File: 147-2-46

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 under section 34 of the
Public Service Staff Relations Act
- Determination of Membership

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,
May 13, 1997.

The Public Service Alliance of Canada has filed an application dated September 10, 1996 seeking a determination by the Public Service Staff Relations Board pursuant to section 34 of the *Public Service Staff Relations Act* that certain students hired by Revenue Canada, Customs, Excise and Taxation are part of the Program Administration (PM) bargaining unit, effective the first day of their employment. By letter dated September 26, 1996 the Treasury Board responded to the above-noted application 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 subparagraph (k) of the definition of "employee" found in subsection 2. (1) of the Act. It is therefore the employer's contention that the Board is without jurisdiction to make a determination in respect of these persons.

At the commencement of the hearing counsel for the employer advised that the Board has the authority to address the jurisdictional issue raised by this application. The parties requested, and the Board agreed, that this proceeding would be confined exclusively to the jurisdictional issue raised by the employer. It was also agreed that, should the Board find that it has jurisdiction to deal with this issue, the Board would reconvene the hearing to consider additional evidence with respect to the merits of this application.

The employer's chief witness was Mr. William Stevenson, currently Policy Head, Students and Education Relations, at the Treasury Board. Mr. Stevenson has had responsibility for the student employment portfolio since 1989. Mr. Stevenson indicated that there has been a Summer Student Program since the late 1960's. He identified a document (exhibit E-1) addressed to Directors of Personnel, dated January 3, 1996 concerning "Administrative Procedures Related to the Federal Summer Student Employment Program (FSSEP)". This letter was signed by Colette Nault, a Director General with the Public Service Commission. Attached to this covering letter is a 12 page document setting out the procedures, criteria, etc. respecting the recruitment and hiring of students under the FSSEP. The document also makes reference to such matters as the hours of work and rates of pay of students hired under this program. It includes several appendices, including Appendix F which sets out the rates of pay for summer employment, distinguishing between the Non-Career Oriented Summer Employment Program (Non-COSEP), and the Career-Oriented Summer Employment Program (COSEP). Appendix A of the document

contains a set of definitions including the definition of "**Federal Summer Student Employment Positions**":

> *Unclassified summer positions for which Treasury Board establishes the rates of pay. Summer student positions do not require any priority clearance. These summer positions provide work assignments which use, complement or augment a student's academic training and development and/or job-related skills; and which introduce the student to the prospect of a career in the Public Service of Canada.*

It should be noted that exhibit E-1 also contains a paragraph entitled "**APPOINTMENTS**" (p. 7) which states that:

> *Appointments must be made in accordance with the Public Service Employment Act (PSEA) and Regulations (PSER), and with Public Service Commission policies and guidelines. The period of appointment for students will be between April 1 and September 30, 1996 inclusive.*
>
> (underlining added)

Paragraph 5.4 which is entitled "**Extension of Appointments**" states:

> *All appointments under FSSEP terminate on or before **September 30, 1996**. Extensions should not exceed that date.*
>
> *Departmental requests for extensions during the Program period, namely between April 1 and September 30, 1996, may be made either by telephone or fax and should be directed to the FSSEP officer (Appendix B) in your local PSC office.*
>
> *In some cases, there may be legitimate reasons for requesting an extension of students beyond September 30, 1996. In these cases, the department must **make the request in writing to their regional/district PSC office** and clearly outline the reason for the extension. The letter must also state that the student is returning to full-time studies in the fall.*

Mr. Stevenson outlined in detail the procedures governing the FSSEP as set out in exhibit E-1. He noted that responsibility for appointing candidates rests exclusively with the Public Service Commission; that is, a candidate must be in the FSSEP inventory established by the Public Service Commission in order to be eligible for appointment. Other criteria must also be met for eligibility, including the

requirement that the student be recognized as having full-time student status by the academic institution in which he/she is enrolled and be planning to continue full-time studies in the fall of 1996 (see page 3). Mr. Stevenson also referred to the distinction in the program between non-career oriented employment, for which no post-secondary education is required and which largely involves unskilled work, and career-oriented employment (i.e. COSEP) which requires some level of post-secondary education or training. Mr. Stevenson also noted the difference between a Co-Op and Non-Co-Op Program; for the former, students alternate between four months study, followed by four months of work experience; for the latter, the students have a conventional academic term which runs from September to April.

