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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

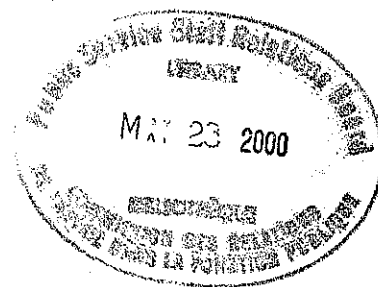
Bargaining Agent

RE: Post-Certification Identification of
Managerial or Confidential Position -
Josée Saint-Marseille, Manager, Corporate Memory (LS-03),
Canadian Space Agency (ADM-00260)

Before: Guy Giguère, Board Member

For the Employer: Raymond Dionne

For the Bargaining Agent: Stephanie Copeland



Heard at Ottawa, Ontario,
March 1, 2000.

DECISION

[1] Pursuant to subsection 5.2(1) of the *Public Service Staff Relations Act (P.S.S.R.A.)*, the employer identified the position occupied by Josée Saint-Marseille, Manager, Corporate Memory (LS-03), at the Canadian Space Agency (C.S.A.), as a managerial or confidential position. The Public Service Alliance of Canada (P.S.A.C.) objected to this identification pursuant to subsection 5.2(3) of the *P.S.S.R.A.* As a result, an examiner, Carol Rossignol, was appointed by the Board, pursuant to paragraph 25(g) of the *P.S.S.R.A.*, to inquire into and report on the duties and responsibilities of Mrs. Saint-Marseille.

[2] On October 19, 1999, a copy of the examiner's report was sent to both parties and they were advised to make any representations on the accuracy of the report to the Board by a certain date.

[3] By letter dated December 20, 1999, Raymond Dionne, the employer's representative, informed the Board that he had no "suggestions to make as to errors in or omissions from" the report but the employer would appreciate a hearing before the Board "to make representations as to the conclusions it should reach based on the oral and documentary evidence".

[4] The bargaining agent made no representations on the accuracy of the examiner's report.

[5] Section 5.2 of the *P.S.S.R.A.* reads as follows:

5.2 (1) Where, before or after the coming into force of this section, a bargaining agent has been certified by the Board, the employer may, in the prescribed manner, identify any position described in subsection 5.1(1) of an employee in the bargaining unit for which the bargaining agent was certified as a managerial or confidential position, and for the purpose of that identification the reference in paragraph 5.1(1)(d) to the Board shall be construed as a reference to the employer.

(2) Where the employer identifies a position pursuant to subsection (1), it shall notify the Board and the bargaining agent in writing of the identification.

(3) Within twenty days after receiving a notice under subsection (2), the bargaining agent may file an objection to the identification with the Board.

(4) Where an objection to an identification is filed pursuant to subsection (3), the Board, after considering the objection and giving the employer and the bargaining agent an opportunity to make representations, shall confirm or reject the identification.

(5) An identification of a position pursuant to subsection (1) takes effect at the end of the period referred to in subsection (3) if no objection is filed within that period or, if an objection is so filed and the identification is confirmed on the objection, the identification takes effect on the date of the decision confirming it.

[6] A hearing was held on March 1, 2000, and the parties did not call any witnesses, relying solely instead on the examiner's report. I hereby incorporate by reference into this decision the examiner's report dated October 18, 1999. Mr. Dionne asked that his letter to the Board of December 20, 1999 be made part of his submissions, to which Mrs. Copeland, after reading the letter, did not object. Mr. Dionne's request was therefore granted.

Arguments

For the Employer

[7] Mr. Dionne submits that Mrs. Saint-Marseille's position should be excluded under paragraph 5.1(1)(d) of the P.S.S.R.A. because of a conflict of interest arising out of Mrs. Saint-Marseille's duties and responsibilities to the employer.

[8] Mrs. Saint-Marseille reports directly to J. Lachapelle, Director of Administration (EX-01) at the C.S.A., who, in turn, reports to the President, M.W. Evans. Mrs. Saint-Marseille is at the first level of three levels of management. In her capacity, she is in charge of and personally responsible for:

- the Library, including several satellite libraries;
- Records Management;
- Mail Services;
- the research and information publications distribution;
- the acquisition, conservation and disposal of C.S.A. information holdings;
- the implementation of communication and marketing strategies;

- the promotion of Corporate Memory services, internally and externally; and
- advising C.S.A. managers, up to the president, and external clients.

