Presentation

to

The Standing Committee on National Finance

Bill C-25
The Public Service Modernization Act

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Ottawa

by

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Appearing on behalf of SSEA:

SSEA is currently involved in a merger with another federal public service bargaining agent: the Canadian Union of Professional and Technical Employees (CUPTE).

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Summary

Since federal public service employees gained the right to organize and bargain collectively more than 35 years ago, there have been many changes to the practices and statutes dealing with labour-management relations, and to the staffing practices and legislation that define the staffing regime of the federal public service. Yet, never has a bill been as ambitious and far-reaching as Bill C-25, *The Public Service Modernization Act*. Bill C-25 is intended to provide "...for more cooperative labour-management relations to support a healthy, productive workplace,...". [1] The bill is also intended to provide "...for increased flexibility in staffing... combined with reinforced safeguards to protect merit in staffing and address possible abuses in the system." [2]

The *Social Science Employees Association* (SSEA) supported these objectives in the Spring. However, SSEA is greatly concerned that in its current configuration, which includes amendments by the House of Commons' Standing Committee on Government Operations and Estimates, the proposed legislation will not achieve the stated goals.

SSEA appeared before the House of Commons' Standing Committee on Government Operations and Estimates on March 25 of the current year. Further to a meaningful discussion of matters raised by the Association and by committee members, at the invitation of the committee SSEA provided additional comments in writing on March 31. We appear before you today to make anew the case for these amendments.

SSEA proposes eleven amendments that would enhance the legislation's effectiveness. The Association proposes (1) wording to strengthen consultation of bargaining agents by public service employers; (2) a clearer definition to the new labour-management process called co-development; (3) a requirement that the proposed new Public Service Labour Relations Board (PSLRB) hear matters brought before the Board unless the parties to the matter agree to waive their right to a hearing; (4) the deletion of a paragraph of the bill which could unjustly jeopardize the independence if not the existence of bargaining agents; (5) a requirement that PSLRB adjudicators be required to hear grievances referred to adjudication unless the parties to the grievances agree to waive their right to a hearing; (6) the inclusion of harassment grievances among the types of grievances that can be referred to adjudication; (7) changes to the bill that will ensure that demotions and terminations of employment are founded in fact not opinion; (8) the inclusion of Section 11 of the current *Public Service Employment Act* in the new version of the Act in order to avoid losing valued public service employees; (9) protection of the notion of relative merit; (10) extension to employees working on Parliament Hill the same staffing privileges that the bill proposes to extend to employees of separate agencies; (11) an amendment to reinforce safeguards to protect merit in general.

List of Selected Positive Elements

A. Section 51/PSLRA: is a privative clause, which means that decisions of the new *Public Service Labour Relations Board* (PSLRB) will have more authority as they are final and binding. The clause will have the beneficial effect of discouraging unnecessary litigation.

B. Section 53/PSLRA: creates an Advisory Board to the Chairperson of the PSLRB on compensation analysis and research; bargaining agents could be members and provide important methodological advice; there is some concern about the composition of the Advisory Board.

C. Section 208/PSLRA: discrimination grievances can go to adjudication; considering the current process whereby complaints of discrimination can only go to the Canadian Human Rights Tribunal, the option of adjudication will allow for more timely and effective action in matters of discrimination.

D. Section 226/PSLRA: gives the PSLRB broader remedial powers.

E. Section 37.1/PSLRA: maintains the right of choice between arbitration and strike/conciliation for bargaining agents if there is an impasse at the bargaining table; moreover, the criteria for settling issues have been broadened; SSEA has relied on arbitration if an impasse occurred at the bargaining table.

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Introductory Remarks

1. The **Social Science Employees Association** is a bargaining agent representing approximately 8,500 employees of the federal government who provide economic and social science services. SSEA also represents the research staff at the Library of Parliament, over 70 research officers and research assistants. The Association negotiates contracts and protects the rights of its members through various grievance, appeal and adjudicative fora.

2. SSEA is currently involved in a merger with another public service union: the Canadian Union of Professional and Technical Employees (CUPTE).

3. Earlier this year SSEA presented its views on Bill C-25, the *Public Service Modernization Act*, to the House of Commons' Standing Committee on Government Operations and Estimates.

4. We wish to thank the committee for inviting our organization to appear before the Senate Committee on National Finance in order to voice our support and concerns regarding Bill C-25.

