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Citation: 2016 PSLREB 84

*Public Service Labour Relations
and Employment Board Act and
Public Service Labour Relations Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

TREASURY BOARD

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Treasury Board v. Public Service Alliance of Canada

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

Before: Bryan R. Gray, a panel of the Public Service Labour Relations and Employment Board

For the Applicant: Joshua Alcock, counsel

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

Heard at Ottawa, Ontario,
March 3, 2016.

REASONS FOR DECISION

I. Introduction

[1] The Canada Border Services Agency (CBSA) has applied for an order under s. 71 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *Act*”) to declare 27 positions managerial or confidential. The positions, which are identified in the schedule to this decision, are classified as FB-02 (1 employee), FB-04 (23 employees), and FB-06 (3 employees). The Public Service Alliance of Canada (“the bargaining agent”) is the certified bargaining agent for the FB bargaining unit and opposes this application.

[2] The facts are not in dispute. My task is to apply them to the situations identified by the *Act* as qualifying for exclusion and determine if the right of the staff to freely associate as active members of their bargaining agent outweighs the concerns of the CBSA vis-à-vis labour relations and other confidential matters critical to preserving the integrity of its CBSA operations. For the reasons set out below the application for all the positions is granted

II. Facts

[3] The employees occupying these positions all work together at the CBSA’s National Border Operations Centre (BOC). The BOC is the single national control centre for all CBSA operations. It operates 24 hours a day, 7 days a week, and is the conduit for all information flowing to and from the CBSA’s different field operations and divisions and its senior management. The BOC was described as the “nerve centre” for the CBSA and its 7 regions with 39 international locations and 1200 service points across Canada.

[4] The hearing heard from one witness, Sabrina Petrow, who has 16 years of service with the CBSA. She is the manager in charge of the BOC. I found her to be a competent and thorough witness. The bargaining agent clarified some important issues in its cross-examination of her, as shall be noted later in this decision the FB-06 and FB-02 positions subject to this application report directly to her, while the FB-04 positions report to the FB-06 supervisors.

[5] The BOC not only coordinates border crossings but also post-border enforcement, intelligence, and hearings related to discharging the CBSA’s mandate. The BOC is responsible for CBSA integration, risk management, reporting, and service delivery to front-line operations. It was created in 2010 to ensure that no surprises

occurred for CBSA senior management and to create a streamlined and unified single point of contact with management for all CBSA operations.

[6] The BOC is composed of a large open workspace with several large flat screen video monitors that allow for the constant monitoring of news and social media to help the CBSA keep abreast of developing situations that impact its operations. The large open work area has many desks and workstations at which staff carry out their responsibilities in an environment conducive to them being integrated and aware of situations and incidents of concern to all employees at the BOC.

[7] The application was filed with the former Public Service Labour Relations Board on January 25, 2013. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the Board”). This proceeding is continued pursuant to the authority of the relevant Parliamentary enactments related thereto.

III. The law

[8] Section 71 of the *Act* allows the CBSA to apply to the Board for an order declaring that a position of an employee in a certified bargaining agent is managerial or confidential on the grounds that the position is one of those referenced in ss. 59(1)(a) to (h).

[9] Section 59 sets out a list of types of positions that are amenable to such an application. Section 59(1)(g) is relied upon for all the positions subject to this application. It cites positions for which the occupants have duties and responsibilities not otherwise described in s. 59(1) that should not be included in the bargaining unit for reasons of conflict of interest or of the occupant’s duties and responsibilities to the employer. Section 62(3) specifies that the employer has the burden of proof in such applications.

[10] Counsel for the employer submitted that s. 59(1)(g) has two branches, the second of which is an undefined umbrella clause in the *Act*. He further submitted that that this subsection is available to address a situation where a person’s duties and responsibilities are so closely aligned to the employer’s interests that it would be incompatible with the employer’s operations to include that position in the

bargaining unit.

[11] The employer cited a decision considering s. 59(1)(g) *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 at para. 76 for the proposition that the section provides the Board with considerable discretion and that there is no clear definition of the range of circumstances under which that discretion may be exercised. The decision found that the provision's clear intention is to permit the Board to consider situations that cannot be aligned with any of the usual rationales for excluding a position from a bargaining unit. The Board in that discussion added it should be used sparingly and applied only in unusual situations.

