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CONFIDENTIAL

CAB. DOC. 183-75

March 14th, 1975.

MEMORANDUM FOR THE CABINET

Public Service Security Inquiry Regulations
Règlement sur les enquêtes de sécurité dans
la Fonction publique

PROBLEM

Following the establishment in 1966 of the Treasury Board as a separate department, amendments were made to the Financial Administration Act in 1967, to clarify and establish the powers of the Board in relation to personnel management. A sub-section was inserted in the amendments to protect the power of the Governor in Council to suspend or dismiss persons "in the interest of the safety or security of Canada". The formulation of the sub-section was such that, in preserving the power of dismissal, it specified that it was to be pursuant to "an inquiry conducted in accordance with regulations of the Governor in Council by a person appointed by the Governor in Council". In fact, until then, no formal regulations had been required and none existed. The new provision was not discussed with the Security Panel nor was it put before the Cabinet Committee on Security and Intelligence. It appears that the effect of the amendment on existing procedures was not adequately appreciated and no regulations were passed pursuant to the new legislation. The deficiency has only now come to light and it is essential that regulations be passed at an early moment as at least one case may require action that would come under the 1967 provisions.

OBJECTIVE

To make interim regulations pursuant to the Financial Administration Act under which inquiries can be made in cases where dismissal of a person employed in the public service may be necessary on security grounds.

FACTORS

Existing procedures in cases where dismissal of a public servant may become necessary for security reasons are set out in Cabinet Directive No. 35 approved in 1963. Where a security problem cannot be resolved at the departmental level, an employee has the right to a review of his case by a board drawn from the members of the

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(then) Security Panel (now the Interdepartmental Committee on Security and Intelligence) made up of senior public servants at the deputy minister level. Such a board is to provide its views to the department and it is then for the responsible Minister to decide whether to recommend dismissal to the Governor in Council. It is very rare for cases not to be settled at the departmental level through discussion with the individual involved and the procedure established under CD 35 has been used only once since it was announced by Prime Minister Pearson in 1963. (In that case no dismissal resulted.)

The inquiry in the proposed regulations would replace the review by a board of senior officials drawn from the Interdepartmental Committee provided for in CD 35. The other provisions of CD 35, relating to departmental review of security cases involving possible dismissal, would continue to operate. The new regulation would simply provide a new final stage in the review procedure.

A review of the other provisions of CD 35 is being currently undertaken by the Interdepartmental Committee on Security and Intelligence as part of a comprehensive review of security procedures.

Since the amendment to the Financial Administration Act in 1967, the report of the Royal Commission on Security, published in June 1969, recommended that a Security Review Board be established to hear security cases of the kind that come under CD 35. The Review Board would be quite independent, with formal procedures, and would consist of persons not governmental officials as under CD 35. In addition to powers relating to government employees it would have jurisdiction with respect to security cases in immigration and citizenship. The government considered the recommendation of the Royal Commission on a number of occasions but was not satisfied as to the merit of establishing a Security Review Board or, if it were to be done, as to the best means of doing it and of integrating it with existing procedures relating to immigration. No final decision was taken and the matter was left in suspense.

The policy considerations relating to a Security Review Board are difficult. Other countries have found that such formal boards raise questions concerning the right of individuals to be represented by counsel and of access to full information which are very difficult to reconcile with the protection of security investigations and of information sources. Problems also arise as to whether establishment should be by legislation or by Order in Council. Establishment by Order in Council can raise problems with regard to the Bill of Rights and to normal procedures under judicial and quasi-judicial process. It is clear that time will be needed for careful consideration as to whether to establish a Review Board and, if so, by what means.

There is at present a case under review in which dismissal of a public servant on security grounds may become necessary. To meet that possibility, while still leaving time for further consideration of the problem of a Security Review Board, interim regulations under the Financial Administration Act appear to be needed.

FINANCIAL CONSIDERATIONS

Nil.

FEDERAL-PROVINCIAL RELATIONS

Nil.

INTERDEPARTMENTAL CONSULTATION

The regulations proposed in this recommendation have been developed by the Department of Justice in consultation with representatives of the Privy Council Office and the R.C.M. Police Security Service.

PUBLIC RELATIONS CONSIDERATIONS

The regulations must be published under the Statutory Instruments Act. Their publication will immediately raise two questions:

- (a) Why the government has not made regulations at an earlier date and whether any dismissals have been made illegally in the period since 1967? It can be pointed out that action to dismiss for security is very rare. Only one case has come for formal consideration under CD 35 outside of individual departments since 1967 but no dismissal resulted.
- (b) Why the government has done nothing before this about the establishment of a Security Review Board and why such a Board is not now being established? The government will have to deal with this in terms of the problems referred to above. It will presumably be necessary to indicate that further consideration is being given to the question of a Security Review Board in connection particularly with the review of immigration policy and immigration legislation.

Questions can also be expected with regard to the right to counsel, access to full information and security procedures generally. Material will be prepared to deal with questions on these matters.

CAUCUS CONSULTATION

Consultation does not appear to be necessary.

CONCLUSIONS

It is desirable that interim regulations be made pursuant to section 7(7) of the Financial Administration Act under which inquiries can be carried out in cases where dismissal of public servants is being considered on security grounds.

RECOMMENDATION

That the Governor in Council approve the attached Public Service Security Inquiry Regulations as an interim measure until more complete consideration can be given to the desirability of establishing a Security Review Board as recommended by the Royal Commission on Security.

RECOMMANDATION

Que le Gouverneur en conseil approuve le Règlement sur les enquêtes de sécurité dans la Fonction publique, ci-après, en tant que mesure provisoire, en attendant que l'on puisse étudier plus à fond l'opportunité d'établir un Comité de révision des questions relatives à la sécurité, ainsi que l'a recommandé la Commission royale d'enquête sur la sécurité.

R. G. Robertson,
Chairman,
Interdepartmental Committee
on Security & Intelligence.

Privy Council Office,
O t t a w a.