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File: 572-02-937

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*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

TREASURY BOARD

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as

Treasury Board v. Professional Institute of the Public Service of Canada

In the matter of an application, under subsection 71(1) of the *Public Service Labour Relations Act*, for a declaration that a position is a managerial or confidential position

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Applicant: Jennifer Champagne, Counsel

For the Respondent: Martin Ranger, Professional Institute of the Public Service of Canada

Heard at Ottawa, Ontario,
July 8, 2008.

REASONS FOR DECISION

Application before the Board

[1] This decision deals with an application by the Treasury Board (“the applicant”) for an order declaring that position number 0000103360, Manager of Supply, classified PG-06, at the Department of Public Works and Government Services (“the DPWGS”), is managerial or confidential pursuant to section 71 of the *Public Service Labour Relations Act*, S.C. 2003, ch. 22, (“the Act”).

[2] In *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 142-02-343 (19990616), the Public Service Staff Relations Board (“the PSSRB”) confirmed the Professional Institute of the Public Service of Canada (“the respondent”) as the bargaining agent for the following bargaining unit:

All employees of the Employer in the Audit, Commerce and Purchasing Group as defined in Part I of the Canada Gazette of March 27, 1999.

[3] On April 1, 2005, the Act, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (“the PSMA”), was proclaimed in force. Pursuant to subsection 48(1) of the PSMA, the bargaining agent continues to be certified as the bargaining agent for the bargaining unit.

[4] On November 1, 2007, the respondent informed the Public Service Labour Relations Board (“the Board”) that it objected to the proposed exclusion of the position because it did not appear to have sufficient responsibility, at the first level of the grievance procedure to exclude it. Furthermore, the respondent was not prepared to allow the exclusion of the position so that the occupant of the position could participate on the management bargaining team.

Summary of the evidence

[5] The applicant tabled 11 documents and called Jason Storm, the occupant of the position proposed for exclusion, as a witness. The respondent tabled six documents and called David Calvert, Mobilizer/Organizer for the respondent, as a witness. I will limit the summary of the evidence to the elements that are necessary to decide the application.

[6] Mr. Storm was appointed to position 0000103360 in August 2007. Before being appointed to that position, he occupied a managerial and confidential position for the DPWGS. The organizational chart shows that Mr. Storm has supervisory responsibility

over 13 other positions. His unit is part of one of six directorates within the Services and Technology Acquisition Management Sector (STAMS) of the DPWGS. The STAMS is comprised of approximately 300 employees and is headed by Jérôme Thauvette, Director General.

[7] On October 15, 2007, Mr. Thauvette informed Mr. Storm that he was to be the representative at the first level of the grievance procedure and that he was to carry out that function on behalf of the DPWGS for the employees reporting to him.

[8] On December 7, 2007, the representative of the Human Resources Branch of the DPWGS advised Mr. Storm that position number 0000103360 had been identified as a managerial or confidential position that had been proposed for exclusion from the bargaining unit under paragraphs 59(1)(e) and (f) of the *Act*.

[9] Earlier, in May 2005, the applicant had proposed that position 0000103360 be excluded from the bargaining unit because the occupant of the position at that time was the representative at the first level of the grievance procedure. However, the proposal was never submitted to the respondent, even though the position was mentioned in a letter from the applicant to the respondent on August 21, 2006.

[10] Further to the fact that the occupant of position 0000103360 acts as the representative at the first level of the grievance procedure, the applicant is proposing that the position be considered managerial and confidential because the occupant is a member of the management bargaining team for the renewal of the Audit, Commerce and Purchasing Group collective agreement.

[11] In a routing slip dated October 26, 2007, the DPWGS mentioned to the applicant that it was urgent for the position to be excluded from the bargaining unit so that the occupant of the position could represent management at the bargaining table. In the meantime, the occupant of the position acted as an advisor to the team, participated in management caucuses and performed some research for the team.