[12] In commenting on the scope of s. 59(1)(g), the bargaining agent submitted that a confidential exclusion must be narrowly interpreted to ensure that the maximum number of employees are able to enjoy the rights and freedoms incidental to collective bargaining, as noted in *Labour Relations Board v. Canada Safeway Ltd.*, [1953] 3 D.L.R. 641 ("*Canada Safeway*"), which is cited in *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 176-02-287 (19791009), [1979] C.P.S.S.R.B. No. 9 (QL) ("*Sisson*").

IV. Issues

A. Incident reporting

[13] Are the incident reporting duties of FB-04 employees sufficient to bring them within the scope of s. 59(1)(g)?

[14] Every excluded CBSA manager has a duty to report any significant events arising within his or her area of responsibility to the BOC within 15 minutes. In urgent situations, it may involve phoning the BOC but normally, a web-based form is completed and submitted instead. Up to 25 000 issue reports are submitted each year. The types of events focus upon the CBSA's image, critical incidents (child welfare, firearms, use of force, hazardous materials, etc.), infrastructure, and safety and security.

[15] Each incident report arrives at the BOC in a single email inbox, which is shared on the desktop computers of all FB-04s on duty and is monitored 24 hours a day, 7 days a week. Each report is read and prioritized.

[16] When an FB-04 initially views a report, he or she must exercise judgement to determine whether further information is required and whether the issue is of sufficient priority that it should be the subject of a significant incident report to senior management. A book of standard operating procedures (“SOPs”) has been developed to guide the exercise of this judgement, but Ms. Petrow indicated that the book of SOPs can never eliminate all individual judgement and discretion by the FB-04 staff.

[17] When a field report is deemed to merit preparing a significant incident report, the assessment is based upon the FB-04’s judgement of the importance of the issue and its operational impact. The FB-04 must then determine if he or she needs further information from the field and which senior managers must be contacted, possibly including the CBSA’s president. The branch that is responsible for the issue is identified as the office of primary interest (“OPI”) , then the FB-04 will collaborate with that branch to prepare and transmit to field operations any direction deemed necessary by the OPI’s senior manager. Approximately 1300 critical incident reports are written annually.

[18] Ms. Petrow described the importance of the role the FB-04s play in the CBSA’s success with respect to discharging its mandate, as the proper decision to report a critical incident in a timely way is essential to senior managers and the CBSA’s president being able to determine risks to operations and to implement measures to avoid or minimize service disruptions at the 1200 service points that travelers and commercial trade rely on.

[19] Labour relations is one of the 24 categories of issues that field offices must report to the BOC. Such incidents include work refusals, job actions, occupational health and safety issues, work slowdowns, and employee picketing. Ms. Petrow stated that approximately 200 such labour relations incident reports arrive at the BOC annually. She confirmed in cross-examination that of those 200, recent experience suggests that approximately one labour relations incident per month is deemed significant. Examples of such issues impacting service delivery include staff wearing stickers or badges about their collective agreements, access to information technology being denied, border traffic being slowed, traffic being waved through without normal due diligence, taxes being collected from more travellers, which generates extra delays, and excessive referrals of travelers to secondary screening.

[20] When such an incident is reported to the BOC, the FB-04 will check with the field office that generated the report as to whether additional information is required. Reports of related issues from other service locations will be assessed for preparing a comprehensive and coordinated report for senior management. When direction is required from senior management to go back to field operations to deal with the issue to ensure the continued quality of service delivery, the BOC will be called upon to prepare and disseminate it.

[21] Ms. Petrow gave an example of how such an incident could unfold if border service agents call in sick or refuse overtime. The flow of trade and travelers through an affected border crossing could immediately be adversely impacted, and within minutes, a report would be sent to the BOC. Within minutes of that, the FB-04 would alert senior executives, and information would be gathered to determine if the problem was isolated to one border crossing. A senior executive could possibly then instruct the FB-04 to coordinate resources from other nearby service centres to deploy additional resources by calling off-duty staff to work, or by deploying management to perform front-line tasks to get the cross-border traffic moving again.

