Files: 150-2-45
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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

George Czmola, John Feldsted, Gayle Fabris and Paul Llewellyn

Applicants

and

Public Service Alliance of Canada

Respondent

RE: Application for revocation of certification under subsection 43(2) of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Applicants: John Feldsted

For the Respondents: Derek Dagger

Heard at Winnipeg,
23 February 1999

The applicants pursuant to subsection 43(2) seek the revocation of the certification of the Public Service Alliance of Canada (PSAC) as the bargaining agent for the Correctional Group (CX) on the ground that it has violated the prohibition contained in subsection 40(1). Although not specified in their respective applications, I take their requests to refer to the CX-non supervisory group.

Specifically the applicants allege that the respondent has allowed employer participation in its affairs thus rendering it unfit to represent the employees in the bargaining unit.

These applications rely on the facts enunciated in cases 161-2-938, 939, 942, 944, 945, 946, 947, 953, 954 and 955. The applicants allege that Linda Garwood-Filbert, a CX officer, while occupying a position or positions included in the definition of 'managerial or confidential position' contained in the Public Service Staff Relations Act (PSSRA), served as Regional Vice-President with the Union of Solicitor General Employees (USGE) a component of the PSAC.

Certain matters of fact concerning Ms. Garwood-Filbert were agreed to by the parties. The supervisory positions held by Ms. Garwood-Filbert have not been identified by the Board as managerial or confidential positions. Ms. Garwood-Filbert has been and continues to be a dues paying member of the PSAC. The substantive position of Ms. Garwood-Filbert has been and continues to be unionized.

At the hearing the respondent objected to the Board's jurisdiction to hear these applications. Mr. Dagger referred to the Kilby et al decision (Board file 161-2-808, 150-2-44) in support of his position.

Mr. Dagger argued that the applicants were raising internal union matters which should not be the basis for a section 43 application. Section 43, as is explained in Kilby (supra) is not concerned with the individual acts of union officials. This is simply a situation where some union members do not like the participation of other union members. If the applicants are so dissatisfied, they have other avenues of redress, such as moving to another employee organization.

To allow these applications would be to allow a small group of individuals to subvert the democratic wishes of the bargaining unit as a whole. This is not what Parliament obviously intended when it enacted section 43 of the PSSRA.

In response to the respondent's objection the applicants filed written arguments which deal with the matters raised herein as well as with issues raised in 161-2-938, 939, 942, 944, 945, 946, 947, 953,954 and 955. The full verbatim text of these arguments is as follows:

PSSRA SECTION 8(1) COMPLAINTS

- *We have filed complaints with the Board respecting failures to comply with prohibitions under Section 8(1) and 10(2) of the Public Service Staff Relations Act.*

- *Our understanding is that this hearing is to determine the substance and validity of our complaints and whether there is sufficient evidence to compel the Board 1) to make further investigations of fact; 2) to declare that there has been a failure to comply with prohibitions; and 3) to take appropriate action to deal with transgressors. This proceeding, as we understand it, is similar to a preliminary hearing except that the Board will determine if further hearings, proceedings or processes are required to deal with these complaints.*

- *There are three major complaints under Section 23 of the Act:*

- *The substance of the first complaint, in respect to Ms. Linda Garwood-Filbert, is that:*
  - *On or about June of 1996 Ms. Linda Garwood-Filbert accepted the position of Regional Vice-President, Manitoba (CSC) with the Union of Solicitor General Employees – PSAC and has held that position continuously since.*
  - *On or about September 1997 Ms. Linda Garwood-Filbert accepted the position of Correctional Supervisor (CX-03) with her employer, the Correctional Service of Canada and has held the position continuously since.*
  - *Ms. Linda Garwood-Filbert, at all material times, knew her position as Correctional Supervisor (CX-03) had been declared a 'managerial or confidential position' as defined in the Act, and placed herself in a conflict of interest and in direct violation of section 8(1) of the Act.*

