

Crown Employees
**Grievance Settlement
Board**

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GSB# 2022-11971; 2022-12047; 2022-12048
UNION# 2023-0999-0002; 2023-0999-0003; 2023-0999-0004

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Union)

Union

- and -

The Crown in Right of Ontario
(Ministry of Children, Community and Social Services
and the Solicitor General)

Employer

BEFORE

Brian McLean

Arbitrator

FOR THE UNION

Donald Eady
Paliare Roland Rosenberg Rothstein LLP
Counsel

FOR THE EMPLOYER

George Parris
Treasury Board Secretariat
Counsel

HEARING

May 12, 2023

Decision

- [1] I have several Union grievances before me all of which assert that the Employer created a number of new positions and then directly assigned persons to those positions contrary to the provisions in the collective agreement that require job postings in such circumstances. The Employer's response is that the assignments in question were reclassifications and not assignments to a new position. What underlies this dispute may be one of the longest running labour relations issues in the public service. That is whether all or some of the first level managers at correctional institutions (who I shall refer to as Sergeants but who have historically been referred to by other titles), who have traditionally been excluded from collective bargaining, ought to be granted the benefits of collective bargaining on the assertion that they do not actually exercise managerial functions.
- [2] The quest by at least some of the Sergeants to obtain the benefits of collective bargaining and the quest by unions to represent the Sergeants have been going on for many years. However, in 2017 the issue came to a head when, after much litigation, the Ontario Labour Relations Board determined that the Public Service Alliance of Canada could not represent the non-managerial Sergeants and that the only unions that could were either the Ontario Public Service Employees Union (the "Union") or the Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (2017 CanLII 51086 (ON LRB)). AMAPCEO filed a grievance to represent the Sergeants, and OPSEU intervened. I was appointed to hear the grievance and by decision dated February 24, 2022 (CanLII 31316 (ON GSB)), I determined that OPSEU held the bargaining rights for any Sergeants who did not exercise managerial functions or who were excluded because they were employed in a confidential capacity in relation to labour relations (together "exercise managerial functions"). Importantly, at the time, the Employer's position was that there were no such persons in that all of the Sergeants exercised managerial functions. The position of both OPSEU and AMAPCEO was that there were many Sergeants who did not exercise managerial functions.

- [3] As an aside, I note that the question of whether Sergeants exercised managerial authority is an individual one to be determined on a Sergeant-by-Sergeant basis. In this regard CECBA states that the CECBA does not apply to “employees exercising managerial functions or employed in a confidential capacity in relation to labour relations”. In light of this, at the time when AMAPCEO was claiming, through its grievance, that it represented the Sergeants, AMAPCEO and the Employer had agreed to a process for the litigation of the issue of which, if any, Sergeants should no longer be excluded because they did not exercise managerial functions. They decided to proceed by way of test cases at institutions and in fact, one witness had been called in connection with that process. The parties anticipated that the litigation of the duties exercised by potentially all of the Sergeants could take a substantial period of time and many days of hearing. However, once I found OPSEU was the correct bargaining agent for any non-managerial Sergeants, AMAPCEO dropped out of the picture and that process ceased. The Employer then took certain actions which gave rise to these grievances.
- [4] The issue before me at this time arises out of the fact that once I issued my February 2022 decision, the Employer decided to try to put an end to this long-standing issue. It did so, by creating a position in the bargaining unit called a correctional supervisor. In general, the apparent intent was that correctional supervisors would be a sort of lead hand who would, among other things, give non managerial direction and oversight to the correctional officers. The correctional supervisor would not have some of the responsibilities that had been held by Sergeants which might be said to be managerial functions. In addition, the Employer decided it would discontinue the use of the Sergeant classification and increase its complement of Staff Sergeants (who it believed would exercise managerial functions).
- [5] These grievances arose out of the fact that the Employer decided to fill many of the correctional supervisor positions with Sergeants, who, as noted, were previously excluded from the bargaining unit (while keeping in mind that the

Union took the position that many of them should have been in the bargaining unit). The Employer assigned interested Sergeants to the position. The Union was unhappy about this because it believed the correctional supervisor position was a “new position” which, under its collective agreement, should have been posted. The Employer’s failure to post meant that correctional officers (COs) did not have the opportunity to be placed into the new role. It notes that there may well be many COs that previously might not have wanted to leave the bargaining unit to become a Sergeant but would be interested in staying in the bargaining unit as a correctional supervisor.

- [6] This decision determines whether the correctional supervisor position is a new position and whether the Employer ought to have posted to fill the positions.

