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*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 an application, under subsection 71(1) of the *Public Service Labour Relations Act*, for a declaration that a position is a managerial or confidential position

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Applicant: Joshua Alcock, counsel

For the Respondent: Linda Cassidy, exclusions and essential services officer

Heard at Ottawa, Ontario,
November 10, 2015.

REASONS FOR DECISION

I. Application before the Board

[1] On January 30, 2015, the Treasury Board (“the employer”) applied to the Public Service Labour Relations and Employment Board (“the Board”) for an order that the positions of five internal integrity and security senior officers, also known as “senior investigators”, in the Regional Integrity Services Branch of Employment and Social Development Canada (“the department”) be designated pursuant to s. 59(1)(g) of the *Public Service Labour Relations Act* (“the Act”) as managerial and confidential positions.

[2] The employer submits that the occupants of the positions should not be included in a bargaining unit because of conflict of interest or because of their duties and responsibilities to the employer.

[3] The employer provided an explanation and rationale for its position with its application that reads as follows:

The incumbent plans and conducts administrative investigations of alleged employee or a group of employee’s malfeasance or other unlawful activity. The incumbent communicates with departmental managers at senior levels and their senior staff officers to discuss/review allegations of an employee’s malfeasance. The incumbent advises and provides briefing notes to senior level management on the evidence and course of investigations.

The incumbent selects the most effective timing and circumstances for meeting an employee subject to an investigation including witnesses. The incumbent’s recommendations as to whether or not there is sufficient evidence to transfer the case to law enforcement agencies could have an impact on the employee’s career with the department and his/her reputation.

The incumbent’s investigation report which complies with legal and regulatory requirements is the basis for a decision that could result in the employees being subjected to disciplinary action ranging from a verbal reprimand to discharge including the laying of criminal charges.

The incumbent assists in the preparation of cases for prosecution and attends formal proceedings (i.e. tribunals, criminal court) to support investigation findings. The incumbent by virtue of his/her duties has to represent the employer during the course of his/her investigation. The incumbent by virtue of his/her duties is within a conflict of interest between union and management.

[4] On February 5, 2015, the Public Service Alliance of Canada (“the bargaining agent”) wrote to the Board, objecting to the exclusion proposals under s. 59(1)(g) of the *Act*, as the bargaining agent was not convinced by the documentation provided that there was a conflict of interest.

II. Summary of the evidence

[5] The employer called one witness, Penny Levesque, the department’s director general and departmental security officer. The bargaining agent did not call any witnesses.

[6] Ms. Levesque described the function of her organization as being primarily emergency management as well as security. The emergency management function is responsible for ensuring that the department is adequately equipped to maintain business operations in the event of an emergency. It engages in planning to meet contingencies such as fires, earthquakes, power outages, and national disasters.

[7] The security function of the organization is accountable for the safety and security of the department, which employs approximately 22 000 people. This responsibility encompasses the physical security of employees as well as special investigations relating to wrongdoing in the workplace.

[8] Her position is not in the bargaining unit. The positions in dispute fall under the Special Investigations Unit (SIU) in the organization chart for the Integrity Services branch.

[9] The AS-07 position of manager of the Special Investigations Unit (“SIU”) is excluded. That manager reports to a director in an EX-01 excluded position that is responsible for both corporate security and internal investigations. The director in turn reports to Ms. Levesque. The director oversees the functioning of SIU, which includes personnel screening and special investigations. The division provides advice and guidance on security issues to the department. The manager oversees investigations and provides expert advice to the investigators.

[10] The disputed positions are five AS-06 senior investigator positions in the SIU that report to the manager position. The role of the employees in these five positions is to conduct special investigations relating to misconduct in the workplace. More particularly, these positions conduct fulsome investigations that add to the basic fact-

finding performed by regional security officers.

[11] The department has five regions, each of which has a “Regional Security Office” in which regional security officers are employed. They are security officers and not investigators and are excluded from the bargaining unit.