5. Our organization represents professional employees in the federal public service.

6. The labour-management relations that we have fostered with employers over the years have been for the most part productive.

7. There have been times when we could only agree to disagree. But again for the

most part, we have done so respectfully.

8. Bill C-25 affects in very profound ways the work place of our membership, as well as the labour-management relations established through our organization with public service employers.

9. We are supportive of change, if the purpose and real effect of change is improvement.

10. We see improvements to existing legislation in the proposed Act.

11. However, we are not convinced at this time that Bill C-25 in its current configuration accomplishes what it is expected to accomplish. To be fully confident we would need a review process that is longer than the one that is available.

12. We do know that there are elements of the bill that need to be improved in the public interest of better labour relations in the federal public service.

13. We would also suggest that there are elements in the bill that require modification in order to ensure a modernized staffing process that will make careers in the public service attractive to college graduates, to professionals, and to the many valuable employees currently serving the Canadian government and the Canadian public.

14. Federal public service employees are different.

15. In contrast to private sector employees and even in contrast to public sector employees working at the municipal or provincial level, they serve all Canadians.

16. The error or improper conduct of the odd public service employee will make headlines.

17. However, the commitment and devotion to duty of over 170,000 employees who work day in and day out to make Parliament's will a reality often goes without recognition.

18. To accept to work for Canadians is not a job. It is commitment.

19. Over time it is a career.

20. Bill C-25 must establish the appropriate legal framework for a human resources management regime that will foster the commitment, for today's public service employee and tomorrow's.

21. The concern was well expressed by the *Task Force on Modernizing Human Resources Management in the Public Service* when it wrote:

> Ensuring adequate numbers of skilled employees will be a challenge. The public service will have to **adapt** accordingly to **attract, retain and develop** the people it needs. [3]
> [emphasis add]

22. We agree.

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Background

23. The principal elements of the current legislative framework governing human resources management were put together in 1967. They included the *Public Service Staff Relations Act*, the *Public Service Employment Act*, and certain parts of the *Financial Administration Act*.

24. Bill C-25 proposes changes to each of these statutes, further to recommendations made by the *Task Force on Modernizing Human Resources Management in the Public Service*.

25. The Task Force itself carried out its work in the aftermath of work by the *Advisory Committee on Labour-Management Relations in the Federal Public Service*.

26. SSEA was involved in consultations and informal talks with the Task Force and the Advisory Committee.

27. Some of our more important recommendations made there way into Bill C-25. Some did not.

28. SSEA recognizes that there is still considerable resistance to change at the top of the managerial structure. However, a few deputy heads are actively pursuing new avenues to improve labour relations.

29. SSEA makes the following observations and recommendations in a similar spirit of change.

Observations and Recommendations

SSEA proposes the following changes to the proposed *Public Service Labour Relations Act.*

30. Labour relations statutes and practice in the federal public service over the past three and a half decades have rested on two modes of interaction: collective bargaining and consultation.

31. Collective bargaining has been structured by the *Public Service Staff Relations Act* which established a quasi-equal relationship of bargaining agents to employer.

32. Consultation has developed or not developed within various parts of the public service according to the perception of legitimacy of union representatives by the different deputy ministers.

33. Consultation has also developed in a more meaningful way under the *aegis* of the *National Joint Council*.

34. SSEA supports the provisions of Division 3 of the proposed *Public Service Labour Relations Act* to the extent that Sections 8 to 11 make consultation compulsory, and purport to create an entirely new mode of labour relations, called co-development.

35. We believe that the current wording of Section 8 will fall short of the intent of the legislation. It makes compulsory the existence of labour-management consultative

bodies. However, it does not make compulsory that such bodies function in a manner that would be effective and in the interest of Canadians.

36. SSEA **recommendation 1 (PSLRA, Section 8):**

that Section 8 of the PSLRA be amended to ensure that consultation committees be established in good faith.

37. Accordingly, we suggest the following wording: PSLRA / Section 8

> 8. Each deputy head must, in consultation with the bargaining agents representing employees in the portion of the federal public administration for which he or she is deputy head, establish **in good faith** a consultation committee consisting of representatives of the deputy head and the bargaining agents for the purpose of exchanging information and obtaining views and advice on issues relating to the workplace that affect those employees.

38. One of the most innovative and potentially useful changes included in Bill C-25 is the inclusion of a new avenue of cooperative labour-management relations called co-development.

