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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

HAIYAN ZHANG

Grievor

and

**TREASURY BOARD
(Privy Council Office)**

Employer

Indexed as
Zhang v. Treasury Board (Privy Council Office)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Daniel Fisher, Public Service Alliance of Canada

For the Employer: Harvey Newman, counsel

Heard at Ottawa, Ontario,
October 31 and November 1, 2005.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Haiyan Zhang was terminated from her position as Senior Analyst in the Communications and Consultations Secretariat of the Privy Council Office (PCO), effective November 28, 2003, as a direct consequence of the revocation of her "Secret" security clearance. She has grieved her termination of employment.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

Summary of the evidence

[3] The parties submitted the following "Statement of Agreed Facts" (Exhibit E/G-1) and attached documents:

Treasury Board (Privy Council Office) and the Public Service Alliance of Canada agree that the following facts, relating to the grievance referenced above are not in dispute:

[1] *The grievor was born on January 30, 1963 in Lanzhou, China. She arrived in Canada on February 21, 1995, after having married a Canadian citizen on January 6, 1995. She was granted Canadian Citizenship on April 12, 1999.*

[2] *The following is a summary of the grievor's federal government work history:*

- *May 13, 2002 to September 2, 2002 (term appointment)
Senior Advisor, Communications & Outreach (IS 05)
Public Service Commission (Appendix 1)*

- *September 3, 2002 to October 15, 2002 (deployment to term position)
Senior Communications Advisor, Communications and Marketing Branch (IS 05)
Industry Canada (Appendix 2)*

- *October 16, 2002 (indeterminate appointment)
Senior Communications Advisor, Communications and Marketing Branch (IS 05)
Industry Canada (Appendix 3)*

- Upon having consulted the grievor's résumé, Maurice Jorre de St. Jorre of the PCO contacted the grievor in an effort to recruit her to work as a Senior Analyst.

- February 24, 2003 (deployment)
Senior Communications Analyst, Communications and Consultations Secretariat (IS 05)
Privy Council Office (Appendix 4)

- February 24, 2003 to August 29, 2003 (acting appointment for a specified period)
Senior Analyst, Communications and Consultations Secretariat (IS 06)
Privy Council Office (Appendix 5)

[3] The Government of Canada has promulgated the Government Security Policy, which applies to all departments listed in Schedule 1, Schedule 1.1 and Schedule II of the Financial Administration Act (FAA). The Policy provides for both a reliability status for employees who require access to government assets and for a security clearance for employees who require access to classified information and assets and have a valid reliability status. The security clearance indicates a successful completion of a security assessment. There are three security clearance levels: Confidential, Secret and Top Secret. The Privy Council Office is named in Schedule 1 of the FAA (Appendix 6).

[4] The Government of Canada has also promulgated the Personnel Security Standard, which establishes the operational standard and certain technical level procedures for personnel security (Appendix 7).

[5] The grievor's substantive position as Senior Communications Analyst (IS-05) (PCO13239) required a security clearance of SECRET. See work description (Appendix 8).

[6] The work description for the IS-06 position (13291), which was last revised in 2001, showed that the incumbent required a security clearance of SECRET. However, prior to assuming her duties at PCO on February 24, 2003, the grievor completed a security screening form that was submitted by PCO to CSIS on February 14, 2003 to have it do a security assessment for the grievor for the purpose of a TOP SECRET security clearance (Appendix 9A and 9B).

[7] The grievor was not required to have a SECRET security clearance while employed at Industry Canada. Upon her arrival at the PCO on February 24, 2003, the grievor was granted a SECRET security clearance; however, she was restricted from having access to TOP SECRET material.

[8] The CSIS Security Assessment identified adverse information regarding the grievor's loyalty to Canada and it was recommended that she should not be granted TOP SECRET security clearance, and that her SECRET security clearance should also be revoked. As only the deputy head can deny, revoke or suspend a security clearance (Section 10.9 of the Government Security Policy), the Director, Security Operations at PCO wrote to management to initiate this decision making process. See memorandum to Mr. Rob Wright, dated August 28, 2003, from Gerry Deneault, Director, Security Operations, regarding CSIS Security Assessment re: the grievor (Appendix 10).

[9] Management met with the grievor on August 28, 2003, to advise her that as a result of the CSIS security assessment, concerns had been raised which needed further examination. She was informed that effective immediately and pending the outcome of this examination, she would be placed on leave with pay and denied access to PCO work sites. It was explained to her that the TOP SECRET assessment could also be used to revoke the SECRET clearance, which would mean that she could no longer work at the PCO as the minimum security clearance level is SECRET. It was also explained that PCO would therefore have to look at employment prospects in different departments. The grievor was advised that she would be provided an opportunity to rebut the information in the CSIS report, which would be provided to her in the next few days. See management's notes re meeting with the grievor on August 28, 2003, to discuss the implications of the CSIS security assessment (Appendix 11).

[10] The grievor was provided with the information with respect to certain concerns raised by CSIS and given the opportunity to respond. See letter to the grievor from Mr. Gerry Deneault, dated September 3, 2003 (Appendix 12).