[12] The subjects of these investigations are employed in the department. The senior investigator’s mandate does not extend to investigating the conduct of those who are not employees.

[13] Examples of wrongdoing that the senior investigators investigate are inappropriate use of the Internet, vandalism, and employees’ abuse of privileged access.

[14] The work description for the senior investigator position was last updated in 2001. The key activities described in it are as follows:

Plans and conducts security investigations of government and departmental Security policy violations and incidents within a portfolio of cases and prepares reports and recommendations on findings.

Gathers and analyses intelligence relevant to the security of the department and the federal government and disseminates information and analysis within a community of security and intelligence practitioners.

Participates in the development of departmental Security investigations policies and processes and represents the department on interdepartmental and intergovernmental working groups involved in the analysis and development of security systems involving multi-jurisdictions.

Participates in the development of security training and awareness program materials and delivers presentations to headquarters and regional managers and staff.

Provides advice and guidance to headquarters and regional management on the policies and processes involved in formal security investigations.

Prepares briefing notes and correspondence on the status and findings of security and investigation cases within a portfolio for senior departmental management.

[15] The 2001 work description described as one of a senior investigator’s key

activities planning and conducting security investigations of alleged *Criminal Code* violations. The description included a requirement to liaise with federal, provincial, and municipal law enforcement agencies to coordinate investigations into incidents and the laying of criminal charges, preparing and providing briefings and reports for Department of Justice prosecutors, and testifying in criminal court proceedings to support the Crown's position. Those are no longer part of a senior investigator's duties as that responsibility was turned over to law enforcement agencies.

[16] An "Administrative Investigation Decision Tree" illustrates the senior investigators' role in the department.

[17] When a manager of a Regional Security Office is made aware of potential employee wrongdoing or inappropriate behaviour, a preliminary fact-finding inquiry is conducted, which involves making a preliminary assessment of information and evidence to determine whether there is enough information for management to address the issue, in consultation with the department's section dealing with labour relations ("Labour Relations"), and apply disciplinary measures or otherwise resolve the issue.

[18] When it is determined that wrongdoing might have occurred and that further investigation is required to uncover more evidence, a written request is made to the Departmental Security Office for an administrative investigation. Wrongdoing in this context means there has likely been a breach of an Act or a regulation or a departmental or Treasury Board policy, directive, standard, or procedure or of the departmental code of conduct.

[19] In consultation with Labour Relations and the responsible assistant deputy minister, the manager drafts an investigation mandate. If the departmental security officer approves it, a senior investigator is assigned to the case to conduct an administrative investigation. When the investigation is completed, the senior investigator submits a report to the assistant deputy minister concerned and to Labour Relations so that the appropriate labour relations measures can be taken.

[20] If discipline is warranted, it is based on the findings in the senior investigator's report. An investigator's findings could lead to other administrative proceedings. Depending on the gravity of the misconduct, the findings could trigger a review of the employee's reliability status or security screening. In terms of practical consequences,

an investigator's findings could lead to loss of employment.

[21] The senior investigator's report does not include recommendations with respect to the labour relations measures to be taken against an employee as any discipline is management's responsibility. However, a report could contain a recommendation for review for cause of an employee's reliability status.

[22] Ms. Levesque consults with Labour Relations and the assistant deputy minister concerned with respect to measures to be taken depending on the gravity of the misconduct.

[23] A system of checks and balances is followed from the outset to determine the investigation plan. The manager has an important role to play in developing the investigation plan with the senior investigator.

[24] Senior investigators are autonomous when conducting investigations. During the course of an investigation, the scope of their mandate is quite wide and can be expanded depending on what they find, as other allegations could come to light, possibly against other employees. The manager and director are involved in the event that a senior investigator is given a new or an expanded mandate, based on what the investigator has found.

[25] At the conclusion of the investigation, the findings are reviewed with the manager and the director as the implications can be quite serious with respect to an employee's reputation and employment.