[22] Ms. Petrow clarified in cross-examination that FB-04s do not make decisions on their own; nor do they participate in management deliberations as to how to handle labour issues. Rather, they are conduits of information to and from senior management. Ms. Petrow similarly confirmed in cross-examination that in the case of a work stoppage incident report, the BOC and FB-04 staff would act as a triage for information flow rather than being involved in labour relations strategy formulation or advice deliberations.

[23] The evidence showed a logbook of such labour incidents reported to the BOC from November 14, 2014 to November 5, 2015. For that approximately 1-year period, 128 incidents were reported from field operations. Many were rather banal matters, such as bargaining agent stickers or patches being worn on uniforms, a bargaining agent Christmas card displayed on an office counter, and an officer wearing green non-uniform shoelaces. However, I also note that more serious incident reports are in the logbook, including work refusals, one of which was at Canada's busiest point of entry, the Ambassador Bridge, and one at an immigration holding centre.

[24] In support of its application, the employer pointed to Ms. Petrow's testimony, in

which she stated the important role that good judgement and exercising discretion play in the work of an FB-04's incident reporting as well as the potentially significant harm to the employer that could arise from an FB-04 mishandling a critical incident.

[25] The bargaining agent noted in its submission on this point Ms. Petrow's evidence that all employees at the BOC are subject to terms of employment and an oath of office, which dictate that any employee who breaches confidence could be subject to discipline. Also noted was Ms. Petrow's confirmation in cross-examination that not every CBSA labour relations issue is handled through the BOC; only events and incidents impacting labour relations are handled there.

[26] The employer argued that the duties of the FB-04 positions within the BOC, as they relate to conducting incident reporting, risk dividing loyalties, which could adversely impact how an employee exercises discretion when handling a report of a labour relations incident and whether to escalate it in a timely manner to senior managers. The employer indicated that its concerns also include breaches of confidentiality but that it is more a matter of an employee experiencing role or loyalty confusion at work if he or she has advance knowledge of a labour relations matter from that employee's activities in the bargaining unit and has to process a report dealing with the same matter.

[27] The employer cited *The Office of the Auditor General of Canada v. The Public Service Alliance of Canada*, PSSRB File No. 172-14-297 (19800319), [1980] C.P.S.S.R.B. No. 2 (QL), at para. 19 ("*Lalonde*"), and stated that this case is not only about a question of access to confidential information but also about a confusion of loyalties that could arise in the mind of a BOC employee who must give urgent attention to and exercise discretion over an incident report dealing with a labour relations matter. The board concluded in that case that access to confidential information does not in itself place a person into a conflict of interest. The combination of particular duties with access to certain kinds of confidential information may give rise to a legitimate concern about the likelihood of a conflict between duty and interest.

[28] The employer also noted a passage from *Canada Safeway* at page 16, which states that a confidential exclusion is not based upon access to information alone but rather upon some special relation of a character that stands out from the generality of relations and that bears a special quality of confidence. An element of personal trust

exists between management and that particular employee that permits some degree of thinking aloud on special matters; and that information is kept to a strictly limited group of people.

[29] The employer cited *Sisson*, which notes that subsequent to the *Canada Safeway* decision, Canadian labour boards developed a three-step test to consider confidentiality exclusions as follows: matters of confidence must be related to industrial relations, disclosing the information at issue would adversely affect the employer, and the person in question must have regular and substantial and not just occasional contact with the confidential information. The board then noted at paragraph 50 two further considerations: the exclusion is narrow, to protect the rights and freedoms incidental to collective bargaining for the maximum number of employees and the exclusion is linked to a conflict-of-interest rationale under which the employer has a duty to organize its affairs so that employees are not placed in an occasional conflict if it can readily be avoided.

[30] The employer also relied upon *Treasury Board (Correctional Service of Canada)*, which found that security intelligence officer (“SIO”) positions qualified for an exclusion order as persons in those positions have to weigh and prioritize potentially high-risk information when exercising their discretion in a time-limited manner as to which issues to present to management.

