**Date:** 20140220

**File:** 569-02-123

**Citation: 2014 PSLRB 18**

*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA**

Bargaining Agent

and

**TREASURY BOARD**
**(Department of Human Resources and Skills Development)**

Employer

Indexed as
*Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*

In the matter of a policy grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Margaret T.A. Shannon, adjudicator

***For the Bargaining Agent:*** Pierre Ouellet, Professional Institute of the Public Service of Canada

***For the Employer:*** Anne-Marie Duquette, counsel

Heard at Ottawa, Ontario,
November 14, 2013.

## I. Policy grievance referred to adjudication

[1] The bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC), the bargaining agent for the Architecture, Engineering and Land Survey Group representing Fire Protection Engineers (FP), filed a policy grievance on July 31, 2012, alleging that the Department of Human Resources and Skills Development Canada (HRSDC), now referred to as the Department of Employment and Social Development, failed to consult with the bargaining agent when it eliminated the Fire Protection Program (FPP) operated by the HRSDC on behalf of the Treasury Board, resulting in FPs being declared surplus. The PIPSC alleged that this failure to consult was a violation of article 32 and Appendix G of the collective agreement between the parties signed on January 25, 2012 (the collective agreement). The PIPSC also alleged that the HRSDC violated the *Public Service Modernization Act*, S.C. 2003, c. 22. Finally, the PIPSC alleged that the employer, the Treasury Board, at no time intended to seek job offers for the employees declared affected.

## II. Summary of the evidence

[2] On March 29, 2012, cost-cutting measures were announced in the federal government budget, which affected the public service of Canada. In June 2012, the Government of Canada confirmed that the FPP delivered by the HRSDC would be eliminated effective April 1, 2014. As a result, 33 FPs were declared affected (see Exhibit 1, tab 2). Those employees identified as affected conduct inspections of government buildings for compliance with the 2010 Treasury Board "Fire Protection Standard" ("the standard"). The HRSDC provides those services on behalf of the Treasury Board. The directive is applicable to all government departments unless they have been exempted (see Exhibit 1, tab 1). At the time of the hearing of this grievance, only one FP had not found alternate employment.

[3] The FPs declared affected review building and renovation plans for compliance with the standard, conduct engineering assessments, propose changes to buildings, and provide limited services to First Nations communities. Deputy heads of government departments could elect to use the HRSDC's services or could elect to provide the services through other means, such as their own employees or outside consultants, under the standard. As a result of the March 29, 2012 budget, all government departments must establish an alternate method of meeting their

obligations under the standard by March 31, 2014. In the meantime, the HRSDC continues to operate the FPP with the intention of facilitating the transformation.

[4] Mark Kohli testified on behalf of the grievor. He started with the public service in January 1989 as an FP and has spent 24 years working in the FPP, *albeit* with several departments, as the mandate of the FPP has been the responsibility of different government departments over that time. Mr. Kohli identified the following three roles of the FPP with respect to the standard: provide fire protection services to the Treasury Board and First Nations, provide strategic advice to the Treasury Board related to fire protection, and perform compliance monitoring of the standard for the Treasury Board. The majority of Mr. Kohli's time was spent in a service role reviewing building plans to determine whether they complied with the *National Building Code of Canada* and the *National Fire Code of Canada*, conducting inspections during construction, conducting fire protection engineering surveys of existing properties, and counselling clients. He is one of the 33 FPs declared surplus and was, at the time of the hearing, the sole FP still awaiting alternate employment.

[5] Mr. Kohli has also held several elected positions within the bargaining unit and, in the spring of 2012, was a union steward and the president for national consultation between the HRSDC and the PIPSC. The first notice to the PIPSC of the FPP elimination was in the letter found at Exhibit 1, tab 2. There were no discussions with him as a shop steward or as the consultation representative before June 22, 2012. He was informed at a national workforce adjustment meeting, which was called to announce the cuts.

[6] On cross-examination, it was shown that the "Deficit Reduction Action Plan" (DRAP) and the future of the FPP were on the agenda for discussion at the Union Management Consultation Committee meetings held on September 19, 2012 and April 30, 2013. Mr. Kohli sent his regrets and did not attend either meeting (see Exhibits 4 and 5). At the time of these meetings, Mr. Kohli was the only representative from the PIPSC on the committee. The matter was also part of a "Town Hall" meeting held by the HRSDC on September 27, 2012 (see Exhibit 4, pages 2 and 3).

