

ISSUES OF GENERAL INTEREST

The past six months have produced a number of employment challenges for Foreign Service officers and PAFSO. The following is an update of those events including the upcoming round of bargaining.

FSDP

Ab Initio Status

Some of you may recall that PAFSO sought a determination from the Public Service Staff Relations Board that successful candidates to the Foreign Service Development Program ("FSDP") who are required to take official language training are "employees" while taking this training and should be included in the bargaining unit represented by PAFSO. The Board decision of December 21, 2001 found that these employees were not included in the bargaining unit because there was no appointment until they successfully completed the language training and during the period of language training they did not perform any of the duties of positions in the Foreign Service bargaining unit.

PAFSO sought a judicial review of this decision to the Federal Court of Appeal, our application was heard February 26, 2003 and a judgement was delivered March 26, 2003. Our application was dismissed with written reasons. Both of these decisions can be read by going to the Public Service Staff Relations Board web site, and the Federal Court web site.

PSSRB Web Site Address: http://www.pssrb-crtfp.gc.ca/cases/114_e.doc

Federal Court Web Site Address: <http://www.canlii.org/ca/cas/fca/2003/2003fca162.html>

The bottom line is successful candidates to the FSDP who require official language training ("Ab Initio status") are not included in the FS group until they successfully complete language training and are officially offered an appointment. PAFSO is very disappointed with the court's decision as half of the FSDP recruits require language training and during this period the external recruits receive an allowance equivalent to 80% of the FSDP starting salary, while the internal recruits remain on full salary. This strongly suggests that the exterior recruits are subsidizing their own language training. There were a number of other factors which in our view were indicia that there is a employer/employee relationship with the Federal Government including Ab Initio's requirement to contribute to Employment Insurance, Public Service Superannuation, Canada Pension Plan, and coverage under Worker's Compensation. This, in our view, showed a *de facto* employment relationship if not a formal appointment, to the program for which they had been recruited i.e. the FSDP.

FSDP Pay Plan

FSDP Maternity/Parental Leave Impact on Pay Increments/Conflict with Collective Agreement

This grievance arose as the result of a conflict between the department's Foreign Service Development Plan and the Foreign Service collective agreement. The Foreign Service collective agreement recognized that time spent on maternity leave without pay

would count for pay increment purposes, while the department's FSDP pay policy said it wouldn't be counted.

PAFSO's position was that the department's policy would not take precedence over the collective agreement. The issue went to adjudication and the adjudication process found in favor of the employee. This decision supports our position that where there is a conflict between the FSDP and our collective agreement, the collective agreement takes precedence. This decision coupled with the Treasury Board Secretariate's (TBS) earlier concession in 1991 that FSDP employees are eligible to receive acting pay should put to rest any assertion that the provisions of the FSDP pay plan takes precedence over the FS collective agreement.

While the adjudication decision resolved the impact resulting from taking Maternity and/or Parental leave on an employee's 18, 36 or 48 month pay increment, it left unresolved the impact this leave would have on the employees probationary period.

Probationary periods are by law excluded from the collective bargaining process and are governed by the Public Service Employment Regulations. These Regulations provide for a probationary period that coincides with the end of a professional development training period but they also exclude from this calculation any period of LWOP. For example an employee who takes a year off for maternity or parental leave purposes will have one year added to this already long probationary period. PAFSO has argued that this Regulation discriminates on the basis of marital or family status as it treats all of the LWOP provisions the same, without due regard for the reasons for the leave taken. We have been unsuccessful in convincing the Public Service Commission of the discriminatory nature of this provision and are now in the process of finalizing a complaint to the Human Rights Commission for a final determination.



FS1 - FS2 Competition

The long awaited results of the FS-1 - FS-2 competition have been announced and not unexpectedly a number of the unsuccessful candidates have appealed. The deadline date for the disclosure process has been set for the middle of September and we expect that the appeal hearing will be scheduled for sometime in October.

Pay Increments FSDP and FS2 Level Employees

All Foreign Service officers who are not at the maximum including those in the FSDP program should also be aware of the Pay Regulation with regard to pay increments found in the Terms and Conditions of Employment Policy July 2002. This Policy can be accessed on the Treasury Board web site: <http://www.tbs-sct.gc.ca>, click on Policies or the TBS search making sure you plug in the correct name and spelling. The Pay Increment section begins at paragraph 29 of the Policy but these regulations can be modified by the FS collection agreement. For example the FS-2 employees receive increments every August 1 unless the employee's performance is less than fully satisfactory. An FSDP employee receives pay increments at the 18th, 36th and 48th month respectively. These are modifications from this policy. Section 40 (1) clearly stipulates that an increment can be withheld if the employee is not performing the duties of the position satisfactorily. However, Section 40 (2) requires the employer in those circumstances to act in a timely manner, giving the employee full opportunity to demonstrate that he/she can perform the duties satisfactorily. To allow for this the employer must give the employee at least two weeks and not more than 6 weeks notice before this due date that the increment will be denied. Failing proper notice the employee is entitled to his/her increment.

FS-2 officers and FSDP officers who do not receive their increments on the due

date i.e. Aug 1 or the 18th, 36th or 48th month marker and who are not told within the time frame noted above, should contact personnel or the pay administrators requesting that their salaries be adjusted to the next highest level.

FS officers should also be aware that the increment period could be further modified by the FS collection agreement e.g.:

- Time spent on **maternity leave without pay** and time spent on **parental leave**, count for pay increment purposes.
- Time spent in excess of 3 months for Care of Immediate Family Leave is not accounted for pay increment purposes. The same holds true for **leave without pay for personal needs**.

If you encounter any difficulty you should contact the PAFSO office.