39. This avenue is not entirely new. It is important to remember that the notion of co-development has been proposed as an alternative to consultation, and to collective bargaining for such issues as classification and staffing.

40. Moreover, the National Joint Council has operated over the years as a forum for co-development at the service wide level of the public service.

41. However, the NJC co-development process includes a dispute resolution process for the exceptional circumstances, and they are truly exceptional, when the parties cannot come to agreement.

42. The dispute resolution process was co-developed by NJC members. It is this dispute resolution process that distinguishes co-development within the NJC from consultation.

43. Without agreement to a dispute resolution process, the difference between consultation and co-development is spurious.

44. However in the spirit of cooperation, it is important to leave to the parties the determination of the appropriate process to resolve disputes.

45. If the parties do not agree to a dispute resolution process, then management can simply withdraw from the co-development process and consult with the union or unions on the issue at hand, thus maintaining full control over the entire process.

46. SSEA **recommendation 2 (PSLRA, Section 10):**

that Section 10 of the PSLRA be amended to include a commitment to a dispute resolution process for co-development initiatives.

47. Accordingly, we suggest the following wording: PSLRA / Section 10

10. **(a)** The employer and a bargaining agent, or a deputy head and a bargaining agent, may engage in co-development of workplace improvements.

(b) The parties to a co-development initiative will agree at the outset to a dispute resolution process for that specific co-development initiative.

48. Section 41 of the PSLRA gives the PSLR Board authority to summarily dismiss a matter without a hearing.

49. The discretionnary power is unlimited and could lead to instances where justice is not served.

50. There may be instances when a hearing would not be in the interest of the parties. If such circumstances were to arise it is important that the Board have the authority to propose proceeding without a hearing.

51. SSEA recommends that the Board have such power, but limited by agreement of the parties.

52. SSEA **recommendation 3 (PSLRA, Section 41):**

that Section 41 of the PSLRA be amended to ensure that the Public Service Labour Relations Board has the convenience of deciding a matter without a hearing, as long as the parties to the complaint agree that the subject matter of the complaint does not require a hearing.

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53. Accordingly, we suggest the following wording: PSLRA / Section 41

> 41. The Board may decide any matter before it without holding an oral hearing **if the parties to the complaint agree to waive their right to an oral hearing.**

54. The assumption of a healthy labour-management relations is the continued, unthreatened and independent existence of management on the one hand, and of labour on the other.

55. The proposed new provisions under Section 76, paragraph 1 could jeopardize the stable existence of many small bargaining agents.

56. Bargaining agents rely on union dues to provide service to members. Interruptions or delays in the transfer of dues from the employer to bargaining agents can create varying levels of hardship.

57. Section 76, paragraph 1 has the effect of requiring that the employer withhold dues or union revenue simply because a proposal by the employer for managerial or confidential exclusion has been made.

58. For a relatively small bargaining agent with members in several departments, the possibility of a few hundred proposed exclusions during a fiscal year has the potential of crippling its operations.

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59. This is truly unfair, particularly as the bargaining agent will be expending resources in order to argue before the Board why some or all of the proposed exclusions should not be granted.

60. Bargaining agents do not control when exclusion proposals are put forth, and how many are put forth. The employer controls exclusion proposals.

61. The financial stability of bargaining agents should not be subject to this kind of dependence.

62. The spirit and effect of Section 76, paragraph 1 undermines the entire statute.

63. SSEA **recommendation 4 (PSLRA, Section 76(1)):**

that Section 76 (1) be deleted from the PSLRA.

64. Accordingly, we suggest the following deletion: PSLRA / Section 76 (1)

76 ~~(1) If an objection is filed under section 73, the employer must hold the amount that would otherwise be the membership dues in respect of the occupant of the position to which the objection relates until the Board makes an order declaring the position to be a managerial or confidential position, until it dismisses the application in respect of the position or until the objection is withdrawn, as the case may be.~~

65. A Member of the Standing Committee on Government Operations and Estimates noted correctly that the *Public Service Employees Survey of 2002* reported high

levels of harassment in the federal public service. The level of harassment reported in the 1999 survey was similar.

66. Most cases of harassment are settled through mediation.

67. However, there are cases where mediation is inappropriate. These cases go to the Deputy Minister for a final decision which can only be challenged thereafter in civil court.

