Files: 172-2-944, 946 to 951

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

TREASURY BOARD

Employer

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent

RE: Post-Certification Managerial or Confidential Identifications, Biological Sciences, Historical Research, Computer Systems Administration, Architecture and Town Planning

Before: Yvon Tarte, Acting Chairperson

For the Employer: Georges Hupé

For the Bargaining Agent: Judith King

Decided without an oral hearing

This matter relates to the identification by the employer of managerial and confidential positions and the bargaining agent's untimely objection to such identification. The positions in question are the following:

Department	**Branch or subdivision**
Canadian Heritage	**Atlantic Region**

Position number	**Position classification**	**Position Title**	**Reason for exclusion**
4213-15197	BI-02	Chief, Park Interpreter, Kejimkujik	5.1.1(d)
4216-10174	HR-03	Cultural Resource Manager	5.1.1(d)
4290-10415	PC-05	Science Advisor	5.1.1(b)
1200-00108	CS-04	Chief, Functional Systems & Operations	5.1.1(b)
4411-00570	AR-05	Manager, Realty & Municipal Services	5.1.1(b)
4540-00079	BI-04	Manager, Cultural & Natural Ecology	5.1.1(b)
4291-10430	AR-05	Senior Management Planner	5.1.1(b)
4222-09571	BI-02	Chief, Park Interpreter, Kouchibouguac	5.5.1(d)

The employer has since withdrawn its proposal for exclusion of position no. 4222-09571.

In separate memoranda dated June 27, 1996, the employer, pursuant to subsection 5.2(2) of the *Public Service Staff Relations Act (*the *Act*), notified both the bargaining agent and the Board of the identifications which are the subject of this decision. In a letter directed to the employer and dated July 11, 1996, the bargaining agent advised of its objections to the identifications on the basis that the positions in question "were not excluded in the past and there has been no real change to their duties". It is uncontested that the bargaining agent's letter of July 11, 1996 was not received by the employer. In a letter to the Board dated August 1, 1996, (received by the Board on August 7, 1996) the bargaining agent forwarded a copy of the letter dated July 11, 1996. Subsequently, the Board forwarded to the employer a copy of the letter dated July 11, 1996.

In a letter dated August 14, 1996, the employer accepted that the bargaining agent had inadvertently sent its objections to the employer rather than to the Board as required under the *Act*, but that in any event, it had never received the bargaining agent's objections. As a result, the Department and the incumbents of the positions in question had already been notified of the exclusion of their positions. The employer requested that the identifications be confirmed by the Board. The bargaining agent countered in a letter dated August 28, 1996, that notwithstanding the "mishaps" that occurred, "the substantive matter to be addressed ought to take precedence over these administrative oversights".

The Board, in a letter to both parties dated September 10, 1996, invited written submissions on the question of timeliness of the bargaining agent's objections. Before summarizing these submissions, it is appropriate at this point to set out the statutory provisions relevant to these submissions:

> *Public Service Staff Relations Act*
>
> *5.2(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.*
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> *(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.*
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> *(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.*
>
> *21. (1) The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made*

hereunder or with any decision made in respect of a matter coming before it.

P.S.S.R.B. Regulations and Rules of Procedure, 1993

2.(2) Where a period of time is specified in these Regulations as a number of days, the period shall be computed as being the number of days specified, exclusive of Saturdays and holidays.

6. Notwithstanding any other provision in these Regulations, the Board may

(a) extend the time specified by these Regulations, or allow for additional time to do any act, provide any notice or file any document; or

...

10. No proceeding under these Regulations is invalid by reason only of a defect in form or a technical irregularity.

Interpretation Act

3. (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

(2) The provisions of this Act apply to the interpretation of this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act.

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

26. Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

27.(1) Where there is reference to a number of clear days or "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded.

> *(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included.*
>
> *(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.*
>
> *(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.*
>
> *(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.*

Submissions of the parties

In its submissions, the bargaining agent claimed that in response to the employer's notice of identification of June 27, 1996, the bargaining agent had until July 26, 1996 to file its objections. The objections "forwarded" on July 11, 1996 were "well within the timeframe to do so", although they were not sent to the Board until August 1, 1996. The bargaining agent argued that its objections dated August 11, 1996, should "be considered as meeting the intent and purpose of section 5.2(3)" and that the Board had two options available to it to deem these objections as timely.