Retroactive Pay/Acting Assignments (FS Collective Agreement with Expiry Date June 30, 2001)

A number of grievances were filed resulting from the FS collective agreement that was signed August 31, 2000 concerning employees who had been in acting assignments prior to the signing date of the 2001 Collective Agreement. The grievances arose because the Treasury Board took the position that employees in these situations on the date of signing could not claim acting pay that would reach back beyond that date. It relied on the general clause that stipulated that unless the parties specifically agreed otherwise the provisions of the collection agreement took effect on the date the agreement was signed. PAFSO's position was that the acting pay provision should be read literally, and when read literally the wording of the acting pay provision provided acting pay to be calculated from the date on which the employee commenced to act.

The grievance was heard at adjudication December 17, 2001 and the adjudi-

cation dismissed the grievance saying that if the partner had intended this clause to be retroactive it should have specified this by specific reference. PAFSO did not agree with the adjudicator's reasoning as a specific reference was not necessary given the precise wording of language contained in the acting pay clause, and sought a judicial review of the adjudicator's decision.

The Federal Court Trial Division heard our application June 23, 2003, and rendered its decision July 3, 2003. The standard of review in these cases is very high. The question on judicial review is whether the adjudicator's interpretation was patently unreasonable. The Court deferring to a labour board's expertise in labour relations issues. The Court in dismissing our application noted: "The adjudicator's decision in the case at bar was not patently unreasonable. Clause 42.08 does not mention a specific date at which it becomes effective and does not contain express language making it applicable to situations that existed prior to the signing of the new collective agreement. If the parties intended to apply, override and reverse clause 42.11 of the old collective agreement in the time period the old collective agreement was in force clause 42.08 should and would have expressly so provided. A retroactive effect will not be presumed unless clearly provided."

PAFSO was disappointed with this decision but has decided against pursuing this case to higher judicial levels, because of costs and the fact that we have negotiated another collective agreement since the grievance arose. However, it will mean that for those employees whose grievances were held in abeyance pending a final resolution of this issue, their grievances will be withdrawn by PAFSO. Interested employees can read these decisions by visiting the web sites referred to earlier. The PSSRB citation is 2002 PSSRB 15.

PSSRB Web Site address:
http://www.pssrb-crtfp.gc.ca/whatsnew/decisions_e.html



Status Report on Federal Pension Plan Surplus Legislation

In September 1999, Bill C-78 was passed into law. The new legislation allowed the Federal Government to expropriate over 30 billion dollars of accumulated surplus in three superannuation accounts including the Public Service Superannuation account. In November 1999, the Public Service unions filed a Statement of Claim in the Ontario Court of Justice, claiming that the pension surplus and the interest it accumulated didn't belong solely to the employer. Since the filing of that claim there have been several preliminary objections filed by the Federal Government concerning the court's jurisdiction, but we are now at the discovery stage of the process. The cost of this challenge is shared by the bargaining agents on a formula based on the size of the bargaining agents' membership. As the statement of claim makes its way through the court system we expect that the cost of this challenge will increase.

The following is a statement prepared for the use of all bargaining agents involved in the claim, to inform members of where things stand with respect to the challenge.

Status Report on Federal Pension Plans Surplus Litigation

Where is the case at?

Three lawsuits challenging the Government's taking of the surplus in the Public Service Superannuation Plan; the RCMP Superannuation Plan and the Armed Forces Superannuation Plan are being pursued jointly by Court Order. The Ontario Superior Court has ruled that it has jurisdiction to hear the cases and that the federal unions pursuing the case are entitled to do so to protect the interests of public servants and other federal government employees. The lawsuits are now at the "discovery" stage. The Government has disclosed several thousand documents relevant to the issues in the case and all of

these documents have been reviewed. These documents include financial data and analyses of the plans as well as hundreds of documents, many at the senior level, dealing with the Government's strategy for dealing with pension surplus. The availability of some cabinet documents remains unresolved.

Once review of the documents was completed, the oral examination phase of the discovery process commenced. The former head of the Pension Division at Treasury Board was examined under oath for a total of 10 days in February and April, 2003, and the Comptroller-General has been examined on accounting and financial issues for several days in March and April. It is expected that examinations will be completed in the fall of this year.

When will the case be heard in Court?

Once the discovery phase is complete, the Court will schedule a Settlement Conference and assign a trial date. It is unlikely that the case will be tried before the fall of 2004.

What have we learned?

The discovery process has shed a great deal of light on how and why the Government dealt with the surplus as it did. Briefly, we now know that the Government's approach to dealing with the surplus was intimately linked to its desire to reduce the federal budget deficit in the mid-1990s. The Government discovered that accounting rules permitted it to quietly "amortize" the surplus and reduce the size of the stated budget deficit, even though the balances reported in the Superannuation Accounts would not be reduced. The net result, which was effectively hidden from employees, was the equivalent of a contribution holiday for the Government for much of the decade – a period in which employees continued to make their contributions in full. To make matters worse, one of the basic reasons for the emergence of the surplus in the first place was wage restraint and

salary freezes! By 1995, \$14 billion in surplus was already build into the Government's internal plan to reduce the deficit. None of these manoeuvres were disclosed to Treasury Boards's Advisory Committee on Pension Reform, which included members from the federal unions.

In 1999, Treasury Board proposed a new "pension deal", but the Department of Finance refused to permit any discussion of sharing of surplus or transferring of the existing surplus to the new pension fund. Although it didn't say so at the time, the Government needed to use the surplus to meet its deficit reduction targets. When the employee side refused to agree to the Government's deal, Bill C-78 was the Government's answer. Under this version of "pension reform", employee contributions increased and the Government retained all the surplus which had by 2000 grown to about \$30 billion.

Because it involves statutory pension plans, the case presents a number of new and groundbreaking issues. We remain committed to pursuing the case and to reversing the largest surplus grab in Canada. ■