[31] The bargaining agent pointed to *Sisson* as support for its argument that excluding 18 FB-04 staff members would be excessive given that altogether, they handle only approximately 20 labour relations critical incident reports per year. *Sisson* finds that the employer has a duty to organize the workplace such that any impacts of exclusions are minimized, to protect the right to freely associate with the bargaining agent for as many staff as possible.

[32] Having considered the cases noted by each party on this issue, I do not find the tasks associated with incident reporting justify approving the employer’s application on this ground alone.

[33] There may be information that would be of such potential harm if it were disclosed that it must be given extraordinary protection, such that all those who may potentially see or access it must be excluded from the bargaining unit. However, as *Sisson* noted, the mere fact that an employee has access to confidential information

does not on its own justify a claim for exclusion based upon confidentiality. Furthermore, I find that any confidentiality concerns about these FB-04 employees and their interaction with incident reporting are allayed by their oath of office as the staff would be subject to discipline if they breached it.

[34] I heard extensive evidence about the work the FB-04s do to gather and process incident reports and the important role their judgement plays in the CBSA. The employer submitted that their judgement could be impaired by divided loyalty if they are active members of the bargaining agent. The employer raised the concern of an FB-04 choosing not to fully investigate or elevate an incident involving job action.

[35] I am not persuaded by this argument. I find the FB-04 staff's work of processing incident reports is transparent and thus allows for prompt and certain accountability if a problem arises with a critical incident not being reported properly. If that ever happened, I am satisfied that the employer would be able to identify the person in question and to deal with the incident appropriately. It is also very probable that if an FB-04 did not handle an incident report properly, the BOC would be made aware of the incident at issue through other means such that any harm arising from the delay and initial mishandling could be mitigated in a reasonable amount of time.

[36] I distinguish the case of the SIO that the employer noted on its facts as I find that the FB-04 positions exercise far less discretion over substantive matters. Given my finding on the evidence that if a critical incident were missed, I would expect the omission to be communicated again to senior management after only a moderate delay. This can be distinguished from instances when a highly sensitive piece of intelligence about safety in a correctional institution may be known only to the SIO possessing it.

[37] Given my findings regarding the duties of the FB-04 positions as related to incident report, I cannot conclude that the application is justified on this ground alone. The evidence shows the FB-04 positions are the conduit for information and do not themselves participate in confidential labour relations discussions with management on how to respond to critical incidents.

B. Daily "Issue Management Secretariat" senior management teleconference

[38] Do the roles of FB-02 and FB-06 staff in the daily Issue Management Secretariat

("IMS") teleconference justify declaring their positions excluded?

[39] The daily IMS teleconference with the CBSA's senior management is another task the BOC coordinates and staffs. Each morning, the CBSA's senior management team assembles via teleconference to discuss the issues to be dealt with that day. An FB-06 and FB-02 from the BOC researches, organizes, and chairs the call and acts as secretary. By 6:30 a.m., the FB-02 on duty assembles the overnight incident reports and conducts a media scan of both mainstream and social media platforms to identify any incidents falling in the 24 defined issues of concern that affect the CBSA. The FB-06 on duty assists by providing direction on preparing for the call and then chairs it. Besides preparing the materials and the agenda, the FB-02 staffs the call and acts as the recording secretary to ensure notes are taken for assigning any follow-up tasks. As part of the chair's duties, the FB-06 is responsible for presenting the agenda topics, quality assurance and strategic advice, and directing the FB-02 when planning the call.

[40] Ms. Petrow stated that approximately 15% of teleconference topics are labour relations issues. She noted that access-to-information files are monitored on the calls but in cross-examination confirmed that no confidential information is shared about those files. She stated that all call participants are in excluded management positions, except for the FB-06 and FB-02.

[41] The role of labour relations issues in the daily IMS teleconference was explored in cross-examination. Ms. Petrow confirmed that if an issue related to collective bargaining is in the morning media scan, it is discussed on the call so that an assignment can be made to the responsible manager for a follow-up analysis and a briefing. The FB-02 assigned to the teleconference does not conduct that follow-up analysis; nor does the BOC have any role in any follow-up or in the conduct of any labour relations or staffing issues. She also confirmed that the FB-02 staffing the call is subject to discipline related to his or her oath of office should she or he ever breach any confidence arising from his or her role in the teleconferences.