Mr. Stevenson also noted that the provision respecting the limited duration of the summer program, that is from April to September only, has been a feature of this program since the 1960's, and was also in effect in 1987. Mr. Stevenson maintained that these restrictions however were not applicable to Revenue Canada after 1987, as the department had its own special provisions. In this context, Mr. Stevenson identified exhibit E-2, a "Memorandum of Understanding Between National Revenue Customs and Excise and the Treasury Board of Canada" dated June 5, 1987. Mr. Stevenson referred in particular to section 4.3.4 of this document which states as follows:

> *NR-CE may, on a year-round basis, hire students (full or part-time) to assist in meeting seasonal fluctuations in workload and the peak periods which frequently occur at major international airports. Such students will be paid at rates established under CEIC programs (such as COSEP, CO-OP, etc.) and will be accounted for outside the normal person-year control framework. Funding will be from departmental operating resources.*

According to Mr. Stevenson, the purpose of this provision was to allow the department to hire students, either full or part-time, to deal with work fluctuations throughout the year. By virtue of section 2.1 of exhibit E-2, the Memorandum has remained in effect up to and including the end of March 31, 1997. Mr. Stevenson referred to a letter dated October 12, 1995 which he wrote to Mr. Peter Harrison, Assistant Deputy Minister, Revenue Canada, concerning exhibit E-2. This letter (exhibit E-3) states the following:

> *This is to confirm that the year-round utilization of students under the Federal Summer Student Employment Program as first set out in the Memorandum of Understanding (MOU) between the Department of National Revenue, Customs and Excise and the Treasury Board of Canada, signed in 1987, remains in effect for the time being.*
>
> *As you are aware, the Secretariat has conducted an extensive review of Public Service practices and needs and is recommending a change in approach to the future use of students. Until Ministers decide on this recommendation for a new framework, the current arrangements are to remain in effect.*
>
> *It is my understanding that the Memorandum was intended to apply to seasonal fluctuations in customs operations, at all locations, and was not limited to international airports.*

Mr. Stevenson testified that on July 10, 1996 the Treasury Board Ministers approved a new student program, to take effect in 1997, the highlights of which are set out in a letter from the Deputy Secretary, Human Resources Branch of the Treasury Board to Deputy Heads and Heads of Agencies. Mr. Stevenson, who is the author of this document and submitted it for Treasury Board approval, pointed out that the new 1997 program has the same eligibility criteria as in the 1996 program. He noted however that under the new program there are restrictions on duties which may be assigned to students under this program; the new program emphasizes that the duties must be part of the learning assignment, and once the training has been completed students are no longer eligible under the program. In effect, there are safeguards to prevent the student from overlapping with fully classified positions by requiring that there must be a "learning agreement" between the manager and the students outlining in detail what must be learned; the agreement has to be defined in terms of employability skills, that is students are to be treated as understudies; furthermore, the students cannot work more than one year throughout their student career, that is a student cannot be recalled to work once that student has worked a total of either 1957 or 2087 hours, depending on the particular occupational group to which the student is assigned (see Annex B of exhibit E-4). According to Mr. Stevenson, the new program specifies that students can work beyond the non-academic period, but only part-time, and only up to a maximum number of hours. Mr. Stevenson maintained that the 1996 Student Program did not preclude

students from being hired for more than three months; this feature continued under the 1997 program, with the addition of the time cap.

