Date: 20140623

File: 166-02-35860

Citation: **2006 PSLRB 77**

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

MICHEL J. DOIRON

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Doiron 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: Dan Butler, adjudicator

For the Grievor: J. Mancini, counsel, UNION OF CANADIAN CORRECTIONAL OFFICERS-SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA-CSN (UCCO-SACC-CSN)

For the Employer: R. Roy, counsel

Heard at Moncton, New Brunswick,
April 6, 2006.

Grievance referred to adjudication

[1] Michel Doiron ("the grievor") is an employee of the Correctional Service of Canada (CSC or the employer) working as a Correctional Officer classified at the CX-COF-1 (hereafter "CX-1") group and level at the Atlantic Institution in Renous, New Brunswick. In this reference to adjudication, the grievor alleges that the employer has failed to grant him acting pay in accordance with the provisions of the collective agreement between Treasury Board and the UNION OF CANADIAN CORRECTIONAL OFFICERS-SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA-CSN ("UCCO-SACC-CSN") that expired May 31, 2002.

[2] On October 9, 2003, the grievor filed a grievance as follows:

> *I grieve the fact that my supervisor Mr. Dan Newton refuses to allow me to receive acting CX-COF-2 pay for the supervisory duties I conducted. I trained monitored and supervised* [Mr. X] *CX-COF-2 for 13 months during the period of December 2001 up to February 2003.*
>
> *[Sic throughout]*

[3] As corrective action, the grievor seeks:

> *To receive applicable rate of pay according to collective agreement for completing CX-COF-2 duties and functions during the above mentioned time frames, and to receive representation of my choice at all hearings.*
>
> *[Sic throughout]*

[4] The grievor indicates in his reference to adjudication that he did not receive a final-level reply from the employer to his grievance. He referred the matter to the Public Service Staff Relations Board ("the former Board") for adjudication on February 25, 2005, under paragraph 92(1)(*a*) of the *Public Service Staff Relations Act,* R.S.C., 1985, c. P-35 *("*the former *Act").*

[5] 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. The Public Service Staff Relations Board was disbanded and the Public Service Labour Relations Board (the Board) was formed. 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 former *Act*.

[6] By letter dated March 20, 2006, the employer objected to my jurisdiction to hear this reference to adjudication on the grounds that the grievance was not filed within the prescribed time limits.

Preliminary Objection

[7] At the outset of the hearing, the employer confirmed its position that the grievor failed to respect the time limit established for presenting his grievance under clause 20.10 of the collective agreement (Exhibit E-1 and G-1). In the employer's submission, this failure precludes me from accepting jurisdiction to consider the grievor's reference to adjudication under section 92 of the former *Act*.

[8] In the alternative, the employer objects to my jurisdiction on the grounds that the substance of the grievance is essentially classification. As such, the action or inaction of the employer challenged in the grievance may not be the subject of a reference to adjudication and is protected by section 7 of the former *Act*.

[9] I received arguments from the parties on the issue of timeliness as the first preliminary matter. In the course of these arguments, the grievor contended that the subject of the grievance was, in fact, continuing in nature and that the employer's timeliness objection was consequently unfounded. This argument prompted the employer to respond that the grievor had changed the nature of his grievance at the hearing in a prohibited fashion.

[10] As evidence was required to establish whether the grievance was continuing and/or that its subject matter is classification, I reserved my decision on the employer's initial timeliness objection and proceeded to receive evidence. On request, I agreed that the parties were free to revisit, as necessary, any aspect of the question of jurisdiction in their final arguments in light of the evidence presented. I have, as a result, summarized arguments on jurisdiction and on the merits together in one section. My findings on all questions follow thereafter.

[11] The grievor and the employer each called a single witness. I admitted a total of ten documents as exhibits, which are available at the Board for examination.

Summary of the evidence

[12] The grievor has worked with CSC for over 19 years. From 1987 to 1999, the grievor performed correctional officer duties in various living units at the Atlantic

Institution at Renous, New Brunswick. Renous is a maximum-security facility housing up to 240 inmates. Between 1999 and March 2005, the grievor served as the Admission and Discharge Officer at Renous. In March 2005, the employer deployed the grievor, at his request, to a position elsewhere in the institution.

[13] The grievor testified that he filed his grievance as a last resort to secure acting pay or a reclassification of his position.

[14] In the spring of 1999, the grievor responded to a call for an acting assignment in the admissions department and was selected. He subsequently performed the duties of Admission and Discharge Officer (CX-1) for six months on an acting basis. When the employer posted a formal competition to fill the position on a permanent basis (Exhibit G-2), the grievor was the only candidate and was appointed to the position on an indeterminate basis in the fall of 1999 without a formal interview. His supervisor at the time was Jim Allison, Co-ordinator of Correctional Operations.

[15] In the course of the following year, the grievor surveyed other maximum and medium-security institutions to determine the typical classification of positions in admission and discharge departments. Among all maximum-security facilities and some medium-security institutions as well, he found that the Admission and Discharge Officer position was classified at the CX-COF-2 level (hereafter "CX-2") wherever the incumbent was responsible for a department with more than one correctional officer. This was the case, in particular, at Dorchester and Springhill institutions, the other maximum-security facilities in the Atlantic region. The grievor later clarified his testimony to indicate that he did not contact medium-security institutions outside his region. The only name that he could recall of a person contacted during his survey was a Mr. Thibault at the super-maximum institution in Québec.

[16] Between 1987 and 1999, the Admission and Discharge Officer position at Renous was classified at the CX-2 level. The grievor does not know why the classification had changed to CX-1 when he took over the duties of the position.

[17] The grievor approached Mr. Allison with the information gathered from his survey and asked Mr. Allison to reclassify the position upwards because he believed that he was performing the same duties and functions as co-workers in other maximum and medium-security facilities whose positions were classified at the CX-2

level. Nothing happened and Mr. Allison did not provide the grievor with reasons for his failure to accept the grievor's request.

[18] The functions of the Admission and Discharge Officer include all of the normal responsibilities of correctional officers for the seizure of illicit substances and contraband and the search of inmate cell effects and property. The incumbent searches, itemizes and logs the personal effects of an inmate on arrival. He also conducts a brief interview with the inmate to assess his/her state of mind. The incumbent advises inmates regarding the standing orders and procedures of the institution and prepares inmates for outside court appearances or temporary absences. The incumbent is also responsible for the day-to-day management of the admission and discharge department. The grievor identified Exhibit G-3 as the job description for his position, though noting that this description does not include a reference to training other officers.

