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Parliamentary Employment and
Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

LIBRARY OF PARLIAMENT

Employer

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervener

RE: Application for Certification

Before: Guy Giguère, Deputy Chairperson

For the Applicant: Michel Gingras, Professional Institute of the Public Service of
Canada

For the Employer: Carole Piette, Counsel

For the Intervener: Alain Piché, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
September 3, 4 and 24, 2003.

DECISION

[1] On June 24, 2002, the Professional Institute of the Public Service of Canada (the Institute) filed an application for certification to represent all non-unionized employees of the Library of Parliament (Library), that is, about 70 employees. The Institute specified that the application did not cover the positions of employees who were excluded under section 3 of the *Parliamentary Employment and Staff Relations Act* (PESRA).

[2] Section 3 of the PESRA defines “employee” as follows:

"employee" means a person employed by an employer, other than

- (a) a person appointed by the Governor in Council,*
- (b) a person not ordinarily required to work more than seven hundred hours in a calendar year or one-third of the normal period for persons doing similar work, whichever is greater,*
- (c) a person employed on a casual or temporary basis, unless the person has been so employed for a period of six months or more,*
- (d) a person employed in a managerial or confidential capacity, or*
- (e) a person excluded from the application of this Part by section 4,*

and for the purposes of this definition a person does not cease to be employed by an employer by reason only of the person's discharge contrary to this Part or any other Act of Parliament;

[3] On July 26, 2002, the employer sent the Board its reply to the Institute’s application for certification. It stated that 88 positions were covered by the Institute’s application and that several of them should be excluded because the employees in question were persons employed in a managerial or confidential capacity. The definition of “person employed in a managerial or confidential capacity” is also in section 3 of the PESRA and reads as follows:

“person employed in a managerial or confidential capacity” means any person who

- (a) is employed in a position confidential to the person occupying the recognized position of Speaker of the Senate, Speaker of the House of Commons, Clerk of the Senate, Clerk of the House of Commons, Administrator of the House of Commons, Gentleman Usher of the Black*

Rod, Sergeant-at-Arms or Law Clerk and Parliamentary Counsel of either House,

- (b) is employed as parliamentary counsel in either House or as legal counsel to a committee of either or both Houses, or*
- (c) is employed by an employer and, in connection with an application for certification of a bargaining agent for a bargaining unit, is designated by the Board, or, in any case where a bargaining agent for a bargaining unit has been certified by the Board, is designated in prescribed manner by the employer or by the Board on objection thereto by the bargaining agent, to be a person*
- (i) who has executive duties and responsibilities in relation to the development and administration of employer programs,*
 - (ii) whose duties include those of a personnel administrator or who has duties that cause the person to be directly involved in the process of collective bargaining on behalf of the employer,*
 - (iii) who is required by reason of the duties and responsibilities of that person to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided by this Part,*
 - (iv) who is employed in a position confidential to any person described in paragraph (b) or subparagraph (i), (ii) or (iii), or*
 - (v) who is not otherwise described in subparagraph (i), (ii), (iii) or (iv) but who, in the opinion of the Board, should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;*

[4] The employer also submitted that, for the positions not excluded on this basis, the employees shared a greater community of interest with Public Service Alliance bargaining units, specifically locals of the LS, LT and CGS groups.

[5] On August 15, 2002, the Institute replied to the employer by stating that the positions covered by its application did indeed share a community of interest and should not come under another certification. The Institute agreed that 16 of the positions should be excluded from the bargaining unit but argued that the other

positions were bargainable because they did not have any real authority within the meaning of section 3 of the PESRA.

[6] On September 23, 2002, the Board appointed Guy Baron and Gilles Grenier to conduct an inquiry and submit a report on the Institute's application for certification in this case.

[7] On January 28, 2003, Ms. Piette wrote Mr. Baron to tell him that the parties had agreed to exclude certain positions from the proposed bargaining unit. She also stated that the parties were asking the Board to determine whether or not 20 positions on which they had not agreed should be included in the proposed bargaining unit. These 20 positions are as follows:

Cataloguing Specialist - Anna Chan

Librarian, Special Projects - Carol Freeman

Administrative Assistant (Office of the Director General - Information and Documentation Branch) - Suzanne Lisotte

Chief, Collection Development Section - Cynthia Hoekstra
(M. Beaulieu, Acting)