68. In order to more effectively address the issue of harassment, SSEA proposes that the new *Public Service Labour Relations Act* recognize harassment grievances as a type of grievance that can be referred to adjudication if not settled between grievor and employer.

69. SSEA **recommendation 5 (PSLRA, Section 209):**

that harassment be included as a grounds for referral of a grievance to adjudication.

70. Accordingly, we propose the following wording: PSLRA / Section 209

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to
(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(b) harassment;
~~(*b*)~~ **(c)** a disciplinary action resulting in termination, demotion, suspension or financial penalty;
~~(*c*)~~ **(d)** in the case of an employee in the core public administration,
(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or
(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or
~~(*d*)~~ **(e)** in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.
(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.
(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph 1~~(d)~~ **(e)**.

71. Section 227 of the PSLRA also gives adjudicators the authority to summarily dismiss a matter without a hearing.

72. Again, the discretionnary power is unlimited and could lead to instances where justice is not served, for example in a case of a grievance against a demotion, or discrimination.

73. The adjudicator should have the option of deciding a matter without a hearing. However, the decision to do so should be limited by agreement of the parties to the grievance.

74. SSEA **recommendation 6 (PSLRA, Section 227):**

that Section 227 of the PSLRA be amended to ensure that the Public Service Labour Relations Board has the convenience of deciding a matter without a hearing, as long as the parties to the grievance agree that the subject matter of the grievance does not require a hearing.

75. Accordingly, we suggest the following wording: PSLRA / Section 227

> 227. The Board may decide any matter before it without holding an oral hearing **if the parties to the grievance agree to waive their right to an oral hearing.**

76. It is important to underscore that the vast majority of public service employees meet or surpass performance expectations.

77. It is only the very exceptional case where, for various reasons, a public service employee does not meet the objectives of his or her position.

78. In such cases, management has a responsibility to the Canadian public to address performance issues.

79. Performance issues in a modernized human resources regime are addressed by managing the performance issue.

80. Currently in the public service, poor performers must accept training to improve their performance. Then they must accept that their performance will be closely reviewed at intervals over a period of time by measuring deliveries against expressed objectives.

81. If the employee's performance continues to fall short of performance expectations, then the employer can take further action including demotion or termination.

82. This process is what is called termination or demotion for just cause. It is not for opinion however reasonable the opinion may appear, but for cause.

83. Managers in the federal public service do not have the resources to appropriately address performance issues.

84. However, the availability of resources is not a statutory issue.

85. Managers in the public service must be provided with an appropriate level of resources in order to allow them to manage.

86. At the risk of repetition, we say once more: the standard for termination or demotion for unsatisfactory performance must be fact, not opinion. It must be measurable by some objective standard.

87. SSEA **recommendation 7 (PSLRA, Section 230):**

that reference in the proposed wording for Section 230 of the PSLRA to opinion be removed.

88. Accordingly, we propose the following wording: PSLRA / Section 230

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230. In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator must determine the termination or demotion to have been for **just** cause ~~if the opinion of the deputy head that the employee's performance was unsatisfactory is deemed by the adjudicator to have been reasonable~~.

SSEA proposes the following changes to what has been proposed for the *Public Service Employment Act.*

89. We underscored at the outside the commitment required to be a federal public service employee: to join the federal public service is to join an organization committed to serving Canadians.

90. The corollary to the employee's commitment is the employer's commitment to support a human resources regime that creates opportunities for career progression.

91. The omission of Section 11 of the current *Public Service Employment Act* (PSEA) will effectively put an end to such an understanding.

92. Section 11 of the current PSEA ensures that persons coming from outside are not cutting off legitimate career opportunities for public service employees who have committed years of service to the Canadian public.

93. In fact, it creates the possibility of career development within the federal public service by requiring that managers look first to their employees in order to fill their human resources needs.

94. The existence of Section 11 of the current Act has not precluded staffing from outside the public service. In fact, the possibility of career development is one of the principal attractions of the public service as a workplace.

95. SSEA recommends to the Standing Committee that Section 11 of the current PSEA be maintained for the purpose of requiring that the Commission continue the practice of staffing positions by considering first employees before going to external candidates.

96. A Member of the Standing Committee on Government Operations and Estimates noted during the presentation last March that SSEA's recommendation could be interpreted as giving an unfair advantage to employees in the Public Service. It was suggested that employees compete with outside candidates.

