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Citation: 2002 PSSRB 26



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

ROD J. NOEL

Grievor

and

TREASURY BOARD
(Human Resources Development Canada)

Employer

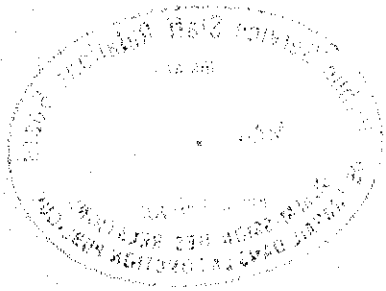


Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Sherrill Robinson-Wilson, Public Service Alliance of Canada

For the Employer: Colleen Edwards, Counsel

Heard at Hamilton, Ontario,
January 28 and 29, 2002.



DECISION

[1] At issue in this case is a three-day suspension issued to Rod Noel, a labour affairs officer with Human Resources Development Canada (HRDC). The letter of suspension (Exhibit E-1) is dated January 13, 2000 and is signed by Mr. Noel's supervisor, Trevor Mills. The letter states, in part:

This refers to our meeting of December 30th, 1999 and our meeting of October 15th 1999. At both of these meetings the issue of your behaviour at the Cogeco Cable Burlington location was discussed.

On October 15th I directed you in writing to refrain from any further action at the Cogeco location until an investigation of your alleged behaviour at this site was completed.

On December 30th I re-confirmed that direction as I had determined that there was a breakdown of relations between you and Cogeco to the point that I felt further contact would not be in HRDC-Labour Program or Cogeco's interest.

Your subsequent action of you telling me that you would issue me with a Direction to over ride my decision, your statement to me, if anyone ever interfered with your investigations you would issue a Direction and your subsequent action of issuing me a Direction to withdraw my instruction to you is viewed to be insubordination and also to be an abuse of your authority as a Safety Officer under the Canada Labour Code and as an employee of HRDC-Labour Program.

...

[2] On consent, the parties tendered 24 exhibits (E-1 to E-24 inclusive), and two witnesses testified, namely, the grievor and his supervisor.

[3] There was no real dispute concerning the background leading up to the events which caused the suspension, and they can be summarized fairly succinctly.

Background

[4] Mr. Noel has been with HRDC since October 1988 as a labour affairs officer. He enforces the health and safety provisions of Part II of the *Canada Labour Code* (the "Code"), as well as investigating issues such as overtime complaints, wrongful dismissals and fatalities at the worksite, to name a few.

[5] In December 1998, the grievor was assigned the task of investigating a complaint which had been filed by an employee of a company called "COGECO". The normal practice in situations such as this is for the labour affairs officer to conduct an on-site inspection, which Mr. Noel did on January 8, 1999. He arrived at the worksite, unannounced, just prior to 10:00 a.m. and inspected the worksite throughout the day.

[6] During the inspection, a senior company official telephoned Mr. Noel's supervisor, Trevor Mills, and complained about Mr. Noel's conduct. Mr. Mills then spoke to Mr. Noel about the situation and determined that Mr. Noel was conducting the inspection properly and should be allowed to continue, and he stated as much to the company official. Later that day, the company official contacted Mr. Mills again and said they wanted Mr. Noel removed or they would call the police and have him removed. Mr. Mills did not remove Mr. Noel from his inspection.

[7] At the end of the workday, Mr. Noel had not completed his inspection; therefore, he returned to the COGECO worksite on January 12 accompanied by a fire safety expert in order to address some issues outside Mr. Noel's expertise. This time, the inspection was completed and Mr. Noel had written some notes on areas where he believed COGECO had not complied with provisions of the *Code*.

[8] Mr. Noel issued COGECO with two directions pursuant to section 145 of the *Code*: one dated January 12 and the second dated January 19, 1999 (Exhibit E-2). The former referred to the use of what Mr. Noel felt was an unsafe piece of equipment and the direction was "...not to use or operate the machine or thing (the ladder)..." The latter direction referred to some 17 contraventions of Part II of the *Code*, with a direction that the contraventions be terminated no later than February 12, 1999.

[9] The above is consistent with how a labour affairs officer operates. He/she visits a worksite and if the officer observes health and safety violations, he/she issues what is called a directive to the company to remedy the situation by a certain date. Companies may appeal this decision to an independent adjudicator who is called a Regional Safety Officer.

