



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MARCELLO IMPERATORE

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs, Excise and Taxation)

Employer

Before: Joseph W. Potter, Board Member

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Robert H. Jaworski, Counsel

Heard at Hamilton, Ontario,
March 30 and 31, 1998.

DECISION

I am being asked to decide on two references to adjudication. The first concerns a request for an extension of time to file the reference to adjudication and the second concerns a one-day suspension.

At the outset of the hearing, Mr. Jaworski, counsel for the employer, indicated he was not opposing the request for an extension of time to file the reference to adjudication. Accordingly, that issue is resolved.

The grievor, Mr. Marcello Imperatore, is a member of the clerical and regulatory group, classified as a CR-02. He is employed by National Revenue, Customs, Excise and Taxation, in Hamilton. He is grieving a one-day suspension imposed for insubordination. The "Disciplinary Action Report", Exhibit E-3, describes the incident as follows:

On August 8th, 1995, you were requested to vacate the DA-CON work area by your immediate supervisor, Joan Tilley. You refused to obey this direct instruction to move. Indeed your refusal to follow orders from Supervisor Tilley occurred not once but three times that morning.

On July 13th you have (sic) a verbal discussion with Supervisor Tilley and Chief Paul Yake over the matter of insubordination. At that time Mr. Yake informed you that you were "clearly insubordinate" and this type of behavior should cease.

His requested corrective action reads:

That the suspension be rescinded without loss of pay or benefits.

During the hearing, Mr. Done also requested that the grievor be reimbursed for the overtime opportunity he lost on August 8, 1995.

Facts

Ms. Joan Tilley testified that she had been acting in the capacity of the grievor's supervisor since May 15, 1995 and supervised 10 to 15 people. In cross-examination, she stated she had acted as supervisor in 1994 for four months less a day, and had an additional 13 days supervisory experience in 1992.

On July 12, 1995, at the end of her work day, Ms. Tilley left a note for the grievor to read upon the commencement of his work the following morning, as his day began before that of Ms. Tilley. The note asked Mr. Imperatore to do a particularly urgent task when he got in. Upon arriving at work, Ms. Tilley observed that Mr. Imperatore, while in, was not doing the task requested and refused to do it when asked by his supervisor. For this refusal, the grievor was spoken to by Mr. Paul Yake, and was told that refusal to follow a direct order was insubordination. Nothing further transpired with respect to those events.

The grievor works what is termed a compressed work week and as such had a compressed day off on August 8, 1995. As overtime was allowed on days off, the grievor decided to work overtime on August 8. Ms. Tilley had previously told the staff that, for those who chose to work overtime on their compressed day off, they could not sit at their regular desk in the core hours and would have to sit elsewhere. The reason for this was Ms. Tilley would have someone else sit at the employee's desk to do more urgent work, while the employee on overtime would perform work of a less urgent nature at another location.

Ms. Tilley's version of the events of August 8 is directly at odds with that of the grievor.

Ms. Tilley testified that, when she arrived at work at 7:30 a.m. on August 8, she saw the grievor sitting at his regular desk, sorting his work and, consequently, she told him he could not sit there. The grievor refused to move, telling Ms. Tilley she could give the replacement worker the other desk. Ms. Tilley said she asked him two or three times to move, then she told him to move. Each time he refused to move. As a result, she went to her supervisor, Mr. Mass, and explained the situation to him. Mr. Mass called the grievor to his office and instructed him to go home. At approximately 8:30 a.m., Mr. Mass informed Ms. Tilley that the grievor had been sent home for the day. Ms. Tilley identified Exhibit E-2 as notes she had made on August 8 shortly after the above events transpired.

Corroborating this version of the events in his testimony was Mr. Brian Randall, who was an acting CR-03 in August 1995. He worked in the same area as the grievor, and Ms. Tilley was his supervisor. He was present for the altercation on August 8 and

was asked to write a report concerning the details. This he did, and it was identified as Exhibit E-4. In it he confirms the grievor was at his own desk when asked to move. He reconfirmed this fact in cross-examination as well. His statement confirming the grievor's refusal to move reads:

Marcello refused this request and continued to pile entries on his own desk.

In cross-examination, Ms. Tilley identified the core hours as 8:00 a.m. to 5:00 p.m. and she had told the staff in a unit meeting in early August they could not sit at their own desk if they were there in the core hours doing overtime work. She agreed that she instructed the grievor to move before 8:00 a.m. She stated she was positive the grievor was at his desk when asked to move and refused, saying "This is my desk." She agreed in cross-examination that the replacement individual could get the regular work done from a location other than the grievor's regular desk. She had not received any formal training as a supervisor.

The grievor's version of the events is very different. Mr. Imperatore said that on August 8, 1995 he arrived at work between 7:00 and 7:30 a.m. and did not sit at his desk. Instead, he went to an area about 20 feet away, where the stacks of files are kept. He began his overtime work in that area. When Ms. Tilley arrived, the grievor testified he was standing in the back of the room and was not at his desk. He testified Ms. Tilley asked him to move his pens, papers, markers and other "stuff" from his desk to another one. The grievor said he agreed, but questioned why he had to move when two other employees on another occasion had not been asked to move. The reply was "Because I told you so." Ms. Tilley asked again if he was going to move and again, he testified, he agreed but at the same time asked for an explanation. Once again she said "Because I want you to move", and at that point Ms. Tilley left.

