Date: 20210309

Files: 572-02-3955 to 3959

Citation: 2021 FPSLREB 24

Federal Public Sector Labour Relations and *Employment Board Act* and *Federal Public Sector Labour Relations Act*

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

BETWEEN

TREASURY BOARD

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Treasury Board v. Public Service Alliance of Canada

In the matter of applications, under subsection 71(1) of the *Federal Public Sector Labour Relations Act*, for a declaration that a position is a managerial or confidential position

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Richard Fader, counsel

For the Respondent: Janson LaBond, Public Service Alliance of Canada

Decided on the basis of written submissions, filed January 13, 20, 26, and 27, 2021.

REASONS FOR DECISION

I. Applications before the Board

[1] The Treasury Board ("the applicant") seeks to have five occupational health and safety (OHS) advisors positions, classified at the AS-04 group and level in the Human Resources Branch's regional offices with Employment and Social Development Canada (ESDC), excluded from the Program and Administrative Services (PA) bargaining unit represented by the Public Service Alliance of Canada (PSAC or "the respondent") under ss. 59(1)(g) and (h) of *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The respondent opposes the applications.

[2] According to the applications, the incumbents of these AS-04 positions provide strategic advice and guidance to OHS committees and to all levels of management on a regional basis, including advice in the areas of hazard prevention, ergonomics, workplace incidents and injuries, returns to work following injury-on-duty leave, refusals to work, workplace violence issues, and complaints. Also, according to the applications, the OHS advisors have a role in monitoring to ensure compliance with and to support management in its responsibilities and accountabilities under Part II of the *Canada Labour Code* (R.S.C., 1985, c. L-2; CLC) and its regulations.

[3] The OHS advisors are part of the Workplace Management Directorate in the Human Resources Branch at ESDC and report to the same director and work collaboratively on a number of files with labour relations (LR) and harassment prevention advisors, who are not represented. The files include workplace violence complaints, refusals to work, grievances with harassment or violence allegations, and grievances involving the National Joint Council's (NJC) *Occupational Health and Safety Directive*. For those reasons, the OHS advisors regularly have access to confidential information with respect to labour relations situations.

[4] Regional OHS advisors have direct contact with directors, directors general (DGs), and assistant deputy ministers (ADMs) with respect to workplace violence complaints, work refusals, and many other OHS matters, while helping to solve problems. This involves having access to incident reports, workers' compensation board claims, investigation reports into workplace violence complaints, inspection reports, and workplace committee reports and grievances that relate to OHS.

[5] The applicant supported its applications by stating that the exclusions it seeks are justified because management must be able to speak freely to the OHS advisors without a doubt that a given advisor solely represents its interests. If management does not have that confidence, it could limit its consultation with an OHS advisor or not be receptive to the advisor's guidance, to the prejudice of the ESDC's interests.

II. Summary of the evidence

[6] As part of their regular duties, OHS advisors handle complaints filed through the internal complaint resolution process and employee claims related to disabling injuries, including workers' compensation board claims; provide advice related to refusals to work; and handle workplace violence incidents and complaints, among other things. In their daily conversations with clients, OHS advisors are made aware of sensitive, confidential, and protected information, some of which is related to areas of improvements for the applicant in terms of compliance with the *Canada Occupational Health and Safety Regulations* (SOR/86-304; "the OHS regulations").

[7] The OHS advisor provides information, advice, and recommendations to the Regional Advisory OHS committees, Workplace Health and Safety committees (WHSCs), and health and safety representatives. The committees are bipartisan and include members of the PA group. The OHS advisors provide training and guidance to those committee members. As a representative of the applicant supporting management in its efforts to apply the OHS regulations in the way the Treasury Board Secretariat (TBS) intended, the OHS advisor is often seen as the voice of management.

[8] Every day, OHS advisors promote, monitor, and provide advice and guidance on the departmental OHS program at the regional level. The five positions that fall under the Human Resources Operations team in the department support management with their daily responsibilities for the OHS program by making recommendations and providing risk analysis and options to all levels of management. To accomplish this, the OHS advisors must interpret the CLC and its regulations, as well as the TBS and NJC *Occupational Health and Safety Directive*, along with all ESDC guidelines and policies, to be able to outline the associated risks (i.e., health hazards, increased costs for the department, grievances, complaints, etc.).

[9] The applicant considers the OHS advisors experts in their field. ESDC incurs these possible risks when it does not follow an OHS advisor's recommendations:

increased work-related illnesses and injuries, increased workers' compensation claims costs, increased level of non-compliance, and adverse decisions from the Canada Labour Program, by the Occupational Health and Safety Tribunal Canada, or by the Federal Public Sector Labour Relations and Employment Board ("the Board"; this short form is used throughout this decision to refer to the Board and its predecessors).

[10] The OHS advisors and labour relations (LR) consultants, who are excluded, participate in the same case consultation meetings, at which LR and OHS cases and jurisprudence are discussed, and updates on union-management relations, including updates on collective bargaining and potential strikes are provided. For example, for a workplace violence complaint, the OHS advisor will review the allegations provided by the employee or the union and then guide management throughout the resolution process.

[11] That involves strategizing with management and guiding it in the fact-finding process to ensure that the issue is resolved effectively and at the lowest level possible. If the complaint cannot be resolved internally, a competent person may be mandated to investigate it. The OHS advisor will then offer support to management as it relates to identifying a competent person and writing the contract to hire that person for the investigation.

[12] The applicant selects the competent person, although in consultation with the WHSC or the health and safety representative, most of the time. Selecting the competent person is often a significant source of disagreement between the employee and management. The parties involved in the allegations must agree on that person's impartiality. When that impartiality is questioned, management seeks advice from the OHS advisor on assessing whether the impartiality has been reasonably questioned, and they discuss the next steps.

