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Public Service
Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

THE CANADIAN FOOD INSPECTION AGENCY

Employer

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent

RE: Identification of Managerial or Confidential Positions:
Inspection Managers (BI-4 and VM-3)

Before: Yvon Tarte, Chairperson

For the Employer: Michel Paré, Canadian Food Inspection Agency

For the Bargaining Agent: Lyette Babin, Professional Institute of the Public
Service of Canada

Heard at Ottawa, Ontario,
August 22 and 23, 2001.

DECISION

[1] On April 2, 2001, the Canadian Food Inspection Agency (the CFIA or the employer) proposed that a series of inspection manager positions, including the two positions that are the subject of this decision (one in the Veterinary Medicine Group, and one in the Scientific and Analytical Group), be identified as "managerial or confidential positions" within the meaning of paragraph 5.1(1)(b) of the *Public Service Staff Relations Act (PSSRA)*. In all cases, the persons occupying these positions have to deal on behalf of the CFIA with grievances submitted at the first level of the grievance process.

[2] Paragraph 5.1(1)(b) of the *PSSRA* reads 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;

...

[3] On April 19, 2001, the Professional Institute of the Public Service of Canada (the PIPSC or the bargaining agent) opposed the identification of these positions.

[4] Subsection 5.2(4) of the *PSSRA* requires that the Public Service Staff Relations Board (PSSRB) confirm or reject the identification of a position after considering the opposition and giving the employer and the bargaining agent an opportunity to make representations.

Evidence

[5] At the outset of the hearing and at the employer's request, a witness exclusion order was issued.

[6] The CFIA called four witnesses to testify. Mr. André Gravel is Executive Vice-President of the CFIA, which was set up in 1997 following the merger of four

departments in order to bring all food inspection and animal and plant protection employees together in a single organization.

[7] The CFIA employs approximately 4,600 persons, who work in nearly all parts of Canada: the National Capital Region, the regions, private-sector plants, and laboratories.

[8] The employer discussed its grievance process with the PIPSC at a May 8, 2000 management-union meeting (Exhibit A-6). The CFIA considered it logical and efficient to make inspection managers, each of whom supervises an average of 50 employees, responsible for dealing with grievances at the first level of the grievance process. Until the CFIA made this decision, directors were responsible for dealing with grievances at the first level.

[9] Patricia Ballantyne is Director of Labour Relations at the CFIA. By creating inspection manager positions, the CFIA added a new level of management that, in its opinion, should form part of the grievance process.

[10] The collective agreements between the CFIA and the PIPSC for the Veterinary Medicine (VM) Group (Exhibit A-4) and the Scientific and Analytical (S&A) Group (Exhibit A-5) stipulate that the grievance process shall include three or four steps, the first of which is the responsibility of the "first level of management". The agreement for the VM group was signed on November 8, 1999; the agreement for the S&A Group was signed on June 16, 2000. Both agreements expired on September 30, 2000.

[11] In its April 1, 1998 Delegation of Human Resources Authority Manual (Exhibit A-1), the CFIA had made directors responsible for dealing with grievances at the first level of the grievance process.

[12] According to Ms Ballantyne, this manual is outdated and the employer hopes to publish a new Delegation Manual this year.

[13] The minutes of the May 8, 2000 management-union meeting read in part as follows:

[Translation]

...

5. *Grievance process*

Mr. Bertrand Myre explained that the PIPSC had considered the revisions to the Canadian Food Inspection Agency (CFIA) grievance process; these revisions proposed that the first step in the process be the responsibility of the inspection manager instead of the regional director. The PIPSC opposed this change since, in its opinion, the inspection manager position did not call for the management skills required by the grievance process. Mr. Myre stated that the PIPSC would challenge any proposals aimed at excluding these positions from the bargaining unit.

Mr. Gingras added that the proposed revision of the CFIA grievance process was incompatible with comments made at the bargaining table. Management stated that it would consider Mr. Gingras's statement.