Chief, Financial Services - Murielle Boucher

Chief, Electronic Services Section - Claude Brind'Amour

Chief, Branch Libraries Section and Reading Rooms - Margaret Campbell

Chief, Public Service Support - Kathleen Chance

Chief, Operational Services - Vivian Larose

Chief, Collection Maintenance Section - Alain Leblanc

Chief, Reference Section - Gilles Marleau

Chief, Serials and Acquisitions Section - Elizabeth McCormick

Chief, Cataloguing Section - Richard Tessier

Chief, Materiel Management - Frank Volpi

Manager, Parliamentary Tours - Sasja Nieuwerker

Manager, Parliament Hill Boutique - Gilles Charbonneau

Manager, Interpretive Development and Evaluation - Jo-Anne Guimond

Manager, Education Outreach – Ted Buglas

Manager, Accounting Operations – Julie Larose

Manager, Publications – Marc Foley

[8] On March 18, 2003, the Board wrote the parties to send them a copy of the inquiry report of Mr. Baron and Mr. Grenier and to notify them that a hearing would be held to deal with the Institute's application for certification.

[9] When the hearing began, Mr. Gingras and Ms. Piette informed me that the parties had agreed to ask the Board to begin by ruling on the employer's objection to inclusion based on section 3(c)(iii) of the PESRA. The persons in the 20 positions on which the parties have not agreed are in fact required to deal formally with first-level grievances. The representatives explained that, since the employer is relying on this ground of exclusion for all these positions, deciding this issue first could avoid a great deal of work for everyone.

Evidence

[10] Tarik Lacene, the Library's Chief, Labour Relations, Classification and Staffing, came to testify for the employer. He explained that the Labour Relations Section is responsible for advising managers and directors on grievances, disciplinary matters, performance appraisals, the interpretation of the collective agreement and the terms and conditions of employment, etc. In addition to its advisory duties, the Labour Relations Section has administrative responsibility for providing grievance numbers, following up on grievances and making sure time limits are observed. The Section also plays a role in co-ordinating the employer's reply to certain kinds of multiple grievances, such as classification grievances.

[11] Mr. Lacene stated that the employer informs employees that they are the first level in the grievance process through a list posted on bulletin boards in the workplace. A list of the persons who have been responsible for the various levels in the grievance process at the Library since 1987 (Exhibit E-4) was filed. Mr. Lacene said that there has been no increase in the number of persons responsible at the first level since 1987 and that there are now 27 of them.

[12] On cross-examination, Mr. Lacene stated that the persons responsible at the first level in the grievance process are not initially given any training in grievance management. The Library is a small organization in which few grievances are presented. When these persons receive a grievance, the Labour Relations Section advises them, and this experience serves as training. Mr. Lacene testified that the nature of the grievance determines how the grievance reply is prepared. If a grievance concerns one of the employer's practices or policies, the practice or policy must be adhered to, and the Labour Relations Section will be highly involved. On the other hand, for grievances where some discretion exists, there will be a dialogue between the Labour Relations Section and the person responsible at the first level. That person will therefore have some latitude in replying. A series of grievances and the replies thereto at the first level in the grievance process were filed (Exhibit E-6).

[13] Mr. Lacene also explained that he is responsible for classifying positions at the Library of Parliament. In October 2000, a decision was made to review the classification of positions in the MPA group. The Hay classification system was used. Workshops for the employees were held in December 2000 to explain to them how to write their work descriptions. Mr. Lacene stated that a number of employees who are the first level in the grievance process chose to write this in their work description (Exhibit E-5). When the positions were classified, this information was available for all positions, and points were awarded for this reason in the classification.

[14] The other witnesses are persons responsible at the first level in the grievance process and came to testify in favour of the Institute's application for certification. Murielle Boucher, Chief, Financial Services, Library of Parliament, explained that she has been working at the Library since November 1997 on secondment. According to her testimony, she learned that she was the first level in the grievance process in the summer of 2002 when classification grievances from her section were given to Ms. Boutin, her supervisor. She was informed verbally at that time that she was the first level in the grievance process and that she had to sign the grievances to acknowledge receipt thereof. She did not write in her work description in March 2001 that she was the first level in the grievance process because she was unaware of this.

[15] She has never been given any training by the employer in grievance management or the interpretation of the collective agreement. She has not received a delegation of authority as is done in financial matters. Ms. Boucher stated that she was a union

representative for the Institute in her previous job with the Office of the Superintendent of Financial Institutions. This union experience familiarized her with the system of grievance levels, although she was never given any training by the Institute or her former employer.