[13] Although there is no right to union representation when it comes to resolving OHS complaints, such as those about workplace violence, according to the applicant, in most cases, the employee will request his or her union's support and advice. Being bargaining unit members, the OHS advisors are placed in a delicate situation vis-à-vis the employees involved in a complaint (such as the complainants, respondents, and witnesses) and the union representative representing them. They are sometimes members of the same bargaining unit as is the OHS advisor.

[14] The resolution process for workplace violence complaints often requires the OHS advisors to closely work with labour relations consultants, as it is common practice at ESDC for the complainant to simultaneously file a grievance and make a harassment complaint on the same matter. This is important, as the LR consultant will guide management through the harassment complaint process, while the OHS advisor will guide it through the workplace violence complaint process simultaneously.

[15] Cooperation between LR consultants and OHS advisors is also imperative in cases of workplace violence complaints alleging harassment. In those circumstances, they work together to provide a timely and accurate response that respects the CLC, the OHS regulations, the *Values and Ethics Code for the Public Sector,* and the TBS's *Policy on Harassment Prevention and Resolution*. Most of the time, management will share the final report, which was issued by the competent person following the investigation, with the OHS advisor. The OHS advisor will then advise and guide management on implementing the corrective and preventive measures in the report, to prevent workplace violence incidents from reoccurring.

[16] The same cooperation between LR consultants and OHS advisors applies to work refusals, since they often result from an accommodation request or an assessment of functional limitations. While LR consultants support management on assessing functional limitations and its duty to accommodate, the OHS advisors provide guidance to management when it comes to the work-refusal process described in the CLC.

[17] In most cases, both the LR and the OHS aspects of a case cannot be dissociated, according to the applicant. As a result, the OHS advisor and the LR consultant will work together to analyze the information on hand and to make recommendations to management in the form of the options available to respond to an employee's request and to resolve work-refusal situations when considering the provided risk analyses from both disciplines.

[18] In that same vein, OHS advisors cooperate with LR consultants handling return-to-work cases following an employee's absence due to a work injury. OHS advisors also work closely with LR consultants on return-to-work cases involving the duty to accommodate, when functional limitations result from a work accident or an occupational illness. In such cases, both the LR consultant and the OHS advisor have

access to the same information, to formulate integrated advice when it comes to resolving a case, including sharing a tracking system or common drive with the LR consultants.

[19] Contrary to what the applicant describes as the OHS advisors' function, the respondent describes the work as limited. The OHS advisors research and analyze complaints, grievances, jurisprudence, injury data, workers' compensation cases, accident investigations, summary investigations, access-to-information requests, and client queries.

[20] In a work refusal, the OHS advisor interprets s. 129 of the CLC for the parties. The advisor then advises the parties as to whether, in the advisor's opinion, a danger existed. If management, the employee, or the WHSC disagrees with the advisor's interpretation, an external health and safety officer (HSO) working in an independent, outside regulatory capacity is then called in, as for any federally regulated employer subject to Part II ("Occupational Health and Safety") of the CLC. The HSOs, not the OHS advisors, investigate work refusals under s. 129. Likewise, the HSOs issue directions for violations of Part II of the CLC to both employers and employees under s. 145. The HSOs report to the federal Minister of Labour, not to the applicant or the PSAC.

[21] In a workplace violence complaint, which are regulated under s. 20 of Part XX ("Violence Prevention in the Work Place") of the OHS regulations (Part XX is now repealed, see *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130). The OHS advisor advises the applicant as to the impartiality of a "competent person", as defined in s. 20.9(1) of Part XX of the OHS regulations. The applicant must appoint a competent person to investigate a workplace violence incident. The OHS regulations dictate that that person must be "… impartial and … seen by the parties to be impartial …".

[22] The competent person's report is shared with the OHS advisor and the advisor then advises and guides management on implementing the report's corrective and preventative measures.

III. Summary of the arguments

A. For the applicant

[23] A position is excluded, not the incumbent, as of the change to the legislation in 1992. Before then, the incumbent was excluded. Exclusions are determined based on a position's duties and responsibilities. This distinction is important because exclusions are not determined based on the incumbent's personal philosophical leanings or integrity, real or perceived. Only relevant are the positions' duties and responsibilities.

[24] Exclusions are determined based on the position's duties and responsibilities. Some provisions of s. 59(1) relating to managerial exclusions require a threshold for exclusion (see, specifically, ss. 59(1)(d) and (e)). The jurisprudence is to the effect that only those positions involved in high-level policy of general application are excluded based on the criteria in s. 59(1)(d). Similarly, true managerial positions with authority over employees that are not ordinary supervisory positions are excluded according to the criteria in s. 59(1)(e).

[25] The confidential exclusions at issue in this case do not turn on a threshold or degree. The rules of legislative interpretation say that when Parliament has specifically provided a threshold or a degree in one paragraph but not in another, it is not open to the Board to read one in. This is borne out in the grievance jurisprudence. Even if the incumbent might never have been called upon to hear an actual grievance, the incumbent is still excluded. A parallel should be drawn with grievance levels (see *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 172-2-831 (19950426), [1995] C.P.S.S.R.B. No. 41 (QL) at 8 to 10; and *Treasury Board (Public Works and Government Services Canada) v. Professional Institute of the Public Service of Canada*, PSSRB File No. 172-2-1115 (19980721), [1998] C.P.S.S.R.B. No. 61 (QL) at paras. 14, 16, and 18).

[26] The applicant has the burden of proving that a position is one referred to in s. 59(1)(g) of the *Act* (see s. 62(3)). This omnibus or residual provision has two parts, involving excluding positions from the bargaining unit either because of a conflict of interest or because of the duties and responsibilities to the applicant.