- *The substance of the second complaint, in respect to the Union of Solicitor General Employees and the Public Service Alliance of Canada, is that:*
  - *On or about June of 1996 Ms. Linda Garwood-Filbert accepted the position of Regional Vice-President, Manitoba (CSC) with the Union of Solicitor General Employees – PSAC and has held that position continuously since.*
  - *On or about September 1997 Ms. Linda Garwood-Filbert accepted the position of Correctional Supervisor (CX-03) with her employer, the Correctional Service of Canada and has held the position continuously since.*
  - *On or about April of 1998, and in the months following, Ms. Linda Garwood-Filbert confirmed her intent and ambitions by accepting acting positions as a Unit Manager (AS-05) with her employer for varying durations.*
  - *On or about April of 1998, Ms. Linda Garwood-Filbert accepted a position on the contract negotiating team for the Public Service Alliance of Canada while holding an excluded position and acting in a managerial position for her employer.*
  - *At all material times the Union of Solicitor General Employees – PSAC and the Public Service Alliance of Canada were aware that Ms. Linda Garwood-Filbert was employed in a 'managerial or confidential position' as defined in the Act, and was acting in a higher managerial position from time to time.*

- *The substance of the second complaint, in respect to the Treasury Board of Canada and Correctional Service Canada, is that:*
  - *On or about June of 1996 Ms. Linda Garwood-Filbert accepted the position of Regional Vice-President, Manitoba (CSC) with the Union of Solicitor General Employees – PSAC and has held that position continuously since.*
  - *On or about September 1997 Ms. Linda Garwood-Filbert accepted the position of Correctional Supervisor (CX-03) with her employer, the Correctional Service of Canada and has held the position continuously since.*
  - *On or about April of 1998, and in the months following, Ms. Linda Garwood-Filbert confirmed her intent and ambitions by accepting acting positions as a Unit Manager (AS-05) wit her employer for varying durations.*
  - *On or about April of 1998, Ms. Linda Garwood-Filbert accepted a position on the contract negotiating team for the Public Service Alliance of Canada while*

holding an excluded position and acting in a managerial position for her employer.

- *At all material times the Treasury Board of Canada and the Correctional Service of Canada were aware that Ms. Linda Garwood-Filbert was employed in a 'managerial or confidential position' as defined in the Act, and was acting in a higher managerial position from time to time.*

- *In recognition that the complaints are intertwined and filed separated largely due to the definitions of each party under the Act, we propose to put forward our case in respect to all three respondents simultaneously.*

- *We submit that there is no practical value in dealing with Section 23 complaints separately with each respondent as the bulk of our submission will be repeated for each complaint. We do not wish to waste the time of the Board or that of the respondents.*

- *We propose to deal with the Section 43 complaint following the Section 23 complaints as only the Public Service Alliance of Canada is involved and the employer need not attend to this aspect of the hearings.*

- *We will deal first with our right to make a complaint under Section 23 of the Act. The complainants are all employees as defined under the Act and have a direct interest in who represents them in relations with the employer.*

- *As employees, we assuredly have an interest in who represents us in bargaining for a collective agreement with our employer. As has been proven in the recent past, the term of any collective agreement may be legislatively extended far beyond that envisaged by an employee organization when signing a contract in good faith.*

- *There is no restriction whatever under Section 23 of the Act as to who may, or may not, lay a complaint. There is a common law requirement that a complainant must have a lawful interest in the matter complained about. We submit that we meet the test as complainants and have a direct and ongoing interest in the matter before the Board today.*

- *We submit that the prohibitions under Sections 8, 9 and 10 of the Act are designed to firstly protect employees as defined in the Act and secondly to ensure fair and unbiased representation of those employees in negotiations with their employer. As employees, we find the election or appointment of an employer manager*

represent us and to act for us on our employee organization contract negotiating team unacceptable.