[19] Starting in 1999, the grievor assumed responsibility for training individuals who replaced him during vacation and sick-leave absences, particularly with respect to the computer programs used in the department and the standing orders specific to the department. These replacements were typically CX-2 level correctional officers some of whom had been assigned to light duty for various medical reasons. From time to time, the employer also assigned correctional officers to provide additional assistance in the department. The grievor's evidence is that he trained and supervised these persons. As well, the grievor trained and supervised clerks who were engaged at times to perform data entry functions. Individuals in the department undergoing training addressed their questions and concerns to the grievor.

[20] Mr. X, a CX-2 correctional officer with 12 years of service, was one of the persons assigned to assist in the admission and discharge department during the grievor's tenure. Under instructions from his physician confining him to light duties, Mr. X arrived in the department in December 2001 as part of a return-to-work program.

[21] The grievor submitted two documents to support his contention that the employer required him to supervise other staff in the department: The first is an email to the grievor dated October 29, 2002, from Dan Newton, the acting Co-ordinator of Correctional Operations at the time (Exhibit G-4):

. . .

> *You are required to advise officers assigned to work in A & D that they must address their issues and concerns with you, and you in turn will make a decision or inquiry through the CCO's Office for direction.*

. . .

The second is a follow-up email from Mr. Newton to Mr. X dated October 30, 2002, (Exhibit G-5):

. . .

> *. . . The point here is Mike is in charge and the only one who has the authority and responsibility and will be held accountable by me for all A & D activities between departments, institutions and other agencies.*

[22] The second document refers to an authorized staffing level of 1.5 person years in the admission and discharge department. This staffing level, according to the grievor, indicates that there was a continuing presence of other persons in the department throughout his tenure, including Mr. X. While the players changed, the requirement that the grievor train and supervise other staff remained. The grievor noted later in his testimony that all other admission and discharge departments were staffed with two or three correctional officers. Port Cartier in Québec, the sister institution to Renous, always maintained a complement of one CX-1 and one CX-2.

[23] A third email from Mr. Newton addressed to the grievor, dated October 30, 2002 (Exhibit G-6), indicated Mr. Newton's intention to discuss the grievor's concern about classification with the deputy warden:

. . .

> *In regards to your ranking and the responsibility within A & D this letter showing my expectations and your comments to the effect if you are to supervise the job should be at a rank of CO2 not CO1 will be discussed with the Deputy Warden. As to how such a promotion will take place or what I have no idea, but I'm sure the matter is open to discussion and I will advise you of my talk with him.*

. . .

The grievor has no recollection that Mr. Newton ever came back to report on the results of his conversation with the Deputy Warden. The grievor is not sure whether

he made Mr. Newton aware of the same information about classification levels in other institutions that he had earlier given to Mr. Allison.

[24] In March 2003, the grievor submitted a request for reclassification to Mr. Newton with detailed supporting reasons (Exhibit G-7). With no response six months later, the grievor submitted a classification grievance. The only reply ever received by the grievor to the latter was from the fourth level of the grievance procedure in Ottawa to the effect that the employer would not entertain the grievance as the grievor did not submit it within 25 days of a change in his job description. The grievor contends that his job description did not officially change at any time.

[25] The grievor introduced as an exhibit the classification standard used by CSC to rank correctional officer positions (Exhibit G-8). The standard includes, at page 10, a CX-1 benchmark job description for an "Admission and Discharge Officer". The grievor testified that this description does not capture all of the duties he was required to perform. In particular, there is no mention of supervision and training. The grievor referred to a second benchmark job description, at page 15, for a "Correctional Officer II" position. The grievor outlined key differences reflected in this description that differentiate a CX-2 position from a CX-1 position.

[26] In cross-examination, the grievor agreed that he had felt all along that he should be a CX-2 and that the issue at hand was not really a question of temporary duties. The grievor identified the classification grievance that he had presented on October 25, 2004, (Exhibit E-2) which explains his case as follows:

> *I griev the fact that my co-workers at Dorchester and Springhill, Insts are paid CX-02 wages for being the A/D officers. I am only paid CX-COF-1 wages as per competition won in 1999. We are completing the same tasks on a daily bases. Management at Atlantic should change position to CX2.*
>
> [*Sic* throughout]

[27] The grievor indicated that orientation for a newcomer to the admission and discharge department usually required two weeks. The orientation process entailed explaining departmental policy and standing orders, computer systems and programs, and visual identification programs as well as providing training on the conduct of day-to-day operations. After two weeks, the grievor's role shifted to monitoring and answering questions. In the case of Mr. X, the grievor testified that training continued

in the post-orientation period and that he monitored Mr. X's performance to ensure that he accomplished tasks in conformity with the law.

[28] Asked whether one-half hour per week was sufficient to address new issues and situations with Mr. X, the grievor responded "maybe" and that day-to-day operations were "pretty standard". The grievor agreed that Mr. Newton did not ask him to supervise Mr. X's performance but he did ask the grievor from time to time how Mr. X was doing. If Mr. Newton had concerns about Mr. X's performance, the grievor speculated that Mr. Newton would probably address these concerns directly with Mr. X. Nonetheless, the grievor is strongly of the opinion that he was the first line supervisor, that the expression "Mike is in charge" found in Exhibit G-5 means more than being responsible. Pressed further, the grievor testified that Mr. Newton did not ask him to monitor Mr. X's attendance, conduct his performance evaluations or input into his performance evaluations.

[29] The employer suggested and the grievor agreed that there was nowhere near the 1.5 person-year-staffing level mentioned in Exhibit G-5 over the course of his six years in the admission and discharge department. The grievor did not concur that this meant that his claim for acting pay was not applicable most of the time. In the case of Mr. X, it lasted 13 months.

[30] The grievor testified that Mr. Newton did not ask him about the department's workload because Mr. Newton was aware that there was a workload problem given that the authorized 1.5 person years was not there. Counsel for the employer asked whether it might be the case that Mr. Newton did not ask about workload because he felt that the department was not being run as efficiently as it could. The grievor replied that he could not recall Mr. Newton saying this, but that it could be the case.

[31] The employer took the grievor through the list of responsibilities in the benchmark job description for "Correctional Officer II" (Exhibit G-8). In several instances, the grievor indicated that he did not perform a particular function mentioned in a paragraph or that the context for performing the function was different in the admission and discharge department. He concluded that "some paragraphs apply, some don't".

[32] Cross-examination closed with the grievor agreeing that his duties as Admission and Discharge Officer had always been the same, that he had always felt that his

position deserved reclassification, and that he compared his own position to positions in other institutions in coming to this conclusion.