The grievor said he then went to his desk and moved his "stuff". He returned to his filing area and Ms. Tilley returned and asked him if he was going to move. Again he replied he would but wanted to know why the other employees had not been asked to move when they worked overtime. At that point, the grievor said Ms. Tilley left and he was called to Mr. Mass' office, then told to go home. As a result, he missed his overtime that day and received a one-day suspension which was served on August 31, 1995.

Ms. Tina Muzzin testified she was a student working with the grievor on August 8, 1995. She arrived at work at about 7:00 a.m. and witnessed Ms. Tilley approach the grievor in the filing area and ask him to move to another desk. At that time, she testified she was situated about five feet away from Mr. Randall and about 15 feet away from the grievor. She was adamant the grievor was not at his desk. She heard the grievor reply to the supervisor's request by agreeing to move but wanting to know why other employees did not have to move in similar circumstances. This exchange happened a couple of times, following which Ms. Tilley left, then returned accompanied by Mr. Mass. At that point, the grievor left with Mr. Mass.

Ms. Muzzin testified that the grievor never refused to move, but she did not actually see the grievor move his personal "stuff" to the other desk.

In cross-examination, the grievor admitted he did not move his personal items upon the initial request by his supervisor to do so because he felt they were still talking. He also admitted he did not tell Ms. Tilley he had moved his personal effects because he was still looking for a satisfactory response. He testified his co-workers would not have seen him move his personal effects because they were working.

Argument

Mr. Jaworski stated employees have an obligation to obey their supervisor. The generally accepted practice is to obey a lawful request, then take issue later if the employee so wishes. It is only in exceptional cases that employees could disobey a direct order and this was not such a case.

The evidence suggests that the grievor refused to cooperate with Ms. Tilley's request several times. Following the July 13 warning (Exhibit E-3), the grievor knew he was expected to obey his supervisors. If he, in fact, did obey the order by moving his possessions, why did he not state this to Ms. Tilley? If he had, that may well have ended the matter. However, for whatever reason, he chose not to inform her, if we believe him that he complied with the request.

An independent witness, Mr. Randall, testified the grievor refused to comply with a request to move and continued to pile work on his own desk. The other independent witness, Ms. Muzzin, did not witness the grievor's demeanour, nor did she observe Mr. Imperatore move his personal belongings.

Finally, Mr. Jaworski stated the issue before me was a one-day suspension. I would be exceeding my jurisdiction if I considered the loss of overtime on the day the grievor was sent home as forming part of the penalty.

Mr. Done stated that this supervisor had a very limited amount of supervisory experience, and did little to control the situation. There was no need, he suggested, for the order to be given in the first place. There was no pressing need for the grievor to move to the other desk and, furthermore, the understanding was that the move was only necessary between core hours, which were 8:00 a.m. to 5:00 p.m. The order came at 7:30 a.m., or thereabouts.

In addition, Mr. Done suggested the evidence shows Mr. Imperatore did not refuse the order. He agreed to move, but simply asked why the same direction was not given to other fellow employees.

All that has been shown here, Mr. Done said, was a momentary aberration in the heat of the moment, provoked by the apparent lack of ability of a supervisor to handle a minor incident. As the employer shoulders the burden of proving the grievor disobeyed a direct order, Mr. Done said the grievance should be upheld because this burden has not been met. As such, the one-day loss of pay should be reimbursed and the loss of pay for the overtime day should be paid back as well. The corrective action covers this latter point.

In the alternative, Mr. Done suggested an oral reprimand was all that the events warranted.

Decision

Mr. Imperatore has grieved the one-day suspension he served on August 31, 1995 for failure to follow a direct order from a supervisor. That was the only issue raised in his grievance. It is too late for him to raise new issues at the adjudication stage and to ask me to consider the loss of overtime on the day he was

sent home (see *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109). Therefore, my decision can only relate to the consequences of the grievor's action insofar as the August 31 suspension is concerned.

Mr. Done says there was no pressing need for the order to be given. Furthermore, he said the move did not have to occur until the core hours, which commenced at 8:00 a.m.

Whether there was a pressing need or not, is not at issue. There was a request by the supervisor for the grievor to move his personal effects to another location. It was not in dispute that the grievor understood the order. It was a lawful order that needed to be followed when given. The question is: Was it, in fact, agreed to, as suggested by the grievor, or was it refused, as suggested by the supervisor?

As the discussion took place in the presence of witnesses, one would think their recall of the events would closely match. Such is not the case. Ms. Muzzin says she heard the grievor express a willingness to comply; Mr. Randall says the grievor refused to comply and continued to pile work on his own desk.

To comply with the request called for some specific action on the part of the grievor. He had to physically move his possessions to another desk. The axiom "actions speak louder than words" certainly is appropriate here. The grievor testified he did move his possessions, but no witnesses actually saw this. In fact, Mr. Randall testified he saw the grievor continue to pile work on his own desk. Ms. Muzzin did not see any specific action at all. So, the only action seen by an independent witness supports the proposition the grievor was not complying with the request.

In light of this, I find that the balance of probabilities does not support a finding that Mr. Imperatore was obeying the order. The order was lawful and some disciplinary response from the employer was justified.

A one-day suspension was meted out. This is within the generally accepted range, given the warning issued on July 13 for a similar situation. It would not be appropriate for me to substitute a lesser penalty in this case when the employer did take into account mitigating factors, such as length of service and performance history.

The grievance is therefore denied.

**Joseph W. Potter,
Board Member**

OTTAWA, May 4, 1998.