[16] On cross-examination, she testified that she did not remember seeing a list of grievance levels on the bulletin boards located on the employer's various premises. Since the summer of 2002, there has been a bulletin board in the room where she works, and she has indeed seen the list of the persons responsible for the various levels in the grievance process.

[17] Ms. Boucher explained that, when she receives a grievance, she forwards it to her supervisor, Ms. Boutin, because Ms. Boutin is actually the one in charge. Ms. Boucher stated that she has authority to grant or deny annual, parental and sick leave. However, she forwards more complex applications, such as those relating to sick leave without pay or extended medical certificates, to Ms. Boutin.

[18] On cross-examination, she answered that she remembered having performance problems with an employee and discussing the matter with Ms. Boutin, who advised her to talk to Mr. Lacene (Exhibit E-8). An equity grievance presented by the same employee in 1999 was also adduced in evidence (Exhibit E-9).

[19] Frank Volpi has been the Chief, Materiel Management, since 1997, and he has known that he is the first level in the grievance process for many years. He explained that he is not the one who makes decisions when he receives a grievance. He merely signs it and gives it to his director. He has not received many grievances over the past few years. One grievance, a classification grievance, was filed in evidence during his cross-examination (Exhibit E-4). He can authorize annual leave and sick leave of up to three days, but that is the extent of his authority. On cross-examination, he explained that he is responsible for appraising his employees' performance but that he discusses this with his director before signing the performance appraisals.

[20] Richard Tessier is the Chief, Cataloguing, and he began working at the Library in June 1980. He has known that he is the first level in the grievance process since 1987, when he received his first grievance. He testified that, when he receives a grievance, he signs it and calls Human Resources. He explained that he was part of the bargaining team for the first collective agreement and that, when it was entered into, the

employer provided training on the levels of the grievance process. There has not been any training on this subject since.

[21] He explained his grievance management experience and reviewed the replies he has given (Exhibits E-6 and E-13). The first grievance he received related to the reading of press clippings in “Quorum” during working hours. He notified Ms. Hill from Staff Relations. He replied to the grievance himself without any instructions from Ms. Hill. He subsequently received grievances on work descriptions, hours of work, applications for leave, etc. When the grievances concerned leave that he did not have the authority to approve, he referred them to his director general. He never had to deny leave, but when he received a grievance concerning matters within his authority, he replied to the grievance together with Human Resources. The reply was drafted by the Labour Relations Section, since, according to him, it had to do with the interpretation of the collective agreement. He has authority to grant annual and sick leave. He gives other applications for leave to his supervisor.

Employer’s arguments

[22] Ms. Piette submits that the persons responsible at the first level in the grievance process are identified on a list posted on the bulletin board as provided for in the Regulations under the PESRA. These lists have been posted since 1987 and are updated periodically. There has been no increase in the number of persons responsible at the first level in the grievance process since 1987.

[23] Seventeen of the twenty positions the employer is seeking to exclude report directly to a director who reports directly to the Parliamentary Librarian. They are the front line of management.

[24] Ms. Piette argues that, insofar as the employer has complied with the provisions of the PSSRA and its Regulations with respect to the grievance process, it is up to the employer to determine how many and which persons it will designate as levels in the grievance process. This is subject to there being no abuse of authority or bad faith by the employer in exercising this discretion. No evidence to this effect was adduced.

[25] Moreover, according to Ms. Piette, the second point to be determined is whether the employer has actually given the persons responsible at the first level in the grievance process the authority to reply to grievances. The employer acknowledges

that these persons have limited discretion to reply to grievances. When a grievance deals with the interpretation of the collective agreement or the terms and conditions of employment, these persons have little or no discretion in how they can reply.

[26] Ms. Piette submits that the persons responsible at the first level are chiefs or managers who must be accountable for their decisions. This is what happens when they have to reply to a grievance against their decision to deny leave, impose disciplinary action and so on. In support of these arguments, Ms. Piette submitted the following decisions:

Professional Association of Foreign Service Officers and Treasury Board (Foreign Affairs Case No. 1) (Board file 144-2-44);

Economists', Sociologists' and Statisticians' Association and Treasury Board (Board file 172-2-28);

Economists', Sociologists' and Statisticians' Association and Treasury Board (Board files 172-2-346 and 172-2-387);

Public Service Alliance of Canada and Treasury Board (Board file 174-2-361);

The Queen in Right of Canada as represented by Treasury Board v. Public Service Alliance of Canada, [1984] 2 F.C. 998 (Q.L.).

