Canada Gazette, Part I, Volume 158, Number 36: Regulations Amending the *Public Service Employment Regulations*

1. General

The Public Service Alliance of Canada (PSAC) has already conveyed, and therefore repeats, our deep disappointment in the quality of consultation that occurred with regard to these changes to the *Public Service Employment Regulations* (PSER). In particular, we are very concerned about the Public Service Commission's (PSC's) lack of examination of the use of seniority as a decision-making factor for layoffs when they occur in the federal public service.

As you know, the PSAC and Treasury Board signed a Letter of Agreement, attached to our recent collective agreement, that clearly indicated that the consideration of this matter was generated by an agreement between the Treasury Board as Employer and the Union, and that the dialogue between the PSC and the PSAC ought to be confined to the Commission, the PSAC and the Treasury Board.

We believe that the PSC was obligated to hear the Union's recommendations and transmit those recommendations to other actors in whole and in good faith to the extent that such recommendations may be required. This belief is further supported by section 14 of the *Public Service Employment Act* (PSEA) which states:

> The Commission shall, on request or if it considers consultation necessary or desirable, consult with the employer or any employee organization certified as a bargaining agent under the *Federal Public Sector Labour Relations Act* (FPSLRA) with respect to policies respecting the manner of making and 'revoking appointments or with respect to the principles governing lay-offs or priorities for appointment.

Instead of consulting with us directly, the Commission broadened the consultation to include a wide selection of other actors, whose identities are for the most part unknown to the PSAC, and whose opinions about our request and recommendations remain secret. This was not the intention of the letter of agreement nor is it what is intended by the language of the PSEA in section 14.

Furthermore, the PSC extended this invitation for comments to others without even hearing PSAC's recommendations. Nor did the PSC include PSAC's recommendations in its broader consultation package. At the same time, the Commission's consultation document included several speculative and unsubstantiated reasons for why seniority could not be included in the consideration of layoffs.

When Commission staff finally met with PSAC to discuss the recommendations, they further advised the Union that they would be considering the recommendations of all those who provided final submissions to the Commissioners. Although at that time Commission staff asked several questions, at no time did they share any reasons why

PSAC's recommendations would not work or in fact be superior to those that the Commission itself was recommending. The PSC would not even commit to attaching our recommendations to their final submission. Finally, the Union did not have an opportunity to consider the PSC's recommended regulation changes until they were gazetted.

As you well know, the strong engagement of public service employees in the public service is largely because of rights and conditions that were introduced by unions, and particularly PSAC, in bargaining. Seniority with respect to layoffs was proposed at the request of our members. Our members do not want to relive the severe stress that was inflicted on employees who were already, by definition, meritorious through the Selection of Employees for Retention or Lay Off (SERLO) process that was administered during the Deficit Reduction Action Plan (DRAP).

PSAC submitted recommendations for equitable seniority that would eliminate some of the stress caused by layoffs while maintaining, and probably improving, equity considerations. Treasury Board shares this goal, or they would not have signed the Letter of Agreement with the Union. The PSC should also share this goal and should not have undermined it through this so-called consultation process.

PSAC has always found the statutory exclusion of lay-offs from collective bargaining unconstitutional. The lack of transparency in this process highlights those concerns. PSAC views these changes as serious and detrimental to the rights of our members and will review our legal options.

2. **Issue**
    a. No comment.

3. **Objective**
    a. No comment.

4. **Description**

Interpretation

No comment.

Disclosure of information obtained in the course of an investigation

In accordance with the *PSEA*, if the Commission is satisfied that there was an error, an omission or improper conduct, political influence or fraud, it has broad powers to investigate.

PSAC asserts the regulations should reflect the PSC's intent to carry out its investigation powers in a more rigorous and proactive manner, including more detailed explanations of decisions not to investigate and substantive rational for decisions.

The results of the PSC's own Staffing and Non-Partisanship Survey demonstrate that there is a lack of trust in the staffing system among many rank and file workers.

PSAC has, and continues to recommend that new regulations require the management personnel delegated to administer the staffing process to:

- provide a full rationale for their decisions;
- provide access to all interview documents in a way that protects privacy;
- maintain a consistent approach to disclosure; and
- instruct personnel administering the test to provide consistent and written instructions vis a vis the testing

Section 20 (1) of the current regulations specifies that the PSC:

> shall not disclose a standardized test, or information concerning a standardized test, owned by an organization or the Commission or that is commercially available, if obtained in the course of an investigation under the Act, unless it can be disclosed, with or without conditions set by the Commission, in a manner that will not affect the validity or continued use of the standardized test or will not affect the results of such a test by giving an unfair advantage to any person.