[27] Historically, applications made under s. 59(1)(g) have been used when a position did not meet the other expressed criteria. In a 1980 case, *Office of the Auditor General of Canada v. Public Service Alliance of Canada*, PSSRB File No. 172-14-297 (19800319),

[1980] C.P.S.S.R.B. No. 2 (QL) ("*Lalonde*") at paras. 15, 16, and 20, when it dealt with proposals under s. 59(1)(g), which then included only the second criterion, "… by reason of his duties and responsibilities to the employer", the Board developed these two, related tests:

> *… whether the person … is a member of "the management team" ….*
>
> *… whether there is a likelihood of conflict between a person's duties and responsibilities to the employer and his* [or her] *interests as a member of a bargaining unit.…*

[28] The express wording, "for reasons of conflict of interest", in s. 59(1)(g) was added in the amendments of 1992. While membership on the management team has been found to necessarily entail a likelihood of conflict of interest, "… it does not follow that all cases of conflict of interest are necessarily linked to membership on the management team" (see *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 174-2-250 (19770214), [1977] C.P.S.S.R.B. 3 (QL) at para. 17 (page 12 of the original decision)).

[29] Likewise, conditions other than an express "conflict of interest" may give rise to an exclusion proposal "… by reason of the … duties and responsibilities to the employer …"; e.g., the sensitivity of the work. It is difficult to expressly enumerate all circumstances in which a position might be viewed as incompatible with membership in a bargaining unit. Section 59(1)(g) was intended to provide the Board with the discretion to assess individual cases.

[30] Although being part of a management team will lead to a conflict of interest, the Board has found the existence of such a conflict in cases in which individuals are not part of the management team (see *Office of the Auditor General of Canada*; *Canada (Treasury Board) v. Public Service Alliance of Canada*, PSSRB File No. 174-2-378 (19820831), [1982] C.P.S.S.R.B. No. 148 (QL); *Professional Institute of the Public Service of Canada v. National Film Board of Canada*, PSSRB File No. 172-8-501 (19900406), [1990] C.P.S.S.R.B. No. 78 (QL); *Treasury Board (Department of National Defence) v. Public Service Alliance of Canada*, 2000 PSSRB 85; *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 ("the 2012 CSC decision")).

[31] The Board held in the 2012 CSC decision that s. 59(1)(g) is an "umbrella provision" (at paragraph 69), while the term "conflict of interest" is "somewhat ambiguous" (at paragraph 68) and the term "duties and responsibilities to the employer" is "even more open-ended" (at paragraph 70). The Board cautioned against fettering discretion by "… attempting to provide a more restrictive definition …" (at paragraph 70).

[32] The latter term embraces situations in which bargaining unit membership "… could impair the effectiveness of that employee's performance of duties essential to the applicant" (at paragraph 72). Despite not having the traditional hallmarks for exclusion, the position at issue in that case would have had a conflict of interest between its duties and "… obligations to fellow members of the bargaining unit" (at paragraph 79). The concept of "… obligations to fellow members of the bargaining unit" has direct application in this case, given that the incumbents provide advice on matters affecting fellow bargaining unit members.

[33] In *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84, the Board commented on the divided loyalty that the incumbents in that case would face in job action situations. The case involved an application for the exclusion of numerous positions at the National Border Operations Centre of the Canada Border Services Agency. The Board noted that the low volume of the work that would result in the conflict of loyalties was not dispositive of the issue (at paragraphs 62, 63, and 67). The concept of "divided loyalty", as used in that case, has direct application to the case at hand.

[34] In *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80, the positions at issue were those of special investigators dealing with, in part, allegations of employee misconduct. The Board held that the incumbents were not part of the management team; nor were they the decision makers when it came to employee discipline. However, the Board found that their investigative and fact-finding role with respect to employees in the same bargaining unit placed them in a conflict of interest (at paragraph 100). The Board expressed dissatisfaction over the employer's delay identifying these positions for exclusion but pointed out that that did not impact its analysis under s. 59 of the *Act* (at paragraphs 103 and 104).

[35] The senior lawyer position at issue in *Treasury Board (Department of Justice) v. Association of Justice Counsel*, 2020 FPSLREB 59 ("the senior lawyer position case"), provided expert advice on issues of access to information and privacy (ATIP) to other colleagues at the Department of Justice on matters intersecting with labour relations. The intersection was found to place the incumbent in a conflict of interest. The position was excluded.

[36] In the 2012 CSC decision, the Board closely examined s. 59(1)(g) of the *Act*. In that decision, at paragraph 69, the Board stated that that section is an umbrella provision that is "… meant to catch situations in which excluding an employee can be justified on one of a broad range of grounds not captured by the more specific descriptions in the other paragraphs." The provision is "… designed as a catch-all that gives the [Board] wide scope to consider positions for exclusion that are not ordinary and that cannot be anticipated." (at paragraph 70) The intention is "… to permit the [Board] to consider situations that cannot be aligned with any of the usual rationales for excluding a position from the bargaining unit." (at paragraph 76)

[37] Implicit in the overall structure of Part II of the CLC is the recognition of a different set of interests in the manner of identifying, investigating, and resolving health and safety issues. Employers, employees, and bargaining agents are bound in an often-adversarial environment. The CLC sets out important checks and balances by which employers and bargaining agents share equal footing when resolving health and safety concerns.

[38] Depending on the number of employees in an organization, the CLC sets the mandatory requirement for health and safety representatives, workplace committees, and policy committees. Committees must appoint two chairpersons, one selected from employer members, and the other from union members. The committees must have equal representation.