In cross-examination Mr. Stevenson agreed that, with the exception of Annexes F and G, exhibit E-1 was produced entirely by the Public Service Commission. He acknowledged that this document deals with hiring students for a summer work program and that, except for Revenue Canada, the program was intended to operate only during the traditional summer student break. He agreed as well that this exception is not specifically noted in exhibit E-1, and in fact the period of appointment set out in the document refers to April to September inclusive. In Mr. Stevenson's view, staffing outside that period is authorized by virtue of exhibit E-2 "combined with the willingness of the Public Service Commission to make an exception to the time limit stated in exhibit E-1". He further stated that, on the basis of the Commission's willingness to make these appointments since 1987, he makes the assumption that the Commission concurs with this exception. He admitted that he had seen no document emanating from the Commission which approves the arrangement between Treasury Board and Revenue Canada. Except for exhibit E-2, Mr. Stevenson is not aware of any other memorandum between Treasury Board and the Department dealing with the hiring or utilization of students.

Mr. Stevenson maintained that prior to the implementation of the new program effective April 1, 1997, students could be assigned the full range of duties of a PM-1. He believes that students were not to be unsupervised and were not to conduct strip searches. With this exception he is not aware of any differences in the duties performed by students and other staff, nor is he aware of the details of their training. Mr. Stevenson is also not aware of any Exclusion Order from the Public Service Commission respecting students employed at Customs and Excise.

With respect to the 1997 program Mr. Stevenson noted that it is up to the immediate supervisor to determine upon completion of the students' training that they should be out of the program, and the department would then terminate the assignment. He is not aware of any restriction on the hours of work or the types of shifts which the students may be required to work. Mr. Stevenson noted that in 1996 the Commission continued to refer students to Revenue Canada, Customs and Excise during the non-summer period.

The employer called two Customs Superintendents from the Niagara District as witnesses: Mr. John Eldridge, who has been a Customs Superintendent at the Peace Bridge in Fort Erie since 1989, and Ms. Lorelei Plata, a Customs Inspector at Rainbow Bridge in Niagara Falls, also since 1989. Mr. Eldridge was responsible for coordinating the hiring and training of students under the FSSEP in fiscal year 1996 for the Niagara District. He stated that all students must be hired from the Public Service Commission's FSSEP inventory and must satisfy certain criteria, for example they must be in attendance full-time at an educational institution to which they are returning in the fall. In 1996 the students were scheduled to work during the non-academic period for approximately 30 hours per week; this has been increased in 1997 to 37½ hours per week. During the academic period the students would normally be scheduled to work 12 hours per week, primarily on weekends for peak traffic hours. In 1996 approximately 86 students were working during the non-academic period; less than 20 of these students were utilized during the academic year. Mr. Eldridge advised that he had been directed in the fall of 1996 not to utilize the students, except for weekends. Students have their own duty roster which is scheduled two weeks in advance. Ms. Plata confirmed that students are employed during the academic period exclusively on weekends. She noted that students would not be used to replace regular staff who call in sick; she has never had to call in a student for an extra shift to replace a regular employee.

Mr. Eldridge was cross-examined concerning the training provided to student employees. He noted that they do not have the same training as regular officers, for example, they do not attend the departmental College at Rigaud, Quebec. Rather, the student would receive two weeks of classroom training, and a week of apprenticeship with an inspector. He agreed that students would do most of the duties of a regular officer. He believes that the students would have peace officer status while they are performing duties as Customs Officers; however they do not receive handcuff training. With respect to post rotation, the students are not assigned to commercial operations.

The applicant chose not to call *viva voce* evidence; however on consent, a Revenue Canada booklet entitled "Guidelines for Operational Efficiencies - Customs Border Services" was filed (exhibit A-1).

Counsel for the applicant submitted that in order for the Board to take jurisdiction in respect of this application it must find that the students referred to in the application are in fact "employees" in accordance with the *Public Service Staff Relations Act*. However, pursuant to paragraph (k) of subsection 2. (1), which came into force on June 20, 1996, students hired pursuant to a student employment program are not employees under the Act. There is no dispute here that, as of the date of this application, there was a designated summer student employment program, that is exhibit E-1, pursuant to which the students in question were employed.

Mr. Snyder acknowledged that exhibit E-1 provides that the duration of the program is from April to September, 1996; according to Mr. Snyder approximately 80 percent of the student employment was confined to this period; about 17 students were employed thereafter on a part-time basis. Mr. Snyder submitted that the evidence establishes that the provision respecting duration was not applicable to Revenue Canada as a consequence of the Memorandum of Understanding entered into between Treasury Board and the Department. Paragraphs 4.3 and 4.5 of the Memorandum provides that students can be hired on a part-time basis to meet seasonal fluctuations throughout the year, and that these students would be remunerated through a relevant student program, i.e. COSEP. Exhibit E-3 establishes that this Memorandum was still in effect as of September 1996.