The PSC must protect the privacy of individual employees. Although we understand the need to protect the integrity of the test, this must be balanced against the appearance of fairness and transparency.

At the same time, the PSC has the ability to share testing information. According to PSAC representatives, this is seldom done, leaving the apparent fairness of the process so compromised that the union is forced to resort to access to information requests. The PSC must design a mechanism that allows it to share the expected responses to a question asked in a process with actual responses.

PSAC has also recommended that the results regarding standardized tests be communicated to unions in a manner that respects the *Privacy Act* and allows unions to properly assess trends with respect to breaches in testing and evaluation practices.

Priority entitlements

PSAC recommended at the beginning of the consultation process that all regulatory priority entitlements be increased to five years for reasons of clarity, consistency and fairness. We continue to support this change.

We agree with the proposed increase in the duration of the priority entitlement from two to five years for employees who become disabled. However, depending on the disability, more than five years may be necessary. PSAC asserts the Commission must go further with respect to members with disabilities who have priority entitlements.

PSAC notes that the Commission must, pursuant to human rights law, evaluate persons with disabilities on a case-by-case basis and not implement one size fits all solutions.

It should be emphasized that an employer is responsible for accommodating employees in the workplace. Our comments here do not change that important legal obligation under the *Canadian Human Rights Act*, nor should priority entitlement be used as a way *not* to accommodate an employee in the workplace.

However, in situations where there are no available accommodations in a department, the priority entitlement should be available as an option. Nonetheless, the employer's obligation does not cease once this option is selected by an employee but continues in the form of support in finding suitable work that meets the employee's accommodation requirements in another department. This should be accomplished through the department's return-to-work and accommodation processes and committees, and the priority entitlement processes under the PSC. The employer must not abdicate its human rights obligations via priority entitlement.

Section 7 of the PSER sets out the requirement to obtain a disability priority. Under ss 7(4), there are five criteria for an employee who is "disabled" to qualify for disability compensation. Each of these five criteria has distinct definitions of "disability". The discrimination arises from the use of these five criteria as the sole basis for determining disability priority. Ss 7(4) excludes employees with disabilities returning to the workplace unless they fall specifically within the five limited criteria. Thus, many employees are denied disability priority entitlements. The result is that an arbitrary distinction is made between employees with disabilities who fall within subsection 7(4) and those who do not. For example, employees whose disabilities are temporary or episodic (so not "continuous" or "expected to last a lifetime") cannot access the disability priority.

The definition of disability under the *Canadian Human Rights Act* (CHRA) is much broader than the definition under ss 7(4). Because these criteria are limiting a group of employees with disabilities from accessing disability priority, the PSER is not consistent with the interpretation and application of disability in the *CHRA.* As such, ss 7(4) definition must be updated to reflect and to be consistent with human rights law. It is also noted that the Supreme Court of Canada in *Battlefords and District Co-operative Ltd. V. Gibbs*, [1996] 3 SCR 566 determined that establishing categories within a prohibited ground of discrimination can itself lead to discrimination.

In addition, ss 7(1) of the PSER requires an employee to be ready to return to work within five years after the day on which the employee becomes "disabled". Again, this makes a distinction between employees with disabilities who can return to work within five years and those who cannot. For example, a person who receives a kidney transplant within five years and can return to work is eligible for the disability priority. However, if the person receives a kidney transplant and cannot return to work after five years, they are ineligible.

Lastly, while PSAC welcomes the increase to the entitlement period in ss 7(2)(a), this section may still have an adverse impact on people with episodic or reoccurring disabilities. This period fails to account for situations where a person may be able to return to work but later become unable to continue working within the five-year period, possibly because of an episodic disability. For example, if a person returns to work after cancer treatment and qualifies for the priority entitlement, the five years continues, even if interrupted for further cancer treatment. The limit should be extended beyond five years and consider a reasonable time when there is a disruption within that period.

Another example is mental health disabilities where an individual's ability to work is episodic and may follow a pattern of "well" periods and "ill" periods.

Therefore, PSAC recommends that the definition of disability must be consistent with the *CHRA*, including episodic disabilities. PSAC also recommends the five-year rule under ss 7(1) be eliminated in order that all employees can access the disability priority as some employees may be able to return to work in five years and others may not.