[7] All 33 affected FPs received their letters advising them of their affected status on June 27, 2012, the day on which Mr. Kohli received his (Exhibit 1, tab 3). The HRSDC representatives explained at the meeting that the FPP was being eliminated, effective April 1, 2014. The reason provided was that the FPP was not part of the core HRSDC

mandate; nor was it a legislated requirement that the HRSDC operate the FPP. The services provided by the FPP were available through other means, including from the private sector. On June 20 and 27, 2012, meetings were held with the management of several departments. Speaking notes and PowerPoint presentations used for these meetings listed the following three reasons for the elimination of the program: it was not part of the HRSDC's core mandate, it was not a legislated requirement and its services were readily available from the private sector.

[8] Mr. Kohli testified that in 2010 he was involved in the development of the standard and identified Exhibit 1, tab 1, subparagraph 8.2, as the source of the HRSDC's specific role in the FPP. Article 32 of the collective agreement (Exhibit 1, tab 4) requires the employer to continue past practice in giving all reasonable employment in the public service of employees who would otherwise become redundant because of contracting out. The FPP was originally created as the Dominion Fire Commissioner in the Department of Insurance. It was moved to the Department of Public Works in 1950 and then to Labour Canada in 1986. The past practice has shown the ability to move the program and its employees from one department to another as the need arises. No consideration was given to transferring the FPP rather than eliminating it. The affected employees were not given any consideration of being transferred to another department as was done in earlier years when the FPP and its employees were transferred rather than being declared affected. On April 13, 2013, Mr. Kohli received an opting letter but has been refused a guarantee of a reasonable job offer (GRJO). According to the HRSDC, it is too early in the process to consider a GRJO.

[9] The HRSDC issued a request for proposals (RFP) and requests for standing offers (RSO) (Exhibit 1, tabs 10 to 14) from the public sector to provide the services of the FPP. Mr. Kohli testified that at the time of the hearing, the RSO process had closed and that his colleagues were reviewing the submissions. The employer, the Treasury Board, by eliminating the program, is forcing government departments to contract out the services provided by the FPP.

[10] Until March 31, 2014, the FPP continues to operate. Even then, its functions have not been eliminated, as the standard continues to be in effect and the government's obligations under it have not been eliminated. After March 31, 2014, there will continue to be a need to provide a limited range of services to the Department of

Aboriginal Affairs and Northern Development and to First Nations. Eliminating the FPP does not eliminate the function; it merely transfers it elsewhere.

[11] Irwin Bess, Director General of Federal Programs, Compliance Operations and Program Development, HRSDC, Labour Canada, testified on behalf of the employer. He is responsible for the co-management of the FPP.

[12] As a result of the strategic operating review of all services offered by the HRSDC and the subsequent DRAP, the decision was made by Cabinet to eliminate the services offered by the HRSDC under the FPP and to make each deputy head responsible for the enforcement of the standard in his or her department or agency. The Fire Protection Standard, dated April 1, 2010 (Exhibit 2, tab 1), makes each deputy head responsible for its implementation. The HRSDC was advised of this decision in mid-June 2012, following the March 29, 2012 budget. As a result of the announcement, 33 FPs were affected.

[13] The FPP is not part of the HRSDC's core mandate but rather a service provided to the Treasury Board, which has been eliminated. Not all departments or agencies used this service at the time of the elimination announcement. On April 1, 2014, the service will no longer be available to those that do use it. There was and is no plan to contract out these services in the meantime. The RSO and RFP processes were initiated to ensure that the HRSDC could continue to meet its commitment to offer services under the FPP until March 31, 2014, as a number of FPP staff have left for alternate employment or have left the public service entirely. Once completed, the establishment of a national master standing offer (NMSO) would assist other departments or agencies to secure services related to the standard in the event that they do not have the resources or the capability in-house.

[14] Mr. Bess testified that the HRSDC has not encouraged the use of private contractors. Each department or agency has the choice of how to build and apply the capacity to meet its obligations under the standard. One of those options is to secure services from the private sector. Deputy heads have discretion on how their departments or agencies meet their obligations.