Mr. Snyder also argued that there is clear evidence from Mr. Stevenson that there was consent from the Public Service Commission to the employment of students on a part-time basis during the academic year; the department was provided access through the Public Service Commission to the FSSEP inventory outside the non-academic period, and this was the sole source of these appointments. Counsel maintained that there is nothing to indicate that the Commission did not approve of this exception, particularly in light of the Memorandum of Understanding, which predates exhibit E-1 and is in fact a long-standing, continuing practice.

In the alternative, counsel submitted that exhibit E-2 in and of itself constitutes a Treasury Board designated student program as that term is used in paragraph (k). Paragraph 4.3 of the Memorandum provides for the hiring of students, and sets out how they are to be compensated, etc. Counsel insisted that the Memorandum can

co-exist with exhibit E-1, and neither is inconsistent with the other. Mr. Snyder also noted that the students in question meet the criteria for the summer student program as set out in exhibit E-1. They are full-time students in an academic institution, and are returning to full-time study during the academic period. Also, they have all been appointed from the Public Service Commission's student inventory.

Mr. Snyder also maintained that the summer student program in force in 1996 contained no restrictions with respect to the assignment of duties or the hours of work, albeit this was changed as of 1997. Accordingly, whether or not these students perform the full range of duties of a Customs Officer is irrelevant to the question of whether the students are subsumed under paragraph (k); in any event the new 1997 program addresses these concerns.

In the further alternative Mr. Snyder submitted that, if the students are deemed to be employees under the Act, then these students cannot be so characterized as of April 1, 1997, since under the new revisions there is no limiting time period other than the cap on the total number of hours. That is, the new program adopts some of the aspects of the Memorandum, and these aspects have been adhered to without exception.

The applicant's representative responded that the students in question were not hired under a student program as described in paragraph (k) and therefore are not excluded from the definition of "employee" in the Act. Mr. Done noted that exhibit E-1 makes specific reference throughout the document to "summer programs"; furthermore, paragraph 5 restricts the employer to employing persons under the program between April to September only; that is, this is clearly a post-secondary summer employment program to learn skills during the non-academic period. Paragraph 5.4 confirms this, by stipulating that employment under the program is to terminate in September.

Mr. Done argued that paragraph 4.3.2 of exhibit E-2 deals with airports only; there is nothing to indicate that the Memorandum was to apply to Customs operations at bridges.

Mr. Done also referred to the Public Service Commission Exclusion Order dated January 11, 1995 (SOR/95-62). Under section 2, that is the interpretation section, it

speaks of “a period of employment included between April 1 and September 30 of each year ...”. This again makes it very clear that the program was intended to operate only for that specific period.

Mr. Done also argued that the utilization of student employees as Customs Inspectors throughout the year is contrary to the Department’s own directives; thus exhibit A-1 states that: “Students should, therefore, not be hired to replace term or indeterminate employees to perform the same duties.” Yet, this is exactly what had been done here in the guise of the FSSEP.

Mr. Done also maintained that the revised 1997 program, does not in any significant way change exhibit E-1. Annex A of exhibit E-4 makes it clear that students should not be hired to perform the full range of “classified duties”; but that is exactly what has been happening at Customs and Excise.

Mr. Done noted that exhibit E-1 makes no exceptions with respect to Customs and Excise, nor is there any evidence emanating from the Public Service Commission about their view as to the practice in the Department. Furthermore, the Memorandum of Understanding contains no description of a student employment program; it is clear in fact that the document does not create or continue a summer student program. Mr. Done maintained that, if the employer’s submissions were accepted, then the *Public Service Employment Act* could be rendered meaningless, and ultimately it may lead to the elimination of the PM bargaining unit in respect of Customs and Excise. The applicant has a vested interest in protecting bargaining unit work and its membership; a broadly interpreted summer student program constitutes a grave threat to the unionized workforce at the border. Mr. Done maintained that the students in question are not being used in accordance with the program, and that exhibit E-4 does not diminish the applicant’s concerns in this regard.

