



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

TREASURY BOARD

Employer

and

THE PROFESSIONAL INSTITUTE OF THE
PUBLIC SERVICE OF CANADA

Bargaining Agent

RE: Designated Positions -
Nutrition and Dietetics Group and
Occupational and Physical Therapy Group

Before: Joseph W. Potter, Deputy Chairperson

For the Employer: Jock Climie, Counsel, and Raymond Dionne

For the Bargaining Agent: Roger Swickis

Heard at Ottawa, Ontario,
March 23, 1999.

DECISION

Following the granting by the Board pursuant to subsection 78.1(3) of the *Public Service Staff Relations Act (PSSRA)* of extensions of the time specified in subsection 78.1(4), the parties met to review the position of each employee in the Nutrition and Dietetics (ND) Group and the Occupational and Physical Therapy (OP) Group bargaining units to determine whether any of them have safety or security duties as specified in subsection 78(1).

On November 19, 1997, the employer advised the Board, in accordance with subsection 78.1(7) of the *PSSRA*, that the parties were unable to agree on those positions in each of the above two bargaining units that have safety or security duties. Accordingly, the employer referred the positions in dispute to a designation review panel, which was duly established.

The report of the designation review panel indicates that the employer proposed some, but not all, positions in both the OP and ND bargaining units for designation as having safety or security duties. Mr. Swickis requested the designation review panel to recommend that 100 percent of each bargaining unit be designated. The designation review panel noted the employer's position that under subsection 78.1(9) of the *PSSRA*, it did not have jurisdiction to make a recommendation on positions, "...other than those specifically referred to..." Accordingly, the designation review panel recommended that the parties refer the issue to the Board.

On April 1, 1998, the employer wrote to the Board and requested:

...that the Board make a determination without hearing on the ND and OP designated positions based on the parties' written representations and on the arguments articulated in the enclosed reports of the Designation Review Panels.

On April 8, 1998, the Board wrote to the parties saying that, unless they objected, the Board intended to issue a written decision similar to the decision issued for the Psychology Group bargaining unit which had 100 percent designations upon consent of the parties.

By letter dated April 14, 1998, the employer submitted that "...the Board has no jurisdiction to increase the number of positions proposed for designation...", and also "...the Board can only make a determination as to the designation from among the positions which have been identified as being in dispute...."

On April 16, 1998, the Board informed the parties that the matter would be dealt with by way of a formal hearing and following many mutually agreed upon postponements, the matter was heard on March 23, 1999.

Position of the Employer

Mr. Climie stated that in order for the Board to rule on an issue involving safety or security designations, there must first be a dispute or disagreement. This is provided for in subsection 78.2(1) of the *PSSRA*. However, before you get to pursue the matter with the Board, subsection 78.1(4) comes into play. This subsection requires the parties to meet and review all positions in the bargaining unit. This was done. The employer proposed some positions in each bargaining unit for designation, and the Institute did not agree, saying all positions in each bargaining unit should be designated. Absent an agreement on which ones should be considered as safety or security designations, the matter was referred to a designation review panel under subsection 78.1(7).

These processes were followed, but in the employer's view there are no disagreements on whether or not the positions the employer proposed have safety or security duties. In light of the fact there is no disagreement with the bargaining agent on the positions the employer says should be designated, there is no issue for the Board to decide. The Board has no jurisdiction to add to the list, which is really what the bargaining agent wants.

Position of the Bargaining Agent

Mr. Swickis presented the Institute's position.

He stated that section 62 of the *PSSRA* suspended the arbitration process, leaving only conciliation/strike as a dispute resolution method, unless both parties could agree on an alternate dispute resolution process under section 61 of the *PSSRA*.

Both the OP and the ND groups are part of a large group of health providers, called the Health II Group. The employer has proposed that approximately 90 percent of the positions in the Health II Group be designated. One group, the Psychology Group, has 100 percent designations following a Board hearing and determination (see Board file 181-2-362). This high number of designations would render the conciliation/strike method of dispute resolution unworkable.

Mr. Swickis submitted exhibit G-1, a 1974 document by J. Finkelman, Q.C., the first chairman of the PSSRB, dealing with proposals for legislative change, as well as Exhibit G-2, the decision of the Supreme Court of Canada in *Canadian Air Traffic Control Association v. The Queen* [1982] 1 S.C.R. 696. Both of these suggest that, in cases of high numbers of designations, the binding arbitration process could be used. Without being able to use arbitration for the Health II Group, the employees are at a disadvantage at the bargaining table.

In addition, this leads to the situation where, should the parties not reach agreement at the bargaining table, those employees who can strike will have their terms and conditions of employment lapse, while the employees occupying designated positions will have their terms and conditions of employment continue.

The proposal advanced by Mr. Swickis is to designate the positions of all employees in each of the two groups.

Reply of the Employer

In reply, Mr. Climie stated the bargaining agent is refusing to participate in the safety or security process. There is some input required from the bargaining agent, and here we have none. Mr. Climie referred to the *Woodland* decision (Board file 148-2-203) of former Chairperson Ian Deans.