[42] Given the evidence before me, I find no justification to exclude these positions for duties relating to the daily IMS teleconference. Had the evidence shown occasional substantive management discussions of how to respond to labour relations issues arising from a media scan, I might have reached a different conclusion. The daily IMS teleconference simply identifies issues already in the public domain and acts as a

clearinghouse for assigning follow-ups to other CBSA staff. The evidence before me shows that there are no confidential aspects to the call that could raise a conflict of interest or divided loyalty issue between the employer and bargaining agent.

C. Event management and strike centre

[43] Does the work of all the positions in relation to the BOC's national event management function, including serving as the strike centre, justify declaring the positions excluded?

[44] Ms. Petrow explained the event management function that the BOC handles for the CBSA. The director general of labour relations decides when to activate the CBSA "strike/situation" centre. Ms. Petrow stated that during normal office hours, the strike/situation centre can be located at the BOC or the labour relations offices but that outside normal office hours, the BOC is the location.

[45] Ms. Petrow explained a CBSA internal briefing document outlining the BOC's mandate and operating details. It states that during a recent collective bargaining process, the CBSA activated the strike/incident centre and located it at the BOC. The BOC acted as the strike centre during FB Group collective bargaining and played a major monitoring and reporting role during the FB Group's "Day of Action" and related labour actions after new name tags were implemented.

[46] Ms. Petrow further stated that the BOC is the repository for the CBSA contingency plans on how its operations are sustained through job action or strike events. Detailed plans for staff relocation and for deploying managers to front-line duties are kept at the ready for implementation on minutes' notice. She also noted the plans include highly detailed assessments of how long different operations can be sustained without full staffing and the impact of deploying excluded staff and management to operations positions. Ms. Petrow stated that all BOC staff have access to confidential strike contingency plans but that otherwise, only CBSA excluded managers have access to them.

[47] The bargaining agent argued on this point that *Sisson*, at para. 50, states that a confidential exclusion must be narrowly interpreted to ensure that the maximum number of employees is able to enjoy the rights and freedoms incidental to collective bargaining. It further notes that the confidentiality exclusion is based upon a conflict-

of-interest rationale and that the employer has a duty to organize its affairs such that its "... employees are not occasionally placed in a position of a potential conflict of interest if that result can readily be avoided."

[48] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 174-02-277 (19780829) ("*Jones*"), the board relied upon the concept of "management team" as stated in *The Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 172-02-31 (19710714), [1971] C.P.S.S.R.B. No. 8 (QL) ("*Gestrin and Sunga*"). The employer made submissions on the matter of the management team concept as noted in *Gestrin and Sunga*. The dissenting opinion in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 174-02-250 (19770214), [1977] C.P.S.S.R.B. No. 3 (QL) ("*Lemieux*"), at para. 20, quotes former PSSRB chairperson Jacob Finkelman, who wrote the following:

The question is not whether an employee will reveal to a bargaining agent confidential information that may come to him in the performance of his duties; his oath of secrecy should afford protection against such a breach of confidence. But the oath ... cannot give the employer assurance that a person can successfully separate in his own mind his personal interests from his responsibilities to the employer in assessing a situation in which he is required to make recommendations on ... programs and so on ... or to take action to carry them into effect....

[Emphasis in the original]

[49] In *Gestrin and Sunga*, at para. 8, the board stated as follows: "It is inconceivable ... that Parliament intended that a person should be placed in a position where he has his feet under both sides of the bargaining table at the same time." The board found that the employees in question were not in management. However, by their active role of writing briefs for a cabinet committee, they also participated in management discussions. Thus, the exclusion order was granted.

[50] In *Lemieux*, at para. 17, the majority of the presiding board members considered the management team concept. It noted that conflicts of interest can arise if persons are privy to decision making or administrative management at higher levels of the public service and that they need not be managers to be granted a management exclusion order.

