Date: 20060316

File: 166-02-36377

Citation: **2006 PSLRB 28**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

Catherine Billett

Grievor

and

Treasury Board (Department of Veterans Affairs)

Employer

Indexed as
Catherine Billett v. Treasury Board (Department of Veterans Affairs)

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

REASONS FOR DECISION

Before: Barry Done, adjudicator

For the Grievor: Neil J. Harden, Professional Institute of the Public Service of Canada

For the Employer: Renée Roy, counsel

Heard at Regina, Saskatchewan,
February 1, 2006.

Grievance referred to adjudication

[1] This grievance concerns how acting pay was calculated in the grievor's case. The parties chose to proceed by way of an Agreed Statement of Facts (Exhibits G-1 and E-1) with Treasury Board calling one witness, Ms. Suzanne Marchand-Bigras. The Agreed Statement of Facts is reproduced below:

Agreed Statement of Facts (Exhibit E-1/G-1)

1. *The grievor, Catherine Billett, is employed by Veterans Affairs Canada in Regina, Saskatchewan. She commenced her employment in January, 1999.*

2. *On November 3, 2004, the grievor's substantive position was as an Area Counsellor, which was classified at the WP 03 level.*

3. *The grievor was at the top of the WP 03 pay range.*

4. *The top of the WP 03 pay range in effect on the date of November 3, 2004 was $57,088 annually under the PSAC Program and Administrative Services collective agreement. This collective agreement had expired on June 20, 2003.*

5. *On November 4, 2004, the grievor was appointed as Acting District Nursing Officer at the NU-CHN 3 level under the PIPSC SH Group collective agreement (with an expiry date of September 30, 2003).*

6. *The acting appointment constituted a promotion under the Public Service Terms and Conditions of Employment Regulations.*

7. *The grievor possesses a Bachelor of Nursing Degree.*

8. *Appendix "B" of the PIPSC SH Group collective agreement provides for Responsibility and Education Allowances for the Nursing Group.*

9. *The employer determined the rate of pay upon promotion for the grievor to be $59,134.*

10. *On December 14, 2004, Ms. Billett grieved the calculation of her acting rate of pay at the NU-CHN-03 group and level.*

11. *The parties reserve the right to call additional evidence as necessary.*

[*Sic* throughout]

[2] During their opening remarks the parties agreed also on the issue to be decided, which is the correct method to be used to determine Ms. Billett's acting rate of pay. More specifically, how should Ms. Billett's entitlement to an Education Allowance be incorporated. Should the Education Allowance be incorporated into the pay rates before the employer calculates the incremental step at which the grievor should be placed or should the incremental step calculations be performed first prior to adding the Education Allowance amount owing to the grievor?

[3] The bargaining agent chose not to call any witnesses. The employer called just one witness, Ms. Suzanne Marchand-Bigras, who testified that her position was that of Manager, Compensation Analysis, Statistical Data and Interpretation Unit with Treasury Board. She testified that her duties were to manage the unit and to interpret a variety of collective agreements and the *Public Service Terms and Conditions of Employment Regulations* (the *Regulations*). Ms. Marchand-Bigras began with Treasury Board in 1998 as an Interpretations Officer, and then she became an analyst in collective bargaining. In November 2005, she started her present job.

[4] A total of six exhibits were introduced through this witness. Exhibit E-2 is the Treasury Board's Terms and Conditions of Employment Policy, together with the *Regulations*. Exhibit E-3 is an undated Treasury Board guide on how to calculate salary on promotion. Exhibit E-4 is the covering page of the Health Services Agreement which expired on September 30, 2003, along with pages 204-209 of that agreement, which are the Annual Rates of Pay for the Nursing Group (NU). Exhibit E-5 represents Appendices B through M of the Health Services Agreement, which are the various allowances that pertain to the Nursing group. Exhibit E-6 is an example of calculations and steps involved in determining acting pay for someone whose substantive level is WP-3 and who is to act at the NU-CHN-03 level (Nursing Group, Community Health Nurse Sub-group). Exhibit E-7 is a further and similar example, this time using the case of a NU-CHN-5 required to act in a WP-06 position.