[9] Mr. Dionne argues that, as outlined in the examiner's report, Mrs. Saint-Marseille meets the criteria set out in paragraph 5.1(1)(d) of the *P.S.S.R.A.* for the following reasons:

- (1) she is nothing but a manager;
- (2) she occupies a managerial position within the organization;
- (3) she is vested with the responsibilities of a manager;
- (4) her interests are more closely associated with those of a manager than those of a union member;
- (5) she acts as a representative of C.S.A. management on several management committees.

[10] In her capacity as Manager, Corporate Memory, Mrs. Saint-Marseille is responsible for and has full authority to manage a budget of \$792,000. When she joined the C.S.A. in 1991, she had to set up the Library, hire staff, build up a collection, etc.

[11] As a member of the management team, Mrs. Saint-Marseille is a member of several management committees. In particular, she is part of the Management Committee of the Administration Division, which is comprised of the managers who report to the Director, Mr. Lachapelle. This committee has decision-making authority.

[12] Mr. Dionne agrees with Mrs. Copeland that not all members of this committee are excluded from the bargaining unit.

[13] In addition, Mr. Dionne submitted in his letter of December 20, 1999 that, as shown in Mrs. Saint-Marseille's job description, the entire focus is management-oriented. She is an essential part of C.S.A. management and her ties are with the management core group as she is dealing with endless management concerns and continuous management issues. The employer submits, therefore, that

Mrs. Saint-Marseille is in a conflict of interest situation and should not be included in the bargaining unit.

For the Bargaining Agent

[14] Mrs. Copeland submits that, in order to determine whether Mrs. Saint-Marseille should be excluded, some of the activities related to her position deserve closer examination.

[15] Repeatedly calling someone a manager does not make such a person a manager. In the *Sisson* case (Board file 176-2-287), the following definition of management is found at paragraph 70:

70. *The Dictionary of Supervision and Management by Ivan S. Banki, published in 1974 and described as an authoritative and comprehensive text, defines management as:*

A collective term that refers to the system, function, process or office of planning, providing, coordinating, directing, evaluating and controlling all available efforts and resources of an organization for the accomplishment of the objectives and policies which are designated by and handed down from the top executives of the organization.

[16] As can be found in the examiner's report, the authority of Mrs. Saint-Marseille is consistent with the authority of a supervisor but not of a manager. Mr. Lachapelle retains all the decision-making authority. For example, Mrs. Saint-Marseille has the responsibility to update the organizational chart but she does not have the authority to approve it. Only the Executive Committee can approve a modification to the organizational chart.

[17] Mrs. Saint-Marseille was never asked to replace her superior, Mr. Lachapelle, as was the case in *Sisson* (*supra*) or in *Andres and Webb* (Board files 172-2-884 A and 172-2-886 A). She only assesses the performance of interns, not staff, as was the case in *Andres and Webb*.

[18] Mrs. Saint-Marseille is a member of the Management Committee of the Administration Division as are all heads of sections from the Administration Division.

[19] According to paragraph 15 of the examiner's report, Mr. Lachapelle stated that he meets with members of this committee informally, about once every two months, and that he prefers to meet with them more frequently one-on-one to discuss specific problems and future directions. He feels that group meetings might not be as productive, since some managers might not benefit from the discussion at large of problems occurring in other sections.

[20] On the other hand, the Executive Committee of the C.S.A. is chaired by the President, Mr. Evans, and division chiefs, such as Mr. Lachapelle, are members. The Executive Committee meets twice a month and receives requests and recommendations and approves them for action. Evidence shows that the Executive Committee has effective decision-making authority and enjoys discretion, freedom of action and independence of action, which the Management Committee of the Administration Division does not have.

[21] The bargaining agent submitted that exclusions must be supported by strong evidence of potential conflict of interest. In this case, Mrs. Saint-Marseille supervises seven employees.

[22] The employer's representative argues that Mrs. Saint-Marseille has created two positions, but in paragraph 47 of the examiner's report it is stated that she "...requested the creation of the LS-2 (267), SI-1 (268 and 272) positions, ...". She did not have the final say in the hiring of staff. The President and the Human Resources Director have this authority, as shown in Exhibit P-6(a) (Delegation of Authority in Human Resources). Only the President and Human Resources have the authority to hire staff.