97. In response, SSEA explained in its supplementary presentation that there are two processes that undermine the objective fairness which would normally follow from the Member's observation.

98. Firstly, the complaint process is weaker for outside competition.

99. As a result, all other factors being equal a manager will prefer avoiding complaints by staffing from outside.

100. Secondly, each and every promotion within the public service involves a minimum of two staffing actions: the action that promotes, as well as the action to replace the promoted employee.

101. Eventually all promotions within the public service result in hiring someone from outside.

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102. Considering that most managers in the public service have neither the time nor the resources to take staffing actions, in most instances convenience will win against effective staffing.

103. Inclusion, of the current Section 11 in the new legislation is the only way to maintain a balance that will allow some promotions in the public service.

104. SSEA **recommendation 8 (PSEA, Section 11):**

that Section 11 of the current PSEA be retained and included in the new Section 11.

105. Accordingly, we suggest the following wording: PSEA / Section 11

11. The mandate of the Commission is
(a) to appoint, or provide for the appointment of, persons to or from within the public service in accordance with this Act;
(b) to ensure that appointments shall be made from within the public service except where, in the opinion of the Commission, it is not in the best interests of the public service to do so;
~~(b)~~ **(c)** to conduct investigations and audits in accordance with this Act; and
~~(c)~~ **(d)** to administer the provisions of this Act relating to political activities of employees and deputy heads.

106. The premisse of the current *Public Service Employment Act* is that the public interest is best served if appointments on the basis of relative merit are used in some instances, and appointments on the basis of individual merit are used in other instances (for example on the reclassification of a position or within a career development program).

107. The proposed amended Act presupposes that it is in the public interest to appoint on the basis of a two-tiered individual merit process.

108. This process makes unlikely competitions where the qualifications of candidates are compared and the best candidate is chosen.

109. In short, the new *Public Service Employment Act* abdicates the responsibility to ensure excellence in the public service.

110. Finding people who have abilities and knowledge that meet basic measures of competence suffices. Why go for excellence when the pursuit of mediocrity is much more expedient!

111. SSEA believes that Canadians deserve the best possible public service.

112. SSEA believes that staffing on the basis of relative merit serves Canadians best.

113. To try to re-introduce relative merit in an effective way could require a comprehensive re-write of the entire portion of Bill C-25 that is devoted to the *Public Service Employment Act*.

114. Another way would be to re-establish relative merit as the basic selection process, and to include in the *PSEA Regulations* that will accompany the new Act the exceptions for individual merit appointments that are currently in the *PSEA/Regulations*, Section 5, paragraph 2 which reads:

Section 5 (2) A selection referred to in subsection 10(2) of the Act [the subsection that refers to individual merit in the current PSEA] *may be made in any of the following circumstances:*

(a) when an employee is to be promoted within an apprenticeship or professional training program;

(b) when an employee is to be appointed to their reclassified position and

> *(i) the position has been reclassified as a result of a classification audit or grievance,*
>
> *(ii) the position is one of a group of similar occupied positions in the same occupational group and level within the same part of an organization that have all been reclassified to the same occupational group and level, or*
>
> *(iii) there are no other similar occupied positions in the same occupational group and level within the same part of the organization;*

(c) the appointment for an indeterminate period, to a position at the same substantive level, or to an equivalent occupational group and level, of an employee who is appointed for a specified period and who has accumulated five or more years of service without a break in service of more than 60 consecutive days under the criteria set out in the Long Term Specified Period Employment Policy established by the Treasury Board and dated June 10, 1999;

(d) when a person who is a member of a disadvantaged group is to be appointed in accordance with an employment equity program;

(e) in an emergency situation, when a person is to be appointed for a specified period, if the appointment cannot be made under section 21.2 of the Act;

(f) if an employee who has been found qualified by the Commission at the EX-1 level within the Career Assignment Program is to be appointed at that level;

(g) when an employee is to be promoted within an occupational group in which positions are classified according to the qualifications of the incumbents;

(h) when an employee is to be promoted within the Law Group from the LA-01 to the LA-2A level;

(i) when a person is to be appointed to one of a class of similar positions in the same occupational group and level from a pre-qualified pool established by the Commission for that purpose, if the person meets

(i) the security, reliability and medical conditions of employment in respect of the position, and

(ii) the condition of appointment set out in section 5.1 of the Student Employment Programs Regulations; and

(j) when a person is to be appointed to a position that belongs to a shortage group.

