



## VIA EMAIL

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# Response to Public Service Commission

## Introduction

During the federal government's DRAP exercise that played out from 2011 to 2015 the Public Service Alliance of Canada was asked repeatedly by both our members and the media how the union could allow such an unfair and stressful lay-off process as the SERLO process to exist. We replied honestly that we had no control over it given it was enshrined in legislation and regulations.

Since then, our members have demanded that we include ways to make the lay-off process more transparent and fairer in PSAC bargaining demands. We have been trying to do so. In the collective agreement that was signed with Treasury Board in 2016 the union made significant advances in improving alternation provisions and in creating a voluntary departure program.

In the last round of collective bargaining, we bargained a letter of understanding that proposed that the Treasury Board of Canada and the PSAC would approach the PSC to look at applying seniority to lay-offs, in a way that wouldn't disadvantage equity groups. This proposal does that.

The Public Service Commission has forwarded a consultation document to all "stakeholders", which puts forth only its own view that Seniority should not be a factor in the decision of which employees to lay-off or not to lay-off. The PSAC had an introductory meeting with the PSC as a precursor to further consultation. Their completed consultation document dismisses the PSAC's views about seniority without effectively even having heard them, disseminating its own one sided and uninformed view. This is not consultation.

In the proposition and arguments below the PSAC will demonstrate that the principle of seniority in layoffs is less stressful and fairer for all workers including workers with equity designation than the Public Service Commission's SERLO process.

## **Seniority**

Most unionized private and public sector unions in Canada include seniority as a factor in determining the order of lay-offs. Although we are not aware of recent consolidated statistics Human Resources Development Canada reported in 2002 that in January 1998, roughly 72.7% of all major Canadian collective agreements contained seniority provisions applying to layoff covering 68% of 1,524,907 employees. (Fourzly, Gervais, Collective Agreements and Older Workers in Canada, HRDC Labour Program 2002) Collective Agreements don't tend to give up important job security provisions so we don't expect that statistic to be any smaller than it was then.

The federal public sector is an outlier in not recognizing seniority as a factor in layoffs, and is recognized as such by the broader legal community when discussing lay-off processes. (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 layoff process 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 corporation 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 layoffs in their collective agreements.

The same 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 layoff, often like the layoff itself is based on events that they can seldom control. They 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 not clear, in their desire to keep their jobs. Seniority processes do not tend to negatively impact workers' mental health in same deleterious way that arbitrary lay-off processes do. Moreover, the negative impact of layoffs in general are often experienced more acutely for older workers for whom it is typically harder to find new meaningful work opportunities.

## **Equitable Seniority**

Within the PSAC's overall seniority proposal the union is advocating for a process of what the union's Human Rights office calls "Equitable Seniority".

The PSAC is of the opinion that the process we are advocating will be more fair, more transparent, accountable and less stressful for both equity group workers and for non-equity workers. We were advised after the job cuts during DRAP that People with Disabilities were disproportionately laid-off, leaving that particular equity group even more underrepresented after the lay-offs had ended. Under the process that we are advocating this should never be the case again.

Some examples of how this would work include:

### Example 1

1. The distinct work areas in which members are compared for lay-off would be identified ahead of time by departments in consultation with the unions at departmental joint union management meetings or at joint WFA meetings. Each area would be as broad as possible while still allowing for workers to be able to do the work of those laid off with minimal training.
2. The department would create a seniority list or lists being sure to include whether workers on the list are members of an equity group, and what equity group of which they are a member.
3. When a Workforce Adjustment situation is declared by the deputy head, the number of people required to be laid-off in each area of selection will be shared with the union. This is already a collective agreement obligation, under 6.2 (B), of the Voluntary Departure Program articles in the PSAC workforce adjustment agreement.
4. As per 6.2, Voluntary Departure Programs, a voluntary departure program will be initiated in consultation with the union. From past experience with DRAP the PSAC is of the firm opinion that this measure alone will eliminate or reduce the need for lay-offs. It may actually improve the representation rates in the federal public service given that the enticements to leave the public service tend to target older workers who choose WFAA 6.4.1 (B) a transition measure payment with access to a pension waiver.
5. A reverse order of Seniority would be followed to decide who would be laid off.
6. If laying off an employee means that an equity group would be underrepresented or below workplace availability levels, that employee would be skipped over for layoff the department would move on to the next employee on the seniority list.

