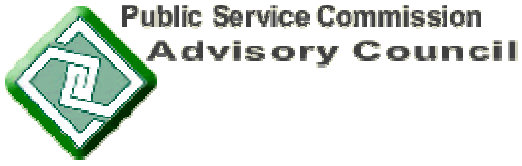

Recourse in the Public Service of Canada

A Proposal to the Public Service Commission Advisory Council

Report of the Public Service Commission Advisory Council's Working Group on Recourse

Submitted
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EXECUTIVE SUMMARY

During the 1990s and onwards, the Public Service Commission has focused a great deal of effort on improvements to recourse under the *Public Service Employment Act* (PSEA). Despite broad-based consultation initiatives, including the National Recourse Advisory Group, implementation of recommended rule changes and other measures, such as disclosure and mediation, it is apparent that there are many complaints and appeals that cannot be dealt with satisfactorily through the recourse provided for under the PSEA. Profound technological changes in the work place, downsizing, slashed budgets and reduced staff resulted in a general state of low morale in the Public Service and increased workplace dissatisfaction. Many complaints and appeals reflected this discontent. However, it has been generally recognized that the current recourse framework and system have been unable to address the legitimate expectations of management and staff for meaningful resolutions to workplace problems. Fundamental change is required.

Consequently, the Public Service Commission Advisory Council identified the staffing recourse system as one of its first three priorities for review. It established the Recourse Working Group in August 1999 to examine recourse under the PSEA, and to provide advice and recommendations for change. The Working Group's members, consisting of bargaining agent, departmental and central agency representatives, reviewed previous data and studies on this subject, consulted their respective stakeholder constituencies and researched developments in recourse systems in the Canadian and other public services.

The Working Group found several related problems in the current Public Service recourse system. The existing system is seen by many as too complex, legalistic and cumbersome. It is difficult to understand and use, takes too long and is costly. Not only is the system complex; there is also an absence of clear and comprehensive information about how to continue through the process. Often multiple recourse mechanisms are used to resolve a single problem. Issues are not addressed when they arise; appeals are only possible at the end of a staffing process. Delays are common. Like cases often do not appear to be handled in a like manner. Corrective measures often fail to satisfy complainants' real concerns and usually amount to redoing a part of the selection process. Individuals in some form of a temporary employment situation often find themselves on the outside of the current recourse system.

The interplay between staffing recourse and other recourse mechanisms in the Public Service led the Working Group members to conclude that their examination could not exclude the larger human resources management context. The picture

that emerged was one of a fractured framework, largely unchanged for decades, patched and mended over time, but that no longer responds to the demands of the Public Service in the modern era. What is needed, in fact, is a unified recourse framework that can respond to the range of employment-related problems for which a plethora of cumbersome and distinct recourse mechanisms now exists.

The Working Group proposes that modern recourse be based on five key values to meet the needs and underlying interests of its stakeholders and clients. These values are fairness, timeliness, flexibility, user-friendliness and reasonableness.

By treating like cases alike in a fair, objective manner, stakeholders and clients will see that recourse is unbiased and trustworthy and that it supports merit.

Timely and efficient recourse that resolves complaints without delay should increase morale and assist departments in getting the right people into the right jobs at the right time.

Increased flexibility will ensure the capacity to respond to current and future contexts as well as the ability to meet a variety of needs.

User-friendly recourse, which is easily understood and accessible to all potential users for the correct reasons, benefits everyone.

A well-fitted and reasonable framework that streamlines recourse into a common system will reduce the demands placed on stakeholders and clients, and also on central agencies that administer and oversee recourse currently. This should translate into reduced costs in the future.

Stakeholders have many interests, but the Working Group concluded that these values reflected the priority needs and concerns and were consistent with a values-based approach to staffing.

Meaningful recourse must also be based on several operating principles. Existing recourse rights must be respected. All employment-related complaints must be addressed comprehensively. And, the framework against which staffing concerns are addressed must be aligned with Public Service values and ethics. This approach is more likely to receive buy-in and commitment from all concerned. Employees must have access to representation throughout to alleviate any concerns that they might have about due process. Unlike today, complaints that move through the process must build on the findings gathered at earlier stages to increase efficiency and effectiveness. Further, the resolution of complaints at the earliest and lowest possible level in a system that moves from less formal to more formal interactions, and the availability of corrective measures throughout will result in greater efficiency and effectiveness. The ongoing availability of education and alternate dispute

resolution mechanisms will also lead to more meaningful resolution of complaints and increased efficiency.

In this report the Working Group has outlined a unified recourse approach that will accomplish three main goals.

1. Promote the use of alternative dispute resolution techniques at all stages of the process.

2. Give departments the opportunity and the authority to resolve disputes at the earliest opportunity.

3. Establish a single process that integrates staffing recourse and all other employment-related complaints in the Public Service.

The Working Group concluded that the recourse system must offer a range of alternative dispute resolution mechanisms, including facilitation, conciliation and mediation throughout the recourse process.

The model presented in this report envisions a two-phase approach to recourse. In the first phase departments will be given the authority and the accountability for resolving problems within their organization. There will be no third party involvement until the department has exhausted all possibilities for resolution. Within the department there will be an early resolution stage, a bringing-together of those with the power to resolve a problem at the lowest level. It will be characterized by access to trained dispute resolution staff and information sharing and should resolve most problems. If necessary, there will then be a more formal two-step written stage, characterized by a mandatory offer of third party mediation, full disclosure and shorter time frames. Most problems should be resolved within the department.

Where this is not possible, the second phase would consist of a new Public Service Employment Relations Office: an independent, non-partisan, neutral body that would deal with all Public Service employment-related matters that are currently subject to third party review. This would replace existing third party bodies that provide recourse and redress for Public Service employees. This body will provide all recourse and redress to individuals. Systemic and oversight responsibilities for staffing and other issues would remain with existing agencies, such as the Public Service Commission, the Public Service Staff Relations Board, etc.

While the recourse model proposed by the Working Group may be implemented incrementally during a transition period, what is required is a fundamental change in the way in which aggrieved employees seek recourse and are given redress, not only for staffing, but for all employment-related complaints.

RECOMMENDATIONS

In this report, the Working Group on Recourse provides the background and rationale for the following recommendations to the Public Service Commission Advisory Council for its consideration and for submission to the Public Service Commission.

1. The recourse system must become capable of responding to individual as well as public interests and of providing appropriate redress that is consistent with the legislative framework for human resources management in the Public Service.

2. The Public Service Commission must continue to safeguard the public interest by having an oversight role and responsibility in respect of systemic issues and the overall health of the staffing system.

3. The many existing recourse and redress systems related to employment in the Public Service must be consolidated into a single, integrated recourse and redress system. This system must respond to the interests, objectives and characteristics set out in the report prepared by the PSCAC's Working Group on Recourse.

4. The Public Service Commission must champion and actively pursue this proposal with the other departments and agencies that have an interest in or responsibility for employment-related recourse and redress in the Public Service.

5. The integrated recourse and redress system must provide for independent third party review, and to this end a new organization must be established, to be overseen by a bipartite management board and comprising adjudicative tribunals that will be competent, non-partisan, authorized to take decisions independently and possessing considerable related expertise.

6. The recourse system must encompass a variety of dispute resolution mechanisms, which must be offered from the earliest opportunity to encourage and maintain a healthy employee-employer relationship.

7. The right to representation must be guaranteed at all stages of the employment-related dispute resolution process, for employees and for employers.

8. The right to seek recourse and redress must be as close as possible to the issue, action or decision that gives rise to an employee complaint or concern. This may mean several decision points before an appointment under the *Public Service Employment Act*.

9. The Public Service Commission must introduce means to ensure that deputy heads have an opportunity to resolve employment-related matters and disputes for which recourse and redress are being sought. Deputy heads must delegate this authority in a manner that is consistent with recommendation 8.

10. The Public Service Commission, in partnership with the unions, Treasury Board, departments and agencies, must dedicate the necessary financial and human resources to promote and support successful implementation of a single, integrated recourse system.

11. Pending legislative change, the Public Service Commission must explore and implement interim measures that are within its jurisdiction under the *Public Service Employment Act* and consistent with this model.

CHAPTER ONE

INTRODUCTION

In August 1999 the Public Service Commission Advisory Council (PSCAC) created a Working Group to examine ways and means to modernize the current recourse system within the Public Service with specific reference to appeals and deployment and other complaints brought to the Public Service Commission under the *Public Service Employment Act*.

The Working Group established a mandate, which was approved by the Advisory Council. It was: *"To provide advice and recommendations on improving the recourse system, including redress and accountability, for the current and future Public Service environment."*[1]

Context

Rapid and far-reaching technological, social and economic changes have had a major impact on perceptions of the role of governments and the relationship of governments to the people they serve. This has created dramatic change in the approaches to governance and in public expectations regarding the delivery of government services. As members of a democracy, the public and those employed in the Public Service have an expectation that the Public Service – as the "face" of the government of Canada – will embody and model fairness, integrity, honesty, competency and respect. Increased access to information has created a greater expectation of fair and equitable treatment and of conflict resolution through discussion and agreement rather than confrontation.