In rebuttal, counsel for the employer maintained that the Memorandum is not restricted to airports, as confirmed both in Mr. Stevenson’s letter and in his testimony. Mr. Snyder also maintained that the Exclusion Order has no relevance with respect to the jurisdiction question.

Reasons for Decision

It is common ground between the parties that the determination of this issue turns on the interpretation and application of paragraph (k) found in the definition of "employee" in subsection 2. (1) of the Act, which reads as follows:

> *2. (1) In this Act,*
>
> *...*
>
> *"employee" means a person employed in the Public Service, other than*
>
> *...*
>
> > *(k) a person who is employed in a portion of the public service of Canada specified in Part I of Schedule I under a program designated by the Treasury Board as a student employment program,*
>
> *...*

Section 34 of the Act reads as follows:

> *34. Where, at any time following the determination by the Board of a group of employees to constitute a unit appropriate for collective bargaining, any question arises as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question.*

There is no dispute that paragraph (k) was in force as of the date of this application, i.e. September 10, 1996. Furthermore, Mr. Done acknowledges that exhibit E-1 constitutes "a program designated by the Treasury Board as a student employment program". What is very much in dispute is whether those students who were employed by Revenue Canada, Customs and Excise between September and April are subsumed by that program and therefore fall within the exception of paragraph (k). This necessarily brings us to a consideration of exhibit E-1. In my view, even a cursory examination of that document makes it very clear that it was intended to provide special rules for the hiring of students during the traditional non-academic "summer" period, that is between April and September exclusively. The document permits no other possible interpretation. Firstly, the very title of the

program, i.e. "Federal Summer Student Employment Program", points to the fact that it was meant to have a limited duration; furthermore, a number of specific provisions reinforce this view. For example, paragraph 5 entitled "**APPOINTMENTS**" notes that "the period of appointment for students will be between April 1 and September 30, 1996 inclusive". Paragraph 5.4 states: "All appointments under FSSEP terminate on or before **September 30, 1996.** Extensions should not exceed that date." While there is provision in the same section for extensions, they are to be made "... during the Program period, namely between April 1 and September 30, 1996" and it further provides that: "... the department must **make the request in writing to their regional/district PSC office** and clearly outline the reason for the extension." (page 9) The evidence does not demonstrate, nor was it even suggested, that the department attempted to make requests for extensions in accordance with these provisions.

In the face of this clear language the employer argues that the continued employment of these students beyond September on a part-time basis is encompassed by the FSSEP because the Commission continued to refer students from the inventory. In my view, it is entirely untenable to conclude on this basis alone that students employed beyond September 1996 are nevertheless subsumed by the program. Such a contention begs many questions: for example, given that this program was apparently in place at least since 1987, why was this exception not incorporated into exhibit E-1, or in any of its predecessors? It is also apparent from exhibit E-1, as well as the Exclusion Order referred to above, that it is the Commission which in effect operates the summer student program; surely if it was the Commission's view that students employed in the academic period are nevertheless part of this program, this could have easily been established through the testimony of a Public Service Commission official.

It can hardly be disputed that the purpose of the FSSEP is to permit students, during what is commonly known as the summer break, to earn some income and gain some useful work experience, both of which will presumably assist them in the pursuit of their studies and their careers; accordingly, the program permits the recruitment of students for temporary assignments with a minimum of bureaucratic obstacles to overcome (see page 236 of the Exclusion Order document (supra)). In my view, it cannot be cogently argued that the summer student program is intended as a ready source of cheap, flexible labour to be utilized throughout the year by the

Department of Revenue Canada, Customs and Excise. Yet, if I were to accept the employer's arguments, that would be the net effect.