115. These many exceptions to relative merit allow for individual merit appointments under the current *PSEA*.

116. The exceptions, if used properly, give a tremendous degree of flexibility to managers staffing possitions.

117. A paragraph stating that the most meritorious candidate must be appointed in all other circumstances would re-establish relative merit as the basis of appointments in the public service. It would look something like:

118. SSEA **recommendation 9 (PSEA, Section 30):**

that the proposed Section 30 of the PSEA be amended in order to identify two types of merit appointments, individual and relative.

119. Accordingly, we suggest the following wording: PSEA / Section 30

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30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of **individual or relative** merit and must be free from political influence.

(2) An appointment is made on the basis of **individual** merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

(3) The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.

(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of **individual** merit.

(5) In all other instances, appointments will be based on relative merit.

120. It has been a longstanding frustration expressed by employees on Parliament Hill, including SSEA members working at the Library of Parliament, that they cannot apply to internal competitions of the federal public service.

121. The proposed new Section 35, paragraph 1 extends this right to tens of thousands of employees working for various public service agencies,... but not to employees on Parliament Hill.

122. There is no justification for an extension to separate agency employees but not to Parliament Hill employees.

123. Moreover by maintaining a wall between internal public service employment opportunities and Parliament Hill employees, the Act creates an unnecessary separation of public administration from the political process.

124. The two must be distinct, but not for employment opportunities of employees in each of these sectors of national polity.

125. A Member of the Standing Committee on Government Operations and Estimates raised a concern regarding the effect of SSEA's original recommendation to amend the proposed wording for Section 35, paragraph 1 of the PSEA.

126. It was noted that some employees on the Hill are partisan appointees, and that it may be inappropriate to allow such appointees to be treated as public service employees.

127. In response to the Member's concern, SSEA amended its recommendation in its Supplementary Presentation to the Committee to read as follows:

128. SSEA **recommendation 10 (PSEA, Section 35 (1)):**

that the proposed Section 35 (1) of the PSEA be amended in order to extend the application of the section to employees of the Library of Parliament and to employees of the Senate and House of Commons who are occupying non partisan positions.

129. Accordingly, we propose the following wording: PSEA / Section 35 (1)

35 (1) Unless otherwise provided in any other Act, a person employed in a separate agency to which the Commission does not have the exclusive authority to make appointments **or an employee of the Library of Parliament, or an employee of the Senate or House of Commons who is not a partisan appointee**
(a) may participate in an advertised appointment process for which the organizational criterion established under section 34 is being an employee, as long as the person meets the other criteria, if any established under that section; and
(b) has the right to make a complaint under section 77.

130. According to the 2002 *Public Service Employees Survey*, 30% of respondents for whom a question regarding staffing competitions was applicable stated that they disagreed with the statement that competitions had been run in a fair manner[4].

131. Measuring for correlation between satisfaction with the fairness of the process and success in the competitions, we find that the relation is weak. In other words, whether a public service employee is successful or not, almost one out of three come away from a competition believing that staffing is unfair.

132. This rate of perceived unfairness does not contribute positively to human resources management and to the effectiveness of the public service as it undermines morale.

133. It is crucial that the new PSEA include an effective complaint process to ensure that public service employees feel that fairness in staffing is protected.

134. The current wording of Section 77 paragraph 1 falls short of being effective.

135. Firstly, both the Public Service Commission and delegated deputy heads can make internal appointments. Yet, Section 77 paragraph 1 entitles aggrieved employees the right to file a complaint to the proposed Staffing Complaints Tribunal only if the appointment or proposed appointment had been made by the Commission.

136. Secondly, it appears that the proposed wording does not consider the possibility of errors, omissions or improper conduct.

137. Thus, for example in the event that a manager were to misplace a page of an employee's résumé, the employee would have no recourse if such an error were to eliminate him/her from consideration for a position.

138. This would be patently unfair.

139. SSEA **recommendation 11 (PSEA, Section 77 (1)):**

that the proposed Section 77 (1) of the PSEA be amended in order to extend the Tribunal complaint process to appointments by deputy heads,

That the proposed Section 77 (1) of the PSEA be amended in order to include among the grounds for a complaint the failure of the Commission or deputy head to fairly assess qualifications as a result of an error, an omission or improper conduct.

