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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

TREASURY BOARD

Employer

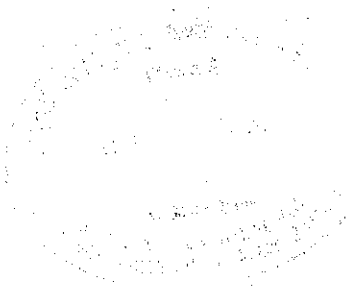
RE: Application for Review under Section 27 of the Public Service Staff Relations Act

Before: P. Chodos, Deputy Chairperson

For the Applicant: Barry Done, Public Service Alliance of Canada

For the Employer: Ron Snyder, Counsel

Heard at Hamilton, Ontario,
October 30, 1997.



DECISION

This matter was originally the subject of a decision of the Board dated June 25, 1997 (Board file 147-2-46) pursuant to an application under section 34 (i.e. determination of membership of a bargaining unit) of the *Public Service Staff Relations Act*. In that decision the undersigned addressed a jurisdictional objection raised by the employer to the effect that the persons in question are excluded from the definition of "employee" under the *Public Service Staff Relations Act* by virtue of subsection (k) of the definition of "employee" found in subsection 2(1) of the Act. For the reasons outlined in the June 25th decision, the undersigned concluded that "*at least some students who had been employed by the Department are not subsumed by paragraph (k) and ... may therefore be part of the program administration bargaining unit for which the applicant is the bargaining agent*". This conclusion was based in large measure on the finding that the document noted as Exhibit E-2, a "Memorandum of Understanding Between National Revenue Customs and Excise and the Treasury Board of Canada" dated June 5, 1987 did not constitute "a program designated by the Treasury Board as a student employment program" per paragraph (k) of the exception to the definition of "employee" in subsection 2(1) of the Act.

The Board had scheduled a hearing for October 30, 1997 in order to address the merits of the application under section 34 of the Act. By letter dated October 24, 1997 counsel for the employer advised the Board of the employer's intention to make an application under section 27 for a reconsideration of the decision dated June 25, 1997. At the outset of the hearing the parties agreed that the Board should hear the application under section 27 prior to considering evidence and argument in respect of the merits of the application under section 34. At the conclusion of the proceedings under section 27, the parties also agreed that a hearing on the merits of the application under section 34 should be deferred pending a decision on the application under section 27.

In support of its application under section 27 of the Act the employer called two witnesses: Mr. John Barry Lacombe and Mr. Garth Matthew Symonds. Mr. Lacombe has been the Assistant Deputy Minister, Verification, Enforcement and Compliance with Revenue Canada since May, 1994. From 1985 until 1992 he was Assistant Secretary, Program Branch, Treasury Board. In that capacity he was responsible for reviewing departmental expenditure proposals, as well as overseeing the implementation of the increased authority and accountability regime, that is, the

delegation of Treasury Board authorities to departments, including financial and personnel management. In that role Mr. Lacombe was heavily involved in discussions respecting the Memorandum of Understanding dated June 5, 1987 (Exhibit E-2). He noted that Revenue Canada had tendered a Treasury Board submission whereby it sought authority from the Treasury Board for increased authority, among other things, in respect of the hiring of students on a year round basis. Mr. Lacombe stated that in his capacity as Assistant Secretary he was very familiar with the rationale for proposals submitted by Revenue Canada for Treasury Board approval, and had participated in a series of discussions with the department on the need to extend the summer student program on a year round basis because of fluctuations in workload and changes in the academic year.

Mr. Lacombe testified that the Memorandum established a Treasury Board student program pursuant to the Treasury Board's authority as employer. Under the Memorandum, Revenue Canada, Customs and Excise was the only department to which the year round student appointment program policy was to apply. He observed that no authority was sought from the Public Service Commission as the Memorandum had nothing to do with the Commission's role, which was limited to coordinating the staffing and recruitment of student employees. He noted that the rates of pay for the students employed by Revenue Canada, Customs and Excise were to be the same as under the Federal Summer Student Employment Program (FSSEP), the only distinction being that the program was extended to year round application. Mr. Lacombe observed that the Memorandum of Understanding did not contain detailed terms and conditions of employment for students, as it was well understood from the supporting material and from discussions with officials that all the other conditions respecting student programs would apply. Mr. Lacombe also noted that the Memorandum of Understanding itself would not record all the details of the Treasury Board submissions, as these are considered confidences of the Cabinet. (It should be noted that counsel for the employer submitted in these proceedings a certificate (i.e. Exhibit E-5) under the signature of the Clerk of the Privy Council attesting to the fact that pursuant to subsection 39(1) of the *Canada Evidence Act*, R.S.C. 1985, the relevant documents are in respect of proposals or recommendations to the Queen's Privy Council within the meaning of paragraph 39(2)(a) and (c) of the

Canada Evidence Act; consequently, the submissions in support of the proposals found in the Memorandum of Understanding could not be produced in evidence.)

