

Date: 2021-07-28

File: 590-02-42347

IN THE MATTER OF
A PUBLIC INTEREST COMMISSION
UNDER THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT*
BETWEEN
THE PUBLIC SERVICE ALLIANCE OF CANADA
AND
THE TREASURY BOARD
FOR THE BORDER SERVICES GROUP

Indexed as

Public Service Alliance of Canada v. Treasury Board

Before: Lorne Slotnick, chairperson,
Joe Herbert and Jacques Emond, nominees

For the Bargaining Agent:

Morgan Gay, Negotiator and Darren Pacione, Research Officer

For the Employer:

Annie Grenier, Negotiator and Craig O'Brien, Jacques Lauperr, Treasury Board
Secretariat

Heard via Videoconference,
May 10, 18 and 20, 2021.

PUBLIC INTEREST COMMISSION REPORT

I. Introduction

[1] This is the Report of a Public Interest Commission (PIC) established under the *Federal Public Sector Labour Relations Act (FPSLRA)* relating to renewal of the collective agreement between the Public Service Alliance of Canada (PSAC) and the Treasury Board (TB), for the unit referred to as the Border Services (FB) group.

[2] All members of the bargaining unit – approximately 10,000 strong – work for the Canada Border Services Agency (CBSA), which was created in 2003. The agency is part of Public Safety Canada. The employees were formerly part of the larger PA group; the current FB bargaining unit was created in 2007.

[3] The CBSA oversees access of goods and people to Canada. The majority of bargaining unit members work as Border Services Officers at approximately 1,200 land, marine and airport points of entry. Others work as inland enforcement officers (enforcing immigration laws), as intelligence officers, investigators, and at Canada Post facilities. Officers at land and marine ports of entry, as well as some others – the majority of the bargaining unit – are equipped with firearms and trained in their use.

[4] The COVID-19 pandemic has dramatically reduced traffic at points of entry, but imposed new duties on CBSA staff. However, there have been no layoffs.

II. Bargaining History

[5] This is the fourth round of negotiations for these parties since the bargaining unit was created. The previous collective agreement had an expiry date of June 20, 2018.

[6] Notice to bargain was issued on May 31, 2018. The parties met on more than 35 days, but were able to resolve only a few minor items. There are several other items – all of which are common to all groups within the Core Public Administration – that have been “agreed in principle.”

[7] The bargaining agent requested conciliation in December 2020, shortly after the employer tabled a comprehensive offer. This Public Interest Commission was appointed in February 2021.

[8] The bargaining agent has brought to the Commission a large number of proposals, many of them stemming from its view that, as employees of an armed law enforcement agency, the members of this bargaining unit are properly compared with organizations such as the Royal Canadian Mounted Police, as well as some provincial and municipal police forces. The bargaining agent also asserts that the CX group, containing federal correctional officers, is an appropriate comparator. The employer disagrees.

[9] Previous Public Interest Commissions with respect to the FB group, in 2014 and 2017, have found that there is no perfect comparator. We agree. While there are similarities with other law enforcement organizations, there are also important differences. Our preference in this report is to recommend changes to the collective agreement where a problem has been identified or a need demonstrated, with the aim of assisting the parties to move towards a settlement.

[10] We have addressed only those issues on which we are making recommendations. This does not mean that issues not addressed have no merit. However, the number of proposals the Commission was asked to consider far surpasses the incremental change that should be expected in one round of bargaining.

III. Statutory Criteria

[11] In considering the matters at issue, the commission has had regard to the factors listed in Section 175 of the FPSLR, which reads as follows:

175 In the conduct of its proceedings and in making a report to the Chairperson, the public interest commission must take into account the following factors, in addition to any other factors that it considers relevant:

- (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
- (b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the public interest commission considers relevant;

(c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;

(d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and

(e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

IV. Duration and Rates of Pay

[12]: The parties recognize that monetary settlements in the federal public sector for 2018 to 2021 have hewed to an established pattern totalling 2.8%, 2.2% and 1.5% in the first three years. (The 1.5% in the third year has generally included a 1.35% across-the-board increase and 0.15% for targeted monetary changes.) As the employer notes, there are now 50 settlements in the core public administration and separate agencies that fit this pattern. The bargaining agent, while acknowledging that the pattern exists, seeks an additional market adjustment of 4.4%, effective at the start of the collective agreement, as part of its goal of achieving parity with its calculated weighted average of selected law enforcement agencies. It is worth noting that the settlements for the FB group in the three previous rounds of bargaining have exceeded the core public administration pattern; the bargaining agent argues that this is itself a pattern that should be followed, whereas the employer argues that earlier bargaining resolved inequities and that the pattern established in the federal public sector should govern.

