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*Parliamentary Employment and  
Staff Relations Act*



Before a panel of the  
Federal Public Sector Labour  
Relations and Employment Board

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BETWEEN

**SENATE PROTECTIVE SERVICE EMPLOYEES ASSOCIATION,  
HOUSE OF COMMONS SECURITY SERVICES EMPLOYEES ASSOCIATION,  
AND PUBLIC SERVICE ALLIANCE OF CANADA**

Applicants

and

**PARLIAMENTARY PROTECTIVE SERVICE**

Respondent

Indexed as

*Senate Protective Service Employees Association v. Parliamentary Protective Service*

Interlocutory decision in the matter of an application for the determination of the inclusion of an employee or class of employees in a bargaining unit, set out at section 24 of the *Parliamentary Employment and Staff Relations Act*

**Before:** Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Applicants:** Senate Protective Service Employees Association - Geneviève Brunet-Baldwin, counsel; House of Commons Security Services Employees Association - Sylvain Beauchamp, counsel; and Public Service Alliance of Canada - Kim Patenaude, counsel

**For the Respondent:** George Vuicic, counsel

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Decided on the basis of written submissions filed  
November 15 and December 12, 2018, and January 21 and March 13, 2019,  
and on oral submissions by teleconference held February 28, 2019.  
(FPSLRB Translation)

**I. Application before the Board**

[1] The Parliamentary Protective Service (“the employer” or “the respondent”), created in 2015, is made up of a group of employees who are part of three different bargaining units represented by three bargaining agents. House of Commons security employees are represented by the House of Commons Security Services Employees Association (HCSSEA), Senate security employees are represented by the Senate Protective Service Employees Association (SPSEA), and scanners are represented by the Public Service Alliance of Canada (PSAC).

[2] The three bargaining agents are the applicants in this application.

[3] Each applicant filed an application with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 24 of the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd supp.); *PESRA*) to have those in program manager, program authority, and program instructor positions declared members of their respective bargaining units. Pending the Board’s ruling on their applications under s. 24, the applicants ask that the Board make a interim order declaring that those in program manager, program authority, and instructor positions are part of one of the three bargaining units.

[4] This decision deals with the application for a interim order. Pending a definitive ruling on the application filed under s. 24 of the *PESRA*, the Board declares that those in the positions in question are part of one of the three bargaining units that the applicants represent.

**II. Background**

[5] Recently, the respondent created an operational training unit to train employees. It created new positions in that unit, which have a classification different from those of the bargaining units’ members. According to the respondent, those in the newly created program manager, program authority, and program instructor positions are excluded from the definition of “employee” in s. 3 of the *PESRA* as they are persons “... employed in a managerial or confidential capacity ...”, one of the reasons for exclusion from the definition. As they are not employees, they cannot be part of a bargaining unit. The positions were posted around September 28, 2018. From August 30, 2018, the respondent had confirmed to the applicants that the positions would not be part of the bargaining units, which it reaffirmed on September 27, 2018. The applicants reacted by filing applications under s. 24 of the *PESRA* to have those in

the new positions recognized as part of their bargaining units.

[6] The HCSSEA and the SPSEA filed documents that show that the bargaining units' members had until now assumed the training duties. Appendix D of the HCSSEA collective agreement provides for a bonus to be paid to employees acting as instructors. The HCSSEA and the SPSEA submitted a memo dated August 11, 2016, in which the respondent invited the bargaining units' members to apply for a training specialist position, the duties of which mirrored those of the newly created positions.

[7] For its part, the PSAC maintains that since 2015, the bargaining unit's members have assumed scanner training duties. The incumbent of the new scanning program authority position continues to perform the same duties as before, as the lead trainer. Similarly, the incumbent of the new scanning trainer position continues to perform the same duties as before.

### **III. Summary of the arguments**

[8] The applicants maintain that by declaring that those in the new positions are not "employees" within the meaning of s. 3 of the *PESRA*, the employer contravenes the provisions of the *PESRA*, since if the bargaining agent representing the employees in these positions objects to the designation "person employed in a managerial or confidential capacity", it is the Board that decides whether to grant that designation; the respondent cannot impose it.

