



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: Stephanie Copeland

Heard at Ottawa,
November 10, 1997.

DECISION

The Public Service Alliance of Canada (PSAC) objects to the exclusion of two positions from bargaining units for which it is the certified bargaining agent. The positions, Chief, Visitor Activities (GT-04) and General Works Manager (AS-03), are part of the Niagara National Historic Sites, a Parks Canada park. A preliminary decision on process in this matter was rendered on 30 September 1997.

The employer has proposed that the positions be designated under paragraphs 5.1(1)(b) and (d) of the *Public Service Staff Relations Act* (the Act). In arguing this case, the parties relied solely on the examiner's report issued by Paul Morin on 26 March 1997. The examiner interviewed Ron Dale, Superintendent at the Niagara National Historic Sites, Buddy Andres, incumbent of the General Works Manager position and David Webb, incumbent of the Chief, Visitor Activities position. Three exhibits which now form part of this case were filed with the examiner. They are an Organizational Chart of Canadian Parks Service Ontario Region (Exhibit 1), Position Analysis Schedule dated May 1989 for the Chief, Visitor Activities position (Exhibit 2) and a Work Description dated September 30, 1993 for the General Works Manager position (Exhibit 3).

The relevant portions of the examiner's report read as follows:

Mr. Dale explained that Niagara National Historic Sites, a Parks Canada park, is wide spread with numerous historic sites extending from the Niagara frontier to the east side of Toronto. They have numerous partnerships formal and informal, agreements and understanding with other groups including local historic societies, genealogical societies, chambers of commerce, municipalities, townships and other historic forts in other jurisdiction.

Mr. Dale added there are two main mandated roles in historic sites which are to preserve aspects of Canadian history considered to be of national importance and to commemorate that history. This means to preserve the physical aspects and stories and to present those stories to the Canadian public in a format they will understand, enjoy and appreciate.

The Superintendant (sic) said the main interpretative operation, is Fort George National Historic Park in Niagara on the Lake, this is where most of the visitors go, where most of the programming dollars are spent. As Chief, Visitor Activities, Mr. Webb is responsible for managing this public presentation programme.

The General Works Manager is responsible for managing the programme that preserves all those sites, the buildings and the grounds according to Mr. Dale.

The season has been extended six weeks this year and is running from April 1st to October 31st said Mr. Dale.

The program is growing in scope and in partnership said Mr. Webb, the season is longer, the park is open seven days a week from April until the end of October with special events and tourists year round.

This season has been exceptionally busy for the Visitor Activities continued Mr. Webb: there were two term persons as team leaders for the programs with 10 to 11 people each, this in addition to students made available from special programs for a total of somewhere around 67. Volunteers were limited in the upward of 80.

Organisation

The Superintendent, Niagara National Historic Sites explained that he reports to the Western Director, Ontario, who reports to the Regional Executive Director who is located in Toronto, who reports to the Deputy Minister.

The Superintendent added that the identification of positions shown on exhibit 1 are as follows: classified positions are identified as "MPS"; students positions are COSSEP or FSSEP. Mr. Webb decided this year to take some of his salary dollars from the classified MPS positions and convert them into FSSEP positions because more persons can be hired. Mr. Webb has a budget of 5.97 full time equivalents and additional salaries for FSSEP positions. He is also responsible for the hiring, training and deployment of other programs such as the twenty students made available by the Friends of Fort George through a Federal Seed Program, the twenty students from the Young Canada Works Program and over sixty volunteers from five to eighty years old.

Mr. Dale explained the General Works Manager is responsible for indeterminate, determinate and student positions. Most of the maintenance is done in the summer since ground maintenance is a major part of the function.

Mr. Webb explained that the full time employees at Niagara are R. Dale, Superintendent, B. Andres, General Works Manager, N. Warr, Finance and Administration, D. Webb, Chief, Visitor Activities and D. Greenall, Collections Manager currently on a museum assistance program and his functions are assumed by Mr. Webb, there is one full time position in

Visitor Activities but it is vacant at the moment since it is used to hire terms, Management Services have four full time positions, a receptionist, three other clerical persons.

Mr. Andres said in the peak of the summer on average, there are from 10 to 12 employees, there were as many as 18 when there are programs such as the John Howard Society. In the winter there are two full time employees and a seasonal carpenter.

The General Works Manager said he is also involved in capital projects with the Engineering Department in Cornwall. He has been the project supervisor on some capital projects.

The General Works Manager explained that the Maintenance Supervisor who reports to him, meets with the crew in the morning and is in charge of that crew for the day. The General Works Manager meets the Supervisor every morning.

