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File: 166-2-35747

Citation: 2005 PSLRB 175



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

LYNNE MONTGOMERY

Grievor

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as
Montgomery v. Treasury Board (Correctional Service of Canada)

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Grievor: Doug Hill, Public Service Alliance of Canada

For the Employer: Renée Roy, counsel

Heard at Fredericton, New Brunswick,
October 6, 2005.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Lynne Montgomery is employed by the Correctional Service of Canada (CSC), Fredericton, New Brunswick. She is a Senior Parole Officer, classified WP-05, and is a member of the Program and Administrative Services bargaining unit.

[2] The provisions of the collective agreement between the Treasury Board and the Public Service Alliance of Canada applicable to the bargaining unit, with an expiry date of June 20, 2003, are applicable to the present case.

[3] On March 3, 2004, she filed a grievance against the employer's decision to cease payment of the Offender Supervision Allowance (OSA), as of March 1, 2004, alleging that this was in contravention of article 60 of her collective agreement and requesting full reinstatement of the OSA.

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

[5] Although it is the employer's obligation, in accordance with the Board's *Regulations*, to provide copies of replies to the grievance, these documents had not been forwarded to the Board. At my request, at the beginning of the hearing, the employer provided copies of the final-level response to me and to the grievor.

Summary of the evidence

[6] The grievor testified on her own behalf. She has been employed by the CSC in Fredericton since 1977. She was hired as a Parole Officer, and was promoted as Senior Parole Officer in March 2003.

[7] The Fredericton office looks after the York Sunbury District. It works with offenders who are placed in the community on one form or another of conditional release. The office currently has two Parole Officers and one Senior Parole Officer.

[8] As the Senior Parole Officer, the grievor supervises the work of the two Parole Officers, along with handling her own caseload of offenders. The case load listing provided in evidence (g-5) showed the grievor with 12 cases while her staff carried

respectively 15 and 20 cases. While her caseload is somewhat smaller than those of the Parole Officers, the grievor testified that she supervises and performs all the duties expected of a Parole Officer in relation to the conditional release of offenders, in accordance with the *Corrections and Conditional Release Act*. She may also intervene directly with offenders who are under the responsibility of one of her subordinates.

[9] In performing the duties of a Parole Officer, she assumes responsibility for the regular supervision of offenders. The grievor monitors the behaviour of offenders with regard to the conditions of release, such as abstention from drug use. She has a role to play in the risk assessment for the Parole Board. The grievor conducts disciplinary interviews with offenders that may result in warrants being issued and offenders being sent back to prison.

[10] The work environment, as described in the work description, is one where the Senior Parole Officer is subject to stress, physical danger and verbal abuse, and where multiple demands result from dealing with parolees with a wide variety of problems and needs. The grievor counsels both parolees and victims, and can be exposed to communicable diseases. The grievor is tested for tuberculosis every two years.

[11] The grievor's Performance Evaluation Report was entered in evidence, along with a caseload listing and the grievor's work description (Exhibits G-4, G-5 and G-6).

[12] The employer called on Ron Lawlor, District Director, Nova Scotia, to testify.

[13] Mr. Lawlor has been employed as a District Director for more than 20 years and is responsible for the supervisory program offered to the offenders and the community and for the activities provided by the CSC through parole offices and halfway houses. He is the direct supervisor for the Senior Parole Officers in his region. In relation to his interaction with Senior Parole Officers, he described his work as interpreting policies, dealing with issues of resources and providing advice in difficult cases.

[14] Mr. Lawlor described the Senior Parole Officer as the person responsible for services to offenders within a geographical area. The numbers of offenders may vary from 30 to 200.

[15] The witnesses reviewed the key activities set out in the Senior Parole Officer work description.

[16] The Senior Parole Officer is primarily responsible for case assignment, quality control of case management, and overseeing program functions within the unit. He or she has responsibility for specialized programs and for communications with community services and organizations. The Senior Parole Officer also manages the work of Community Assessment Parole Supervision (CAPS) contracts and Community Based Rehabilitation Facilities (CBRF).

[17] The work also entails determining if there are victim-notification requirements and ensuring that correctional services are provided to victims.

[18] The Senior Parole Officer has a small case management load and may take cases from a Parole Officer in different situations, such as when an officer is on vacation leave. The Senior Parole Officer is also part of the district management team.

[19] Mr. Lawlor testified on the key activities found in the work description of a Parole Officer that was tendered in evidence. These activities included managing the reintegration of offenders, assessing, analysing and recommending release suitability, ensuring that legal and policy requirements are met, and evaluating the impact of programs on offender reintegration.

[20] Under cross-examination, Mr. Lawlor acknowledged that the situation in Nova Scotia was similar to the one in New Brunswick and that Senior Parole Officers carried a caseload of offenders and were considered Parole Officers.

