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File: 566-02-13796

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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

SACHA SYLVAIN

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Sylvain v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Guido Miguel Delgadillo, Public Service Alliance of Canada

For the Employer: Andréanne Laurin, counsel

Decided on the basis of written submissions filed December 11, 18, and 22, 2023.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Request before the Board

[1] Sacha Sylvain ("the grievor") filed a grievance on January 27, 2015, which was referred to adjudication on February 17, 2017. The collective agreement in effect when the reference was made was between the Treasury Board and the Public Service Alliance of Canada for the Operational Services group that expired on August 4, 2014 ("the collective agreement").

[2] The grievance consists of seven pages detailing all the facts that led to filing it. In summary, the grievor submitted that the selection board for a unit general safety officer (UGSO) position at the AS-04 group and level should have considered his status as a priority employee after a workforce adjustment.

[3] As a corrective measure, the grievor requests that the Department of National Defence ("the employer") comply with the mediation agreement signed in June 2014 and that his application be reconsidered for the UGSO position. He requests that the employer consider his priority employee status, the option of a return to studies provided in the mediation agreement, his experience as an acting UGSO, and his positive performance appraisal.

[4] In response to the grievance's referral, the employer raised a preliminary objection to the jurisdiction of the Federal Public Sector Labour Relations and Employment Board ("the Board"). It submits that the appropriate remedy in the circumstances is a staffing complaint under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). It submits that the Board's jurisdiction is limited by ss. 208 and 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") and that a grievance cannot be filed if another administrative procedure for redress is available.

[5] For the following reasons, the objection is dismissed. The grievor alleges that the collective agreement was violated. The essence of the grievance is the interpretation and application of the collective agreement's Appendix I, on workforce adjustment. According to the written submissions from his bargaining agent, the issue is the grievor's status at the moment he was informed of his affected-employee status and of his rights under Appendix I.

II. Summary of the evidence

[6] The parties produced a joint statement of facts. I will reproduce later the salient facts on which basis I dealt with the employer's objection to the Board's jurisdiction.

[7] The grievor was a cable technician at the GL-EIM-09 group and level, which was equivalent to an AS-02 classification.

[8] On September 26, 2013, the grievor received a letter advising him that he was an affected employee in a workforce adjustment process because of a lack of work or a function's removal.

[9] On November 25, 2013, he received an options letter. Since he did not choose an option, the grievor received a letter advising him that he was deemed to have chosen Option "A"; that is, he would have surplus priority employee status until March 28, 2015.

[10] On July 8, 2014, a "Notice of Interest" for the UGSO AS-04 position was shared with some employees. It stated that the intention was to temporarily staff a position through an acting assignment for a period of four months less a day.

[11] On July 14, 2014, in response to a Notice of Interest that the employer sent, the grievor applied for the acting UGSO position. On July 18, 2014, the employer advised him that his application was being considered for an acting period of four months less a day.

[12] The grievor occupied the acting UGSO AS-04 position from September 15, 2014, to January 15, 2015. During that acting period, he expressed an interest in occupying the position permanently.

[13] On January 12, 2015, the employer informed the grievor that he did not meet the merit criteria, specifically the education criterion, since he did not have an occupational health and safety certificate from a recognized university and did not meet the possibility of an acceptable arrangement since his experience, which was limited only to participating in an occupational health and safety committee as a local member, could not be considered sufficient to occupy the UGSO position indeterminately.

[14] On January 27, 2015, the grievor filed a grievance contesting the employer's decision. It was dismissed at all levels of the internal grievance process.

[15] On February 27, 2015, the grievor received a letter advising him that he would be laid off effective March 28, 2015. However, on March 17, 2015, he accepted an offer letter for an indeterminate occupational health and safety advisor and human resources projects position at the AS-02 group and level, which was at-level.

[16] The grievor was never laid off and had no breaks in employment during that period.

III. Summary of the arguments

A. The employer's objection

[17] The employer submits that s. 208(2) of the *Act* and clause 18.10 of the collective agreement prohibit referring a grievance to adjudication when another Act of Parliament provides an administrative procedure for redress. Those provisions avoid multiple appeals and require officials to pursue recourse specific to the issues that they raise.

[18] According to the employer, the grievor's claims are about staffing issues. He alleges that the statement of merit criteria for the position that he sought was inadequate and that the employer should have used another statement of merit criteria. He alleges that he disagrees with the employer's conclusion that he did not meet the position's essential qualifications. Connected to those allegations, he requests that his candidacy be re-evaluated.