[13] The bargaining agent has also proposed a duration of four-years, with a 1.5% increase in the final year - as was agreed recently with the CX group, even though most agreements achieved after the onset of the Covid-19 pandemic were for three years. The employer proposes a three-year agreement.

[14] Given that a three-year agreement would have an expiry date that passed more than a year ago, the Commission recommends a four-year agreement. We do not

believe there is a compelling case at this time to deviate from the established wage settlement pattern.

[15] We recommend the following across the board increases:

Effective June 21, 2018 - 2.8%

Effective June 21, 2019 - 2.2%

Effective June 21, 2020 - 1.35%

Effective June 21, 2021 - 1.5 %

[16] Regarding pay, the bargaining agent is also proposing a paid meal period of half an hour per day. Employees would continue to work a 37.5-hour work week, but would be paid for 40 hours a week. This, it says, is standard for law enforcement agencies. The employer says this proposal is unwarranted and cost-prohibitive, adding more than 6% to the wage base before any other increases.

[17] The current agreement (Article 25.04) provides for overtime payment when employees are required to “stay on the job” during their meal period. This, however does not cover situations where employees are not on the job, but because of their location or other factors, are unable to leave the workplace. We recommend, as have the two previous Commissions, a provision for a paid meal period when employees are prevented from leaving the worksite (because of the work location or other factors, but not required to “stay on the job”) be included in the collective agreement.

V. Other issues

[18] Article 10 - Information. Currently, Article 10.02 requires the employer to supply each employee with a copy of the collective agreement. The employer seeks to change this obligation to provide only for electronic access, unless that is “unavailable or impractical,” in which case the employee could request a hard copy. The Commission recommends language similar to the employer proposal, under which the employer would provide electronic access, but that any employee would be provided a hard copy, on request of that employee.

[19] Article 17- Discipline. We recommend that Article 17.02, which provides for union representation at disciplinary and other hearings if an employee requests, be clarified to specify that the union representative is not merely an observer, but is entitled to participate.

[20] Article 17 - Discipline. The Employer wishes to have the two-year sunset clause on discipline extended by the period of any unpaid leave. The Commission recommends language extending the sunset period by the period of any leave that is six months or greater.

[21] Article 18 - Grievance Procedure. The Commission believes the parties would benefit from compressing the grievance procedure from four steps, the current default procedure, to a maximum of three, and recommends that the parties negotiate such language.

[22] Article 22 - Health and Safety. The bargaining agent is proposing a new clause requiring the employer to ensure that no employee works alone. The CBSA's policy is that officers should not be required to work alone at a CBSA office where officers carry out, or may carry out, enforcement duties. However, the bargaining agent cites situations where officers have been required to work alone. The Commission recommends the following language be added to the collective agreement: "The Employer will ensure that no employee will be scheduled to work alone at a CBSA office where officers carry out duties that require enforcement of CBSA program legislation or the Criminal Code or that may lead to the enforcement of such legislation."

[23] Article 25 - Hours of Work. The bargaining agent has requested numerous changes to this article, mainly related to scheduling. By and large, these issues should be discussed on a local level, within the parameters outlined in the collective agreement. We do believe the bargaining agent has raised a legitimate issue with its proposal for a new Article 25.18, which would broaden the use of years of service for qualified employees when the employer is filling a vacant line on a schedule. This would ensure, for example, that a qualified employee could move onto another schedule at the same worksite when a vacancy occurs, before the line is offered to employees outside the worksite. However, the employer has raised a jurisdictional

issue regarding the Commission's power to recommend such a change. Assuming we do not have jurisdiction, we make no recommendation, but encourage the parties to discuss and address this issue. In return, the bargaining agent could consider a small reduction in the current seven-day notice period required when a scheduled shift is changed, pursuant to Articles 25.12 and 25.21.

[24] Article 27 - Shift and Weekend Premiums. The shift and weekend premiums have remained at \$2.00 an hour since 2002, according to the bargaining agent's brief. The Commission recommends an increase in the shift premium.

[25] Article 30 - Designated Paid Holidays. With the recent addition of the National Day for Truth and Reconciliation to the *Canada Labour Code*, the Commission recommends this holiday be added to the list of designated paid holidays in Article 30.01.

[26] Article 59 - Allowances. The bargaining agent is proposing a monthly fitness/wellness allowance for maintaining a membership at a gym or fitness facility, except where the Employer provides an adequate fitness facility free of charge on site. While the employer does have on-site fitness facilities at some locations and has a discount arrangement with one chain, the bargaining agent argues that many employees are left out and must use their own funds to maintain the physical fitness standards required by the employer. The Commission recommends language be added to the collective agreement providing for a partial reimbursement of cost for use of a fitness facility where the employer does not provide a fitness facility on-site.