[51] The employer cited *Jones* as it summarizes the management team concept and

cites the dissenting decision in *Lemieux* to adopt it as part of its decision. The employer also cited *Professional Institute of the Public Service of Canada v. National Film Board of Canada*, PSSRB File No. 172-08-501 (19900406), [1990] C.P.S.S.R.B. No. 78 (QL) (“*Turcotte*”). The employee in that case participated in discussions about labour relations files but did not participate in the decisions regarding them. When it approved the exclusion order, the board found that although the employee did not participate in the labour relations decisions, she was aware of the outcome before the impacted staff members were. As such, she was in a conflict of interest by being both privy to that sensitive information and a bargaining unit member.

[52] In *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 175-02-465 (19861210), [1986] C.P.S.S.R.B. No. 341 (QL) (“*Lacombe*”), the PSSRB granted an exclusion order for a clerical support staff person on the basis that she was in contact with highly confidential materials and that she worked in close proximity to managers that had a direct collective bargaining role. The board noted the employee in question was subject to her oath of office to protect secret information but that the fact she not only had access to but also had to work with and understand collective bargaining information would not allow the employer to protect confidential information with potentially significant implications for labour relations and collective bargaining. The board ruled that the employee’s potential right to exercise her right to freely associate with her bargaining agent directly conflicted with the collective bargaining knowledge that she would possess from her close work with management.

[53] The bargaining agent argues the employer has a duty to organize its work in such a way as to avoid impacting the right of the employees at issue to enjoy membership and activities in their bargaining agent.

[54] The positions that are the subject of the application before me work alongside a group of FB-05 excluded positions. Ms. Petrow testified that there are a total of 20 such positions, which results in a minimum of two FB-05 staff working each shift at the BOC.

[55] The bargaining agent explored the issue of excluded FB-05 positions in its cross-examination of Ms. Petrow. She testified that it is not possible for FB-05 staff to be assigned sole responsibility for all labour relations incident reports that arrive at the BOC. She explained that there can be as few as two FB-05 staff on duty at any one

time at the BOC and that their duties are such that the employer cannot guarantee that there will always be an FB-05 sitting at a desktop computer the moment a labour-related incident report arrives. Ms. Petrow repeated her assertion that given the potential for a significant event report to be created at any moment, there cannot be gaps in monitoring incoming communications.

[56] She also testified that the employer had assessed the possibility of assigning a small number of FB-04 staff to be solely responsible for handling labour incident reports. Given the vagaries of scheduling shifts, the risk of staff being ill, and the seniority rules for calling off-duty staff into work, she stated that it would be impossible to manage such scheduling.

[57] The bargaining agent cited *Treasury Board v. The Public Service Alliance of Canada*, PSSRB File Nos. 172-02-884-A and 886-A (19970930), [1997] C.P.S.S.R.B. No. 106 (QL) (“*Andres and Webb*”), which considered an application under s. 5.1(1)(b) of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) at that time, which dealt with positions with “... substantial management duties ... and authority over employees ...”. Although that differs significantly from the application in the present case, that decision also notes the importance of the concept that the right of employees to membership in their bargaining units should not be removed lightly and that whenever possible, the employer must arrange its affairs so as to minimize the need for exclusion.

[58] In light of the evidence before me, I find the event management and strike centre functions of the BOC that potentially involve all of the positions subject to this application justifies my approval of the employer’s applications.

[59] I am persuaded by the evidence that the employer has gone to great lengths to create a very well-equipped and modern clearinghouse for management operations activities that is the preferred location for collective bargaining and strike management. And it plays a critical role in handling extremely sensitive labour relations events.

[60] I can think of few, if any, more important aspects of management’s conduct of labour relations than the sure and steady hand on operations during the critical times of job actions, collective bargaining, and strikes. Ample evidence was adduced at the hearing of the employer’s concern with the proper conduct of cross-border traffic and

flow of goods to ensure the safety of travelers and of our nation. Such a common work area as created by the BOC also reduces the risk of time-sensitive and important information being lost or misplaced in periods of peak activity.