[26] The senior investigator's role is substantial as management relies upon his or her thoroughness and unbiased approach. Management does not double-check facts but relies on the investigators' training and professionalism as they are aware of the consequences of a report.

[27] Management also relies on the thoroughness of the senior investigator's report with respect to fact-finding as the report is divorced from opinion and can be relied upon by management when it decides whether to impose discipline.

[28] When senior investigators interview employees, the employees are entitled to representation, be it a co-worker, a lawyer, or a union representative, and 80 to 85% of employees interviewed are represented. However, they must speak on their own behalf.

[29] Depending on the severity of the allegations, for example alleged misconduct that could warrant termination, it is highly likely that the employee will be accompanied by a representative.

[30] Senior investigators conduct investigations into the following types of alleged misconduct:

- violations of the department's *Code of Conduct* or the *Values and Ethics Code for the Public Sector*;
- abuses of authority, alterations of documents, breaches of agreements, and conflicts of interest;
- inappropriate or unauthorized accesses, misuses of funds, and preferential treatment;
- unauthorized disclosures of information (i.e., leaks to the media or the competition);
- not showing respect for people (i.e., not providing a safe and healthy workplace);
- resolution of doubt ("RoD") issues;
- breaches of trust (the employer's trust (integrity));
- not preserving the confidentiality of information;
- reviews for cause; and
- violations of the policy on the use of the electronic network.

[31] The assistant deputy minister also directly tasks senior investigators to investigate employee complaints of reprisal for disclosing wrongdoing under the *Public Servants Disclosure Protection Act* (S.C. 2005, c. 46; *PSDPA*). The senior investigators report directly to the senior disclosure officer. This process attaches a higher level of secrecy, and there are no checks and balances.

[32] During cross-examination, Ms. Levesque acknowledged that some of the senior investigators had occupied their positions for at least five years. She also acknowledged that the only change to the job description that has existed since 2001 was the removal of the requirement for senior investigators to investigate criminal conduct. She was not aware of the rationale for the employer not applying to have the positions excluded until this application was filed.

[33] She was aware that the five employees occupying the positions had grieved the proposal to exclude them from the bargaining unit.

[34] With respect to investigations under the *PSDPA*, she confirmed that the senior investigators have done some but since she is not entitled to know any details about those investigations, she could not say how many were done.

[35] She acknowledged that the regional security officers whose positions are excluded from the bargaining unit have duties other than fact-finding, such as assisting at events where security is required, including responsibility for the security of employees and facilities in the event of a strike.

[36] The rationale for excluding the regional security officers from the bargaining unit states in part as follows:

...

In addition, the incumbent is responsible for the implementation of security measures during any labour dispute, when renewing collective agreements and provides advice and guidance to management on security measures during demonstrations and picket lines the incumbent may intervene in cases where the entrances to buildings are blocked due to events [strikes etc.] And may discuss some disputes with directors, managers representatives of the police, security personnel and owners of any business present. The IIS senior officers expertise is required to address all safety issues at these events. The fact of being a member of a bargaining unit places the holder in a direct conflict of interest situation. Membership of a bargaining unit makes it virtually impossible for the fulfilment of impartiality in this function.

[Sic throughout]

[37] Ms. Levesque confirmed that the senior investigators make no recommendations with respect to discipline; nor do they recommend revoking an employee's security status.

[38] Senior investigators are called upon to testify before the Board to support employer action against employees. In *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70, a case involving a grievance filed by an employee whose reliability status was revoked and ultimately terminated,

one of the senior investigators whose position is at issue in the present case, Frank Bourque, gave evidence to the Board concerning his investigation..

III. Summary of the arguments

A. For the employer

[39] Section 59(1)(g) of the Act provides as follows

59 (1) After being notified of an application for certification made in accordance with this Part, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that

...

(g) the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer ...

...

[40] The second part of the paragraph, which reads, "... by reason of the person's duties and responsibilities to the employer ...", is ambiguous. Nevertheless, this is a clear case for excluding the positions in dispute under either part of s. 59(1)(g).