Management explained that the proposed changes to the grievance process were in part the result of changes at the CFIA, where there were now inspection managers to whom, in management's opinion, it was logical to give responsibility for the first step of the grievance process.

General discussion ensued about the advantages and disadvantages of having inspection managers act at the first level of the grievance process. The PIPSC felt that the unofficial complaints process, which was managers' responsibility, would be impaired if persons occupying these positions were also made responsible for the first level of the grievance process, and that more grievances might result. On the other hand, management considered that it would be advantageous to bring decisions closer to the persons directly involved.

The PIPSC stated that it would put its concerns in writing.

...

[14] In March, April and May 2001, all inspection managers were notified that they had been designated representatives of the employer for the purposes of the grievance process.

[15] As well, charts indicating the designated levels in the grievance process were posted in the employer's offices (Exhibit A-9).

[16] In addition, the inspection managers received, or are to receive, training allowing them better to assume their responsibilities as representatives of the employer at the first level of the grievance process.

[17] Ms Ballantyne did not take part in the discussions between the CFIA and the PIPSC during the negotiations to renew the collective agreement for the S&A Group.

[18] Mr. Glen Patterson (BI-4, S&A Group) and Mr. Michel Landry (VM-3), both inspection managers, whose positions are the subject of this decision, identified a generic work description (Exhibit A-7) as an accurate description of the duties of their positions. Both have been notified of their responsibilities in the grievance process, have received labour relations training, and have dealt with at least one grievance at the first level.

[19] Two persons testified for the PIPSC. Mr. Michel Gingras is a negotiator for the PIPSC and is responsible for negotiations for the S&A Group at the CFIA.

[20] On the opposite side of the bargaining table were Peter Cenne, who left the CFIA during the negotiations, and Bob Derikosis.

[21] Early in the negotiations, the PIPSC had prepared a list of union demands, including a request that clause C10.05 of the collective agreement for the S&A Group be changed to designate clearly the regional director as the person responsible for the first level of the grievance process.

[22] During a February 8, 2000 bargaining session, Mr. Cenne used the Delegation Manual (Exhibit A-1) to explain that the person responsible for dealing with grievances at the first level of the grievance process was indeed the regional director until further notice. Mr. Gingras accepted the assurances by the employer's representative, and the above-mentioned demand by the PIPSC was withdrawn.

[23] At the May 8, 2000 management-union meeting, Mr. Gingras was surprised and distressed to learn that the CFIA wanted to lower the first level of the grievance process to the inspection manager position. The agreement in principle concerning the agreement for the S&A Group had been signed one month earlier on the basis of Mr. Cenne's assurances.

[24] In response to the objections expressed by the PIPSC at the May 8, 2000 meeting, the employer agreed to consider Mr. Gingras's demands. The collective agreement for the S&A Group was signed by the parties on June 16, 2000, with no further discussion on the issue of the first level of the grievance process.

[25] Mr. Gingras stated that the PIPSC has been prejudiced by accepting *prima facie* the assurances provided by the CFIA during bargaining. The bargaining agent signed in good faith a collective agreement that, because of Mr. Cenne's representations, did

not contain the clause clearly designating the regional director as the person responsible for dealing with grievances at the first level. The CFIA's proposed identification of positions would affect the representation of certain members of the bargaining unit and reduce the PIPSC's income from union dues.

[26] Mr. André Thibodeau, an Operations Officer (BI-2) at the CFIA, was a member of the PIPSC bargaining team for the S&A Group. He confirmed what Mr. Gingras had said: that during the negotiations, in February or March 2000, Mr. Cenne had assured the representatives of the PIPSC that the person responsible for dealing with grievances at the first level of the grievance process was indeed the regional director; that there had been no further discussion on this issue during the negotiations. Therefore, the employer did not change its position concerning the grievance process.

Arguments

For the CFIA

[27] Although the PIPSC claimed that it was given certain assurances during the negotiations for the S&A Group, Mr. Gingras' and Mr. Thibodeau's testimony in this regard was vague and unclear.