[33] Reacting to the employer's questions regarding the "Correctional Officer II" benchmark job description (Exhibit G-8), counsel for the grievor asked him to re-examine most of the paragraphs describing the functions of this CX-2 position. Given an opportunity to consider the text in greater detail, the grievor identified throughout substantial parallels to the work required of him as an Admission and Discharge Officer. At this point, the grievor's evidence closed.

[34] Mr. Newton began work at CSC in February 1991 and retired three days prior to this hearing. Between September 2002 and September 2004, he acted in the capacity of Co-ordinator of Correctional Operations except for a brief period as Acting Deputy Warden. His duties as Co-ordinator of Correctional Operations included supervision of the admission and discharge department. He was also responsible for the return-to-work program that placed Mr. X in the admission and discharge department.

[35] When he began these duties, there was one authorized position in the admission and discharge department at the CX-1 level. A CX-2 position was not warranted because the mathematical formula used to determine staffing levels required an inmate population of 300 to justify 1.5 to 2.0 person years in the department. When Mr. Newton made inquiries about the possibility of having a CX-2 level-position instead in the department, he learned that CSC considered CX-1 appropriate where there was only one admission and discharge position. Mr. Newton discussed the matter with the Deputy Warden who informed him that the grievor had previously submitted "something" before about promotion to CX-2 and had "lost" because Renous was not a large enough institution. He did not in his discussion with the Deputy Warden discuss the details of the "Correctional Officer II" benchmark job description (Exhibit G-8) and claims not to have had access to this document. As a result of his discussion with the Deputy Warden, Mr. Newton was able to secure agreement for 1.5 person years in the department, essentially to facilitate its use as part of the return-to-work program.

[36] Mr. Newton testified that he never asked the grievor to train Mr. X or anyone else. He accepted that the grievor would have to provide a "miniscule" amount of training to someone arriving in the department but certainly not anything like two

weeks of orientation. New arrivals would quickly understand the procedures for the entry and exit of inmates.

[37] Mr. Newton did not ask the grievor to supervise Mr. X. He detailed tasks for Mr. X and told him to use the grievor as a resource person available to provide help on specific issues. He neither required the grievor to monitor Mr. X's attendance, to ensure that he met work standards, to conduct performance evaluation reports nor to provide input into performance evaluations. Mr. Newton conducted performance evaluations himself and any questions he may have posed to the grievor about how people were doing was simply a case of a supervisor seeking to ensure that his staff were okay. If he had concerns about Mr. X's work or competence, he would address them directly himself.

[38] The reference in Exhibit G-4 to other officers "…addressing their issues and concerns…" with the grievor was meant only to indicate that Mr. X could discuss workloads and procedures with the grievor. Anything not in the procedures were to be brought to Mr. Newton's attention. The reference in Exhibit G-5 that ". . . Mike is in charge. . . ." was a reaction to Mr. X assuming that he had become the second Admission and Discharge Officer in the department. The purpose of Mr. Newton's email was not to tell Mr. X that the grievor was in charge of him but rather that it was only the grievor who had authority to take decisions in the admission and discharge department. It was Mr. Newton's intent to move Mr. X along in about three months time as part of the return-to-work program. Mr. Newton was concerned that Mr. X had become complacent about his status and was making assumptions about his role in the department that were not justified.

[39] In cross-examination, Mr. Newton qualified his earlier testimony by saying that the number of inmates in an institution determines the number of employees in the admission and discharge department rather than necessarily the distinction between a CX-1 and CX-2 position in that area.

[40] Mr. Newton acknowledged some familiarity with the sister Port Cartier facility in Québec but suggested that it had a different set of staffing rules and guidelines. He was unable to explain why some smaller institutions have CX-2 admission and discharge positions and questioned the integrity of the grievor's survey findings. He admitted, however, having no personal knowledge about practices at other maximum-security facilities and had himself encountered great difficulty gathering any

information about staffing levels elsewhere. Regarding the possibility of getting extra help for the department, the Deputy Warden gave Mr. Newton permission to check around. Mr. Newton talked with Ottawa and was told again that the size of the department depended on inmate population. He believes that he did relay this information to the grievor at the same time that he informed the grievor of his success in securing authority for 1.5 person years in the department.

[41] Mr. Newton did not make the determination that the admission and discharge position at Renous could not be classified at the CX-2 level. The institution had decided throughout whatever studies that it had conducted that the admission and discharge department would operate with a CX-1 position. Mr. Newton did not himself dispose of the grievor's request for reclassification because the deputy warden had indicated that the matter had already been raised, was not accepted at the time and would not be accepted.

Summary of the arguments

For the grievor

[42] The grievor contends that the subject matter of the grievance is continuous in nature. Unless there are exceptional reasons for doing so, a grievance alleging a continuous breach of the collective agreement cannot be dismissed as untimely.

[43] The date of filing of the grievance at the first level was October 9, 2003. To assess its timeliness, the relevant test is to go back 25 working days from the first-level filing date and determine whether the grievor at that time was performing duties on an acting basis at the CX-2 level. The period for which acting pay is claimed begins on this date and the breach of the acting pay provision of the collective agreement continues until the grievor left the admission and discharge position in March 2005.

[44] Modern labour arbitration stays away from an overly technical approach. In the case of this grievance, the fact that the text of the grievance mentions a thirteen-month period associated with the supervision of Mr. X should not be held against the grievor, a person without expertise in the drafting of grievances. The grievor, as demonstrated in the evidence, undertook supervisory requirements throughout his tenure in the position and performed other functions that are part of the work of a correctional officer at the CX-2 level. This makes the grievance a continuing matter.

[45] Section C of the UCCO-SACC-CSN grievance presentation form includes the following important words:

> *And all other rights that I have under the Collective Agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.*

It happens frequently that union officers do not include all of the rights for which a collective agreement breach is alleged when they draft the text of the grievance. The formulation of the grievance may not always be proper. Employers like to rely on these shortcomings to narrow the scope of a grievance or to challenge its receivability. This is why Section C of the grievance forms contains the additional language cited above, directly preceding the grievor's signature. With this language, the grievor is entitled to have the words "and all other rights" read into the construction of the grievance. Hypothetically, were the grievor not to have written anything in Section C, the grievance could still be processed given the presence of the standard additional language in this section of the form.

[46] The employer bears the burden of proving that the grievance was submitted in an untimely fashion. There is no evidence in this case that the grievor did not perform duties of a higher-level position on an acting basis 25 days prior to the date of the filing of the grievance. There is thus ample reason to dismiss the objection to timeliness.