Mr. Andres says there were staff meetings to make the employees well aware of the reductions in staff and possibilities of contracting out, the Superintendent has now asked them for ideas to reduce costs. The staff meeting was the same day as the candidate areas for the Employee Take Over Program were made available to staff. Any employee could apply for those, the difficulty for contracts like grass cutting is the equipment.

Functions and Roles

In the off season, Mr. Dale explained that Mr. Webb would for example prepare job interviews by writing questions and answers, ordering supplies, determining the format of the programs for the coming season, set up special events programs, get involved in marketing and publicity, which is the whole realm of getting ready for the next season. He works with outside volunteer groups and manages the volunteer program.

When reductions are necessary, Mr. Dale further explained that the General Works Manager and the Chief Visitor Activities plan their season during the winter months, the adjustments in the work force are done when hiring at the beginning of the season. Because of anticipated cuts, there may be full time positions which may be surplus.

The Chief, Visitor Activities explained that his role is to present and assist in the preservation of the resources. The incumbent plans, assesses and monitors visitor programs and oversees the planning, organising, directing and controlling of what the visitors see. The programs at Niagara are

complex because they involve volunteers and staff. Fort George is the principal location for activities featuring the War of 1812.

The Chief says the overall direction of the visitor program is his function.

For a period of approximately six months, there was no Superintendent so basically the Chief explained that he ran his program, he argued for his budgets and tailored his program on the resources that can be achieved through the Friends of Fort George or others.

The Chief, Visitor Activities says his functions include allocating the resources available, deciding which programs are going to be reduced, for example he had to fill more of the classified positions taking money from FFSEP in order to have a military animation activity for the bicentennial, so he needed a specialist for the drill team and the soldiers.

The Chief, Visitor Activities says evaluations are written for all staff and volunteers. The volunteers consider this work as "a job", it carries status, some people use this experience to apply to full time positions with the public service or elsewhere. They appreciate the feedback. Sometimes there are performance problems, the chief is the one who would do a verbal reprimand. The Chief had to take disciplinary steps and let two persons go (hired technically by the Friends). He is kept appraised by the team leaders at the morning meetings or individually of any breach, such as people being late. Normally it is an oral reprimand, very occasionally there is a written reprimand. If someone would have to be let go or if there is a serious problem, it would be the Chief's role to determine the disciplinary steps, the Superintendent would be involved if they had to let someone go. During the two week training period for the summer staff, there is mention of discipline, expectations, what is acceptable and what is not, what could lead to dismissal or discipline, working relationship with other co-workers and volunteers.

The General Works Manager explained he manages, co-ordinates, controls, directs the total maintenance program of the Niagara National Historic Sites. He hires staff on a seasonal basis and has a small full time staff. He co-ordinates the maintenance and use of all vehicles, equipment, 27 historic buildings and more than 900 acres of grounds of which 200 acres is maintained extensively. He also gives several contracts for work, he initiates the contracts, he writes the specifications, he awards contracts and supervises them. He is responsible for site security, he issues keys and

alarm codes, he is the first staff member to be contacted in the event of a security breach.

Mr. Andres continued explaining that a Maintenance Supervisor directly supervises the staff during the summer time, the summer staff starts in April and stays until November. These would be term employees, they are tractor operators and students.

The General Works Manager explained that he had to release an employee who was a summer student two years ago on the grounds that the person could not take directions, the quality of the work and absenteeism. In other occasions he verbally disciplined, gave some three letters of warning to term or FSSEP, he did not have to discipline any of the full time staff.

The General Works Manager said he also does appraisal of his full time staff directly and the summer term employees are done in conjunction with the Maintenance Supervisor.

Mr. Andres said he had numerous occasions to act in the position of the Superintendent. With the former Superintendent he acted for a five week period once. With the current Superintendent, it has not been more than two weeks at a time. Members of the management team rotate as acting Superintendents. While acting Superintendent, he spends between one or two hours in the Superintendent's office to check the mail, sorting the important, not so important, for signature, when there is a deadline he calls the originator to see if it is urgent and should be dealt with immediately or if it can be postponed until the Superintendent returns.

Committees and Teams

The Superintendent said he has a management team consisting currently of the Chief, Visitor Activities Mr. Webb, the General Works Manager Mr. Andres and the Chief, Finance and Administration Ms. Warr (this position is presently excluded) (exhibit 1).

The Superintendant (sic) explained the management team meets and decides on major strategic directions for the Park, these include hours of opening, length of season, major expenditures, anything that will affect the sub activities. The management team tries to have weekly management meetings but it is not always possible, there are at least two per month. For example there will be one this week where the allocation of money kept in the Superintendent's budget for emergencies will be discussed collectively. Once the

budgets are allocated at the beginning of the year, the General Works Manager has to maintain the park to a certain set standard, he has the choice of using no staff and contract out, lay off full time indeterminate employees and to hire additional summer staff and so on. The same applies to Mr. Webb.