[41] The 2012 decision of the former Public Service Labour Relations Board in *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46, was the first decision rendered on that provision in many years.

[42] The adjudicator in that case described s. 59(1)(g) as an umbrella provision enumerating a broad range of grounds for exclusion by reason of conflict of interest. She described the second ground of exclusion, i.e., by reason of a person's duties and responsibilities to the employer, as being even more open-ended, with the intent to allow exclusions not aligned with any of the other grounds for exclusion enumerated in the section.

[43] In *The Professional Institute of the Public Service of Canada v. Canada (Treasury Board - Economics, Sociology & Statistics Group - Scientific and Professional Category)*, PSSRB File No. 172-02-31 (19710714), [1971] C.P.S.S.R.B. No. 8 (QL), the Public Service

Staff Relations Board (PSSRB), in one of its early decisions, when determining whether employees were employed in a managerial or confidential capacity, referred to the discussions before the Special Joint Committee of the Senate and of the House of Commons on Employer-Employee Relations in the Public Service and to the debates on Bill C-170 before the House of Commons and the Senate to justify including a catchall clause in the *Act*. That clause was to enable the PSSRB and its successors to deal with special situations as it was not possible to foresee all the circumstances under which an employee may be employed in a managerial or confidential capacity.

[44] In *Public Service Alliance of Canada v. Canada (Treasury Board - Purchasing and Supply Group Bargaining Unit)*, PSSRB File No. 174-02-250 (19770214), [1977] C.P.S.S.R.B. No. 3 (QL), the majority of the PSSRB stated that membership in the management team implied a real likelihood of conflict of interest; however, if it could be said that all cases of membership on the management team entailed that likelihood, then it did not follow that all such cases are necessarily linked to membership on the management team.

[45] The majority concluded that a person could be excluded under paragraph (g) of the relevant definition even if the person could not be considered a member of the management team, provided that the proven conflict of interest is latent in his or her duties and responsibilities to the employer.

[46] The employer is not arguing that the group of positions in this case are part of the management team. The core of the issue is that the central feature of the functions of this group of positions is that they conduct investigations into alleged wrongdoing of other employees, 85% of whom hold unionized positions.

[47] What is known from the investigative process is that the tension between roles comes to a head in the process.

[48] The investigator sets a course when conducting an investigation into allegations that an employee, for example, has violated the code of conduct. The investigator may determine that the allegation is not founded. If he or she concludes that the allegation is founded, then his or her report is referred to the manager. Some form of action will then be taken against the employee, ranging from a reprimand up to and including termination.

[49] An investigator may find that allegations concerning an employee's reliability status are founded.

[50] In either case, those determinations will have profound consequences for an affected employee.

[51] While the investigator does not make the final determination as to whether a reliability status should be rescinded, his or her report is the foundation upon which the decision is made. And once it's made, if it is adverse to the employee, the senior investigator's role is brought into the heart of the union-management relationship, which is adversarial.

[52] The next step in many cases is filing a grievance that is then referred to adjudication. Then, on one side is management, which relies on the senior investigator's factual determinations, while on the other side is an employee, who is frequently represented by a bargaining agent challenging the factual foundation of the investigator's report.

[53] Subsection 59(1) as a whole is an attempt to carve from a bargaining unit employees who are at the core of the conflictual intersection between union and management. Paragraph 59(1)(c) deals with excluding occupants of positions who provide labour relations advice and is based on the same core conflict. Those employees do end up at adjudication testifying on behalf of management. A senior investigator's report can have significant consequences to employees.

[54] When exercising his or her autonomy, the senior investigator exercises judgment, determines what evidence is relevant, assesses the value of the documentary evidence reviewed, and draws the factual conclusions. He or she may suggest expanding an investigation underway into an employee's conduct or investigating other employees.

[55] Decisions are made in consultation with senior managers. The employer must repose complete trust in the investigator and must be able to rely upon his or her impartiality and objectivity in the investigation.

[56] In theory, a senior investigator could be the president of the bargaining agent that represents the employee who was the subject of the investigation.