[15] On June 27, 2012, a coordinated meeting was held across the country to announce that the FPP would be eliminated and to issue affected letters to the employees in the program. Since then, the HRSDC has marketed the affected

employees as much as possible. A priority system was established in order to help the HRSDC identify opportunities internally and elsewhere for those affected. Employees were asked to register within the "Vacancy Management System" to assist the HRSDC in the task of identifying options. The 33 affected FPs were advised that no GRJO would be forthcoming within the HRSDC's Labour Program as there were no opportunities for engineers. It was unknown how the departments and agencies would react to the HRSDC's elimination of the FPP, but opportunities for the FPs could have developed, depending on how each department or agency reacted and what method of building its capacity to meet the obligations under the standard was chosen. Their ability to hire engineers was unknown.

[16] In the fall of 2012 and the winter of 2013, the HRSDC promoted its affected employees to other departments and agencies. A "Director General Working Group" was established to consider options to facilitate the transition from the FPP. Twelve of the FPP's largest clients were on the working group. The number of full-time equivalents each would need to meet its obligations under the standard was established, and the affected FPs were marketed to fill those equivalents.

[17] By January 2013, secondments were in place for many of the affected FPs, and offers were pending for others. Keeping the affected employees within the public service was one of the primary concerns in the fall of 2012. Mr. Bess reached out to individual departments and brokered connections between the HRSDC and employees. Town Hall meetings were held to ensure that all employees were aware of the opportunities. The first indication of interest was from Public Works and Government Services Canada that it might be possible to add the FPP as one of its business lines. The FPs are a hot commodity, and by August 2012, significant interest in taking on the affected employees had been expressed by several departments (see Exhibit 2, tabs 18 to 23 inclusive). Affected employees were provided with option letters on April 15, 2013 (Exhibit 2, tab 24). As of the date of this hearing, only two FPs remained surplus, although one of the two was merely waiting for the paperwork to come through to finalize his deployment. The only unplaced FP remaining was Mr. Kohli.

[18] Mr. Bess prepared a PowerPoint presentation (Exhibit 2, tab 4) for his assistant deputy minister to discuss with his colleagues. It was intended for a high-level discussion in broad terms of the issue and not a discussion about the method of transition from the HRSDC to individual deputy head responsibility. Slide 10 of the

presentation identifies the shifting responsibility. The fact that it notes that it would no longer be mandatory to use the FPP does not mean that there would no longer be an obligation to comply with the standard; nor does it recommend that the work be contracted out to the private sector. At that time, it was unknown how deputy heads would meet their obligations, but options were available. The first bullet of that slide refers to the existence of options. The goal of the presentation was to begin an examination and discussion of the options.

[19] An online news article (Exhibit 2, tab 5) included a two-slide excerpt from that presentation. The rest of the presentation and the goal of the discussions of the meeting were not placed in context. Mr. Bess was surprised about the contracting out comments in the article. It was a complete misrepresentation of the goal of the meeting, which was to establish a strategy for the transition from the FPP to individual departmental responsibility. No discussion has been held to privatize fire prevention services within the public sector. The move to eliminate the FPP was a move by the Government of Canada to align programs with their responsibilities.

[20] Throughout the process, the HRSDC has strived for transparency. The PIPSC was involved throughout, including the Union Management Consultation Committee meetings (Exhibits 4 and 5) and the Town Hall meeting, where plans were discussed. Mr. Bess spoke to Mr. Kohli directly on the matter and followed up with him via phone when he was absent from the meetings. Since the announcement, the parties have spoken often about the matter. The community was aware of the resources available, and the success in reducing the number of affected FPs from 33 to 1 confirms it.

## III. Summary of the arguments

### A. For the grievor

[21] The employer and the HRSDC have failed to maximize employment opportunities and to limit the impact of workforce adjustment on the affected FPs. Affected employees were not given all reasonable consideration to continue their employment in the public service as a result of contracting out. Furthermore, the employer failed to consult with the bargaining agent. Exhibits 4 and 5 are minutes of Union Management Consultation Committee meetings, not an indication that the bargaining agent was consulted and involved before the announcements of June 2012.

[22] The grievor did not dispute the employer's right to eliminate the FPP, but obligations go with that right. In dispute is whether the FPP has been contracted out. The RFP and the RSOs (Exhibit 1, tabs 10 to 14) indicate that the employer is seeking to establish a standing offer for the provision of FPP services. Exhibit 1, tab 5, is a statement that clearly identifies contracting out the FPP as an option. The grievor did not accept Mr. Bess's explanation that the tendering process undertaken by the HRSDC for FPP services was done merely to ensure that it had the capacity to maintain its level of service in the interim until April 1, 2014. Nor did the grievor accept the explanation that establishing the standing offers would help departments and agencies meet their obligations under the standard in the event that the deputy head chose the route of using private-sector rather than internal resources.