[10] The company filed an appeal of Mr. Noel's directions on January 21, 1999 (Exhibit E-4). The letter stated that the company was not going to comply with Mr. Noel's written requirement that the directions be posted in the worksite (notwithstanding that subsection 143(3) of the *Code* specifically required them to do

so.) The letter also requested that Mr. Noel be removed from the COGECO file "...as the relationship with Mr. Noel lacks mutual trust and respect."

[11] Due to the filing of the appeal, the grievor had to write a report on the events that took place during his inspection. He completed his report on March 25, 1999 (see Exhibit E-10, first attachment).

[12] Shortly after completing his report in March, the grievor called the company to inquire as to whether or not they were going to comply with his directions, which they were required to do in spite of a pending appeal. Receiving no reply to his inquiry, the grievor wrote a further direction (Exhibit E-6).

[13] This direction is dated May 12, 1999 and stated that the company had until May 26, 1999 to provide details of compliance. The company replied on June 18, 1999, indicating either full compliance or, in some instances, that they were working towards compliance.

[14] In order to ascertain whether or not the directions were, in fact, being complied with, Mr. Noel and a colleague, Paul Danton, visited the company on August 5, 1999. Mr. Noel observed that his directions were not posted, as he had required, although he was informed that they had been posted for a period of time, then removed.

[15] Shortly after the August visit, Mr. Noel learned that the hearing on the appeal was scheduled for September 22, 1999. On September 17, COGECO withdrew its appeal (see Exhibit E-24).

[16] On September 23, COGECO wrote to the Minister of Labour complaining about Mr. Noel's actions during the inspection and requesting that Mr. Noel have no further dealings with their company (Exhibit E-10).

[17] Mr. Noel was made aware of the complaint by Mr. Mills shortly after Mr. Mills received a copy of it. They met to discuss the allegations on October 15.

[18] Mr. Mills testified, and confirmed under cross-examination, that he told Mr. Noel that Mr. Noel's involvement in the COGECO file would be suspended while the complaint was being investigated. Mr. Mills stated, in cross-examination, that Mr. Noel co-operated with that request.

[19] Mr. Noel testified that he was continuing to receive telephone calls from employees of COGECO informing him that nothing was happening to change their health and safety concerns. Mr. Noel sent an e-mail to Mr. Mills outlining his concerns about non-compliance, and also asking that the order suspending his investigation be issued in writing. Finally, he asked that the COGECO file be transferred to a fellow employee for continuance.

[20] Mr. Mills issued the written direction suspending Mr. Noel from any further action at the COGECO site until the allegations were reviewed (Exhibit E-23). In addition, the parties met on November 24 to discuss the issues raised in Mr. Noel's e-mail.

[21] At the November 24 meeting, Mr. Noel expressed his concerns with respect to the health and safety issues he felt were still outstanding in the COGECO file. The two most serious issues related to fire safety, he said.

[22] Mr. Mills stated he would assign Paul Danton to the file and Mr. Noel agreed with that. Mr. Danton then came to the meeting and Mr. Noel briefed him on the file, giving him a copy of the original directions issued, and he explained that two issues were related to fire safety.

[23] It was agreed that Mr. Danton would make a site visit to COGECO to follow-up on the directions issued.

[24] While all of this was taking place, Mr. Mills was also investigating the ministerial complaint. He wrote a report on November 15, 1999 (Exhibit E-13). His conclusion stated, in part: "...this is a difficult situation to attach blame, not losing sight of the fact that it is not whether the officer was right or wrong, but what was the perception of the employer and how do we address that...."

[25] As a follow-up to the November 24 meeting, Mr. Danton visited the COGECO worksite and issued his report on December 17, 1999 (Exhibit E-15).

[26] Mr. Danton's report addressed the two fire safety issues and he concluded COGECO was in compliance. He ended his report by stating: "As a result of the above information this assignment is now considered closed."

[27] Mr. Danton gave a copy of his report to Mr. Noel shortly after issuing it. Mr. Noel read it and noted its brevity; he still had some concerns with respect to COGECO's fire safety plan.

[28] On or about December 22, Mr. Mills called Mr. Noel and asked that they meet on December 30 to review some outstanding issues. Mr. Mills said he told Mr. Noel that he thought he would be happy with the results of the meeting.

[29] Upon hearing this, Mr. Noel thought the remaining outstanding issues with COGECO would get back on track, and either he or another officer would continue to monitor the file.