Firstly, section 10 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993* (the *Regulations*) states that "no proceeding is invalid by reason only of a defect in form or a technical irregularity" and because this proceeding involves the legislated entitlement of the status of employee "the seriousness of the issue at hand is of such nature and impact that the widest possible interpretation of this regulation ought to be given".

Secondly, paragraph 6(a) of the *Regulations* permits the Board to extend the time specified by the *Regulations* to do any act, provide any notice or file any document. While the 20-day limit in subsection 5.2(3) does not emanate from the *Regulations,* the filing of objections "may be considered under the latter portion of this authority". The bargaining agent suggested that its interpretation is not precluded by the "permissive" language of subsection 5.2(3) whereby the bargaining agent *may* file an objection. No detriment to the employer flows from allowing the

bargaining agent additional time while a "major detriment" is caused to the incumbents if it is not allowed additional time.

The bargaining agent provided as additional rationale the fact that a criterion used by the employer as a basis for exclusion (5.1(1)(b)) is relatively new and that the parties would benefit from the Board's interpretation of it [the Act underwent substantial amendment effective June 1993]. The Board should hear evidence on the merits of the proposed exclusion before ruling on timeliness. It is not fair that employees bear the repercussions of a clerical error, that is, exclusion from the bargaining unit, loss of status as "employee", loss of rights to collective bargaining and to participate in the activities of the employee organization. The bargaining agent cited Vice-Chairman Cantin's dissenting opinion in *Public Service Alliance of Canada and Treasury Board,* (Board file 181-2-279), at page 21, to the effect that time limits may be extended where "good cause" exists.

In its submissions, the employer argued that the 20-day deadline for objecting to the employer's identification was up on July 17, 1996, and not as the bargaining agent maintains, on July 26, 1996. The bargaining agent's objections were only received by the Board and the employer on August 7, 1996. The employer also argued that the provisions of the *Regulations* advanced by the bargaining agent have no application to the statutory time limit of 20 days. With regard to the bargaining agent's contention that "good cause" is sufficient to extend time limits, the employer contended that the bargaining agent had not provided "sufficient cause". No reason other than inadvertence was advanced. In addition, the bargaining agent did object to other employer identifications submitted at the same time as the identifications in dispute here.

The employer pointed to a case decided by Deputy Chairperson Korngold Wexler [Although no specific reference was given, the Board assumes the employer is referring to *Treasury Board and Social Science Employees Association,* (Board file 172-2-893)] for the proposition that, faced with the 20-day statutory requirement, "relief could only be granted in the most unusual and extraordinary circumstances". There is no evidence of such circumstances here. The jurisprudence also establishes that a factor to be considered is the amount of time a party is in default. Here the bargaining agent "was two and possibly three weeks late in objecting". In addition, in

the present circumstances, the incumbents have already been notified of their exclusion and union dues check-off has stopped.

In its reply, the bargaining agent maintained that the deadline was indeed July 26, 1996, a date 20 working days from the receipt of notice of identification, June 27, 1996. This is so because of the operation of subsection 2(2) of the *Regulations* which describes a period of time as being exclusive of Saturdays and holidays. The *Interpretation Act* defines holiday as including Sundays and holidays such as Canada Day. Section 12 of the *Interpretation Act* also states that enactments are to be deemed remedial and are to be given fair, large and liberal constructions. Thus, the 20 days referred to in subsection 5.2(3) are working days, and accordingly, the objections were forwarded to the employer before the deadline and to the Board only four days after the deadline.

The bargaining agent reiterated that sections 10 and 6(a) of the *Regulations* must be considered in light of section 12 of the *Interpretation Act.* This is in keeping with section 21 of the *Public Service Staff Relations Act,* which envisions the exercise of the powers of the Board that are incidental to the attainment of the objects of the *Act*.

The bargaining agent also countered that although objections relating to positions other than the positions the subject of this matter were indeed made in a timely fashion, they were made by a different officer of the bargaining agent. The officer in the present case was instructed to forward objections to the employer rather than to the Board. The bargaining agent maintains that the "element of 'good cause' does not refer solely to the 'why' of 'how' of a clerical error, but may also apply to the possible outcome of a course of action, or inaction". Therefore, the "extreme repercussions" on the incumbents constitute "sufficient good cause". The decision *Treasury Board and Social Science Employees Association, supra,* is distinguishable on the basis that the bargaining agent in that case presented no arguments in support of its request to extend time.

