Date: 20050630

File: 166-2-32749

Citation: 2005 PSLRB 67

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

CRAIG PURCHASE

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Purchase 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: Léo-Paul Guindon, adjudicator

For the Grievor: John Mancini, UNION OF CANADIAN CORRECTIONAL OFFICERS-SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA-CSN

For the Employer: Anne-Marie Lebel, Articling Student

Heard at Moncton, N.B.,
October 20 and 21, 2004.

Grievance referred to adjudication

[1] Craig Purchase, a correctional officer at the CX-02 classification and level, has worked at Dorchester Penitentiary for the Correctional Service of Canada (CSC) since January 1998. On September 9, 2002, he grieved that he was not given an overtime shift for September 3, 2002.

[2] 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*, I continue to be seized with this reference to adjudication, which 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*").

Summary of the evidence

[3] The grievance is based on the following clauses of the collective agreement between the Treasury Board and the UNION OF CANADIAN CORRECTIONAL OFFICERS–SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA–CSN (Codes 601 and 651; expiry date May 31, 2002) (Exhibit G-1):

. . .

> ***21.10 Assignment of Overtime Work***
>
> *Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: CX-1 to CX-1, CX-2 to CX-2, etc.;*
>
> *and*
>
> *(c) to give employees who are required to work overtime adequate advance notice of this requirement.*

. . .

> ***26.10*** *Subject to the operational requirements of the service the Employer shall make every reasonable effort to allocate, on an equitable basis, work in vacant posts on designated paid holidays to those employees on leave with pay who are readily available and qualified.*

[4] A copy of the "Day Shift Roll Call" is posted on the wall 14 days in advance of the starting date of the new schedule to inform the employees of their working schedule. The grievor stated in his testimony that he is required to advise the supervisor in charge if he wants to be called back in to work overtime for a specific shift. The "Day Shift Roll Call" is managed by the supervisor, who puts a star next to the name of the correctional officer who has advised him of his or her availability. The grievor stated during his testimony that he was ready to work overtime and that he had advised his supervisor of his availability.

[5] Larry Hicks, who testified for the employer, stated that a correctional officer who wants to be called in for overtime has to advise the supervisor in charge of his availability. The supervisor will indicate on the working copy of the "Day Shift Roll Call" in his possession that the correctional officer is available to work overtime by putting a star next to his name. For example, a star was placed before Mr. Léger's name (Exhibit E-1, post 3D in Unit #3) showing that he was willing to work overtime. No such star was put before the grievor's name (Exhibit E-1, post 4E in Unit #4).

[6] On September 3, 2002, the grievor was scheduled to work the evening shift from 19:00 to 23:00 and the morning shift from 23:00 to 07:00 in Unit #4 (Exhibit E-2). For the morning shift, two employees were called in for overtime:

- D. Savoie, who was scheduled in RTC on the day shift (Exhibit E-1), was called in for overtime in RTC for the morning shift (Exhibit E-2);

- M. Conway worked as a substitute in Unit #3 on the day shift (Exhibit E-1) and was called in for overtime in Unit #4 for the morning shift (Exhibit E-2).

[7] The "Day Shift Roll Call" for September 3, 2002, shows that redeployments took place and that no one was called in to work overtime on the day shift (Exhibit E-1):

- Unit #2: R.N. Austin (CX-2) was redeployed from 250 Day Posts (analysis) to Unit #1 to replace J. Burns (2D position);

- Unit #3: C. Williams was redeployed from the 3A position to hospital and was not replaced;

- Unit #3: K.A. Willman (CX-3) replaced A.A. Amos (CX-3) who was on annual leave in 250 Day Posts and was redeployed to replace J.R. Gallant in 3B position;

- Unit #3: M. Conway was redeployed as a substitute from the 11:00 to 19:00 shift to the 07:00 to 11:00 shift;

- Unit #3: T. Talbot who was on annual leave (position 3C) was replaced by the redeployment of T. Budgell from position 3H. T. Budgell was a CX-2 acting in a CX-3 position;

- Unit #4: P. Whitters was called in as a substitute for the 11:00 to 19:00 shift.