These developments, coupled with the structural changes imposed by the Program Review of the mid-1990s and an urgent requirement to build for the future, have highlighted the need to review current human resources management frameworks, practices and processes, especially those related to staffing. Human resources management approaches must be modernized to meet the challenges of recruitment, retention and employee well-being if the Public Service is to become a vibrant, dynamic and exemplary employer. Benchmarking results suggest that approaches must be broader, more strategic, more values-based and more closely aligned with results.

[1] PSCAC: Terms of Reference - Working Group on Recourse, September, 1999; p.1

There is a demand for faster recruitment with an emphasis on finding staff able to function almost immediately, rather than requiring training and time to grow into their responsibilities. The emphasis on results, fueled by instantaneous communications and expectations of instant action, bring into question whether such values as fairness and equity can be upheld in an environment in which speed and financial efficacy are prime goals.

Related Studies and Initiatives

The Survey Follow-up Action Advisory Committee, responding to the issues identified in the 1999 Public Service Employee Survey, noted in its report in May 2000 that "*The current legislation and regulations provide a framework that imposes a great number of rules and procedures that discourage collaboration between management, employee representatives and employees on the priorities identified by the survey*."[2] While this statement refers to the difficulties in the existing labour-management relationship, the same can be said of about the staffing framework.

The Auditor General's report of April 2000[3] noted that many studies of the federal Public Service human resources management framework have been conducted since the implementation of the Glassco Commission's recommendations in 1967. Chapter 9 of the Auditor General's report lists 34 studies – more than one a year – and that number represents only a limited selection of the studies undertaken. The report found that all of the major studies have agreed about the problems created by divided responsibilities and unclear accountabilities within the human resources management regime. Changes to the legislative structure to resolve these problems have been recommended consistently. Despite this, very little change has actually occurred, due to some extent to reluctance to undermine the independence of the Public Service Commission.

The results of the Public Service Employee Survey conducted in 1999 indicated that 30% of respondents perceive the selection, classification and promotion processes as lacking transparency and inherently unfair. The Working Group members believe that this applies equally to the perception of recourse. There is also frustration with the perceived inability of recourse systems and processes to respond to the concerns and to provide solutions commensurate with the gravity of the issues being brought forward.

The September 2000 report of the Committee of Senior Officials (COSO) Sub-Committee on Workplace Well-being notes the need for fair and transparent staffing processes. The report also said that having access to timely redress was important

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[2] *COSO Sub-Committee on Workplace Well-being: Workplace Well-being: The Challenge*; Government of Canada, September 2000

[3] *Auditor General of Canada: Report to the House of Commons, April, 2000: Chapter 9, Streamlining the Human Resource Management Regime: A Study of Changing Roles and Responsibilities*

for employees.[4] These comments were made with respect to harassment and discrimination grievances; however, it can be argued that this principle should be true of any complaint related to Public Service employment practices.

The June 2000 Public Policy Forum study, *Levelling the Path,* noted that redress processes related to rights and to interests are two of the five key points of friction in current Public Service labour-management relations. The report recommended increased flexibility in legislation so that: *"...practitioners in both labour and management can experiment with and implement innovative forms of dispute resolution*. *At the same time parties need to have access to an impartial and objective redress mechanism that is consistently supplied."*[5] Of special interest given the focus of this report, it was also noted that: *"During this project, workplace-level initiatives received strong support for their responsiveness, speed, and efficiency, as well as for their ability to lessen the strain on more formal redress mechanisms."*[6] The authors were referring here to the independent development and use of alternative dispute resolution mechanisms in various departments.

It is significant that these studies and reports all point to a need for a change agenda for human resources management in the Public Service of which recourse is a critical component. The current recourse component of the human resources management system is complex, costly, slow, confusing and non-responsive for employees and managers alike. It does not contribute to either harmonious employee-employer or labour-management relations. Despite recent changes in some areas and efforts towards early, less formal dispute resolution, the recourse component is bound in legislation and case law that emphasize corrective measures long after decisions have been taken, as opposed to early intervention and conflict resolution, which could have a profound and positive effect on workplace well-being.

Like the earlier studies, this report also recognizes the need to streamline recourse and redress processes and the importance of identifying and resolving problems at the earliest possible opportunity. To be successful, it is crucial that stakeholders who can influence and change the system take ownership and move the change agenda forward. Equally important, employees, managers, deputy heads, unions and central agencies must have an opportunity to discuss, to take ownership of and to provide input to the vision proposed in this report, i.e., that of a single recourse system for employment-related issues in the Public Service in which decisions are taken by balancing the values of competency, fairness, equity, transparency, representativeness, non-partisanship and the principles of efficiency and effectiveness in an informed and ethical manner.

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[4] *op. cit.: Workplace Well-being – The Challenge: pp. 35, 36, 44*
[5] *Mayer, Anita and Szekula, John: Levelling the Path: Perspectives on Labour-Management Relations in the Federal Public Service; Public Policy Forum; June 2000: pp. 32, 61*
[6] *ibid.: p. 61*

There is no doubt that change can be difficult, especially fundamental change that challenges the *status quo* of our culture, systems, processes and institutions. The Working Group firmly believes that such change is both necessary and possible. What is required is a commitment to making the Public Service an exemplary workplace that enables employees to meet the Canadian public's needs today and in the future.

CHAPTER TWO

THE CURRENT RECOURSE SYSTEM

Background

Many types of recourse exist under the Public Service human resources management framework, and can be exercised simultaneously in relation to different aspects of a management decision. Recourse may take the form of appeals, complaints, deployment investigations and grievances and deal with such issues as staffing, official languages, terms and conditions of employment, classification and discrimination. Several organizations play a role in these various recourse options. The Public Service Commission (PSC) is concerned with appeals, deployment complaints, and investigations into other matters under its jurisdiction, which is described in the *Public Service Employment Act* (PSEA). Recourse gives the Commission information about the health of the staffing system and serves as one means to ensure the fair, equitable, open and nonpartisan treatment of individuals in staffing processes.

The PSC's predecessor, the Civil Service Commission, had authority to investigate and report on the operation and violations of the employment legislation. Although it could not take corrective action, it had a duty to report on its findings. By 1967, the PSC's recourse functions had expanded to include the establishment of boards to hear appeals, take decisions and make recommendations to the Commission based on their findings.

Through amendments made to the legislation that took effect in 1993, the Commission's recourse functions were more explicitly articulated. The PSEA now prescribes a variety of recourse mechanisms, some of which come under the authority of deputy heads (i.e., deployment complaints), others the Commission (i.e., deployment and other complaints), and some under appeal boards (i.e., appointments from within the Public Service).[7] Administratively speaking, employees of the PSC's Recourse Branch act as agents of the Commission or, alternatively, as independent appeal boards. In addition, at the time of the writing of this report, the Recourse Branch investigates allegations of harassment under an order in council.

Individuals who bring forward a complaint or an appeal, and the deputy head, are described as the parties to the issue. Consequently, certain principles of natural justice apply, such as the right to know the case against oneself and to have an

[7]For greater clarification, see box on the next page entitled "What recourse is granted under the PSEA?"

opportunity to be heard in the inquiry. The *Public Service Employment Regulations* (PSER) describe many procedural aspects of the recourse system, including the obligation to disclose certain information and the rights given to successful candidates in relation to appeals.

What recourse is granted under the PSEA?

The PSEA offers an opportunity for recourse in relation to allegations:

- that individuals do not have the qualifications necessary to perform the duties of a position
- that an appointment would contravene the terms and conditions of delegated authority
- regarding any other matter within the Commission's jurisdiction
- that qualifications don't afford a basis for selection according to merit
- that an appointment or proposed appointment has not been made according to merit (appeal)
- that an appointment or proposed appointment stemming from corrective measures has not been made according to merit (appeal)
- that a deployment was not authorized by, nor made according to, the Act or constituted an abuse of authority (deployment complaint – departmental)
- that disposition of a deployment complaint at departmental level was not satisfactory (deployment complaint – PSC)
- of fraud, tampering with exam, political partisanship
- of harassment (through an order in council)

The staffing recourse system does not explicitly address many issues (and are considered staffing matters), such as secondments, assignments, certain acting situations, rejection on probation, lay-offs, non-renewal of specified period employment and non-promotion following reclassification of a position, unless they can be articulated as a merit issue, in which case examining the case through an appeal or an investigation may be possible. As a result, these and other issues, including the application of: work force adjustment directives, certain National Joint Council directives, conditions of employment and collective agreements; harassment; discrimination; classification; discipline; and termination, are addressed through grievances, which are outside the jurisdiction of the Public Service Commission.

Certain grievable issues may be reviewed by the Public Service Staff Relations Board (PSSRB). The PSSRB's jurisdiction is described in *Public Service Staff Relations Act* and, like the Commission's, has evolved through jurisprudence. At this time, the PSSRB does not have jurisdiction to inquire into matters covered by other statutes, such as the PSEA and the *Canadian Human Rights Act*. The PSSRB

reviews those elements related to a provision of a collective agreement or arbitral award if the union agrees. It will also review cases that result in a suspension or financial penalty to an employee, and termination or demotion decisions taken under the *Financial Administration Act*.