- *We further submit that we do not need to prove impropriety to lodge a complaint under Section 23 of the Act. Section 8(1) stands as a bar to the <u>possibility</u> of employer involvement or impropriety in the formation and operation of an employee organization.*

- *Section 10(2) prohibits bad faith representation of employees and we submit that subverting contract negotiations by allowing an employer manager to sit on our negotiating team is an ultimate in bad faith representation.*

- *We appear here to ask the Board to uphold the prohibitions under Section 8(1) and 10(2) and submit again that we have the standing to do so.*

- *Next, we will deal with the theory that a management or confidential employee can continue to participate in the operation of an employee organization as long as the employer has not made application under Section 5.2 of the Act for identification of the position as a managerial or confidential exclusion.*

- *We submit to the Board that the application of Section 8(1) is separate and independent from, and not contingent or dependent on, applications under Section 5(2) of the Act.*

- *Section 8(1) does not specify position <u>identified</u> as being managerial or excluded positions, ONLY …..<u>persons who occupy</u> managerial or confidential positions as defined in the Act. We submit that if legislators had envisaged restricting the prohibition to positions identified under Section 5 as managerial or confidential positions they would have so stated in the wording of Section 8(1).*

- *We further submit that Section 5.2(1) of the Act is written in permissive rather than imperative language:*

  *5.2 (1) Where, before or after the coming into force of this section, a bargaining agent has been certified by the Board, the employer **<u>may</u>**, in the prescribed manner, identify any position described in subsection 5.1(1) of an employee in the bargaining unit for which the bargaining agent was certified as a managerial or confidential position, and for the purpose of that identification the reference in paragraph 5.1(1)(d) to the Board shall be construed as a reference to the employer.*

*An employer **may** identify a managerial or confidential position under Section 5.2 of the Act. There is **no onus, no demand on** and **no requirement** for an employer to do so.*

*We submit that at any given time, all positions defined as "managerial or confidential" under the Act will **not** necessarily be identified through an application for identification by the employer. There is, after all, no requirement for the employer to make application for identification, only permission to do so. The failure of an employer to identify managerial or confidential positions can be due to delays in process, oversight, clerical error or other innocent misadventure, **but** could conceivably be done by intent or even malice.*

We further submit that making applications for, or the failure to make application for, identification of managerial or confidential positions under Section 5.2 of the Act does not, in any way, absolve an employer from a duty to avoid the prohibitions in Section 8(1) of the Act.

There is no requirement for a union or employee organization to identify managerial or confidential positions. We submit that it would be disadvantageous for an employee organization or union to do so. Membership numbers and income from dues would reduce. Indeed, Section 5.3 of the Act makes provision for an employee organization to challenge identification of positions as managerial or confidential to reacquire members.

We submit that an employee organization or union cannot transfer its responsibility for complying with prohibitions under Section 8(1) of the Act to the employer through relying solely on applications under Section 5 (2) of the Act to protect itself.

Our position is that the prohibitions contained in the Act, Sections 8, 9 and 10 cannot be read as contingent on identification of managerial or confidential positions as defined in the Act. We submit that if legislators had envisaged such a restriction they would have so stated in wording the prohibitions contained in sections 8, 9 and 10. They did not do so.

*We further submit that if this were the case, Section 5 (2) would be written in imperative language **requiring** employer identification of managerial or confidential positions rather than in permissive language **allowing** the employer to make such identifications.*

Under the Act, the sole authority on what is and is not a managerial or confidential position is the Board, as set out under Sections 5.1, ss (1), 5.2, ss (4) and 5.3, ss (2):

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:

(a) a position the occupant of which has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;

(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;

(c) a position the occupant of which is directly involved in the process of collective bargaining on behalf of the employer;

(d) a position the occupant of which has duties and responsibilities not otherwise described in this subsection and who in the opinion of the Board 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; and

(e) a position the occupant of which has, in relation to staff relations matters, duties and responsibilities confidential to a position described in paragraph (a), (b) or (c).

5.2 (4) Where an objection to an identification is filed pursuant to subsection (3), the Board, after considering the objection and giving the employer and the bargaining agent an opportunity to make representations, shall confirm or reject the identification.