The Facts

- [7] The parties did not call any witnesses. Instead, they entered into an agreed statement of fact (“ASF”) which sets out some of the relevant history in more detail than I have described above and the applicable collective agreement provisions. The ASF states:

The Corrections Collective Agreement

Recognition Clause

1. OPSEU is the exclusive bargaining agent for the Correctional Bargaining Unit. The full Recognition clause is found in Article 1 of the current Collective Agreement between OPSEU and the Crown in Right of Ontario. The Current Collective Agreement expired on December 31, 2021. The parties are currently in bargaining for a renewal Collective Agreement. “Correctional Bargaining Unit Collective Agreement”, Tab 1

2. At Article 1.1.2 of the Correctional Bargaining Unit Collective Agreement, OPSEU is recognized, inter alia, as the exclusive bargaining agent for the Correctional Bargaining Unit consisting of all Crown employees who are public servants employed in positions responsible for:

- a. the security, control, supervision, care and rehabilitation of adult offenders and young offenders in provincial correctional institutions/facilities (including maximum security units at the provincial psychiatric hospitals....)
- b. (not relevant)
- c. (not relevant)
- d. Employees in positions or classes that have been or may be established within the above description.

3. Excluded from the bargaining unit are Crown Employees covered by subsection 1.1(3) of the Crown Collective Bargaining Act, 1993, all persons or employees exercising managerial functions or employed in a confidential capacity in relation to labour relations.

4. Article 1.4 of the Recognition Clause reads as follows:

Where the Employer establishes a new classification or creates a new position within an existing class, the Employer shall provide the Union with a copy of the class standard and/or position description, including bargaining unit status (if applicable), at the relevant MERC.

5. Article 1.8 of the Recognition Clause reads as follows:

For clarity, the Employer agreed (sic) that any new positions or any new classification of employees that fall within the definition set out in Article 1.1 will be placed in the Correctional Bargaining Unit represented by OPSEU.

6. Therefore, if there is a position or classification that is not otherwise excluded from collective bargaining and the position is within the description contained in Article 1.1.2, then it must be represented by OPSEU.

Article 6-Posting and Filling of Vacancies or New Positions

7. Article 6.1.1 states:

When a vacancy occurs in the Regular Service for a bargaining unit position or a new regular position is created in the bargaining unit, it shall be advertised for at least ten (10) working days prior to the established closing date. Notices of vacancies shall be posted either electronically or on bulletin boards and, upon request, shall be provided in large-sized print or braille where the posting location has the capacity to do so.

8. Article 6.6.1.1 states:

With the agreement of the Union, the employee and the Employer, an employee shall be assigned to a vacancy where:

- a. the vacant position is identical to the position occupied by the employee, and,
- b. the vacant position is in the same ministry as the position occupied by the employee, and the provisions of Articles 6.1.1, 6.2, 6.3, 6.4 and 6.5 shall not apply.

9. Article 6.6.2 states:

The assignment of an employee to a vacancy in accordance with Articles 7 (Pay Administration), 20 (Employment Stability), 25 (Leave-Special), 42 (Long Term Income Protection), 50 (Pregnancy Leave) and 51 (Parental Leave) shall have priority over an assignment under Article 6.6.1.

An Abbreviated History of the Sergeant Position.

10. A “Sergeant” position has existed for many years in Corrections. Previously they have been referred to as Operational Managers (“OMs”), in the past two decades classified as the now defunct Operational Manager 16 (OM16) where all Sergeants shared the same job specification. Prior to the use of the singular OM16 position, there were OM14 positions in use, and prior to that the CO4 position. Subsequent to the OM16 position, Correctional Operational Managers 1 and 2 (“COM1 and COM2”) were utilized. Most recently, Sergeants were classified as Management 07 (M7) and Management 08 (M8). M8s (and previously COM2) are referred to as “Staff Sergeants”.

11. Since statutory collective bargaining rights began in the mid 1970s, the “Sergeant” position has always been excluded from collective bargaining. The Employer has always taken the position that none of the Sergeants are employees as they all exercise managerial functions. OPSEU takes the position that the Sergeants do not exercise managerial functions and should be included in the Corrections Bargaining Unit.

12. There was a dispute between AMAPCEO and OPSEU about which union was entitled to represent Sergeants if they were found to be “employees” within the meaning of CECBA. That dispute was resolved by a decision of the GSB (Vice Chair McLean), dated February 24, 2022, which found that “AMAPCEO has no bargaining rights over Sergeants and Youth Services Managers as they were relinquished in 2008/2009 and that any such rights are held by OPSEU as the representative of employees at these institutions”.

13. The GSB referred “this dispute to OPSEU and the Crown so that they can consult and advise the GSB as to next steps they would like to take.”