The PSEA establishes, in a specific order, the "statutory priorities". The PSER also establishes a list of "regulatory priorities" that have no relative order of priority. Employees with a disability who must take medical leave can only avail themselves of the statutory priority provision in the *PSEA* if their position is backfilled. To benefit from this statutory priority, the employee must be on leave without pay and the position must be staffed indeterminately. Positions are often left vacant, and the result is that employees with disabilities are not ranked high enough on the statutory priority list. Instead, they are left with regulatory priority and even then, they must be unable to perform the duties of their substantive position. With some disabilities (e.g. stress from a bullying supervisor, scent and mold allergies) the line between being able to perform their duties or not is not clear. An employee with disabilities with a regulatory priority must then compete with employees who have other regulatory priority entitlements, e.g. surplus employees from other organizations, spouses or relocations.

In addition, some employers use the priority system to effectively bypass their legal obligation to accommodate. These employers seem to believe that priority entitlement is, in itself, the accommodation and that their responsibility lapses when the entitlement period ends.

Ideally disability priority should be ranked in the statutory priority list as defined in the Act. PSAC recommends employees with disabilities be ranked first in priority on the regulatory priority list. Given that changes to the PSEA are not within the mandate of the regulatory review, regulatory changes must be enacted that correct issues impacting employees with disabilities which are not currently addressed by the PSEA.

Although not directly related to the regulatory review, PSAC also recommends the Commission provide employees with disabilities with additional training on how to take advantage of their priority entitlement. Departments have an obligation to provide this

training. Training of this nature would enable employees with disabilities to participate more fully in accessing job opportunities and make the best use of the priority system.

Finally, we firmly believe the reinstatement priority entitlement for surplus and laid-off employees should be extended to five years. We fail to understand why meritorious employees who have given their lives to public service and who have lost their jobs through no fault of their own should have the weakest priority status. The public service would benefit from applying a longer priority entitlement to these employees because they have already proven themselves to be adept at the work that they do. It's important to remember that layoffs must not be viewed as a remedial measure for poor service. There are other mechanisms to enforce poor performance and managers must not use the mechanism of layoff as an alternative to proper performance management. The extension to five years puts minimal pressure on the public service and departmental management's capacity, since in recent years the obligation to access priority rights has fallen more on the individual and less on the Commission.

Acting appointments

No comment.

Lay-off provisions

PSAC is extremely disappointed that the PSC did not introduce changes to the PSER to include seniority as a factor in the SERLO process during situations of workforce adjustment. Alarmingly, the Commission removed seniority as a factor for the Ships Repair Group, demonstrating a move in the opposite direction. The PSC failed to provide any evidence justifying the elimination of this provision besides the need to harmonize the lay-off provisions across all occupational groups. The PSC clearly missed its opportunity to harmonize lay-off provisions to include seniority and missed an opportunity to meaningfully improve the SERLO process.

The federal government's DRAP exercise from 2011 to 2015 was well documented in its use of the unfair and stressful SERLO process for making lay-off decisions. Since then, PSAC has considered and studied ways to make the lay-off process more transparent and more fair in legislation and regulations. In the last round of collective bargaining, the Treasury Board of Canada and PSAC mutually agreed, in a letter of understanding, to recommend the PSC consider and study the possibility of including seniority in the PSER, in a way that wouldn't disadvantage any equity groups. Sadly, PSAC submits that the changes to the PSER, were made without proper consideration or study.

In all consultation and bargaining venues, PSAC repeatedly provided evidence that the application of seniority in lay-offs is less stressful and more fair for all workers, including workers with equity designations, than the PSC's SERLO process.

Most unionized private and public sector unions in Canada include seniority as a factor in determining the order of lay-offs. The federal public sector is an outlier in not recognizing seniority as a factor in lay-offs and is recognized as such by the broader legal community when discussing lay-off processes (see Goldblatt Partners,https://goldblattpartners.com/unsolicited-blog/what-is-seniority/).

In fact, seniority lay-off forms a part of many PSAC collective agreements covered by federal labour jurisdictions. Under the FPSLRA, seniority governed lay-off processes are standard for PSAC members working on Canadian Forces bases as Staff of the Non-Public Fund. Seniority provisions are also present in PSAC collective agreements with national museums, crown corporations like Canada Post and the Royal Canadian Mint, units governed by the *Canada Labour Code*. Moreover, seniority lay-off provisions are the norm in many other jurisdictions where the PSAC represents workers. Most provincial, municipal and education unions and employers have provisions for seniority as a factor in lay-offs in their collective agreements.

The Goldblatt Partners Blog above reminds its readers that seniority is:

> an agreement that the parties reach because it offers benefits to both sides. For an employer, seniority-based rights have traditionally helped incentivize employees to stay on longer term and provide stability for the employer's workforce, which is a part of why employers have long agreed, and still agree, to trade off some of their decision-making discretion in favour of seniority-based rights.