[23] As appears in the Delegation of Authority (Exhibit P-6(a)), Mrs. Saint-Marseille has been delegated authority which is consistent with supervisory authority. Much of this authority is shared or delegated to lower levels. Where employment security is concerned, her authority is very limited. She does not have the authority to terminate the employment of an employee. Her authority is limited to the imposition of financial penalties and suspensions up to a maximum of five days. As seen at page 38 of the *Keegan and Jessen* decision (Board files 172-2-1003 and 172-2-1004), the authority to suspend an employee is not enough for a position to be excluded.

[24] When Mr. Lachapelle was asked for examples of conflicts of interest, he replied (see the examiner's report at paragraphs 21 to 25) that it was the records responsibilities that could give rise to a conflict of interest. For example, in a dispute between management and one of the bargaining agents, management might require certain documents. Mr. Lachapelle stated this had never happened and the only actual situation where this occurred was the case of Mario Rinaldi, a former manager at the C.S.A. However, Mrs. Copeland added that, in the Rinaldi case, Mrs. Saint-Marseille was actually overseeing her employee retrieving documents; she was not directly involved in the retrieval of documents.

[25] Mr. Dionne argues that Mrs. Saint-Marseille is part of the management team because she sits on management committees. As discussed earlier, the Management Committee of the Administration Division has no effective decision-making authority. Mrs. Saint-Marseille is no longer involved in the Internet and Intranet Committee and the Employment Equity Committee. The C.A.M.A.Q., mentioned at paragraph 53 of the examiner's report, is a "networking" committee with no decision-making authority. The Steering Committee of the Council of Federal Libraries and the Council of Federal Libraries are sub-committees and make recommendations only; there exists no possibility of a conflict of interest as a member. With reference to the Federal Libraries and Consortium, the C.S.A. management is not bound by it. Finally, as chairperson of the Corporation of Professional Librarians of Quebec, Mrs. Saint-Marseille acts as chair of a professional committee but does not represent the C.S.A. on it.

Reasons for Decision

[26] It is proposed by the employer that the position occupied by Mrs. Saint-Marseille, Manager, Corporate Memory, be excluded pursuant to paragraph 5.1(1)(d) of the *P.S.S.R.A.* Therefore, I must determine whether the position of Manager, Corporate Memory, held by Mrs. Saint-Marseille should be excluded from the bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer.

[27] Paragraph 5.1(1)(d) of the *P.S.S.R.A.* reads as follows:

5.1(1) Where, in connection with the application for the certification of an employee organization as a bargaining agent, the Board is satisfied that any position of an employee in the group of employees for which certification is sought meets any of the following criteria, it shall identify the position as a managerial or confidential position:

...

(d) a position the occupant of which has duties and responsibilities not otherwise described in this subsection and who in the opinion of the Board should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer;

...

[28] As early as 1971, then Chairman of the Public Service Staff Relations Board, J. Finkelman, Q.C., in *Gestrin and Sunga* (Board file 172-2-31 at pages 8-9), formulated the management team concept. Mr. Finkelman explained that it was impossible for the legislator to "foresee all the circumstances under which it might be proper for the employer to put forward a proposal to exclude an individual as being employed in a managerial capacity" and that "the inclusion of a 'catch all' clause was deemed necessary to enable the Board to deal with special situations". The use of a catch all clause gave the Board wide discretion, since its language provided little guidance to determine if a person fell under this head (now 5.1(1)(d)). Chairman Finkelman therefore saw that this catch all clause could permit the designation of persons (now positions) who, although not otherwise described in the previous heads (now 5.1(1)(a) to (c) and (e)), were "in essence to be regarded as members of what might be referred to as 'the management team'".

[29] Without defining "management team", Chairman Finkelman explained that Messrs. Gestrin and Sunga not only prepared briefs for Committees of Cabinet and the Cabinet itself, but were also actively involved in the discussions that took place in the Committees. Therefore, they participated in management decisions and were part of the management team.

[30] The principle set out in *Gestrin and Sunga (supra)* has been applied consistently in later decisions of the Board. In those cases, the Board, without giving any clear-cut definition of what constituted a management team or a manager, enunciated a number of guidelines to distinguish between a manager and a supervisor.