[28] In any case, the CFIA confirmed its intentions concerning the grievance process at the May 8, 2000 meeting, after consulting the PIPSC and before the collective agreement was signed in June 2000.

[29] As well, discussions at the bargaining table between the parties are conducted without prejudice.

[30] The CFIA acted in good faith and in accordance with the collective agreement and its own operational requirements.

[31] In support of its argument, the CFIA referred to the following cases: *Public Service Alliance of Canada v. Treasury Board* (Board file 172-2-831), *Treasury Board v. Social Science Employees Association* (Board file 172-2-957), *Treasury Board v. Professional Institute of the Public Service of Canada* (Board file 172-2-1115) and *Treasury Board v. Public Service Alliance of Canada and Public Service Staff Relations Board*, [1984] 2 F.C. 998 (C.A.).

For the PIPSC

[32] In light of the promises of status quo given at the bargaining table for the S&A Group, and pursuant to the doctrine of estoppel, the employer may not change its grievance process until the applicable clauses of the collective agreement have been amended. In support of this argument, the representative of the PIPSC cited *Canadian Labour Arbitration* (third edition, Brown & Beatty, 2:2210-2:2220).

[33] The collective agreement for the S&A Group was signed in June 2000 on the basis of the assurances given during bargaining by the employer's representative.

[34] If the employer is allowed to break its promises, the PIPSC and its members will be truly prejudiced.

Rebuttal of the CFIA

[35] The employer did not undertake never to amend the grievance process and, in any case, the assurances given by Mr. Cenne at the bargaining table applied only to the S&A Group.

Reasons for Decision

[36] The PIPSC bases its opposition to the identification of the two above-mentioned positions on the doctrine of estoppel, including promissory estoppel. We note that certain Quebec authorities use both these English terms.

[37] On page 6 of *L'estoppel et les laches en jurisprudence arbitrale* (monograph 23, 1990, École de relations industrielles, Université de Montréal), authors Claude D'Aoust and Louise Dubé define estoppel as [translation] "... a means used by one party in a dispute to prevent the other party from acting in a manner that is incompatible with its prior conduct, because of the prejudice the first party would suffer, given that it relied upon the initial conduct of its opponent ...".

[38] Although this definition is rather broad, it does a very good job of encompassing the principles that the PSSRB's adjudicators have long implemented in applying the doctrine of promissory estoppel.

[39] Given the high level of good faith and trust that must prevail during bargaining to renew a collective agreement, we must attach great importance to the promises made and assurances given during collective bargaining. Although, under section 7 of the *PSSRA*, the employer may not be obliged to negotiate the duties assigned to

positions, in this case it did agree to do so and must now govern itself in accordance with the commitments it made at the bargaining table.

[40] On the basis of the uncontradicted evidence produced by the PIPSC, I conclude that, during the negotiations for the S&A Group, through its representative the employer convinced the PIPSC that there was no need to change its demands about the first level of the grievance process, since what the bargaining agent was seeking was already included in the CFIA's Delegation of Authority Manual until further notice. In this context, until further notice can only mean until the next round of collective bargaining. As well, on the basis of the evidence, I conclude that the PIPSC would suffer genuine prejudice should the Board agree to identify the position of Mr. Patterson (BI-4) as a managerial or confidential position.

[41] I therefore conclude that, concerning the position of Mr. Patterson (BI-4), the PIPSC's objection must be upheld, and this position may not be identified as a managerial or confidential position for the moment.

[42] However, no evidence of estoppel has been produced for Mr. Landry's position (VM-3). Since, according to the duties of this position, the occupant must formally deal with grievances submitted under the process set out in the *PSSRA*, I have no choice but to accept the CFIA's argument and to identify Mr. Landry's position as a managerial or confidential position.

[43] During the hearing, the parties informed me that collective bargaining to renew the agreement for the S&A Group was already under way; the CFIA and the PIPSC can therefore resume their negotiations concerning the grievance process in this collective agreement.

**Yvon Tarte,
Chairperson**

OTTAWA, September 25, 2001.

PSSRB Translation