[27] New Article - Medical Appointments. The bargaining agent proposes a new article with provisions concerning medical certificates. The Commission recommends that the following language be added to Article 35 - Sick Leave with Pay: "When the employee is asked by the Employer to provide a medical certificate, the employee shall be reimbursed for the cost of the certificate to a maximum of \$50."

[28] New Article - Student Employment. Students are excluded from the bargaining unit under the *Federal Public Sector Labour Relations Act*. However, the bargaining agent has proposed an article dealing with student employment, arguing that students are being used to replace bargaining unit members or to deny overtime opportunities

in certain situations, and that they sometimes perform the full range of duties without full training. In the absence of detailed evidence about this issue, the Commission is reluctant to make a recommendation. However, we believe the parties would benefit from further discussion of the issue, with a view to finding the proper balance between providing opportunities for students and not undermining the work of the bargaining unit.

[29] New Article - New Recruits. The employer is placing new graduates from its Rigaud training centre at the FB02 pay rate. The bargaining agent, arguing that they are performing the full duties of an FB03 employee, seeks new language guaranteeing that new graduates be placed at the higher FB03 level once they are posted to a port of entry. Grievances have been filed about this issue. In the absence of the kind of detailed evidence that would be presented at an arbitration hearing, the Commission recommends that this issue be resolved through the grievance and arbitration procedure.

[30] Appendix H - This Appendix addresses pay during administrative suspensions pending investigations. It says that pay and allowances will be stopped only "in extreme circumstances when it would be inappropriate to pay an employee." It goes on to say this will be considered when the employee is in jail awaiting trial, or clearly involved in commission of an offence under a federal act or the Code of Conduct. The Code of Conduct covers a broad range of issues, including some that may be considered relatively minor, such as rudeness or appearance. In our view, the reference to the Code of Conduct undermines the expressed intention of Appendix H to restrict pay stoppages during investigation to the most extreme circumstances. We recommend deletion of the reference to the Code of Conduct in Appendix H.

[31] New Appendix - Firearm Practice Time. The employer formerly provided two mandatory firearm practice shifts per year for employees who were required to carry firearms. This was not included in the collective agreement, and the employer eliminated the requirement. The bargaining agent argues that employees are now using their own time to practice so that they can meet the employer's requirements for annual recertification on firearms. The Commission recommends that the parties negotiate a provision in the collective agreement for some firearm practice.

[32] Various Articles and Appendices - Amendments agreed in principle. Several changes that have been made in bargaining across the core public administration have been agreed in principle by this employer and bargaining agent. The Commission recommends that changes to the following articles be made in accordance with the employer's proposals:

- Article 38 - Maternity Leave Without Pay
- Article 40 - Parental Leave Without Pay
- (new) Article 42 - Caregiving leave
- (new) Article 53 - Domestic Violence Leave
- Appendix C - Workforce Adjustment
- Appendix E - Joint Learning Program
- Appendix F - Child Care
- Appendix N - Supporting Employee Wellness
- Appendix O - Mental Health in the Workplace

Appendix D - Implementation

[33] The Commission recommends the language proposed by the employer, mirroring language agreed in other federal bargaining units.

July 28, 2021

(Original signed by)

Lorne Slotnick, Chair

Joe Herbert - I concur

Jacques Emond - I dissent - dissent attached

DISSENT FROM THE EMPLOYER

The purpose of the Public Interest Commission (PIC) is to assist the parties to complete their bargaining. However, in my opinion the process is not working in this matter.

The parties' negotiations took place over 13 sessions for a total of 36 days. Out of the original 55 proposals made by the bargaining agent, more than 40 were brought for consideration to the PIC. I am in agreement with the Chair that the number of proposals that the PIC was asked to consider far surpasses the incremental change that should be expected in one round of bargaining. The vast number makes the PIC ineffective in the overall bargaining process.

In my view, the Union used the negotiations and the PIC to maintain their wish to become and be an organization equal to the RCMP, Provincial or Municipal police forces and equal to the CX group of the Correctional Service of Canada. Previously, PICs in 2014 and 2017 found that this argument failed to show any comparatives then and, in my view, failed to show it at this time as well.

My concerns and comments with the Chair's Decision are as follows:

ARTICLE 22 - HEALTH AND SAFETY

The Public Service Alliance of Canada (PSAC) has proposed a new clause requiring the Employer to ensure that no employee works alone.

The Chair refers to CBSA's policy that an officer should not be required to work alone at a CBSA office where officers carry out, or may carry out, enforcement duties, creates confusion.

CBSA's policy addresses only Ports of Entry (POE) and not all CBSA work locations. The purpose of the policy is to ensure that at least two employees are scheduled to be on shift at all times. However, it was recognized that there could be unplanned

circumstances where an employee would work alone. The policy does outline mitigation measures to be put in place.

Moreover, this is an operational matter and therefore should not be included in the Collective Agreement. It is already properly addressed in the CBSA Doubling-Up Policy which has been developed in consultation with the bargaining agent.