Over the years the courts have clarified the purpose of an appeal, which is to ensure that the public interest[8] is served by selecting the best qualified person for appointments in the Public Service. As noted by Shoemaker and Starchuk in their 1997 report to the Commission, safeguarding the integrity of the Public Service is an important public interest principle, in which employees have a vested interest. The public interest is upheld when appointments are made based on merit. One way this can be measured is through the number of appeals brought by employees. However, many studies have suggested that many appellants bring an appeal because they feel that they have been wronged in some way by a particular selection decision; that is, they are concerned with their own results (private interest). This is especially true where the potential for additional compensation exists, or where there has been a longstanding history of other problems relating to training, assignment of overtime, etc. This leads to higher numbers of appeals and, therefore, is not an accurate benchmark against which to examine the public interest. Although public and individual interests are intertwined, individual interest cannot stand on its own under the current legislative framework. The current staffing recourse system was not designed to address these individual interests and many argue that it neither does nor can respond to them satisfactorily.

Departmental managers and human resource advisors see appeals as challenging the probity and integrity of their selection decisions. A number have said that they do not see the value of the public interest perspective, particularly when an appeal is allowed on what they consider to be technicalities. Even more frustrating to departments is that an appellant, who may not have advanced beyond the screening process, can probe the full selection process including those parts in which he or she was not involved. This has been described as a fishing expedition and is entirely legitimate given the public interest thrust. Departments are concerned that the staffing recourse system is removed from their control, whereas they would like to have a first opportunity to resolve complaints at their level.

In 1999-2000 there were 24,844 appealable selection processes, of which 1,499 were appealed (6%) and of these, only 126 (8.4%) were allowed. Overall this represents 0.5% of the total appealable selection processes during that period.

[8] *For the purposes of this paper, public interest is defined as the interest of the public as a whole as opposed to the interest of a particular individual.*

Procedures

The PSEA does not set out the procedural aspects of staffing recourse. These can be found in the PSER, and include the timeframe for bringing an appeal; the period for disclosure of material to be introduced in a hearing and the appellant's allegations; the notice period for scheduling hearings; the manner in which the Commission may handle and assign appeals and complaints; and administrative details related to the decisions taken and to whom they are communicated. Only certain of these provisions have specific timeframes, which total between 73 and 79 days, broken down as follows:

- appeal period – 14 days, plus six additional days if sent by Canada Post
- disclosure period – 45 days
- notice of hearing – 14 days

In reality these periods can be much longer because disclosure is often not completed within the 45-day period. Statistics from the PSC's Recourse Branch show that the average time for disclosure is in fact 61 days. (The standard for other administrative tribunals is between 90 and 100 days.) The time taken to complete disclosure is largely dependant on such issues as the number of candidates, the number and location of appellants and the availability of the selection board members, the departmental representative, the appellants and their representative(s). Sometimes the period is shorter, for example where departments and appellants go to disclosure promptly and notify the Registrar's office of completion. Every effort is then made to schedule the appeal hearing shortly after that. It can also be shorter if the appeal involves an acting or a term appointment that is for a short duration and might cease before the hearing. It is important to note that the average turnaround time for an appeal is 137 days and that only 47% of the appeals filed go to a hearing. In 1999-2000, appeal decisions were rendered on average 13.8 days after the hearings were concluded. The service standard for other federal administrative tribunals is much longer, i.e., 60 to 95 days.

Recourse decisions are also subject to review by the courts. On average, this can take between 12 and 18 months to conclude. Depending on the decision, the matter may be returned to an appeal board for further inquiry and deliberation, or to a department for corrective action. This contributes to the length of the process and to criticisms about the staffing system, which are exacerbated if the corrective action is subsequently challenged. If the issue is one of significant public interest or involves an area of special importance, the Commission may be the party asking for judicial review. This does not always coincide with the department's desire to resolve the issue and make appointments as quickly as possible.

The motivating factors that lead someone to seek recourse in relation to the staffing system and the range of possible remedies are detailed in the booklet *Recourse and Redress in the Public Service*, developed by the Working Group and published by the PSCAC in June 2000.

CHAPTER THREE

THE ISSUES

Over the years the Public Service staffing recourse system has been reviewed through a variety of working groups, task forces and project teams. Among the more recent initiatives, the Commission set up a National Recourse Advisory Group (NRAG) in 1997-98 to look into means to increase efficiency and effectiveness. The NRAG tabled many recommendations, and most of the non-legislative changes were introduced and reported to the PSCAC in 1999. The recommendations that pertained to the *Public Service Employment Regulations* were introduced in March 2000. Despite these improvements, the members of the Working Group through consultations with their respective constituencies identified many issues requiring further investigation and action.

Time, Timeliness and Efficiency

The consensus is that the time it takes to move cases through the recourse component of the staffing system is too long. The time spent on disclosure (on average 61 days), setting up and scheduling hearings (on average 37 days after disclosure), gathering information and awaiting decisions produces a resolution long after the initial complaint originated. Consequently, the facts may have changed and the decisions have little or even a negative impact on the situation. This leads to corrective measures seen as neither timely nor effective.

It is agreed that staffing recourse is complicated and cumbersome, creating a system that can be costly and even difficult to use, particularly for individuals who feel that their private interests have not been addressed appropriately. This has led some to seek out other means to resolve the problem, resulting in the use of multiple recourse mechanisms. This can further complicate and delay the staffing process, not to mention the consequences it can have on the more general and ongoing employee-employer relationship.

The recourse system timeframes are awkward, do not consider operational requirements, and are rarely followed by the parties. There are no consequences for missing a deadline and parties often agree to extensions. The result is that the system becomes backlogged. Although an employee’s concerns may relate to a decision taken early in a competition (e.g., screening), the right to appeal is only granted once the results are made known and an appointment is proposed or made. The employee can try to bring his or her concerns forward; however, it is only at the appeal stage that a neutral third party renders a binding decision. This inflexibility generates frustration and may result in lost time and money, as well as a disruption in service or operations. Employees may not be bringing forward legitimate concerns

because they do not wish to be perceived as contributing to further delays in the staffing process. The current recourse system may, therefore, not be a reliable safeguard of the public interest. A move towards more sophisticated conflict management processes in other jurisdictions suggests that early intervention and resolution generally results in greater employee and employer satisfaction.

Fairness

The Working Group's members agreed that fairness is an important value in the staffing system. It is equally important that parties operate from a level playing field when it comes to recourse. The members found that there is a perception that the process is biased in management's favour and that allegations of "crown-princing" of successful candidates cannot be addressed effectively. This is because access to training, development and other opportunities that may have occurred long before the selection process under appeal are outside the jurisdiction of an appeal board. Like cases do not appear to be handled and decided similarly, which may be attributable to the variety of staffing mechanisms and the related recourse approach. Nevertheless, for the employee bringing a complaint, the results appear the same, i.e., someone else gets the position.

Effectiveness

Working Group members felt that the current recourse system does not respond effectively to issues brought to it. Reasons for this may include the demands on the system to resolve issues for which it was not originally designed, e.g., harassment. This is particularly true for appeals, where the *real* issue may not be an individual staffing decision or selection process, but rather another event or series of events outside the staffing process. In this circumstance, neither the process nor the results resolve the problem. This may also motivate individuals to seek out other recourse options, such as grievances or complaints of discrimination under the *Canadian Human Rights Act*.

The range of options for correcting defects in a selection process does not appear to meet with satisfaction from any of the parties. Corrective measures usually amount to redoing a part of a selection process, such as replacing questions or reassessing a candidate, which does not necessarily alter the outcome. The recourse provisions of the legislation do not include sanctions for a hiring manager who acts outside the terms and conditions of delegation, nor is there redress for the employee whose appeal was upheld (for example, wins the appeal, but still does not get the job). The result is that other candidates are penalized by the delays, the appellant becomes increasingly frustrated, and there is no penalty, or incentive to change, for the manager whose decisions were not consistent with a values-based approach to staffing and the policy framework.

Flexibility, Adaptability and Accessibility

As mentioned previously, there are attempts to use the staffing recourse system to resolve issues for which it is not intended. Consequently, there is a perception that the number of complaints being funnelled into it is on the rise, as are the cases that are outside the jurisdiction of appeal boards. Such human resource actions as assignments, secondments, term and casual appointments are either not, or not explicitly, subject to the current staffing recourse system, which is constrained by the legislation and case law. Much of the work in the Public Service is carried out by individuals in some form of a temporary employment situation and is outside the jurisdiction of appeals or deployment investigations. Some members of the Working Group expressed concern that the mandate for deployment recourse is too narrow, but this cannot be changed without amending the legislation.

The Universal Classification Standard (UCS) is expected to be implemented in the future. This will result in many conversions, appointments and deployments as departments seek to stabilize their organizations. The Working Group members are concerned about the capacity to respond to what may be an expanded recourse workload when UCS is introduced.

User complaints reveal that the recourse component of the staffing system is cumbersome and characterized as too legalistic, making it difficult to understand and to use. The variety of types of complaints and the intricacy of rules governing each makes it difficult for users to know and understand the mechanisms and jurisdictions. Over the years, a wealth of case law has developed, some of which might be at odds with the original intent of the legislative framework, but has added to the rigidity of the staffing and recourse systems.