[23] Mr. Kohli testified about a past practice going back to the 1980s, which has seen the FPP, under different names, transferred from one department to another. Clause 32.01 of the collective agreement requires the employer to observe past practices. Never before was the FPP contracted out when it was transferred between departments.

[24] Mr. Bess's emails (Exhibit 2, tabs 8 to 20) demonstrate that efforts were made to continue the employment of the affected FPs. However, this does not reach the level of reasonable efforts or reasonable consideration to the continued employment of the FPs within the public service. The failure of the HRSDC to issue GRJOs is a clear indication of how the employer has failed to make all reasonable efforts. Early on in the process, according to these emails, some departments expressed interest in taking on affected employees. Based on this interest, GRJOs could have been offered, as required by paragraph 1.1.7 of the *Workforce Adjustment Policy*. Of the 33 affected FPs, many found work elsewhere in the public service. Eighteen chose to either retire or take advantage of other options offered to them by the employer. These employees could have been offered other work through secondments, deployments or alternations. Those who remained were expected to find their own opportunities; the employer did not actively seek out employment for the affected employees. Efforts were made, but they fell short of the requirement of giving the affected employees all reasonable consideration to continue their public service employment.

[25] Appendix G of the WFAP (Exhibit 1, tab 6) outlines the employer's obligations in circumstances such as these. Paragraph 1.1.1 requires the employer to give affected

employees a reasonable opportunity to continue their public service employment. Since the HRSDC had the ability to find out if openings or opportunities existed elsewhere, it should have gone beyond merely contacting other departments. The HRSDC should have gone to the point of issuing GRJOs.

[26] Paragraph 1.1.2 requires human resources planning to minimize the impact of changes, such as the elimination of a program by the employer. It was within the employer's rights to eliminate the FPP, but minimizing the impact of that decision goes beyond the HRSDC. It is a matter of public service interest. With proper human resources planning, the employer can predict opportunities and issue GRJOs. A GRJO is not limited in time; the job opportunity can occur at some future date. It does not have to exist at the time of the offer.

[27] It was possible for the employer to predict that there would be opportunities for employment within the core public administration. The services provided by the FPP were mandatory and would continue to be offered by the HRSDC until 2014. After that, the obligations would devolve to individual deputy heads, who would need the FPs' skills to meet these obligations. Past practice dictates that the FPs would follow these responsibilities. Therefore, a GRJO was possible.

[28] Paragraph 1.1.27 of the WFAP prohibits hiring consultants or contracting out services while there are surplus employees capable of performing those duties. The employer considered an alternate way of delivering the service; however, it did not consider using surplus employees before considering contracting out. Contracting out the FPP is not an option; it is a certainty. Since it was part of the game plan from the beginning, the employer has demonstrated its intent to contract out. The employer cannot pretend that it has not violated paragraph 1.1.27 of the WFAP. The evidence clearly demonstrates the violation.

[29] A GRJO is a staffing action that states that the employer thinks opportunities will exist. Interest was demonstrated in taking on the affected FPs as the months passed, which was sufficient to issue GRJOs.

[30] The grievor has demonstrated that the employer has failed in its obligations under the WFAP and the collective agreement.

[31] The grievor's representative submitted no reported decisions or other authorities to support his argument.

**B. <u>For the employer</u>**

[32] The grievor has made general allegations that the HRSDC's actions following the elimination of the FPP were contrary to the spirit, definitions and objectives of the WFAP. It is trite law that general clauses of a collective agreement that are meant to be an introduction to the agreement, such as definitions and objectives clauses, do not grant substantive rights to employees (see *Canada (Attorney General) v. Lâm*, 2008 FC 874, at para 28).

[33] The decision to terminate the FPP was made by Cabinet. On April 1, 2014, deputy heads will choose how to meet their obligations under the standard. There will no longer be any requirement for the FPP to provide services on behalf of the Treasury Board. The standard will be amended to reflect the deletion of the FPP. The grievor alleged that this is a violation of clause 32.01 of the collective agreement and the WFAP.

[34] Sections 6 and 11.1 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*), grant the Treasury Board a broad unlimited power to set general administrative policy for the federal public service, organize the federal public service, and determine and control personnel management within the federal public service. Subsection 7(1) grants the employer the authority to create and eliminate programs.