[57] In *The Professional Institute of the Public Service of Canada and Canada (Treasury Board) (Economics, Sociology and Statistics Group Scientific and Professional Category)* [1971] C.P.S.S.R.B. No 8. the PSSRB again considered the interpretation to be given to the statutory provision to exclude persons not otherwise described but who in the PSSRB's opinion should not be included in a bargaining unit by reason of their duties and responsibilities to the employer.

[58] In that case, the employer sought to exclude one person, who occupied an assistant secretary to the Cabinet Committee on Priorities and Planning position, and another person, who occupied a Privy Council officer position in the Cabinet Secretariat.

[59] In deciding to exclude the two positions, the PSSRB, amongst other factors, considered that if the two employees were not designated, they would not only have been entitled to have their terms and conditions of employment determined by collective bargaining, but also, they would have been entitled to sit at the bargaining table as members of the bargaining agent at the same time as they would have been participating in formulating management policies that might if not directly, certainly indirectly, then materially have had a profound effect on the bargaining process.

[60] The PSSRB concluded that “[i]t is inconceivable to us 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 point of the analogy is that although the employees may not take an active role in collective bargaining, they are entitled to if they are included in the bargaining unit.

[61] 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), the PSSRB found that a “Ms. Lacombe” came within paragraph (g) of the definition in the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) of a person employed in a managerial or confidential capacity in circumstances in which she was privy to confidential bargaining information.

[62] The PSSRB reasoned in part that were she to exercise her full rights as a member of the bargaining unit, including the right to represent it at the bargaining table, the employer could not have prevented her from acting upon her knowledge of confidential bargaining information that she had obtained during the course of her employment.

[63] In the circumstances of this case, senior investigators have to make difficult assessments about whether employees have engaged in misconduct, which necessitates discussions with senior management. In turn, senior management must be able to rely upon the impartiality, judgment, and autonomy of these employees.

[64] In *Public Service Alliance of Canada and Canada (Treasury Board) (Purchasing and Supply Group Bargaining Unit)* [1977] C.P.S.S.R.B. No.3, at 11, the minority referred to the subject of conflict of interest as addressed by Jacob Finkelman, QC, the former chairperson of the PSSRB, in his review of the PSSRA entitled “Employer-Employee Relations in the Public Service of Canada”, at page 29, which reads in part as follows:

The problem is one of drawing the line between persons whose loyalties to their fellow employees and to their bargaining agent may be tolerated and even encouraged without doing harm to the system and those who must devote themselves exclusively to furthering their employer's interest.

[65] Senior investigators cannot have divided loyalty. Their loyalty can be only to the employer, which requires the benefit of a correct decision that it can fully and truly rely upon.

[66] In *Professional Institute of the Public Service of Canada v. National Film Board of Canada*, PSSRB File No. 174-08-501 (19900406), [1990] C.P.S.S.R.B. No. 78 (QL), the PSSRB considered whether a nurse who reported to the chief of staffing in human resources management and whose duties included obtaining supplementary information at the request of personnel officers or managers about employees on sick leave should be excluded from the bargaining unit. While the nurse safeguarded her professional oath of secrecy and obtained employees' consent for the release of medical information, she communicated her opinions to personnel advisors.

[67] The PSSRB had to determine whether she should be excluded on the basis that she was a person employed in a managerial or confidential capacity or on the basis of her duties and responsibilities to the employer. The PSSRB concluded that she was not employed in a managerial or confidential capacity. However, it also concluded that she should not be included in a bargaining unit by reason of her duties and responsibilities to the employer.

[68] The PSSRB found that although she would keep any confidential information to

herself, she communicated her assessments of employees on sick leave to management and often participated in discussions leading to a plan of action for one of those employees.

[69] Although she did not decide on the plan of action, she was aware of it before the employee was informed. The PSSRB concluded that only with great difficulty could she be at the same time a member of the bargaining unit as the employees upon whom she was providing information to management and the provider of that information and that if she remained in the bargaining unit, she would be in a conflict of interest. There is a similarity with the facts in this case.