Mr. Lacombe expressed the view that the Memorandum is a stand alone document which supersedes any other document, unless and until that authority is explicitly revoked by the Treasury Board. He stated that there was no obligation to amend the FSSEP since the Memorandum already covered this subject matter; the purpose of the memorandum was to provide tailor-made authority to a specific department, which would then take precedence over general provisions. He observed that the Memorandum of Understanding was signed by the President of the Treasury Board with the authority of the Cabinet Committee of the Treasury Board. He noted that the documents which led to the issuance of the Memorandum are not accessible, as they are confidences of the Cabinet. He further observed that the Memorandum was to continue on indefinitely, subject to an annual review; while he was at the Treasury Board, the Memorandum was in fact renewed. Mr. Lacombe also noted that it is the normal practice for the Assistant Secretary to sign off submissions to Treasury Board.

In cross-examination Mr. Lacombe stated that no other department had made requests to Treasury Board in respect of a summer student program. He agreed that the Public Service Commission has the authority to staff positions. Mr. Lacombe also stated that accessibility to submissions to Treasury Board required a security clearance, probably at the "Secret" level.

Mr. Garth Symonds has been Director of the Student Programs Division, Public Service Commission since October 1996. He was involved in administering the 1996/97 student employment program as described in Exhibit E-1. Mr. Symonds observed that the Public Service Commission is not involved in the creation of the summer student programs, which are the responsibility of the Treasury Board; the Commission's role is limited to making appointments, including appointments of summer students. Mr. Symonds identified an exchange of correspondence between Mr. Mansel Legacy, National President, Customs Excise Union and Mr. Robert Giroux, then President of the Public Service Commission, as well as Mr. Ian Clark, then Secretary of the Treasury Board. In his letter of March 7, 1994 to Mr. Giroux, Mr. Legacy notes that:

> *It has come to the attention of the Customs Excise Union Douanes Accise that Revenue Canada is currently hiring students at COSEP rates to perform the duties of Customs Inspectors.*
>
> *... While we are aware of a MOU that existed between Treasury Board and National Revenue, Customs & Excise, it would appear that this Agreement expired in 1991.*
>
> ...
>
> *...I would request your assistance in establishing if indeed there is an authority for Revenue Canada to hire students at COSEP rates, to work as Customs Inspectors at this time of the year.*
>
> (Exhibit E-6)

Mr. Giroux replied that:

> ...
>
> *As the employer for the federal public service, the Treasury Board is responsible for all personnel matters related to employment except staffing. Since this is not a staffing matter I am referring your letter to Mr. Ian D. Clark, Secretary of the Treasury Board.*

This was followed by a reply from Mr. Clark to Mr. Legacy dated May 3, 1994 which refers to the Memorandum of Understanding, and notes that:

> *The M.O.U. is currently being re-negotiated. Until a revised agreement is reached, the practice of hiring students to fulfil part of the duties of a Customs Inspector under the Career Oriented Summer Employment Program rates will continue as an extension of the previous Memorandum of Understanding.*
>
> (Exhibit E-8)

Mr. Symonds referred to the 1996/97 Student Referral Program (Exhibit E-1). He noted that while this program provides for the termination of employment as of September 30th, Revenue Canada is the only department which is not required to make a request to the Public Service Commission to extend employment for students beyond the summer period, as it already has the authority to extend employment under the Memorandum of Understanding. In his view, the Public Service Commission has no authority to extend employment in respect of Revenue Canada

students in light of the Memorandum of Understanding He also observed that the Memorandum was not incorporated into the FSSEP because the latter was meant to be a general document applying across the board; however, the Memorandum of Understanding relates exclusively to one specific department. Accordingly, there was no reason to specifically address the Memorandum as part of the administrative procedures found in Exhibit E-1.