[21] Mr. Lawlor confirmed that a Senior Parole Officer who assumed a caseload, performed the duties of a Parole Officer as set out in the Parole Officer's job description (Exhibit E-1) and confirmed that the grievor had managed a caseload of offenders.

[22] Mr. Lawlor confirmed that prior to March 2004, all Senior Parole Officers in the Atlantic region received the OSA, although this was not necessarily the case across Canada.

Summary of the arguments

For the grievor

[23] The grievor's representative argued that the issue was one of interpretation of the collective agreement and whether or not the grievor, as a Senior Parole Officer,

meets the criteria set out in clause 60.01 of the collective agreement. Is the grievor a Parole Officer, does she work in the community and does she assume responsibility for the regular supervision of offenders? To all these questions, the representative argued that the evidence clearly demonstrated that she was a Parole Officer working in the community and assuming a caseload of offenders.

[24] The grievor's representative argued that the OSA had to do with the hazards and the risks of the job, and that the grievor had established that she carried on a continuous basis a caseload of 12 to 15 offenders. Her work in case management is recognized in the Performance Evaluation Report (Exhibit G-6). The caseload listing (Exhibit G-5), also indicated that she supervised offenders that had a low to high risk and needed assessment.

[25] In cross-examination, the District Director indicated that he was aware of the fact that the grievor carried a caseload of offenders and assumed the responsibilities of a Parole Officer.

[26] The grievor's representative further argued that the grievor had continued to receive the OSA after her appointment in March 2003, until the time it was disallowed. He indicated that under clause 60.03 of the collective agreement, the OSA is salary for the purposes of superannuation, Canada Pension Plan and Employment Insurance (EI) and argued that the grievor relied on this benefit. The employer should be estopped from ceasing to pay it.

[27] The grievor's representative quoted extensively from *Brown and Beatty* with regard to the doctrine of estoppel and argued that it had been the practice of the employer to allow the OSA to be paid to Senior Parole Officers. He quoted from *Molbak v. Treasury Board (Revenue Canada Taxation)*, Board File No. 166-2-26472 (1995) (QL): "When the parties...proceed on the basis of an underlying assumption..., on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so."

[28] The grievor's representative contrasted the situation of the grievor to that of employees working in a penitentiary, as outlined in *Mailloux v. Treasury Board (Solicitor General of Canada - Correctional Service Canada)*, Board File No. 166-2-28560

(1999) (QL). In that decision, it is apparent that the allowance paid was influenced by both the frequency and degree of supervision, which is not the case for the OSA.

[29] Finally, the grievor's representative, relying on *Osmack v. Treasury Board (Solicitor General Canada)*, Board File No. 166-2-17218 (1990) (QL), urged me to examine the unique situation of the grievor and determine if the grievor meets the criteria set out in clause 60.01 of the collective agreement. The purpose of the OSA is to compensate for the additional risks Parole Officers face in the performance of their duties. He asked me to rule in favour of the grievor and to grant the corrective action requested.

For the employer

[30] Counsel for the employer argued the grievance had no merit and the grievor had failed to establish a breach of the collective agreement.

[31] Reviewing the criteria set out in clause 60.01 of the collective agreement and relying on the *Canadian Labour Arbitration*, Third Edition, by Messrs. Brown and Beatty, paragraph 4:2120, and the rules of interpretation found in *Collective Agreement Arbitration in Canada*, Third Edition, by Messrs. Palmer and Palmer, counsel argued that the words "incumbent of a Parole Officer position" must have some meaning. Although the grievor, as a Senior Parole Officer, is responsible for the supervision of offenders in the community, she is not the incumbent of a Parole Officer position.

[32] Counsel pointed out that when the grievor was asked if she was a Parole Officer, she replied she was a Senior Parole Officer. She argued that both witnesses made a distinction between one who holds the title of Senior Parole Officer and one who holds the title of Parole Officer.

[33] The employer's counsel relied on *Gunn v. Treasury Board (Revenue Canada - Customs, Excise and Taxation)*, Board File No. 166-2-28657 (1999) (QL), which dealt with a decision to refuse to pay an allowance based on the fact that the grievor was on leave without pay. In that case, the bargaining agent successfully argued that the grievor remained the incumbent of a CS group position, although he may have been performing other duties. In the present case, the fact that the grievor was performing Parole Officer duties did not make her the incumbent of a Parole Officer position. She believed the issue was one which ought to be brought to the bargaining table.

[34] As to the issue of promissory estoppel, counsel argued that there was no evidence of detrimental reliance. At no point in the evidence did the grievor show that she had changed her own financial situation on the belief that she would be receiving the OSA. The application of clause 60.03 of the collective agreement, with regard to when the OSA is considered income for the purpose of superannuation or other benefits, does not require any action or inaction in the part of the grievor.