B. For the bargaining agent

[70] In *Treasury Board (Canadian International Development Agency) v. Public Service Alliance of Canada*, PSSRB File No. 174-02-378 (19820831), [1982] C.P.S.S.R.B. No. 148 (QL), the PSSRB found that each case must be determined on the basis of its merits. In particular, it stated as follows at paragraph 23:

23. The Board took the position with respect to res judicata that the Board could not accept by way of preliminary motion that the designation of Messrs. Dare and Bédard be determined solely on the grounds that designations with respect to other persons have been made by the Board (or agreed privately between the parties) in circumstances analogous to those present in the instant case. Res judicata means that the matter has already been decided (in a previous case) in precisely the same circumstances and between the same parties. It cannot be argued that Bolduc and the instant application involve precisely the same circumstances. The two cases may have marked similarities, but they can never be the same, if only because Mr. Bolduc is not Mr. Dare. Thus the Board rejects the contention by the representative for the employer that the decision in Bolduc pre-determines the Board's decision with respect to Messrs. Dare and Bédard.

[Emphasis in the original]

[71] The PSSRB stated at paragraph 33 that it was not "... influenced by the fact that the parties had decided, privately, to designate a number of persons performing substantially the same functions ..." as of the position in dispute.

[72] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File Nos. 172-02-884A and 886A (19971219), [1997] C.P.S.S.R.B. No. 143 (QL), the PSSRB stated Public Service Labour Relations and Employment Board Act and Public Service Labour Relations Act

the following at pages 13 and 14:

Under paragraph 5.1(1)(d), the Board has some discretion in determining whether the duties and responsibilities of a position so closely associate the incumbent of that position with the employer as to warrant exclusion or whether there is likelihood of serious conflict of interest between the duties of the position and membership in the bargaining unit. It is under this heading that the “management team” concept developed by the Board over the years has some application.

It is particularly important, when interpreting paragraph 5.1(1)(d) to remember that the right to membership in a bargaining unit (unionization) should not be removed lightly. Wherever possible an employer must arrange its affairs so as to minimize the need for exclusion. This is necessary to preserve the statutory framework for the regulation of labour relations in the Public Service. Exclusions under paragraph 5.1(1)(d) must be supported by cogent evidence of potential conflict or association with management by reason of the duties of the position.

[73] The burden of proof rests with the employer, which must demonstrate that the duties and responsibilities of the incumbent in the position will place the employee in a conflict of interest. There must not be a perceived but an actual conflict.

[74] The incumbents of these positions have been performing their duties with no real or perceived conflict for many years. As reflected in their grievances, they believe that there is no conflict between their duties and responsibilities as senior investigators and their union affiliation.

[75] For example, as alluded to earlier, in *Heyser*, a senior investigator with the employer’s SIU since 2010, Mr. Bourque, investigated an allegation that an employee had falsified a medical document and had submitted it to the employer for the purpose of extending a teleworking agreement. The investigation into that allegation was undertaken in 2011 and concluded in 2012. It involved another employee in the same bargaining unit. Mr. Bourque remained a member of the bargaining agent through the investigation.

[76] The employer called Mr. Bourque to testify in support of its revocation of the reliability status of the grievor in that case. The decision notes that his involvement ended upon his submission of the administrative investigation report and that he was surprised to learn several months later that the grievor’s reliability status had been

revoked.

[77] Throughout this time frame, the employer appeared unconcerned that a conflict of interest might exist. The bargaining agent believes that the incumbents of these positions can investigate with an unbiased approach and that they can provide a factual report to the employer.

[78] In *Treasury Board v. Association of Public Service Financial Administrators*, PSSRB File Nos. 172-02-1003 and 1004 (19981202), [1998] C.P.S.S.R.B. No. 106 (QL), the employer had identified positions entitled “manager, financial planning and analysis”, and “manager, financial services”, in different regions of Indian and Northern Affairs Canada as managerial and confidential positions. The bargaining agent objected. The PSSRB concluded that although the occupants of those positions had supervisory duties, the evidence failed to establish that they performed substantial management duties as well.