[47] The test posed by clause 50.07 is simple: Did the grievor "substantially perform the duties of a higher-classification level" as claimed?

. . .

> ***50.07*** *When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least one (1) working day, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or she had been appointed to that higher classification level for the period in which he or she acts.*

. . .

[48] The evidence shows that the position of Admission and Discharge Officer at Renous is comparable to other CX-2 positions. Examining the classification standard

used by CSC (Exhibit G-8), the grievor testified that the benchmark position description for a CX-1 "Admission and Discharge Officer" presented in the standard is ". . . not what I do". His duties more closely resemble the requirements outlined in the benchmark position entitled "Correctional Officer II" classified at the CX-2 level. Replacing the reference to "unit" in the latter description with the words "Admission and Discharge", it is clear that the grievor assumed part of every function listed in the CX-2 benchmark without exception. The employer has offered nothing to challenge the grievor's evidence to this effect other than a vague opinion expressed by Mr. Newton challenging the grievor's evidence that he supervised and trained others. Mr. Newton's own email of October 29, 2002, (Exhibit G-4) states otherwise:

. . .

> *You are required to advise officers assigned to work in A & D that they must address their issues and concerns with you, and you in turn will make a decision or inquiry through the CCO's Office for direction.*

. . .

Mr. Newton's follow-up email to Mr. X of October 30, 2002, (Exhibit G-5) is equally clear:

. . .

> *. . . The point here is Mike is in charge and the only one who has the authority and responsibility and will be held accountable by me for all A & D activities between departments, institutions and other agencies.*

. . .

[49] The employer appears never to have taken the grievor's request for reclassification seriously. Mr. Newton took the issue to the Deputy Warden but neither Mr. Newton nor the Deputy Warden examined the merits of the grievor's case. As a result, the "last resort" available to the grievor was to file an acting pay grievance so that he could at least receive the salary appropriate to the duties he was performing.

[50] The evidence indicates that the functions that the grievor was required to perform did not change in any significant way from the moment he arrived in the admission and discharge section until he left it. The grievor has met the onus of establishing that he substantially performed the duties of a higher classification, as set

by clause 50.07. His evidence proves a breach of the collective agreement as of 25 days prior to the date of the grievance and continuing thereafter. This evidence also negates the employer's timeliness objection. While the grievor did link the wording of his grievance to the earlier period when he supervised Mr. X, this reference does not change the evidence that the grievor trained and supervised others and that he performed all of the functions outlined in the "Correctional Officer II" description in the classification standard (Exhibit G-8) throughout his tenure in the admission and discharge section and, specifically, for the period 25 working days prior to October 9, 2003, through to March 2005.

For the employer

[51] Clause 20.10 of the collective agreement requires that an employee present a grievance no later than the 25th day after the date the employee becomes aware of the action or lack of action that gives rise to the grievance:

. . .

> *20.10 An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

. . .

[52] In this case, the grievance refers specifically to a requirement to train and supervise an employee for a 13-month period ending in February 2003. The grievance was not filed until eight months later in October 2003. The grievor, therefore, failed to respect the time period for filing a grievance stipulated in clause 20.10 of the collective agreement. With these facts, the employer has met its onus to demonstrate the basis for its timeliness objection. The onus shifts to the grievor to show that there was something underlying the grievance that protects it from being viewed as untimely. The grievor has not met this requirement. The adjudicator must, as a consequence, dismiss the reference to adjudication for want of jurisdiction.

[53] In the case of a continuing grievance, a grievor normally presents a claim worded in an open-ended manner and asks for corrective action which similarly signifies a continuing claim. This is clearly not the case in this situation. Both in

Section B where the grievor states the nature of the grievance as well as Section C where he outlines the required corrective action, the cause is specifically linked to a finite thirteen-month period.

[54] The grievor has attempted to change the nature of his grievance at this hearing by expanding the scope of, and time during which he requests a remedy. This effort violates the injunction against altering the terms of the initial grievance expressed in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109:

. . .

> ***5.*** *In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.*

. . .

[55] The employer referred me to several decisions in support of its further contention that I do not have jurisdiction to consider a grievance whose real subject matter is classification. *Chadwick v. Canada (Attorney General)*, 2004 F.C. 503, is the seminal decision establishing where acting pay ends and classification begins:

. . .

> *24. Dr. Chadwick was grieving her claim that her employer failed to apply the collective agreement. Clause G1.08 of that agreement makes reference to the situation where an employee is required by the employer to substantially perform the duties of a higher classification level on an acting basis for at least ten, consecutive days. By necessity, a comparison of different classification levels would need to be undertaken in order to determine whether the grievor's work falls within Clause G1.08. This Clause also includes a temporal element, in that an employee seeking acting pay*

> *pursuant to it will only receive such pay for a specified time period during which time he or she substantially performed the duties of a higher classification level. Had she been seeking the higher pay indefinitely, I might have found otherwise. However, that is not the case before me. The applicant claims that she was required to substantially perform the duties of the VM-02 position from March 31, 1998 through to July 30, 2001 and should receive acting pay for that specified time period. This dispute concerns remuneration rather than classification.*
>
> . . .

[56] The lesson of *Chadwick* is that the real subject matter of a grievance seeking acting pay for an indefinite period is classification. The grievor's claim under clause 50.07 in this case does seek acting pay for what in effect is an indefinite period. The adjudicator must interpret the indefinite nature of this claim as establishing classification as the true subject matter, and decline jurisdiction because section 7 of the former*Act* protects the exclusive authority of the employer to classify positions.

[57] *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40, outlines indicators for determining whether the subject matter of a grievance is classification rather than acting pay:

> . . .
>
> *59. In summary, some of the indicators that a grievance is a classification grievance and not an acting pay grievance (and therefore where an adjudicator has no jurisdiction) are:*
>
> *- the claim for acting pay is an ongoing claim and not for a specified period;*
>
> *-the grievor has sought a reclassification, either informally or through a classification grievance;*
>
> *- the grievor continues to perform the duties he/she has always performed and only the classification levels in the workplace have changed; and*
>
> *- the acting pay grievance is based, in part, on a comparison with similar positions in other work areas.*
>
> . . .

[58] In light of this case law, the manner in which the grievor has proceeded in this case confirms that classification is the real issue. The grievor's claim to acting pay is ongoing. The grievor testified that he did seek reclassification of his position and that

he has always performed the same duties. He depends on a comparison of duties outlined in a classification standard to support his claim.