This recommendation also limits the Employer's ability to organize its operations and assign duties, a managerial right that is recognized as per s.7 of the FPSLRA.

ARTICLE 25.04 (PAID MEAL PERIOD)

The Chair's recommendation for a provision for a paid meal period when employees are prevented from leaving the worksite (because of the work location or other factors, but not required to "stay on the job") be included in the collective agreement.

I disagree.

This recommendation is not based on any serious or documented evidence and is not justified. It is unclear which problem this would solve. The recommendation will lead to disparity in terms and conditions of employees within the FB Group. Furthermore, this is an operational matter and should not be included in the collective agreement.

The recommendation is also inconsistent with s. 175 of the FPSLRA which established the factors the PIC must take into consideration.

The Chair does not provide any reasonable guidance on how to implement a paid meal period. It is my understanding that the Employer cannot reasonably identify employees who would be subject to this proposal. With this mind, the implementation would particularly create a two-tiered workplace whereby employees in the same occupational group are treated differently.

ARTICLE 25.18 - (Vacant Lines)

The Bargaining Agent's proposal on vacant lines leads to the movement of personnel through staffing actions, such as a deployment, which are governed by the Public

Service Employment Act (PSEA). It is a matter for which direct or indirect recommendations fall outside of the PIC jurisdiction as per s. 177 (1) (c) of the FPSLRA.

It is inappropriate for the PIC to recognize that this matter falls outside of its jurisdiction but to indirectly make a recommendation on the next steps by inviting the parties to continue to discuss this matter in the collective bargaining context. This is inconsistent with s. 177 (1) of the Act.

Under the PSEA, appointments to or within the public service must be based on merit and this act also governs processes for deployments. The proposal is contrary to terms established, or that could be established, under the PSEA. As such, it also cannot form part of the report under section 177(1)(b) of the FPSLRA.

ARTICLE 27 – SHIFT AND WEEKEND PREMIUMS

The Chair has noted that the “shift and weekend premium” has remained at \$2.00 an hour since 2002 and recommends an increase in the shift premium. Taking into consideration the increased wage proposal, I would suggest that the shift premium should be increased to \$2.25 on a prospective basis only and without any retroactivity.

ARTICLE 59 - ALLOWANCE

The Chair recommends language to be added to the collective agreement providing for a partial reimbursement of costs for use of a fitness facility where the Employer does not provide a fitness facility on site.

I am not in agreement.

The recommendation is inconsistent with section 175 of the FPSLRA which establishes the factors the PIC must take into consideration in the conduct of its proceedings and in making a report. This is an operational matter that should not be included in a collective agreement.

Health benefits are consistent across the CPA. The reimbursement of gym membership would fall under this category and should not be individually negotiated for inclusion in certain collective agreements. This recommendation is also ambiguous, not operationally viable or practical and would lead to differing interpretations between

the parties creating labour unrest; for example, would the reimbursement apply only to Border Services Officers/front line employees or all FBs? What constitutes an adequate CBSA fitness facility? How does the Employer ensure that reimbursement is made towards the use of a legitimate service provider?

NEW ARTICLE – STUDENT EMPLOYMENT

I am not in agreement with the Chair that the claims by the union that students are being used to replace bargaining unit members are to deny overtime opportunities to the bargaining unit members in certain situations. The Union did not provide any examples or justification.

This matter falls under s.177(1)(c) of the FPSLRA and as such falls outside of the PIC's jurisdiction. Although they are not part of the bargaining unit, the recommendation also runs the risk of allowing the Union to interfere with the establishment of the students' terms and conditions of employment.

APPENDIX H – CODE OF CONDUCT

The Chair has proposed that the Code of Conduct undermines the expressed intention of Appendix H to restrict pay stoppage during investigations to most extreme circumstances and recommends deletion of the reference to Code of Conduct in Appendix H. It is my understanding that in the last round, the parties expressly negotiated the current language found in Appendix H which is aligned with how administrative suspension pending investigations are dealt with in the Core Public Administration.

It is my view that the current language found in Appendix H is appropriate and is supported by caselaw which has recognized that administrative suspension without pay can be justified under such circumstances.

Removing the ability of proceeding with suspension without pay for matters related to the Code of Conduct pending the outcome of an investigation for the FB Group would create a precedent and run the risk of a spill-over effect to other groups.

NEW APPENDIX - FIREARM PRACTICE TIME

The Chair's proposal for the parties to negotiate a provision in the collective agreement for some firearm practice time. Previously, the Employer provided two mandatory firearm practices per year for employees who were required to carry firearms.

As a result of the CBSA training strategy the mandatory firearm practices are no longer required. This proposal interferes with the CBSA President's legislated authority to determine the learning, training and development requirements of employees as are set out in the Financial Administration Act.