5.3 (2) Where an objection to an identification is filed pursuant to subsection (1), the Board, after considering the objection and giving the employer and the bargaining agent an opportunity to make representations, shall confirm or terminate the identification.

We submit that a decision on whether there has been a violation of the prohibition under Section 8(1) of the Act requires a separate Board decision on the managerial or confidential status of the positions held by Ms. Garwood-Filbert.

We submit that the Board has the power, under Sections 23 and 25 of the Act, to make investigations required. We further submit that the Board holds the power to make a determination on the managerial or confidential status of the positions Ms. Garwood-Filbert holds with the Correctional Service of Canada, on both a substantive basis and in an acting capacity whether an application for identification has been made or not.

We further submit that the Board can make such determinations when considering complaints under Section 23 of the Act. The validity of such complaints cannot be assessed without this determination of status of the positions.

We submit that the failure to apply for identification under section 5(2) of the Act or an application in process for identification cannot be used as a subterfuge by either the employer or an employee organization to avoid a duty to comply with the specific prohibitions under section 8(1) of the Act.

We further submit that Section 8(1) applies to both employers and employee organizations and that there is onus on each adhere to the prohibition. We would bring the Board's attention to Section 40(1) of the Act:

> *40. (1) The Board shall not certify as bargaining agent for a bargaining unit, any employee organization in the formation or administration of which there has been or is, in the opinion of the Board, participation by the employer or any person acting on behalf of the employer of such a nature as to impair its fitness to represent the interests of employees in the bargaining unit.*

Clearly, the prohibition under Section 8(1) applies to an employee organization since certification as a bargaining agent is contingent on complying with the prohibition in Section 8(1) of the Act.

We submit that there is an onus on an employer to comply with the prohibitions under Section 8(1) as otherwise an employer could, by not advising the Board or employee organization that a given position was managerial or confidential, entrap an employee organization in violation of Section 8(1) and Section 40 of the Act.

We will now turn our attention to the specifics of violation of Section 8(1) of the Act:

For several months prior to the filing of the complaints before the Board, Linda Garwood-Filbert occupied a managerial or confidential position with the Correctional Service of Canada, as defined under the Act:

> *"managerial or confidential position" means a position
>
> > *(g) identified as such a position pursuant to section 5.1 or 5.2, the identification of which has not been terminated pursuant to section 5.3;*

For further clarification, we draw the Board's attention to Section 5.1 of the Act:

> *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;*

We will show that Ms. Garwood-Filbert's positions for the past few months clearly involve the duties set out in definition sub-section (g) and further clarified under Section 5.1 subsection (b).

Ms. Garwood-Filbert's substantive position has been that of a Correctional Supervisor (CX-03) and we submit the Correctional Supervisor (CX-3) generic work description as Exhibit #____.

We have added line numbers to the document for ease of reference. We draw the Board's attention to Page 1, line 41 "evaluates staff performance, takes disciplinary actions" and to Page 3, lines 125 through 129:

> *The work involves:*
> > *supervising and motivating a minimum staff of twelve (12) correctional officers, including defining training and development needs, preparing staff performance appraisals, monitoring the use of*

> *overtime and leave, recommending and taking disciplinary action, and maintaining a duty roster, supervising institutional staff during their shift.*

We submit that the duties described, in particular the duty to invoke employee discipline, are within the definitions under Section 5.1 sub-section (1) item (b) of the Act.

As evidence of some of the occasions on which Ms. Garwood-Filbert has acted as a Unit Manager, we submit copies of the Stony Mountain Institution weekly Routine Orders dated 01 April 1998, 21 October 1998, 18 November 1998, 22 December 1998 and 27 January 1999 as Exhibits #

These documents indicate that Ms. Garwood-Filbert has acted as Unit Manager for the periods:

> *02 April to 20 April 1998*
> *20 October to 22 October 1998*
> *16 November 1998 to 18 December 1998*
> *21 November 1998 to 04 January 1999*
> *31 January 1999 to 02 February 1999*

although we hasten to add that this list is by no means exhaustive or complete.