[39] Along with encouraging resolution at the lowest possible level, the CLC recognizes that the employer's interests and those of employees and their bargaining agents are not always the same. Section 127.1 provides for an internal complaint resolution process that involves the committee structure. Ultimately, if an impasse arises between employer members and bargaining unit members, the matter is

investigated, and a direction is issued against the employer if a violation of the CLC and its regulations is found (see s. 145(1) of the CLC).

[40] A similar scenario is found in the refusal-to-work provisions at ss. 128 and 129. The CLC directs the parties to attempt to find a resolution at the lowest possible level. But if one is not found, a minister's delegate must investigate and decide whether there is a "danger" (resulting in a continued right to refuse work and a direction against the employer); if not, the employee at issue is required to return to work. It is a trite point, but in its members' workplaces, the PSAC takes an active role throughout the process, from the lowest level all the way to hearings before the Canada Industrial Relations Board (CIRB; formally, the Occupational Health and Safety Tribunal Canada).

[41] "Conflict of interest" is not defined in the *Act*. However, it is a well-established concept in the Board's jurisprudence. In *Atkins v. Treasury Board*, PSSRB File No. 166-02-889 (19740321) and cited in *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62 , the Board noted the definition of conflict of interest given by American professor Dean Manning as follows at page 29:

> *Any interest of an individual may conflict at times with any other of his* [or her] *interest. This book however, is concerned with only two interests: one is the interest of the government official (and of the public) in the proper administration of his* [or her] *office; the other is the official's interest in his* [or her] *private economic affairs. A conflict of interest exists whenever these two interests clash, or appear to clash.*
>
> *A conflict of interest does not necessarily presuppose that action by the official favoring one of these interests will be prejudicial to the other, nor that the official will in fact resolve the conflict to his* [or her] *own personal advantage rather than the government's. If a* [person] *is in a position of conflicting interests, he* [or she] *is subject to temptation however he* [or she] *resolves the issue. Regulation seeks to prevent situations of temptation from arising … .I have underlined the words "or appear to clash" because they go to the root of the problem. It is not sufficient for the public servant or his* [or her] *associates to be convinced of their own innocence and integrity. Nor is it necessary to prove that they have been disloyal to the employer. Even in the absence of evidence of wilful wrongdoing, a conflict of interest or the appearance thereof can be easily recognized by an intelligent citizen as contrary to public policy.*
>
> [Emphasis in the original]

[42] Likewise, in *Assh v. Canada (Attorney General)*, 2006 FCA 358 at paras. 74 to 76, the Federal Court of Appeal noted the following. The application of the "perception of conflict" test to particular facts is a question of mixed fact and law. It involves a factual assessment, which can be made based only on practical judgments and inferences, rather than direct evidence. The test for a conflict of interest is whether a reasonable person would think that there was a realistic possibility that including the OHS advisor in the bargaining unit could influence the performance of the advisor's duties.

[43] In the OHS context, the PSAC plays a key role as a stakeholder in the advocacy of its members' interests. Bargaining unit members have every right to participate in the PSAC's important work, including in advocacy in the OHS area. The Board has recognized conflicts of interest based on "… obligations to fellow members of the bargaining unit" (see the 2012 CSC decision, at paragraph 79).

[44] In this context, a bargaining unit member is torn between the advisor role to labour relations and management versus the position of the member's bargaining agent. It must be remembered that as bargaining unit members, the incumbents have the right to hold office in the union and to participate in its ongoing activities of promoting both its agenda and that of its members. OHS is of significant interest to the PSAC. The conflict of interest between the PSAC's role and that of management advisors on these matters is clear and obvious. The PSAC's participation in OHS appeals involves an appeal either against a finding that there is no danger under s. 129(7) of the CLC or against a direction issued pursuant to s. 145.

[45] In terms of paragraph 59(1)(h) of the *Act*, the applicant submits that the duties and responsibilities must be in relation to labour relations matters. The Board's decisions in the AJC case and the senior lawyer position case are inconsistent in their approach to the term labour relations. The approach in the senior lawyer position case is to be preferred as it is broader and is consistent with the title of the *Act* and findings of other provincial labour boards. Based on the approach in that case, the term labour relations would include occupational health and safety. Further, the expression "in relation to" signals an intention by Parliament that the "duties and responsibilities" in question need not be confined to those things that constitute labour relations matters, they merely need to relate to them or have some connection to them. The Board in the AJC case failed to undertake this analysis and only analysed

whether the duties and responsibilities constitute labour relations matters. Even if the Board finds that occupational health and safety does not fall squarely within the term labour relations, the applicant submits that matters of occupational health and safety are "in relation" to labour relations.

[46] For paragraph 59(1)(h) of the *Act* to apply, the duties and responsibilities must also be confidential. OHS advisors are experts and provide advice to all levels of management, often in an adversarial context. As a result, the applicant submits that the OHS advisors have confidential duties to those positions specifically identified in paragraph 59(1)(b) (positions classified in the executive group), as well as to labour relations positions (LR and harassment advisors) identified at 59(1)(c).

B. For the respondent

[47] The key activities of the OHS advisors state that they provide OHS advice, guidance, and recommendations to both management and to joint WHSCs "… to enable a healthy and safe workplace." This coincides with the overarching goal of Part II of the CLC. The purpose of that Part is to prevent accidents and injury to health arising out of, linked with, or occurring in the course of employment to which it applies.

[48] The applicant argued that these positions must be excluded because the employees in them advise management with respect to work refusals, workplace violence complaints, and other alleged CLC violations involving PSAC members. In fact, they are also tasked with providing advice on these same issues to, among others, the members of joint WHSCs, which include PSAC members.