In addition, once seniority lists are established, the amount of work to update them and administer them is negligible compared to the work required by managers to implement an individual merit process for workers who are already, by definition, meritorious.

Seniority provides employees with a clear understanding of their job security and their job status. No lay-off is welcome, but employees who are laid off through a seniority system know that the process for the lay-off, often like the lay-off itself, is based on events that they can seldom control. When seniority is used as a determinant in lay-off, employees don't feel stigmatized, or that they have done something wrong, or that they ought to have done something differently, or that they were not "good enough" for reasons that are unclear. Seniority processes do not tend to negatively impact workers' mental health in the same deleterious way that arbitrary layoff processes do. Moreover, the negative impact of lay-offs in general are often experienced more acutely for older workers for whom it is typically harder to find new meaningful work opportunities.

The following reiterates PSAC's responses to the PSC 's consultative document, which presaged the proposed regulations on lay-offs (letter from Chris Aylward to the PSC, 22 December 2023) The Commission's Impact Analysis Statement and proposed regulations fail to address the PSAC's arguments in any meaningful way.

(1) With these regulatory changes, the PSC continues to hold the position that employees who are at risk of losing their jobs must demonstrate their merit. Although the Commission claims that the proposed regulations focus on the degree to which employees meet the most essential qualifications, both now and in the future, rather than on their individual merit, employees are still required to prove their qualifications for a retained position, which is unnecessary given that their service and experience should already demonstrate their qualifications. If employees do not have the ability to perform the assigned duties of their positions, then the Employer either failed to provide them with the training required or has not undertaken the necessary progressive discipline and/or dismissal process. Replacing these processes with a lay-off process is inconsistent with the spirit of the SERLO process.

Employees with greater seniority, by definition, can not only do their jobs but, by most accounts, do their jobs more effectively and expertly than newer employees. While seniority is not a “qualification”, certainly years of experience is an important measure of a worker’s competence to do their work. The Commission is being intellectually dishonest to suggest otherwise. Long-tenured workers regardless of the job often have more knowledge about the work they do than any qualification or certification could provide. For instance, during DRAP over one thousand Compensation Advisors were either laid off, forced into retirement or transferred into other work. It was believed that their years of experience could be replaced by courses and certifications from community colleges. That proved untrue, as the Phoenix disaster clearly revealed. Compensation advisors had to be enticed to return to the workplace with retention allowances. Experience is essential whether it is in providing logistics support to the military or understanding the myriad legislation and rules consistent with providing accurate and timely employment insurance benefits to Canadians or in multiple other jobs that public service workers do on behalf of Canadians.

(2) In its consultative document, the Commission asserts that certifications gained during an employee’s work tenure could be identified as a qualification to capture their seniority in the SERLO process. PSAC maintains that seniority, and experience accumulated during those years of service, are of great value to the public service separate from, and in addition to, any certifications or qualifications that workers have obtained. Seniority and certifications are different attributes of an employee and conflating them does not address the fairness and transparency shortcomings of the current lay-off process.

(3) In its consultative document, the Commission suggests that the adoption of seniority could undermine efforts and recent gains made towards achieving a representative and inclusive public service.

PSAC’s proposal to adopt a system of equitable seniority reinforces the employment equity in the federal public service. It is a superior system to one that invokes individual merit and management discretion to decide on who should be laid off. As mentioned, individual merit in itself, and particularly in the case of lay-offs, facilitates favoritism and

the application of bureaucratic patronage both consciously and unconsciously. Equitable seniority provisions as laid out by PSAC preclude this happening, and if it does, it is unequivocally an abuse of authority, for which there is a complaint mechanism.

(4) In its consultative document, the PSC posits that recently hired veterans could be disadvantaged based on seniority. Anyone recently hired could be disadvantaged in a system based on seniority. That is how seniority works. It is a transparent system that rewards employees for their experience and loyalty to the organization. Of course, recently hired veterans would be more likely to be laid off than veterans who have been employed in the public service for a longer time. Long-tenured veterans should not be disadvantaged either. This is all supposition, however, as the Commission has not provided any proof supporting their assumption that this is likely to happen.

Many veterans have disabilities that were caused while in service to their country. We believe PSAC's equitable seniority process will protect those workers more than decisions made by individual merit and subject to likely bureaucratic patronage. Moreover, the system will be less stressful and less harmful to all workers with disabilities inflamed by stressful workplace situations.