Mr. Dale further explained how the management team deploys the resources is its collective decision for the Niagara National Historic Sites. There are possible budget cuts of 10%, 20%, 30% and the management team will discuss where they would cut. These cuts come from the Program Management Committee at the Deputy Minister level. The purpose of the exercise is to allow the Deputy Minister and even the Minister to understand the severity of certain cut scenarios. For example if 25% was cut, the effect could be going from a six month operation to a two month operation.

If the Chief, Visitor Activities or the General Works Manager would come with an idea which would not be in the best interest of the park, the Superintendent said he would tell them "no", the same way that the Regional Executive Director could stop the Superintendent. It would be reviewed by the management team when it is a major shift and could affect other sections.

There are no agenda at the management team meetings, it is usually a round table discussion explained the Superintendant (sic). There are minutes of these meetings which are taken by a clerical support person. If anything sensitive is discussed, this clerical person leaves the room. For example if the team discusses developing a strategy for dealing with the district management committee when there is a 10% - 20% cut, the discussions are in camera. The same applies when protected or confidential information restricted to management is discussed. In the management team, only the Chief, Finance and Administration and the Superintendent are excluded. Members of the team act in turn as superintendent when Mr. Dale is absent, which is frequent.

Mr. Webb said that as the Chief he had a very free hand within the context of the management team. The team tried to meet weekly. During the meetings they argue for resources at the park level, they submit park plans, even if the capital project system is changed and is now done at the district level, projects are still discussed at the park level but it is less formal than it used to be in the MYOP process.

At the management team, the Chief, Visitor Activities said that being a cost centre manager, fights for resources by negotiating and as a group they determine where they are

going and where cuts are going to be made. Increasingly Parks Canada tries to be less hierarchical and to have interdisciplinary teams, committees and groups at all levels.

Mr. Webb explained that in management meetings staff performance, employee problems are discussed such as if the Chief would have problems with one of his employee who could be terminated or disciplined.

Mr. Webb said that prior and during the actual strike, the management team discussed what could be a strike strategy for the Park. That was a clear conflict for all who were members of the component.

There are weekly management meetings although it was more difficult this summer, Mr. Andres says he is part of the management team with Mr. Webb, Ms. Warr, , and Mr. D. Greenall who is currently on assignment. Mr. Greenall's position is not excluded.

Mr. Andres explained the management team meets for budget purposes where the forecasts are brought forward for the season, normally they get half of their requests. It is then reviewed again in September. For example, up until three years ago janitorial service was contracted, the Superintendent suggested he reviewed this contracted service, Mr. Andres discovered it would be less expensive to staff the positions instead of giving the work as contract, since then employees do the work. However with the Employee Take Over Program (ETO), janitorial is one service on the table for a take over and it may become a contract. There is also in Cornwall a critical maintenance fund, each park submits projects for critical maintenance, Mr. Andres submits it directly, with the approval of the Superintendent. When the money is allocated, the General Works Manager initiates the contracts.

The regional executive management committee has decided to study administrative support common services and look for ways to save in that function explained Mr. Dale. The team doing the study suggests to establish service centres which would leave Niagara with a couple of clerical persons only and many functions would be centralised. Therefore there would no longer be a need for a Chief, Finance and Administration at Niagara. Consequently the management team would be reduced to three persons and consequently the supervision of the clerical personnel will be changed.

Mr. Andres said he is on the Ontario Committee for the ETO (Employee Take Over) program. Other members of the committee are Mr. N. Britain who is the leader, Mr. D. Sadler

from the Canals and Ms. L. Robillard from Sault Ste-Marie, Mr. J. Lewis (see appendix 4). The committee is now at the stage where the work is identified and can be offered for three years to the employees as private contractors. They would have until October 15 to put in expression of interests. If the employees don't show an interest there is a possibility of going to an outside contractor. At the Niagara National Historic Sites, Mr. Andres would recommend it and both the Superintendent and himself in conjunction would determine to accept the offer. The Superintendent and the management team have the authority to maintain the status quo or to contract the work.

Conflicts

The Chief, Visitor Activities says that because he is a member of the bargaining unit, he could not be a steward for the bargaining agent, since he is part of the management team of the Park. There is a perception that the people being supervised by Ms. Warr, Mr. Andres and himself could not come to him with a problem because he would tell them about the problem. The biggest conflict is when Mr. Webb acts as the Superintendent. For example, he was an acting superintendent at Fort Malden when there was a lunch time picket. This was a conflict because he may have had to report on an infraction or a problem on the picket line as the acting superintendent.