[49] In *Treasury Board v. Association of Justice Counsel*, 2020 FPSLREB 3 at paras. 57 and 60 ("the AJC case"), the Board ruled that OHS advice and the type of duties described in the OHS advisors' work description were in fact not labour relations activities. According to that decision, s. 240 of the *Act* provides for the application of Part II of the CLC (covering OHS) to the public service. As in that case, the applicant in this one argues that the incumbents provide advice with respect to evaluating health and safety risks, the applicant's related obligations, and even the applicant's right to address health and safety issues without having to involve an employee representative. According to the AJC case, those duties fall within the applicant's exclusive health and safety duties under ss. 124 to 125.3 of the CLC and not under labour relations.

[50] In the AJC case, the applicant also advanced grounds for exclusion under s. 59(1)(h) of the *Act*. The Board applied its long-standing principles with respect to confidential labour relations objections originally articulated in *Canada (Treasury Board) v. Public Service Alliance of Canada*, PSSRB File No. 176-2-287 (19791009), [1979] C.P.S.S.R.B. No. 9. (QL) ("*Sisson*"), as follows:

> …
>
> *a. The mere fact that an employee has access to confidential information does not of itself mean that she or he is employed in a confidential capacity.*
>
> *b. To be considered a confidential exclusion, there must exist between the particular employee and the employer "… a relation of a character that stands out from the generality of relations, and bears a special quality of confidence." There is an element of personal trust which permits some degree of "thinking aloud" on special matters.*
>
> *c. In many instances, it is of the essence to the confidence that the information not be disclosed to any member of any group or body of the generality of employees.*
>
> *d. The confidential matters to which the person has access must be related to industrial relations.*
>
> *e. Disclosing the information would adversely affect the employer.*
>
> *f. The person must be involved with this information as a substantial and regular part of his or her duties. It is not sufficient that he or she comes in contact with it occasionally.*
>
> *g. The confidential exclusion is to be narrowly interpreted to avoid circumstances in which the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoys the freedoms and rights incidental to collective bargaining.*
>
> *h. The denial of collective bargaining rights to persons employed in a confidential capacity is based on a conflict-of-interest rationale. The employer has a duty to organize its affairs so that its employees are not occasionally placed in a position of a potential conflict of interest if that result can readily be avoided.*
>
> …

[51] The Board concluded that the employees in the AJC case did not provide labour relations advice. The PSAC submits that applying these principles to this case will result in the same conclusion.

[52] The OHS advisors research and analyze complaints, grievances, jurisprudence, injury data, workers' compensation cases, accident investigations, summary

investigations, access-to-information requests, and client queries. They carry out analyses to provide OHS regulatory interpretation to management and joint WHSCs.

[53] In a work-refusal situation, the OHS advisor interprets s. 129 of the CLC for the parties. The advisor then advises the parties as to whether, in the advisor's opinion, a danger exists. If either management, the employee, or the WHSC disagrees with the advisor's interpretation, an external HSO working in an independent, external regulatory capacity is called in, as for any federally regulated employer subject to Part II of the CLC. HSOs investigate employee work refusals under s. 129. They issue directions for Part II violations to both employers and employees under s. 145. HSOs' duties and responsibilities that flow from those two sections are not to the employer or the PSAC but to the minister of labour.

[54] In its submission, the applicant strongly emphasizes the role that an OHS advisor could play in a workplace violence complaint, which are regulated under s. 20 of Part XX of the OHS regulations. These regulations have been in place since 2008. Evidently, in all the time that has passed since then, employees working as OHS advisors for the department have been able to perform their duties despite being PSAC members.

[55] It is unremarkable for an OHS advisor to advise the applicant as to the impartiality of a competent person per s. 20.9(1) of Part XX of the OHS regulations. The applicant must appoint a competent person to investigate a workplace violence incident. The OHS regulations dictate that that person must be "… impartial and … seen by the parties to be impartial …". An OHS advisor does not have the final word on who the competent person would be. The parties have recourse to an HSO's ruling, as in a work-refusal situation.

[56] Similarly, it is unremarkable to share the competent person's report with the OHS advisor. The report is also provided to the joint WHSC, per s. 20.9(5)(b) of the OHS regulations. Advising and guiding management on implementing the report's corrective and preventative measures does not give rise to any conflict of interest. The joint WHSC does the same thing. In the AJC case, the Board already dismissed any labour relations significance to the employer's right to address health and safety issues without having to involve an employee representative.

[57] Grievances are mentioned twice in the work description, at pages 1 and 4. There is no evidence that demonstrates that dealing with OHS grievances is a substantial or regular part of an OHS advisor's duties. Any advice or recommendations that an advisor gives or makes is necessarily based on the advisor's technical and objective interpretation of federal health and safety legislation, regulations, departmental rules, and policies. There is no evidence from any of the upper management representatives, who allegedly received advice from an OHS advisor, most notably the DGs or ADMs. There is no evidence demonstrating that OHS advisors have any power of effective recommendation over any management decision.

[58] The OHS advisors do not assign blame for a workplace safety incident or an injury, do not have the authority to discipline, and do not interpret collective agreements. They do not respond formally to grievances at a specific level for the applicant. Reporting to the same director as do the HR advisors is of no consequence. Both represented and unrepresented employees report to the same director. It is not grounds for exclusion.

[59] Sharing a tracking system or common drive with the HR and LR advisors is but a convenience to the applicant that precludes duplicating systems. Researching and analyzing the occasional OHS grievance does not require wholesale access to all the grievances and complaints in the applicant's internal labour relations database. The applicant controls access to that database and may structure and grant that access as it sees fit.

[60] The applicant cannot ignore its obligation to organize its affairs so that the OHS advisors are not occasionally placed in a position of a potential conflict of interest. It can readily be avoided. It is easily remedied. Likewise, it cannot ignore its obligation to protect the information it collects from disclosure to those who have no need to access it. Exclusions are not intended to remedy the applicant's budgetary or organizational issues.