- Segregation: R. Cormier, who was on annual leave, was replaced by redeployment of W. Reade from Unit #2 (position 2C);

- Unit #1: S. Somers was on rest (position 1D). D. Blacquière (CX-3) was scheduled for redeployment from 250 Day Posts to replace S. Somers, but it was not executed.

[8] The grievor stated during his testimony that a supervisor (CX-3) was assigned to a CX-2 position in a unit (T. Budgell was redeployed to Unit #3 (position 3C)). In his direct examination, he stated that a CX-3 officer is not qualified to fill a CX-2 position because he is not up-to-date in training for weapons, fire and cardiopulmonary resuscitation (CPR). In cross-examination, he specified that he was not sure if CX-3s received the same training given to CX-1 and CX-2 employees.

[9] The grievor filed as Exhibit G-3 the replies of the employer at the first and second levels of the grievance process. He noted from M. Bourque's reply at the first level that the employer admitted that correctional supervisors (CX-3s) have been redeployed from their regular posts to cover CX-1 and CX-2 positions. The grievor outlined that the employer stated that these redeployments were made with the sole purpose of providing the required staffing levels without the expenditure of overtime. This management practice falls within the operational requirements referred to in clause 26.10 of the collective agreement, as stated in the first level reply. The second

level reply confirmed this management practice and supported Warden Mills, who strives to maintain a balanced operating budget and control overtime expenditures.

[10] Mr. Hicks, who testified for the employer, explained the shift schedule for September 3, 2002. He stated that CX-3s are qualified officers. He identified the following CX-3 officers (acting or formal position): K.A. Willman, A.A. Amos, T. Budgell and D. Blacquière. The witness could not specify when those officers obtained their training.

Summary of the arguments

For the grievor

[11] Sub-clause 21.10(b) of the collective agreement specifies that overtime work shall be allocated to employees at the same group and level as the position to be filled (i.e.: CX-1 to CX-1, CX-2 to CX-2, etc.), subject to the operational requirements of the service. In the present file, the employer redeployed three CX-3 employees (K.A. Willman, A.A. Amos and T. Budgell) to CX-2 posts in the units of the penitentiary in violation of sub-clause 21.10(b).

[12] The wording of clause 26.10 is similar to the wording in clause 21.10 in relation to operational requirements. In *Whyte v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-17992 (1989) (QL), the adjudicator concluded that the collective agreement imposed an obligation on the part of the employer to try to meet the wishes of the employee with respect to vacation leave requests. To be able to assume that obligation, the employer must carry a normal complement of staff and when it is not possible, the requirement to cover leave by providing for overtime may not be an unreasonable cost for the employer to bear. This interpretation of the vacation leave clause should be applied to the overtime provisions in the present file.

[13] In *Imbeau v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-2-23534 (1993) (QL), the adjudicator concluded that the employer did not make a reasonable effort to find a better solution by exploring other alternative staffing actions to accommodate the grievor's potential absence before denying the request for leave.

[14] For the bargaining agent, those decisions specify that it is not an acceptable argument for the employer to say that it is more economical to reassign CX-3s to CX-1

and CX-2 posts instead of assigning the same group and level employees in overtime, as stated in the collective agreement. The bargaining agent requests that the adjudicator accept the grievance and send a clear message to the employer that overtime staffing costs are not a defence.

For the employer

[15] The employer submits that the grievor was not called in to work overtime because the redeployment of employees already available in the "Day Shift Roll Call" covered the positions. In the present grievance, it is up to the grievor to prove that he was the next one to be called in from the availability list and that he was not called. In *Cianni v. Treasury Board (Solicitor General Canada – Correctional Service),* 2004 PSSRB 98, the adjudicator concluded as follows:

. . .