[59] Granting the grievor's corrective action would have the same effect as reclassifying his position. As reflected in the adjudicator's finding in *Charpentier v. Treasury Board (Environment Canada)*, Board File Nos. 166-02-26197 and 26198, these circumstances constitute a situation where an adjudicator may not intervene:

. . .

> *41. I do not, however, have the necessary authority to decide whether the employer's decision was valid in the area of classification. Although the wording of the grievances concerns the acting pay and makes no mention of "classification", granting the redress that has been requested would be the same as a reclassification. . . .*

. . .

[60] Should I find that the subject matter of the grievance is acting pay rather than classification, the employer offered two further decisions for consideration: *Moritz v. Canada Customs and Revenue Agency*, 2004 PSSRB 147, supports the proposition that the existence of overlapping duties between two positions, one of which is classified at a higher level, does not have the effect of establishing that the incumbent of the other substantially performs the duties of a higher level. *Afzal v. Treasury Board (National Defence)*, Board File No. 166-02-19422, holds that a requirement to provide on-the-job familiarization to an employee does not itself show that an employee is substantially performing duties at a higher level.

[61] There is overlap between the grievor's job description (Exhibit G-3) and the benchmark description of duties for "Correctional Officer II" (Exhibit G-8) but, as per *Moritz*, overlap does not establish misclassification. The employer submitted that a number of references in the grievor's own job description quite adequately encompass the duties that the grievor argues are found instead in the CX-2 "Correctional Officer II" benchmark.

[62] The evidence in this case indicates that the employer never asked the grievor to supervise performance, monitor attendance, carry out a performance evaluation or provide input into a performance evaluation. None of the other usual indicators of supervision apply.

[63] Mr. Newton has explained the context for the emails he sent on October 29 and 30, 2002 (Exhibits G-4 and G-5), showing that his instructions did not comprise a requirement that the grievor act as a supervisor. Mr. Newton's credibility was not challenged in cross-examination and his testimony should, therefore, stand as uncontradicted. Furthermore, contrary to what was alleged by the grievor, Mr. Newton did take the grievor's classification grievance seriously. He consulted with his superior and with others and was able to get extra help for the grievor in the admission and discharge section.

[64] In summary, the employer argues that I should dismiss the grievance as untimely. In the alternative, I should find that the grievor cannot now change the nature of his grievance and convert it into a continuing matter. In any event, the fundamental nature of the grievance concerns classification, a subject matter outside the jurisdiction of an adjudicator under the former *Act*. Finally, in the further alternative, the grievor has not met his onus to establish a breach of clause 50.07 of the collective agreement.

[65] A successful claim for acting pay for the 13-month period identified in the grievance would require more than a few days or hours of duties performed here and there, and at least 80 per cent of the duties of a higher position undertaken rather than two to five per cent. The grievor has not met these requirements.

Rebuttal argument for the grievor

[66] *Burchill* does not apply. There is no new grievance in this case and no attempt to change the nature of the grievance. There is no element of surprise to the employer as it has long known that the grievor is seeking acting pay for doing the job of a CX-2.

[67] Neither *Chadwick* nor *Bungay* are helpful. The grievor is not seeking a reclassification of his position and does not ask that the adjudicator render a decision that would affect the employer's rights under section 7 of the *PSSRA*. The grievor is asking squarely for acting pay, not for an ongoing period, but rather for a defined period ceasing in March 2005.

[68] The evidence shows that the requirement to supervise and train that the employer now seeks to minimize was much more complex and involved than a one-day affair. The admission and discharge section was staffed throughout with an extra 0.5

person-year (Exhibit G-5). The grievor accordingly undertook supervision and training responsibilities for several other persons during his tenure in addition to Mr. X. In this regard, there may be overlap between positions but the existence of an overlap does not determine the issue of entitlement to acting pay in any way.

Reasons

[69] The grievor argues that the employer has breached the collective agreement on a continuing basis by failing to compensate the grievor for his required performance on an acting basis of the duties of a higher-classification level.

[70] The employer challenges my jurisdiction to hear this grievance on the grounds that it is untimely and, in the alternative, because the subject matter of the grievance is classification. The employer also contends that the grievor has changed his grievance at the hearing in a prohibited fashion. In the event that I accept jurisdiction to consider the grievance, the employer argues that the grievor has not met his burden to demonstrate, on a balance of probabilities, that the employer has violated the applicable provision of the collective agreement.

[71] The evidence and arguments before me suggest that I must consider four issues in reaching my decision:

1. Does the way the grievor specified his grievance and the requested corrective action at the hearing change the nature of the grievance? If in the affirmative, is this change permissible?

2. Was the grievance presented in a timely fashion?

3. Is the subject matter of the grievance classification rather than acting pay?

4. If the subject matter is acting pay, has the grievor demonstrated that the employer has violated the collective agreement?

Does the way the grievor specified his grievance and the requested corrective action at the hearing change the nature of the grievance? If in the affirmative, is this change permissible?

[72] At the hearing, the grievor depicted his grievance as a claim against a continuing breach of the acting pay provision of the collective agreement (clause 50.07). He specified that the effective date of the requested corrective action is the 25th day preceding the filing of his grievance on October 9, 2003, and that the period for which he claims a remedy extends until the grievor left the position of Admission and Discharge Officer on an unspecified date in March 2005.

[73] Section B of the grievance presentation form originally submitted by the grievor details his cause of action as follows:

> *I grieve the fact that my supervisor Mr. Dan Newton refuses to allow me to receive acting CX-COF-2 pay for the supervisory duties I conducted. I trained, monitored and supervised Mr. P. Fitspatrick* [sic] *CX-COF-2 for 13 months during the period of December 2001 up to February 2003.*

[74] Section C of the grievance presentation form outlines the requested corrective action:

> *To receive applicable rate of pay according to collective agreement for completing CX-COF-2 duties and functions during the above mentioned time frame, and to receive representation of my choice at all hearings.*
>
> [*Sic* throughout]

[75] The subject matter of the original grievance is clear. The wording of Section B asserts that the grievor "trained, monitored and supervised" a CX-2 correctional officer, Mr. X, in the admission and discharge department. This is the activity for which the grievor claimed acting pay. In both Sections B and C of the grievance presentation form, the grievor refers to this activity occurring during a 13-month time period beginning in December 2001 and ending in February 2003. There is no reference in the grievance that this requirement involved any person in the department other than Mr. X nor for any time other than the cited 13-month period. In short, the original presentation of the grievance stated a finite cause of action and proposed a finite remedy.