[61] The Board has held that matters relating to grievances are not automatically confidential. Most of the position's duties involving grievances are related to data entry and to updating systems and files. Not all information related to grievances, including discipline, is confidential (see *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11 at para. 39). The Board has also repeatedly held that employees'

occasional exposure to confidential grievance information is not grounds for exclusion. Only those who exchange confidential grievance information should be designated as "employed in a managerial or confidential capacity". Otherwise, it could not be ensured that the maximum number of persons would enjoy the freedom and rights of collective bargaining.

[62] With no evidence as to the frequency, the applicant alleges that the OHS advisors participate in meetings discussing cases, jurisprudence, and updates on union-management relations, including updates on collective bargaining and potential strikes. This is not confidential labour relations information. It is known to the union, the workforce, and, to a significant extent, the public at large. Labour relations boards' websites, legal databases, the parties' websites, workplace bulletin boards, intranets, and Union-Management Committee minutes contain it.

[63] The OHS advisors in this case are not HR advisors classified in the PE (Personnel Administration) group. Their jurisdiction is OHS, not LR, which are distinct disciplines.

[64] In contrast, the applicant references three cases from two provincial labour relations boards that it feels support its arguments. The PSAC feels that they all can be distinguished. In the *Toronto District School Board v. Canadian Union of Public Employees Local 4400, 2008 CanLII 10519* case, the administrative assistant whose job description was under review said that she provided confidential administrative support in compensation and benefits, the Human Resources Information System (HRIS), occupational health and safety, and payroll services and that she worked directly for two excluded mangers. She had full access to the OHS manager's email and to a manager who gave instructions to the Board's legal counsel. She also had access to the HRIS manager's correspondence and calendar.

[65] The respondent notes that the applicant in that case provided multiple levels of access to its HRIS database, depending on security clearance. The administrative assistant was one of very few in management who had the highest level of unrestricted access to the HRIS database. In fact, she had the ability to change an individual's access level. She took the minutes of senior management meetings and had access to information about management's perspective on bargaining proposals.

[66] The OHS advisors in this case before the Board are not involved in collective bargaining. They do not have unrestricted access to DGs' or ADMs' personal email

accounts or even to those of their immediate supervisors or managers. The health and safety information they have access to is the same information available to the union via the joint WHSCs.

[67] In *Burnaby General Hospital v. Registered Nurses' Association of British Columbia*, [1978] 2 Can. L.R.B.R. 550, the British Columbia Labour Relations Board recognized that the labour relations function is distinct and separate from safety. That board found it "… unnecessary to base [its] determination upon any tenuous labour relations connection." The employee in question was a staff health nurse at the hospital at issue who investigated extended employee work-related injuries, assessed and analyzed absenteeism affecting employee job performance, and assessed employees for their fitness for duty. She also investigated sick-leave abuses.

[68] The Board has ruled as follows that each application under s. 59(1)(g) must be determined on its merits (see *Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 46 at para. 31):

> *… each case must be decided on its own circumstances by reference to the jurisprudence that has developed. Also, it should be remembered that it is the employer's duty to organize its affairs so that its employees are not occasionally placed in a position of conflict of interest.*

[69] The Board has applied s. 59(1)(g) narrowly, sparingly, and in those unusual circumstances in which including a position in the bargaining unit would be fundamentally incompatible with the position's duties and responsibilities, and then only after it was satisfied that the application did not fall properly within the other provisions of s. 59.

[70] OHS is not adversarial, or at least it should not be as it is in everyone in the workplace's best interests. Throughout its submission, the applicant seeks to frame it in the federal public service as an adversarial regime, pitting the country's largest employer against the members of its largest bargaining agent. In its submission, employers and bargaining agents are presented as being bound within the adversarial environment that is Part II of the CLC. The CIRB's predecessor rejected this characterization in *British Columbia Telephone Company* (1979), CLRB Decision No. 221 (QL).

[71] The CIRB has made it clear that industrial relations issues, including applying a collective agreement, are distinct from applying federal OHS law. As further proof of the supposed running health and safety conflict between the parties, the applicant submitted two-and-a-half pages of appeals filed against HSO directions. In some of the appeals, the employer is the appellant. In others, it is the PSAC. In fact, employers, employees, and unions can file appeals. Indeed, sometimes both the employer and union appeal the same HSO direction, albeit for different reasons.

[72] The OHS advisors, like most federal-public-sector employees, are privy to confidential information. The Board has repeatedly stated that the oath that all those employees swear is sufficient to protect the confidential information they may come in contact with during the course of their duties and that it is not to be used as a basis for exclusion (see *Lalonde*, at para. 19).

[73] The PSAC submits that the OHS advisors' oath, professionalism, and fiduciary duty to their employer are more than adequate to protect any confidential information that they must deal with. The applicant alleges that OHS advisors have "direct contact" with DGs and ADMs with respect to workplace violence complaints and work refusals. Everyone is being asked to believe that somehow, this is evidence of an extraordinary, confidential relationship. It is not. Unionized members of joint WHSCs have such contact with upper management, often through their committee co-chairs (one representing the applicant, one union) or directly, given that members of upper management often also sit on the national Policy Workplace Health and Safety Committees (PWHSC).

[74] The long list of duties and obligations in s. 125.1 of the CLC (titled, "Further specific duties of the employer") is instructive. Departments are aware of their obligation to consult, inform, and cooperate with joint WHSCs. Similarly, the applicant submits that OHS advisors' access to incident reports, workers' compensations claims, investigation reports into violence, inspection reports, workplace committee reports, and OHS-related grievances is privileged. Again, it is not. That information is shared with and known to unions. Indeed, the joint WHSCs' members participate in investigations, including into accidents, fatalities, and occupational diseases. They make recommendations to prevent repeat occurrences. Among other things, they also accompany HSOs in workplace investigations or inquiries (see s. 141.1), represent employees during work refusals (see ss. 128(1) and (10)), participate in investigations

conducted under the internal complaint resolution process (see s. 127.1(3)(a)), and receive all HSO reports or directions pertinent to the workplace (see s. 141(6)).