We submit the Unit Manager generic work description as Exhibit #_____. Again, we have added page and line numbers for ease of reference.

We draw the Board's attention to page 3, lines 80 through 82. We submit that the duties outlined, which include discipline of employees and in particular the response to first level grievances, are within the definitions under Section 5.1 sub-section (1) item (b) of the Act.

We have not brought the actual work descriptions pertaining to Ms. Garwood-Filbert, as they are not available to us without a breach of the Privacy Act. If there is any question respecting the voracity of the work descriptions we have submitted, we invite the Board to exercise its powers and demand production of the appropriate authentic documents.

We also submit an instruction entitled "Steps in the Grievance Procedure" put out by Prairie Region Deputy Commissioner Mr. Remi Gobeil dated 30 September 1997. We have added page and line numbers for reference. This instruction was issued to support the employer contention that Correctional Supervisor positions were managerial or confidential exclusions.

We bring the Board's attention to Page 4, lines 135 through 150. It is clear that both Correctional Supervisor and Unit Manager positions have responsibility for first level

management grievance responses and are within the definitions under Section 5.1 sub-section (1) item (b) of the Act.

We submit for reference a letter written to complainant George Czmola dated 08 April 1997 and signed by Ms. Garwood-Filbert as evidence of her activity as a manager invoking disciplinary action as Exhibit #_____.

We also submit for reference a first level grievance response to complainant Czmola signed by Ms. Garwood-Filbert as responding manager dated 06 June 1997 as Exhibit #_____.

It is interesting to note that;

1) *this grievance response predates Mr. Gobeil's official instruction by some three months; and*
2) *this grievance response indicates that Ms. Garwood-Filbert has occupied a managerial position as defined under the Act since early June 1997 or some 20 months ago.*

We submit that the positions occupied by Ms. Garwood-Filbert are bona fides managerial or confidential positions, and invite the Board to make such further investigation as it deems appropriate to make a confirmation declaration.

Simultaneously, Ms. Garwood-Filbert has occupied the position of Regional Vice-President, (CSC) Manitoba with the Union of Solicitor General Employees component of the Public Service Alliance of Canada since re-election to that position about June, 1996.

We submit for reference a letter from Mr. Barry Done of the Public Service Alliance of Canada to Mr. Dumoulin of the Board office dated 25 November 1998 as Exhibit #_____.

1) *Under item #1, Mr. Done confirms Ms. Garwood-Filbert' membership in the PSAC.*
2) *Under item #2, Mr. Done confirms Ms. Garwood-Filbert's employment position as a Correctional Supervisor (CX-3)*
3) *Under item #4, Mr. Done confirms Ms. Garwood-Filbert's positions with the employee organization as Regional Vice-President and member of the Table 4 negotiating team.*

We submit that the substance of our complaints was lost on Mr. Done and on the PSAC. We find it incredible that the conflict of interests is not apparent to either the organization or its counsel.

Correctional Service of Canada employees, including the complainants before you, are represented on the National

Executive of their employee organization by an employer manager. We submit that this is a violation of Section 8(1) of the Act.

There have been many attempts, by many employees to resolve this matter. We submit copies of correspondence by Mr. Andrew Reekie as Exhibit #_____.

We submit copies of the reply by Ms.. Lynn Ray as Exhibit #__.

In Ms.. Ray's letter, dated February 10, 1998, just over a year ago, she states:

> *"It is the position of the USGE National office and National Executive, that Sister Garwood-Filbert, among others, remains a member in good standing of USGE, despite her CX-3 classification. To date, there has not been a request for exclusion by CSC National Headquarters and until such time as the exclusion is requested and processed, she is entitled to attend all meetings and functions of this organization as well as hold office on the National Executive."*

We submit to the Board that the position of the USGE National Executive, as outlined by Ms.. Ray, is incorrect, untenable and illegal.

We submit copy of a letter signed by Local Executive members to the Stony Mountain Local dated 23 November 1998 as Exhibit #_____.