Applicant's arguments

[27] Mr. Gingras submits that the Board's decisions indicate that, for a grievance level to exist, the person in question must have real, independent authority to reply to grievances. The evidence showed that the persons responsible at the first level certainly do not have such authority or independence in replying to grievances.

[28] The evidence shows that the persons responsible at the first level in the grievance process have been given no grievance management training. They merely sign grievances when they receive them, and their action is limited to being conduits by forwarding the grievances. Some of them learn that they are the first level in the grievance process only when they receive their first grievance and are told by their director or by Human Resources that they have to sign it. They are not personally notified in writing that they are a level in the grievance process. The employer claims to be complying with the Act's provisions by having a bulletin board on which lists of the grievance levels are posted. A much more modern and effective method would be to distribute these lists to the employees electronically. All of the witnesses stated that

they have never received a human resources delegation manual and, in fact, they have no authority to decide how to reply to a grievance.

[29] In support of these arguments, Mr. Gingras cited the following decision: *Syndicat des travailleuses et des travailleurs de Météomédia - CSN et Pelmorex Communications Inc., division Météomédia*, [2003], CIRB decision no. 238.

Reasons for decision

[30] It is important to read the definition of “person employed in a managerial or confidential capacity” found in section 3(c)(iii) of the PESRA together with the provisions of section 71(4) of the PESRA. Section 3(c)(iii) reads as follows:

(iii) who is required by reason of the duties and responsibilities of that person to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided by this Part,

[31] Section 71 deals with the Board’s power to make regulations in relation to the procedure for the presenting of grievances; subsection (4) states the following:

(4) For the purposes of any provision of this Part respecting grievances, an employer shall designate the person whose decision on a grievance constitutes the final or any level in the grievance process and the employer shall, in any case of doubt, by notice in writing advise any person wishing to present a grievance, or the Board, of the person whose decision thereon constitutes the final or any level in the process.

[32] Clearly, the employer is the one that designates the persons who make up the levels in the grievance process. The Board’s role when a designation is contested is limited to ensuring that such persons have been properly designated and are responsible for dealing with grievances as part of their duties.

[33] The Appeal Division of the Federal Court confirmed this in a decision concerning similar provisions of the *Public Service Staff Relations Act*. In *The Queen in Right of Canada as represented by Treasury Board v. Public Service Alliance of Canada*, *supra*, it held the following at page 1005:

. . . the Board has the power and duty to determine . . . whether those persons come within any of the classes described in . . . the definition. . . .

Consequently, the question for decision under that paragraph is whether the persons designated by the employer do, as a matter of fact, have the duty and responsibility to deal with grievances on behalf of the employer. . . .

[34] Therefore, the first thing to be determined is whether the 20 persons about whom the Board must decide have been properly designated by the employer as levels in the grievance process.

[35] Mr. Gingras submitted that, in some cases, the employees did not know they were responsible at the first level and were told this when they received their first grievance. Nonetheless, the evidence shows that the lists of the persons responsible at the various levels in the grievance process were clearly posted on the bulletin boards provided for this purpose in the workplace.

[36] The fact remains that it is unfortunate that some employees may learn they are the first level only when they receive a grievance. Although this is not expressly provided for in the PESRA or the Regulations, section 60(3) of the Regulations provides that methods other than bulletin boards may, subject to the Board's approval, be used to provide employees with the lists of persons responsible at the various levels in the grievance process. Thus, as Mr. Gingras suggested, the employer could put such a list on its Intranet site, which could prevent this type of situation.

[37] Moreover, it is not in dispute that the employees covered by the application for exclusion have been properly designated by the employer as the first level in the grievance process. I therefore conclude that these 20 persons have indeed been designated as the first level in the grievance process at the Library.

[38] The second question to be decided is therefore whether the persons designated by the employer do, as a matter of fact, have the duty and responsibility to deal with grievances on behalf of the employer. A review of the Board's decisions is necessary to decide this question.

[39] Mr. Finkelman, the Board's first Chairperson, wrote in *Foreign Affairs Case No. 1, supra*, at page 7, that a person responsible at a grievance level had to be ". . . a person who has been endowed by the employer with the duty and responsibility of making decisions on his own initiative on some type of complaints that are presented in writing. . . ." Mr. Finkelman specified (at page 7) that such a person ". . . at the lower

levels of the grievance process may have no authority to make a binding decision on some types of complaints; that he can do no more with respect to such complaints than refer them on to the next or the final level”.

