

Date: 20250514

File: 771-02-42394

Citation: 2025 FPSLREB 58

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



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

BETWEEN

DAVID REAL

Complainant

and

**DEPUTY HEAD
(Canadian Energy Regulator)**

Respondent

and

OTHER PARTIES

Indexed as

Real v. Deputy Head (Canadian Energy Regulator)

In the matter of a complaint of abuse of authority under section 77(1)(a) of the *Public Service Employment Act*

Before: Joanne Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Cathy Martinello

For the Public Service Commission: Marc-Olivier Payant

Decided on the basis of written submissions,
filed October 11 and December 4, 2024.

I. Introduction

[1] The complainant, David Real, made a complaint alleging an abuse of authority in the application of merit in an advertised appointment process (numbered 20-ENR-IA-0099) for a group leader, environmental protection, position with the Canada Energy Regulator (“CER”). The position is classified NB-11, PC-05.

[2] The issue in this proceeding is whether the Federal Public Sector Labour Relations and Employment Board (“the Board”) has the jurisdiction to reopen a staffing complaint that was withdrawn and enforce the terms of a settlement agreement.

[3] For the following reasons, I find that following the withdrawal of a staffing complaint made under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”), the Board is without jurisdiction to reopen the file or enforce a settlement agreement.

II. Background

[4] On December 18, 2020, the complainant made the complaint. He subsequently participated in mediation with the CER, and the parties settled the matter.

[5] The complainant electronically signed and filed a notice of withdrawal with the Board on November 10, 2021. On November 15, 2021, the Board wrote to him, acknowledging receipt of the withdrawal and advising that the file was closed.

[6] There was no further contact from the complainant until October 2, 2024, when he wrote to the Board, to make the following request:

On 10 November 2021, using FPSLREB facilitated mediation, I entered into a settlement agreement to resolve complaint 771-02-42394. In my view, the Canada Energy Regulator has breached the settlement agreement. Specifically, Term 2 has not been met.

I am requesting that the FPSLREB reactivate file 771-02-42394, specifically to enforce the settlement agreement.

...

III. Matter before the Board

[7] In response to the complainant’s request, the CER made a preliminary objection, arguing that the unconditional withdrawal of a complaint made under the PSEA prevents the Board from later reopening the matter.

[8] In support, it relied on the decision of the former Public Service Staffing Tribunal (“the Tribunal”) in *Howarth v. Deputy Minister of Indian Affairs and Northern Development*, 2009 PSST 11.

[9] The complainant replied to the CER’s preliminary objection. He submitted that the Board indeed has jurisdiction to resolve a dispute concerning a settlement agreement. In his view, as the Board had jurisdiction to hear the initial complaint, it retains the authority to consider whether the CER breached the settlement agreement.

[10] The complainant referred to the Board’s decision in *Kennedy v. Deputy Head (Department of Citizenship and Immigration)*, 2023 FPSLRB 118, to support his request to reopen the file.

[11] The Public Service Commission took no position on the CER’s preliminary objection.

IV. Analysis

[12] The complaint underpinning this matter was made under s. 77(1)(a) of the *PSEA*, which provides as follows:

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board’s regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)

...

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d’un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l’emploi, présenter à celle-ci une plainte selon laquelle elle n’a pas été nommée ou fait l’objet d’une proposition de nomination pour l’une ou l’autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l’administrateur général dans l’exercice de leurs attributions respectives au titre du paragraphe 30(2);

[...]

[13] The complainant's withdrawal of the complaint on November 10, 2021, conformed to the requirements of s. 26 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6) and included this statement: "I hereby withdraw the above-mentioned complaint." He raised no concern about the withdrawal's validity or the Board's reliance on it.

[14] To support the request to reactivate the complaint to enforce the settlement agreement, the complainant referred to the *Kennedy* decision. However, I am not persuaded that it applies to a staffing complaint initiated under the *PSEA*.

[15] The *Kennedy* decision originally involved two grievances referred to adjudication under the *Public Service Labour Relations Act* (S.C. 2003, c.22, s. 2; *PSLRA*), as the legislation was known before being renamed the *Federal Public Sector Labour Relations Act* (*FPSLRA*) in 2017. The parties later entered a settlement agreement, following which the grievor withdrew the grievances from adjudication. On a subsequent application from the grievor, the Board granted the request to reopen one of the grievances.

[16] The Board's decision comprehensively reviewed the powers granted to it by s. 12 of the *FPSLRA*, which was formerly s. 36 of the *PSLRA*. Section 12 provides as follows:

12 The Board administers this Act and it may exercise the powers and perform the duties and functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, with regulations made under it or with decisions made in respect of a matter coming before the Board.

12 La Commission met en œuvre la présente loi et exerce les attributions que celle-ci lui confère ou qu'implique la réalisation de ses objets, notamment en rendant des ordonnances qui en exigent l'observation, celle des règlements pris sous son régime ou des décisions qu'elle rend sur les questions dont elle est saisie.

[17] The decision placed particular emphasis on the phrase in s. 12 that gives the Board powers that "... are incidental to the attainment of the objects of this Act ...". It concluded that the authority given by s. 12 permitted the Board to consider reopening a grievance referred to adjudication under the *FPSLRA*.

[18] However, the *Kennedy* decision and the Board's labour relations authority under the *FPSLRA* are distinguishable from the complaint before me. A staffing complaint and the related hearing process are governed by the *PSEA* and not the *FPSLRA*.

[19] It is a fundamental legal principle that an administrative tribunal such as the Board has only the authority that is given by its enabling legislation (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 108). In this case, it is the *PSEA* that defines the scope of the Board's authority over a staffing complaint.

[20] At s. 77, the *PSEA* grants complainants the right to make a complaint to the Board. The right to be heard by the Board is given in s. 79(1). The Board's authority to order corrective action in the case of a substantiated complaint is addressed in ss. 81 and 82.

[21] For the Board to allow the complainant's request to reopen the complaint file, the authority would have to be found within the *PSEA*. However, it is not. The *PSEA* does not give the Board authority over staffing complaints to "... exercise the powers ... as are incidental to the attainment of the objects of this Act ...", as s. 12 of the *FPSLRA* does in grievance matters.

[22] The facts in the *Howarth* case presented a comparable situation to the Tribunal. The complainant in *Howarth* withdrew a complaint after agreeing to terms of settlement. She later asked the Tribunal to hear a new complaint, on the ground that the respondent had failed to comply with the terms of the settlement.

[23] The Tribunal then reviewed the legal effect of a discontinuance as set out by the Federal Court of Appeal in *Canada (Attorney General) v. Lebreux*, [1994] F.C.J. No. 1711 (C.A.)(Q.L.), 178 N.R. 1 (F.C.A.), and held at paragraph 23, "The withdrawal of a complaint under the *PSEA* is a complete bar to adjudication." It also declined to hear a new complaint of abuse of authority relating to an alleged failure to comply with the terms of settlement, holding that it did not fall within the complaint provisions of s. 77 of the *PSEA*.

[24] I adopt the outcome in the *Howarth* matter. Given that the *PSEA* governs staffing complaints, that this complaint was unconditionally withdrawn on November 10, 2021, and that the *PSEA* does not accord the Board the authority to reopen a

complaint after it has been withdrawn, I find no avenue for the Board to consider the complainant's request. The preliminary objection is upheld.

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

(The Order appears on the next page)

V. Order

[26] The CER's preliminary objection is upheld.

[27] The complainant's request to reopen the complaint is dismissed for lack of jurisdiction.

May 14, 2025.

**Joanne Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**