



TBS FILE: 8946-018-008

PSLRB FILE: 585-02-25

November 21, 2008

Mr. Pierre Hamel
C D Howe Building
240 Sparks Street, West Tower, 6th Floor
PO Box 1525, Station B
Ottawa, Ontario
K1P 5V2

Dear Mr. Pierre Hamel:

**Re: Request for the Establishment of an Arbitration Board –
The Treasury Board of Canada and
The Association of Justice Counsel
Law (LA) Group Bargaining Unit**

In accordance with your letter dated November 6, 2008, please find attached a written articulation of the employer's jurisdictional objections and argument with respect to the bargaining agent's proposals. These arguments will be limited to the employer's jurisdictional objections, and the employer maintains its objection to the bargaining agent's proposals which were agreed to by the parties at the bargaining table, or that were withdrawn by the bargaining agent at the bargaining table, or for which no proper bargaining proposal from the bargaining agent has been filed. These objections can be found at Appendix A-2 and A-3 of the employer's Form 10.

**Clause 10.17 - Full or Part-time leave for AJC President/Officers
Clause 10.18 - No Prejudice to Lawyers on Article 10 Leave**

The bargaining agent proposes that the leave in question shall be counted for the purposes of pension benefits and entitlement. These provisions are directly related to pension provisions that are or can be established under the *Public*

Service Superannuation Act (PSSA). Therefore, this proposal is in conflict with sections 113(b) and 150 (1)(b) of the *Public Service Labour Relations Act (PSLRA)*. These provisions read as follows:

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if [...]
(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]
(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*;

Article 11 - Grievance Procedure

Specifically, the proposal at clause 11.03 contains an obligation to produce all documentation relating to the grievance which is available to the person or persons making the decision being grieved. This proposal may require the amendment of the *Access to Information Act*, since the information available to the person making said decision may be barred from disclosure under the *Access to Information Act* or the *Privacy Act*. This is specifically prohibited under the *PSLRA* at sections 113(a) and 150 (1) (a):

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if
(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or

condition of employment, or establish any new term or condition of employment, if
(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;

Article 16 - Professional Responsibilities

Portions of the bargaining agent's proposal at Article 16 deal with the subject of appraisals. Specifically, at clause 16.01, it is proposed that an employee may not be negatively evaluated for raising concerns about professional obligations or refusing to act in a manner contrary to their professional obligations. This is contrary to section 150(1)(c) of the PSLRA which states:

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]
(c) the term or condition relates to standards, procedures or processes governing the appointment, **appraisal**, promotion, deployment, rejection on probation or lay-off of employees;
[emphasis ours]

Clearly, the language proposed directly or indirectly relates to standards, procedures or processes governing appraisals and should be set aside.

Article 19 - Vacancies

Article 19 deals specifically with notice and application rights when dealing with vacant positions, as well as the rules governing the filling of vacancies. This is clearly contrary to sections 113(b), 150(1)(b) and (c) of the *PSLRA*.

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if [...]
(b) the term or condition is one that has been or may be established under the ***Public Service Employment Act***, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]

(b) the term or condition is one that has been or may be established under the ***Public Service Employment Act***, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*;

(c) the term or condition relates to standards, procedures or processes governing the **appointment**, appraisal, **promotion**, **deployment**, rejection on probation or lay-off of employees;

[emphasis ours]

All relevant rules and obligations regarding notice provisions and the right to apply for a position are regulated by the *Public Service Employment Act (PSEA)*. The *PSLRA* does not allow the insertion of language that directly or indirectly deals with matters arising under the *PSEA*. This proposed Article should be set aside.

Article 48 - Timekeeping

The bargaining agent proposes that timekeeping may not be used for the purpose of adversely evaluating an employee. Clearly, the proposal deals with appraisals, which are specifically excluded pursuant to section 150(1)(c) of the *PSLRA* which states:

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]

(c) the term or condition relates to standards, procedures or processes governing the appointment, **appraisal**, promotion, deployment, rejection on probation or lay-off of employees;

[emphasis ours]

Clearly, the language proposed directly or indirectly relates to standards, procedures or processes governing appraisals and should be set aside.

Clause 56.01 - Duration

The Duration proposed by the bargaining agent is from April 1, 2006 until March 31, 2009. The I stipulates at section 156 that an arbitral award :

156. (1) The arbitration board must determine the term of the arbitral award and set it out in the arbitral award.

(2) In determining the term of an arbitral award, the arbitration board must take the following into account:

(a) if a collective agreement applicable to the bargaining unit is in force or has been entered into but is not yet in force, the term of that collective agreement; or

(b) if no collective agreement applying to the bargaining unit has been entered into,

(i) the term of any previous collective agreement that applied to the bargaining unit, or

(ii) the term of any other collective agreement that it considers relevant.

(3) An arbitral award may not be for a term of less than one year or more than two years from the day on which it becomes binding on the parties, unless the arbitration board determines otherwise in any case where paragraph (2)(a) or (b) applies.

Therefore, in accordance with paragraph (3), unless the arbitration board determines otherwise in accordance with paragraph (2)(b), the duration of the arbitral award must be between one and two years from the day on which it becomes binding on the parties. Consequently, the proposal to have the term expire on March 31, 2009 would be contrary to paragraph 156(3). Clearly, there are good labour relations and policy reasons for this requirement, as it is not in the interests of the parties to have an arbitral award expire shortly after (or even before) the arbitration board's order. The expiry of the award must be at least one year and no more than two years from the date of the award or its coming into force.

