Files: 172-2-884A
172-2-886A

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 Managerial or Confidential Designation:
Chief, Visitor Activities (GT-04) and General Works Manager (AS-03)

Before: Yvon Tarte, Chairperson

For the Employer: Georges Hupé

For the Bargaining Agent: Doug Marshall

Heard at Ottawa,
September 15, 1997.

The Public Service Alliance of Canada objects to the exclusion of two positions from bargaining units for which it is the certified bargaining agent. The positions are Chief, Visitor Activities (GT-04) and General Works Manager (AS-03).

Preliminary Objection

At the outset of the hearing in these matters, the representative of the bargaining agent raised a preliminary objection relating to the authority of the Board to deal with these objections to identification. The bargaining agent's preliminary objection is based on the fact that the employer had changed the heading contained in section 5.1 of the *Public Service Staff Relations Act* (the Act) under which the initial proposal for exclusion had been made.

Chronology of Events

The parties agreed to the following chronology of events and facts. By letter dated November 8th, 1995 the employer identified the two positions as being managerial or confidential positions as defined in section 5 of the *Act*. On November 27th, 1995 the bargaining agent objected to this identification. Approximately one year latter on September 5th, 1996 the Board appointed Paul Morin to meet with the employer and the bargaining agent to conduct an examination in these cases.

The examination took place on September 9th and 10th, 1996. Prior to September 9th, 1996 the employer indicated to the bargaining agent that it wished to add a ground under section 5 to justify the designation of the two positions. At the examination the bargaining agent raised objections to the addition by the employer of grounds for designation. The examiner included the following paragraph in his report:

> *Prior to the examination, the Union Representative expressed concerns that the two positions were proposed under two heads while the Bargaining Agent is arguing in other cases that the Employer could not submit under more han one head. However there was no objection to proceeding with the examination under the two heads.*

On September 11th, 1996 the employer wrote to the Board to formally request the addition of a ground under section 5.1 of the Act to justify the exclusion of the two positions. On November 5th 1996, the bargaining agent wrote to the Board to

request that the exclusion discussions in these cases "be held in abeyance until such time as the Board renders a decision on the employer's ability to amend its exclusion proposal without going through the proper established procedure". On November 18th, 1996 the employer responded to this objection by agreeing that "the final version of the examination report should not come out until the matter under dispute is resolved". (Exhibit U-1).

Argument for the Bargaining Agent on the Preliminary Objection

The procedure for dealing with the exclusion of positions is set out in section 5.2 of the Act and section 38 of the *PSSRB Regulations and Rules of Procedure (1993).* The statutory provisions and the regulations require that the employer assess the functions and duties of each position before submitting it for proposal for identification. The bargaining agent is entitled to know at the beginning of the process under which heading of section 5.1 the employer proposes a position for identification. The Treasury Board very rarely complies with the procedures set out in the statute.

Very little case law exists on this topic. In Public Service Alliance of Canada and the Treasury Board (Board file 176-2-293) the Board, at pages 2 and 3, stated:

> *In our view, it is reasonable both for this Board and the Bargaining Agent to expect that the Employer will have given sufficient consideration to its proposals for the designation of employees as being employed in a managerial or confidential capacity as to enable it to clearly indicate the paragraph or paragraphs of the definition in section 2 of the Act on which its proposals are based at the time such proposals are initially submitted. We would like to think that the current additional proposal for the designation of Mr. Oliver is an exception, based on particular circumstances, rather than as an indication of any pattern or regular practice on the part of the Employer in making its proposals. Otherwise the whole designation procedure will be unnecessarily time consuming and wasteful in respect of the resources of all concerned. Be that as it may, there is nothing in the Act which prohibits the Employer from making additional proposals under other paragraphs subsequent to the filing of its initial proposal. Furthermore, notwithstanding, at the least, the inconvenience which the Employer's action has caused the Bargaining Agent, we are not able to support the latter's contention that it is tantamount to an abusive process on the part of the Employer. We would mention that the circumstances of the*

> *instant case are distinguishable from those in the Bond and Lingeman Case (supra) as Mr. Zajchowski's report, unlike the situation in the earlier case, is not yet in final form and has not been submitted to the Board. We would point out here as well that Mr. Oliver remains in the bargaining unit until such time as he is designated by the Board to be a person employed in a managerial or confidential capacity.*