[76] As outlined in paragraph 43 above, the grievor's claim for acting pay at the hearing was for a continuing requirement to train, monitor or supervise persons in the department for a period beginning in August 2003 and ending in March 2005. These other persons were not identified at the hearing but did not include Mr. X, whose presence in the department ended in February 2003 according to the original grievance. The shift in the timeframe of the grievance argued at the hearing is also significant. The grievor invited me to examine the situation as it existed beginning 25 working days prior to the grievance filing date of October 9, 2003, rather than the 13-month term indicated in Sections B and C. The grievor called the grievance a continuing matter. He proposed corrective action that was primarily prospective rather than retrospective in relation to the filing date of the grievance. This corrective

action had nothing to do with duties relating to Mr. X nor with the period December 2001 through February 2003.

[77] In my view, the statement of the grievance at the hearing changes its nature and does not simply clarify or refine it. As reformulated, the grievor's case for acting pay involves different evidence about different persons and a distinctly different time frame. If I were to accept his restatement of the grievance, testimony relating to Mr. X and to what occurred between December 2001 and February 2003 would likely have little or no probative value. (In effect, the wording of the original grievance can be ignored.) My task would be to weigh the duties required of the grievor immediately before the grievance filing date of October 9, 2003, and extending to March 2005, and determine whether they establish that the grievor then "substantially perform[ed] the duties of a higher-classification level" within the meaning of clause 50.07. Any remedial action flowing from this determination would be divorced from the circumstances and timeframe of the original grievance.

[78] I find no reasonable basis in the grievor's original specification of the grievance to permit him to transform it into an action that examines his work relationship with a different person or persons, involving duties that may or may not be the same, during a totally different time period. There are common elements, to be sure, but the differences overcome the commonalities. It may be true, as the grievor contends, that there are no surprises here for the employer in the sense that the subject matter of the claim remains acting pay. Nevertheless, the employer's defence for the grievance as originally submitted (had the employer offered a defence at some point during the internal grievance procedure) would have involved information and an analysis specific to the circumstances involving Mr. X and for the timeframe originally cited. As specified at the hearing, the case against which the employer must defend is substantially different.

[79] In his defence, the grievor argues either that I should adopt "the modern" approach to labour relations and not hold the grievor to his original specification of the grievance, and/or that I should find that the additional standard words in Section C of the UCCO-SACC-CSN grievance presentation form allow the grievor the latitude to present his grievance at the hearing in the fashion he did.

[80] I respectfully disagree with both arguments. However much one might sympathize in the name of "modern labour relations" with the need for flexibility in

resolving problems brought to the redress process, there are limits to this flexibility. *Burchill* offers an important cautionary note that the redress procedure cannot function within the intent of the statute and with necessary procedural safeguards for both parties if a cause of action can be substantially altered well after the process has been launched. This is not a question of requiring a grievor at the outset to be an expert legal draftsperson but rather of ensuring that the subject of a grievance and the circumstances giving rise to the grievance can be clearly and commonly understood and evaluated as the grievance advances through the redress mechanism.

[81] I turn to the additional words in Section C which read as follows:

> *And all other rights that I have under the collective agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.*

[82] It seems to me that the logic of the grievor's argument concerning the significance of these words, if taken to the limit, would free the grievor from any responsibility to be specific about the rights allegedly breached or to describe clearly the required corrective action when presenting a grievance. The grievor's interpretation of the grievance presentation form would allow him, in essence, to say at any point during the process, "just in case I have forgotten to mention a specific right or redress, I grieve and claim that too." While I can imagine why the grievor or the bargaining agent might wish it this way, I question whether this approach supports effective problem-solving. The information sought of the grievor in Section C accomplishes at least two useful purposes: it signals something about the grievor's expectations as to how the problem can be resolved. It also helps to flesh out or illustrate the details of the grievance itself as presented in Section B of the form. Under the grievor's submission, this helpful information might either be absent from the form or could be changed virtually without restriction as late as the hearing before an adjudicator.

[83] The significance I give to the additional words in Section C is more limited. In my view, these words must be read within the purpose of Section C and do not allow the grievor to alter the contents of Section B with full flexibility. The expression "and all other rights that I have under the collective agreement" in Section C may mean, if anything, that the grievor can claim other corrective action that flows from the collective agreement to rectify the problem described in Section B, but *not* that he can

allege a breach of the collective agreement substantially different from what is set out in Section B.

[84] In sum, I find that the grievor has changed the nature of his grievance at the hearing within the meaning of the *Burchill* decision and, further, that the grievor has not offered arguments that persuade me to permit this change. I will, therefore, consider the reference to adjudication on the basis of the original specification of the grievance found on the grievance presentation form. This specification states the grievance as a finite cause, not a continuing matter, and focuses primary attention on the thirteen-month period identified by the grievor during which he allegedly trained and supervised Mr. X.

Was the grievance presented in a timely fashion?

[85] I have ruled above that the grievance to be considered is the version originally submitted by the grievor. This grievance seeks acting pay for a 13-month period ending in February 2003. The grievor filed his grievance on October 13, 2003.

[86] Clause 20.10 of the collective agreement requires that an employee present a grievance no later than the 25th day after the date the employee becomes aware of the action or lack of action that gives rise to the grievance:

. . .

> *20.10 An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

. . .

The evidence establishes that the grievor did not present his grievance within the required 25 days from the date on which the grievor began his alleged supervisory duties with respect to Mr. X..

[87] The grievor has not applied to the Board under section 63 of the *PSSRB Regulations and Rules of Procedure, 1993*, to extend this time limit.

[88] The employer asserts that the untimely submission of the grievance precludes me from accepting jurisdiction to consider the grievor's reference to adjudication. Both

subsections 92(1) and 96(1) of the former *Act* contemplate that a grievor must have properly pursued his grievance through the grievance procedure to be eligible to refer a grievance to adjudication:

. . .

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the* Financial Administration Act, *or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> . . .
>
> ***96.*** *(1) Subject to any regulation made by the Board under paragraph 100(1)(d), no grievance shall be referred to adjudication and no adjudicator shall hear or render a decision on a grievance until all procedures established for the presenting of the grievance up to and including the final level in the grievance process have been complied with.*

. . .

[89] Were the circumstances of this case different, the failure of the grievor to submit his grievance within the required timeframe would stand as a probable bar to a reference to adjudication. The Board has recognized in past decisions, however, that there are circumstances where an employer cannot insist that the grievor strictly

respect the time limits set out in the collective agreement as a precondition to his bringing the case to adjudication. Such circumstances, I believe, exist in this case.