The Reorganization of the “Sergeant” Position

14. In May 2022 the Ministry of the Solicitor General announced an “Institutional Services Division organizational review of supervisory and management functions and overall rank structure within the adult correctional institutions”.

15. The Ministry advised that the February 24, 2022, GSB Decision and the challenge to the managerial exclusion would be given due consideration and the Ministry considered whether the entire Sergeant cadre needed to be excluded from collective bargaining or whether some front-line supervisory work being performed could be performed through a non-excluded role. Understanding that there had been numerous challenges to the exclusion of Sergeants from collective bargaining on the basis that they were not performing “excluded work”, the Employer’s intent was to determine what number of M7 positions could be moved into the bargaining unit.

16. During the review it was determined that the M7 position would be collapsed into either the M8 position or a bargaining unit role. The Employer determined that in order to have the role of the M7 (less the managerial components) in the bargaining unit, an OPSEU bargaining unit job specification would need to be created in which the former M7 Sergeants would be placed as the Management Compensation Plan (MCP) M7 classification could not be used for this purpose. Furthermore, the M7 salary and salary progression were tied to the MCP and would need to be completely revised if placed in the bargaining unit.

17. In creating the OPSEU position, the M7 job specification was taken as a starting point and the management functions were removed. The result was an initial job specification that then went to the Job Evaluation and Initiation Branch (JEIB) for further refinements and eventual classification. The Employer determined that existing regular (permanent) M7 Sergeants would either successfully compete for vacant M8 positions or be reclassified to Correctional Supervisor.

18. The Employer met with OPSEU on October 7, 2022 to provide OPSEU with a preliminary overview of the reorganization and implementation of the new rank and structure, including the newly created Correctional Supervisor role. OPSEU took this information away to review and also requested a meeting in 3 weeks. At the meeting OPSEU requested further information on the implementation of the Correctional Supervisor position and the formula used to determine the number

of positions. OPSEU also raised concerns with the 9-step wage grid for the Correctional Supervisor role and how that was established. OPSEU was told “that ship had sailed since Cabinet approval had already occurred” OPSEU told the Employer that they would be providing a written response and that they needed time for further review.

19. The Employer again met with OPSEU on October 31, 2022 to discuss any further issues and advise OPSEU of an upcoming announcement for the reorganization. During this meeting, OPSEU expressed concern with the November 2, 2022 communication materials, for which the Employer reviewed the materials with OPSEU and made one requested change. Also at this meeting, the Employer advised OPSEU as to how the Correctional Supervisor position would be implemented including that Correctional Supervisors would be former M7 Sergeants given the M7 position was being reclassified. OPSEU raised concerns regarding the direct assignment of former Sergeants to the Correctional Supervisor position and indicated to the Employer that this should be negotiated between the Union and the Employer.

20. On November 2, 2022 the Ministry announced its “Organizational Review Update”.

21. In this Memorandum, the Ministry announced that “the current sergeant rank will no longer be utilized, and the existing responsibilities will be shared by a new position, the correctional supervisor, and a strengthened staff sergeant complement”.

22. In this Memorandum, the Ministry announced that “a net new complement of correctional supervisor positions that deliver supervisory functions exclusively” and that this position will be represented by the OPSEU bargaining unit....”. The Employer created a new position- a Correctional Supervisor position to be represented by OPSEU and updated the Staff Sergeant job description. In addition, the Employer increased the number of Staff Sergeant positions throughout the Province.

23. In the Memorandum of November 2, 2022, the Ministry indicated that, in most cases, there would be a competitive process for the staff sergeant position. With respect to the correctional supervisor position, “a fair and equitable process will take place on a site-by-site basis for sergeants to opt for staff sergeant or correctional supervisor roles”. The Ministry indicated that this process would be fully implemented in Spring 2023.

24. Attached to the Memorandum of November, 2, 2022 was an Appendix outlining the roles and responsibilities of the new positions as well as the existing position of Correctional Officer and Q and A documents.

25. On December 14, 2022, OPSEU responded to the Memorandum with a number of procedural and substantive concerns regarding the reorganization including:

- that the new wage grid for the Correctional Supervisor Position was not discussed nor negotiated with the Union;
- that there was an unacceptable overlap between the position descriptions for the new positions;
- that the number and proposed distribution of the Correctional Supervisor position made no operational sense; and
- that the Ministry was proposing to directly assign excluded staff to the new Correctional Supervisor positions without a posting or competition and that was a violation of the Collective Agreement.

There were other concerns raised around pension issues, fixed-term staffing issues, the lack of information about the Youth Services Manager position in the Youth Justice Division and how future vacancies would be filled in the Correctional Supervisor position.