Reasons for Decision

Section 78 of the *PSSRA* deals with designated positions, and subsection 78.2(1) says:

78.2(1) Where, after considering the recommendations of a designation review panel, the parties continue to disagree on whether any positions have safety or security duties, the employer shall, not later than notice day, refer the positions in dispute to the Board.

The employer says there is no dispute with respect to those positions which it proposed as having duties the performance of which is necessary in the interest of the safety or security of the public. The only dispute rests with the residue of the positions in the bargaining units and, as the employer has not proposed them for designation, they are not in dispute within the meaning of subsection 78.2(1) of the *PSSRA*.

Mr. Swickis says that in the Institute's view, 100 percent of the positions in both bargaining units should be designated. The reasons he advances for this proposition are in the interest of what can best be described as strategic collective bargaining. He is not saying every position in the two bargaining units has duties the performance of which is necessary for safety or security reasons, but rather that all the positions should be designated for strategic reasons.

Whatever his rationale, Mr. Swickis has *de facto* agreed that all those positions proposed for designation by the employer have safety or security duties.

The question now to be answered is: Does the Board have jurisdiction to designate more positions than the employer says it requires?

Subsection 78.2(1) says it is the employer who refers positions in dispute to the Board if the parties continue to disagree after considering the recommendations of the designation review panel. There is no legislative provision for the bargaining agent to refer disputed positions to the Board. This, I believe, is based on the premise that as a general rule the bargaining agent would want the designation list kept to a minimum and the employer would want more designated positions; therefore the employer would refer the positions in dispute to the Board.

In the instant case, the employer has put together a list of positions it seeks to have designated. The Institute, while not explicitly agreeing with the list, has taken the stance that all positions should be designated. At that point, the employer can request the Board, under subsection 78.1(6), to designate the positions. As far as the employer

is concerned, all the positions it needs for designation have been agreed to by the bargaining agent.

I do not see any provision for the Institute to ask that the list be increased. Neither do I see where the Board could derive jurisdiction to increase the list, which the employer says is sufficient to meet its own operational needs. The Board is not in the business of running the employer's operations.

The legislation does not oblige the employer to propose all positions in the bargaining unit for designation. Where the employer proposes positions for designation and the bargaining agent disagrees with some or all of the proposals, the Board is required to make a determination. However, here there is, in fact, no disagreement. Absent that, there is no issue for the Board to decide.

In the Psychology Group decision (*supra*) to which Mr. Swickis referred, the employer initially proposed less than 100 percent of the bargaining unit for designation and the parties agreed that all positions in the bargaining unit were in dispute. At the hearing before the Board, the bargaining agent amended its position and argued that all positions should be designated and the employer, in that case, agreed. Therefore, there was no issue to be resolved by the Board. All positions (i.e. 100 percent) were agreed to by the parties.

In the instant case, the employer says it does not require 100 percent of the positions in the ND and OP bargaining units to be designated. While the bargaining agent may wish for the designation of 100 percent of the positions, for whatever strategic reason, there is no authority that I can see that would permit the Board to make such a ruling. Therefore, pursuant to subsection 78.1(6) of the *PSSRA*, the Board hereby designates the positions proposed by the employer for the Nutrition and Dietetics Group and the Occupational and Physical Therapy Group bargaining units as having safety or security duties. These positions are contained in the diskettes submitted by the employer bearing identification HE1.XLS and OP1.XLS.

On July 8, 1997, the Treasury Board and the Institute submitted a joint request to the Board to the following effect:

The parties are hereby requesting the Board to extend the time limit to issue Form 13 for all the bargaining units which the Professional Institute of the Public Service of Canada is the bargaining agent and the Treasury Board is the employer to 30 days following a request for a conciliation board, in accordance with the Board's decision in files 125-2-68 to 70

On July 10, 1997, pursuant to section 6 of the *P.S.S.R.B. Regulations and Rule of Procedure, 1993*, the Board granted the request of the parties and ordered that:

... in all such cases where a determination has not yet been issued, the Board will extend the time specified in subsection 60(1) of the Regulations within which an employee is to be informed of the fact that he or she occupies a designated position to a period of 30 days from the date of a request for conciliation pursuant to section 76 of the Act. (Board file 181-2)

In accordance with this order, the employees who occupy designated positions in the Nutrition and Dietetics Group and the Occupational and Physical Therapy Group bargaining units are to be so informed within the 30-day period specified in the above-cited order. Thereafter, future occupants of a designated position shall be notified within 30 days of the date on which they first occupy the position.

Pursuant to subsection 78.5 of the PSSRA, the Board hereby authorizes the employer to inform the employees occupying the designated positions identified herein. For this purpose, the Board will provide the employer with a Form 13 for each designated position containing all the information required, with the exception of the name of the employee occupying the designated position and the "Dated at..." portion of the Form, which is to be completed by the employer prior to notification.

Finally, the Board draws the employer's attention to its responsibility under subsection 60.(2) of the *Regulations* that, on notification of an employee who occupies a designated position, it is to provide forthwith a copy of the notice referred to in subsection 60.(1) to the bargaining agent.

**Joseph W. Potter,
Deputy Chairperson**

OTTAWA, April 23, 1999