Date: 20040714

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Citation: 2004 PSSRB 87

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

IN THE MATTER OF
THE *PUBLIC SERVICE STAFF RELATIONS ACT*
and a dispute affecting the
Manitoba Food and Commercial Workers, Local 832
chartered by the United Food and Commercial
Workers International Union (AFL-CIO/CLC), as bargaining agent,
and the Staff of the Non-Public Funds, Canadian Forces, as employer,
in respect of all the employees of the Employer in the
Operational Category employed
at the Canadian Forces Base at Shilo, Manitoba
bargaining unit

TERMS OF REFERENCE OF THE ARBITRATION BOARD

To: Ken Strike, chairperson of the arbitration board;
Susan Hart-Kulbaba and W.B. (Brian) Mallon, arbitration board members

[1] This matter deals with a request for the establishment of an arbitration board pursuant to sections 64 of the *Public Service Staff Relations Act* (the *Act*) with respect to the dispute referenced above. A brief account of the exchange of correspondence between the parties leading up to the establishment of this arbitration board is in order, given the unusual situation arising in this case.

[2] Sections 64 to 75.1 of the *Act* apply where arbitration is the method of dispute resolution. The following sections, which set out the procedure for an arbitration board, are of particular interest:

> ***66.*** *(1) Subject to section 69, forthwith on the establishment of an arbitration board, the Chairperson shall deliver to the arbitration board a notice referring the matters in dispute to the board for arbitration.*

(2) Where, at any time before an arbitral award is rendered, the parties reach agreement on any matter in dispute referred to an arbitration board under subsection (1) and enter into a collective agreement in respect thereof, the matters in dispute so referred to the board shall be deemed not to include that matter and no arbitral award shall be rendered by the board in respect thereof.

67. *In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute, an arbitration board shall consider*

(a) *the needs of the Public Service for qualified employees;*

(b) *the conditions of employment in similar occupations outside the Public Service, including such geographic, industrial or other variations as the board may consider relevant;*

(c) *the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;*

(d) *The need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and*

(e) *any other factor that to it appears to be relevant to the matter in dispute.*

68. *Subject to this Act, an arbitration board shall, before rendering an arbitral award in respect of a matter in dispute, give an opportunity to both parties to present evidence and make submissions to it.*

69. *(2) Subsection 57(2)[1] applies, with such modifications as the circumstances require, in relation to an arbitral award.*

(3) No arbitral award shall deal with

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1 **57.** (2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,

(a) the alteration or elimination or the establishment of which would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation; or

(b) that has been or may be established pursuant to any Act specified in Schedule II.

(a) *the organization of the Public Service or the assignment of duties to, and classification of, positions in the Public Service;*

(b) *standards, procedures or processes governing the appointment, appraisal, promotion, demotion, deployment, lay-off or termination of employment, other than by way of disciplinary action, of employees; or*

(c) *any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.*

(4) An arbitral award shall deal only with terms and conditions of employment of employees in the bargaining unit in respect of which the request for arbitration was made

70. *(1) An arbitration board shall, as soon as possible after it receives the notice referred to in subsection 66(1), render an arbitral award in respect of the matters in dispute.*

(1.1) An arbitral award shall be signed by the chairperson of the arbitration board and a copy thereof shall be sent to the Chairperson, and no report or observations thereon shall be made or given by the other members of the board.

(1.2) On receipt of a copy of an arbitral award, the Chairperson shall forthwith cause a copy thereof to be sent to the parties and may cause the award to be published in such manner as the Chairperson sees fit.

(2) Subject to subsection (3), a decision of the majority of the members of an arbitration board in respect of the matters in dispute shall be the arbitral award in respect of those matters.

(3) Where the majority of members of an arbitration board cannot agree on the terms of the arbitral award to be rendered, the decision of the chairperson of the board shall be the arbitral award in respect of the matters in dispute.

(4) An arbitral award shall, whenever possible, be made in such form

(a) *as can be read and interpreted with, or annexed to and published with, any collective agreement dealing with other terms and conditions of employment of the*

> *employees in the bargaining unit in respect of which the arbitral award applies; and*
>
> *(b) as enables its incorporation into and implementation by regulations, by-laws, directives or other instruments that may be required to be made or issued by the employer or the relevant bargaining agent in respect thereof.*

[3] By letter of January 16, 2004, the bargaining agent filed with the Board a request for conciliation pursuant to section 76 of the *Act* and requested the establishment of a conciliation board. The letter was accompanied by the bargaining agent's proposals regarding terms and conditions of employment on which it wished the conciliation board to report and make recommendations.

[4] The employer replied to the request by letter dated February 2, 2004. By letter dated February 18, 2004, the parties were advised of my intention to establish a conciliation board in the above-cited dispute and the parties subsequently informed the Board of their respective nominees to be members of the conciliation board.

[5] By letter of April 6, 2004, the Board's Director of Dispute Resolution informed the parties that the Board's records showed the process of arbitration as the dispute resolution process which had been specified by the bargaining agent and recorded by the Board pursuant to sections 37 and 38 of the *Act*, at the time of certification in 1981. The Board's records did not show any subsequent alteration of such specification and the parties did not produce any documentation that would have me conclude otherwise. Indeed, the bargaining agent confirmed by letter dated April 7, 2004, that arbitration was the dispute resolution process originally specified and currently available to the parties.