[35] Sections 6 and 7 of the *Public Service Labour Relations Act,* S.C. 2003, c. 22, s. 2 (*PSLRA*), clearly state that nothing in that *Act* must be construed as limiting the right of the employer to manage the federal public service. An adjudicator does not have the jurisdiction to limit this authority. Unless a limitation is expressly stated in a collective agreement, it cannot be inferred (see *Babcock et al. v. Attorney General (Canada),* 2005 BCSC 513, at para 10 to 12, and *Brescia v. Canada (Treasury Board),* 2005 FCA 236, at para 42 to 45).

[36] In exercising any management function conferred under the *FAA*, the employer may do that which is not specifically or by inference prohibited by statute or a collective agreement (see *P.S.A.C. v. Canada (Canadian Grain Commission)* (1986), 5 F.T.R. 51, at pages 12, 15 and 16, and *Peck v. Parks Canada*, 2009 FC 686, at para 33).

Nothing in the statute or in the collective agreement prevents the Government of Canada or the employer from eliminating the FPP. If the parties intended to limit the employer's right to organize the federal public service, they would have said so expressly (see *Li v. Canada (Citizenship and Immigration),* 2011 FCA 110, at para 26).

[37] The employer has the authority to contract out services pursuant to the *FAA*, subject to any limitations in the collective agreement (see *Canada (Attorney General) v. Public Service Alliance of Canada,* [1993] 1 S.C.R. 941). The only limitations in the collective agreement on contracting out services are in clause 32.01 and in paragraph 1.1.27 of the WFAP. Paragraph 1.1.27 requires that a contract be in place when employees are affected. There was none in place in June 2012; nor is there one today. Clause 32.01 does not have any impact either as it also requires a contracting-out situation. The grievance is premature, in the employer's opinion. No work has been contracted out. It was reasonable for the HRSDC to plan for the eventuality that it could not continue to offer FPP services until March 31, 2014 if it had no FPs left in its employ. The HRSDC was merely carrying out contingency planning; it was not contracting out the FPP.

[38] In assessing any limitations prescribed under the collective agreement, an adjudicator must examine the ordinary meaning of the words used by the parties and refrain from modifying terms or conditions that are clear. The adjudicator must also take into account the entire collective agreement. The fact that a particular provision may seem unfair is not a reason to ignore it if the provision is otherwise clear (see *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans),* 2010 PSLRB 112, at para 50 and 51, and *Wamboldt v. Canada Revenue Agency,* 2013 PSLRB 55, at para 25 to 28). Contrary to the argument of the grievor, deputy heads were never obligated to use FPP services. They had the option of meeting their obligations through other means of their choice. In fact, some departments did just that. A deputy head could always contract out his or her obligations under the standard, do it in-house, rely on another department or use the FPP.

[39] What will happen in 2014 is irrelevant to this grievance. Relevant are the HRSDC's actions in 2012. The HRSDC has clearly demonstrated its intent to market affected employees. Mr. Bess's evidence clearly demonstrates the success of this intent. There remains only one surplus FP. He will remain so until August 2014, so there is still plenty of time to find him a position. Given that there was nearly a two-year delay

between the "Budget 2012" announcement and the actual elimination of the FPP, in 2012 it was impossible to know if there would still be affected employees, as the HRSDC did not know at that time how departments and agencies would react to the elimination of the FPP or how they would choose to meet their obligations once the FPP was eliminated. Therefore, it was reasonable to declare the FPs affected.

[40] The PIPSC had the evidentiary burden under clause 32.01 of the collective agreement and paragraph 1.1.27 of the WFAP. Belief and opinion are not sufficient to discharge such a burden. It was the uncontradicted evidence of Mr. Bess that the HRSDC did everything possible in the circumstances. It was impossible to determine placement opportunities within the HRSDC, let alone within other departments, which were implementing their own DRAP initiatives. The focus of the Director General Working Group was not on placing the FPs; it was on continuing the FPP services until 2014 and on how deputy heads would meet their obligations under the standard after that time. A by-product was the many placements of FPs within other departments.