[30] In attendance at the December 30 meeting were the grievor, his colleague Peggy Wright, and Mr. Mills.

[31] Mr. Mills' notes as to what took place are contained in Exhibit E-16 and Mr. Noel's notes are contained in Exhibit G-1.

[32] While a number of non-related items were discussed, the COGECO file was also discussed. Mr. Noel said there were still some outstanding issues remaining, and Mr. Mills replied the file was closed, and the investigation was over. Mr. Noel told Mr. Mills he was not comfortable with that decision, and could not understand why a file would be closed when safety issues remained outstanding. He said he thought this was interference with his work.

[33] Mr. Noel then testified he told Mr. Mills: "I have no option other than I may have to direct you." Mr. Mills recalls Mr. Noel saying if anyone ever interferes with his investigations again, he would issue them with a direction.

[34] The meeting ended and Mr. Noel said he was very upset. He stayed up all night thinking about what course of action he could take. He was aware of a previous situation where another labour officer had issued a direction to a manager ordering the manager to terminate his interference in an investigation (Exhibit G-2).

[35] Mr. Noel concluded he had to take the same action and consequently he issued Mr. Mills with a direction which states, in part (Exhibit E-18):

...

Therefore, you are **HEREBY DIRECTED**, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to take measures immediately to ensure compliance with section 143 of the Canada Labour Code, Part II, by permitting the undersigned safety officer to carry out his duties as designated by the Minister of Labour.

...

[36] A covering letter together with the direction was sent to Mr. Mills' supervisor, Robert Howsam, Regional Director. The letter states, in part (Exhibit E-18):

...

Please be advised that, pursuant to subsection 145(5) of the Canada Labour Code, Part II, the employer shall cause a copy of this direction to be posted in all Ontario Region HRDC-Labour Program District Offices and give a copy of it to all safety and health representatives.

...

[37] Mr. Noel testified his intent in issuing this direction was to ensure the COGECO file would not be closed and that he, or some other officer, would follow-up and ensure compliance.

[38] As with all directions issued by a labour affairs officer, appeal rights existed and the direction issued by Mr. Noel as contained in Exhibit E-18 was appealed by Mr. Howsam (see Exhibit E-20).

[39] The appeal was heard on April 11, 2000, and the Regional Safety Officer hearing the matter concluded that Mr. Mills had not contravened the *Code*, and rescinded the direction Mr. Noel had issued (see Exhibit E-23).

[40] In the meantime, Mr. Mills issued Mr. Noel with the three-day suspension by way of the January 13, 2000 letter. The suspension was necessary, according to Mr. Mills, because Mr. Mills felt Mr. Noel was challenging his authority as a manager. Mr. Mills felt it was within his rights to reassign the file and Mr. Noel was contradicting his managerial role. This, Mr. Mills felt, went beyond the bounds of reasonable behaviour.

[41] In addition, the requirement to post the notice in the Ontario Region was excessive because Mr. Mills was responsible for the Southwest portion of the Ontario Region only.

[42] Mr. Noel explained that he felt the direction should be posted in the Ontario Region because the covering letter was sent to Mr. Howsam, the Ontario Regional Director. This was the normal course of action and, he stated, it was not meant to be anything personal against Mr. Mills.

Arguments

For the Employer

[43] Managers have to be able to manage as they see fit and it is not up to employees to determine what is best. The manager bears responsibility for his decisions and that authority is vested in the manager.

[44] Employees must comply with the directions issued by their managers, even if they think the directions to be wrong. The axiom "obey now, grieve later" is applicable here.

[45] This is a case of insubordination. The grievor had been temporarily removed from the file in October 1999 and the manager had the right to do that. Later, the manager assigned another officer to review the outstanding issues.

[46] The grievor accepted the fact that another officer, Mr. Danton, took over the file and everyone waited for Mr. Danton's report. This was issued in December 1999, and it closed the file.

[47] The grievor's reaction was one of insubordination. Firstly, he threatened the manager with the possibility of issuing a direction; then he did so. This equated to the grievor saying: "I'm running this operation and I'll tell you how to do it." Also, this equated to saying it in front of all employees of the Ontario Region.

[48] All of these actions attempted to reduce the authority of the manager.

[49] There are exceptions to the insubordination principle, namely if the instructions put the employee in danger or if the instructions are illegal. Neither applies here; therefore, there was no reason for the grievor not to comply.