[19] In addition, the employer submits that Appendix I is not applicable since the position that the grievor sought constituted a promotion. The objective of Appendix I, on workforce adjustment, is to maximize job retention among the employer's employees. The guarantee of a reasonable job offer includes an employment offer at an equivalent or lower level. It does not set out a right to a position at a higher level. The grievor held a cable technician position equivalent to one at the AS-02 group and level. The UGSO position that he sought was at the AS-04 group and level. On March 17, 2015, he accepted an occupational health and safety advisor and human resources projects position at the AS-02 group and level. He was never laid off and had no breaks in service during that period.

[20] The employer also submits that the grievance is theoretical. If the Board concludes that Appendix I applies, the question that the grievor raised is purely theoretical. He was offered an equivalent position before he was to be laid off, which he accepted. The employment relationship was not broken. Therefore, it would be purely theoretical for the Board to consider whether the employer respected its obligation in the workforce adjustment situation.

[21] For all those reasons, the employer maintains that the appropriate remedy in the circumstances is a staffing complaint. To support its arguments, it referred me to the following decisions: *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.); *Burlacu v. Canada (Attorney General)*, 2022 FC 1112; and *Fang v. Deputy Head (Department of Industry)*, 2023 FPSLREB 52.

B. The grievor's response

[22] The grievor asserts that the Board has jurisdiction to hear the grievance as it is the only available remedy to challenge the employer's decision. As of its filing, no internal staffing or appointment process was ongoing that would have led to a right of recourse under the *PSEA*.

[23] In his grievance, the grievor alleges that Appendix I was violated, and he contests that he was not selected for the UGSO position. His opinion is that his rights, as set out in Appendix I, are not limited by the fact that the UGSO position constituted a promotion. He submits that as of the moment the grievance was filed, he was a priority employee and was entitled to retraining under Appendix I. Therefore, the appropriate remedy in the circumstances was a grievance.

[24] The grievor contends that he was a priority employee and that he met the merit criteria or that he could have met them after exercising his right to retraining under Appendix I's provisions. The employer's refusal to appoint him to the UGSO position violated his rights set out in Appendix I. Although he disagrees with the merit criteria, it is not the substance of the grievance.

[25] The grievor submits that the Board must examine the potential violation of his priority right and his retraining right under Appendix I. The grievance does not challenge the appointment of the person who ultimately was nominated to the

position. The grievor claims his priority and retraining rights, as set out in Appendix I, for his possible appointment to the UGSO position.

[26] In short, the grievor's opinion is that he was a priority employee, that there was a position for which he was qualified, or that he could meet the merit criteria after exercising his retraining right. Finally, the employer violated Appendix I by failing to offer him retraining.

[27] The grievor disagrees with the employer's argument that the grievance raises a theoretical issue. He submits that the employer's decision adversely affected his career. Had it not been for the violation of Appendix I, he would have held the post in question. The refusal impacted his salary and career path significantly. He did not submit any case law to support his argument.

IV. Analysis

[28] Section 208(1) of the *Act* establishes an employee's right to file a grievance. Section 208(2) limits that right and provides that if an administrative procedure for redress is available under another Act of Parliament, an employee may not file an individual grievance.

[29] Recently, in *Katoch v. Canada (Attorney General)*, 2024 FC 744 at para. 9, the Federal Court ruled that before s. 208(2) of the *Act* can be applied to prevent filing an individual grievance under s. 208(1), the administrative procedure in question must provide "real redress" that provides a "personal benefit" to the grievor (see *Johal v. Canada Revenue Agency*, 2009 FCA 276 at para. 35; and *Chickoski v. Canada (Attorney General)*, 2017 FC 772 at para. 81.

[30] The case law of both the Federal Court and the Board is consistent with respect to staffing. Section 208(2) of the *Act* was enacted to avoid the possibility of duplicating proceedings under the *Act* on one hand and the *PSEA* on the other (see *Boutilier*, *Burlacu*, *Fang*, and *Chopra v. Canada (Treasury Board)*, [1995] 3 F.C. 445 (T.D.) at 452).

[31] In *Fang*, at para. 10, the Board held that s. 208(2) of the *Act* provides that an employee "… may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament …". As in that case, the parties' collective agreement that was in force at the moment the

grievance was filed stated that filing a grievance was subject to s. 208 (see clause 18.10 of the collective agreement).

[32] In *Boutilier*, the Federal Court of Appeal held as follows that the redress available in the other administrative procedure did not have to provide an equal remedy, provided that it dealt reasonably and effectively with the substance of the grievance: "Differences in the administrative remedy, even if it is a 'lesser remedy', do not change it into a non-remedy" (see paragraph 23).