I have carefully considered the employer's submission that the Memorandum of Understanding (exhibit E-2) between Customs and Excise and Treasury Board constitutes either a supplementary document to exhibit E-1 or is in and of itself a "student employment program". I believe this submission is also untenable. Nowhere in the Memorandum does the document purport to be a student program, nor does it in any way make reference to exhibit E-1. Furthermore, the Public Service Commission is not a party to it, nor does it even identify the Public Service Commission, or acknowledge its role, notwithstanding that, as the employer readily admits, it is a key player in the student employment program. An examination of the Memorandum convinces me that it is in the nature of a financial management and control document and not a summer student employment program, a subject which it barely touches upon. An examination of the Preamble, i.e. section 1.0, makes it very apparent that this is the case:

> *1.0 PREAMBLE*
>
> *1.1 Background*
>
> *On February 21, 1986, the Treasury Board and Cabinet approved in principle a revised approach to Treasury Board decision-making which, when fully implemented, will significantly increase the authority and accountability of Ministers and the departments and agencies for which they are responsible (TB #800978/79/80). The essence of the new regime is to provide Ministers with greater flexibility to reallocate resources and a general reduction in Treasury Board controls over many activities. This is coupled with an evolving accountability regime to protect the integrity of the management process.*
>
> *The February 21, 1986, decision provided that Ministers and departments can negotiate Memoranda of Understanding with the Treasury Board in order to establish increased accountabilities and authorities beyond those provided in the decision.*
>
> *The establishment of a Memorandum of Understanding (MOU) requires as a prerequisite that a department has appropriate planning, monitoring, control, internal audit and program evaluation infrastructures in place. Such*

> *infrastructures are in place in Customs and Excise and the Department continues to work closely with the Treasury Board Secretariat and the Office of the Comptroller General to ensure that such infrastructures are maintained and enhanced, where required, during the life of this agreement. Appendix A presents the management accountability regime which Customs and Excise will maintain to meet the requirement for accountability in the context of this Memorandum of Understanding. Appendix B presents the "IMAA Accountability Regime for NR-CE" as proposed by the Treasury Board. It includes specific accountability targets to be achieved by the Department.*

The rest of the document also supports this view. For example, the subheading for section 4.3, which was referred to by Mr. Snyder, speaks of "Terms and Conditions Respecting NR-CE's Resource Management Framework"; the heading for section 4.5 states "Terms and Conditions Respecting Accountability and Reporting". There is hardly a word in the document that specifically relates to a student employment program other than paragraph 4.3.4, *supra.* The rest of this detailed nine page document says nothing about students in any context. There is in fact no reason to read the Memorandum as anything other than a stand alone document, as opposed to a document which supplements or amends exhibit E-1. If, as contended by the employer, the Memorandum should be read together with exhibit E-1, why wouldn't that document incorporate the relevant provisions of the Memorandum, or at least make some reference to it, keeping in mind that the Memorandum is dated June 8, 1987, that is, it has been in existence nine years prior to the issuance of exhibit E-1. Also, the only parties to the Memorandum is one government department, and the Treasury Board. It seems bizarre and illogical that an agreement which purports to constitute a "student employment program" as contemplated by paragraph (k) would involve only one government department. Contrast this with exhibit E-1 and exhibit E-4 which are intended to have application throughout the federal public service.

Accordingly, I am led inexorably to the conclusion that it is only exhibit E-1 and its successor document exhibit E-4, which constitute a "student employment program" per paragraph (k). As a consequence therefore - in view of the facts that are currently before me - it appears that there are at least some students who have been employed by the department who are not subsumed by paragraph (k) and who may

therefore be part of the program administration bargaining unit for which the applicant is the bargaining agent. Accordingly, it will be necessary to reconvene a hearing of this matter in order to address the application on its merits. I would note that it appears the Treasury Board has issued a revised program (i.e. exhibit E-4) effective April 1, 1997, whose provisions contain significant changes from the 1996 program. It may well be that the recruitment and employment of students under exhibit E-4 will have very different implications with respect to the application of paragraph (k); however, at this point that issue remains largely in the realm of speculation and will have to await further developments.

The parties will be advised in due course as to the date for resumption of this hearing.

P. Chodos,
Deputy Chairperson.

OTTAWA, June 25, 1997.