140. Accordingly, we propose the following wording: PSEA / Section 77 (1)

77 (1) When the Commission **or a deputy head** has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may – in the manner and within the period provided by the Tribunal's regulations – make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; ~~or~~

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1) **; or**

(d) the failure of the Commission or deputy head to fairly assess qualifications as a result of an error, an omission or improper conduct.

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Recommended Amendments

(Recommended additions are in bold)

A) Recommended changes to the proposed *Public Service Labour Relations Act*:

1. PSLRA: Section 8

8. Each deputy head must, in consultation with the bargaining agents representing employees in the portion of the federal public administration for which he or she is deputy head, establish **in good faith** a consultation committee consisting of representatives of the deputy head and the bargaining agents for the purpose of exchanging information and obtaining views and advice on issues relating to the workplace that affect those employees.

2. PSLRA: Section 10

10. (a) The employer and a bargaining agent, or a deputy head and a bargaining agent, may engage in co-development of workplace improvements.

(b) The parties to a co-development initiative will agree at the outset to a dispute resolution process for that specific co-development initiative.

3. PSLRA: Section 41

41. The Board may decide any matter before it without holding an oral hearing **if the parties to the complaint agree to waive their right to an oral hearing.**

4. PSLRA: Section 76 (1)

Delete Section 76 (1)

5. PSLRA: Section 209

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to
(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;
(b) harassment;
~~(*b*)~~ **(c)** a disciplinary action resulting in termination, demotion, suspension or financial penalty;
~~(*c*)~~ **(d)** in the case of an employee in the core public administration,
(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or
(ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or
~~(*d*)~~ **(e)** in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.
(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.
(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph 1~~(d)~~ **(e)**.

6. PSLRA: Section 227

227. The Board may decide any matter before it without holding an oral hearing **if the parties to the grievance agree to waive their right to an oral hearing.**

7. PSLRA: Section 230

230. In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion

for unsatisfactory performance, an adjudicator must determine the termination or demotion to have been for **just** cause.
[delete: "... if the opinion of the deputy head that the employee's performance was unsatisfactory is deemed by the adjudicator to have been reasonable."]

B) Recommended changes to what has been proposed for the *Public Service Employment Act:*

8. PSEA: Section 11

11. The mandate of the Commission is
(a) to appoint, or provide for the appointment of, persons to or from within the public service in accordance with this Act;
(b) to ensure that appointments shall be made from within the public service except where, in the opinion of the Commission, it is not in the best interests of the public service to do so;
(c) to conduct investigations and audits in accordance with this Act; and
(d) to administer the provisions of this Act relating to political activities of employees and deputy heads.

9. PSEA: Section 30

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of **individual or relative** merit and must be free from political influence.
(2) An appointment is made on the basis of **individual** merit when
(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and
(b) the Commission has regard to
(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,
(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and
(iii) any current or future needs of the organization that may be identified by the deputy head.

(3) The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.
(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of **individual** merit.
(5) In all other instances, appointments will be based on relative merit.

10. PSEA: Section 35 (1)

35. (1) Unless otherwise provided in any other Act, a person employed in a separate agency to which the Commission does not have the exclusive authority to make appointments **or at the Library of Parliament or any other employer on Parliament Hill**
(a) may participate in an advertised appointment process for which the organizational criterion established under section 34 is being an employee, as long as the person meets the other criteria, if any established under that section; and
(b) has the right to make a complaint under section 77.

11. PSEA: Section 77 (1)

77. (1) When the Commission **or a deputy head** has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may – in the manner and within the period provided by the Tribunal's regulations – make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of
(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)
(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process;
(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1) ; or
(d) the failure of the Commission or deputy head to fairly assess qualifications as a result of an error, an omission or improper conduct.

TOC

Endnotes

1. **Hansard**. *House of Commons Debate; the Honourable Lucienne Robillard tabling Bill C-25*. Volume 138, Number 054, 2nd Session, 37th Parliament; Thursday February 6, 2003.

2. **Hansard**. *House of Commons Debate; the Honourable Lucienne Robillard tabling Bill C-25*. Volume 138, Number 054, 2nd Session, 37th Parliament; Thursday February 6, 2003.

3. **Task Force on Modernizing Human Resources Management in the Public Service.** *Public Service Modernization Act; Backgrounder*. February 2003. Page 2.

4. **Government of Canada**. *What You Told Us...; Public Service-Wide Results*. Public Service Employees Survey, 2002. Page 23.