(5) In its consultative document, the Commission argues that seniority may disadvantage employees who take extended periods of leave without pay, such as for the care of family. The Commission is once again making an unsubstantiated declaration. It is equally true that an individual merit process, and the tendency towards the bureaucratic patronage that it facilitates, has the potential to equally disadvantage workers who have taken extended periods of leave without pay. In fact, it is more likely that this would be the case for overworked managers striving for consistency in their teams, and who don't want to engage in time consuming backfilling exercises.

PSAC submits that the system of Equitable Seniority for which we are advocating, would be fairer and more transparent for workers who have availed themselves of unpaid family leave. Seniority considers the employees' whole career and not one small part of it that a particular manager may only be aware of.

(6) In its consultative document, the Commission suggests that seniority may negatively influence recruitment and renewal efforts to attract new public servants. The argument against using seniority bears absolutely no grounding in fact. Rather, the opposite is true. Most new recruits to a new organization would prefer to know that there is a transparent and fair process in place in the organization they are applying to work for. Most highly unionized workplaces have seniority as a facet in lay-offs, and there are no known instances of workers not accepting a job for this reason. In fact, they might be more likely to turn down a job if they believe that if they speak truth to power, get involved in their union or just don't behave as expected, that they could be laid off without any real recourse or explanation, should there be lay-offs.

(7) Finally, in its consultative document, the Commission argues that their proposed changes would harmonize the manner in which SERLOs are performed across the public service. The SERLO system invites employee stress, management favouritism and bureaucratic patronage. The last thing PSAC members want is for this unfair system to be used across the public service. The proposed regulations would further inequity by allowing managers to unilaterally determine qualifications that are most required for the work to be performed, currently and in the future. It isn't difficult to imagine how this process could be manipulated to retain the employee(s) a manager likes best, for reasons that may have nothing to do with an employee's ability to perform their job.

Conclusion

In the 2022 Clerk of the Privy Council's report to the Prime Minister, the clerk at the time wrote:

> **We know that keeping workplaces safe and healthy involves more than the physical space. It also involves taking care of the health and well-being of employees, including by considering how work and mental health intersect**...**The Public Service has made a lot of progress in recognizing the importance of mental health and continues to work to support employee well-being**.

It is time to make further progress. It is widely recognized that when the *Public Service Modernization Act* amended the PSEA, it omitted any serious consideration about how decisions about which employees would be subjected to lay-off should be undertaken. One could argue, and many scholars of Public Administration have argued, that individual merit is a tool that is not fit for the purpose of staffing.

Individual merit and the SERLO process that embodies it, is even less fit for the purpose of deciding who will be laid off. It is impossible to make that choice without some incidence of bureaucratic patronage either consciously or unconsciously biasing the decision. It is unfair to draft regulations that not only put managers in a difficult position, but also create extra workloads.

It is even more unfair to rob workers who are already meritorious through a process which, during the DRAP years, was almost universally deemed to be unfair, arbitrary, in some cases discriminatory. In addition, this process failed to provide proper recourse mechanisms. The degree of stress that federal public service workers experienced then was completely unacceptable and has only been equaled by the Phoenix pay fiasco.

PSAC members want seniority. They want a fair and transparent alternative.

We are deeply disappointed in the PSC's decision to move forward with these proposed changes to the PSER. We have repeatedly demonstrated that the SERLO process caused undue stress for both workers and managers, and that the harm caused is a

symptom of its design. If that design is maintained, further stress and difficulties will persist. PSAC submits that our recommendations provide a reasonable, fair and more objective alternative: equitable seniority. However, the Commission has failed to give proper consideration to this superior lay-off method and instead enshrined in the regulations the most problematic aspects of the SERLO process whereby individual merit, and the inevitable bureaucratic patronage that the use of individual merit facilitates, is used for choosing federal public service employees for lay-off.

In conclusion, PSAC expresses its profound disappointment with the PSC's decision to reinforce jurisdictional barriers regarding the inclusion of seniority in lay-off situations. Despite concerted efforts through multiple rounds of negotiations and a mutual agreement with the Treasury Board to recommend changes to the PSEA, the PSC's actions have left the PSAC with no viable alternative but to explore legal recourse, including a potential Charter challenge. We urge the PSC to reconsider its position and work collaboratively towards a resolution that respects the principles of fairness and worker rights.

5. **Regulatory Development**
    a. See above.

6. **Regulatory Analysis**
    a. No comment.

7. **Implementation, compliance, enforcement, and service standards**
    a. No comment.

8. **Proposed Regulatory Text**
    a. No comment.

9. **Regulations Amending the Public Service Employment Regulations**
    a. No comment.

10. **Transitional Provision**
    a. No comment.

11. **Coming into Force**
    a. No comment.

12. **Confidential Business Information**
    a. No comment.