[5] Using Exhibit E-2, at page 7, the witness explained in some detail the method used to calculate Ms. Billett's rate of acting pay. That method first considered the definition of promotion provided in section 24 of the *Public Service Terms and Conditions of Employment Regulations*. According to the Agreed Statement of Facts, points 3 and 4, Ms. Billett's rate of pay at the WP-03 level was $57,088. Next, the

witness referred to the collective agreement (Exhibit E-4) at page 206, which shows that the maximum rate for the NU-CHN-03 classification on October 1, 2002 was $62,174.

[6] The next step applied by the employer in the calculation of the grievor's acting rate of pay appears to be at the heart of the dispute between the parties: the witness explained that one must now consider what, if any, Education Allowance the grievor was entitled to. As Ms. Billett possessed a Bachelor of Nursing degree, Appendix B Education Allowances-Nursing Group, section (B)(d) applied. The amount of the allowance was $3,000, and that amount had to be added to each incremental step of the substantive rates of pay for the nursing group in order to "alter" them. This, she said, is in accordance with the preamble found in Appendix B at page 257 of the Nursing collective agreement:

. . .

> *For all purposes of pay, the annual rates of pay for the Nursing Levels stipulated in Appendix "A" shall be altered by the addition of the amounts specified hereunder. . . .*
>
> [Emphasis added]

. . .

[7] One must now, she continued, take the new, altered rate, and, according to the rules for determining salary on promotion, add the lowest increment in the Nursing rates of pay. Only when these steps have been done can one select the correct increment to place the grievor into, which is at the altered rate of $59,134, the first step in the new rates. The witness compared the Terminable Allowance provided for in Appendix C of the Nursing collective agreement at page 260, to the Education Allowance provided for in Appendix B. She observed the distinction that the Terminable Allowance at Appendix C(c) ". . . does not form part of an employee's salary".

[8] In cross-examination, the witness conceded that had the grievor not possessed a Bachelor of Nursing degree, she would have been placed at the third increment in the Nursing rates of pay. This was so due to the fact that Appendix B would not apply. As well, she conceded that a nurse without a Bachelor's degree would take two years less to reach the maximum rate of pay than a nurse with such a degree, that a nurse without a degree would only make $580 less on appointment than a nurse with a degree, and that it was possible for a nurse with a degree to make less than a nurse

without a degree on initial appointment. The specific example cited was that of a nurse with two one-year university courses who would, in accordance with Appendix B, section B, paragraph (c)(ii) of Exhibit E-5, be placed at the second increment in the Nursing rates of pay.

[9] Mr. Harden next asked whether a nurse with a degree received the Education Allowance automatically. The answer was no. The witness stated that the Education Allowance is paid only when the post-graduate education is used in the performance of nursing duties, according to the preamble found in Appendix B (Exhibit E-5) at page 257:

. . .

> ***B. Education Allowances***
>
> *Where the following post-graduate nursing training or nursing education is utilized in the performance of the duties of the position. . . .*

. . .

[10] In reply to the question of whether the witness was an expert in interpreting collective agreements she replied that, if there was one, she was "the closest thing" to it.

[11] In re-examination, Ms. Roy had the witness refer to Exhibit E-6, being the sample calculations, and explain that a nurse with a degree would earn more than a nurse without a degree at the maximum rate of pay. Also, as the allowance is part of salary, it would be maintained during periods of maternity leave.

[12] 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*").

Summary of the arguments

I. Submission by the Bargaining Agent

[13] Mr. Harden began by directing my attention to Appendix D (Allowance for Forensic Psychiatrists) of the collective agreement (Exhibit E-5). He observed that