[41] It was premature on July 31, 2012 to allege a breach of paragraphs 1.1.1 and 1.1.2 of the WFAP. Establishing a violation of paragraph 1.1.27 and a failure by the employer to issue GRJOs requires clear, cogent and convincing evidence that the deputy head knew of or could predict future employment for the FPs. This is a high evidentiary onus. There is no evidence that would support this conclusion. Tabs 19 and 20 of Exhibit 1 list unverifiable numbers, which are irrelevant to July 2012. The number of employees in the FPP is no indication of predictability of future employment. The FPs are specialized, highly skilled employees. At some point, it might have become possible to predict future employment for these employees, but at the time of the grievance, it was not. Even though interest in taking on FPs was expressed by those attending the Director General Working Group, an expression of interest is not equivalent to a predictability of employment. The grievance alleges that future employment was predictable on the date it was filed, not that it would become predictable over time.

[42] When the PIPSC filed this policy grievance, it was based on the fear that the work of the FPs would be contracted out by the HRSDC or other departments. On July 31, 2012, no department was contracting out services otherwise performed by the FPs within the FPP. The fact that the FPP has had many names and has existed and been moved between other departments in the past is irrelevant. Clause 32.01 of the

collective agreement does not in any way restrict the right of the Government of Canada or the Treasury Board to eliminate or terminate a program and decide to contract out services.

[43] A breach of paragraphs 1.1.1 and 1.1.2 of the WFAP was dealt with in *Canadian Association of Professional Employees v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 100 ("the CAPE decision"). In dismissing the grievance, the adjudicator dealt with the burden of proof required to establish a violation of the WFAP at paragraphs 18, 19, 21 and 23. In dismissing the grievance, the adjudicator ruled that the bargaining agent in that case had not met its burden of proof. The same is true in this case. The grievor has not put forward any clear and cogent evidence to establish a breach of paragraphs 1.1.1 and 1.1.2. The evidence provided by Mr. Bess established that the HRSDC did exactly what is required of the employer when situations of workforce adjustment arise.

[44] The employer further submitted that the principles set out by the adjudicator in the CAPE decision are equally applicable to the alleged violation of paragraph 1.1.27 of the WFAP in this case. To demonstrate that a deputy head knew or could have predicted the availability of future employment for an affected employee requires clear and cogent evidence to that effect. The PIPSC has put forward no evidence that the deputy head at the HRSDC knew or could have predicted the availability of future employment in the core public administration on June 27, 2012, when the FPs were notified of their affected status.

[45] The grievance is without merit and was premature. It should be dismissed.

**C. Grievor's reply**

[46] The grievance was filed as a result of a statement (contained in Exhibit 1, tab 5) that options for delivering FPP services were available from the private sector. No proof was available when the grievance was filed. To avoid any argument concerning timeliness, the grievance was filed in July 2012. The reality is it was premature.

[47] The employer's argument that GRJOs are provided only if at the time the decision is made to affect employees, it is predictable that employment opportunities will exist, makes no sense. GRJOs are about the future. They would be inapplicable if they were frozen in time. The employer knew that the standard would continue past

the elimination of the FPP. This was enough information for the deputy head to make GRJOs to the affected FPs.

## IV. Reasons

[48] The responsibilities and powers of the Treasury Board are set out in sections 7 and 11.1 of the *Financial Administration Act*. Section 7 and 11.1 of the *FAA* grant the employer broad power to set the general administrative policy for the federal public service, organize the federal public service, and determine and control the personnel management of the federal public service. Paragraph 7(1) (b) of the *FAA* grants the employer the exclusive authority on all matters relating to "…the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein…" In exercising these functions, including contracting out services, the employer may do anything that is not specifically or by inference prohibited by statute or the collective agreement. (See for example *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at para 56; and *P.S.A.C. v. Canada (Canadian Grain Commission)*, at page 12). At the adjudication hearing, the grievor did not dispute the employer's right to eliminate the FPP, but argued that obligations that go with that right were violated. He alleged that the employer failed to ensure that continuous employment in the public service for indeterminate employees is respected and that all measures are taken in order to avoid the outsourcing of those services to the private sector. He submitted that section 32.01 of the collective agreement and articles 1.1.1, 1.1.2 and 1.1.27 of the WFAP, which is incorporated into the collective agreement, have been violated.