[11] By letter, dated September 15, 2003, the grievor responded to the concerns raised by CSIS. In her rebuttal, she states that she takes her loyalty to Canada as an honour and privilege and denies engaging in any activities that would pose any threat to the security or national interests of Canada. See letter from the grievor to Mr. Gerry Deneault, dated September 15, 2003 (Appendix 13).

[12] A recommendation was made to the Clerk of the Privy Council (deputy head) that he deny the grievor's TOP SECRET security clearance and that he revoke her SECRET clearance. The Clerk was advised a SECRET clearance was a mandatory requirement for employment at the PCO. The PCO was aware of its obligations under Section 5 of the Personnel Security Standard upon revocation of the grievor's security status. The Clerk also decided, based on the CSIS security assessment, that he could not recommend her for employment elsewhere in the Federal Public Service and therefore he took no steps to do so. See memorandum to the Clerk of the Privy Council, Mr. Alex Himelfarb, dated October 9, 2003, and attachments (Appendix 14).

[13] The decision of the Clerk of the PCO was to deny the grievor's TOP SECRET security clearance and to revoke her SECRET clearance. She was so advised by letter, dated October 10, 2003 (Appendix 15).

[14] Management met with the grievor on October 16, 2003, to discuss with her the implications of the Clerk's decision. She was advised that as a result of this decision and because that at least a valid SECRET clearance was a requirement for employment at PCO, her employment would be terminated. The decision to terminate the grievor was not related to work performance. See Management's notes re meeting with the grievor on October 16, 2003 (Appendix 16).

[15] During the above-noted meeting, the grievor was informed that effective the end of day on November 28, 2003, her employment with the PCO would be terminated pursuant to section 11(2)(g) of the FAA. She was further advised that she would remain on leave with pay until that date. See letter of termination, dated October 15, 2003, signed by Michael Wernick, Deputy Secretary to the Cabinet, Plans and Consultations (Appendix 17).

[16] The grievor filed a complaint with the Security Intelligence Review Committee (SIRC), on October 16, 2003 (Appendix 18).

[17] The grievor grieved her termination and requested that the letter of termination be withdrawn and that she be reinstated with no loss of pay or benefits. See copy of grievance presentation, dated October 16, 2003 (Appendix 19).

[18] Management issued a final level reply to the grievor's grievance on November 24, 2003, in which she was advised that her grievance and requested corrective action were denied. See copy of final level grievance response, dated November 24, 2003 (Appendix 20).

[19] The grievor's complaint to the SIRC was dismissed on March 4, 2005. The decision to dismiss the complaint was based on the evidence before the Chairperson, not all of which would necessarily have been disclosed to the grievor where to do so would jeopardize national security. The Chairperson concluded that there were reasonable grounds for the Clerk to have decided that the grievor should be denied Level III clearance and to revoke her Level II clearance (Appendix 21).

[4] Ms. Zhang testified at the hearing. In addition to her testimony summarized below, I have summarized the relevant portions of the documents that were attached as appendices to the Statement of Agreed Facts.

[5] Ms. Zhang received a Masters degree in China and worked for *Xinhau*, the New China News Agency. She immigrated to Canada in 1995. Since her arrival in Canada, she has obtained an Executive MBA degree and her designation as a Certified Management Accountant (CMA). She has been involved in volunteer community activities, including a position on the board of the United Way. She commenced employment with the federal public service in 2002 after working with the Business Development Bank of Canada. After a brief period as a term employee at the Public Service Commission, she obtained an indeterminate appointment as an IS-5 with Industry Canada.

[6] Ms. Zhang testified that someone who worked at the PCO and who knew her husband suggested that she send her curriculum vitae to the PCO. Ms. Zhang sent it in and almost immediately received a call from Maurice Jorre de St. Jorre, Director, Operations, inviting her to discuss job opportunities with the PCO. Within a week or two of their conversation, he called her to ask her to come to the PCO to work for him. She told him that she had to think about it and he replied: "Nobody thinks about working at the PCO" and that working for two years at the PCO was like working for 20 years anywhere else in the federal public service. After talking to a few people, Ms. Zhang determined that it was the right move for her.

[7] Ms. Zhang was advised that it was administratively difficult to move her to the PCO as an IS-6; therefore, the PCO would deploy her at her current IS-5 group and level and put her in an acting IS-6 position. She was told that at the end of six months she would be appointed to the IS-6 position.

[8] The acting IS-6 position had a security clearance level of “Secret”, as did her substantive position at the PCO (Exhibit E/G-1, Appendices 8 and 9A). As noted in the Statement of Agreed Facts, Ms. Zhang was granted a “Secret” clearance level when she arrived at the PCO on February 24, 2003. On February 14, 2003, Lyne Fournier, of the PCO Security and Intelligence Secretariat, sent a letter to the Canadian Security Intelligence Service (CSIS) indicating that Ms. Zhang would have access to material classified up to and including “Top Secret” and requested the appropriate security assessment (Exhibit E/G-1, Appendix 9B). Ms. Zhang testified that Mr. Jorre de St. Jorre called her to tell her that a mistake had been made and that the PCO had applied for a “Top Secret” clearance for her. Ms. Zhang testified that Mr. Jorre de St. Jorre had told her that he would like all IS positions to eventually be classified “Top Secret”.