according to paragraph 4, a forensic psychiatrist would lose the Education Allowance while on maternity leave; that in that regard, there was no difference in the treatment of allowances. He acknowledged that the *Public Service Terms and Conditions of Employment Regulations* govern the determination of rates of pay in this case, as set out in the Terms and Conditions of Employment Policy (Exhibit E-2) at sections 24 and 46(b). He asserted that the employer's method of calculating pay violates the preambles both to Appendix B of the collective agreement (Exhibit E-5) and to paragraph B of the Appendix, and leads to an absurd result. For that reason, counsel argued that I ought to prefer the bargaining agent's suggested method of calculating acting pay which is to "do the slotting and then, add the Education Allowance". For greater clarity, he added that nurses with or without a degree should be "slotted in" at the same level which, in this case would be step 3 at $58,554. This is obtained by adding the maximum rate of the substantive WP-03 position ($57,088) to the lowest increment in the Nursing rates of pay, ($1,204) for a total of $58,292. This would in turn make $58,544 the applicable pay level, according to the rules on promotion, being the step that is nearest to but not less than $58,292.

[14] The intent of Appendix B, he said, is to reward a nurse with a degree with additional monies compared to a nurse without a degree. The union position on calculations meets this intent (a reward for having obtained greater qualifications) while the employer's position would only give such a nurse $580 more. As well, using the employer's method, a nurse would not receive the full $3,000 allowance until they reached the maximum rate of pay. The employer's method effectively negates most of the allowance for a four year period, which is an express attempt to avoid the terms of the agreement. Surely, he argued, it was not the intent of the parties to reward a nurse without a degree more than one with a degree, as the witness testified can happen if the employer's method of calculation is accepted.

[15] The employer's position that the allowance forms part of salary is true whether it is applied before or after the slotting. The flaw in the employer's approach is that it does not look at Appendix B as a whole and does not consider when the allowance comes into effect. The language in Appendix B shows that the Education Allowance can only come into effect after slotting and after the nurse has begun using his or her skills in the performance of his or her duties. The language reads ". . . where the . . . nursing education is utilized in the performance of the duties of the position". The tense used is the present tense, not the future tense, and the presumption is that the

parties intended the language they negotiated. Three things must be in place for an employee to receive the allowance:

1. a nurse must have a degree;

2. a nurse must be performing the duties of the position;

3. a nurse must use the degree in the performance of the duties of the position.

[16] Absent any one of these, a nurse is not qualified to receive the allowance, and a nurse is not using the degree in the performance of his or her duties before being slotted in. That is the plain meaning of the language! A promotion is sequential; one is appointed, one's pay is determined and then one begins to perform the duties of the position.

[17] Mr. Harden next reviewed case law: *Bainbridge v. Treasury Board (Health and Welfare Canada),* Board File No. 166-2-16132, (1986) at page 7; *Sumaling v. Treasury Board (Correctional Service Canada),* 2005 PSLRB 32 at paragraphs 21, 23 and 29; *Gervais v. Treasury Board (Solicitor General – Correctional Service),* Board File No. 166-2-28207 (1998) at paragraph 26; *Reid v. Treasury Board (Solicitor General of Canada – Correctional Service),* 2003 PSSRB 77; *Gunn v. Treasury Board (Revenue Canada – Customs, Excise and Taxation),* Board File No. 166-2-28657 (1999) at paragraph 40; and *Parker et al. v. Treasury Board (National Archives of Canada)*, 2004 PSSRB 13 at paragraph 46.

[18] According to Mr. Harden, the gist of the case law is that if one is not performing the duties, one is not qualified to receive the allowance. Appendix A-6 of the collective agreement, in paragraph 11 shows the clear intent of the parties. This paragraph, entitled "Rate of Pay on Initial Appointment", makes no distinction between the rates of pay on initial appointment based on education, which supports the union position. He wonders why it is that when appointing from within, a distinction is being made when appointments from without merit no such distinction. It seems absurd that it would financially benefit a nurse not to use their degree in the performance of their duties.

[19] Lastly, Mr. Harden had me look at the decision in *Canada (Attorney General) v. Lajoie,* (1992) 149 N.R. 223, which supports the union's position on calculation, and an excerpt from page 123 of Palmer, *Collective Agreement Arbitration in Canada*, 3rd ed.

