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Citation: 2024 FPSLREB 91

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

CANADA REVENUE AGENCY

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Canada Revenue Agency v. Professional Institute of the Public Service of Canada

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Natalie Atherton, representative

For the Respondent: Vance Coulas, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions, filed February 28 and March 20 and 27, 2024.

REASONS FOR DECISION

I. Overview

[1] The Canada Revenue Agency (CRA) applied to exclude 14 positions from the Audit, Financial, and Scientific Group bargaining unit represented by the Professional Institute of the Public Service of Canada (PIPSC). The CRA applied to exclude those positions because they have each been designated as the decision maker (referred to as the employer's "representative" in the relevant collective agreement) at the first level of the grievance process. The issue in this application is whether designating a position as a level in the grievance process is sufficient to exclude that position or, alternatively, whether an employer needs to demonstrate that deciding grievances is a significant or regular part of the duties of that position.

[2] I have concluded that designating a position as a level in the grievance process automatically means that the position is excluded from the bargaining unit. Since PIPSC concedes that all 14 positions have been designated as a level in the grievance process, I grant the CRA's application.

II. The positions at issue

[3] The CRA applied to exclude the 14 positions with the following numbers: 30180218, 30196653, 30233553, 30239574, 30303228, 30303229, 30313905, 30320760, 30322915, 30322916, 30338702, 30342281, 30370907, and 30413535. All 14 positions are classified at the MG-06 group and level. Most importantly, all 14 positions have been designated as a level in the grievance process at the CRA.

[4] The parties have provided me with a copy of the job descriptions for each position. As PIPSC drew to my attention in its written argument, only one job description states that the position is a level in the grievance process — the rest do not mention grievances at all. I have no evidence indicating that any of the occupants of those positions have actually decided grievances or, if they have, the frequency at which they have done so. However, I do have a copy of the certificate appointing the employee occupying each position as the first level in the grievance process at the CRA, and PIPSC agrees that each position is the first level in the grievance process.

III. Procedure followed to decide this application in writing

[5] This decision is being released alongside five other decisions involving applications by an employer to exclude a position or group of positions identified in s. 59(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The six decisions bear the citations 2024 FPSLREB 90 through 95.

[6] For context, the Federal Public Sector Labour Relations and Employment Board ("the Board") is authorized to decide any matter without an oral hearing; see the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), at s. 22, and *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68. When the Board schedules an oral hearing for an exclusion case, it typically lasts one or two days at most. However, a large number of exclusion applications were filed before 2023. Therefore, the Board identified 53 older files that may be suitable to be determined in writing.

[7] Both employers and bargaining agents have a shared interest in expeditious decisions in exclusion cases. Scheduling 53 days of hearing would delay the dispositions of many of these exclusion cases, as well as the hearings of other cases that the Board has not yet scheduled. Exclusion cases are also well-suited for hearing in writing because, most of the time, the evidence about the duties performed by the position at issue is not in dispute and can be provided by the employer through a combination of documents (including a job description) and will-say evidence.

[8] Therefore, the Board wrote to 3 employers and 2 bargaining agents involved in these 53 files. One pair of employer and bargaining agent identified a more recent application that was similar to other existing applications, so the Board issued directions about 54 files, some of which involved multiple employees. The directions provided the employer and bargaining agent in each case with a timetable to file written submissions. The parties in each case were also given the opportunity to request an oral hearing; none did so. In many cases, the Board extended the period for the employer's initial submissions to permit the parties an opportunity to discuss these exclusion applications. After those discussions, the Board had to decide only 21 files involving 2 employers and 2 bargaining agents. Two groups made out of these 21 files were consolidated because they all raised the same issue: this group of 14 and a group of 3 (in 2024 FPSLREB 90).

[9] To explain further about this case, after reviewing the materials filed by the CRA and PIPSC's objections in these 14 files, I identified that the basis of all the applications and objections was the same. Therefore, I directed that the parties address these 14 cases together, which I will now refer to in the singular. I also directed that the parties address this application in writing. I set a timetable for these written submissions, which I adjusted to permit the parties the opportunity to discuss the application between themselves. The parties ultimately filed written submissions. Having reviewed the documents filed with the CRA's initial application, the additional document submitted by PIPSC, and the submissions of the parties, I remain convinced that this application can be addressed in writing. As I said in the overview, the only material fact in this case is that these 14 positions were designated as a level in the grievance process. This application turns on a legal question: whether designating a position as a level in the grievance process is sufficient to require the Board to exclude it from a bargaining unit. This legal question is suitable to be decided in writing.