The Working Group found that the PSEA itself limits flexibility and adaptability. The right to appeal is given to unsuccessful candidates in relation to appointments or proposed appointments made by closed competition or without competition within the Public Service. Employees do not have a right of recourse at earlier stages or related to other discrete decisions within the selection process, although the Commission may investigate. As mentioned previously, the right to appeal at the end of a selection process is often too late to be helpful, relevant and satisfactory. The Act gives the Commission broad regulatory authority, which can be used to tailor the staffing recourse system. This authority cannot be used to regulate recourse related to assignments, secondments or even deployments because these fall outside the Commission’s jurisdiction.

Education, Communication and Integration

The Working Group members shared the view that there is a general lack of understanding about recourse, how it works and what it can be expected to do. This applies equally to managers deciding, employees with complaints about the decisions, and those whose job it is to advise either party about the process and rights, e.g., bargaining agents and human resource advisors. Ask more than one person the same question about a particular mechanism, timelines or jurisdiction and there is likely to be more than one answer. This can result in the same complaint being run through the recourse system several times, i.e., multiplicity of recourse. It can also result in delays and frustration while individuals search for the right answers. Some human resource advisors specialize in one field, e.g., staffing or classification or staff relations and may not be as knowledgeable about other recourse processes. Union representatives may experience the same problem. The fault lies not only with the complexity of the system, but also with an absence of clear, accessible and comprehensive information about recourse.

CHAPTER FOUR

THE FOUNDATION

The issues set out in the previous chapter form an important first step to reviewing the current system. The issues reflect the different perspectives of the various stakeholders, but were not shared equally among the Working Group members. The members determined that rather than focusing on the problems alone, placing the emphasis on shared interests would be more productive. The issues were examined critically, which led to the development of a framework of common interests that ranged from the policy considerations to the design characteristics of an ideal recourse system. This approach showed the Working Group members that there was a shared agenda of interests that cut across stakeholder constituencies.

The interests were consolidated into five key value statements, which the Working Group agreed would become the pillars framing an optimal recourse component of the staffing system. The members validated the statements with their respective stakeholder groups for completeness and to ensure that they formed an appropriate framework around which a new approach to recourse could be constructed. It was concluded that an optimal recourse system must be:

- fair, equitable, objective, independent and effective;
- user-friendly;
- well-fitted, integrated and reasonable;
- fast, timely and efficient; and,
- flexible, simple and adaptable

The following pages provide additional information about these value statements and the interests from which they were derived.

Fair, equitable, objective, independent and effective

The Working Group defined a recourse system that is fair, equitable, objective, independent and effective as one that ensures that all stakeholders' interests are safeguarded; that like cases are handled and decided in a similar way; and that, where appropriate, redresses and sanctions are provided that respond to the needs of the parties involved. It must be reliable and deliver unbiased results.

This value statement responds to stakeholders' interests that a recourse system must be, and be perceived as, neutral and capable of representing or safeguarding the interests of all parties equally, including those of the successful candidate. A system viewed as fair, equitable, objective, independent and effective engenders

trust because the processes are not only fair but are seen to be fair. This value statement also responds to the interest to provide for meaningful redress.

User-friendly

A “user-friendly” recourse system is one that is accessible to and inclusive of all potential users. Its purpose is clear, well understood and advocated by stakeholders. Processes are logical, simple and supported by learning and information to guide and assist users, i.e., employees, their representatives and the human resources community. There are no systemic barriers to full participation by the diverse make-up of employees and applicants who seek recourse.

This value statement reflects such interests as the need to ensure that all employees know and understand the reasons for recourse, its limits and other appropriate mechanisms to address concerns. It also reflects the importance of designing a system that can respond to concerns in an expedient, yet a meaningful manner. Finally, it is imperative that recourse is accessible to all, including members of the designated employment equity groups, who seek to raise and resolve employment-related concerns.

Well-fitted, integrated and reasonable

Recourse must be an integral part of the broad human resources management framework, i.e., it must not stand alone. It must be set in its proper context, which is the employer-employee relationship and not the staffing system alone. For recourse to be well-fitted and reasonable, it must not place a disproportionate demand on users and operators in relation to the human resource action or initiative that leads to recourse, e.g., time spent on an appeal should not be greater than the time taken to find a successful candidate.

Working Group members agreed that the system must be one that discourages multiplicity of recourse. The recourse system must neither enable nor force individuals to shop around until they find a decision-maker able to respond to their concerns. This value statement builds on the desirability of a legislative framework that enables a common recourse system, which provides shared accountability, encourages excellence and upholds and entrenches the values that Parliament feels are essential of and for a competent, representative, non-partisan and valued Public Service.

Fast, timely and efficient

A recourse system that is fast, timely and efficient ensures that solutions will be implemented within a timeframe that is close to the event that caused the complaint. This contributes to a more cost-effective process, whether in terms of human and

financial resources or in terms of morale and goodwill implications. This value statement reflects the stakeholders' interest to have a recourse system that provides for access and exit at the various points during the staffing process that are most likely to generate a concern. Potentially costly errors can be averted or resolved, reducing the losses attributable to repeating a selection process.

A recourse system that is efficient must offer meaningful redress in a prompt and timely manner and be consistent with the legislative framework (e.g., if an appellant is shown to be the top-ranked candidate, he or she would be appointed immediately). It must offer an opportunity to resolve problems in timeframes that are appropriate and manageable and that do not place an undue burden on the system, nor have an adverse impact on an organization's business and operational requirements. An essential component is access to information and a range of dispute resolution measures from the earliest stages.

Flexible, simple, adaptable

The recourse system must be built on and around a framework designed to meet the needs of today and of the future. These needs are many and varied, therefore, there must be a certain suppleness if the system is to be responsive. It must also be simple to administer and easy for everyone to understand, not just for expert users, such as human resources, bargaining agent and legal representatives. As human resources management in the Public Service evolves, for example with the introduction of the Universal Classification Standard, the recourse system must adapt. It should be unnecessary to undertake yet another study, or another round of reforms, to modify the system to respond to changes on other fronts. The Working Group members shared the view that the system must provide for both individual and public interests to be met.

Compatibility with the values-based approach to staffing under the PSEA

As mentioned previously, Parliament has seen fit to design a legislative framework for staffing and recruitment in the Public Service founded on the notion that decisions taken are fair, equitable and transparent and will contribute to a work force that is competent, representative and non-partisan. The merit principle, as set out in the *Public Service Employment Act,* is a main lever for ensuring that this is the case, but it is the actual practices and decisions taken by managers that in fact make it so.

The Working Group is satisfied that there are strong links between the five recourse value statements and the values-based approach to staffing. While the terms may be somewhat different, the interests and objectives are the same. For example, a fair, equitable, objective and independent recourse system is founded on the objective that recourse decisions will be made objectively and that employees will be treated justly. Likewise, a fast, timely and efficient recourse system is comparable to the service delivery principles of affordability and efficiency. It speaks to the fact that

all aspects of the staffing process (including recourse) must be carried out in a way that contributes to management's objective to have the right people in the right place at the right time at the right cost. A flexible, simple and adaptable recourse system is predicated on the process value of equity and the service delivery principle of flexibility, i.e., that recourse approaches will be adapted to the needs of the individual and the organization. A user-friendly recourse system addresses the values of equity and representativeness, i.e., that recourse processes will be barrier-free and inclusive and, therefore, contribute to a Public Service that reflects the population it serves. Finally, a well-fitted, integrated and reasonable recourse system satisfies the process value of transparency, i.e., that recourse decisions are made openly.

The Working Group concluded from its analysis that an optimal recourse system could not be limited to staffing issues alone. If the needs of the stakeholders are to be met, the Working Group would have to consider the importance of increased departmental involvement from the outset, the necessity of legislative change, new bodies to deal with recourse and redress, and the importance of alternative dispute resolution mechanisms.

No single recourse component of the broad human resources management framework in the Public Service is currently capable of responding to the wide range of interests expressed by the stakeholder groups. Although the Working Group began its work by looking at recourse under the PSEA, members became convinced that the focus had to be on the bigger picture. This is particularly true if the objective is to build a recourse system that responds to the stakeholders' interests, i.e., one that is effective, flexible, integrated, reasonable, efficient, simple, user-friendly and timely. While stakeholders may have divergent and sometimes conflicting issues, the Working Group found that there was a commonality of interests. In turn, these common interests can serve as a foundation for building a new, unified recourse system for the Public Service, such as the one proposed in the next chapter.

CHAPTER FIVE

OBJECTIVES AND KEY FEATURES OF AN OPTIMAL RECOURSE SYSTEM

Building on the value statements described in the previous chapter, the Working Group determined that an optimal recourse system must be designed around, and capable of delivering on, the following objectives, namely that it:

- balance individual and public interests;
- be capable of responding to all employment-related complaints;
- include a common, neutral third party to make final and binding decisions;
- incorporate a range of dispute resolution mechanisms, ranging from least formal to most formal;
- guarantee access to representation;
- provide for meaningful redress at all stages;
- provide means to respond to all employment-related complaints at the earliest and lowest possible level within departments and agencies by making deputy heads accountable to resolve them; and
- offer support, information and education throughout the process to facilitate dispute resolution.