Mr. Andres said that he was not designated during the last strike, however he thinks he was proposed. He always considered himself as management, he says there is a conflict when he does appraisals and evaluations, or is involved in discipline. In a strike situation, because he is also in charge of security, there could be sabotage, however it did not happen at this location. During the strike he believes he is seen as part of management, he reported to work and had a vehicle that belongs to the employer. On one occasion he did not access the administration building because of pickets. During the strike, the management team discussed contingency plans, there were rumours that there would be pickets around the Fort and no management staff would enter. The Fort remained opened and he discussed a contingency plan with the Superintendent. He was given the option of reporting to work or not.

The General Works Manager believes he is potentially in a situation of conflict of interest in the staffing process when there is a need for security screening, Mr. Andres initiates that with the Finance Officer, he then accesses the security screens and evaluations.

At the end of the examination, the parties indicated there were no other witnesses or documents to be submitted, the examination is closed.

ARGUMENTS

For the Employer

The concept of “substantial management duties, responsibilities and authority over employees” contained in paragraph 5.1(1)(b) of the Act has not yet been defined by the Board. The concept of “management team” elaborated on by the Board in prior decisions relates to similar principles and should therefore be used in the interpretation of this paragraph.

The duties of both positions as stated in the examiner’s report provide convincing evidence of what the legislator must have had in mind when section 5.1 was promulgated in 1993. The incumbents of the positions are given great autonomy to organize their work and along with the Superintendent coordinate and manage all activities of the Niagara Historic Sites Park. It is clear from the examiner’s report that the duties of both positions are managerial in nature.

From the examiner’s report we find that the functions of both positions require that their incumbents participate in a significant manner in the development of the Sites program. Both Messrs. Andres and Webb are members of the management team and have the power to act independently. They participate in setting Park policy (in areas such as length of season and hours of operation), have supervisors or team leaders reporting to them, discuss staff performance, may discipline employees, participate in budget talks and perform contingency plans and strike strategy with senior management. Messrs. Andres and Webb share a community of interest with management. Both may be called upon to replace the Superintendent who is frequently away and was at one time absent for six months.

The PIPSC and TB (*Gestrin*) (Board file 172-2-31), PSAC and TB (*O’Connell*) (Board files 174-2-157 and 158), PIPSC and TB (*Larivière*) (Board file 172-2-178) and PSAC and TB (*Sisson*) (Board file 176-2-287) decisions are useful references to establish the evolution of the Board’s thinking on the concept of management team. The

O'Connell decision (supra) is particularly useful since the facts in that case are similar to the situation at hand.

The specific requirements of the positions, in particular the need to deal with persons outside the Public Service, their involvement in strike planning and strategy, their financial involvement and authority over personnel, the extent of their contribution in the development of policies and programs and the impact of that contribution, all dictate that both these positions be identified as managerial or confidential positions.

For the Bargaining Agent

The incumbents of the two positions participate in the administration of the Niagara National Historic Sites and manage a small staff. Although Messrs. Andres and Webb work as part of a team, as most public servants do, they do not meet the management team criteria developed by the Board over the years.

Mr. Webb, the Chief, Visitor Activities, is responsible for the public presentation of the Niagara Historic Sites program. The importance of his position is restricted to visitor activities and is limited in scope. The historic site is only opened six months a year. Mr. Webb has a permanent staff of one but that position is presently vacant. In peak periods, the Chief, Visitor Activities supervises 5.97 full-time staff to which he can issue reprimands. The *Sisson* decision (supra) clearly establishes that the simple fact of being a supervisor is not sufficient to justify exclusion.

Mr. Andres, the General Works Manager, has a permanent staff of two full-time employees and a part-time carpenter. During peak periods of operations he supervises 10 to 12 employees. Like Mr. Webb, the extent of his ability to discipline employees is to issue reprimands.

The fact that both incumbents may replace the Superintendent in his absence is irrelevant. Whenever they act in such a capacity they can be excluded.

The examiner's report is not clear to what extent Messrs. Andres and Webb are actually involved in the development of strike strategies nor to what extent they deal with staff during a strike.

The budget and staffing authorities given to Messrs. Andres and Webb merely reflect the flexibility they must have to operate properly during peak periods.

The *Gestrin*, *O'Connell* and *Larivière* decisions referred to by the employer are of little use in this case since they all deal with very senior, critical management positions. The positions in those cases cannot be compared to the two positions here which have very limited policy making functions and extremely limited supervisory responsibilities.

