registry Officers whose responsibility it was to examine the documents that become part of the particular dossiers. Mr. Larabie's attendance in the judge's chambers during the private conference between representatives of the parties and the judge is not as a participant but simply as a recorder of minutes. These are duties the confidential nature of which is adequately protected by Mr. Larabie's security clearance and oath of secrecy.*

...

[25] Nonetheless, the Board identified as confidential positions those of Legal Research Officers to Federal Court of Appeal judges (Board file 148-2-109). *Larabie* is referred to in that decision, which pointed out that:

...

16. ...Confidential relationships must not be casual or fortuitous if they are to comply with the definition. The relationship must be such that it transcends the normal requirements of confidence in the performance of duties and has been described as one which would permit the superior person to “think aloud” in the presence of the other who it is alleged is in the confidential position.

...

[26] In this same decision, the Board established a relationship between the position of a Legal Research Officer to a Federal Court of Appeal judge and that of a Law Editor at the Supreme Court of Canada by indicating that:

...

19. ...under Part 1(b) and Part 3 of the position descriptions, there would appear to be duties and responsibilities which place the Legal Research Officers herein in a situation more akin to that described in the case of Patry and Young (Board files 172-2-296 / 184-2-27) which concerned the position of Law Editor in the Supreme Court of Canada. In that decision the Board noted:

The law editor apparently prepares a draft summary based on his/her own careful reading of the judgments. This is normally followed by consultation with one or more of the judges. In discussing the draft summary with a law editor a judge must have confidence that he can freely explain or elaborate his thinking so that important elements are not distorted or lost in the summary report. For his part the law editor must feel secure enough to make suggestions as to form and consistency “and indeed make suggestions relative to what other judges have done”

...

[27] In the case at hand, it has been established that the Head, Ministerial Correspondence Unit, occasionally runs into the Minister since she has access to his office; but she receives her instructions from the Departmental Assistant or the Minister’s Executive Assistant.

[28] Nonetheless, the Head, Ministerial Correspondence Unit, has knowledge of all correspondence and documents intended for the Minister’s office. Although this aspect

of the position calls for a high degree of confidentiality, I do not believe that, in itself, it should lead to the conclusion that the position should be identified as a confidential position pursuant to paragraph (a) under the definition of “managerial or confidential position” in subsection 2(1) of the Act. Furthermore, in file 148-2-46, the Board indicated the following:

...

8. On the evidence that was adduced, Mr. Fleming suggested that counsel for the employer was going much further than the Minister himself in enveloping the operations of his office in a “shroud of secrecy”. If Parliament had intended this particular perception of the “environment” of a Minister’s Office, it would have differentiated the Minister of the Crown from the other officials who are specified in paragraph (a) of the definition. (...)

...

[29] In a more recent decision, the Board highlighted, at page 44, the concepts of discussion, exchange and confidentiality associated with the notion of a confidential position within the meaning of what has become paragraph (a) of the definition of “managerial or confidential position” in subsection 2(1) of the Act (Board file 175-2-595, August 18, 1992):

...

...I find that the evidence does not support the conclusion that the relationship between Mr. Roy and his superior, Ms. Trépanier, is of a character which “stands out from the generality of relations and bears a special quality of confidence” nor does there appear to be any significant “thinking aloud” “on matters in relation to employees, the public or on proposed action of any sort or description”; (...)

...

[30] In the previous case, paragraph 70 of the examiner’s report indicated that:

[Mr. Roy] logs all incoming mail in a ledger, ensures that items are dealt with according to their priority and level of confidentiality. The degree of urgency and the level of confidentiality are sometimes determined by reading the correspondence. The incoming mail includes ministerial correspondence, correspondence from provinces or other branch heads as well as from the general public. Mr. Roy will

refer the files or correspondence to the responsible officer based on the content of the document according to his knowledge of the unit's ongoing work and the manner in which it has been assigned to the various staff members.

[31] The examiner's report also indicated, at paragraph 116, that:

Ms. Trépanier indicated Mr. Roy would be aware of her discussions with Treasury Board, the Privy Council as well as the result of political discussions on this subject because of his work.

[32] Furthermore, at paragraph 130 of the examiner's report it is indicated that:

Ms. Trépanier explained that Mr. Roy knows at all times who she is meeting and what issues are being discussed since he types all the documents and takes related phone calls and messages, checks documents and maintains records. As a result he is aware of what is going on. For example, Mr. Roy types Cabinet documents and ensures they are distributed to the appropriate persons in a timely manner. He also follows-up on ministerial inquiries during Ms. Trépanier's absence. Since Ms. Trépanier's mail includes Cabinet documents and ministerial correspondence prepared by her colleagues, Mr. Roy would also become aware of these in the course of his duties.

[33] For all the above reasons, the evidence does not allow me to conclude that the position in question should be identified pursuant to paragraph (a) under the definition of "managerial or confidential position" in subsection 2(1) of the Act. It is understood that this decision only addresses the identification of the position pursuant to paragraph (a) under the definition of "managerial or confidential position" in subsection 2(1) of the Act and does not in any way deal with the employer's application pursuant to paragraph 5.1(1)(d) of the Act.

Jean-Pierre Tessier
Board Member

OTTAWA, August 4, 2000

Certified true translation

Maryse Bernier