[49] Article 32 of the Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada, expiry date September 30, 2014, requires that the employer continues past practice in situations where employees would otherwise become redundant because work is contracted out:

> *The Employer will continue past practice in giving all reasonable consideration to continued employment in the public service of employees who would otherwise become redundant because work is contracted out.*

[50] Paragraph 1.1.1 and 1.1.2 of Appendix G ,"Workforce Adjustment" discuss the responsibilities and role of the department in a workforce adjustment situation, to ensure for example, that affected employees are given every reasonable opportunity to continue their careers in the public service; and to minimize the impact of workforce

adjustment through effective human resources planning. Those clauses read as follows:

> *Part 1*
>
> *Roles and responsibilities*
>
> *1.1 Departments or Organizations*
>
> *1.1.1 Since indeterminate employees who are affected by workforce adjustment situations are not themselves responsible for such situations, it is the responsibility of departments or organizations to ensure that they are treated equitably and, given every reasonable opportunity to continue their careers as public service employees.*
>
> *1.1.2 Departments or organizations shall carry out effective human resource planning to minimize the impact of workforce adjustment situations on indeterminate employees, on the department or organization, and on the public service.*

In a workforce adjustment situation, paragraph 1.1. 27 requires departments to review the use of private temporary agency personnel, contractors, consultants, employees appointed for a specified period (terms) and all other non-indeterminate employees. Where practicable, the department cannot re-engage these contractors or renew the employment of non-indeterminate employees if such an action would facilitate the appointment of surplus or laid-off employees. That provision reads:

> *1.1.27 Departments or organizations shall review the use of private temporary agency personnel, contractors, consultants, employees appointed for a specified period (terms) and all other non-indeterminate employees. Where practicable, departments or organizations shall not re-engage such temporary agency personnel, contractors, consultants nor renew the employment of such employees referred to above where such action would facilitate the appointment of surplus employees or laid-off persons.*

[51] The grievor alleged that the employer has contracted out the services of the affected employees. To support this claim, the grievor has relied on the RFP and RSOs in Exhibit 1, tabs 10 to 14, which indicate that the employer is seeking to establish a standing offer for the provision of FPP services. Having put all of the evidence before me in context, I cannot agree that seeking an expression of interest to offer FPP services is equivalent to the employer contracting out these services. The uncontradicted evidence of Mr. Bess was that at the time of the grievance and indeed

since that time, no standing offer for the provision of FPP services has been signed by the employer. The evidence also shows that the employer issued an FFP and RSO to ensure the continuation of services during the time of transition. Mr. Bess testified that the employer was planning for the continuation of services until April 2014 in the event that it could no longer offer the FPP services as announced, due to the migration of the FPs to other employment. As he stated in his testimony, the fact that the PowerPoint presentation notes that it would no longer be mandatory to use the FPP does not mean that the work would be contracted out to the private sector. Exhibit 2, Tab 7 also outlines the mandate of the DG working group on the Fire Protection Program noting that the main goals of the working group include the support of departmental plans to maintain the continuity of fire protection advice and services to April 2014 and beyond. In the update on the wind-down of the FPP, there is reference to the standing offers as a contingency measure. (Exhibit 2, Tab 25.) That update also refers to the fact that a number of the affected FPP staff have secured positions within the federal public service where they can continue to apply their fire protection knowledge and expertise.

[52] The grievor also argued that the employer violated clause 32.01 of the collective agreement, which requires the employer to observe past practices. He argued that the employer has failed to make every effort to allow the FPs to continue their employment with the public service and that the employer should have transferred the FPs with the program *en masse* to another department as had been done many years ago. The evidence of Mr. Kohli in this regard however, involved the transfer of the FPP program, under different names, from one department to another. This is not a situation in which the program itself was transferred as an entity, as was described by Mr. Kohli. The situation is such that the HRSDC will no longer assume the responsibility of the standard on behalf of the deputy heads. Each deputy head will now be responsible for meeting his or her obligations under the Treasury Board protocol. This is within the employer's otherwise unfettered right to organize the workplace, as supported by the legislation and case law cited by counsel for the employer. Furthermore, it is also the uncontradicted evidence of Mr. Bess that all but one of the FPs who wished to stay with the public service found such an opportunity. Given the fact that nothing has been contracted out, the application of article 32.01 of the collective agreement is arguably premature. However, there is ample evidence before me of the efforts made by the employer to ensure "*giving all reasonable*

*consideration to continued employment in the public service of employees who would otherwise become redundant…"*

[53] Finally, the grievor has also asserted that paragraph 1.1.2 of the WFAP requires human resources planning to minimize the impact of changes, such as the elimination of a program by the employer. The grievor has not met the required burden of proof to establish this, that is, on the balance of probabilities. Mr. Bess testified at length concerning the efforts he and the HRSDC made to market the affected employees from the time of the announcement to the time of the hearing. The employer asserted that this was exactly what was required of it in these circumstances. The evidence shows that these efforts successfully contributed to limiting the effects of the elimination of the FPP on the FPs.