[9] The CSIS conducted the assessment and raised concerns with the PCO both about the application for “Top Secret” clearance and about her existing “Secret” clearance. The “Personnel Security Standard”, a Treasury Board document (Exhibit E/G-1, Appendix 7), states that individuals are to be denied a security clearance if there are reasonable grounds to believe that the following conditions apply:

- *As it relates to loyalty, the individual is engaged, or may engage, in activities that constitute a threat to the security of Canada within the meaning of the CSIS Act.*
- *As it relates to reliability, because of personal beliefs, features of character, association with persons or groups considered a security threat, or family or other close ties to persons living in oppressive or hostile countries, the individual may act or may be induced to act in a way that constitutes a "threat to the security of Canada"; or they may disclose, may be induced to disclose, or may cause to be disclosed in an unauthorized way, classified information.*

[10] Ms. Zhang attended a meeting on August 28, 2003, with Mario Laguë, Assistant Secretary to the Cabinet, Simon Fothergill, Director, Legal Operations/Counsel, and Chantal Butler, Staff Relations Advisor. The minutes of the meeting were introduced

as an exhibit (Exhibit E/G-1, Appendix 11). At the meeting, Ms. Zhang was advised by Mr. Laguë that she was on leave with pay as of that day. Mr. Fothergill advised her that she would have an opportunity to respond to the concerns raised by the CSIS investigation. Mr. Laguë stated that, if Ms. Zhang decided to resign, all processes would be stopped. Mr. Fothergill advised her that the information from the CSIS could also be used to revoke her “Secret” clearance and that she might want to “consider career choices” in the event that she was found to be ineligible for either a “Secret” or a “Top Secret” clearance. Mr. Fothergill reiterated the possibility of her resigning, but the minutes of the meeting record that he assured her that she should not feel under any pressure to do so. Mr. Fothergill also advised her that, if her “Secret” clearance were revoked, she could no longer work at the PCO since the minimum level was “Secret”. Mr. Fothergill is then recorded in the minutes as stating that “...we would therefore have to look at employment prospects in different departments...”. The minutes of the meeting note that Mr. Fothergill advised her that, if no position could be found, her employment would be terminated. Ms. Zhang testified that she was not told at that meeting that her employment could be terminated.

[11] Gerry Deneault, Director, Security Operations, wrote a letter to Ms. Zhang on September 3, 2003, advising her of the findings in the CSIS report and inviting her written response to the findings (Exhibit E/G-1, Appendix 12). Mr. Deneault wrote:

...

Based on the CSIS assessment, PCO has concerns about your loyalty to Canada as well as your reliability as it relates to such loyalty, which could lead to a decision to deny your level III security clearance and to revoke the security clearance previously provided to you.

...

Our first concern is that, particularly as a former employee of the New China News Agency (aka Xinhua News Agency), you may have engaged in intelligence collection activities on behalf of a foreign state.

Secondly, we are concerned that you appear to maintain regular contact with foreign representatives who may be involved in intelligence collection activities.

These concerns raise serious doubt as to whether you should be granted or should retain a government security clearance....

[12] As noted in the Statement of Agreed Facts, Ms. Zhang provided a detailed response on September 15, 2003 (Exhibit E/G-1, Appendix 13). Mr. Deneault wrote a memorandum to Alex Himelfarb, the Clerk of the PCO, on October 6, 2003, recommending that Ms. Zhang's security clearance be revoked and that her employment be terminated (Exhibit E/G-1, Appendix 14). This memorandum was released pursuant to the *Privacy Act* and parts of it have been blocked out. In the memorandum Mr. Deneault stated:

...

In accordance with the GSP [Government Security Policy], we have considered the possibility of reassigning or appointing her to a less sensitive position elsewhere in the Government of Canada...

[The remainder of the paragraph is blocked out.]

[13] Mr. Deneault also notes in this memorandum that, if Ms. Zhang's employment is terminated, "we can administratively cancel her reliability status". As noted in the Statement of Agreed Facts, Ms. Zhang's "Secret" security clearance was revoked on October 10, 2003, by Mr. Himelfarb. Ms. Zhang testified that, to her knowledge, her enhanced reliability status was not revoked or cancelled.

[14] Ms. Zhang was advised of the termination of her employment, effective November 28, 2003, at a meeting on October 16, 2003. with Mr. Laguë, Mr. Fothergill, and Ms. Butler. Her union representative, Denis McCarthy, was also present. At the meeting, Ms. Zhang was provided with a letter of termination signed by Michael Wernick, Deputy Secretary to the Cabinet, Plans and Consultations (Exhibit E/G-1, Appendix 17). The letter stated:

...