[79] In addition, in rejecting the employer’s identification of the two positions as managerial and confidential, the PSSRB concluded at page 46 that the evidence did not reveal any decision-making or effective recommendation role for either position that would have warranted excluding them.

[80] In the case at hand, the senior investigators provide a straightforward factual report. They do not make recommendations as to disposition. Management makes the decision.

[81] The employer argued that a potential conflict arises from senior investigators being involved in investigations under the *PSDPA*. No evidence was adduced supporting this potential conflict.

[82] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 174-02-515 (19920429), [1992] C.P.S.S.R.B. No. 62 (QL), the employer proposed that a manager, finance and administration, at the Canada Employment and Immigration Commission be excluded on the basis that she was employed in a managerial or confidential capacity. The bargaining agent objected. The employer had argued that the incumbent was part of the management team in the directorate and thus that she warranted exclusion.

[83] In concluding that the manager should not be designated as a person employed Public Service Labour Relations and Employment Board Act and Public Service Labour Relations Act

in a managerial and confidential capacity, the PSSRB stated as follows at page 5 of the decision:

... It has been generally accepted by labour relations boards that such conflict cannot be founded merely on the possibility, or even the probability, that the incumbent may receive confidential information from time to time. Every employee has a fiduciary duty to respect such confidences. The fundamental question is whether the employee is an integral part of management notwithstanding the fact that the relationship is not otherwise described in the definition....

[84] The decision to exclude regional security investigators from the bargaining unit has been relied on. These positions are heavily involved in providing security in labour disruptions and strike activities. There is no evidence that the positions under discussion in this case could be in that position.

[85] The bargaining agent acknowledges the concerns addressed in the case of the *Professional Institute of the Public Service of Canada* and the *National Film Board of Canada* that there are situations that could create conflicts of interest if employees avail themselves of their right to participate in a union. The incumbents of those positions had access to information related to the bargaining table. That concept prevails in most jurisdictions.

[86] In this case, there is no potential access to information at the bargaining table. It is not an issue. The conflict would not exist.

[87] Members of a bargaining unit have the right to participate in their union's activities.

[88] A review of the actions of the five members in question, who have been employed between one and five years, demonstrated quite clearly that they have the ability to investigate and to provide a factual report to the employer without giving rise to a conflict of interest.

C. The employer's reply submissions

[89] Senior investigators' involvement in investigations under the *PSDPA* is a component of the employer's case, but its main submission relates to their investigatory role into the conduct of other employees in the bargaining unit.

[90] The bargaining agent referred to *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 174-02-515, in which occasionally confidential information, such as budget and personnel allocation, came to the employee's attention, and the PSSRB found the evidence less than convincing that the employee was an integral part of management.

[91] The employer's submission in this case is not related to confidential information. The root of the conflict is in the investigation process.

[92] It is not clear that anything can be attributed to the statements made on the grievance forms that the employee in the senior investigator positions submitted when they grieved the employer's request that they be excluded from the bargaining unit. Their opinion as to whether a conflict of interest exists is not material.

[93] Mr. Bourque testified before the Public Service Labour Relations Board in *Heyser* before the employer proposed excluding his position. The only material matter is whether the position warrants exclusion, irrespective of when the testimony occurred.

IV. Reasons

[94] The employer argues that the occupants of the senior investigator positions should not be included in the bargaining unit for reasons of conflict of interest or by reasons of their duties and responsibilities to the employer. It relies on s. 59(1)(g) of the *Act*.

[95] In *Treasury Board (Correctional Service of Canada)*, the adjudicator examined the meaning of the grounds articulated in s. 59(1)(g), namely, "conflict of interest" and "... the person's duties and responsibilities to the employer ...", as follows:

...