[35] The employer's counsel distinguished the decisions submitted by the grievor's representative on the basis that they dealt with different facts and issues. She indicated it was the employer's position that no breach of the collective agreement had occurred and she requested that the grievance be dismissed.

Reply

[36] In reply, the grievor's representative indicated that when a police officer is promoted to the level of sergeant, that person remains a police officer. A captain firefighter remains a firefighter. As a Senior Parole Officer, the grievor remains a Parole Officer performing Parole Officer duties.

[37] With regard to the detrimental reliance, he argued that the grievor's pension would be affected by the discontinuation of the OSA.

Decision

[38] Article 60 of the collective agreement reads as follows:

ARTICLE 60

OFFENDER SUPERVISION ALLOWANCE

Excluded provisions

Employees who are eligible for the Penological Allowance are not covered by this Article.

60.01 *The Offender Supervision is used to provide additional compensation to an incumbent of a Parole Officer position who is employed in the community and who, by reason of duties being performed in relation to the conditional release of offenders, as defined in the Corrections and Conditional Release Act, assumes responsibilities for the regular supervision of offenders.*

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60.02 *The value of the Offender Supervision Allowance is one thousand six hundred dollars (\$1600) per annum. As of 21 June 2002 the allowance will be increased to one thousand seven hundred and fifty dollars (\$1750) per annum. This allowance shall be paid on the same basis as the employee's regular pay. An employee shall be entitled to receive the allowance for any month in which he or she receives a minimum of ten (10) days' pay in a position to which the allowance applies.*

60.03 *The Offender Supervision Allowance shall not form part of an employee's salary except for the purpose of the following benefit plans:*

Public Service Superannuation Act
Public Service Disability Insurance Plan
Canada Pension Plan
Quebec Pension Plan
Employment Insurance
Government Employees Compensation Act
Flying Accident Compensation Regulations

[39] The evidence left no doubt as to the fact that the grievor, employed in the community by reason of the duties being performed, assumed responsibilities for the regular supervision of offenders. While the grievor may have had between half and two-thirds of a caseload compared to other Parole Officers, this is not an issue as the collective agreement does not distinguish between a full caseload and a partial caseload. Suffice to say that the supervision of offenders is a considerable part of the duties of the grievor.

[40] The issue raised by the grievance is whether the grievor is the incumbent of a Parole Officer position. In other words, should the collective agreement be interpreted to limit the application of the OSA to Parole Officer positions or is the OSA payable to incumbents of position titled Senior Parole Officer, along with those titled Parole Officer, as they are both incumbents of Parole Officer positions?

[41] In reviewing the situation, it is clear, both in the final-level reply from the employer and through the evidence given by Mr. Lawlor, that prior to March 2004, the employer paid the OSA to Senior Parole Officers. I have also noted, in the collective agreement itself, that clause 60.01 has not been changed from the previous agreement, as indicated by the absence of a double asterisk beside this clause. This is a clear indication that the collective agreement can reasonably be interpreted to allow

payment of the OSA to Senior Parole Officers and indeed had been so interpreted by the employer prior to March 2004.

[42] It is interesting to note that clause 60.01 of the collective agreement uses the phrase "...to an incumbent of a Parole Officer position..." Had the collective agreement read: "incumbent of the Parole Officer position", it would have been clearer that the term referred to a particular position rather than to a class of positions.

[43] The addition of the word "Senior" to the title of the position of employees that have supervisory functions, in addition to the regular duties of a Parole Officer, does not, to my mind, change the fundamental nature of the position. The grievor is an incumbent of a Parole Officer position in the generic sense. In accordance with the *Corrections and Conditional Release Act*, she assumes the regular supervision of offenders. She is subject to essentially the same risks and stresses, as found in described in both job description under working conditions submitted in evidence (E-1, G-4). These are precisely the problems meant to be addressed by the OSA. Although the OSA does not explicitly state that this is its purpose, it is clear from reading the article that this is the case and the fact that those who receive the PFA are excluded from receiving the OSA further confirms this.

[44] I am comforted in my view that the words "incumbent of a Parole Officer position" should be interpreted in the generic sense by the fact that the employer had been doing so for some time by agreeing to pay the OSA a large number of Senior Parole Officers.

[45] Furthermore, the employer has provided for the explicit exclusion from the OSA for employees who are in receipt of the Penological Allowance. Had the employer wished to exclude Senior Parole Officers, it could have done so as well.

[46] Having decided that the employee is entitled to the OSA, I see no need to deal with the issue of estoppel raised by the grievor.

[47] Consequently, the grievance is allowed.

[48] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[49] I order that the employer pay to the grievor the Offender Supervision Allowance, retroactively from March 1, 2004, including any adjustment to benefits that flow therefrom.

December 14, 2005.

**Georges Nadeau,
adjudicator**