Each of these objectives is described in greater detail below, followed by one or more recommendations.

Balance individual and public interests

An optimal employment-related recourse system in the Public Service balances the individual and the public interests. As outlined in Chapter 2, there is a fundamental disconnect in the recourse component of the staffing system. Employees and applicants who bring appeals or request investigations are motivated by their respective individual interests. The appeal board or investigator determines only whether the public interest has been served, i.e., whether the selection has been made according to merit.

A recourse system that responds to one interest while ignoring or even operating against the other will ultimately find itself in the untenable situation facing the current staffing recourse system. This occurs where issues are brought forward that the staffing recourse system was not designed to address and cannot resolve. As a result, all stakeholders, including those managing the system, find themselves frustrated and ensnared in a morass of disputes for which there can be no satisfactory conclusion. The public interest is well served when employees and managers in the Public Service enjoy a healthy work environment, in which disputes

related to individual interests can be resolved meaningfully between the parties, in a timely and reasonable manner.

Recommendation 1: The recourse system must become capable of responding to individual as well as public interests and of providing appropriate redress that is consistent with the legislative framework for human resources management in the Public Service.

Recommendation 2: The Public Service Commission must continue to safeguard the public interest by having an oversight role and responsibility in respect of systemic issues and the overall health of the staffing system.

Be capable of responding to all employment-related complaints

A key objective is that all complaints be handled through a common approach, which the Working Group named the "Unified Recourse System". The idea of a single recourse system responding to all employment-related complaints is significant. It reflects the belief that the Public Service should have a common framework for employment-related dispute resolution. This objective also reflects the operational imperative to consolidate the many recourse mechanisms, which the Working Group believes will result in a more efficient, more cost-effective and more constructive recourse process.

From a design perspective, all employment-related complaints should be funnelled to a single window or contact point within a department to ensure that they are properly channelled to the appropriate decision-maker. Besides offering a centralized intake or coordinating function, the single window represents a first opportunity to make an active offer of assistance, for example by offering a range of mechanisms aimed at resolving the dispute. The availability of staff trained in alternative dispute resolution (ADR) could, for example, help clarify situations in which misunderstanding may be a causal factor to a dispute and could be resolved easily. This opportunity would be lost if the complaint moved immediately to a more formal process before a third party, not to mention that it would be more costly and less efficient.

Recommendation 3: The many existing recourse and redress systems related to employment in the Public Service must be consolidated into a single, integrated recourse and redress system. This system must respond to the interests, objectives and characteristics set out in the report prepared by the PSCAC's Working Group on Recourse.

Recommendation 4: The Public Service Commission must champion and actively pursue this proposal with other departments and agencies that have an interest in or responsibility for employment-related recourse and redress in the Public Service.

Include a common, neutral third party to make final and binding decisions

Sometimes, despite the best of intentions, people cannot come to an agreement about the way to resolve a dispute. No matter the reasons for the inability to close the file, the fact remains that the dispute must be resolved. In these circumstances, it is essential that an optimal recourse system include a neutral third party to make final and binding decisions.

The same issue may be looked at from different perspectives, for example, an employee might bring an appeal, a grievance and a human rights complaint about a manager's decision to appoint someone else on an acting basis.[9] Currently, not only will each dispute be dealt with in accordance with different policies and legislation, but each will be heard by a separate independent third party, with distinct timeframes, procedures and processes. This is because legislation establishes several different independent third parties to hear disputes about employment-related issues in the Public Service and to render decisions. These include the Public Service Commission, appeal boards, the Public Service Staff Relations Board, the National Joint Council and the Canadian Human Rights Commission, among others. Each is responsible for dealing with specific types of disputes. For example, the Public Service Commission may inquire into deployment complaints, but may not hear appeals because these come under the purview of appeal boards.[10] In another example, the Public Service Staff Relations Board may rule on terminations and demotions, but only if they stem from disciplinary action.

The Working Group believes that it is essential that these independent third parties be consolidated and vested with the necessary authority to resolve any employment-related disputes that may be brought before this single body. For recourse decisions

[9] *For purposes of the example, assume that the employee is a woman, who appeals because she believes that selection was not made according to merit. She grieves because she believes she is performing the same duties and is not being compensated accordingly. She brings a human rights complaint because a male employee was selected and she believes this was motivated by discrimination on the basis of sex.*

[10] *Sections 6 and 21 of the* Public Service Employment Act *give appeal boards the exclusive authority to hear appeals, whereas subsection 34.5(2) gives the Commission the final word on deployment complaints.*

to be fair, equitable and objective, this body must be neutral, be independent and be staffed with employees who possess expertise in dispute resolution and the various employment disciplines. The Working Group suggests that such a body might be co-managed effectively by a joint labour-employer management board, which could establish and maintain rosters of trained, knowledgeable and trusted mediators and investigators.

Recommendation 5: The integrated recourse and redress system must provide for independent third party review and to this end a new organization must be established, to be overseen by a bipartite management board and comprising adjudicative tribunals that will be competent, non-partisan, authorized to take decisions independently and possessing considerable related expertise.

Incorporate a range of dispute resolution mechanisms, ranging from least formal to most formal

While some individuals feel comfortable approaching their supervisor to sit and discuss their employment-related concerns, the reality is that many others are not. Consequently, the Working Group concluded that the recourse system must offer parties a range of dispute resolution mechanisms, including facilitation, conciliation, mediation and a "hearing", in which decisions are taken by a neutral third party but only after hearing from both sides.

Based on the PSC's recent experience with the early intervention process for appeals, the Working Group members concluded that a mandatory offer of support (for example, facilitation, mediation, etc.) must be incorporated into each stage in the recourse process, including the final level. The Working Group believes that consensual dispute resolution by the parties must be the objective to work towards, but recognizes that this will not always be possible. A system that enables each party to a dispute to feel that their concerns have been heard fairly, that their interests have been met, and that the solution is mutually satisfying, is the ideal for which to strive.

Individuals should also have choices about how to bring an employment-related concern to the attention of the appropriate authority. These could range from an informal oral complaint to a formal written submission. Whichever the preference, the system should be incremental and information gathered at one stage should move to the next level with the complaint.[11]

[11] *While this is already the case with grievances and human rights complaints, the same cannot be said of deployment complaints. Appeals only have one level of inquiry before judicial review.*

Recommendation 6: The recourse system must encompass a variety of dispute resolution mechanisms, which must be offered from the earliest opportunity to encourage and maintain a healthy employee-employer relationship.

Guarantee access to representation

Human resources management in the Public Service is governed by a complex legislative and policy framework that includes the *Financial Administration Act*, the *Official Languages Act*, the *Canadian Human Rights Act*, the *Employment Equity Act*, the *Public Service Employment Act*, the *Public Service Employment Regulations,* the *Standards for Selection and Assessment*, the *Public Service Staff Relations Act*, numerous collective agreements, assorted policies, directives and terms and conditions of employment, not to mention 34 years of related case law. Expecting that employees and managers could have anything but the most superficial knowledge of any, let alone all, of these documents is unreasonable. Even the most experienced and knowledgeable human resources, union and legal representatives tend to specialize in one or just a few disciplines.

No one should feel that they are alone as they work their way through the recourse system. Representation must be available to the parties from the earliest stages, if for no other reason than to ensure that the recourse system functions properly and that redress is fair, reasonable and consistent with the complex legislative and policy framework. It is hoped that with eventual reform of the human resources management legislative framework, increased trust in the employee-employer relationship and an improved work environment in the Public Service, the need for representation will decrease, but it should nevertheless be accessible to anyone who wants it.

Recommendation 7: The right to representation must be guaranteed at all stages of the employment-related dispute resolution process, for employees and for employers.

Provide for meaningful redress at all stages

Another important objective is that meaningful redress be possible at any and all stages of the process, unlike the current regime in which selection decisions must – for the most part – be finalized before an employee or applicant can obtain resolution. Upon learning of a mistake in the staffing process, for example related to screening, the delegated manager may find that he or she is powerless to resolve it, not to mention that he or she may also have to wait several weeks or months for a decision by the PSC or an appeal board.

There can be several reasons for this. For example, a manager may not interfere with decisions taken by a selection board. Second, once an eligibility list has been

established, the selection board ceases to exist and changes that relate to the merit assessment may only be taken by the Commission. Third, if an appeal has already been filed, corrective action may only be taken by the Commission, and this only once the defects have been identified by an appeal board.

This is in marked contrast to the grievance process, where not only must an employee file a grievance within a short time after the action or decision that leads to a dispute, but it must be heard and dealt with by someone who has the authority to resolve it. Otherwise, it moves to the next level in the grievance process.

Departments must provide meaningful redress, but it must be consistent with the overarching legislative framework. While an employee may win an appeal, that is not to say that meaningful redress means that he or she will be appointed to the position. Redress does not mean that merit, which is the cornerstone for appointments in the Public Service, will be set aside. The objective is to make the person whole in a way that is compatible with other provisions of the relevant legislation.

Recommendation 8: The right to seek recourse and redress must be as close as possible to the issue, action or decision that gives rise to an employee complaint or concern. This may mean several decision points before an appointment under the Public Service Employment Act.

