

Date: 20110202

File: 575-02-14

Citation: 2011 PSLRB 9



*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

TREASURY BOARD

Respondent

Indexed as

Public Service Alliance of Canada v. Treasury Board

In the matter of an application, under subsection 77(1) of the *Public Service Labour Relations Act*, for revocation of an order that declared that a position is a managerial or confidential position

REASONS FOR DECISION

Before: Casper M. Bloom, Q.C., Ad. E., Chairperson

For the Applicant: Stephanie Copeland, Public Service Alliance of Canada

For the Respondent: Lynn Grenier-Beaulne, Treasury Board Secretariat

Decided on the basis of written submissions
filed November 24 and 30, 2010 and January 11, 2011.

REASONS FOR DECISION

Application before the Board

[1] On November 24, 2010, the Public Service Alliance of Canada (“the bargaining agent”) filed an application with the Public Service Labour Relations Board (“the new Board”) for an order revoking the managerial or confidential status of position 22755 (Intergovernmental Affairs Officer, Department of Indian Affairs and Northern Development, in Amherst, Nova Scotia) (“the position”) and returning the position to the following bargaining unit, for which the bargaining agent was certified as the bargaining agent (see *Public Service Alliance of Canada v. Treasury Board*, PSSRB File Nos. 144-02-19 and 36 (19680724), as modified by *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 141-02-1 (19930812), *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 142-02-337 (19990607), and *Treasury Board (Canada Border Services Agency) v. Public Service Alliance of Canada*, 2007 PSLRB 22):

All employees of the Employer in the Program and Administrative Services Group as defined in Part I of the Canada Gazette of March 11, 2006.

[2] On November 24, 2010, the Treasury Board (“the employer”) responded that it consented to this application.

Background

[3] When the initial application for exclusion was made, the position was identified as a “managerial or confidential position” under paragraph (g) of that definition in subsection 2(1), paragraph 5.1(1)(b) and section 5.2 of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”). At that time, paragraph (g) read as follows:

2. (1) In this Act,

...

“managerial or confidential position” means a position

...

(g) identified as such a position pursuant to section 5.1 or 5.2, the identification of which has not been terminated pursuant to section 5.3;

For their part, paragraph 5.1(1)(b) and section 5.2 provided as follows:

5.1 (1) Where, in connection with the application for the certification of an employee organization as a bargaining

agent, the Board is satisfied that any position of an employee in the group of employees for which certification is sought meets any of the following criteria, it shall identify the position as a managerial or confidential position:

...

(b) a position the occupant of which has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act;

5.2 (1) Where, before or after the coming into force of this section, a bargaining agent has been certified by the Board, the employer may, in the prescribed manner, identify any position described in subsection 5.1(1) of an employee in the bargaining unit for which the bargaining agent was certified as a managerial or confidential position, and for the purpose of that identification the reference in paragraph 5.1(1)(d) to the Board shall be construed as a reference to the employer.

(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.

(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.

(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.

[4] No record exists of an order made by the former Public Service Staff Relations Board (“the former Board”) that declared the position a “managerial or confidential position.” Before April 1, 2005, a position could have been identified by the employer as a “managerial or confidential position” without any determination by the former Board.

[5] On April 1, 2005, the former *Act* was repealed, and the *Public Service Labour Relations Act* (“the new *Act*”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 50 of the *Public Service Modernization Act*, the position was deemed a “managerial or confidential position” under the new *Act* as follows:

50. Every position that was a position referred to in any of paragraphs . . . (g) of the definition “managerial or confidential position” in subsection 2(1) of the former Act immediately before the day on which the definition “managerial or confidential position” in subsection 2(1) of the new Act comes into force is deemed, as of that day, to be a managerial or confidential position within the meaning of subsection 2(1) of the new Act.

[Bold in the original]

[Emphasis added]

For its part, subsection 2(1) of the new *Act* provides as follows:

2. (1) *The following definitions apply in this Act.*

. . .

“managerial or confidential position” means a position declared to be a managerial or confidential position by an order made by the Board. . . .

. . .

[Emphasis added]

Reasons

[6] There is no dispute between the parties that before April 1, 2005, the position was identified as a “managerial or confidential position” under paragraph (g) of that definition in subsection 2(1), paragraph 5.1(1)(b) and section 5.2 of the former *Act*. Pursuant to section 50 of the *Public Service Modernization Act*, the position is deemed to have been ordered declared by the new Board as a “managerial or confidential position” within the meaning of subsection 2(1) of the new *Act*.

[7] Sections 77 and 78 of the new *Act* provide that a bargaining agent may apply to the new Board for an order revoking the order that declared a position a “managerial or confidential position,” in which case the bargaining agent bears the onus of proving that the position is no longer a “managerial or confidential position”:

77. (1) *If the bargaining agent considers that a position is no longer a managerial or confidential position, the bargaining agent may apply to the Board for an order revoking the order that declared that position to be a managerial or confidential position.*

(2) *The bargaining agent must provide the employer with a copy of the application.*

78. (1) *If an application is made under section 77, the Board must, after giving the employer and the bargaining agent an opportunity to make representations, determine whether the position is still a managerial or confidential position and, if it determines that it is not, make an order revoking the order that declared the position to be a managerial or confidential position.*

(2) *The burden of proving that a particular position is no longer a managerial or confidential position is on the bargaining agent.*

[8] Given that the employer has consented to this application, I consider that the bargaining agent has met its burden of proof.

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

(The Order appears on the next page)

Order

[10] I declare that position 22755 (Intergovernmental Affairs Officer, Department of Indian Affairs and Northern Development, in Amherst, Nova Scotia) is no longer a “managerial or confidential position” within the meaning of subsection 2(1) of the new Act, and I order revoked the order that declared it so.

February 2, 2011.

**Casper M. Bloom, Q.C., Ad. E.
Chairperson**