[90] In *Canadian Labour Arbitration*, Brown and Beatty (at paragraph 2:3130) identify the failure by an employer to challenge a procedural irregularity at an early opportunity as a situation where the doctrine of "waiver" may apply:

. . .

> *In its application, waiver is a doctrine that parallels the one utilized by the civil courts known as "taking a fresh step", and holds that by failing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect, the party waives the defect." That is, by not objecting to a failure to comply with mandatory time-limits until the grievance comes on for hearing, the party who should have raised the matter earlier will be held to have waived non-compliance, and any objection to arbitrability will not be sustained. This has been held to be so even though there was a timely objection as to arbitrability but not one that related to the failure to meet time-limits.*

. . .

[91] The theme of waiver has been applied by Board adjudicators. For example, in *Beers v. Treasury Board (Department of National Defence),* 2000 PSSRB 2, and in *McMahon v. Senate of Canada*, 2003 PSSRB 50, the adjudicators endorsed and applied previous decisions that found that the employer's failure to raise an objection based on timeliness during the grievance procedure constituted a waiver of the right to advance this objection at adjudication. To cite *Beer*s:

. . .

> *[56] . . . I believe that the occasion for an employer to raise a timeliness objection is during the grievance procedure. It is too late once the case is ready for adjudication. If an employer fails to object in the grievance procedure, it can be deemed to have waived its right to object to the timeliness of the grievance. It seems to me that an issue of timeliness on the presentation of a grievance ought to be raised at the earliest opportunity, and that is during the grievance process. That is where the parties are supposed to explore all issues that arise around the grievance. The purpose of the grievance process is to focus on and canvas all issues that are readily apparent. Otherwise, the party failing to do so may be taken to have condoned and overlooked the failings in the adherence to the time limits in the collective*

> *agreement. The matter that is referred to adjudication includes both the grievance and the procedural issues that the parties raise in the grievance process.*
>
> . . .

This passage goes on to conclude that the issue of timeliness, is ". . . a procedural issue that can be waived by either party expressly, or by implication, when a party fails to raise the objection during the grievance process".

[92] In the present case, the record shows that the employer failed to raise the question of timeliness at any level of the grievance procedure. When I asked the employer at the hearing to explain this failure, the employer stated that it had no explanation to offer.

[93] I recognize that the employer is not obligated under the collective agreement to reply to a grievance at any or all levels and that a grievor can advance a grievance through all levels of the grievance procedure and to adjudication without having received a reply from the employer. I do believe, however, that an employer who neglects to challenge the receivability of a grievance based on its alleged untimeliness at some point during the internal grievance procedure, and who cannot provide good reasons for this failure, forfeits the right to raise the issue at the late date of an adjudication hearing. In the circumstances of this case, I therefore find that the employer has waived its right to object to the timeliness of the grievance at this hearing. The reference to adjudication is, therefore, properly before me.

Is the subject matter of the grievance classification rather than acting pay?

[94] The employer argues that the real subject matter of the grievance is classification. Classification is not among the subjects that an employee may refer to adjudication under subsection 92(1) of the former *Act*. Moreover, unless otherwise waived by the collective agreement, the employer's unilateral authority in the domain of classification is explicitly protected by section 7 of the former *Act*:

> . . .
>
> ***7.*** *Nothing in this* Act *shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

. . .

[95] He who objects must prove. The employer bears the burden of demonstrating that the subject matter of the grievance, as specified in its original form, is classification rather than acting pay. If the employer does not meet this burden, the analysis turns to the merits of the claim for acting pay and the burden shifts to the grievor to show, on a balance of probabilities, that the employer has breached the acting pay provisions of the collective agreement.

[96] The test outlined in *Bungay* provides a helpful focus for distinguishing between a classification grievance and an acting pay grievance:

. . .

> *59. In summary, some of the indicators that a grievance is a classification grievance and not an acting pay grievance (and therefore where an adjudicator has no jurisdiction) are:*
>
> *- the claim for acting pay is an ongoing claim and not for a specified period;*
>
> *- the grievor has sought a reclassification, either informally or through a classification grievance;*
>
> *- the grievor continues to perform the duties he/she has always performed and only the classification levels in the workplace have changed; and*
>
> *- the acting pay grievance is based, in part, on a comparison with similar positions in other work areas.*

. . .

[97] I add to this test a commonsense appreciation of what lies behind the two types of grievances: in an acting pay case, the grievor's substantive position is normally presumed to be properly classified. The grievor argues that the employer has assigned extra duties for a specified period over and above those of the employee's substantive position, as outlined in the job description. These extra duties are associated with a higher level role. The grievor asserts, as a result, an entitlement to acting pay. In a classification case, by contrast, the grievor claims that the duties the employer requires on a continuing basis are undervalued. The grievor argues that an assessment of these duties against the relevant classification standard justifies upgrading the level of his substantive position within an occupational group (and/or changing the occupational group).

[98] Acting pay and classification grievances often turn about the same type of evidence. What does the evidence show in this case?

[99] There is, to be sure, limited evidence specific to the 13-month acting requirement alleged in the original grievance; the exchange of emails found in Exhibits G-4 through G-6 and the conflicting testimony of the grievor and Mr. Newton on the meaning of this exchange and the nature of the relationship between the grievor and Mr. X. The significance of this evidence is mixed. Looking at Exhibits G-4 through G-6, only the final of the three documents, an email from Mr. Newton to the grievor, contains a reference that clearly suggests classification as the primary issue:

. . .

> *. . . In regards to your ranking and the responsibility within A & D this letter showing my expectations and your comments to the effect if you are to supervise the job should be at the rank of CO 2 not CO 1 will be discussed with the Deputy Warden. As to how such a promotion will take place or what I have no idea, but I'm sure the matter is open to discussion and I will advise you of my talk with him.*

. . .

By comparison, the contents of Exhibits G-4 and G-5 as well as the oral evidence given by the grievor and Mr. Newton reveal a debate that was primarily about lines of communication and authority within the admissions and discharge department, either generally or with respect to the grievor's responsibilities vis-à-vis Mr. X. This evidence is not unrelated to the issue of classification, but it can plausibly be viewed as equally germane to a claim for acting pay. I note that the actual request from the grievor for reclassification (Exhibit G-7) came in March 2003 after the 13-month period covered by the grievance ended, although it is hardly reasonable to infer from this fact that the grievor's concerns only arose in March 2003.