Provide means to respond to all employment-related complaints at the earliest and lowest possible level within departments and agencies by making deputy heads accountable to resolve them

By making deputy heads accountable to resolve all employment-related disputes, the onus is put where it belongs, i.e., with the employer as opposed to a third party. Many stakeholders' criticisms pertain to speed, timeliness and efficiency. By placing accountability with deputy heads, there is an increased capacity to improve the time, approach and appropriateness of the redress to the nature of the complaint being brought into the system.

Left too long unattended, parties to a dispute can become entrenched in their respective positions, and disputes may fester and poison the work environment, not to mention the costs that can be incurred. This situation can be exacerbated when disputes are taken out of the control of the parties and brought immediately before a third party, such as the PSC's appeal boards. In an optimal system, the parties must be empowered to resolve disputes as close as possible to the place and time where they occurred. This also offers organizations the opportunity to adapt the system to their particular structure and geographic diversity, and enables them to accommodate their employment-related dispute resolution approaches to their knowledge, experience and capacity.

The means for resolving staffing-related disputes must include the authority to revoke or appoint, as appropriate. It would be inefficient if a department could hear a staffing-related dispute, but was unable to effect the remedy necessary to resolve it. There must also be sufficient discretion to be able to delegate this authority within the organization. At this time the authority to take corrective measures (e.g., revocation and appointment), rests exclusively with the Public Service Commission, which is prohibited by law from delegating this authority.

Recommendation 9: The Public Service Commission must introduce means to ensure that deputy heads have an opportunity to resolve employment-related matters and disputes for which recourse and redress are being sought. Deputy heads must delegate this authority in a manner that is consistent with recommendation 8.

Offer support, information and education throughout the process to facilitate dispute resolution

It is well understood that ongoing support, information and education are essential to the way people do their jobs. The Working Group believes that it is even more important when it comes to dispute resolution in the workplace. The absence of clear, comprehensive and accessible information – for employees and managers alike – is in large part responsible for the misconceptions, the misunderstandings and the misuse of the existing staffing-related recourse system. Some employees bring appeals because they do not know where else to bring their concerns; others have been told by well-intentioned, but misguided colleagues and others – including managers, human resource advisors and employee representatives – that this is the only choice. Modifying the system, even if it is to simplify it, will not cause the fundamental changes needed. Without active offers of support, information and education on a permanent basis, parties will continue to operate within the new as they did in the old. In very short order, yet another working group or task force will be convened to examine the recourse system.

The availability of support, information and education can have many positive benefits. The benefits include: developing awareness, which may reduce the number of issues that escalate to a complaint; promoting openness in the work environment; and a willingness to resolve disputes amongst the parties themselves. These can aid in reestablishing trust in the employee-employer relationship.

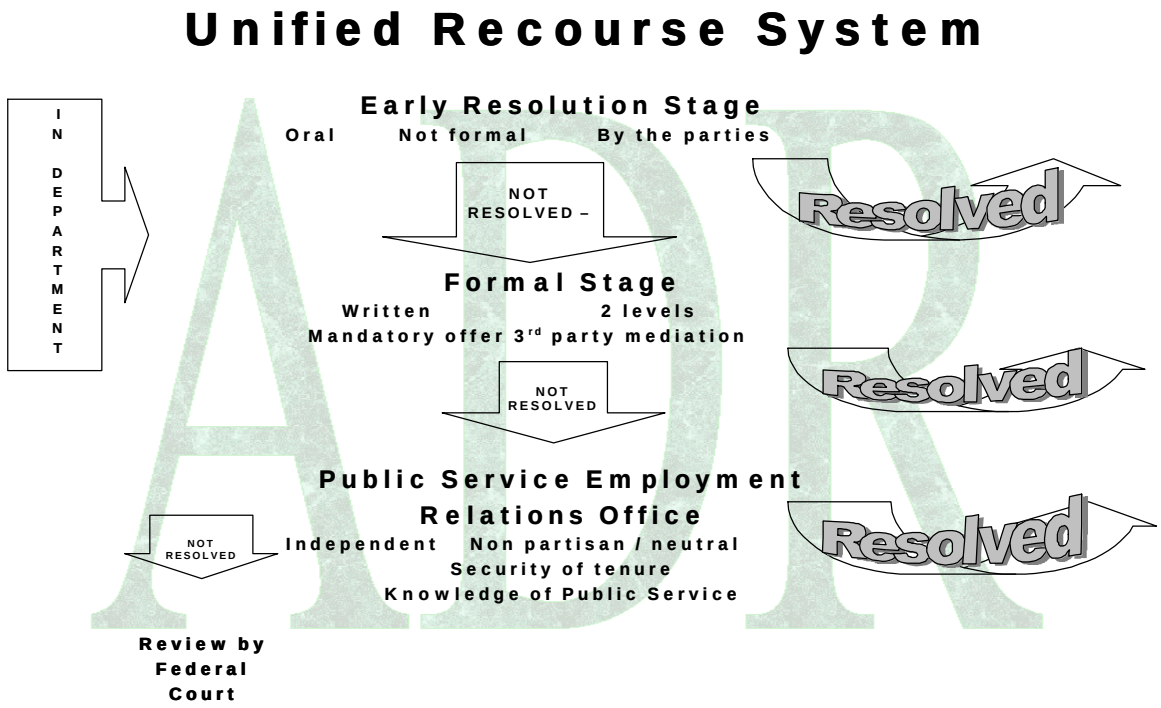
Recommendation 10: The Public Service Commission, in partnership with the unions, Treasury Board, departments and agencies, must dedicate the necessary financial and human resources to promote and support successful implementation of a single, integrated recourse system.

CHAPTER SIX

A MODEL FOR A UNIFIED RECOURSE SYSTEM

An important question for readers of this report will no doubt be how the authors envisage this optimal recourse system functioning. The Working Group gave considerable thought to the matter, and this chapter endeavours to describe the processes and elements of this new system. It also gives some description of the organizational characteristics and qualities of the various bodies and organizations that could be put into place to give effect to the new system.

The Working Group tested the model thoroughly by examining each of the current grounds for complaint, such as rejection on probation, allegations of fraud, selection according to merit; each of the current processes including appeals, deployment complaints, investigations, etc.; along with each of the existing remedies. The Working Group is satisfied that the model is robust and flexible enough to address all the issues that are currently provided for under the *Public Service Employment Act* and is capable of meeting the objectives described in the previous chapter.



MODEL

EARLY RESOLUTION STAGE

Oral Informal Complaint

The supervisor receives a phone call or meets with the complainant.

The supervisor is the preferred first step; however, this may not always be appropriate, for example, if the complaint is about the supervisor personally. Bringing the complaint informally to the supervisor sets up an early opportunity to clarify, and perhaps resolve, the issues. Although not mandatory, the parties may wish to seek the assistance of a trained support resource to help them work through the issues in a mutually satisfactory manner.

How do they handle the complaint?

The complaint is discussed informally, i.e., complainant and supervisor meet, with or without representation, as they feel appropriate. Based on the facts, circumstances, and the nature of the complaint, they try to come to a mutually satisfactory solution.

If the complaint is resolved, the process ends here. If not, the complainant may choose to take his or her concerns to the Formal Stage.

While this stage of the process is oral and informal, the information provided and the outcome of the discussion will be expected to form the basis for a written complaint, should the complainant choose to go to the next stage.

The Working Group suggests that the timeframes for bringing an oral informal complaint should be longer than those allocated for the formal stage. This is because the longer the timeframes at the least formal levels, the greater the possibility for an effective, cost-efficient and amicable resolution. Nevertheless, the timeframes should be determined in relation to the process, e.g., if intended to deal with a screening decision, the complaint should be brought before the assessment portion of the selection process begins.

FORMAL STAGE

Written Formal Complaint

A written complaint is received at the single intake window within the department.

How do they handle the complaint?

The single intake window contacts the complainant to offer information and support, e.g., mediation. This offer of support remains in effect and available throughout the formal stage, i.e., a complainant can opt for it any time before a decision is actually taken. The complainant has the right to representation, but is responsible for seeking their representative. The complainant must inform the single intake window of their representative's coordinates, e.g., name, address, telephone number, etc.

The single intake window determines to whom the complaint should be directed, e.g., the first management level authorized to address and resolve the problem, within their organization or another department (this may be the case in certain selection processes). This person and the representatives are notified in writing and provided with any material submitted by the complainant. If the complainant chooses mediation, copies would also go to the appropriate resource.

The parties have a right to full disclosure, i.e., they have access to any information that might have been used or led to the decision, action, etc. that led to the dispute. This also includes access to any allegations that the complainant wishes to make. It is important to note that no new material should be introduced at subsequent stages that could reasonably have been accessed or provided by either party at this point.

The delegated management level arranges to meet with the employee, the representatives and, depending on the selected approach, the mediator.

The actual process will be determined in large part by the approach selected, e.g., a mediated approach will function differently from a hearing. Nevertheless, both parties must have an opportunity to hear and be heard and are responsible for stating their case clearly. If necessary, they may introduce supporting information, documents and witnesses. They may also respond to or rebut the information provided.