As required by the Treasury Board's policy on Government Security - Personnel Security Standard, I have carefully considered whether you can be reassigned or appointed to a less sensitive position at an equivalent or lower level. I have concluded that this constitutes an exceptional circumstance where no such reassignment or assignment is possible. This is because the CSIS security assessment raises serious questions about your loyalty to Canada and your reliability as it relates to such loyalty.

...

[15] Handwritten notes of the meeting of October 16, 2003 were prepared by Ms. Butler (Exhibit E/G-1, Appendix 16). Mr. Laguë stated that he was “not prepared to be constrained in what he might say to a prospective employer as some issues were raised in respect to loyalty”. Mr. Fothergill advised her that it would be “more prudent” not to rely on the PCO for references.

[16] Ms. Zhang testified that her union representative proposed that her leave with pay be extended until the decision of the Security Intelligence Review Committee (SIRC) had been rendered and that Ms. Zhang could work at a charitable organization of the PCO’s choosing in the interim. This suggestion was not responded to by the department.

[17] In cross-examination, Ms. Zhang testified that during her leave with pay (prior to her termination on November 28, 2003) she was interviewed for a position at the Canada Customs and Revenue Agency (CCRA) requiring an enhanced reliability status. She testified that, when the manager contacted the PCO, he was told by someone at PCO that the CCRA should not hire her. She testified that she knew that the PCO was not going to support her because of the security clearance issue but she had not understood that it was going to stop others from hiring her.

[18] The SIRC held seven days of hearings on Ms. Zhang’s complaint between January and June 2004. The version of its report tendered as an exhibit at this hearing (Exhibit E/G-1, Appendix 21) was declassified from “Top Secret” to “Protected/Personal Information”. The SIRC concluded that there were reasonable grounds for the Clerk to deny a “Top Secret” security clearance and revoke the “Secret” security clearance. The SIRC also concluded that there were reasonable grounds to believe that, as a former employee of *Xinhau*, Ms. Zhang may have engaged in intelligence collection activities on behalf of a foreign state and that Ms. Zhang appeared to maintain regular contact with foreign representatives who might be involved in intelligence collection activities. Among other recommendations, the SIRC recommended that the decision of the Clerk be upheld. (The other recommendations related to the conduct of the investigation and the failure of the CSIS to properly disclose information to Ms. Zhang in advance of the hearing, as required by the Rules of Procedure for the SIRC.)

[19] At the conclusion of her testimony in examination-in-chief, Ms. Zhang was asked if she had anything to add. She stated that it was unfortunate that the Government was imposing such an injustice on her. She stated that she was being treated the same

way as her father had been treated by the Chinese Government. She stated that she has faith in this country and asked that I keep the hope that new Canadians have in this country alive.

Summary of the arguments

For the employer

[20] Mr. Newman submitted that this was a termination of employment for non-disciplinary reasons. The report from the SIRC (Exhibit E/G-1, Appendix 21) shows that the Clerk of the PCO had serious grounds for concern. The SIRC concluded that there were reasonable grounds on which the Clerk of the PCO could decide to revoke Ms. Zhang's security clearance. Mr. Newman submitted that loyalty to Canada was a basic condition of employment. If an employer reasonably suspects that an employee may be an agent for a foreign power, there is no basis to retain or offer employment to that person.

[21] Mr. Newman noted that Ms. Zhang had not been employed with the Government of Canada for long. She performed her work in a satisfactory manner and her work performance was not the basis for the termination of her employment. Since she did not retain her security clearance, a condition of her employment at the PCO, her employment was terminated. Since she was considered a threat to national security, it is not unreasonable to conclude that she cannot be employed in the public service of Canada.

[22] Mr. Newman submitted that it was irrelevant whether the IS position at the PCO required a "Top Secret" clearance or not. The department has a right to request such an assessment. According to Ms. Zhang's evidence, the PCO was planning to upgrade the position to "Top Secret"; therefore, it should come as no surprise that the assessment was conducted.

[23] Mr. Newman noted that the Government Security Policy (Exhibit E/G-1, Appendix 6) sets out the role of the SIRC and the PCO's general security role. He also noted that only the Deputy Head can deny or revoke a security clearance. Mr. Newman also noted that security assessments and reliability checks are conditions of employment under the *Public Service Employment Act (PSEA)* and that until required checks are completed individuals cannot be appointed to a position.

[24] Mr. Newman submitted that it is not up to the Deputy Head to conduct an investigation. The assessments by the CSIS are expected to be acted upon by the Deputy Head; it is very rare that the Deputy Head would not act upon a CSIS recommendation. Ms. Zhang was denied a security clearance on the basis that there were reasonable grounds to believe that, “as it relates to loyalty, the individual is engaged, or may engage, in activities that constitute a threat to the security of Canada...” (Personnel Security Standard; Exhibit E/G-1, Appendix 7). Mr. Newman noted that this conclusion was upheld by the SIRC.