## Example 2

1. The distinct work areas in which members are compared for lay-off would be identified ahead of time by departments in consultation with the unions at departmental joint union management meetings or at joint WFA meetings. Each area would be as broad as possible while still allowing for workers to be able to do the work of those laid off with minimal training.
2. Seniority lists would be prepared for each area of lay-off. There would be a seniority list for each equity group and a seniority list for the workers who are not part of an equity group.
3. Workers in each equity group would be identified for lay-off on a seniority basis.
4. Lay-offs would not occur in each equity group until the workforce availability or representation point, whichever is greater for each group, is reached.
5. Workers with lower seniority that are in excess of workforce availability or representation will be positioned based on seniority within the master seniority list.
6. When a Workforce Adjustment situation is declared by the deputy head, the number of people required to be laid-off in each area of selection will be shared with the union. This is already a collective agreement obligation, under 6.2 (B), of the Voluntary Departure Program articles in the PSAC workforce adjustment agreement.
7. As per 6.2, Voluntary Departure Programs, a voluntary departure program will be initiated in consultation with the union. From past experience with DRAP the PSAC is of the firm opinion that this measure alone will eliminate or reduce the need for lay-offs. It may actually improve the representation rates in the federal public service given that the enticements to leave the public service tend to target older workers who choose WFAA 6.4.1 (B) a transition measure payment with access to a pension waiver.
8. If more layoffs are required after the voluntary departure program is completed, they will then be done by reverse order of seniority using the seniority processes articulated at point # 2 to #5 of this example.

## **SERLO process**

SERLO stands for the “Guide for Selection of Employees for Retention and Lay-off”. The guide was produced in 2012 when the PSC realized that the government of the day was contemplating extensive layoffs, in a reduction exercise not seen since the mid 1990s.

The SERLO process attempts to integrate individual merit into a layoff process under the Public Service Employment Act.

The Public Service Modernization Act was introduced in Parliament in February of 2003. Previously, hiring in the public service was facilitated by a process of relative merit. The legislation ultimately amended the Employment Act to replace relative merit with individual merit. It was silent about the process for lay-offs, but by extension also replaced the process used during the lay-offs in the 90s called reverse order of merit, which was based on the principle of relative merit. This process was plagued with problems, but it was somewhat transparent and fair in that there had to be established processes for comparing workers, and individual processes could be grieved if they were conducted improperly.

At some point in 2011 or 2012 the Commission realized that reverse order of merit was inconsistent with the principle of individual merit and that an alternate process would have to be invented. The Guide was created, but unfortunately the SERLO process caused public service workers to undergo unprecedented stress, was inconsistent in its logic and depended almost completely on the assumption that individual managers would adhere to the values and ethics that they were supposed to adhere to, with almost no accountability around how that would happen. Moreover, the Guide is simply that. It is neither law, a directive or a policy.

The principle of individual merit itself is flawed. Required accountability measures don't exist. Even before individual merit was introduced the report from the Task Force on Values and Ethics (1996, P 27) cautioned that ““over the past two decades there has been a discernible shift in the public service appointment process to favour greater managerial discretion. We do not suggest this is a harmful trend in itself. But we do think that if it goes too far, without appropriate safeguards, it could undermine the institution it seeks to serve by creating the appearance, if not the reality, of bureaucratic patronage.”

A paper published in the Dalhousie Journal of Interdisciplinary Management in 2014 asserts that the definition of Individual Merit in the 2003 PSEA has “created an opportunity to water down the merit system and compromise the integrity of meritorious appointments. (Abstract p. 1) Continuing in the body of the paper the paper's author notes that “While hiring remains far removed from political actors, and so political patronage seems unlikely, there are fewer protections than provided by relative merit. Furthermore, opportunities for bureaucratic patronage – patronage based not on political allegiance but on relationships within the bureaucracy – are greatly increased. (p. 8)

(Brett Taylor, Merit 2.0: Implications of the 2003 Public Service Employment Act on Merit as an Organizing Principle in the Federal Public Service, Dalhousie Journal of Interdisciplinary Management, Vol 10, No. 1, Spring 2014)

According to the Public Service Commission (**Annual Report 2021–22: Building tomorrow's public service today**) the rate of non-advertised appointments in the federal public service has risen to a rate of %55.3 of appointments. We believe that the threshold

for the “appearance, if not the reality, of bureaucratic patronage” has been reached or exceeded.