The PIPSC and TB (*Bond and Lingeman*) (Board file 172-2-219) decision provides a better comparison. Both employees in that case were chiefs who were part of the management team of an inspection and technology branch. In that situation, the Board concluded that the evidence presented did not justify exclusion.

In *The Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23* [1974] 1 Canadian L.R.B.R. 1, the British Columbia Labour Relations Board held (at page 12) that it was “a serious matter to find that a non-managerial employee should be excluded from collective bargaining” and that an “employer has an onus to organize its affairs so that its employees are not occasionally placed in this position of a potential conflict of interest if that result can readily be avoided.”

The examiner's report clearly shows that the two positions being considered do not have substantial management duties or responsibilities over employees nor do they give rise to serious conflict and should therefore not be excluded.

Reply of the Employer

Contrary to what the bargaining agent may think, the positions occupied by Messrs. Andres and Webb require more than just supervision. The intent of the 1993 modifications to the Act was to provide for more managerial exclusion. The new provisions no longer require conflict between duties and membership in a bargaining unit as a condition for exclusion. Both positions have substantial managerial duties and meet the criteria for exclusion.

REASONS FOR DETERMINATION

The employer has proposed that the positions occupied by Messrs. Andres and Webb be excluded pursuant to the grounds for exclusion contained in paragraphs 5.1(1)(b) and (d) of the Act.

Those paragraphs read as follows:

Managerial or Confidential Positions

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:

...

(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;

...

(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;

...

In order to be excluded under paragraph (b) of section 5.1(1), a position must contain substantial management duties, responsibilities and authority over employees or the position must have duties which require that its incumbent deal formally with grievances on behalf of the employer.

The employer has not suggested that the second ground of paragraph 5.1(1)(b) dealing with grievances is applicable in these cases.

With respect to the first ground of paragraph 5.1(1)(b), the language used clearly requires both substantial management responsibilities and authority over employees. In other words, this ground refers to the management of staff or the responsibilities and authority that a manager has over his or her staff. The French version of this portion of paragraph 5.1(1)(b) is much clearer and concise when it states: “leurs occupants exercent, dans une proportion notable, des attributions de gestion à l’égard de fonctionnaires ...”.

The word substantial is defined in the *Concise Oxford Dictionary* (Seventh Edition) as “having substance, actually existing, not illusory; of real importance or value, of considerable amount ...”. The word “notable” used in the French version of section 5.1 is defined in the *Nouveau Petit Robert* (1993 Edition) as “qui est digne d’être noté, remarqué”. In other words, something that is worth notice. In the Board’s opinion, neither the position held by Mr. Andres nor the position of Mr. Webb confers upon either one substantial management and authority over employees. Although they may issue reprimands to employees they supervise, they have no important authority to discipline them nor do they possess significant management authority over those employees.

The Board must therefore conclude that the positions presently held by Messrs. Andres and Webb do not qualify for exclusion under paragraph 5.1(1)(b) of the Act.

Under paragraph 5.1(1)(d), the Board has some discretion in determining whether the duties and responsibilities of a position so closely associate the incumbent of that position with the employer as to warrant exclusion or whether there is likelihood of serious conflict of interest between the duties of the position and membership in the bargaining unit. It is under this heading that the “management team” concept developed by the Board over the years has some application.

It is particularly important, when interpreting paragraph 5.1(1)(d) to remember that the right to membership in a bargaining unit (unionization) should not be removed lightly. Wherever possible an employer must arrange its affairs so as to minimize the need for exclusion. This is necessary to preserve the statutory

framework for the regulation of labour relations in the Public Service. Exclusions 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.

Unlike the *Sisson* (supra) situation, Messrs. Andres and Webb are not required by the duties of their positions to replace on a regular basis (all night shifts and holidays) the Superintendent. Nor does the examiner's report show that they are more involved in the management process than any competent supervisor normally would. Messrs. Andres and Webb work in cooperation with the Niagara National Historic Sites management team but cannot, on the basis of the duties mentioned in the examiner's report, be considered to be an integral part of that team.

There have been no recent changes in the duties of the positions being proposed for exclusion. The job description for the Chief, Visitor Activities position (Exhibit 2) is dated May 1989 and the work description for the General Works Manager position goes back to September 1993. Nothing contained in the examiner's report warrants at this time a departure from the status quo.

The Board therefore concludes that the positions presently held by Messrs. Andres and Webb do not qualify for exclusion under paragraph 5.1(1)(b) of the Act.

The objections of the bargaining agent against the exclusion of the General Works Manager and Chief, Visitor Activities positions are upheld.

**Yvon Tarte,
Chairperson**

OTTAWA, December 19, 1997