[25] Mr. Newman submitted that the Personnel Security Standard (Exhibit E/G-1, Appendix 7) requires that consideration be given to other positions within the department. There were none in the PCO. The Clerk considered this to be an exceptional circumstance, as there were concerns about Ms. Zhang posing a threat to the security of Canada. The Clerk has no authority to appoint employees outside of the PCO. Furthermore, Mr. Newman argued that there is no legal obligation to give any consideration to employment outside the PCO. Mr. Newman submitted that, even if there were such an obligation, it was a “no-brainer” that the PCO cannot look for a job for a person who is a threat to the security of the country because of concerns about that person’s loyalty to the country. Mr. Newman asked, “If this is not exceptional, what is?”

[26] Mr. Newman submitted that Ms. Zhang was put on notice concerning her career choices at a meeting on August 28, 2003. He stated that he disagreed with Mr. Fothergill’s comments at the meeting about looking for employment prospects in other departments. It may be a moral requirement but it is not a legal one. The Deputy Head has no authority to appoint outside his or her own department. It may be desirable to consider positions outside the department if it is feasible, but in this case it was not feasible. Mr. Newman noted that, in a memorandum to Mr. Himelfarb (Exhibit E/G-1, Appendix 14), Mr. Deneault wrote that the PCO had considered the possibility of reassigning or appointing Ms. Zhang to a less sensitive position elsewhere in the Government of Canada. As stated in the Statement of Agreed Facts, the employer did not believe it could recommend her for other positions. This was because of concerns about her loyalty. Mr. Newman submitted that I could not second-guess Mr. Warnick’s assessment that this constituted an exceptional circumstance (Exhibit E/G-1, Appendix 17). I have no evidence to allow such a “second guess”. The SIRC report confirms the concern expressed by Mr. Himelfarb.

[27] Mr. Newman submitted that, in *Singh v. Treasury Board (Public Works and Government Services Canada)*, 2000 PSSRB 39, the adjudicator recognized that the examination of alternate positions was limited to those within the department. Mr. Newman noted that the matter was ultimately settled (*Singh v. Treasury Board (Public Works and Government Services Canada)*, 2003 PSSRB 25).

[28] In its reasons in *Singh v. Canada (Public Works and Government Services)*, 2001 FCT 577, the Federal Court found that the adjudicator could not order an appointment to an alternate position. The Court also concluded that the requirement to make a diligent search for alternate positions was limited to within the department.

[29] Mr. Newman submitted that, even if there were an obligation to go outside the department, the PCO acted reasonably. These were exceptional, even extraordinary circumstances. The security of the State trumps just about everything, he submitted.

[30] Mr. Newman argued that the decision in *Sullivan v. Canadian Security Intelligence Service*, 2003 PSSRB 26, was not relevant. He noted that the adjudicator in *Sullivan* did not say that the employer had to find alternate employment, but only suggested that Ms. Sullivan could seek alternate employment in the public service. In any event, the situation in *Sullivan* was not as serious as the case here, where there is a reasonable apprehension of danger to the interests of the State.

[31] In conclusion, Mr. Newman submitted that I should dismiss the grievance.

For the grievor

[32] Mr. Fisher noted that Ms. Zhang had job security in her indeterminate position at Industry Canada. A “Top Secret” clearance was not a prerequisite for employment at the PCO, as evidenced by the job description for the position (Exhibit E/G-1, Appendix 9), which required only a “Secret” clearance. The application for a “Top Secret” clearance was initiated as a result of an administrative error or mistake. Her confirmation in the IS-6 position should not have been contingent on a “Top Secret” clearance.

[33] Mr. Fisher noted that the termination letter relied on subsection 11(2)(g) of the *Financial Administration Act* (FAA). He agreed that this must be read in conjunction with section 11(4) of the *FAA* and the decision of the Federal Court of Appeal in *Gannon v. Canada (Treasury Board)*, 2004 FCA 417. This meant that Ms. Zhang could

be dismissed only for just cause. Mr. Fisher submitted that the employer did not show just cause in this case. It did not meet its obligations to Ms. Zhang and it is entirely within an adjudicator's jurisdiction to reinstate her.

[34] Mr. Fisher submitted that, although Ms. Zhang was precluded from working at the PCO upon the revocation of her security clearance, she should have been placed on leave with pay and the employer should have undertaken its obligation to find her suitable employment elsewhere in the federal public service. Ms. Zhang was amply qualified for other positions and her enhanced reliability status had never been revoked. Mr. Fisher submitted that she should have been sent back to Industry Canada. He submitted as well that to bar Ms. Zhang from any employment in the public service does not meet the test of just cause. If her termination of employment stands she will have been deprived of her substantive right to a just cause basis for the termination of her employment.

[35] Mr. Fisher argued that the significant onus of just cause is reflected in the Personnel Security Standard (Exhibit E/G-1, Appendix 7), where it states:

If the individual concerned is an employee, consideration must be given to reassignment or appointment to a less sensitive position at an equivalent level. Should no such position be available, appointment to a position at a lower level must be considered. Termination of employment may be considered only in exceptional circumstances and only when all other options have been exhausted.