> *With regard to clause 26.10 itself, it seems to me that it is a reasonable operational requirement for the employer to allocate work from a vacant post to the staff already on shift. This would include part-time staff on shift and it would take place before calling people who are on alternate holidays and available at a premium rate. That approach is clearly part of the staffing formula of 1.77, and moving staff to cover vacant posts within a shift appears to be well established. In this regard, I did not hear any evidence of a dispute when full-time staff on shift are used to fill vacant posts. Further it would not be operationally sound for part-time staff that are paid regular pay not to be used or minimally used while staff on alternate holidays are brought in at a premium rate. I do not rely on cost alone to determine operational requirements but it is corroborative of the other factors.*

. . .

[16] That decision should receive application in the present file, and the employer applied a reasonable operational requirement when it allocated work from a vacant post to the staff already on shift. The *Cianni (supra)* decision also stated that costs have to be considered in an operational requirement evaluation. Furthermore, in the present file, clause 21.10, which receives application in the allocation of overtime work, cannot be applied for the day shift because no overtime was necessary. Consequently, the grievance should be denied.

Reasons

[17] In his grievance, Mr. Purchase alleges that the employer did not offer him overtime for the day shift of September 3, 2002. On that day, he was scheduled to work from 19:00 to 07:00 in Unit #4. No indication of his availability appears on the "Day Shift Roll Call".

[18] For the day shift, vacant positions were filled by the reassignment of other employees on the schedule. The evidence shows that some CX-3 supervisors were reassigned to CX-1 and CX-2 positions in the units. The employer explained that the CX-3 redeployments to CX-1 and CX-2 positions were made for the sole purpose of providing the required staffing levels without the expenditure of overtime. The employer argued that this practice falls within the operational requirements referred to in clause 21.10.

[19] The issue in this case is, in part, related to management rights. It is recognized that the employer is entitled to schedule work and assign employees to posts as long as it does not come into conflict with the collective agreement. The specific issue to be determined is whether the employer can assign CX-3 employees on shift to fill vacant CX-1 and CX-2 posts, and whether this practice is in violation of clauses 21.10 and 26.10 of the collective agreement.

[20] The grievor argues that the employer has no choice other than to fill job vacancies in CX-1 and CX-2 posts by correctional officers of the same grade and level. If there is no CX-1 or CX-2 correctional officer already on the schedule available to fill the posts, the employer should call one or more in for overtime, and it cannot reassign CX-3 correctional officers to these posts.

[21] For its part, the employer submitted that it is a reasonable operational requirement to reassign CX-3 correctional officers already on the schedule to CX-1 and CX-2 posts before calling in employees for overtime to fill those positions. The employer submitted that the conclusion reached in *Cianni (supra)* should apply in the present case.

[22] I agree with the employer that, in this case, its management rights include the power to assign staff to specific posts to perform their work. The staffing responsibilities of the employer include the possibility to readjust the schedule to allocate work from a vacant post to the staff already on shift. In order to limit

management rights on that matter, the collective agreement must be explicit. In the present case, I must decide if clause 21.10 is a limitation on the authority of the employer to assign staff in this manner. Article 6 states as follows:

ARTICLE 6

MANAGERIAL RESPONSIBILITIES

> ***6.01*** *Except to the extent provided herein, this agreement in no way restricts the authority of those charged with managerial responsibilities in the Public Service.*

. . .

[23] As already stated, I consider that Article 6 includes management's right to allocate work from a vacant post to the staff already on shift. Clause 21.10, entitled "Assignment of Overtime Work", is included in Article 21, which deals with hours of work and overtime and is found in Part 3 of the collective agreement, entitled "Working Conditions".