26. On January 24, 2023 the Employer and OPSEU met and discussed the concerns outlined in the December 14, 2022 letter. The Employer did not change its position or its implementation plans.

27. A copy of the position description for the new Correctional Supervisor Position is at Tab 7 and the Staff Sergeant position at Tab 8.

28. The Ministry also released a proposed allocation of correctional supervisor and staff sergeant positions by institution and across the Province.

29. On or about January 30, 2023, affected employees were sent an election letter entitled "Re Institutional Services Organizational Structure". In that letter, employees were given 3 options:

1. to elect to remain in the Sergeant position and be reclassified to a Correctional Supervisor position in the OPSEU bargaining unit;
2. elect to be considered for a promotional opportunity as a Staff Sergeant (if a staff sergeant was not successful, they could apply to vacancies in other locations or be "directly assigned" to a Correctional Supervisory position within the OPSEU-COR bargaining unit or,

3. Elect to resign/retire from the OPS.

30. On February 3, 2023, OPSEU filed three policy grievances covering both the Corrections and the Youth Facilities.

31. On or about April 25, 2023, the Employer informed OPSEU that it was “implementing a change to the institutional rank structure” and that it was “giving the option of being reclassified into an OPSEU-represented Corporal position in the Correctional Supervisor classification”. It appears that approximately 75 former Sergeants will be directly assigned to the Correctional Supervisor position (Tab 12). Any remaining M7 Sergeants that are not promoted to M8 will become Correctional Supervisors.

32. On or about April 26, 2023, the Employer posted 40 permanent Correctional Supervisor positions and 67 temporary Correctional Supervisor positions. A copy of the Job Posting is at Tab 13.

OPSEU’s Position at this stage in the proceedings

33. It is OPSEU’s position that the Ministry clearly has directly assigned or appointed excluded employees into the Correctional Supervisor position, a position which is newly created (see attached Position Description Form at Tab 5) without following the clearly outlined posting and competition process in Article 6 of the Corrections Collective Agreement. OPSEU’s position is that the Employer should be required to post the vacancies in accordance with the Collective Agreement. Should persons be directly assigned to those positions, OPSEU will seek that they be removed from the position and that such position or vacancy be posted in accordance with the Collective Agreement

Decision

[8] The starting point of the analysis is the collective agreement. First, Article 6.1.1. says there must be a job posting “When a vacancy occurs in the Regular Service for a bargaining unit position or a new regular position is created in the bargaining unit”. There is no doubt that the Correctional Supervisor job is, on its face, a “new regular position in the bargaining unit”. Such a job title did not exist prior to the reorganization caused by my February decision.

- [9] This conclusion is also supported by the memorandums from Daryl Pitfield, the Assistant Deputy Minister, Institutional Services to all employees which had the “Re.: Line”: “Review of Supervisory and Management Functions Update Regarding Grievance Settlement Board Decision”. The first memorandum stated in part:

As part of the review, due consideration will be given to the recent Grievance Settlement Board (GSB) decision that was issued regarding AMAPCEO’s bargaining representation rights for front-line institutional managers, specifically Sergeant positions in the Ministry of the Solicitor General.

The Arbitrator, in his determination, found that AMAPCEO has no bargaining rights over Sergeants and referred this matter to the Employer and OPSEU (intervenor status) to address and report back to the Board. The decision also referred the dispute regarding representation to “OPSEU and the Crown so that they can consult and advise the GSB as to any next steps they would like to take”.

We are committed to working with OPSEU on this matter and will be providing you with updates as more information becomes available. There are no current changes to reporting relationships or any terms and conditions of employment resulting from this decision. No final decisions have been made at this time, but we are having active conversations with OPSEU and we will let you know once the consultations are complete.

- [10] The memorandum from Mr. Pitfield was followed by another one in November in which he announced what had been decided. It stated in part:

New Institutional Organizational Rank Structure

As a result of this review, I am announcing a change to the institutional organizational rank structure which will optimize and integrate how we work together as a team to keep Ontario safe in a modernized correctional service.

In this new structure, the current sergeant rank will no longer be utilized, **and the existing responsibilities will be shared by a new position, the correctional supervisor**, and a strengthened staff sergeant complement. A thorough assessment has been conducted to determine appropriate staffing allocations based on the unique operational needs of each institution, considering current

and future state roles and responsibilities. Additional considerations included size of institutions, design, and layout.