The letter outlines attempts to rectify the failure to comply with prohibitions dating back to April of 1998. We submit that although there have been other attempts by various individuals to address this matter, it has proven to no avail, and brings us before you to consider the complaints we address today.

We submit that the USGE, as an employee organization cannot hide behind section 5 of the Act as an excuse for failure to avoid the prohibitions under Section 8(1) and that the prohibitions under Section 8(1) stand alone.

We, as the complainants are appalled that the USGE is apparently incapable of recognizing a serious conflict of interest. We submit that in its endeavours to combat the employer at every turn on identification of managerial or confidential positions, the USGE has completely ignored its responsibility to comply with the prohibitions under Section 8(1).

On or about April of 1998, Ms. Garwood-Filbert was elected to or appointed to the PSAC Table 4 (CX) negotiating team to

replace Mr. Serge Paquette, who resigned from the USGE/PSAC to take up a position as a Correctional Supervisor (CX-3) with the Correctional Service our employer. Mr. Paquette, at least, had the good sense to avoid a serious conflict of interest situation.

We have shown, through exhibits _____ that Ms. Garwood-Filbert has acted as a Unit Manager on several occasions for varying lengths of time. We remind the Board that these are only some of the occasions on which Ms. Garwood-Filbert acted as Unit Manager. We draw your attention to section 2(2) of the Act:

> *2. (2) In this Act, a reference to a person who occupies a position or to the occupant of a position includes a person who is acting in that position or who has assumed wholly or substantially the duties and responsibilities of that position and a reference to the position of a person includes a position of a person who is acting in that position or who has assumed wholly or substantially the duties and responsibilities of that position.*
>
> *R.S., 1985, c. P-35, s. 2; 1992, c. 1, s. 116, c. 54, ss. 32, 78 (E); 1996, c. 18, s. 17.*

We would point out to you that the position of Unit Manager occupied by Ms. Garwood-Filbert in an acting capacity is an identified managerial or confidential position. The reasons given by Ms.. Ray for the continued union membership of Ms. Garwood-Filbert do not apply to her acting as a Unit Manager which should have resulted in her withdrawal from the union and from all union offices.

We further submit that the employee organization union violation of Section 8(1) in this instance also results in a violation of Section 10(2) of the Act:

> *10. (2) No employee organization, or officer or representative of an employee organization, that is the bargaining agent for a bargaining unit shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in the unit.*
>
> *R.S., 1985, c. P-35, s. 10; 1992, c. 54, s. 36.*

We submit a list of the PSAC CX Group negotiating team, taken from the PSAC Internet site last November as Exhibit # _____.

Ms. Garwood-Filbert is shown as the team representative for the Prairies region.

We respectfully submit that allowing an employer manager to sit on the employee organization or union negotiating team cannot be construed as representing the complainants or correctional officers at large in good faith. We further submit that the decision to allow Ms. Garwood-Filbert to continue to act as an officer of the organization and member of the negotiating team was arbitrary, and that this arbitrary decision has not been reviewed despite several pleas for reconsideration.

Finally, we turn our attention to the matter of requested redress.

In respect to our complaint against Ms. Garwood-Filbert, we have asked the Board for an Order:

- *That Ms. Linda Garwood-Filbert be prohibited from membership in or participation in the activities of the Union of Solicitor General Employees – PSAC or the Public Service Alliance of Canada effective immediately and continuing for as long as she holds a position of Correctional Supervisor (CX-03) or higher with the Correctional Service of Canada.*

We submit that Ms. Garwood-Filbert has an obligation to obey the law and has failed to observe the prohibitions under Section 8(1) and 10(2) of the Act. We further submit that Ms. Garwood-Filbert is unable or unwilling to accept that she cannot serve two masters in an executive capacity without serious conflict of interests.

We are confident that on examination, the Board will find that Ms. Garwood-Filbert's positions with our employer are managerial or confidential and will make a declaration to that effect. In view of the long-standing violation of Section 8(1) prohibitions we request the Board order in addition to any declaration on managerial or confidential identification to make it clear that violations of the prohibitions will not be tolerated.