[31] As it is difficult to determine the dividing line between a manager and a supervisor, each case must be decided on its own circumstances by reference to the jurisprudence that has developed. Also, it should be remembered that it is the employer's duty to organize its affairs so that its employees are not occasionally placed in a position of conflict of interest.

[32] I find particularly helpful the definition of supervision quoted in the *Sisson* case (*supra*), at paragraph 71. This definition is taken out of the *Dictionary of Supervision and Management* by Ivan S. Banki:

71. *Supervision is defined as:*

The function and activity of making sure that the objectives of the organization are carried out according to plans and policies which are designated and handed down from management.

[33] A supervisor, therefore, would oversee the implementation by staff of the policies and plans which are decided upon by management.

[34] The burden of proof lies with the employer and as Chairperson Tarte explained in *Andres and Webb (supra)*, at page 14:

Exclusion under paragraph 5.1(1)(d) must be supported by cogent evidence of potential conflict or association with management by reason of the duties of the position.

[35] Having reviewed the examiner's report and the documents filed at the hearing, and after considering the jurisprudence and representations made by both parties, I have reached the conclusion that the proposed identification of this position by the employer cannot be confirmed.

[36] The evidence referred to by the employer's representative in support of his argument that the position ought to be excluded from the bargaining unit did not convince me that there was "potential conflict or association with management by reason of the duties of the position".

[37] Even if Mrs. Saint-Marseille gives some input to Mr. Lachapelle on budgetary and administrative matters, it has not been shown that it is of such a nature as to establish that she is part of the management team. Similarly to the decision of then Deputy Chairperson Chodos in *Wind* (Board file 174-2-515), and also the decision of Deputy Chairperson Henry in *Kegan and Jessen (supra)*, at page 46, Mrs. Saint-Marseille's involvement in different committees does not reveal any decision-making or effective recommendation role that would warrant an exclusion. Those committees were mostly information-sharing forums or were attended by managers and non-excluded personnel. In this case, the power to make decisions rested either with Mr. Lachapelle, the Director of Administration, or members of the Executive Committee.

[38] Mrs. Saint-Marseille supervises seven employees but this is not in itself enough to demonstrate management responsibility. Unlike the *Sisson (supra)* situation, Mrs. Saint-Marseille does not replace her superior, Mr. Lachapelle, in his absence and has very limited authority in terms of suspending employees. She cannot terminate an employee's employment and may suspend an employee for a maximum of five days only. As well, Mrs. Saint-Marseille assesses only the performance of interns and not staff.

[39] With respect to the issue of conflict of interest, following *Gestrin and Sunga (supra)*, although being part of the management team necessarily implies a likelihood of conflict of interest in the case of an employee included in the bargaining unit, conflict of interest is also possible without being part of the management team. In this regard, I refer to the *Lemieux* decision (Board file 174-2-250), at page 9.

[40] Even if the duties of the position do not cause Mrs. Saint-Marseille to be a member of the management team, the position could still be excluded under paragraph 5.1(1)(d) of the *P.S.S.R.A.* provided that it is proven there is a conflict, between the duties and responsibilities of her position and her continued inclusion in the bargaining unit.

[41] According to Mr. Lachapelle, it is Mrs. Saint-Marseille's records responsibilities (retrieval of documents in a union-management dispute, as an example) that could give rise to a conflict of interest. However, in cross-examination, he stated that this had never happened and that the only actual occurrence involved a former manager, Mario Rinaldi. Mrs. Saint-Marseille's involvement was to supervise the work of staff in retrieving documents.

[42] I find, in this situation, no cogent evidence of actual or potential conflict of interest. Nothing in the examiner's report or in the submission of the employer's representative showed any other potential conflict of interest affecting the position occupied by Mrs. Saint-Marseille.

[43] The Board therefore concludes that the position currently held by Mrs. Saint-Marseille does not qualify for exclusion from the bargaining unit under paragraph 5.1(1)(d) of the *P.S.S.R.A.* Accordingly, the objection of the bargaining agent against the employer's identification of the position of Manager, Corporate Memory, is upheld and the identification is rejected.

Guy Giguère,
Board Member

OTTAWA, May 16, 2000.