In Professional Institute of the Public Service of Canada and the Treasury Board (Board file 172-2-219) the Board had to deal with a situation similar to this one. The employer in that case had sought leave of the Board to amend the grounds on which it was requesting an exclusion following an examination. At page 2 of its decision the Board stated:

> *At the hearing, which was duly held on July 20, 1976, the representative of the Bargaining Agent advised the Board that she agreed to the Employer's proposed amendment and did not require that the Report be referred back to the Examiner to enable the parties to adduce further evidence relating to head (g). Having regard to the agreement of the representative of the Bargaining Agent, the Board ruled that it was prepared to grant the Employer's requested amendment. However, the Board advised counsel for the Employer that, in the absence of the agreement of the Bargaining Agent, it would not have been prepared to accede to the Employer's request.*

Mr. Marshall stated that in the last year amendments to an initial proposal for identification have been made by the employer in numerous cases. This assertion was agreed to as factual by the representative of the employer. The situation deteriorated to a point where in November 1996 the Board proposed to the parties the execution of the following Memorandum of Agreement:

> *When a position is submitted for a managerial and (sic) confidential exclusion, the Employer specifies the head under which it proposes the exclusion. However prior to an examination or a hearing (PSSRB series 148 and 172) the Employer may wish to modify to the head under which the position is proposed. In order to streamline the process of modifying or adding to the head under which a position is proposed and to allow the parties time to review, consult and possibly reach an agreement, the Bargaining Agent and the Employer agree to the following:*

> *1) the Employer will notify on the appropriate form, the Bargaining Agent and PSSRB of the change or addition, the original PSSRB file number will be mentioned;*
>
> *2) the Bargaining Agent has twenty days to object (PSSRA, paragraph 5.2 (3));*
>
> *3) if the Bargaining Agent does not object, the position is excluded under the new head proposed;*
>
> *4) if the Bargaining Agent objects the process continues to a hearing or examination;*
>
> *5) if a hearing or examination is already scheduled, it will proceed as scheduled provided it is to be held forty days after the latest objection;*
>
> *6) if a hearing or examination is scheduled within forty days, it will be re-scheduled at least forty days after the latest objection unless the parties agree to proceed on the date originally scheduled.*

The employer's conduct in these cases establishes a clear pattern of abuse. What is the purpose of the procedure set out by Parliament in the statute if it can be simply ignored by the employer. The employer's conduct in these cases is duplicitous and wasteful and therefore harmful to the bargaining agent.

The exclusion process can be compared to the grievance process and by analogy the principles set out by the Federal Court in *Burchill* (Burchill v. Attorney General of Canada, [1981] 1 F.C. 109; 37 N.R. 530) should be applied to this case.

Even if the Board has authority to amend the employers' identification for exclusion, at no time in these cases has the employer sought leave to amend its initial proposal. In this case, as in many others before it, the employer has merely assumed the authority without the consent of the Board to amend its proposal. The bargaining agent therefore requests that these cases proceed only on the grounds for exclusion stated in the employer's initial proposal.

Arguments for the Employer on the Preliminary Objection

As the jurisprudence clearly states nothing in the statutes prohibits the employer from proposing different grounds for exclusion. The employer admits to having amended several of its proposals for exclusion in the past. It has never done

so to harass the bargaining agent. Rather these changes occur because a more comprehensive review of the files is made by the Treasury Board as the employer prepares for an examination scheduled by the Board. In this case as in other cases of this kind the employer has always given the bargaining agent ample time to deal with the proposed changes. It is possible that the employer is not doing enough in the initial stages of the identification process but the fact remains that the new provisions of the Act have not yet been fully explained by the Board in its jurisprudence.

The employer disagrees with the bargaining agent's position that it cannot propose a position for exclusion on the basis of more than one head under section 5.1 of the Act. The employer believes it acted properly in this case and the matter should be heard on the merits.

Reply of the Bargaining Agent on the Preliminary Objection

The amendments to section 5.1 of the Act in 1993 provide no excuse to the employer for this deplorable practice. In reality there is very little contest between the parties on the interpretation of section 5.1. That fact is shown by the limited number of cases which reach the Board for its determination. The bottom line is that the employer is not following the procedure set out by law. Giving the bargaining agent an additional twenty days to respond is not a cure to the problem. Finally the bargaining agent is not arguing that the employer may not, in its initial proposal, suggest more than one ground for exclusion.