[24] Clause 21.10 does not state that the employer is required to allocate overtime work in every case where the necessity to fill posts on a shift arises. Secondly, clause 21.10 contains qualifiers which state that management shall make every reasonable effort to allocate overtime work on an equitable basis and to the employees of the same group and level as the position to be filled <u>when</u> overtime is necessary to fill the post. In other words, the language used in clause 21.10 does not create an absolute right for employees of the same group and level to work overtime in a vacant position. Secondly, the allocation of overtime work in clause 21.10 is subject to the "operational requirements of the service". I agree with the adjudicator in the *Cianni (supra)* decision, who concluded that this language creates some discretion for the employer to consider operational requirements when deciding to allocate work in vacant positions. The language in clause 21.10 is the same as the one considered in clause 26.10, which is related to the allocation of work in vacant posts on designated paid holidays. The conclusion reached in *Cianni (supra)* can receive application in the present case. Clause 26.10 reads as follows:

> ***26.10*** *Subject to the operational requirements of the service the Employer shall make every reasonable effort to allocate, on an equitable basis, work in vacant posts on designated paid holidays to those employees on leave with pay who are readily available and qualified.*

[25] I conclude, as the adjudicator in *Cianni (supra)* stated, that it is a reasonable operational requirement for the employer to assign qualified staff already on shift to vacant posts. On the issue of qualifications, I conclude that CX-3 correctional officers are qualified employees to fill CX-1 or CX-2 positions. The grievor did not convince me that they are not qualified for those positions. Indeed, while the grievor in his testimony stated that CX-3's were not up-to-date in their training on weapons, fire and CPR, he agreed in cross-examination that he was unsure whether CX-3's received the same training as CX-1's and CX-2's. The employer's witness, Mr. Hicks, testified that CX-3's were qualified officers and he was not contradicted on this in cross-examination. To be very specific, I consider that the employer, in allocating work from vacant posts to the staff already on shift, applied a reasonable operational requirement of the service by staffing the employees available on shift in the positions to be filled in a proper exercise of its managerial responsibilities.

[26] It is only after this first step is completed that a need to call in additional employees on an overtime basis will or will not be apparent. If, after the reassignment of staff already on shift, some posts still have to be filled, the employer shall then make every reasonable effort to allocate overtime work as prescribed by clause 21.10. Only on that occasion will the employer have to give effect to the three conditions specified in that clause. If it assigns employees to overtime work, the employer will have to make every reasonable effort to (1) allocate overtime work on an equitable basis among readily available qualified employees; (2) allocate the work to employees of the same group and level as the position to be filled; and (3) give adequate advance notice to the employees.

[27] The wording of clause 26.10 is similar to that in clause 21.10, in relation to "subject to the operational requirements of the service", which appears in both. The reasoning and the conclusion specified above for clause 21.10 should also stand with respect to clause 26.10 in relation to the issues of operational requirements and management rights in this particular case. I agree with the conclusions laid down on

those issues in *Cianni (supra)*, and, in the interest of consistency of interpretation, they should find application in this case.

[28] Accepting the arguments submitted by the grievor would mean that clause 21.10 would have an effect on the general staffing procedure to be followed in the allocation of work to the staff complement already on shift. That interpretation cannot stand, clause 21.10 being limited to the assignment of overtime work only; it cannot be extended to general staffing processes. Indeed, the clear wording of Article 21.10 indicates that it only applies to the assignment of <u>overtime</u> work. Finally, even if the grievor had proven a violation of either 21.10 or 26.10, he still has to prove his own personal entitlement to be assigned the overtime (the articles say "on an equitable basis") and he has not done this.

[29] The *Whyte* and *Imbeau* decisions *(supra)* are not applicable to the present case, as they deal with the granting of vacation leave, which is a different concept from the assignment of overtime work. The employee's right to benefit from needed and earned vacation leave is a far different concept from their right to be assigned overtime.

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

(The Order appears on the next page.)

Order

[31] For all of these reasons, the grievance is denied.

June 30, 2005.

Léo-Paul Guindon,
adjudicator