[6] By letter dated April 22, 2004, the bargaining agent accordingly confirmed that the terms and conditions of employment that should be referred to the arbitration, along with its proposals on those terms and conditions, were the ones attached to its January 16, 2004 letter, mentioned in paragraph 1 of these Terms of Reference. The two letters, the terms and conditions of employment and supporting material are attached hereto as SCHEDULE I.

[7] The employer provided the Board with its response to the bargaining agent's proposals on May 14, 2004, by e-mail. Copies of the e-mail and supporting material are attached hereto as SCHEDULE II.

[8] On June 15, 2004, the bargaining agent wrote to the Board for the purpose of amending its position with respect to Appendix B-4 dealing with Retroactive Pay. That letter, which sets out the revised proposal, is attached hereto as SCHEDULE III.

[9] The employer did not object to the inclusion of the revised proposal in the Terms of Reference of the Arbitration Board, but deferred its response on it, as outlined in its letter of June 29, 2004 to the Board, attached hereto as SCHEDULE IV.

Proposal raising a question of jurisdiction

[10] After reviewing the exchange of proposals between the parties, I sought written submissions from the parties on the issue of whether a particular proposal by the bargaining agent could be included in the Terms of Reference of the arbitration board. That proposal reads as follows:

> *Proposal*
> *The Union shall be entitled to file a policy grievance to deal with any situation involving the Union and/or the interpretation of this agreement. Under such circumstances, all of the provisions detailed in Article 18 shall be deemed amended so as to allow for the grievance to be properly dealt with.*
>
> *Employer's reply*
> *The employer does not agree to this proposal and refers the Union to Section 23 of the PSSRA to address their concerns.*

[11] In its submissions provided by letter dated May 21, the bargaining agent argued that it saw nothing in subs. 57(2), 66(1) or 69(2) of the *Act* that "would prohibit the Board from dealing with the Union's proposed contract language for Article 18.20". The bargaining agent referred to the concept of "policy grievance" set out in subs. 220(1) of the *Public Service Modernization Act* and expressed the view that its proposal was consistent with this contemplated legislative change.

[12] The employer submitted that the proposal regarding Article 18.20 was not one that could be included in the Terms of Reference of an arbitration board , having

regard to subs. 57(2), 66(1) or 69(2) of the *Act*. Section 23 of the *Act* gives the Board exclusive jurisdiction to deal with complaints related to the form of presenting a grievance, and this matter "could not be delegated to an arbitrator" without offending section 57(2) of the *Act*. The employer further argued that a grievance is defined in the *Act* as a complaint presented by an employee (...), and allowing a bargaining agent to grieve in the manner suggested would therefore require an amendment to the legislation and hence be in contravention of subs. 57(2). Finally, the employer made reference to section 99 of the *Act*, which provides for a process by which a bargaining agent may deal with "any situation involving the Union".

Decision on the proposal regarding policy grievance (Article 18.20)

[13] After reviewing the parties' submissions and the relevant provisions of the *Act*, I conclude that the bargaining agent's proposal regarding Article 18.20 (policy grievance) cannot be included in the Terms of Reference of an arbitration board.

[14] Paragraph 57(2)(a) of the *Act*, referenced in subs. 69(2), provides the following:

> *57(2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,*
> *(a) the alteration or elimination or the establishment of which would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation; or*
> *(b) (...)*
> (emphasis added)

[15] Pursuant to subs. 66(1) of the *Act*, the Chairperson must determine the Terms of Reference *subject to section 69* and consider the effect of the parties' proposals on the parameters set out in subs. 57(2).

[16] The bargaining agent's proposal regarding the possibility that the Union file a policy grievance appears to me to offend that provision of the *Act*. The resolution of rights disputes under the *Act* is entirely governed by the statutory framework set out therein and the parties cannot amend it. The *Act* defines "grievance" as "a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of the employee and one or more other employees (...)". Consequently, a

grievance cannot be filed by a bargaining agent under the statutory regime provided in the *PSSRA* and the *Act* does not recognize the concept of a "policy grievance" that would be presented by a bargaining agent. While this situation will change under the new *Public Service Labour Relations Act* enacted under the *Public Service Modernization Act*, S.C., 2003, c. 22, the relevant provisions in those Acts have not yet been proclaimed in force.

[17] The *PSSRA* also provides for the possibility that the parties file with the Board a reference pursuant to section 99, subject to the conditions prescribed by this provision, to address disputes arising out of the application of a collective agreement. The *Act* has therefore established a comprehensive statutory scheme to address rights disputes arising between the parties. The bargaining agent's proposal to include the possibility that the Union file a "policy grievance" is not compatible with that statutory scheme. In that regard, the proposal goes beyond the scope of matters which may be included in a collective agreement or arbitral award and has the effect of requiring the amendment of the *Act*, a result which subsection 57(2)(a) clearly does not allow.

[18] Accordingly, pursuant to subsection 66 of the *Act*, the matters on which the arbitration board shall render an arbitral award in this dispute are those set out as outstanding in SCHEDULES I, II, III AND IV attached hereto, with the exception of the proposal set out as Article 18.20 and dealing with policy grievances.

[19] Should any further jurisdictional question arise during the course of the hearing as to the inclusion of a matter in these Terms of Reference, that question must be submitted forthwith to me because the Chairperson of the Public Service Staff Relations Board is, according to the provisions of subsection 66(1) of the *Act*, the only person authorized to make such a determination.

Yvon Tarte,
Chairperson

DATED AT OTTAWA, July 14, 2004