[54] According to the grievor, with proper human resources planning, the employer can predict employment opportunities and issue GRJOs. A GRJO is not limited in time; the job opportunity can occur at some future date. It does not have to exist at the time of the offer. The employer's refusal to make and issue GRJOs in June 2012 was a violation of paragraph 1.1.2 of the WFAP. The fact that so many of the FPs have since been placed is conclusive evidence of the predictability of future employment for FPs within the public service.

[55] In the collective agreement, the WFAP provides this definition of a guarantee of a reasonable job offer:

> *Guarantee of a reasonable job offer* (garantie d'une offre d'emploi raisonnable) *is a guarantee of an offer of indeterminate employment within the Core Public Administration provided by the deputy head to an indeterminate employee who is affected by workforce adjustment. Deputy heads will be expected to provide a guarantee of a reasonable job offer to those affected employees for whom they know or can predict employment availability in the Core Public Administration. Surplus employees in receipt of this guarantee will not have access to the options available in Part VI of this Appendix.*

[56] The wording of the above paragraph states that deputy heads are expected to provide a GRJO to those affected employees for whom they know or can predict employment availability in the Core Public Administration. Mr. Bess testified that this refusal was based on the employer's inability to predict the nature of how FPP requirements would be conducted by deputy heads once the service was no longer

provided by the HRSDC. He also raised the fact that departments were dealing with their own DRAP initiatives. In addition, Mr. Bess also explained that the 33 affected FPs were advised that no GRJO would be forthcoming within the HRSDC's Labour Program as there were no opportunities for engineers. In this case, the fact that it might have been possible, after the fact, to provide a GRJO does not necessarily translate into known or predictable employment availability at the relevant time. I am satisfied that the cancellation of the FPP and the transfer of accountabilities and obligations under the standard to each deputy head were such that the employer could not know or predict employment availability in the Core Public Administration at the time that the employees were declared affected.

[57] In his testimony, Mr. Bess acknowledged that opportunities for the FPs could have developed, depending on how the department or agency decided to meet its capacity. As it turns out, all but one of the FPs has since found alternate employment within the public service or has chosen to leave the public service. However, the only certainty was that at the time of the announcement of the elimination of the program in June 2012, and the subsequent issuance of notices to those affected, no one knew or could have predicted how the FPP services would be provided within other departments or agencies. It was not unreasonable, in the circumstances, for the HRSDC to refrain from issuing GRJOs. The problem is that the grievor claimed that the GRJOs should have been issued at the time fixed by the filing of the grievance.

[58] The last line of the definition of a GRJO in the collective agreement states that "[s]urplus employees in receipt of this guarantee [the GRJO] will not have access to the options available in Part VI of this Appendix." The definitions in the Appendix also point out that an "opting employee" who has not received a GRJO has 120 days to consider the options in the Appendix. The wording of these definitions strongly suggest that the GRJO is fixed in time. As I have stated in my reasons above, the grievor has not established on a balance of probabilities that the deputy head knew or could predict future employment for the FPs at the time that the grievors were declared surplus and provided with other options available in Part VI of the Appendix of the collective agreement.

[59] Much of the grievor's argument hinged on a presumption that section 32.01 and paragraph 1.1.27 of the WFAP had been violated because the services of the affected employees had been contracted out. The grievor admitted in rebuttal argument that

the grievance was premature. I agree. There are several factors that must be satisfied to establish a violation of paragraphs 1.1.1., 1.1.2 and 1.1.27 of the WFAP. In order to begin to establish that this provision has been violated, the grievor would be required to demonstrate that the department had contracted out or re-engaged a contractor to perform the services of the FPP. I have concluded that the employer has not contracted out or re-engaged a contractor to perform the services of the FPP and that there was no re-engagement of private temporary agency personnel, consultants, contractors, employees appointed for specified periods (terms) or other non-indeterminate employees, rather than declaring the FPs affected. Furthermore, given the grievor's admission that this grievance was premature and that it was filed to preserve time limits rather than being based on an actual breach of the collective agreement contracting-out article or the WFAP, the grievance, as filed, is without merit.

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

*(The Order appears on the next page)*

## V. Order

[61] The grievance is dismissed.

February 20, 2014.

**Margaret T.A. Shannon,**
**adjudicator**