[9] The applicants request a interim order to preserve the rights of the employees who are currently part of the bargaining unit and who, by obtaining one of the announced positions, are automatically removed from the bargaining unit. According to the applicants, removing employees from a bargaining unit deprives them of their right to union representation.

[10] The respondent maintains the following in paragraph 19 of its response: "[translation] ... it would be inappropriate to include the operational training unit positions in the application for membership in the bargaining unit since they are managerial or confidential positions within the meaning of the *Parliamentary Employment and Staff Relations Act*."

[11] According to the respondent, those in the new positions will perform duties that until now were not all filled by the bargaining units' members.

[12] The respondent maintains that the application for membership, and thus an application for a interim order, is premature, because the Board will have to rule on whether the positions are managerial or confidential, as the respondent argues. I quote paragraph 35 of the respondent's response to the HCSSEA's application, as follows:

[Translation]

*35. The PPS intends to soon file an application to designate these positions as managerial or confidential. Until a ruling is made on the PPS's application, this application for membership is premature.*

[13] In a letter addressed to the Board and dated March 13, 2019, the respondent took the position that since these are new positions, it is not necessary to make an application under s. 39 of the *Parliamentary Employment and Staff Relations Regulations* (SOR/86-1140; "the *Regulations*"), which sets out the procedure for excluding persons associated with the employer from the definition of "employee" when they are part of a bargaining unit.

#### **IV. Analysis**

[14] This decision deals only with the applicants' application for a interim order; that is, a declaration that those in the new positions that the respondent created are currently part of one of the three bargaining units.

[15] The HCSSEA represents the bargaining unit defined as "... all employees of the employer in the Protective Services Group ..." at the House of Commons.

[16] The SPSEA represents the bargaining unit defined as "[translation] all employees of the employer in the Protective Service Sub-group in the Operational Group".

[17] The PSAC represents the bargaining unit defined as "[translation] all employees of the House of Commons Security Services Directorate who work as scanners and scanner supervisors".

[18] First, the respondent argues that those in the new positions are not employees due to their exclusion in s. 3 of the *PESRA*, which defines the term "employee". Second, in a letter addressed to the Board on March 13, 2019, the respondent maintains that they are new positions, and as a result, it is not necessary to exclude them.

[19] In s. 3 of the *PESRA*, the term "employee" is defined in part as follows:

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

(a) ...

(b) ...

(c) ...

(d) a person employed in a managerial or confidential capacity ...

(e) ...

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 ....

[Emphasis in the original]

[20] Section 3 of the *PESRA* effectively excludes those employed in a managerial or confidential capacity from the definition of "employee". Thus, they cannot be part of a bargaining unit composed of employees. Nevertheless, the definition of "person employed in a managerial or confidential capacity", also in s. 3 of the *PESRA*, should be considered. It provides as follows that only the Board, or the employer in the prescribed manner, can designate a person as employed in a managerial or confidential capacity:

**person employed in a managerial or confidential capacity**  
means any person who

(a) ...

(b) ...

(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 [sic] prescribed manner by the employer or by the Board on objection thereto by the bargaining agent, to be a person ....

[Emphasis in the original]

[21] Section 39 of the *Regulations* specifies as follows how the employer must file an application to exclude a position based on the reason that the employee is a person employed in a managerial or confidential capacity:

**39 (1)** *Where, after the Board has certified an employee organization as bargaining agent for a bargaining unit, the employer wishes to designate any person in the bargaining unit described in subparagraphs (c)(i) to (v) of the definition **person employed in a managerial or confidential capacity** in section 3 of the Act, the employer shall file with the Board in duplicate a statement setting forth the name of the person whom the employer wishes so to designate, the person's job description, classification, the subparagraph under which the person is to be designated and, where any such person is to be designated under subparagraph (iv), the position, title, job description and classification of the person to whom the position of employment of the person to be designated is confidential.*

[Emphasis in the original]

[22] The respondent recognizes the necessity of such an approach, since twice in its response to the HCSSEA's application (at paragraphs 25 and 35), it states its intention to apply to the Board for designation. I note paragraph 25 ([translation] "... the PPS intends to file an application for the designation of these persons as employed in a managerial or confidential capacity under the *PESRA* regulations ..."). Paragraph 35 ([translation] "The PPS intends to soon file an application to designate these positions as managerial or confidential.") does not meet the requirements of the *PESRA* or its *Regulations*, since under that Act, persons are excluded, not positions. The same comment applies to the March 13, 2019, letter, which speaks of creating new positions and not of those occupying them.