The Public Service Commission spends a significant amount of time examining what on average is .0003% of public service for instances of political patronage, but very little time if any examining possible instances of bureaucratic patronage. The concept of individual merit espoused within the PSEA and the other criteria around it in the Act tend to facilitate opportunities for bureaucratic patronage instead of uncovering them. The ever-growing rate of non-advertised appointments confirms this.

The inevitability of bureaucratic patronage is even more pronounced in the instance of lay-offs. The distrust in the system and the stress caused is far more pronounced as well. Not winning a competition, or not being even considered for a job that you believe you are qualified for is disappointing. Losing your livelihood and your pride in your work through an arbitrary process is much worse.

The SERLO guide assumes that managers who lay off employees will embrace the values of the public service regardless of how vague those values are. The SERLO guide suggests that the “guiding values of fairness, transparency, access and representativeness guide managers in the process of selecting employees who are to be retained and those who are to be laid off, and that fairness **means** that decisions are made objectively and free from political influence or personal favouritism.” (Guide for Selection of Employees for Retention and Lay-off – Section 3: Values) This is the main criteria for accountability. Unless there is a gross violation of the PSEA the PSC has no power to enforce further accountability. A complaint based on an abuse of authority, which is pretty much the only complaint available to workers, is almost always unsuccessful, and would almost certainly be so in the instance of deciding who should be laid off.

It’s impossible to apply individual merit the way it is meant to be applied to workers who are already meritorious. Managers are tasked with reviewing multiple meritorious employees whom they manage without comparing them to one another. Individual merit in this case is actually only Reverse Order of Merit, except that employees cannot grieve. Employees rightly view the process as being unfair and arbitrary.

The Guide for Selection of Employees for Retention and Lay-off reminds managers that “The process of selecting employees for retention or lay-off is not designed to replace policies and procedures aimed at resolving performance issues or disciplinary problems,” how-ever there is no accountability to ensure that managers don’t use lay-offs to clean house, bypassing the principles of progressive discipline or constructive dismissal and employee’s collective agreement rights.

Seniority on the other hand integrates a level of fairness into the process that the SERLO process abandons. It saves manager’s time and ensures that employees are not left wondering if they will be arbitrarily chosen to be laid off and when.

This is important. There are many, many instances of employees experiencing stress caused by the SERLO process during DRAP documented by daily by Union representatives and frequently by the media.

For instance, Bill Curry writing for the Globe and Mail in September 2012, reported that in 2011 the EAP office “office received about 41,000 calls, a record. By the end of August 2012, the office had already received 30,009 calls with four months left in the year.” Lay-offs are stressful in the first place. The SERLO process made lay offs even more so. Francois Legault, who is the director of the EAP counselling program at the time is reported to have said that “We’re seeing a spike this year, as we expected” He continued by saying that 167 of those calls were identified as a suicidal risk last year and that over the first eight months of this year (2012) the office received 155 suicidal-risk calls. The Globe article reports that one suicide was actually attributed to lay-offs. The article also reports that the President of one of the bargaining agents at the time noted that 1200 “affected” letters were issued. All of these employees would have to undergo a SERLO process. Using seniority would eliminate the need for issuing these large numbers of affected letters and employees would know long in advance where they stood on the seniority lists.

### **Analysis of the Public Service Commission’s Rationale for not using Seniority**

Without even hearing the PSAC’s arguments advancing seniority as a mechanism, the Commission writes that it “proposes that the selection of employees to be laid-off be solely based on their assessment against the most relevant qualifications, operational requirements and/or organizational needs for the work to be performed, currently and in the future, as determined by the deputy head,” reaffirming the SERLO process, and that seniority would not be used.

They argue that they have given the subject careful consideration. They have not. They omitted including or even discussing the PSAC’s view before forming their own. They basically argue that the SERLO process should be kept, regardless of the harm and stress that it caused during DRAP.

In our view the SERLO process facilitates bureaucratic patronage in a more profound and destructive way than in the case of staffing. It is disappointing to not be picked for a job you wanted. It is devastating to be laid of from a job you value and be cut off from wages you need by an arbitrary process for which there is no real ability to lodge a complaint. It creates additional stress for employees who may be laid off and also for managers who want to treat their employees fairly but do not have any valid criteria for doing so.

The PSC’s rationale for dismissing seniority is also weak and based on assumptions that are not sustained in fact.