In cross-examination, Mr. Symonds noted that the Commission's role with respect to students is to provide for their appointment and recruitment, and to ensure that the criteria for hiring students are met; the Commission still continues to refer students to Revenue Canada. The Commission has no authority to monitor the hours of work of students, or their duties or their training. Also, the Commission is not responsible for determining whether students have completed their training and are therefore no longer eligible under the Student Employment Program. Mr. Symonds insisted that Customs and Excise did not have to apply for an extension under the FSSEP as it already had that authority pursuant to the Memorandum of Understanding. He maintained that this is true both before and after April 1997, notwithstanding the language of Exhibit E-1; that is, paragraph 5.4 of that document did not apply to Revenue Canada in respect of hiring students year round.

Counsel for the employer submitted that the evidence presented in this proceeding, in conjunction with the evidence reflected in the June 25, 1997 decision establishes that the students in question fall within the paragraph (k) exclusion; that is, these students were employed pursuant to a Treasury Board student employment program. Mr. Snyder noted that the concerns raised in the earlier decision have now been responded to; that is, the Memorandum clearly establishes the right to extend to Revenue Canada authority to employ students year round. The new evidence also addresses the concerns about the role of the Public Service Commission in respect of the Revenue Canada student program. Mr. Snyder stated that the employer did not anticipate these concerns when it presented its case at the previous hearing on this matter. He submitted that these issues constitute "other compelling reasons" justifying a review of this decision. In addition, because the Board questioned the authority of the Memorandum to create a student program, the employer's counsel was compelled to locate and secure additional documents (i.e. the documents referred to in the certificate from the Clerk of the Privy Council) which are not available to this

Board; these documents confirm the fact that submissions were made to Treasury Board Ministers concerning the student employment programs outlined in the Memorandum. Mr. Snyder noted that he would not have been permitted to examine those documents in the absence of the earlier decision. Moreover, it was only after reviewing these documents that Mr. Lacombe's involvement came to light. Accordingly, the employer could not have reasonably been able to present this evidence at the original hearing.

Counsel submitted that the employer has met two of the three tests enunciated by the Board respecting the application of section 27: firstly, the earlier decision raised issues which could not have reasonably been contemplated at the first hearing; and secondly, the evidence could not have reasonably been produced at that time. In support of his submission counsel referred to the Board decisions in *Public Service Alliance and Treasury Board* dated December 18, 1985 (Board file 125-2-41), *The Professional Institute of the Public Service of Canada and National Energy Board, Public Service Alliance of Canada* dated December 29, 1993 (Board file 125-26-60); and *Deschamps and Public Service Alliance of Canada* dated July 16, 1993 (Board file 125-2-57).

The bargaining agent's representative maintained that a review under section 27 of the *Public Service Staff Relations Act* ought to operate by exception, and not as an alternative to going to the Federal Court on judicial review. Mr. Done noted that the Board's jurisprudence has set out limitations as to the invocation of section 27. These limitations are important; the parties require finality in the Board's decisions and, accordingly, the Board should be cautious about permitting a reconsideration and rearguing of any case.

Mr. Done also argued that it is not the intent of section 27 to allow a party to see what the Board's views are, and then present a new, tailor-made case in the guise of new evidence. He submitted that the evidence of Mr. Lacombe and Mr. Symonds could have been presented during the earlier hearing into this matter. The circumstances have not changed here and the "compelling evidence" is not new. Mr. Done also maintained that the Board should be wary of "opening up the flood gates" by allowing parties to seek review of any decision which they do not like.

Reasons for Decision

Section 27, which sets out the Board's authority to review its decisions, provides as follows:

> ***27.*** *(1) Subject to subsection (2), the Board may review, rescind, amend, alter or vary any decision or order made by it, or may re-hear any application before making an order in respect thereof.*
>
> *(2) Any rights acquired by virtue of any decision or order that is reviewed, rescinded, amended, altered or varied pursuant to subsection (1) shall not be altered or extinguished with effect from a day earlier than the day on which the review, rescission, amendment, alteration or variation is made.*

Applications under section 27 (previously section 25 of the Act) have been the subject of relatively few Board decisions. In one of these decisions, *Public Service Alliance of Canada and Treasury Board* dated December 18, 1985 (supra), the Board made the following observations:

> *In the Board's view, section 25 was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of section 25 was rather to enable the Board to reconsider a decision either in the light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists. It would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of.*
>
> *6. The Board notes that this approach to section 25 of the Act is very much in line with that taken by the Ontario Labour Relations Board in relation to its statutory power "if it considers it advisable to do so, [to] reconsider any decision". In Lorain Products (Canada) Ltd. [1978] OLRB Rep. March 262, at page 263, the Ontario Board explained its understanding of the purpose of this power in these terms:*
>
> > *The Board having regard to the labour relations chaos which would result if there were not some finality to its decisions has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party*

> *seeking reconsideration can show that it has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board. The parties to Board proceedings are entitled to rely upon the decisions of the Board in the knowledge that they are final and conclusive unless evidence of the type referred to above is uncovered (See re Detroit River Construction Ltd. case, 63 CLLC 16,260 at p. 11117, York University case, [1976] OLRB Rep., April 187, Ottawa Journal case, [1977] OLRB Rep. Sept. 549). The Board does not permit reconsideration for the purpose of allowing a party to repair the deficiencies in its case or to reargue the merits of its case.*

The Canada Labour Relations Board has similarly refused to reconsider decisions it has rendered unless satisfied that good reasons exist for doing so. According to Dorsey, Canada Labour Relations Board: Federal Law and Practice (1983), at page 300:

> *The Board provides an avenue to seek review where there is a serious disagreement with the Board's "interpretation of the Code or its policy". It also wishes to provide a quick, inexpensive avenue to correct errors that may be the grounds for judicial review; to allow the introduction of evidence not brought forward in the original proceeding for "good and sufficient reasons"; to reconsider a Board order that has had "unanticipated consequences in its application"; and to review decisions that turn on conclusions of law (e.g., "constitutional jurisdiction or interpretation of extraneous statutes").*
>
> *This list of reasons and grounds for internal review is not exhaustive. The Board is still in the process of evolving its procedure and has not foreclosed the possibility of new grounds to support an application for review in the nature of an appeal.*

The undersigned wholeheartedly agrees that the Board should be very cautious about inviting a reconsideration of its decisions. It should be a hallmark of labour

relations board decisions that they are rendered expeditiously; leaving the door wide open to a review of earlier decisions goes against that grain and undermines the objective of finality in the resolution of disputes. Having said this, however, the Board must be cognizant of the indisputable fact that section 27 does serve an important purpose in allowing the Board to reconsider decisions, where there are appropriate reasons for doing so. Where these reasons exist, the Board has not hesitated to uphold a request for a review under section 27, even in the absence of new evidence or a change of circumstances; see for example the Board's recent decision in *Public Service Alliance of Canada and Treasury Board and The Professional Institute of the Public Service of Canada* (Board files 125-2-68 to 70). If the Board were to do otherwise, it would be effectively rendering the provisions of section 27 nugatory and without any meaning. Furthermore, in some circumstances a review under section 27 may actually assist in expediting the resolution of the dispute by providing, in the words of former Canada Labour Relations Board Vice-Chairman Dorsey "*a quick, inexpensive avenue to correct errors that may be the grounds for judicial review*".

Are there compelling and appropriate reasons for reconsideration of the Board's earlier decision? Based on the testimony of Mr. Lacombe and Mr. Symonds, it is apparent that the Memorandum of Understanding which was concluded between the Treasury Board and Revenue Canada in 1987 provided due authority from the Treasury Board to Revenue Canada to establish a year round student employment program. It is also clear that this program continued in force until the present day and was not in any way superseded or supplanted by the FSSEP. In light of these conclusions, it would do the parties an injustice to allow the earlier decision to run its course.

I also accept the submissions of counsel for the employer that Mr. Lacombe's involvement in the Memorandum of Understanding, which dates back some ten years ago was not readily apparent until counsel had been permitted access to confidential Cabinet documents, as a consequence of the earlier decision. Accordingly, I also find that the new evidence presented at this hearing could not reasonably have been presented at the original hearing and therefore meets one of the criteria for review under section 27 as enunciated in the Board's decision of December 18, 1985.

Therefore, the application under section 27 of the Act is granted; in light of the new evidence presented in this case the Board finds that the Memorandum of Understanding of 1987, which is currently in effect, constitutes a student employment program as that term is used in the exception contained in paragraph (k) to the definition of "employee" in subsection 2(1) of the Act. I shall remain seized of this matter in the event that there are outstanding matters that need to be addressed in respect of the application under section 34 of the Act.

P. Chodos,
Deputy Chairperson.

OTTAWA, December 9, 1997.