In respect to the Union of Solicitor General Employees and the Public Service Alliance of Canada, we have asked the Board for Orders:

- *that the Union of solicitor General Employees – PSAC and the Public Service Alliance of Canada be prohibited from allowing membership of employer representatives in contravention of Section 8(1) of the Act; and*
- *that the current negotiations between the Treasury Board and the Public Service Alliance of Canada at Table 4 (Correctional Group) be declared void due to tainting by an employer representative sitting on the union negotiating team; and*

- *that all outstanding matters at contract negotiation at Table 4 (correctional Group) be referred to binding arbitration immediately.*

We submit that there is a requirement for an employee organization to observe the prohibitions under Section 8(1) and further, that this requirement is not mitigated by application of Section 5 (2) of the Act. Our primary concern is in respect to persons occupying managerial or confidential positions also acting as officers, officials and representatives o the employee organization. We submit that if there is any doubt, or if the employer has applied for declaration that a given position is managerial or confidential, the employee organization must exercise discretion and avoid allowing a member to hold office in its organization pending decision of the Board.

We submit that in this instance, the employee organization has attempted to avoid the prohibitions under Section 8(1) by transferring its responsibilities to the employer through reliance on applications under Section 5(2). We ask that the Board reject this argument and issue an order confirming the provisions of Section 8(1).

We submit that contract negotiations between the employee organization and the employer have been compromised by having a management or excluded member on the employee organization negotiating team. We submit that it is significant that the membership of the correctional officer group rejected the tentative settlement recommended by the negotiating team and the employee organization.

We submit a copy of the PSAC release on strike votes for members as Exhibit #_____ Table 4 – Correctional Officers voted 92% in favour of a strike which we feel is indicative of some strong feelings of discontent in this group.

We submit a copy of an employer organization news release as evidence of the rejection as Exhibit #_____. 6 out of 10 correctional officers rejected the tentative agreement that the negotiating team and their employer organizations recommended. There seems to be a considerable problem in communications between the members and their union.

We submit that the employee organization has made no effort whatever to rectify the situation and that ongoing negotiations are subject to suspicion and not in the interests of the complainants or of other members of the correctional officer (CX) group.

We respectfully point out that both the employee organization and the employer were aware of Ms. Garwood-Filbert's dual roles and conflict of interest, yet

did nothing to bring Ms. Garwood-Filbert or themselves into compliance with Section 8(1) of the Act.

We submit that a declaration by the Board that the negotiations for Table 4 have been compromised is in order.

We further submit that an Order referring all outstanding contract issues to binding arbitration is the best means of overcoming the breach of trust in current negotiations with a minimal effect on the employees effected.

In respect to the Correctional Service of Canada and the Treasury Board of Canada, we have asked the Board for Orders:

- *that the Treasury Board of Canada and the Correctional Service of Canada be prohibited from allowing representatives to participate in union activities and in union representations in contravention of Section 8(1) of the Act; and*
- *that the current negotiations between the Treasury Board and the Public Service Alliance of Canada at Table 4 (Correctional Group) be declared void due to tainting by an employer representative sitting on the union negotiating team; and*
- *that all outstanding matters at contract negotiation at Table 4 (Correctional Group) be referred to binding arbitration without delay.*

We submit that there is a requirement for an employer to observe the prohibitions under Section 8(1) and further, that this requirement is not mitigated by application of Section 5(2) of the Act. Our primary concern is in respect to persons occupying managerial or confidential positions also acting as officers, officials and representatives of a employee organization. We submit that if there is any doubt, or if the employer has applied for declaration that a given position is managerial or confidential, the employer must exercise discretion and avoid allowing an employee to hold office in an employee organization pending decision of the Board.

We submit that contract negotiations between the employee organization and the employer have been compromised by having a management or excluded member on the employee organization negotiating team. We submit that it is significant that the membership of the correctional officer group rejected the tentative settlement recommended by the negotiating team and their employee organization.