The delegated management level takes a decision. If mediation has been used, the decision will be based on the agreed-to resolution, but it must comply with the relevant legislation. If a hearing approach was followed, the decision will be taken based on the information supplied by the complainant and the manager, according to the relevant legislation. The decision is in writing and copies provided to each party and their representatives, where applicable.

The timeframes for this stage should, as before, be reasonable, but relevant to the context in which recourse is being sought. For example, if the dispute is about an acting appointment or a term appointment, or another decision that is time-sensitive, expecting that the timeframes would be relatively short is reasonable. Again, as

noted with the oral informal stage, the timeframes should not extend into the next decision point.

If resolved, the process ends here. If not, the complainant may request a Second Level Departmental Review.

Second Level Departmental Review

How do they handle the complaint?

The second level departmental review examines the material that was before the delegated management level and the decision, in addition to the grounds on which the complainant is asking for a review. Should the Second Level Departmental Review feel it necessary, they may ask the parties for additional information or clarification.

The Second Level Departmental Review either confirms or overturns the decision taken at the previous level. The parties and their representatives are informed of the decision in writing. Depending on the issue, the process may end here whether the dispute is resolved to the complainant's satisfaction or not. The parties will be informed if the decision is one that may be reviewed by an independent third party and the timeframes for bringing it to the Public Service Employment Relations Office.

The timeframes for requesting second level review should be very short. Parties will have already had full disclosure, therefore, it should be possible to keep the timeframes to a few days. This is the organization's last opportunity to consider the complaint and take a decision before it is brought to an outside body for a final and binding decision. In the circumstances, the Working Group believes that the parties, particularly the departments and agencies, will quickly come to see the value of taking fair, reasonable and objective decisions in-house rather than having them imposed by an outside body. In effect, this approach is entirely consistent with the Consultative Review of Staffing's recommendations made in 1997.

Public Service Employment Relations Office

To address the problem of complexity and multiplicity of recourse mechanisms and bodies within the Public Service, the Working Group proposes that a final stage reviewing body be created. The Working Group dubbed this the "Public Service Employment Relations Office". This single body's role would be to adjudicate all employment-related complaints and give a final and binding decision.

The Public Service Employment Relations Office (PSERO) offers the complainant the option of mediation prior to proceeding with a decision to be taken by a third party. If the complainant does not choose mediation, or if mediation fails, the

PSERO selects an appropriate individual from its roster of resources with the expertise in the relevant human resource discipline. The individual is provided with the information submitted by the complainant and copies of the decisions taken at lower levels.

While a complaint may be brought to the PSERO by an individual, a bargaining agent or equivalent representative, the bargaining agent retains the right to determine whether a complaint goes forward when it involves the application or interpretation of the collective agreement.

The individual assigned to inquire into and adjudicate the matter referred by the PSERO, in accordance with the rules of natural justice, will have all the powers to subpoena witnesses, hear the evidence, render a binding decision and remain seized of the matter to ensure compliance with the decision.

The PSERO may confirm or overturn the decision taken at the previous level or, if the complainant chose mediation, base its decision on the agreed to resolution, which must comply with the relevant legislation. The parties and their representatives are informed of the decision, which is final and binding, in writing.

The parties may seek judicial review of the PSERO decision by the Federal Court, Trial Division, according to the relevant legislation.

About the Public Service Employment Relations Office

As mentioned in the preceding section, the Working Group is of the view that for the last stage of a unified recourse system a new organization, which it calls the Public Service Employment Relations Office (PSERO), should be created. This organization's mandate would be to adjudicate all employment-related disputes and to render final and binding decisions on these matters. The PSERO would optimally have the recourse and redress powers in respect of Public Service employment-related matters that currently reside with other agencies, including the Public Service Commission, the appeal boards, the Public Service Staff Relations Board, the Canadian Human Rights Commission, the Commissioner of Official Languages, etc. The Working Group recognizes that this requires legislative change, but believes that such a body is imperative if the Public Service is to address the complexity and multiplicity of recourse mechanisms, and the inefficiency and costs, both human and financial, that these entail.

It is suggested that the PSERO be composed of a small bipartite management board, with a chairperson agreeable to both sides. It should be noted that the model for such a board already exists with the Public Service Health Care Plan Trust. Board members should sit for fixed terms, with a few members either being replaced or standing for reappointment in any given year. Terms should ideally be staggered

so that the PSERO does not find itself having to replace all members simultaneously.

The management board would be tasked with assembling a roster of well-qualified experts, who would act as adjudication tribunals for complaints brought to the PSERO. These could include complaints relating to appointments, deployments, rejection on probation, lay-off, interpretations of collective agreements, terms and conditions of employment, etc. The PSERO would assign the appropriate adjudication tribunal to a dispute. The roster must include individuals trained in alternate dispute resolution mechanisms. The PSERO's decisions will no doubt be reviewable by the Federal Court. Therefore, it is essential that these individuals be selected based on their competence; that they are non-partisan; that they have authority to take decisions independently; and that they have considerable expertise in the subject area.

The PSERO must also have the necessary legal authority to hear "accelerated" cases. These are situations where an employee faces loss of income or even employment. In such a case, the normal process, i.e., the departmental decision-making stages, would be modified.

Finally, the PSERO should remain seized of a case until the remedy has been implemented by the department or agency. It should not be necessary for an individual to have to undertake a new departmental process to deal with a dispute about the manner in which the remedy is being carried out. To do so would be neither efficient nor cost-effective.

It is not suggested that the PSERO be an oversight body in the same manner that the Public Service Commission is with respect to the overall health of the staffing system. In fact, the Working Group believes that the relationship between the PSERO and the Public Service Commission should be such that there are effective means for consultation and exchange of information. For example, the PSERO would inform the Commission of trends or patterns that seem to be developing. For its part, the Commission could consult the PSERO regarding the potential need for new policies or amendments to existing ones, e.g., to clarify a particular regulation. The same would no doubt be true for other agencies that are responsible for regulating human resources management in the Public Service, e.g., the Treasury Board or the Canadian Human Rights Commission.

Does the Model Satisfy the Interests?

The Working Group evaluated the model against the stakeholders' interests and the value statements. Members firmly believe that the model responds positively to each, as described in this section.

The model enables individuals to bring complaints to departmental resources with the authority to resolve the problem. The supervisor or hiring manager also has an opportunity to express his or her views and explain the decisions or actions that have led to the dispute. This gives both parties an equitable opportunity to express their points of view and to work towards a mutually satisfactory solution. If they cannot resolve the dispute themselves, they have access not only to support, such as a mediator, but also to a third party to help them in bringing about resolution. This approach is not only fair, it also ensures that decisions taken are fair, equitable, objective and effective. Furthermore, the involvement of trained resources and designated delegated authorities (as well as the neutral third party) contributes to ensuring that like cases are handled and decided similarly. Finally, departments have the authority necessary to address individual interests and to take remedial action, should this be required, with the involvement of an outside body as a last resort only. This is surely an improvement over recourse as currently provided for under the *Public Service Employment Act*, where it has been seen that the system was not designed to address individual interests.

The proposed model is able to be faster, timely and more efficient than the current system. Concerns can be brought to the attention of the supervisor, hiring manager, or other delegated authority, as they occur, rather than only at the end of a selection process. The single intake window offers an interesting means to streamline the process and increase efficiency. If the timeframes are kept within the suggested design parameters and assuming that the necessary commitment to change is adopted, the proposed model should show a marked improvement in the time taken to resolve disputes, particularly in relation to the staffing process. The Working Group cannot overemphasize the importance of support, education and information, without which the new system is likely to become as bogged down, backlogged and reviled as the system that is in place today.

Matters that are time sensitive, such as jurisdictional issues, term and acting appointments, and those that may result in loss of employment, could be reviewed through an accelerated process. This possibility contributes to increased efficiency and speed. Finally, the Working Group is of the view that by giving deputy heads accountability to resolve disputes, the greatest number of complaints will be resolved at the departmental level, at either the informal or formal stages.

Greater simplicity is achieved because all human resources management-related concerns are dealt with through a common system. Individuals need not worry whether they have submitted their complaints to the right organization, used the right process, or filed within the correct timeframes, because there is a common approach for grievances, harassment complaints, appeals and deployment complaints. That being said, it is imperative that the legislative and policy frameworks, at the departmental, central agency and PSERO levels, are developed in an integrated

manner, i.e., to ensure a cohesive rather than a fractured approach and to enable the simplicity intended with this model.

Some may argue that the model is more complicated, particularly because it has more levels than the current recourse component of staffing system. The Working Group predicts that as the parties become more familiar with the new system and embrace the necessary philosophical, attitudinal and cultural shift to employment-related dispute resolution, the system will deliver on the objective of simplicity. It must, however, be supported, nurtured and given time to evolve and mature, particularly as the human resources management framework changes in the next few years with the introduction of the UCS.

By having the capacity to tailor processes at the departmental level, labour and management are able to reflect their distinct characteristics and respond to their operational, organizational and even geographic needs. Individuals have improved and timely access to dispute resolution and the number of “rules” should be reduced. The common process makes it easier for individuals to understand and use the system to resolve a problem, i.e., employee, manager and their representatives. This holds true of the system from start to finish, but can only be effective if the legislative and policy framework is designed to this end. Finally, the support, information and education noted as an essential element contribute to a more user-friendly recourse system.