Summary of the arguments

[12] The applicant is seeking the exclusion of position 0000103360 pursuant to paragraphs 59(1)(e) and (f) of the *Act*. The evidence presented showed that the occupant of the position is the representative at the first level of the grievance procedure and that he is a member of the management bargaining team.

[13] Faced with these facts, the Board, according to the applicant, must grant the exclusion and does not have jurisdiction to determine if it was appropriate for the applicant to delegate the authority for first-level grievances to the occupant of position 0000103360.

[14] The applicant's representative referred me to the following decisions to support her arguments: *Treasury Board v. Public Service Alliance of Canada*, [1984] 2 F.C. 998; *Treasury Board v. The Professional Institute of the Public Service of Canada*, PSSRB File No. 172-02-668 (19920924); *The Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File Nos. 174-02-452 to 456 (19860430); *Treasury Board (Public Works and Government Services Canada) v. Professional Institute of the Public Service of Canada*, PSSRB File No. 172-02-1115 (19980721); *Economists', Sociologists' and Statisticians Association v. Canada (Treasury Board)*, PSSRB File No. 172-02-339 (19801231); *Canada (Treasury Board) v. Professional Institute of the Public Service of Canada*, PSSRB File No. 172-02-301 (19791108); *Canada (Treasury Board) v. Economists', Sociologists' and Statisticians Association*, PSSRB File No. 172-02-31 (19710714); *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1996] F.C.J. No. 159 (QL); and *Canada (Treasury Board) v. The Professional Institute of the Public Service of Canada*, PSSRB File No. 172-02-268 (19771121).

[15] The respondent argued that the decision to delegate grievance authority to the occupant of position 0000103360 was made by the applicant when it realized that the occupant of that position could not be part of the management bargaining team because his position was not excluded. In reading the routing slip dated October 26, 2007, one can sense that the applicant was panicking and that it was ready to do whatever was necessary to get the position excluded.

[16] According to the respondent, in the correspondence related to this case, the applicant never submitted that the position had evolved in a way that could justify that its occupant should act as a representative for a level of the grievance procedure. The applicant had to prove why the position should be part of the grievance procedure and demonstrate that it did not act in bad faith.

[17] The respondent argued that there was bad faith on the part of the applicant in using a process that it did not need to use but that it did use to keep a person on its bargaining team.

Reasons

[18] This case involves the following provision of the Act:

59. (1) After being notified of an application for certification made in accordance with this Part, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that

...

(e) the occupant of the position has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Part 2;

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

...

[19] The evidence clearly demonstrates that the occupant of position 0000103360 is the representative for the first level of the grievance procedure. It also demonstrates that the occupant is part of the management negotiating team. Either of those reasons would be a sufficient motive for excluding the position from the bargaining unit.

[20] The respondent argued that the decision of the applicant to designate the occupant of position 0000103360 as the representative at the first level of the grievance procedure was made in bad faith. There is nothing in the evidence presented that could lead me to arrive at that conclusion.

[21] The case law is clear. The Board does not have the authority to question the motives behind an employer's decision to designate an employee as a representative at a level of the grievance procedure. This was first established in *Treasury Board v. Public Service Alliance of Canada*, [1984] 2 F.C. 998. Then followed a large number of decisions of the PSSRB in the same direction. The decisions were all rendered under the *Public Service Staff Relations Act (PSSRA)*. However, there is not enough of a difference between the provisions of the Act and those of the PSSRA to allow me to disregard the abundant jurisprudence already established.

[22] On the question of participating on the management's bargaining team, the PSSRB was presented with facts comparable to this case in *Economists', Sociologists' and Statisticians Association v. Canada (Treasury Board)*, PSSRB File No. 172-02-339 (19801231). It then ruled that this type of involvement in collective bargaining on behalf of the employer is enough to justify an exclusion from the bargaining unit.

[23] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[24] The position of Manager of Supply at the DPWGS, classified PG-06 and numbered 0000103360, is declared to be a managerial or confidential position.

July 16, 2008.

**Renaud Paquet,
Board Member**