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File: 575-32-26

Citation: 2013 PSLRB 159



*Public Service
Labour Relations Act*

Before a panel of the Public
Service Labour Relations Board

BETWEEN

CANADIAN FOOD INSPECTION AGENCY

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as

*Canadian Food Inspection Agency v. Professional Institute of the Public Service of
Canada*

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: David P. Olsen, a panel of the Board

For the Applicant: Rubina Bhangoo, Canadian Food Inspection Agency

For the Respondent: Michael Urminsky, Professional Institute of the Public Service of
Canada

Decided on the basis of written submissions
filed November 7, 12 and 27, 2013.

Application before the Board

[1] On November 7, 2013, the Canadian Food Inspection Agency (“the employer”) and the Professional Institute of the Public Service of Canada (“the bargaining agent”) filed a joint application with the Public Service Labour Relations Board (“the new Board”) for an order revoking the managerial or confidential status of position 11920 (National Manager, Seeds Section (Associate Director, Regulatory Section Seed Division), Canadian Food Inspection Agency, in Ottawa, Ontario) (“the position”) and returning the position to the following bargaining unit (“the bargaining unit”), for which the Professional Institute of the Public Service of Canada (“the bargaining agent”) was certified as the bargaining agent (see *Canadian Food Inspection Agency v. Public Service Alliance of Canada et al.*, PSSRB File No. 140-32-14 (19971027), as modified by *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, PSSRB File No. 125-32-90 (19990420) and *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, PSSRB File No. 125-32-93 (19991222)):

. . .

. . . all the employees of the employer in the Agriculture, Biological Sciences, Chemistry, Commerce, Engineering and Land Survey, Purchasing and Supply, Scientific Research and Economics, Sociology and Statistics Groups. . .

. . .

On April 1, 2005, 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 subsection 48(1) of the *Public Service Modernization Act*, the bargaining agent continues to be certified as the bargaining agent for the bargaining unit.

[2] On November 27, 2013, the bargaining agent responded that it consented to this application.

Background

[3] When the initial application for exclusion was made, the incumbent of the position was identified as a “person employed in a managerial or confidential capacity” under subparagraph (c)(iii) of that definition in section 2 of the *Public Service Staff*

Relations Act, R.S.C., 1985, c. P-35 (“the former Act”). At that time, subparagraph (c)(iii) read as follows:

2. In this Act,

...

“person employed in a managerial or confidential capacity”
means any person who

...

(c) is employed in the Public Service and, in connection with an application for certification of a bargaining agent for a bargaining unit, is designated by the Board, or, in any case where a bargaining agent for a bargaining unit has been certified by the Board, is designated in prescribed manner by the employer or by the Board on objection thereto by the bargaining agent, to be a person

...

(iii) who is required by reason of the duties and responsibilities of that person to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act,

[4] No record exists of an order made by the former Public Service Staff Relations Board (“the former Board”) that declared the incumbent of the position a “person employed in a managerial or confidential capacity.” Before June 1, 1993, a person could have been identified by the employer as a “person employed in a managerial or confidential capacity” without any determination by the former Board.

[5] On June 1, 1993, subsections 32(1) and (4) and 94(2) of the *Public Service Reform Act*, S.C. 1992, c. 54, were proclaimed in force. Subsection 32(1) repealed the definition of “person employed in a managerial or confidential capacity” in section 2 of the former Act, and subsection 32(4) provided for a new definition of “managerial or confidential position.” Pursuant to subsection 94(2), the incumbent of the position was then deemed employed in a “managerial or confidential position” as follows:

94. (2) A person who, immediately before the repeal of the definition “person employed in a managerial or confidential capacity” in section 2 of the Public Service Staff Relations Act by subsection 32(1) of this Act, was a person described in paragraph (c) of that definition shall

be deemed to occupy thereafter a position described in paragraph (g) of the definition “managerial or confidential position” in section 2 of that Act, as enacted by subsection 32(4) of this Act.

[Bold in the original]

[Emphasis added]

[6] On April 1, 2005, the former Act was repealed, and the new Act was proclaimed in force. Pursuant to section 50 of the *Public Service Modernization Act*, the incumbent of the position was deemed the incumbent of 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

[7] There is no dispute between the parties that before June 1, 1993, the incumbent of the position was identified as a “person employed in a managerial or confidential capacity” under subparagraph (c)(iii) of that definition in section 2 of the former Act. Pursuant to subsection 94(2) of the *Public Service Reform Act* and 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.

[8] 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.

[9] The new *Act* does not provide that the employer may apply to the new Board for an order revoking the order that declared the position a “managerial or confidential position.” However, section 36 of the new *Act* allows the new Board to “. . . exercise the powers and perform the functions . . . as are incidental to the attainment of the objects of this *Act*. . .” Further, the preamble of the new *Act* specifically recognizes the importance of efficient and harmonious labour-management relations, collaborative efforts between employers and bargaining agents and their commitment to mutual respect. In the absence of any objection on the part of the bargaining agent, I find that allowing the employer to file this application jointly with the bargaining agent does no violence to the new *Act* and fosters the attainment of its objects.

[10] Further, I find that this application constitutes an admission by the employer that the position is no longer a “managerial or confidential position.”

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

(The Order appears on the next page)

Order

[12] I declare that position 11920 (National Manager, Seeds Section (Associate Director, Regulatory Section Seed Division), Canadian Food Inspection Agency, in Ottawa, Ontario) 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.

December 9, 2013.

David P. Olsen
a panel of the Public Service
Labour Relations Board