[33] In *Burlacu*, the Federal Court interpreted those sections the same way, in that the available administrative redress under s. 208(2) of the *Act* need not necessarily provide the employee with equal or greater relief. However, it must provide genuine redress that deals reasonably and effectively with the substance of the grievance (see *Boutilier*, at para. 23, and *Burlacu*, at para. 21).

[34] The circumstances supported in the grievor's grievance differ from those in *Chopra*, *Boutilier*, *Burlacu*, and *Fang*. In *Boutilier*, *Burlacu*, and *Fang*, the basic grievance involved an internal appointment process for which the *PSEA* provided an administrative procedure for redress.

[35] On the contrary, the grievor's allegations and claims refer to the interpretation and application of Appendix I, which is on workforce adjustment. Although he disputes that he did not meet the merit criterion for the AS-04 UGSO position, the basis of his grievance is his claim to a presumed entitlement to retraining set out in Appendix I. He claims that he is entitled to retraining and that he should be considered a priority for the UGSO position. As a surplus employee, he claims to be entitled to retraining for an appointment to an AS-04 group-and-level position, which would constitute a promotion. Therefore, the appropriate remedy in the circumstances is a grievance and not a complaint under the *PSEA*.

[36] In *Fang*, the employer raised an objection under s. 208(2) of the *Act*. The Board examined the grievance and the complaint that the grievor referred to adjudication. It noted that the complaint made under the *PSEA* involved the same appointment process raised in the grievance. In his grievance, the grievor claimed damages for lost wages because he had not been promoted. He made the same damages claim in his complaint under the *PSEA*. The Board determined that that remedy was not available in a complaint under the *PSEA*. The grievor also claimed damages under the *Canadian*

Human Rights Act (R.S.C., 1985, c. H-6; *CHRA*) in his grievance and complaint. The Board held that s. 77 of the *PSEA* authorizes interpreting and applying the *CHRA* and that it grants the Board the power to order a remedy under ss. 53(2)(e) and 53(3) of the *CHRA*. The Board denied the grievance for lack of jurisdiction and allowed the complaint under the *PSEA*.

[37] In *Boutilier*, it was argued that the facts alleged must be essentially the same as those in the other redress process. It also stated that s. 91(1) of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; the equivalent of s. 208(2) of the *Act*) "… does not require that **the same redress** be available under another provision …" [emphasis in the original] or that the remedy be equal to or greater than that sought in the grievance.

[38] Contrary to the facts raised in all those decisions, the grievor's allegations and claims cannot be remedied by a staffing complaint made under the *PSEA*. The *PSEA* provides compensation to employees who are adversely affected by indeterminate appointments — either to the Public Service Commission if the appointment was made through an external appointment process (see s. 66 of the *PSEA*) or to the Board if it was made through an internal appointment process (see s. 77(1) of the *PSEA*).

[39] A staffing complaint made under s. 77, which means after a proposed appointment or an appointment through an internal appointment process, provides that a person in the area of recourse referred to in s. 77(2) may, in the manner and within the period provided by the Board's regulations, make a complaint that he or she was not appointed or proposed for appointment for any of the reasons set out in it. As I mentioned earlier, in the circumstances of the grievor's grievance, there was no internal appointment process. In addition, he made no abuse-of-authority allegations.

[40] I find that the Board has jurisdiction to hear the grievance, as the complaint process under the *PSEA* is not applicable in the circumstances of this case because there was no external or internal appointment process. No other administrative procedure can address the grievor's concerns as to the issues. Accordingly, I dismiss the employer's objection under s. 208(2) of the *Act*.

[41] I also reject the employer's argument that the grievance is theoretical. It submits that Appendix I does not apply since the position that the grievor sought constituted a promotion. He was never laid off and had no employment breaks during that period.

According to the employer, the guarantee of a reasonable job offer includes an employment offer at an equivalent or lower level. It does not provide a right to a higher-level position. That is the grievance's true nature.

[42] Although I agree with the employer that the purpose of Appendix I, on workforce adjustment, is to maximize job retention among its employees, the grievance's true nature is the grievor's claim that he may move to the AS-04 position, either directly through priority or through employer-paid training, to qualify for it.

[43] Under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide, without a hearing, any case or matter that it is seized of. Accordingly, the hearing on the grievance's merits will proceed by way of written arguments as to whether the grievor could claim his rights under Appendix I for positions that would constitute promotions. The Board will contact the parties to organize a pre-hearing conference and to establish a timetable for submitting written arguments.

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

(The Order appears on the next page)

V. Order

[45] The employer's preliminary objection is dismissed.

September 16, 2024.

FPSLREB Translation

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board