

57. That the paragraph of the Act which defines "person employed in a managerial or confidential capacity" be amended to read as follows:

"persons employed in a managerial or confidential capacity" means any person who

(a) Is employed in a position confidential to the Governor General, a Minister of the Crown, a judge of the Supreme or Federal Court of Canada, the deputy head of a department or the chief executive officer of any other portion of the Public Service;

(b) Is employed as a legal officer in the Department of Justice;

(c) Is employed as an officer or employee on the payroll of the Treasury Board;

(d) Is directly involved on behalf of the Public Service Commission in a formal process of

(i) Appointments

(ii) Consultation, or

(iii) Redress

prescribed by or under the Public Service Employment Act;

(e) Effectively participates in the determination of government policies or programs, or participates in the approval of plans of organization;

(f) exercises effective control over employees;

(g) (i) Is directly involved on behalf of the employer in the process of collective bargaining or consultation prescribed by this Act or exercises appointing authority on behalf of the employer; or

(ii) Is primarily engaged in the administration of personnel policies or programs other than a person whose duties are of a routine or clerical nature;

(h) Is a person to whom the persons identified in sub-paragraphs (c), (d), (e), (f) or (g) are directly accountable in respect of the duties described in such sub-paragraphs; or

(i) Is engaged in confidential duties under the exclusive direction and control of a person or persons identified in sub-paragraphs (b), (c), (d), (e), (f), (g) or (h), other than a person in a support capacity whose confidential duties relate solely to the processing of grievances at the first level in the grievance procedure established under this Act,

and includes any other person who, in the opinion of the Board, should not be included in a bargaining unit by reason of a conflict between his duties and responsibilities to the employer and any interest he might have as a member of a bargaining unit.

#### INCOMPETENCE AND INCAPACITY AND DISCIPLINARY ACTION

Evidence submitted to your Committee reflected the difficulty in drawing the line between behaviour requiring disciplinary action and involuntary infractions which may be traced to incompetence or incapacity. The 1967 legislation divides the third party involvement in these matters between the Public Service Employment Act and the

Public Service Staff Relations Act. The authority of the Public Service Commission under the Public Service Employment Act relates to circumstances where the employer proposes to release or demote an employee for incompetence or incapacity. The authority of adjudicators under the Public Service Staff Relations Act applies to disciplinary action.

This overlap has led to a variety of legal arguments respecting the jurisdiction of the Public Service Employment Act and the Public Service Staff Relations Act in a particular case. Moreover, there is confusion as to the procedure to be followed by management. In their appearances before your Committee, the bargaining agents sought the elimination of this divided authority by bringing releases for incompetence and incapacity within the jurisdiction of the Public Service Staff Relations Board.

Your Committee has studied the problem and supports the elimination of this divided authority, but recognizes that this consolidation should not interfere with the Public Service Commission's appointing authority.

We therefore recommend that:

58. Where the action of the employer results or will result in the termination of employment of an employee from a position in the Public Service, and the reasons alleged by the employer are misconduct, abandonment of position, incompetence or incapacity, the employee should be entitled to grieve the termination action.

59. Where the employee's grievance has not been dealt with to his satisfaction at the final level, he should be able to refer it to the Public Service Staff Relations Board for adjudication.

60. The adjudicator should be empowered to rescind the termination where he upholds the employee's grievance, or substitute other action if the employer's action was not well-founded but he should not be empowered to recommend or effect an alternate appointment.

61. The Public Service Commission should on request re-appraise every employee whose employment in a position in the Public Service has been involuntarily terminated to assess whether the employee is suitable for appointment to another position.

62. An employee found suitable for appointment following re-appraisal should be entitled to have his name entered on any appropriate eligibility list and for a period of time (e.g. one year) enter closed competitions.

63. Where the employee is appointed within the period referred to in Recommendation 62 above, ordinary rules of continuity of employment should apply to him.

64. None of the procedures referred to above involving redress of grievance and opportunity for re-employment should apply to an employee who is offered and accepts another position in lieu of termination.

#### UNION VOTING PROCEDURES

Union voting procedures, particularly strike and ratification votes, have received considerable attention. The present Public Service Staff Relations Act is silent with respect to the conduct of votes by bargaining agents.