[50] If employees were allowed to do this, there would be anarchy in the workplace.

[51] The grievor was angry at the manager's decision, as stated in the December meeting, to close the file. The direction issued to the manager was done to override this decision. If the grievor did not agree with it, he could have written a letter to the Regional Director, Mr. Howsam, and stated his concern.

[52] Counsel for the employer submitted the following cases: *Hogarth* (Board file 166-2-15583); *MacLean* (Board file 166-2-27968); *Nowoselsky* (Board file 166-2-14229) and *Imperatore* (Board files 149-2-169 and 166-2-27963).

For the Grievor

[53] The issue here is whether the direction issued by the grievor warranted a three-day suspension. The grievor's position is that it did not.

[54] The evidence clearly showed the grievor was concerned about issues of non-compliance with respect to directions he had initiated. Originally, the grievor thought those areas would be dealt with via the appeal lodged by the company. Ultimately, the appeal was withdrawn; therefore, non-compliance was more important at that juncture to the grievor.

[55] When Mr. Danton was placed on the file, the grievor co-operated with him. However, when Mr. Noel read Mr. Danton's report, he was puzzled by it. It was very brief. Also, the file was recommended to be closed, but there was nothing to show compliance had been done.

[56] The grievor was frustrated and felt his only course of action was to issue a direction. The intent of doing so was to have either himself or another officer take over the file and address the outstanding issues.

[57] This is not insubordination because Mr. Noel took an action which he understood was within his authority to take.

[58] If there is a finding of insubordination, then a mitigating factor should be the grievor's overriding concern for the safety of the COGECO employees. His entire actions were predicated on that concern.

Reasons for Decision

[59] The grievor received a three-day suspension for what was termed insubordination, as detailed in the disciplinary letter of January 13, 2000 (Exhibit E-1). What did the grievor do, and was it, in fact, insubordination?

[60] The grievor was a labour affairs officer (referred to as a safety officer under the *Code*) and had carriage of a file related to a company called COGECO. Following a site visit, the grievor issued two directions to the company to address certain areas he felt contravened Part II of the *Canada Labour Code*.

[61] The company filed an appeal with respect to those directions, and also complained about the grievor's behaviour while he was on the worksite.

[62] Ultimately, the appeal was withdrawn, but the company lodged a complaint about the grievor's behaviour with the Minister of Labour who has political responsibility for this aspect of the HRDC program.

[63] The grievor's supervisor, Mr. Mills, then decided that the most appropriate course of action was to remove the grievor from the file while the investigation was being conducted.

[64] However, the grievor remained concerned about issues of purported non-compliance and sent an e-mail to Mr. Mills asking that either he, or another officer, resume the investigation into the health and safety matters.

[65] Mr. Mills then assigned another officer, Paul Danton, to look into the issues and the grievor briefed Mr. Danton on two important issues, both related to fire safety.

[66] Mr. Danton conducted an investigation, determined that the company complied with the direction in each of these two areas, and stated that the file could now be considered closed.

[67] Mr. Mills met with the grievor to review a number of work-related issues and stated that the COGECO file was now closed. The grievor was not happy with this decision, as he felt a number of health and safety issues were left unresolved. The grievor felt Mr. Mills was interfering in his job as a labour affairs officer and at a

meeting held on December 30, he told Mr. Mills that he might have to issue him with a direction.

[68] A few days later, Mr. Noel issued the written direction, which directed Mr. Mills to permit Mr. Noel to carry out his duties as designated by the Minister of Labour.

[69] Mr. Noel testified his intent in doing this was to have either himself, or another officer, resume carriage of the COGECO file and address non-compliance issues.

[70] The direction makes no mention of having the file assigned to anyone except the grievor. This direction is, in my view, quite clear in stating: "...you are **HEREBY DIRECTED...**to take measures immediately to ensure compliance...by permitting the undersigned safety officer to carry out his duties...." The grievor signed the direction.

[71] In reading the document in its totality, I conclude that the grievor's intention was to, in effect, order Mr. Mills to assign the COGECO file to the grievor with the intent being, as testified to by the grievor, to ensure the file would not be closed.

[72] This directly contravened Mr. Mills' decision to have the file assigned to another officer (Mr. Danton) and ultimately to decide to close the file following a recommendation to that effect from Mr. Danton.