We submit that the employer has made no effort whatever to rectify the situation and that ongoing negotiations are subject to suspicion and not in the interests of the complainants or of other members of the correctional officer (CX) group.

We respectfully point out that both the employee organization and the employer were aware of Ms. Garwood-Filbert's dual roles and conflict of interest, yet did nothing to bring Ms. Garwood-Filbert or themselves into compliance with Section 8(1) of the Act. We submit that a declaration by the Board that the negotiations for Table 4 have been compromised is in order.

We further submit that an Order referring all outstanding contract issues to binding arbitration is the best means of overcoming the breach of trust in current negotiations with a minimal effect on the employees effected.

We recognize that the exchanges and interchange between an employee organization and an employer become heated and lead to entrenched positions on both sides. We submit that despite the trials and tribulations of labour relations combat, the rights and interests of the employees being represented cannot and must not be set aside.

The essence of the Public Service Staff Relations Act is embodies in Sections 8, 9 & 10 of the Act. These prohibitions set out the essence of fair labour relations practice to be exercised in the public sector. These prohibitions set out protections against unscrupulous activities by the parties as defined in the Act. Most of all, these prohibitions ensure that the employees defined under the Act will be represented fairly without discrimination.

We submit that a failure to comply with the prohibitions set out in the Act is a very serious matter and attacks the very foundation of the legislation. If thousands of federal employees are to have any confidence in the representation and collective bargaining processes set out in the Act, the Board must deal with our complaints fairly but firmly.

We respectfully remind the Board that we are dealing with the

Public Service Staff Relations Act, not the
Public Service Employers Act; and not the
Public Service Employee Organization Act.

We have come before you asking the Board to investigate our complaints further as it sees fit. We beseech you to intervene as appropriate in this matter.

We submit that it is imperative for the Board to protect the members of the correctional officer (CX) group from arbitrary and illegal representation by the Union of Solicitor General employees and the Public Service Alliance of Canada.

> *We submit that no respondent is or are entirely blameless in this matter. However ferreting out a responsible person or persons is less important than dealing expediently with this situation to the benefit of the employees concerned and sending a signal to employers and employee organizations that transgressions of prohibitions under the Act will not be tolerated. We further submit that the orders requested will accomplish that end.*

Conclusions and Reasons for Decision

Subsections 43(2) and 40(1) of the PSSRA read as follows:

> *43.(2) Where the Board, on application to it by the employer or any employee, determines that a bargaining agent would not, if it were an employee organization applying for certification, be certified by the Board by reason of a prohibition contained in section 40, the Board shall revoke the certification of the bargaining agent.*
>
> *40. (1) The Board shall not certify as bargaining agent for a bargaining unit, any employee organization in the formation or administration of which there has been or is, in the opinion of the Board, participation by the employer or any person acting on behalf of the employer of such a nature as to impair its fitness to represent the interests of employees in the bargaining unit.*

To allow this application the Board would have to conclude that the PSAC has allowed participation by the employer or a person acting on the employer's behalf in its affairs to such an extent that it is no longer fit to represent the interests of the employees in the bargaining unit. Subsection 40(1) clearly provides for a two step test to be met before the certificate of a bargaining agent can be revoked.

That is to say the applicants must first show the employer or its agent has participated in the administration of the employee organization. Once that first step has been met, the applicants would then have to show that the employer's participation was of such a nature as to impair the bargaining agent's fitness to represent the interests of employees in the bargaining unit.

The applicants have not met the first test of subsection 40(1). They have produced no evidence of employer participation in the affairs of the PSAC.

The Board's decisions in 161-2-938, 939, 942, 944, 945, 946, 947, 953, 954 and 955 find that Ms. Garwood-Filbert has not and does not occupy managerial or confidential positions.

I need not then perform the second step evaluation required by subsection 40(1) which is only necessary when there exists some evidence of employer participation in the administration of the affairs of the bargaining agent.

These applications are dismissed.

Yvon Tarte
Chairperson

Ottawa, April 29, 1999