The PSAC had asked the Commission if there had been any problems with using Seniority for the Ship Repair groups in the past. Without addressing the question, the PSC instead “proposes to harmonize the lay-off provisions across all occupational

groups”, repealing the current provision related to seniority for the Ship Repair group, without any substantiation for doing so.

## **The Public Service Commission Rationale**

**(1)** The PSC says that the selection of employees to be laid-off should be made in relation to the employee’s ability to perform the functions of the retained position, and Seniority is not a qualification and is not a measure of a person’s competence in their position.

The PSAC response to this is that employees are already meritorious. Employees who have greater seniority, by definition, can do their job, and by most accounts do their jobs more effectively and expertly than newer employees. If they cannot, then they haven’t either been afforded the training required or they should have undergone a progressive discipline and or dismissal process. Replacing these processes for a layoff process is against the spirit of the SERLO process, as it ought to be. Nor should the nature of a position be radically altered just as an excuse to substantiate a layoff decision.

Seniority is not a “qualification”, but 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 certification from community colleges. They could not be, and the Phoenix problems just got worse. 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.

The Commission has provided no evidence to support these assertions.

**(2)** The Commission asserts that any certifications gained due to years of experience could be identified as a qualification. We would maintain that seniority and experience accumulated from those years of experience are of great value to the public service in themselves and that any certifications or qualifications that workers have obtained over that time inform that experience, they do not in any way replace it.

**(3)** The Commission posits that the adoption of seniority could undermine efforts and recent gains made towards achieving a representative and inclusive public service.

The PSAC’s proposal to adopt a system of equitable seniority reinforces the gains made towards achieving a representative and inclusive 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 before individual merit in itself, and particularly in the case of



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

**(4)** 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 for their 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 that the PSAC's process of equitable seniority will actually protect those workers more than decisions that are made by individual merit and subject to likely bureaucratic patronage. Moreover, the system will be less stressful and will be less harmful to all workers who have disabilities that are inflamed by stressful workplace situations.

**(5)** 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 bureaucratic patronage that it facilitates might 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.

The PSAC submits that the system of Equitable Seniority that we are advocating, would likely be fairer and more transparent to workers who have to avail themselves of unpaid family leave. Seniority takes into account the employees' whole career and not one small part of it that a particular manager may only be aware of.

**(6)** The Commission suggests that seniority may negatively influence recruitment and renewal efforts to attract new public servants.

This argument against using seniority bears absolutely no grounding in fact. 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 layoffs, and we know of no 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 layoffs.

(7) Finally, the Commission argues that their proposed model would harmonize the manner in which SERLOs are performed across the public service.

The SERLO system invites employee stress, management favouritism and bureaucratic patronage. Unions and the members they represent do not believe that harmonizing the SERLO process across the public service is in any way beneficial. Managers who care about their workload and who want to be as fair as possible to their employees may not see it as a benefit either.

## **Conclusion**

In the 2022 Clerk of the Privy Council's report to the Prime Minister, the clerk at the time wrote that "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." and that "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 more progress. It is widely recognized that when the Public Service Modernization Act amended the Public Service Employment Act, it omitted any serious speculation about how decisions about which employees to layoff 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's impossible to make that choice without some incidence of bureaucratic patronage either consciously or unconsciously colouring the decision. It is unfair to draft regulations that put managers in that position, leaving aside the extra workload it implies.

It is even more unfair to rob workers who are already meritorious in every sense, of their livelihood and their human dignity through a process which during the DRAP years was almost universally deemed to be unfair, arbitrary, in some cases discriminatory and absent of real recourse mechanisms. The degree of stress that that federal public service workers experienced then, has only been equalled by the damaged Phoenix pay fiasco.

- We believe that in this proposal we have demonstrated the paucity of the Public Service Commission's current position and rationale for that position.
- We believe that we have demonstrated the SERLO process caused stress for both workers and managers, and that the harm caused is a symptom of its design. If that system is maintained it will do so again.
- We believe that we have demonstrated that our proposal for equitable seniority will work, and

- That it is a superior process to the SERLO process, individual merit and the inevitable bureaucratic patronage that the use of individual merit facilitates in the process of choosing people for layoff.

PSAC members have asked their union to advocate for seniority. They want a fairer and more transparent alternative. This proposal follows up on the agreement between the Treasury Board and the PSAC that was negotiated in the midst of a historic strike.

We believe the PSC should agree to this change.



Chris Aylward  
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