II. Submission by Treasury Board

[20] The grievor has the onus of proving a breach of Appendix B of the collective agreement. Clearly, the Education Allowance is part of salary, on that point the language in the Appendix is exceedingly clear:

> *APPENDIX "B"*
>
> *RESPONSIBILITY AND EDUCATION ALLOWANCES – NURSING GROUP*
>
> *. . . for all purposes of pay, the annual rates of pay for the Nursing levels stipulated in Appendix "A" shall be altered by the addition of the amounts specified hereunder in Column II in the circumstances specified in Column I.*

It is the annual rates of pay in Appendix A that are to be altered.

[21] The bargaining agent did not point to any specific language in Appendix B that had been violated, and the Appendix B language in any case does not support its position that the three pre-conditions specified must be met. Performance of the duties is irrelevant. It is the annual rates of pay that must be altered, not one's specific rate of pay. The bargaining agent's method is stretching the language. One must comply with the agreement, which is to say that one must alter the rates by adding the Education Allowance. Ms. Roy suggested that the *Bainbridge (supra)*, *Sumaling (supra)* and *Gervais (supra)* cases have no application to this grievance. The issue is not whether duties are being performed but the relevance of education to the duties of the position. Unlike all other provisions for allowances in the agreement, only the Education Allowance provision includes the words "the rates of pay shall be altered". It does not merely say that an employee receives an allowance of a certain amount; it requires that annual rates of pay be altered.

[22] For all intents and purposes, the Appendix A rates of pay cease to exist when one is entitled to an Education Allowance. Parties to an agreement must be held to the language in the agreement if it is clear, regardless of the absurdity that may result from a clear reading. As the excerpt from *Palmer (supra)* states, hardship is no reason to alter a clear meaning. The more appropriate forum for the bargaining agent is to renegotiate the language.

III. Reply argument by bargaining agent

[23] It is the preamble to section B of Appendix B that is clear and must have some meaning. The rates of pay contained in Appendix A continue to exist even when one qualifies for the Education Allowance.

Reasons for decision

[24] This grievance concerns the application of the SH collective agreement as it pertains to pay calculations on promotion. The specific provisions of the agreement that apply are article 45 and the Pay Notes for Appendix A, the applicable portions of which are reproduced below:

Article 45

PAY

> ***45.01*** *Except as provided in clauses 45.01 to 45.08 inclusive, and the Notes to Appendix "A" of this Agreement, the terms and conditions governing the application of pay to employees are not affected by this Agreement.*
>
> ***45.02*** *An employee is entitled to be paid for services rendered at:*
>
> *(a) the pay specified in Appendix "A" for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in his certificate of appointment,*
>
> *or*
>
> *(b) the pay specified in Appendix "A" for the classification prescribed in his certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.*
>
> ***45.03*** *The rates of pay set forth in Appendix "A" shall become effective on the date specified therein.*
>
> ***45.04*** *Only rates of pay and compensation for overtime which has been paid to an employee during the retroactive period will be recomputed and the difference between the amount paid on the old rates of pay and the amount payable on the new rates of pay will be paid to the employee.*
>
> ***45.05 Pay Administration***

When two (2) or more of the following actions occur on the same date, namely appointment, pay increment, pay revision, the employee's rate of pay shall be calculated in the following sequence:

(a) the employee shall receive their pay increment;

(b) the employee's rate of pay shall be revised;

(c) the employee's rate of pay on appointment shall be established in accordance with this Agreement.

45.06 Rates of Pay

(a) This clause supersedes the Retroactive Remuneration Directives. Where the rates of pay set forth in Appendix "A" have an effective date prior to the date of signing of the collective agreement the following shall apply:

(i) "retroactive period" for the purpose of subparagraphs (ii) to (v) means the period commencing on the effective date of the retroactive upward revision in rates of pay and ending on the day the collective agreement is signed or when an arbitral award is rendered therefore;

(ii) a retroactive upward revision in rates of pay shall apply to employees, former employees or in case of death the estates of former employees, who were employees in the bargaining unit during the retroactive period;

(iii) rates of pay shall be paid in an amount equal to what would have been paid had the collective agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay;