[75] Finally, ss. 134.1(5) and (6) and ss. 135(8) and (9) of the CLC mandate that any and all such information be made available to workers and their unions via the joint WHSCs.

[76] For over 60 years, labour relations boards and the courts have applied a narrow interpretation to managerial and confidential exclusions, lest the majority of employees be excluded from collective bargaining (see *Sisson*, at paras. 42 to 51).

[77] The PSAC submits that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, a concession, or favour; they are a basic right that will not be withdrawn from any employee without very serious reasons (see *U.S.W.A. v. Cominco Ltd.* (1980), CLRB Decision No. 240 (QL)). The Board has also recognized the need to narrowly interpret exclusions from the bargaining unit as follows: "We must also ensure that the maximum number of persons enjoy the … rights incidental to collective bargaining" (see *Sisson*, at para. 73).

[78] The applicant's submission is founded on the premise that workplace OHS is but an adversarial subset of labour relations between constantly warring parties. The CIRB, the arbiter of federal OHS law, rejected this premise. The CIRB has determined that workplace OHS is separate and distinct from labour relations.

[79] These employees are OHS advisors, not HR advisors. They are not labour relations practitioners in the employ of a labour board. They are not the applicant's representatives with the authority to discipline their fellow employees. They do not interpret collective agreements. They have not been delegated the authority to formally respond to grievances on the applicant's behalf. In fact, they are technical experts in the OHS field who advise both managers and joint WHSCs on applying federal occupational health safety law, regulations, policies, and programs, all of which have the goal of achieving safe and healthy workplaces, free from accident and injury.

[80] The applicant did not meet its burden of proof. There exists no fundamental incompatibility between the OHS advisors' duties and their inclusion in the bargaining unit. There is simply no cogent evidence before the Board that would warrant denying

their collective bargaining rights, which are protected under the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.); "the *Charter*").

[81] Accordingly, the respondent requests that the Board dismiss the applications.

IV. Reasons

[82] The parties submitted many historic examples of a position being excluded from the bargaining unit, which I do not find instructive, particularly in light of the Supreme Court of Canada's decision recognizing that the right of employees to meaningfully associate in the pursuit of collective workplace goals is protected by the *Charter* (see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1). Each case must be determined based on its own facts in such a manner as to impinge on the *Charter* rights of each employee in the identified group in the least intrusive manner. These cases provide guidance as to the application of section 59 of the Act only.

[83] Under the *Act*, I have the discretion to exclude a position from the bargaining unit, upon application by the applicant, in certain circumstances, as follows:

> …
>
> *59 (1) After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that*
>
> *(a) the position is confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, or a deputy head;*
>
> *(b) the position is classified by the employer as being in the executive group, by whatever name called;*
>
> *(c) the occupant of the position provides advice on labour relations, staffing or classification;*
>
> *(d) the occupant of the position has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;*
>
> *(e) the occupant of the position has substantial management duties, responsibilities and authority over employees or has*

> *duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Part 2 or Division 2 of Part 2.1;*
>
> *(f) the occupant of the position is directly involved in the process of collective bargaining on behalf of the employer;*
>
> *(g) the occupant of the position has duties and responsibilities not otherwise described in this subsection and 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; or*
>
> *(h) the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).…*

[84] The applicant seeks the exclusion of the OHS advisors under ss. 59(1)(g) and (h).

[85] When exercising this discretion in matters protected by the *Charter*, as the decision maker, I must consider the statutory objectives of the *Act*. I must ask how the *Charter* values at issue will be best protected in view of the statutory objectives and balance the severity of the interference of the *Charter* protection with the statutory objectives (see *Doré v. Barreau du Québec*, 2012 SCC 12; and *Certain Employees of Brandt Tractor Ltd. v. International Union of Operating Engineers, Local No. 115*, 2012 CanLII 53287).

[86] The preamble to the *Act* contemplates mutual respect and harmonious labour-management relations between the employer and the bargaining agents. It also contemplates that employees' collective bargaining interests are protected. For applications under paragraphs 59(1)(d) to (h), s. 62(3) of the *Act* provides that the burden of proving that the position should be excluded is on the employer. Therefore, I believe that the presumption in those types of applications is that a position with a classification identified as represented by a bargaining agent is to be included within the definition of the bargaining unit unless, with clear and cogent evidence and on the balance of probabilities, the applicant convinces the Board that the position is a managerial or confidential position. This requires a case-by-case analysis of the work relationship and duties of each position for which an exemption is sought.

[87] As an important part of any application under s. 59(1)(h), in relation to labour relations matters, the occupant of the position must have duties and responsibilities

confidential to the occupant of a position classified in the executive group, provide labour relations advice, have substantial duties involving formulating and determining government policy, or be directly involved in the collective bargaining process on the applicant's behalf.

[88] The following test, applied by this Board (see *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 175-2-465 (19861210), [1986] C.P.S.S.R.B. No. 341 (QL) at 6) for determining whether a position should be excluded, is called the *Canada Safeway* test:

- The confidential matters to which the person has access must be in relation to industrial relations.
- The disclosure of the information would adversely affect the employer.
- The person must be involved with this information as a substantial and regular part of his (or her) duties. It is not sufficient that he (or she) occasionally comes in contact with it.

[89] I can answer each point only in the negative, for the following reasons.