[10] Finally, I want to thank all the parties (the two employers and two bargaining agents) for the quality of their submissions. It was clear that the employers and bargaining agents worked hard to resolve the majority of these cases on their own and that the cases remaining either raised important points of principle (like this one) or were borderline cases based on their facts. These were not easy cases; the parties' submissions made them easier. I thank them for it.

IV. This application involves a question of statutory interpretation

[11] For context, most labour relations statutes in Canada exclude from their ambit managers or employees who have confidential information about collective bargaining. The *Act* is unusual in that it spells out in detail the types of positions that should be excluded from a bargaining unit because they exercise managerial or confidential duties.

[12] The CRA brings this application based on s. 59(1)(e) of the *Act*. Therefore, I must decide it based on the text, context, and purpose behind s. 59(1)(e). I will do so by first examining previous decisions interpreting s. 59(1)(e) and then by considering its text, context, and purpose in light of those decisions.

[13] The entirety of s. 59(1) of the *Act* reads as follows (with the portion relied upon by the CRA in emphasis):

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*	***59 (1)*** *Après notification d'une demande d'accréditation faite en conformité avec la présente partie ou la section 1 de la partie 2.1, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :*
(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;*	***a)*** *poste de confiance occupé auprès du gouverneur général, d'un ministre fédéral, d'un juge de la Cour suprême du Canada, de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt, ou d'un administrateur général;*
(b) *the position is classified by the employer as being in the executive group, by whatever name called;*	***b)*** *poste classé par l'employeur dans le groupe de la direction, quelle qu'en soit la dénomination;*
(c) *the occupant of the position provides advice on labour relations, staffing or classification;*	***c)*** *poste dont le titulaire dispense des avis sur les relations de travail, la dotation en personnel ou la 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;*	***d)*** *poste dont le titulaire a des attributions l'amenant à participer, dans une proportion notable, à l'élaboration d'orientations ou de programmes du gouvernement du 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;***	***e)*** *poste dont le titulaire exerce, dans une proportion notable, des attributions de gestion à l'égard de fonctionnaires* ***ou des attributions l'amenant à s'occuper officiellement, pour le compte de l'employeur, de griefs présentés selon la procédure établie en application de la partie 2 ou de la section 2 de la partie 2.1;***
(f) *the occupant of the position is directly involved in the process of*	***f)*** *poste dont le titulaire participe directement aux négociations*

collective bargaining on behalf of the employer;	*collectives pour le compte de l'employeur;*
***(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*	***g)** poste dont le titulaire, bien que ses attributions ne soient pas mentionnées au présent paragraphe, ne doit pas faire partie d'une unité de négociation pour des raisons de conflits d'intérêts ou en raison de ses fonctions auprès de l'employeur;*
***(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).*	***h)** poste de confiance occupé, en matière de relations de travail, auprès des titulaires des postes visés aux alinéas b), c), d) et f).*

[Emphasis added]

A. Previous court and Board decisions interpreting this provision

[14] Both the Board and the Federal Court of Appeal have interpreted the second part of s. 59(1)(e) of the *Act* and its predecessor, the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; "the *PSSRA*"), to mean that once the employer has assigned a position the duty to receive and deal formally with a grievance, the position must be excluded from the bargaining unit.

[15] In *The Queen in Right of Canada v. Public Service Alliance of Canada*, [1984] 2 FC 998 (C.A.), the Board initially did not grant the employer's application to exclude 260 positions that were the first level in the grievance process on the grounds that management had not justified the decision to designate so many employees as the first level in the grievance process. The Federal Court of Appeal overturned that decision, stating:

> …
>
> *… In my view, the definition of "person employed in a managerial or confidential capacity"* supra*, clearly includes those persons to whom the employer has effectively assigned the duty to deal with grievances under the Act. In this case, as noted* supra*, the Board has made an affirmative finding of fact in this regard. I agree with applicant's counsel that such a finding effectively disposed of the issue between the parties and that the Board should have stopped*

> *at that juncture and decided the matter in favour of the employer.…*
>
> …

[16] The provision of the *PSSRA* in force at the time was slightly different from the current s. 59(1)(e) of the *Act*. The *PSSRA* at the time excluded employees instead of positions. As it was worded at the time, it excluded an employee "… who is required by reason of the duties and responsibilities of that person to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act …". Parliament amended the *PSSRA* in 1992 (which came into force in 1993) to add s. 5.1 to that Act. Paragraph 5.1(1)(b) of the amended *PSSRA* is identical to s. 59(1)(e) of the current *Act* (aside from some technical wording that is not relevant to this case).