[36] Mr. Fisher noted that the obligations of the employer flow from its administrative decisions and are clearly reflected in the Personnel Security Standard. The employer is obliged to exhaust internal sources and then look inter-departmentally for alternative positions. The department initially acknowledged this obligation in a meeting with Ms. Zhang on August 28, 2003 (Exhibit E/G-1, Appendix 11). The department knew that this was what it had to do and never did it. Mr. Fisher submitted that the circumstances of this case do not amount to "exceptional circumstances". The Personnel Security Standard speaks clearly of the employer's obligation and the employer is in breach of its own policy. Mr. Fisher submitted that the employer did not consider any positions, including positions at a lower level.

[37] Mr. Fisher argued that the obligation of the employer extended beyond the department. The PCO is not a separate legal entity. The Personnel Security Standard speaks of the Treasury Board of Canada and the policy applies to listed departments (Exhibit E/G-1, Appendix 6). To treat the PCO as a separate legal entity conflicts with a reading of the *FAA* and the policy.

[38] Mr. Fisher argued that the treatment of Ms. Zhang was also a breach of procedural fairness. As in *Singh (supra)*, her treatment was not equitable. She was recruited by the PCO; they wanted her so badly that the department massaged the staffing process to appoint her to an IS-6 position. It is clear that they wanted her. Now she has no job in the public service and is barred from finding any other position in the public service without a recommendation from the PCO. Her work performance was never at issue.

[39] Mr. Fisher noted that, in its September 3, 2002, letter, the employer relied on two concerns. He submitted that Ms. Zhang was not before this adjudicator to argue the merits of the SIRC findings. However, the employer's right to revoke a security clearance is unilateral and the threshold for such a revocation is low. The grounds relied on for the revocation were only that the employer is no longer prepared to grant a security clearance. Those grounds should not trigger the termination of Ms. Zhang's employment. Such a finding with respect to her security clearance does not extinguish the employer's obligation to look first within the department for an alternate position and, second, to go outside the department. Mr. Fisher submitted that the two concerns identified were not sufficient for the purpose of establishing just cause, nor were they sufficient to set aside a policy requirement to look for alternate employment.

[40] Mr. Fisher argued that there was no suggestion of improper dealings by Ms. Zhang or a violation of national security. As a matter of fairness, what message does this send to employees? If the CSIS raises concerns about your former life and makes an assessment that is unsatisfactory, you are fired. The just cause standard is not satisfied in this instance. Mr. Fisher argued that the grounds for revoking the security clearance state that Ms. Zhang "may have" engaged in certain activity. It was not established that she did in fact engage in intelligence gathering. He submitted that this was not sufficient to satisfy the statutory requirement of just cause.

[41] Mr. Fisher submitted that, with Ms. Zhang's experience, extensive community involvement, her MBA, and her three languages, it was virtually impossible that a position within the public service could not have been found for her.

[42] Mr. Fisher submitted that, if a "Top Secret" assessment had not been conducted, then these repercussions would not have occurred. If Mr. Jorre de St. Jorre had advised her that there could be repercussions, this might not have happened. The administrative details of her security clearance should have been finalized before she took the position at the PCO.

[43] Mr. Fisher agreed that it was not feasible to look within the PCO for an alternate position for Ms. Zhang. In this case, the search should have been extended beyond the department. As in *Singh (supra)*, a concern for fairness and equity should have prompted the PCO to review its decision. The PCO did not make an honest effort to find Ms. Zhang alternate employment. There was evidence from Ms. Zhang that she was barred from a position at the CCRA even though the position did not require a security clearance.

[44] Mr. Fisher argued that the mandate of the SIRC does not extend to making recommendations that bar Ms. Zhang from employment.

[45] Mr. Fisher submitted that the Treasury Board was required to search diligently for alternate positions, as stated by the Federal Court in *Singh (supra)*. *Singh* also holds that termination should be an option of last resort. In this case, it was an option of first resort. In this case, the failure of the Treasury Board to search diligently was a breach of the obligation set out in the policy.

[46] Mr. Fisher submitted that Ms. Zhang should have been considered for deployment to other IS-5 positions. He noted that she has maintained her innocence and her loyalty to Canada. She also did not at any time attempt to hide anything.

[47] Mr. Fisher submitted that, as in *Singh (supra)*, this is a situation that "begs for review". Mr. Fisher also referred me to *Sullivan (supra)*.

Reply submissions of the employer

[48] Mr. Newman submitted that Mr. Fisher's argument that the security clearance should not have been conducted is irrelevant. The fact is that it was conducted and the CSIS uncovered what it did.

[49] Mr. Newman noted that there was no suggestion that there were grounds for disciplinary action.

[50] He argued that the Clerk of the PCO could not be expected to try to find an alternate position for an employee who is a risk to the security of the country. It was recognized by the Clerk and the officials at the PCO that this would be an exercise in futility.

[51] Mr. Newman submitted that the PCO looked at all the jobs within the department and even considered going outside but ruled this out because it was not prepared to recommend her. Mr. Newman submitted that the Federal Court judgment in *Singh (supra)* only stands for the proposition that the department should canvass all jobs and the Court clearly limited this exercise to within the department.