I want to stress that the operational need for frontline management positions in all institutions remains essential, both now and in the future. The assessment determined the need for:

- **A net new complement of correctional supervisor positions that deliver supervisory functions exclusively.** This position will be represented by the OPSEU bargaining unit, and will provide supervisory functions to a floor or living unit such as coordinating daily routines, directing workflow, etc. Note, a staff sergeant will assume supervisory responsibilities in the absence of a correctional supervisor.
- An increased complement of staff sergeants which demonstrate and deliver both supervisory and managerial functions (e.g., hiring process, staff development, performance planning reviews, oversight, workplace accommodations, disciplinary process, etc.)
- See the Appendix for a brief overview of duties and responsibilities of the correctional supervisor and staff sergeant roles. (emphasis added)

[11] As can be seen, in this memorandum, the correctional supervisor was referred to as a “new position”. Elsewhere in the memorandum there was reference to a “new structure” reflecting the fact that this was something of a re-organization.

[12] Moreover, none of the exclusions to the job posting requirement apply here. Article 6.6.1.1 does not apply because it provides circumstances where an employee can be assigned to a vacancy but only with the agreement of the Union. Article 6.6.2 provides exceptions in certain circumstances without union agreement but none of those circumstances are present here. Accordingly, these provisions support the Union’s position because they suggest that the parties have turned their minds to when the Employer may directly assign an employee to a new position and none of them are present.

- [13] Even after the Union advised the Employer that it objected to the way the Employer proposed filling the correctional supervisor positions the Employer continued to refer to the CS position as a new position:

As a result of this review, the Ministry will be implementing changes to the institutional organizational structure based on the operational requirements of each institution. This letter is to advise that front-line managerial duties currently performed by the M07 Sergeant positions at your institution will be completed by the Staff Sergeant position at the M08 classification level and front-line supervisory functions will be completed by the **new Correctional Supervisor*** position in the OPSEU COR bargaining unit.

- [14] However, in other parts of the same memorandum the Employer referred to a “reclassification”:

If you do not respond to this letter, you will be deemed to have selected Option 1 (elect to be **reclassified to a Correctional Supervisor*** position in the OPSEU-COR bargaining unit at [institution]). (emphasis added)

- [15] The Employer argues that the Union’s argument puts form over substance. It agrees that the correctional supervisor position is a new one in that there was never such a position called that before. However, what is really going on is that the Employer had a group of Sergeants who the Union claimed were in the bargaining unit because they may not have usually performed the managerial functions which Sergeants have the authority to perform. Accordingly, rather than engage in an extremely lengthy legal process to determine precisely which Sergeants exercised managerial duties and which did not, the Employer reclassified some Sergeants as correctional supervisors and discontinued the use of the old position of Sergeant. In doing so, it claims that what it did was remove all of the duties from the old position that might be considered managerial in nature. It then effectively kept the Sergeants in the new bargaining unit position.

- [16] Critically, in my view, the Employer has never conceded and does not concede that there are any Sergeants who are including in OPSEU’s bargaining unit

because they do not exercise managerial functions. This creates problems for the Employer and its strategy in resolving this long-standing issue. In the absence of the Employer's concession, the Sergeants are all excluded from OPSEU's bargaining unit. The effect of this is that the Employer effectively placed Sergeants into OPSEU's bargaining unit into a newly created position, thereby circumventing collective agreement rights. I am unaware of any provision of the collective agreement which would allow the Employer to reclassify excluded employees as bargaining unit employees without engaging or impinging upon the Union's rights under the collective agreement.

[17] In addition, while I understand the Employer's position and have sympathy with it, this is not putting form over substance. The situation of every Sergeant was different. It may well be that Sergeants at a particular institution were clearly properly excluded. In those situations, the Employer is effectively parachuting a properly excluded person into the bargaining unit who is then given special treatment to be appointed into the supervisor job without any consideration to members of the bargaining unit who may by seniority, skill or ability have a right to that job under the collective agreement.

[18] I recognize that the result of this decision may have terrible consequences for some former Sergeants. Many of them wished to be represented by PSAC. That was denied. Many wished to be represented by AMAPCEO. That was denied. No doubt, many are content to be represented by OPSEU. However, the end result is that at the moment of success when non managerial employees (if any) were finally represented by a trade union the Employer embarked on a course of action and the Union enforced its strict legal rights with the outcome that it is possible that former Sergeants may lose their jobs with the public service. These circumstances cry out for immediate open-minded and flexible action by both parties to alleviate a situation that is deeply unfair.

[19] For all of these reasons I find a breach of the collective agreement and uphold the grievance. I reserve on the appropriate remedy and remit the issue of remedy to the parties in the hopes that they can reach an agreement.

Dated at Toronto, Ontario this 27th day of June 2023.

“Brian McLean”

Brian McLean, Arbitrator