Reasons for Determination of the Preliminary Objection

Sections 5.1 and 5.2 of the Act and section 38 of the PSSRB Regulations read 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:*
>
> *(a) a position the occupant of which has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;*

(b) a position the occupant of which has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act;

(c) a position the occupant of which is directly involved in the process of collective bargaining on behalf of the employer;

(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; and

(e) a position the occupant of which has, in relation to staff relations matters, duties and responsibilities confidential to a position described in paragraph (a), (b) or (c).

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

***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.

38. *(1) Where, after the Board has certified an employee organization as a bargaining agent for a bargaining unit, the employer wishes to identify a position in that bargaining unit in accordance with the criteria set out in subsection 5.1(1) of the Act, the employer shall, for the position identified, submit to the Board and the bargaining agent, in addition to the notification required by subsection 5.2(2) of the Act, a document setting out*

(a) the job title, position or work description, position number, classification, the department or agency and the geographic location of the identified position;

(b) the citation of the paragraph in subsection 5.1(1) of the Act that sets out the criterion met by the identified position; and

(c) where the position is identified under paragraph 5.1(1) (e) of the Act, the applicable paragraph, together with the job title, position or work description, position number and classification of the position in relation to which the duties and responsibilities of the occupant of the identified position are alleged to be confidential.

(2) Where a bargaining agent files an objection pursuant to subsection 5.2(3) of the Act, the objection shall contain a concise statement of the grounds for the objection.

(3) Where a bargaining agent files an objection pursuant to subsection 5.3(1) of the Act, the objection shall set out, for each position objected to, each position objected to,

(a) the job title, position or work description, position number, classification, the department or agency and the geographic location of the position objected to; and

(b) a concise statement of the grounds for the objection.

(4) Forthwith on the filing of an objection referred to in subsections (2) and (3), the bargaining agent shall provide a copy of the objection to the employer.

As indicated by the Board in decision 172-2-293 (supra) nothing in the *Public Service Staff Relations Act* prohibits the employer from making additional proposals

for exclusion following an initial submission. Be that as it may, the Board and the bargaining agent are entitled to expect that an employer will act with due care and consideration in the making of any proposal for exclusion.

In the absence of agreement between the parties on how to deal with these matters, the Board must administer the exclusion process in a manner that is consistent with the competing principles enunciated previously. Proposing a position for exclusion under an additional head is not a simple amendment to the previous proposal, but constitutes a new proposal and must proceed as such. The bargaining agent must be given the opportunity to object, and if it does an examination is to be scheduled.

Where an examination has already been scheduled with respect to a previous proposal for the position and the employer makes a new proposal, the examination should be postponed, unless the parties otherwise agree, and rescheduled so that it may deal with all the proposals for the position at the same time.

Where an examination has been conducted on a previous proposal and a new proposal for the position is made before the examiners' report is issued, the report should be withheld pending the examination of the new proposal.

Similarly when the employer proposes a position under a new head and the examiners' report on a previous proposal has been issued, but the matter has not been heard by the Board, the hearing should not proceed pending the availability of the examiners' report on the new position.

In such cases the matter should only be referred to the Board for determination when the examiners' report is available for all of the proposals made by the employer for the exclusion of the position.

In this case, after receiving the employer's proposal to add paragraph 5.1(1)(d) of the *Public Service Staff Relations Act* as a basis for exclusion, the Board should have given both sides the opportunity to reschedule an examination.

Since that opportunity was not officially given, the parties are hereby given 20 days from the date of the issue of this decision to advise the Board whether either side requires an examination on the employer's additional proposal. If such a request is

made the examination will be scheduled in due course following which the question of the exclusion of the two positions on the basis of all grounds proposed by the employer may be referred to the Board for determination.

If no request for a further examination is made by either party within the time limit set out in this decision, the matter will be referred to the Board for determination, on the basis of all grounds proposed by the employer unless the parties prior to that time reach an agreement.

Yvon Tarte,
Chairperson

OTTAWA, 30 September 1997.