[52] Mr. Newman noted that, in terms of procedural fairness, the principle in *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.), applied.

[53] Mr. Newman submitted that the issue of whether Ms. Zhang was lured to the PCO was not at issue before me. She was quite happy to submit her curriculum vitae. Mr. Newman said that the employer was not disputing that she was a desirable candidate. However, she was not desirable at all once the department had the assessment report from the CSIS.

[54] Mr. Newman argued that *Gannon (supra)* was not relevant, as cause was shown in this case.

[55] Mr. Newman submitted that the PCO could not send Ms. Zhang back to Industry Canada. She left Industry Canada and the PCO could never recommend her for a job at Industry Canada.

Reasons

[56] Ms. Zhang lost her employment with the public service of Canada as a result of the revocation of her “Secret” security clearance. Her termination of employment was non-disciplinary and in accordance with section 11(2)(g) of the *FAA*. How the revocation of her security clearance came about is not within my jurisdiction and is a matter that has already been dealt with by the SIRC. The role of an adjudicator in the case of a termination as a result of the revocation of a security clearance is a narrow one, according to the Federal Court in *Singh (supra)*. The Court concluded that there was an obligation on the part of the employer to “search diligently” for alternate positions. The Treasury Board Personnel Security Standard also requires a search for alternate positions unless there are “exceptional circumstances”. The employer argues, first, that there is no obligation on the part of the employer to look outside the department for alternate positions and, second, that in this case there are “exceptional circumstances” that justify the department’s decision not to search for alternate positions.

[57] The issues are as follows:

1. What is the extent of the employer’s obligation to “search diligently” for alternate positions?
2. Are there “exceptional circumstances” that justify the employer’s not meeting this obligation?
3. Did the employer meet its obligation in light of all the circumstances?

The extent of the employer’s obligation

[58] It is conceded by the grievor that there are no alternate positions at an equivalent or lower level within the PCO. The issue then becomes whether there is an obligation to look for positions outside the department.

[59] The Personnel Security Standard (Exhibit E/G-1, Appendix 7) states that, when a security clearance is revoked, consideration must be given to reassignment or appointment to a less sensitive position at an equivalent level or, if one is not available, to a position at a lower level. The Standard is silent on whether the search for alternate positions should extend outside the department. However, it is clear that the authority of the Deputy Head to appoint or reassign an employee is limited to

within the department. The Standard therefore does not require the Deputy Head to appoint or reassign an employee to an alternate position outside the department.

[60] The Federal Court has determined the jurisdiction of an adjudicator in cases where the revocation of a “Secret” clearance results in termination of employment. While agreeing that an adjudicator could not order the appointment of a grievor to an alternate position, the Court in *Singh (supra)* stated:

However, that is not to say that he had no jurisdiction to find that the employer could not limit its search for alternate employment to a branch where such a position could not possibly be available to the applicant because of the mandatory "secret" security clearance.

[61] The Court concluded:

In my view, subparagraph 92(1)(b)(ii) of the PSSRA in conjunction with paragraph 11(2)(g) of the FAA affords an adjudicator the jurisdiction to inquire as to whether the Treasury Board searched diligently for alternate positions. Termination of employment should be the option of last resort. Clearly, upon revocation of a security clearance, serious effort must be deployed by the respondent [employer] to re-assign or appoint the employee to an alternate position at the same level within the Department.

[62] The Court clearly states that the obligation to “search diligently” for alternate positions rests with the Treasury Board, as employer, and is not limited to the Deputy Head of the department. In *Singh (supra)*, there were positions within the department that were classified below the “Secret” level and the Court, on the facts, limited the employer’s obligation to the department level. At the PCO, the situation is quite different; there are no positions lower than “Secret”.

[63] Ms. Zhang was initially told by Mr. Fothergill, in the presence of Mr. Laguë, that the PCO was required to seek out other employment for her within the federal public service. In my view, that is the correct interpretation of the law. The obligation to search for alternate positions, as expressed by the Federal Court, rests on the employer. The analysis in *Singh (supra)* applies as well to the situation here. In *Singh*, the employer limited its search for alternate positions to positions within a branch where “Secret” clearances were required. The Court described the employer’s search as “perfunctory”. In this case, the employer’s search for alternate positions, if limited to the PCO, can also be considered “perfunctory”.

[64] Accordingly, I find that the employer is required to conduct a search for alternate positions within the parts of the public service for which it is the employer, unless there are exceptional circumstances (discussed below).

Are there “exceptional circumstances”?

[65] The Personnel Security Standard (Exhibit E/G-1, Appendix 7) states that, after the revocation of a security clearance, termination of employment may be considered “only in exceptional circumstances and only when all other options have been exhausted”. The employer argued that there were “exceptional circumstances” that prevented the PCO from searching for alternate positions for Ms. Zhang in other departments. The statements made to Ms. Zhang by the PCO officials were clear; they would not “market” her to other departments because of concerns about her loyalty and reliability. Unfortunately, the paragraph in the memorandum from Mr. Deneault that contains the justification for this position has been blocked out (Exhibit E/G-1, Appendix 14) and there was no evidence from the employer concerning the basis for its decision.