[17] In *Treasury Board (Public Works and Government Services Canada) v. Professional Institute of the Public Service of Canada*, [1998] C.P.S.S.R.B. No. 61 (QL), PIPSC argued that the amendments to the *PSSRA* changed its meaning. In essence, PIPSC argued in that case that the word "substantial" in what is now s. 59(1)(e) modified both clauses in s. 59(1)(e) — namely, the position must exercise substantial management duties or substantial grievance duties. The Board rejected that argument, concluding at paragraph 18 of its decision that the *PSSRA* did not require the occupant of a position to deal substantially with grievances for their position to be excluded. The Board was also concerned about the practical consequences of PIPSC's argument in that case, stating that accepting that interpretation "… would lead to uncertainty in the identification process, whereby the same positions might or might not be identified under the Act depending on fluctuations in the volume of grievances with which their incumbents must deal."

[18] The Board has also confirmed this approach under the current *Act*. In *Treasury Board v. Professional Institute of the Public Service of Canada*, 2008 PSLRB 55, the Board granted the employer's application to exclude a position because it was the first level in the grievance process, stating:

> …
>
> *21 The case law is clear. The Board does not have the authority to question the motives behind an employer's decision to designate an employee as a representative at a level of the grievance procedure. This was first established in* Treasury Board v. Public Service

> Alliance of Canada, *[1984] 2 F.C. 998. Then followed a large number of decisions of the PSSRB in the same direction. The decisions were all rendered under the* Public Service Staff Relations Act *(*PSSRA*). However, there is not enough of a difference between the provisions of the* Act *and those of the* PSSRA *to allow me to disregard the abundant jurisprudence already established.*
>
> …

[19] I have followed those previous decisions in reaching my conclusion.

B. The text of s. 59(1)(e) of the *Act*

[20] I also agree with those previous decisions that the text of s. 59(1)(e) of the *Act* is clear. It only requires an employer to show that the position "… **has** duties and responsibilities dealing formally on behalf of the employer with grievances …" [emphasis added]. There is nothing in that paragraph stating that the position must exercise those duties frequently or that the duties are a substantial part of the job.

C. The statutory context

[21] Considering the statutory context, s. 59(1)(e) of the *Act* has two grounds for an exclusion. The second ground requires the Board to exclude a position that "… **has** duties and responsibilities dealing formally on behalf of the employer with grievances …" [emphasis added]. By contrast, in the first ground, the word "substantial" modifies the phrase "… management duties, responsibilities and authority over employees …". The frequency at which the duties are performed is relevant to the first ground but not the second. Other provisions of s. 59(1) of the *Act* also contain language that either grants the Board discretion (such as the word "should" in s. 59(1)(g)) or qualifies the basis of exclusion in a way that requires the Board to make some factual assessment (such as "substantial" in s. 59(1)(d)).

[22] There is no qualification for the second ground in s. 59(1)(e). This is an indication that Parliament deliberately made that ground automatic once a position was designated as a level in the grievance process. If Parliament intended the term "has duties" to mean "has substantial duties", it would have said so explicitly, as it did in other paragraphs in s. 59(1) of the *Act*.

D. The purpose of s. 59(1)(e)

[23] Finally addressing purpose, I agree with the Board's earlier concern about the practical consequences of considering the frequency at which a position hears grievances. The frequency of grievances can fluctuate and depend on factors outside the control of the employer or the employee occupying the position. Making a position's exclusion dependent upon the frequency and recency of grievances would mean that positions could shift between excluded and non-excluded status. This uncertainty is inconsistent with the *Act*'s purpose of harmonious labour relations (spelled out in its preamble), because harmonious labour relations depend upon some stability in understanding who is, and is not, included in a bargaining unit.

[24] Furthermore, the purpose behind s. 59(1) is to address the conflict of interest that would arise with the existence of divided loyalties resulting from the duties performed for the employer and membership in the bargaining unit that is at the heart of the collective bargaining scheme (see *Cowichan Home Support Society v. U.F.C.W., Local 1518*, [1997] B.C.L.R.B.D. No. 28 (QL) at para. 115, cited in *Treasury Board v. National Police Federation*, 2023 FPSLREB 110 at para. 152). Managers who decide grievances can be called upon to interpret and apply a collective agreement. If grievance deciders (called the employer's "representative" in the collective agreement between the CRA and PIPSC for the Audit, Financial and Scientific Group that expires on December 21, 2026) were permitted to remain in the bargaining unit, they could be asked to interpret and apply their own collective agreement or collective agreements with similar language. Frankly, the conflict of interest is obvious: an employee should not have the power to issue binding decisions on behalf of the employer that affect their own terms and conditions of employment because the temptation to make a decision contrary to the employer's interests (and favourable to their own interests) is too great. The interpretation urged on me by the CRA in this case is consistent with the purpose of s. 59(1) of the *Act* to prevent conflicts of interest.