Finally, the bargaining agent in its response, contrasted the language of subsection 5.2(2) where the mandatory expression "shall" is used and the language of subsection 5.2(3) where the permissive expression "may" is used. It reiterated its method of calculating the 20-day period in the *Act* and added that "the notification of

incumbents by the employer should not be a barrier to the proper application of the Act".

Determination

The first issue I will deal with is the proper computation of the 20-day period in subsection 5.2(3) of the *Act*. The bargaining agent maintains that by virtue of the provisions of the *Regulations,* the effect of section 21 of the *Act,* and the provisions of the *Interpretation Act,* the 20-day period is exclusive of Saturdays and holidays. This cannot be so for two reasons. Firstly, the *Regulations* cannot derogate from the *Act*. Subsection 2(2) of the Regulations, by its own wording clearly applies only to a time period contained in the Regulations and not to any time period provided by statute. Secondly, the *Interpretation Act,* which applies to all federal enactments unless a contrary intention appears, sets out what is meant by a period defined by a set number of days (see section 27, reproduced above). The 20-day period only excludes days or holidays on which the first event occurs (the receipt of the notice of identification) or holidays on which the second event (the filing of an objection) would otherwise occur. Clearly, in the fact situation before the Board, the bargaining agent has not objected in a timely fashion.

The bargaining agent also maintains that the 20-day period is not mandatory because of what it suggests is permissive language in subsection 5.2(3), contrasted with the mandatory language of subsection 5.2(2). I cannot accept this argument. The only aspect I find permissive in subsection 5.2(3) is that a bargaining agent may or may not choose to file an objection. The time period in which it is permitted to file an objection if it should so choose, however, is imperative.

That being said, the Board is not without the authority to extend a mandatory time period in a proper case as the jurisprudence cited below bears out. The questions before this Board are firstly under what circumstances may such an extension be granted and secondly, do the present facts constitute proper circumstances.

The Federal Court of Appeal has considered the issue of the imperative or mandatory nature of time periods in the *Act,* although in the context of designations for the safety or security of the public, and not in the present context of managerial

and confidential exclusions which, in my opinion, does not constitute a substantial distinction.

In *Public Service Alliance of Canada v. Canada (Treasury Board),* [1989] 2 F.C. 445, the Federal Court of Appeal set aside the decision of this Board in *Public Service Alliance of Canada and Treasury Board* (Board file no. 181-2-279) in which it was held that a 20-day time limit for the employer to file a statement of employees whose duties were considered necessary in the interest of safety or security of the public, was directory and not mandatory. Writing for the unanimous court, Hugessen J.A. stated the following at page 588:

> *I am astonished to learn that the situation here is not unique. At the time of the hearing before the Board, there were nineteen pending instances where the employer had failed to comply with the time limit in subsection 79(2). It may be that this is due to simple negligence or it may be that it is an indication that the time provided is too short; if the latter is the case, the remedy lies in amending the legislation, not in interpreting it in a manner which does violence to the language. It is to be noted that no attempt was made by the employer to justify the late filing and I accordingly do not exclude the possibility that the Board could, in a proper case and for good cause shown, relieve the government from the consequences of its default.*

As a result of the decision of Hugessen J.A., the Board held a number of hearings to determine if the employer should be relieved of the consequences of its late filings of lists. The Board, in the decision *Public Service Alliance of Canada and Treasury Board* (Board file 181-2-269, 181-2-270, 181-2-277) relating to one of these hearings, refused to extend the time for filing, having found that the cause of the failure to comply was the "employer's own inefficiency, negligence and lack of foresight". It found that such circumstances did not constitute "a proper case and for good cause shown". The employer applied for judicial review of that decision and thus in *Canada (Attorney General) v. Public Service Alliance of Canada,* [1989] 3 F.C. 585 the Federal Court of Appeal revisited the issue. The court, in the unanimous judgment of Iacobucci C.J. (as he then was) found that the Board committed no reviewable error. In commenting on Hugessen J.A.'s prior determination, Justice Iacobucci stated the following at pages 590-592:

> *Mr. Justice Hugessen's comments in the Data Processing decision, from their context and from the underlying rationale of section 78 and related provisions of the Act, clearly mean that good cause relates to explaining the <u>delay</u> in late filing not to why <u>relief</u> should be given to the government from the consequences of its late filing. Although the statute in question, unlike many others that deal with time limits, does not mention the possibility of a proper case and good cause and although specific time limits should as a general matter be taken seriously, I do not think it does harm to statutory interpretation or Parliament's intent to acknowledge that such time limits can be treated as being legally met where an event or happening akin to an accident, force majeure or Act of God has intervened to prevent literal compliance with the time limit. It takes little imagination in our modern complex life to think of circumstances where, through no fault or shortcoming of the employer, the filing of the list was delayed. I believe this was behind Hugessen J.A.'s comments. Obviously one cannot generalize since each case depends on the statute in question and the words used amongst other factors. Accordingly I believe the PSSRB does have an implied but very limited jurisdiction to relieve the government—employer—of its default if it is persuaded by the reasons for the delay in what would likely be most unusual or extraordinary circumstances.*
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> *...*
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> *... For the employer to say that because of the importance of the duties performed more time is needed to file statements flies in the face of the plain language of the statute and the process provided therein. If the applicant's view is correct, then the question arises as to how much time would be taken to file the statement—presumably the Treasury Board could take a very long time to file and one then has to ask what will have happened to the Act's reconciliation of public safety and security and collective bargaining rights of the employees involved.*
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> *Allowing the time limit to be interpreted with good cause for delay is still adhering to the time limit but merely saying that there is a deemed compliance with the time limit. However, if one accepted the applicant's argument that good cause also means a consideration of the important duties of the employees, that would be tantamount to allowing the time limit to be ignored and not complied with which could result in detriment to the collective bargaining rights of employees in a manner inconsistent with the Act.* (original underlining)

As indicated previously, these statements of the court were made in the context of designations of employees for the safety or security of the public. The designation provisions of the *Act* at the time provided for a designation process to begin after notice to bargain was given only to begin anew in the round of bargaining to follow. Thus, the granting of an extension to the employer to file the required statements held in abeyance the use by the parties of the mechanisms provided in the *Act* to deal with an impasse in negotiations. The Court sought to prevent a situation where, in the absence of such filing, the whole process of interest dispute resolution provided in the *Act* would have come to a grinding halt.

In contrast, the present context of managerial and confidential exclusions does not disclose such immediacy and does not, arguably, have such a direct effect on interest disputes. The process of managerial or confidential exclusions however, is no less important in the scheme of public sector collective bargaining than the process of designations of employees for the safety or security of the public. Who is an *employee* under the *Act* as well as the parameters of a bargaining unit are fundamental issues. They serve to define the exercise of the rights granted by the *Act* to employees and their bargaining agents. From this vantage point, I see no reason why the jurisprudence of the court referred to above is not applicable to the circumstances before this Board.

In any event the court's statements deal with general application of statutory time limits, regardless of the particular context or nature of any given case. Even assuming that the court's jurisprudence is not binding in the present context, at the very least the court's decisions are helpful in arriving at the decision this Board is called upon to make.

I now turn to the question of whether the circumstances of this case justify an extension of time. Paraphrasing the comments of Justice Hugessen, is this a proper case and is there good cause shown to relieve the bargaining agent from the consequences of its default? Or to paraphrase the comments of Justice Iacobucci, are the circumstances before this Board akin to an accident, *force majeure*, or an Act of God or do they constitute the most unusual or extraordinary circumstances?

I think not. As the court has pointed out, the matter must be approached from the perspective of good cause as an explanation for the delay, and not approached from the perspective that relief should be granted because the consequences arising from a refusal to extend time may be grave and detrimental. I have no doubt that the bargaining agent views the consequences of this refusal as grave and detrimental, but that alone cannot be determinative of the issue before this Board.

The evidence before this Board is that the bargaining agent failed to respect the statutory time limit because of oversights perhaps rooted in the administrative structure put in place to deal with managerial or confidential exclusions. At any rate, they were simple oversights. Clearly, such does not satisfy the principles laid down by the court in determining whether a party should be relieved of the consequences of default.

Thus, for the reasons stated above, the Board denies the bargaining agent's application for an extension of time to file objections to the identifications made by the employer. In accordance with subsection 5.2(5) of the *Act*, the identifications set out on page one of this decision are hereby deemed to have taken effect 20 days from June 27, 1996, the date of notice to the Board and to the bargaining agent.

Yvon Tarte,
Acting Chairperson.

OTTAWA, December 2, 1996.