(iv) in order for former employees, or in the case of death for the former employees' representatives, to receive payment in accordance with subparagraph (iii), the Employer shall notify by registered mail, such individuals at their last known address that they have thirty (30) days from the date of receipt of the registered letter to request in writing such payment after which time any obligation upon the Employer to provide payment ceases;

(v) *no payment nor notification shall be made pursuant to clause 45.06 for one dollar ($1.00) or less.*

45.07 *This Article is subject to the Memorandum of Understanding signed by the Employer and the Professional Institute of the Public Service of Canada dated 21 July 1982 in respect of red-circled employees.*

****

45.08 Overpayment

Should there be an error made in pay calculations resulting in an overpayment, the employee shall be notified beforehand in writing of the requirement for repayment to the employer and the intended repayment schedule. The employer will discuss the proposed schedule with the employee prior to putting it into effect.

45.09 Acting Pay

(a) *When an employee is required by the Employer to substantially perform the duties of a higher classification level on an acting basis for the number of consecutive working days indicated in (i) or (ii), the employee shall be paid acting pay calculated from the date on which the employee commenced to act as if the employee had been appointed to that higher classification level for the period in which the employee acts.*

(i) *two (2) working days: ND-DIT and OP level 1, and NU-CHN and NU-HOS levels 1-4;*

(ii) *four (4) working days: all other employees.*

(b) *When a day designated as a paid holiday occurs during the qualifying period, the holiday shall be considered as a day worked for the purpose of the qualifying period.*

. . .

***APPENDIX "A-6"*

NU-NURSING GROUP

PAY NOTES

PAY INCREMENT FOR FULL TIME AND PART-TIME EMPLOYEES

. . .

RATE OF PAY ON INITIAL APPOINTMENT

11. The rate of pay on initial appointment for the NU-HOS levels 1 to 3 and NU-CHN levels 1 to 3 will be established as follows:

(a) A nurse, with no experience, or with no recent experience, or with less than one (1) year of recent experience, will be appointed at the first (1st) step of the NU-HOS-1 level or at the first (1st) step of the NU-CHN-1 level.

(b) A nurse, appointed at the NU-HOS-2, NU-CHN-2, NU-HOS-3 or NU-CHN-3 will be paid on appointment in the applicable salary scale of rates:

(i) with more than one (1) year, but less than three (3) years of recent experience, at the first (1st) step;

(ii) with more than three (3) years of recent experience but with less than five (5) years of recent experience, at the second (2nd) step;

(iii) with five (5) or more years of recent experience, at the third (3rd) step;

or

such higher step as determined by the Employer.

(c) Assessment of recent experience will be at the discretion of management.

. . .

Appendix B

RESPONSIBILITY AND EDUCATION ALLOWANCES – NURSING GROUP

For all purposes of pay, the annual rates of pay for the Nursing Levels stipulated in Appendix "A" shall be altered by the addition of the amounts specified hereunder in Column II in circumstances specified in Column I.

. . .

B. Education Allowances

Where the following post-graduate nursing training or nursing education is utilized in the performance of the duties of the position:

. . .

(d) Bachelor's degree in nursing $3,000

[25] Turning first to clause 45.01, I find nothing in clauses 45.02 through 45.08 that assists me in determining how to calculate acting pay in a case that includes an entitlement to an Education Allowance. Next, according to clause 45.01, I am to refer to the Pay Notes to Appendix A, or, in the case of the Nursing Group, to Appendix A-6 specifically. The bargaining agent directed my attention to paragraph 11, which relates to pay on initial appointment. According to this, what determines the matter of placement into a given incremental step is the amount of recent experience a nurse has, and not the amount of education: the greater the recent experience, the higher the incremental step. No reference is made here to placement being determined only after factoring in the Education Allowance. This Article states that "Except as provided in . . . the Notes to Appendix A of this Agreement, the terms and conditions governing the application of pay to employees are not affected by this Agreement". The language seems clear. Express provisions, negotiated by the parties, take precedence over the *Public Service Terms and Conditions of Employment Regulations*, and do affect the application of pay to employees.

[26] I must now consider whether the language in Appendix A-6, which I believe to be clear, conflicts with the language in Appendix B, the latter being the language relied upon by the employer.