[61] I find that the employer is justified in its application to exclude all the positions requested as they are all present in and important to the proper functioning of the BOC. The employer has the right in its management interactions, including when “thinking out loud”, to be free from the fear of any of its staff having conflicted loyalties. The employer would be in an impossible position, when involved in or preparing to face a strike or other action and deploying operational plans for such an event, if it were in the midst of staff who could be active members of bargaining agent’s leadership.

[62] I also believe it would be unfair to such an employee who if not excluded, could enjoy such active membership in the bargaining agent and be looked upon with mistrust by the employer for potentially having conflicted loyalties.

[63] While the bargaining agent argued that the quantity of labour relations work was so minimal that it could not justify any exclusion, I take both a quantitative and qualitative view of the work being handled by the staff at issue in the exclusion application. Even a modest amount of labour relations work that is of critical importance to the CBSA’s proper functioning can justify granting an exclusion application.

[64] Based on the facts before me, the BOC’s hosting of the event management and strike centre is just such an activity; those are relatively infrequent events, but they are of fundamental and critical importance to the employer in conducting its labour relations duties and in delivering its core mandate to the nation.

[65] By deciding to grant the exclusion order, I am following the management team concept traced back to *Gestrin and Sunga*, *Lalonde*, and *Lacombe* and in particular the words of Mr. Finkelman cited earlier with respect to staff not being on both sides of the table during collective bargaining.

[66] In my view, the CBSA should not have to set up and operate a second BOC of only excluded management to ensure the efficacy of the management team; that would defeat the purpose of having one centralized national clearinghouse for the command

and control of the CBSA's field operations and would be an unreasonable accommodation of the right of staff to freely associate with their bargaining agents.

[67] The employer must be able to operate and organize its affairs such that it is free from any apprehension that its officials involved in critical business operations might have divided loyalties.

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

(The Order appears on the next page)

V. Order

[69] The employer's application is granted.

[70] The Board declares that all of the positions identified in the schedule to this decision are managerial or confidential positions, effective February 15, 2013.

September 12, 2016.

**Bryan R. Gray,
a panel of the Public Service Labour
Relations and Employment Board**

**Public Service Labour Relations and Employment Board
Positions List
Annex 1**

Department or Agency: Public Service Alliance of Canada

Dept.	Position	Classification	Reason	PSLREB Number	Status
BSF	30241030	FB-02	59. 1(g)	572-02-2709	
BSF	30137019	FB-04	59. 1(g)	572-02-2727	
BSF	30153744	FB-04	59. 1(g)	572-02-3028	
BSF	30155996	FB-04	59. 1(g)	572-02-3048	
BSF	30156248	FB-04	59. 1(g)	572-02-2726	
BSF	30157156	FB-04	59. 1(g)	572-02-3047	
BSF	30158760	FB-04	59. 1(g)	572-02-2725	
BSF	30158764	FB-04	59. 1(g)	572-02-2724	
BSF	30186077	FB-04	59. 1(g)	572-02-2723	
BSF	30186077	FB-04	59. 1(g)	572-02-3046	
BSF	30188642	FB-04	59. 1(g)	572-02-2722	
BSF	30202877	FB-04	59. 1(g)	572-02-2721	
BSF	30202878	FB-04	59. 1(g)	572-02-3051	
BSF	30202882	FB-04	59. 1(g)	572-02-2719	
BSF	30208690	FB-04	59. 1(g)	572-02-2718	
BSF	30214815	FB-04	59. 1(g)	572-02-3118	
BSF	30219411	FB-04	59. 1(g)	572-02-2717	
BSF	30219414	FB-04	59. 1(g)	572-02-2716	
BSF	30240480	FB-04	59. 1(g)	572-02-2715	
BSF	30240481	FB-04	59. 1(g)	572-02-2714	
BSF	30240482	FB-04	59. 1(g)	572-02-2713	
BSF	30240483	FB-04	59. 1(g)	572-02-2712	
BSF	30246865	FB-04	59. 1(g)	572-02-2711	
BSF	30261881	FB-04	59. 1(g)	572-02-3049	
BSF	30212413	FB-06	59. 1(g)	572-02-2737	
BSF	30215266	FB-06	59. 1(g)	572-02-2736	
BSF	30275638	FB-06	59. 1(g)	572-02-3080	