The proposed approach is reasonable, integrated and well-fitted. The proposal is predicated on an integrated legislative and policy framework, which may be beyond the scope of any single central agency, but is essential if there is truly a commitment to an improved Public Service and an exemplary workplace. Implementing non-legislative aspects, such as a single intake window, common process and unified neutral third party would allow for greater integration; however, the other objectives would not be met.

The design embraces the use of a range of dispute resolution mechanisms, which is sadly lacking in the current staffing recourse system. The Working Group heard that the traditional, adversarial approach was alienating some individuals, including members of certain employment equity groups. This may be alleviated with the choice of dispute resolution mechanisms, such as facilitation and mediation, which are less confrontational that the hearings used today.

The system is incremental in its design. Each level is designed to resolve concerns efficiently and expeditiously, using as few resources as possible. Only unresolved cases move along to a next level, with only a small number likely reaching the PSERO. There is reduced duplication of work because the inquiry is not undertaken *de novo* and disclosure must be complete from the earliest formal stage.

The proposed model can both protect the public interest and address the individual interests of those who bring a complaint to the recourse system. All decisions must be taken according to the overarching legislation, e.g., appointments according to merit, deployments may not result in promotions, lay-off only where there is lack of work or discontinuance of a function, etc. The values that Parliament reflected in the *Public Service Employment Act* are not subverted by a recourse system that also gives individuals the possibility of having their interests addressed and satisfied, if solutions are congruent with legislation. In bringing authority and accountability for recourse and redress to deputy heads, departmental managers must take increased ownership for establishing and maintaining a positive and healthy work environment. At the level of the PSERO, the public and individual interests are well served by an organization that is independent, objective, unbiased with its roster of highly competent and non-partisan adjudicators.

The Public Service Commission has much to gain from this model. It can focus on overseeing the staffing system and ensuring it is robust, healthy and capable of responding to the recruitment challenges of the future. Individual recourse transactions become the responsibility of deputy heads, and they have control over the time it takes to resolve disputes, as opposed to the Commission's appeal boards and Recourse Branch representatives. The Public Service Commission is able to pursue its stewardship and oversight role through the establishment of essential regulations or policies aimed at ensuring that the Public Service comprises competent, non-partisan employees, selected in a fair, transparent and an equitable manner. The proposed system envisions the Commission retaining its investigative and audit powers to enable it to monitor and review systemic issues affecting merit.

There is also an important education and information role for the Commission to play, which has been lacking, but is essential to move the change agenda forward and to maintain the ongoing effectiveness, efficiency, simplicity and responsiveness of the new recourse system. The Working Group feels that the model offers the Commission an interesting and novel relationship with the PSERO, i.e., to seek out and obtain information from an outside body regarding trends, developments and patterns in recourse related not only to staffing, but the entire human resources management regime in the Public Service, and to use this information to shape or adjust staffing and recruitment policy for the future.

Finally, although not noted in the recommendations, the Working Group considers it prudent to build in some form of evaluation process for the proposed integrated recourse system, up to and including the PSERO. This is important, since the objectives and the changes being proposed are significant and are aimed at improving the system, increasing its effectiveness and contributing to a more productive, happier and healthier work environment. Will it be successful? The only way to determine this will be to develop sound performance criteria and to carry out a post-implementation evaluation to assess if the objectives have indeed been met.

CONCLUSION

The Challenge

While the pressures for change have been constant over the past decade, the pent-up demand for a cost-effective, streamlined Public Service from Canadians and employees alike has reached the point where the need for action is acute. The Public Service of Canada, long recognized as a pillar of national stature in the world, must now respond to the challenges of the 21st century. It is evident from a myriad of eminent studies, reviews and reports over the past few years that a retooled human resources regime is a key to the modernization of the Public Service. Our report addresses only one element of this reform, albeit one that is of significant interest to important stakeholders. An effective and fair recourse and redress system is essential for an efficient, well-functioning Public Service built on values of non-partisanship, merit, fairness and transparency. In an era of individualism and complexity, such a system is an essential ingredient to establishing the Public Service as career of choice and to attracting and retaining our share of the best and the brightest.

The staffing recourse system has been reviewed by the Public Service Commission on many occasions over the past decade. It has carried out most of the recommendations of the National Recourse Advisory Group and revised many existing rules. It has also introduced innovations regarding disclosure and alternate dispute resolution. However, despite its best efforts, these initiatives have failed to satisfy the desires and needs of many stakeholders. Rather than adjusting the rules of the existing process, which is limited by legislation, a new approach to recourse is needed.

The Working Group proposes implementing a model that is more in tune with modern notions of dispute resolution, and calls for putting greater authority and accountability for conflict and dispute resolution in the hands of departments and the parties to the dispute. Based on the values of the Public Service and the established interests of the major stakeholders, the model envisions the Public Service Commission maintaining its mandate to oversee the health of staffing and merit, while giving departments the authority and ability to address and resolve staffing disputes. The proposed model establishes a single window for complaints resolution, emphasizes early resolution of complaints by those involved, allows concerns to be raised and addressed at appropriate decision points in the staffing process, and encourages the application of mediation and alternative dispute resolution at all stages. It is intended to ensure that real issues are fully identified and satisfactorily addressed in an efficient and timely fashion.

While developed in the context of the staffing regime, the proposed unified recourse model has been designed for application to all existing recourse across the Public Service. The dictates of efficiency, consistency, lack of duplication and the need for timely, comprehensive and conclusive resolution of workplace conflict and disputes demand it. The adoption and implementation of this approach to recourse clearly require the support and cooperation of a broad range of stakeholders within the Public Service. While the concept and vision are set out, there remains a significant level of detail to be developed to make the proposed model fully functional. Moreover, legislative change is required for full realization of the vision proposed. However, legislative change need not be an impediment to incremental change en route to full implementation. Indeed, the continued support and participation of some stakeholders in this and future renewal initiatives is contingent on demonstrable action being taken. With the support and cooperation of the key players and central agencies, appropriate agreements and arrangements may be fashioned, signalling commitment to change. Inevitably, such change requires a significant commitment from all those in leadership roles in the stakeholder groups, both for priority and funding. Implementation involves cultural and process change, and for most departments, a significant investment in change management, training, and funding for the development and nurturing of internal conflict management and alternative dispute resolution capability.

Recommendation 11: Pending legislative change, the Public Service Commission must explore and implement interim measures that are within its jurisdiction under the Public Service Employment Act and consistent with this model.

Leadership

Many issues, stakeholder interests, and recommendations put forward in this report are not new. They can be found in many guises in previous studies and reviews. What is also clear is that if any of these proposals for change are to move beyond the paper stage, strong, committed leadership is required. There is a need not only for legislative change but also for major cultural change. Without strong support from key leaders in the stakeholder communities, modernization of the Public Service recourse system and process will not succeed. For example, our recommendations are predicated on a shared and lateral approach to issues that is very different from the stovepipe approach currently imposed by the legislation. This is well illustrated by recommendations 3 and 4:

> *"The many existing recourse and redress systems related to employment in the Public Service must be consolidated into a single, integrated recourse and redress system. This system must respond to the interests, objectives and characteristics set out in the report prepared by the PSCAC's Working Group on Recourse.*

"The Public Service Commission must champion and actively pursue this proposal with other departments and agencies that have an interest in or responsibility for employment-related recourse and redress in the Public Service."

Recommendations that require major legislative and process change will, as a matter of course, provoke legitimate concern and debate among various stakeholders and central agencies. How long such debate persists and whether it will ultimately create inertia is dependant, in very large part, on the nature of the support for the change being supplied by senior leaders. In *Leading Change*, John Kotter notes:

"Managing change is important … but for most organizations, the much bigger challenge is leading change. Only leadership can blast through the many sources of corporate inertia. Only leadership can motivate the actions needed to alter behaviour in any significant way. Only leadership can get change to stick by anchoring it in the very culture of an organization."[12]

There is a clear consensus among the stakeholders around the need and direction for change in recourse and redress in the Public Service. This, with the general impetus for change in the overall human resources system coming from a variety of sources, presents a rare opportunity. If Daryl Connor is correct in his conclusion that change is most successfully effected when there is the greatest overlap between the current culture and the desired new behaviours,[13] the converging pressures for change are creating a unique opportunity for Public Service leaders to move the agenda forward. James Ogilvy, in *Visions for the 21st Century,* notes:

"… o*ur most vexing problems today are not problems that can be solved by science and technology: They are human problems that call for a degree of social invention that we have not seen since the creation of democracy …"*[14]

The recommendations for revision to the recourse process embodied in this report are part of this "social invention" and, with the support of Public Service leaders, they will be a key component of a renewed human resources regime in a 21st century Public Service.

[12] *Kotter, John: Leading Change; Harvard Business School Press, 1996; p. 30*
[13] *Connor, Daryl: Managing at the Speed of Change; pp. 161-179*
[14] *Ogilvy, James: "Earth Might be Fair," from Visions for the 21st Century, ed. Sheila Moorcroft, Adamantine Press Limited; 1992; p. 148*

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