[23] The new positions that the respondent created are or will be held by persons who work to ensure Parliamentary security by offering training in one of the three roles of the PPS employees represented by the applicants: House of Commons security, Senate security, and security provided by scanners. They are employees; they are associated with the employer and, as a result of their duties, are currently part of one of the three bargaining units. In the absence of an application for exclusion, I see no reason not to include the trainers in the bargaining unit where they work to ensure Parliamentary security, in accordance with the definition of the members who make up the three bargaining units.

[24] The Board's jurisdiction to act in the context of an application for a interim order is set out in s. 10 of the *PESRA*, which reads as follows:

**10** *The Board shall administer this Part and shall exercise the powers and perform the duties and functions that are conferred or imposed on it by, or are incidental to the*

*attainment of the objects of, this Part including the making or orders requiring compliance with this Part, with any regulation made under the Part or with any decision made in respect of a matter coming before the Board under this Part.*

[25] I believe that an order that recognizes the employee status of those appointed to the employer's newly created positions complies with the *PESRA* and its *Regulations*. Under the guise of its right to manage, the employer may not create positions and circumvent the rights of the individuals in those positions as employees simply by a declaration that they are not employees. The *PESRA* sets out a very specific procedure for declaring that a "person employed by an employer" is a "person employed in a managerial or confidential capacity". It seems clear to me that the duties performed by those in the new positions logically arise from the security provided by PPS employees. Training is provided on-site and is focused on the specific requirements of the three bargaining units' members. In the past, those members performed the training duties. If a distinction is to be made, the respondent argues that it has to do with the managerial or confidential role of those occupying the new positions. The respondent has to demonstrate it. In the absence of designating those employed in managerial or confidential positions within the intent of the regulatory requirements, the incumbents of these positions are still employees.

[26] The respondent seeks to remove the incumbents of the new positions from the bargaining units, and it is possible that it would succeed. However, to do that, it must comply with the exclusion procedure and allow the Board to rule in the event that the bargaining agents object. Before that ruling, an employee who obtains one of the new positions continues to be an employee while waiting for a future designation, if that is the decision. The new positions fall within the three bargaining units' sphere of activities.

[27] The application under s. 24 of the *PESRA* is necessary to determine the bargaining unit that the positions belong to. That application is still before the Board. Section 24 provides that the Board decides whether an employee is included in one bargaining unit or in any other, as indicated as follows in its wording:

*24 ... as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question.*

[28] Yet, the issue here is determining whether those in the employer's new training positions are "employees" within the meaning of the *PESRA*. The applicants seek a

declaration that they are employees. In the absence of a designation that would exclude them, they are employees. The Board has not yet received an exclusion application, and it must still rule on the application filed under s. 24.

[29] As a result of their employment and for the moment, these persons are part of the employees in one of the three bargaining units. The employer cannot declare on its own accord that they are excluded from the definition of “employee” because they are employed in a managerial or confidential capacity, given the definition, which provides for a designation ordered by the Board, when applicable, in the event the bargaining agent objects.

[30] During a telephone conference held on February 28, 2019, the applicants were of the view that distributing the positions among them would not present a problem. The HCSSEA and the SPSEA recognize that the incumbents of scanning training positions should be part of the bargaining unit that the PSAC represents. The incumbents of training positions for the HCSSEA and SPSEA can simply remain in the same bargaining units they were in before they obtained the new positions.

[31] The definitive membership of those in the new positions remains to be decided under s. 24 of the *PESRA*. The respondent will be free to submit a designation application for those whom it believes should be excluded.

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

*(The Order appears on the next page)*



**V. Order**

[33] The Board declares that those currently in the program manager, program authority, and instructor positions within the Parliamentary Protective Service are employees and are part of the bargaining unit of which they were members before their appointments to their new positions.

April 1, 2019.

FPSLREB Translation

**Marie-Claire Perrault,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**