[66] Mr. Newman argued that the fact that Ms. Zhang was identified as a potential security risk and that her loyalty to Canada was questioned constituted the necessary “exceptional circumstances”. A finding of concerns about the person’s loyalty to Canada is one of the grounds for revoking or denying a “Secret” or “Top Secret” security clearance. Without additional evidence, it is not appropriate to regard this as an “exceptional circumstance”. If concerns about loyalty to Canada alone constituted exceptional circumstances, this would rob the requirement in the Standard of any meaning since all revocations would meet the definition of “exceptional”. I do not agree with Mr. Newman’s contention that I cannot “second-guess” the decision of the PCO that this was an “exceptional circumstance”. The employer must provide some evidence to justify the decision not to seek an alternate position that has resulted in the termination of Ms. Zhang’s employment.

[67] The employer conceded that there were no concerns about Ms. Zhang’s work performance; therefore, its reluctance to search for alternate positions was based solely on concerns about her reliability. However, there was no evidence that Ms. Zhang’s enhanced reliability status was ever revoked or cancelled. The department did turn its mind to this, as shown by the fact that Mr. Deneault wrote in his memorandum that her reliability status could be cancelled “administratively” (Exhibit

E/G-1, Appendix 4). The Personnel Security Standard provides for recourse in the event of a revocation of enhanced reliability status and there was no evidence that Ms. Zhang received notification of this right to recourse. The employer had an opportunity to introduce evidence in reply to contradict Ms. Zhang's testimony that her enhanced reliability status had not been revoked or cancelled. Consequently, I must proceed on the basis that her enhanced reliability status was not cancelled or revoked.

[68] If there was evidence that Ms. Zhang's enhanced reliability status had been revoked, I would accept the fact that the employer could not make a diligent search for alternate positions. However, on the evidence presented, she retained her enhanced reliability status at the time of her termination of employment. If the employer had concerns about Ms. Zhang's reliability, it could have revoked her enhanced reliability status. It is likely that such an action would have effectively eliminated all possible alternate positions. (This is based on my assumption that there are few, if any, positions with the public service that are at a level lower than enhanced reliability.) However, it is not open to the employer to justify its failure to search for alternate positions on the basis of concerns about reliability without revoking the grievor's enhanced reliability status.

Has the employer's obligation been met?

[69] The employer did not search for alternate positions at an equivalent or lower level for Ms. Zhang. As I have concluded above, there was not sufficient evidence before me to find that there were "exceptional circumstances" that would justify the employer's failure to do so. Given that Ms. Zhang's existing enhanced reliability status had not been revoked, there was no reason, on the evidence before me, that she could not have been considered for an appointment to an alternate position within the public service. I therefore conclude that the employer's obligation has not been met. Termination for non-disciplinary reasons must be for cause. According to the Federal Court in *Singh (supra)*, termination must be the last resort after a diligent search has been made for alternate positions. The failure of the employer to conduct a diligent search therefore means that there was no cause for termination.

Remedy

[70] I now turn to the appropriate remedy for a breach of the employer's obligation to search for alternate positions. This was not dealt with by the Federal Court in *Singh (supra)*. In *Gannon (supra)*, the Federal Court of Appeal held that reinstatement was required if it is found that there is no cause for termination. However, reinstatement to her former position at the PCO is not legally possible since Ms. Zhang no longer meets the security level required for the position. As noted in *Singh (supra)*, I cannot order her appointment to an alternate position.

[71] However, I can order that the employer conduct a diligent search for an alternate position at the equivalent (her substantive IS-5) or a lower level for Ms. Zhang. The employer should be given some time to conduct such a search. In the circumstances, two months from the date of this decision to conduct a search should be sufficient.

[72] Pending completion of the employer's search, Ms. Zhang should be put back on leave with pay. This means that she should be reinstated to leave with pay from November 28, 2003, until the employer has completed its search for an alternate position. When the employer completes its search, Ms. Zhang's leave with pay status will end. I will retain jurisdiction solely to deal with any matters relating to the implementation of the part of the order concerning the grievor's reinstatement to leave with pay status.

[73] In her grievance, Ms. Zhang requested that the letter of discharge and all copies be withdrawn and destroyed in her presence. I see no need to make such an order. The termination is rescinded by this decision; therefore, the termination letter and any copies are of no effect.

[74] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[75] The grievance is allowed, in part.

[76] I order that the employer conduct a diligent search for an alternate position for the grievor at an equivalent (IS-5) or lower level within the parts of the public service for which it is the employer, for a period of two months from the date of this decision.

[77] I order the employer to reinstate Ms. Zhang in her leave with pay status effective November 28, 2003, until the employer has completed its search for an alternate position.

[78] I will remain seized of the matter solely in relation to the implementation of the reinstatement to leave with pay status should the parties have any difficulties in implementing this part of the order.

December 8, 2005.

**Ian R. Mackenzie,
adjudicator**