[73] At page 7-176.1 of *Canadian Labour Arbitration*, Third Edition, Brown and Beatty, it states:

7:3600 Insubordination

7:3610 Refusal to follow instructions

One of the most basic and widely accepted rules of arbitral jurisprudence holds that employees who dispute the propriety of their employer's orders must, subject to the considerations which follow, comply with those orders and only subsequently, through the grievance procedure, challenge their validity....

...

[74] Further, at page 7-183 it states:

7:3620 Exceptions

...

Many arbitrators have said that these specific exceptions are not to be unduly extended so as to permit them, for example, to enable employees to challenge indirectly the propriety of a particular work assignment and more generally the employer's right to manage its business....

...

[75] In this case, Mr. Mills is the manager. As the name implies, he manages. His duties include managing the workforce and the workload. That is what he is paid to do. The effect of the direction issued to Mr. Mills would be to have the grievor decide firstly to have the file re-activated and secondly to have the file assigned to him.

[76] I can draw no conclusion other than the above, as I find the direction is worded very clearly. If the grievor had intended the file to be assigned to either himself, or someone else, as he testified, surely he could have worded the direction as such. He did not. He specified that he be allowed to carry out his duties. The totality of the document leads me to believe, quite clearly, that he wanted carriage of the COGECO file.

[77] The decision of the Regional Safety Officer with respect to the appeal of Mr. Noel's direction found, at page 7, that Mr. Noel had the authority pursuant to section 145 of the *Canada Labour Code*, Part II, to issue directions (see Exhibit E-23). Furthermore, the decision states, at page 7:

...

...Therefore, section 143 could apply to the manager of a safety officer when the safety officer is engaged in carrying out his duties under the Code....

...

[78] Having determined that it was within Mr. Noel's authority to issue the direction, the Regional Safety Officer then looked at whether or not Mr. Mills was contravening section 143 of the *Code*. In other words, was there a need to issue the directive?

[79] At page 9 of the decision, the Regional Safety Officer wrote:

...

In my opinion, Mr. Mills was only assuming his responsibilities as a manager when he gave an assignment to safety officer Noel, when he supervised the assignment in progress subsequent to the complaints, when he discussed with the safety officer the compliance efforts of Cogeco, and, most importantly, when he took control over the assignment because, in his opinion, the safety officer had lost his objectivity in this case. Mr. Mills was not related to Cogeco's work place nor involved in any way with the safety issues at Cogeco. He stood to gain no personal benefit from the outcome of Mr. Noel's investigation. He simply decided that it was time to bring closure to an investigation which had taken place and which, in his opinion, did not warrant further involvement. He believed that the safety officer had lost his objectivity when he realised that the situation between the safety officer and Cogeco was turning into a relationship issue. In my opinion, Mr. Mills reasonably satisfied himself that Cogeco was working towards compliance and legitimately closed the file.

...

[80] Based upon the evidence presented to me, I concur with that finding. There was nothing I was made aware of that indicated Mr. Mills was acting inappropriately when he ultimately decided to close the file. Mr. Noel did not agree with this decision, but it is not up to Mr. Noel to issue a direction, the effect of which would be to re-open the file.

[81] Given the above, I find that an act of insubordination did occur. The grievor clearly attempted to contravene the manager's decision to close the file by issuing the direction to his supervisor. Furthermore, the grievor attempted to have the file assigned to himself.

[82] Accepting such action as proper would amount, in my view, to allowing employees to determine their workload and which files they would pursue. This would, again in my view, obviate the need to have a manager and may well destroy the impartiality a labour affairs officer would obviously need to conduct his or her work properly in that the labour affairs officer would determine the allocation of work.

[83] Having found the actions of Mr. Noel constituted insubordination, I must address the issue of quantum. Was three days appropriate?

[84] In *Hogarth (supra)*, at page 5, the adjudicator writes:

...

I agree with the thrust of Ms. Bouzigon's argument that an adjudicator should only reduce a disciplinary penalty imposed by management if it is clearly unreasonable or wrong. In my view, an adjudicator should not intervene in this way just because he feels that a slightly less severe penalty might have been sufficient. It is obvious that the determination of an appropriate disciplinary measure is an art, not a science....

[85] A three-day suspension is, given all of the facts of this particular case, not excessive and therefore I can find no basis on which I could, or indeed should, alter the penalty.

[86] In light of all of the above, the grievance is dismissed.

**Joseph W. Potter,
Vice-Chairperson**

OTTAWA, March 5, 2002.

