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File: 575-32-35

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*Public Service
Labour Relations Act*

Before a panel of the Public
Service Labour Relations Board

BETWEEN

CANADIAN FOOD INSPECTION AGENCY

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Canadian Food Inspection Agency v. Public Service Alliance 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 Public Service Labour Relations Board

For the Applicant: Christine Gallinger, Canadian Food Inspection Agency

For the Respondent: Linda Cassidy, Public Service Alliance of Canada

Decided on the basis of written submissions
filed April 24, 2014 and May 26, 2014.

REASONS FOR DECISION

Application before the Board

[1] On April 24, 2014, the Canadian Food Inspection Agency (“the employer”) and the Public Service Alliance 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 15246 (Chief, National Import Service Centre, Canadian Food Inspection Agency, in Mississauga, Ontario) (“the position”) and returning the position to the following bargaining unit (“the bargaining unit”), for which the Public Service Alliance 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 other than those performing duties in positions which are or would be classified under the **Veterinary Medicine (VM), Agriculture (AG), Biological Sciences (BI) (which includes the former Scientific Regulation (SG) Group), Chemistry (CH), Commerce (CO), Engineering and Land Survey (ELS), Purchasing and Supply (PG), Scientific Research (SE) Economics, Sociology and Statistics (ES) Groups** in the classification system of the Treasury Board and other than those performing duties in positions which are or would be classified in the **Informatics (IN) (formerly the Computer Systems Administration (CS)) Group**. . . .*

...

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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 May 26, 2014, the bargaining agent re-affirmed its consent to this joint 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 2(1)(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 new Act 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] 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.

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

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

(The Order appears on the next page)

Order

[11] I declare that position 15246 (Chief, National Import Service Centre, Canadian Food Inspection Agency, in Mississauga, 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.

June 3, 2014.

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