

Date: 20060505

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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

PAUL HOWARD COHEN

Grievor

and

CANADA REVENUE AGENCY

Employer

EXPEDITED ADJUDICATION DECISION

Before: [Sylvie Matteau, adjudicator](#)

For the Grievor: Cécile La Bissonnière, Public Service Alliance of Canada

For the Employer: [Sylvie Bolduc](#)

Note: The parties have agreed to deal with the grievance by way of expedited adjudication. The decision is final and binding on the parties and cannot constitute a precedent or be referred for judicial review to the Federal Court.

[Heard at Ottawa, Ontario,](#)
[April 28, 2006.](#)

REASONS FOR DECISION

[1] Paul Howard Cohen, the grievor, filed a grievance on October 29, 2003, to recover an amount deducted from his salary by the employer from a performance pay he received for fiscal year 2001-2002. This amount represents the difference between the calculation based on his higher acting salary at the time and the calculation based on his substantial position's salary.

[2] The parties have agreed to submit this grievance to the expedited adjudication process.

[3] 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 evidence

[4] An agreed statement of facts was signed by the parties and read into the record. It is as follows:

...

1. *At all material times, the grievor's substantive position was at the PM-04 group and level.*
2. *The applicable collective agreement for this grievance is the Program Delivery and Administrative Services Collective Agreement between the Canada Customs and Revenue Agency and the Public Service Alliance of Canada, which expired on October 31, 2003. The relevant article is **Article 54.03 (a)** - Management Performance Leave which states the following:*

Subject to the conditions established in the Employer's CCRA Performance Guidelines for the Management/Gestion (MG) Group, employees who perform MG duties during the annual review period, shall be eligible to receive up to ten days (10) of management performance leave for people management based on the annual performance assessment.

[Exhibit A - Article 54.03 (a) of the PDAS Collective Agreement]

3. *For the period of April 1, 2001 to March 31, 2002, the grievor was in an action assignment as an excluded manager within the Appeals Branch in a PM-05 position. During the course of this acting assignment, his position was converted to an excluded MG-04 position.*
4. *On July 25, 2002, management provided the grievor with an Employee Performance Management Report covering the period of April 1, 2001 to March 31, 2002. The grievor was notified that, in meeting his performance expectations, he was eligible for performance pay that was authorized at 3%.*

{Exhibit B - Form Y-280-1, Addendum to the Employee Performance Management Report}

5. *Pursuant to Section 5 c) of the Employer's CCRA Performance Guidelines for the Management/Gestion (MG) Group referred to in the above noted article, performance pay is available to excluded MG Group members.*

[Exhibit C - Compensation Bulletin 2002-7-3/HR-P17 and Annex A - CCRA Performance Management Pay and Leave Guidelines]

6. *On September 23, 2002, the grievor received his performance pay calculated based on his acting MG salary.*
7. *On October 2, 2003, the grievor was informed by his compensation advisor that an administrative error had occurred. His performance pay for fiscal year 2001/2002 should have been calculated based on his substantive salary rather than his acting salary in accordance with the above-mentioned Employees' CCRA Performance Pay and Leave Guidelines for the Management/Gestion (MG) Group.*
8. *The Compensation Division recovered the overpayment in the gross amount of \$320.76 from the grievor's regular pay of October 22, 2003, in accordance with Subsection 155(3) of the Financial Administration Act.*

[Exhibit D - Email from LiseJ Demers to Paul Cohen, dated October 2, 2003]

9. *On October 29, 2003, the grievor submitted his grievance on this issue.*

...

Reasons

[5] According to the grievor, a contract was signed between the parties on July 25, 2002, granting him performance pay at the rate of 3% of his salary. He is referring in fact to the Form Y-280-1 used by the employer and titled Addendum to the Employee Performance of Management Report - Performance Pay and Leave Authorization which he and his manager signed. The grievor was allegedly told that the calculation would be based on his salary, although the form is not specific in this regard.

[6] At the time, the grievor was acting in a MGSPS-04 position at a higher rate of pay than his substantial position at the PM-04 group and level. In his opinion, his understanding of his manager's representations was confirmed when on September 23, 2002, he received his performance pay calculated based on his acting salary.

[7] The employer recognized that prior to June 19, 2002, the guidelines on performance pay did not specify that calculations were to be made on the basis of the salary of the substantive position. On July 22, 2002, following the June 2002 review of the guidelines, a Compensation Bulletin was circulated. It notified managers of this change. These guidelines are part of the collective agreement under subclause 54.03 (a).

[8] The grievor submitted that the employer was not allowed, under the doctrine of Estoppel, to recover the amount that was allegedly paid in excess. However, two elements are required to apply this doctrine and the onus is on the grievor, in this case, to establish that: 1) a promise was made and acted upon by the employer; and 2) a detrimental reliance was made on the part of the grievor. Although it could be argued that the grievor was promised a performance pay based on his acting salary and was in fact paid on September 23, 2002, according to this understanding, the evidence does not support this conclusion. Furthermore, the important second element of the doctrine was not established by the evidence.

[9] The employer alleges an administrative error and the grievor filed no evidence that the employer had in fact agreed to calculate the performance pay on the basis of his acting salary. In a document adduced in evidence, namely the grievor's statement of facts dated January 29, 2004 accompanying his fourth-level grievance, he explains his understanding of the July 25, 2002 agreement with his manager in the following terms (paragraph 3): "...The terms and conditions were that the bonus was to be calculated and paid at 3% of the grievor's salary". There is no evidence of an agreement that the parties were both referring to the acting salary.

[10] The document that the grievor referred to in terms of a contract does not specify that the 3% authorized on July 25, 2002 was to be calculated on the basis of his acting pay either. In other words, there is neither evidence of this promise or understanding on the part of the employer nor that the manager was deliberately promising to calculate the performance pay on the basis of the acting pay knowing that the revised guidelines specified that as of June 19, 2002, such bonus should be calculated on the basis of the salary of the substantive position. Considering the evidence before me, I conclude that an administrative error occurred. Furthermore, there is no evidence of detrimental reliance on the part of the grievor. The doctrine of Estoppel does not find application.

[11] As far as the administrative error is concerned, it is well established by the jurisprudence that the employer is allowed, in such a case, and more particularly in the present case under section 155 of the *Financial Administration Act*, R.C.S. 1985, c.F-11, to correct any mistake and recover any amount paid in excess of what should have been paid.

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

(The Order appears on the next page)

Order

[13] The grievance is denied.

May 5, 2006.

**Sylvie Matteau,
adjudicator**