[68] The use of the term "conflict of interest" in paragraph 59(1)(g) of the PSLRA is somewhat ambiguous. The rationale often provided in the jurisprudence for excluding employees on the grounds that they have "authority over employees" (paragraph 59(1)(e)), are "... involved in the process of collective bargaining on behalf of the employer ..." (paragraph 59(1)(f)), or that they provide "... advice on labour relations, staffing or classification ..." (paragraph 59(1)(c)), is that those functions create a conflict between the duties associated with an employee's position and the employee's status as a member of a bargaining unit.

...

[70] The second ground for exclusion under paragraph 59(1)(g) of the PSLRA — “... the person’s duties and responsibilities to the employer ...” — is even more open-ended. That phrase confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities and to call on adjudicators to carefully consider, under that paragraph, the overall relationship between the position and the applicant’s interests....

...

[96] However, she cautioned that when deciding whether a position should be excluded from a bargaining unit, the loss of the bargaining agent’s protection and of the benefit of a collective agreement could have significant implications for an employee, and those advantages should not be disregarded lightly. She observed as follows:

... in some circumstances, including an employee in a bargaining unit could impair the effectiveness of that employee’s performance of duties essential to the applicant. Paragraph 59(1)(g) of the PSLRA suggests that the reasons for making a finding of that risk include factors not ordinarily considered. When a finding is made of a fundamental incompatibility between an employee’s duties and inclusion in a bargaining unit, the employee’s position may legitimately be excluded.

[97] In *National Film Board of Canada*, the PSSRB found that a nurse, if she were to remain in the bargaining unit, would have been in a conflict of interest. She had communicated her assessment of employees on sick leave to management and had often participated in discussions that led to plans of action by management for employees, even though she had not decided on those plans.

[98] In the case before me, the evidence is clear that the senior investigators’ role is to conduct special investigations with respect to alleged misconduct by other employees in the workplace, including members of the same bargaining unit. Management relies on the findings of fact in the special investigators’ reports when it decides whether disciplinary action, up to and including discharge, is warranted, whether other administrative proceedings should be launched, or whether the findings justify reviewing an employee’s reliability status or security screening.

[99] The employer has called senior investigators to testify before the Board's predecessors in support of decisions such as those revoking employees' reliability status.

[100] Although I do not consider the occupants of the positions in question members of the management team, and I am cognizant that they do not participate in decision making, I am satisfied on the evidence on a balance of probabilities that a conflict of interest is latent in their duties and responsibilities to the employer within the meaning of s. 59(1)(g) of the *Act*, not unlike the nurse's situation in *National Film Board of Canada*.

[101] The bargaining agent rightly argues that the right to membership in a bargaining unit should not be removed lightly and that wherever possible, an employer must arrange its affairs to minimize the need for exclusions.

[102] Given the specific nature of the special investigators' duties to investigate other employees' misconduct in the workplace, it is not clear to me how the employer could rearrange its affairs.

[103] However, I would be remiss if I did not comment on the employer's unexplained delay bringing its application to designate these positions as managerial and confidential. That delay cannot be in the best interests of labour relations between the parties.

[104] Nevertheless, it is my responsibility to apply s. 59 of the *Act*, and I conclude that the occupants of the internal integrity and security senior officer positions in the Regional Integrity Services Branch of the department are managerial or confidential. They are excluded from the bargaining unit.

[105] The employer requested in its application that the positions be declared managerial or confidential effective the first day after the closing date set out in s. 34 of the *Public Service Labour Relations Regulations*, SOR/2005-79. A copy of the application was received by the bargaining agent on February 2, 2015, so the closing date would have been February 22, 2015.

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

(The Order appears on the next page)

V. Order

[107] The application is allowed, and I declare that the internal integrity and security senior officer positions in the Regional Integrity Services Branch of the department identified by position numbers 78364, 81714, 85351, 61440 and 61441 are managerial or confidential positions, effective February 23, 2015.

August 25, 2016.

**David Olsen,
a panel of the Public Service Labour
Relations and Employment Board**