Appendix B

RESPONSIBILITY AND EDUCATION ALLOWANCES – NURSING

For all purposes of pay, the annual rates of pay for the Nursing levels stipulated in Appendix "A" shall be altered by the addition of the amounts specified hereunder in Column II in circumstances specified in Column I.

. . .

> ***B. Education Allowances***
>
> *Where the following post-graduate nursing training or nursing education is utilized in the performance of the duties of the position:*
>
> *. . .*
>
> *(d) Bachelor's degree in nursing $3,000*

[27] I find nothing in this language that addresses timing. In other words, absent some very clear provision to the contrary, I see no compelling reason to alter the annual rates of pay first, prior to applying the normal rules on promotion. Appendix B requires only that the rates be altered. This, in my view, is not in conflict with Appendix A-6; indeed, some of the absurdities that ensue in applying the employer's methodology suggest that they could not have been intended by the parties at the bargaining table.

[28] I disagree with Ms. Roy's assertion that language which is clear must be adhered to regardless of any absurdity that may result. On this point I am guided by the jurisprudence on contract interpretation. In *Assh*, 2004 PSSRB 111, the adjudicator held, in paragraph 52, that, with respect to the general rules of construction and interpretation, there is an exception to the rule that the ordinary meaning of words shall apply. That exception, she held, occurs in the case where applying the ordinary meaning rule would lead to an absurd result. This is the case here. In the *Beal* case, 2002 PSSRB 93, the adjudicator was considering a PFA clause and found, at paragraph 30, that the employer's approach to calculation could lead to absurd and unjust results. The adjudicator decided that he then had to look at the general principles upon which the PFA was based. There is also support for the use of this approach in the jurisprudence of the Federal Court of Appeal. That court, in *CATCA v. Canada* [*Treasury Board*], [1985] 2 F.C. 84 held that it would be unjust if two employees receiving the same salary and doing the same work one day would continue in their work but receive different salaries the next day only because one was subsequently terminated before the signing of the new collective agreement. It held that in the absence of very clear words, no such incongruous result could have been intended. It would certainly be an incongruous result if the grievor were to be paid less than her counterpart who does not have post-graduate education in nursing, simply because the grievor is eligible for the Education Allowance.

[29] In dealing with the issue of absurdity, one must first determine the purpose of the clause in question. Given what is the self-evident purpose of the clause, its application by the employer leads to an absurd result. An allowance, by its very definition, is meant to offer an employee something more because of their specific situation, qualifications or skills. Offering an allowance to an employee and having that allowance penalize them is certainly incongruous, and defeats the very purpose of the clause.

[30] It simply does not seem reasonable, as Mr. Harden points out, that a nurse with a degree would be initially placed at a lower increment than, earn less than and take two more years to reach the maximum pay rate for the position than a nurse without a degree. If that was what the parties intended, why negotiate an Education Allowance at all? Why agree to pay $3,000 more per year to nurses who have made the effort to obtain their degree? Surely providing an Education Allowance on a sliding scale, that is to say, the more education one has, the greater the allowance the employer is prepared to pay, is recognition of the worth of an education to the employer, and the fact that it enhances the performance of nursing duties. Yet the employer's pay calculations seem to suggest that somehow a nurse with a degree is not only not worth as much as one who does not have a degree, but is worth even less. I seriously doubt this employer wants to send that message.

[31] The jurisprudence I was provided was of limited use as the issue to be determined in each case was distinct from the one before me. Two of those cases dealt with the retroactive effect of a reclassification; the others dealt with entitlement to an allowance, which is not in dispute for the grievor.

[32] The approach that is in keeping with the collective agreement and whose application leads to no absurd result is the one urged upon me by the union, and it is that one I endorse.

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

(The Order appears on the next page)

Order

[34] This grievance is allowed and I direct the employer to apply the Education Allowance only after the grievor's appropriate incremental step has been determined. I further direct the employer to apply this decision from the date on which Ms. Billett began to act.

March 16, 2006.

Barry Done,
adjudicator