E. Cases relied upon by PIPSC are not about the second ground in s. 59(1)(e)

[25] PIPSC relies upon the Board's previous adoption of the "*Canada Safeway*" test for excluding employees. That test, derived from *Labour Relations Board v. Canada Safeway Ltd.*, [1953] 2 SCR 46, is three-fold and is applied to determine whether an employee or position should be excluded because of concerns about confidentiality in matters relating to industrial relations — namely, the confidential matters must be

related to industrial relations, their disclosure would adversely affect the employer, and the person must be involved with this information as a substantial and regular part of their duties. The *Canada Safeway* test is not relevant to the second ground in s. 59(1)(e) of the *Act*. It may be relevant to the first ground when assessing whether a position performs substantial management duties because the idea of a regular part of an employee's duties is similar to whether those duties are substantial; it may also be relevant when deciding applications made under ss. 59(1)(c), (g), or (h) of the *Act* because they are about confidentiality and labour relations. But it is not relevant here because this case is not about confidentiality or the meaning of the term "labour relations".

[26] PIPSC also relies upon *Canada (Treasury Board) v. Public Service Alliance of Canada (Correctional Group)*, [1979] C.P.S.S.R.B No. 9 (QL), for the proposition that an employer must distribute duties in a way that ensures that the maximum number of employees can enjoy the freedom and right to engage in collective bargaining. PIPSC further argues that this means that the Board can inquire into whether the employer has distributed its grievance officers appropriately, relying on the following passage from that case:

> …
>
> *56. … If the employer distributes the responsibility for investigating grievances in such a manner as to expose a number of employees to an occasional conflict of interest rather than assigning the responsibility to the smallest practical number it cannot expect to find this Board sympathetic to such an action.…*
>
> …

[27] However, that case was not about whether to exclude an employee who was a level in the grievance process; that case was about excluding an employee who was (allegedly) confidential to the employee who was the first level in the grievance process. Therefore, the application was made under the paragraph of the *PSSRA* that was closest to what is now s. 59(1)(h) of the *Act* — not under s. 59(1)(e). I cannot apply the principles set out in that case to the second ground of s. 59(1)(e).

F. The Board cannot apply *Charter* values in this case

[28] Finally, PIPSC relies upon the fact that collective bargaining and union membership are protected under s. 2(d) of the *Canadian Charter of Rights and*

Freedoms (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*"). I agree. However, PIPSC has not challenged the constitutionality of s. 59(1)(e) of the *Act*. Its argument (although not phrased quite this way) is that I should decide this case considering those constitutional rights. As the Board stated in *National Police Federation*, at para. 157, "The Supreme Court of Canada has held that administrative decision makers must exercise their statutory **discretion** in a manner consistent with the values underlying the granting of discretion, including *Charter* values …" [emphasis added]. This is consistent with the Supreme Court of Canada's recent decision in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para. 65, which is that **discretionary** decisions must take *Charter* values into account.

[29] As I have explained, I have no discretion in this case. Paragraph 59(1)(e) is clear. It does not give the Board the discretion to deny an application once the employer has demonstrated that the position has been designated as a level in the grievance process (i.e., it is "dealing formally" with grievances). Since I have no discretion, I cannot apply *Charter* values to this case.

[30] For these reasons, I grant the CRA's application. Even though I have no evidence indicating that the positions have substantial and regular involvement in the grievance process, their designation as the first level in the grievance process is sufficient to justify their exclusion under the *Act*. Therefore, I declare that the positions are excluded. Each order is effective as of the date of the CRA's application.

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

(The Order appears on the next page)

V. Order

[32] The application is allowed.

[33] I declare that positions numbered 30180218, 30196653, 30233553, 30239574, 30303228, 30303229, 30313905, 30320760, 30322915, 30322916, 30338702, and 30342281, titled “Manager, Finance” and classified at the MG-06 group and level at the Canada Revenue Agency, are excluded positions, effective April 24, 2019.

[34] I declare that position number 30370907, titled “Assistant Director, Regional Programs” and classified at the MG-06 group and level at the Canada Revenue Agency, is an excluded position, effective December 23, 2021.

[35] I declare that position number 30413535, titled “Manager, Program Development and Business Analysis and Reporting” and classified at the MG-06 group and level at the Canada Revenue Agency, is an excluded position, effective April 19, 2023.

July 17, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board