Clause 56.02 - Implementation and retroactive application

The bargaining agent proposes a retroactive date of April 1, 2006. However, notice to bargain was given on May 10, 2006. Therefore, the arbitral award may not be retroactive beyond that date.

155. (1) The arbitral award has effect as of the day on which it is made or, subject to subsection (2), any earlier or later day that the arbitration board may determine.

(2) The arbitral award or any of its parts may be given retroactive effect, but not earlier than the day notice to bargain collectively was given.

(3) If a provision of an arbitral award is to have retroactive effect, the provision displaces, for the retroactive period specified in the arbitral award, any term or condition of any previous collective agreement or arbitral award with which it is in conflict.

Appendix A S1.2 - Salary and Performance Pay

The bargaining agent proposes that lawyers with more than 4 years of call to the bar or commencement with the employer as an LA-1 be promoted to the minimum of the LA-2A scale. Clearly, this is in conflict with sections 113(b), 150(1)(b) and (c) of the PSLRA as promotions are governed, or may be governed, by the PSEA.:

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if [...]

(b) the term or condition is one that has been or may be established under the ***Public Service Employment Act***, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]

(b) the term or condition is one that has been or may be established under the ***Public Service Employment Act***, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*;

(c) the term or condition relates to standards, procedures or processes governing the **appointment**, appraisal, **promotion**, **deployment**, rejection on probation or lay-off of employees;

[emphasis ours]

This section must therefore be excluded from the terms of reference.

Appendix A S1.6 - Salary and Performance Pay

The bargaining agent proposes a minimum percentage (30%) of lawyers who must be classified at the LA-2B level or higher. Clearly, this proposal deals with classification matters and conflicts with sections 6, 7 and 150(1)(c) of the *PSLRA*.

6. Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board under paragraph 7(1)(b) of the *Financial Administration Act*.

7. Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]
(c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;
[emphasis ours]

Paragraph 7(1)(b) of the *FAA* reads as follows:

7. (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to [...]
(b) the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein;

Therefore, since the proposal seeks to limit the right or authority of the employer to assign duties and classify positions, it must be set aside.

Appendix A S1.9 - PIPSC Lawyers

The bargaining agent proposes that the effective date of April 1, 2006 be read as February 28, 2006 for PIPSC lawyers (lawyers who were formerly represented by the Professional Institute of the Public Service of Canada and whose collective agreement expired on said date). This conflicts with section 155 of the *PSLRA*, since it predates the date on which notice to bargain was given (May 10, 2006).

155. (1) The arbitral award has effect as of the day on which it is made or, subject to subsection (2), any earlier or later day that the arbitration board may determine.

(2) The arbitral award or any of its parts may be given retroactive effect, but not earlier than the day notice to bargain collectively was given.

(3) If a provision of an arbitral award is to have retroactive effect, the provision displaces, for the retroactive period specified in the arbitral award, any term or condition of any previous collective agreement or arbitral award with which it is in conflict.

Further, it conflicts with sections 6, 7 and 150(1)(c) of the *PSLRA* as outlined above. This clause must therefore be set aside.

Appendix A S3.1 - PREA Performance Increases

Portions of the bargaining agent's proposal at Appendix A S3.1 deal with the subject of appraisals. Specifically, they propose set limits on the number of performance appraisals that may be set in each category (does not meet, meets or exceeds). This is contrary to section 150(1)(c) of the *PSLRA* which states:

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]

(c) the term or condition relates to standards, procedures or processes governing the appointment, **appraisal**, promotion, deployment, rejection on probation or lay-off of employees;
[emphasis ours]

Clearly, the language proposed directly or indirectly relates to standards, procedures or processes governing appraisals and should be set aside.

Further, this section is in conflict with section 155 of the PSLRA which states:

155. (1) The arbitral award has effect as of the day on which it is made or, subject to subsection (2), any earlier or later day that the arbitration board may determine.

(2) The arbitral award or any of its parts may be given retroactive effect, but not earlier than the day notice to bargain collectively was given.

(3) If a provision of an arbitral award is to have retroactive effect, the provision displaces, for the retroactive period specified in the arbitral award, any term or condition of any previous collective agreement or arbitral award with which it is in conflict.

The bargaining agent's notice to bargain was given on May 10, 2006. Therefore, the arbitral award may not be retroactive beyond that date.

Appendix A S3.2 - PREA Performance Increases

Portions of the bargaining agent's proposal at S3.2 deals with pensions, as in indicates that lump-sum payments will be pensionable. This is contrary to sections 113(c) and 150(1)(b) of the PSLRA which state:

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if [...]

(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]

(b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*;

The issue of what may or may not be pensionable is governed by the *PSSA* and this proposal should be set aside.

Appendix A S3.4 - PREA Performance Increases

This clause incorporates the Performance Review and Employee Appraisal Policy into the collective agreement. This is in clear contradiction to section 150(1)(c) of the PSLRA which states:

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if [...]
(c) the term or condition relates to standards, procedures or processes governing the appointment, **appraisal**, promotion, deployment, rejection on probation or lay-off of employees;
[emphasis ours]

Clearly, the language proposed directly or indirectly relates to standards, procedures or processes governing appraisals and should be set aside.

Yours sincerely,



Marc Thibodeau, CRIA
Senior Negotiator
Collective Bargaining
Labour Relations and Compensation
Operations

c.c. G. Grenier
S. Mailer
S. Barrett
C. Trottier



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