[90] The purpose of excluding an employee from a bargaining unit is to preserve the applicant's legitimate business interests. Involvement in labour relations issues is one of the typical hallmarks for exclusion (see *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 at para. 77). According to the applicant's submission, all grievances, including OHS grievances, would fall within the definition of "labour relations" under the recent decision in *Canadian Energy Regulator v. Professional Institute of the Public Service of Canada*, 2020 FPSLREB 120. I note that the finding in that decision was that "Generally, grievances would fall under the subject matter of labour relations." (at para. 114) and that neither occupational health and safety duties or related grievances were at issue.

[91] Ultimately, based on the evidence in that case, the Board determined that the director positions at issue did not play any role with grievances other than being allowed to accept one and transmit it to the delegated grievance-step officer and dismissed the proposed exclusion under s. 59(1)(c) of the *Act*. I disagree with the applicant's statement because it fails to contemplate the specific duties and responsibilities that OHS advisors have in relation to grievances and does not consider the different quasi-judicial structures established to oversee OHS matters versus labour relations and even staffing matters, for example, as enumerated separately from labour relations in paragraph 59(1)(c). There is a distinction, or Parliament would

not have created and maintained this distinction and the specific focus on confidential duties and responsibilities in relation to labour relations matters in paragraph 59(1)(h) of the *Act*. Ultimately, the evidence in this case, like in the *Canada Energy Regulator* case, was that an OHS advisor's role in relation to grievances is not a substantial or regular part of their duties. Nor was I convinced that those duties and responsibilities relate to or have some connection to labour relations.

[92] The applicant argued that the Board should take a broad view of what encompasses labour relations and what defines a grievance. I agree that over time, the labour relations world has changed. But in the public service, it has not changed so much as to allow me to disregard the structure under which the Board was established or the very clear rulings of its sister board, the CIRB. In *British Columbia Telephone Company*, the CIRB's predecessor stated that labour relations and OHS matters are distinct. I agree with this statement, particularly given the public service labour relations structure, within which the Board has limited jurisdiction over any matter involving the CLC.

[93] Much was made of the access to labour relations information granted to the OHS advisors. Most of the information that they can access is either publicly available or readily available if sought and is not related to collective bargaining or other sensitive labour relations matters. The items they can access are protected by the applicant's security classification system. Any exposure beyond filing and retrieving it is incidental. There is no evidence that the OHS advisors have been required to participate in any substantive way in developing applicant policy or collective bargaining proposals. It was not demonstrated that including the OHS advisor position in the bargaining unit has impaired the applicant from accomplishing its legitimate business interests. Looking at the factors enumerated in the *Canada Safeway* and *Sisson* cases, I reach the conclusion that the OHS advisor positions do not fall within the exclusion of paragraph 59(1)(h) of the *Act*.

[94] Access to confidential information alone is not sufficient to justify excluding a position from the bargaining unit as that access is controlled in part by the security clearance level that the position requires. A shared electronic filing system may allow OHS advisors to access information that they may not access otherwise. But that access does not guarantee precluding the incumbent from membership in the bargaining unit, unless the situation falls within the categories set out in s. 59(1)(h) of

the *Act*. Merely having access to and filing documents that may incidentally be related to labour relations is insufficient to meet the exclusion categories.

[95] If I am to impinge on an employee's right to meaningfully associate in the pursuit of collective workplace goals under s. 59(1)(h) of the *Act*, I require convincing and compelling evidence in support. As explained, I do not have it in this case. Peripheral or incidental access to and input into the LR process is not sufficient to discharge the burden of proof. Nor is the access to confidential information being covered by a public servant's oath of office and the *Values and Ethics Code for the Public Sector* sufficient to warrant ordering an exclusion based on confidentiality (see *Sisson*).

[96] The applicant argued that the OHS advisors should be excluded because of their role of advising management and labour relations advisors in the OHS area. I disagree. Providing expert advice related to occupational health and safety to their LR colleagues does not equate to providing labour relations advice that deals with terms and conditions of employment, the potential for disciplinary action, and the realm of collective bargaining, interpretation, and implementation, among other nuances outlined in the cases cited by the parties. Since I have concluded that an exclusion application under s. 59(1)(h) should not be granted, the question remains as to whether the OHS advisors should be excluded under s. 59(1)(g).

[97] In my opinion, the applicant's argument that the OHS advisors are in a conflict of interest because of the importance that the PSAC puts on workplace safety is flawed, from two perspectives. First, workplace safety should be of primary concern to all involved, including the applicant. The fact that a bargaining agent has stated that it is a priority does not mean that one of its members cannot faithfully fulfil his or her obligations to advise the applicant on the proper administration of the CLC. Second, the applicant's proposal speaks to employees' loyalty, which is not the purpose of an exclusion. OHS is a bipartisan obligation. One should not presuppose a conflict of interest merely because of membership in one group or the other. Furthermore, the OHS advisors work in a mixed environment and render services related to all categories of employees, including those in different bargaining units, those who are not members of a bargaining unit, excluded employees, and management, in which it is unlikely that a perceived conflict of interest would arise.

[98] I concur with the finding in the AJC case at para. 60, in that I, too, fail to see a labour relations element to this type of advice. My understanding is that the advice pertains to the applicant's exclusive health and safety duties under ss. 124 to 125.3 of the CLC.

[99] The respondent made much of the lack of evidence in the applicant's submissions as to the degree upon which management relies on the advice that the OHS advisors provide to it. The applicant raised an objection to this argument, stating that but for the respondent's request that this matter proceed by way of written submissions, which the Board granted, *viva voce* evidence of that nature would have been called. I agree with the applicant that the respondent's comment was disingenuous. I have drawn no negative inference from the applicant not providing me an affidavit or other evidence, as requested by the respondent. My decision is based solely on the submissions before me.

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

(The Order appears on the next page)

V. Order

[101] The applications are dismissed.

March 9, 2021.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board