[40] Since that case, a number of the Board’s decisions have provided further clarification. In *Dennee* (Board file 174-2-245), the Board held the following at page 13:

It is not unusual that various levels of management would work closely with staff relations personnel regarding some grievances. Staff relations divisions have been established to provide, among other services, such specialized advice and/or assistance to management personnel. The decision making authority, however, clearly remains with those persons designated pursuant to the Act.

[41] In *Public Service Alliance of Canada and Treasury Board (Kraft and Sephton Case)* (Board file 174-2-398), the persons responsible at the first level in the grievance process had received no grievance management training and knew little about how to deal with grievances. The Board accepted the exclusion, stating in paragraph 29 that this did not reveal “. . . any abuse (*mala fides*) by the employer of its authority and/or duty. . . .”

[42] Another relevant decision is *Pelletier* (Board file 172-2-284), in which the Board held that the fact that such persons consult their supervisor in preparing the reply to a grievance does not mean they are in thrall to their supervisor, and they remain free to reject their supervisor’s opinion.

[43] If we look now at the evidence in this case, it can be seen that the persons responsible at the first level in the grievance process are required to sign grievances that are handled at other levels, such as classification grievances, to acknowledge receipt thereof. The employer admitted that these persons have little or no discretion in replying to grievances on the interpretation of the collective agreement or the terms and conditions of employment. They sign them and forward them to the next level in the grievance process, or else the Labour Relations Section prepares a reply. As stated in *Foreign Affairs Case No. 1*, it is normal for the person responsible at the first level in the grievance process to have no authority to make a decision on this type of grievance and to be unable to do more than refer it on to another level.

[44] Persons responsible at the first level in the grievance process may consult the Labour Relations Section on such matters, but, according to the employer, the

authority to reply to such grievances remains with them. The Institute replied that these persons do not really have the authority to reply to grievances and in fact act merely as conduits. According to Mr. Gingras, these persons are not really able to reply to grievances because they have not been given any training and have not been formally delegated the authority to reply to grievances.

[45] The employer explained that few grievances are presented at the Library of Parliament and that it prefers to give no formal grievance management training and instead to proceed on a case-by-case basis. As we saw in *Kraft and Sephton, supra*, even if the persons responsible for a level in the grievance process have been given no grievance management training, this does not mean it can be concluded that they have no authority to reply to grievances.

[46] However, these persons have been given management authority with respect to annual leave, the approval of the main types of sick leave, the preparation of performance appraisals for the employees they supervise and so on. The evidence shows that they must reply to grievances against the decisions they have made, in respect of which they have management authority. In doing so, they must consult the Labour Relations Section to prepare their reply. It is one of the roles of the Labour Relations Section to provide advice or assistance to the persons responsible for the various levels in the grievance process. This does not mean that these persons lose their authority to reply to grievances. The Labour Relations Section is consulted, but the fact remains that the employer has given management authority and authority to reply to grievances on these subjects to the 20 employees who are the first level in the grievance process.

[47] Likewise, even if the persons responsible at the first level consult their supervisor when preparing the reply to a grievance, they actually remain free to reject their supervisor's opinion. As the Board wrote in *Pelletier, supra*, I find that the employer has given the persons responsible for the first level in the grievance process unfettered authority to reply to grievances.

[48] For all these reasons, I must therefore conclude that the 20 positions specified in paragraph 7 of this decision are excluded from the proposed bargaining unit. They are managerial or confidential positions within the meaning of section 3(c)(iii) of the PESRA, since the persons in the positions are required to deal formally with grievances on behalf of the employer.

[49] This being said, I wish to make the following recommendations to the employer. The fact that few grievances are presented at the Library means that the persons responsible for them develop little expertise or autonomy in managing grievances. As Mr. Gingras noted, the distribution of a simple document setting out the delegation of authority with respect to human resources management could make it clear to the persons responsible at the first level in the grievance process what authority they have to reply to various grievances. A second document explaining the grievance management procedure could be systematically provided to the persons responsible for the various levels in the grievance process to inform them clearly how to exercise their authority. The second document would ensure that these persons have some basic training in grievance management.

Guy Giguère
Deputy Chairperson

OTTAWA, November 28, 2003.

P.S.S.R.B. Translation