[100] Given its mixed nature, I do not believe that the employer can substantiate its classification objection through this evidence alone. Certainly, only one of the indicators suggested by *Bungay* is arguably present — the grievor's request for reclassification in close proximity to the timeframe of the grievance.

[101] The larger body of evidence at the hearing was not explicitly linked to the 13-month timeframe of the grievance. Its focus, instead, was on the grievor's longer-term situation and more general experience.

[102] The grievor opened his testimony by qualifying his grievance as ". . . a last resort. . . ." to secure ". . . acting pay or reclassification." In the year following his appointment to the Admission and Discharge Officer position, the grievor surveyed classification levels of comparable positions in other institutions and formed the conclusion that his position should be rated at the CX-2 level rather than CX-1. With the survey information in hand, he pressed a claim for reclassification on his original supervisor, Mr. Allison, and then later on Mr. Newton. When informal efforts failed to produce results, the grievor filed a formal classification grievance which apparently failed at the fourth level of the grievance procedure.

[103] In later testimony, the grievor detailed similarities between his duties and those of a CX-2 level benchmark position. In cross-examination, the grievor stated that his duties as Admission and Discharge Officer had always been the same throughout his tenure in the job. He said that Mr. X was only one of a series of individuals he supervised and trained over the period, and that this important training and supervision requirement was absent from his own CX-1 job description as well as the CX-1 benchmark job description. He agreed with counsel for the employer that he had felt all along that he should be a CX-2 and that the issue in his grievance ". . . was not really a question of temporary duties."

[104] In argument, the grievor emphasized that the functions that he was required to perform did not change in any significant way from the moment he arrived in the admission and discharge section until he left it. He asserted that, on the basis of a comparison using the employer's classification standard, the position of Admission and Discharge Officer at Renous was comparable to other CX-2 positions.

[105] Am I entitled to rely upon evidence and submissions of this type, reflecting the grievor's longer-term situation and experience, to assist in determining the subject matter of the original grievance? I believe that I *am* justified in doing so. In most cases, the evidence led by the parties includes facts which establish the general context in which the grievance occurred. Context supplies important texture and is an important aide to understanding events and perceptions. That it is usually considered problematic to take something "out of context" speaks to the importance of

understanding background and linkages. This does not mean that any and all contextual evidence has relevance and value in determining a grievance; quite the contrary. Information about context helps decide an issue to the extent that it amplifies or clarifies elements already apparent or suspected in the more direct evidence.

[106] The grievor urges me to the conclusion that the 13-month period identified in the original grievance was neither separate nor distinct from the remaining time the grievor spent in his position. According to the grievor, the requirement to train and supervise on which the claim for acting pay is based occurred throughout the grievor's six years in the job. In this sense, the 13 months with Mr. X conform to the grievor's longer-term experience and were not in any way exceptional. When the grievor compared the duties of his position to those at the CX-2 level, he did not limit his focus to these 13 months. The evidence is that the grievor felt that his position should have been classified at the CX-2 level from the outset, as it was prior to 1999, and that it should have remained at the CX-2 level until he left his position in 2005.

[107] From this perspective, the longer-term situation and the 13 months are intimately connected in the grievor's own evidence and arguments. This entitles me, I believe, to import the longer-term evidence as helpful context in which to understand the situation as it existed during the 13-month focus of the grievance.

[108] When I do so, I find that, on balance, the grievor's enduring concern has been to secure reclassification of his position or the equivalent salary as if the position were reclassified. The evidence shows that the grievor's repeated efforts to secure reclassification were frustrated by the responses of an employer who, with or without justification, concluded that the size of the Renous institution and/or the size of the admission and discharge department made it impossible to classify the grievor's position at the CX-2 level. The grievor was unsatisfied with this response, perhaps understandably. He turned to an acting pay grievance as ". . . a last resort . . . ." to pursue his claim.

[109] The grievor's situation, at the very least, exhibits two of the elements of the test outlined in *Bungay*; i.e., the grievor clearly sought a reclassification, *both* informally and through a classification grievance, and he based his claim on a comparison with similar positions in other work areas. The evidence on these two elements is strong.

The grievor's testimony that he performed the same duties throughout his time in the admission and discharge department also satisfies, in part, a third *Bungay* element.

[110] A fourth *Bungay* indicator is that the claim for acting pay is ongoing. I note with interest that the grievor argues that *Bungay* does not apply here because his acting pay claim — in the reformulated version of the grievance — does have a finite termination date in March 2005. This argument strikes me as unpersuasive. There is a terminal date to the grievor's claim only because the grievor decided to leave his position. Otherwise, there would be good reason to expect that the grievor's claim for acting pay would have continued beyond March 2005. In this speculative sense, the fourth element in *Bungay* related to the ongoing nature of the acting pay claim might be satisfied, and might also align well with the Federal Court's approach in *Chadwick* from which *Bungay* flows. I nonetheless draw no inference from this speculation. Given my ruling that the grievance is framed by a finite 13-month period, I will assume that the acting pay claim is finite, by definition, and that the fourth *Bungay* element does not apply.

[111] There is, however, no requirement that all of the indicators discussed in *Bungay* must be present to support a conclusion that classification comprises the real subject matter of a grievance. The individual indicators suggested in *Bungay* are neither necessary conditions nor, taken together, do they constitute an exhaustive or definitive list. They nevertheless do provide a helpful test. In the circumstances of this case, I am satisfied that the evidence, on balance, aligns well with the depiction of a classification grievance in *Bungay*.

[112] I am also satisfied that the evidence conforms better with a commonsense appreciation of a classification grievance (outlined in paragraph 98 above) than it does an acting pay grievance. According to the evidence supplied by the grievor, the duties on which the grievor's claim is based were always there. They were not added as "extras" at some point to his substantive position. The job description did not change. It was, in the grievor's view, deficient throughout inasmuch as it failed to reflect the continuing requirement to train and supervise others. The grievor contends that the duties were better matched to the "Correctional Officer II" benchmark position than to the CX-1 job description, an opinion consistent with a classification preoccupation. He acted on this preoccupation on several fronts but was unsuccessful. He turned finally to acting pay as a solution to achieve what he was unable to achieve on the

classification front. As the grievor himself said, his grievance ". . . was not really a question of temporary duties."

[113] These reasons lead me to accept the employer's jurisdictional objection. I find that the grievor's claim for acting pay is best understood as an alternate attempt to achieve a pay outcome consistent with his persisting classification objective. Under section 92 of the former *Act*, I do not have jurisdiction to consider a reference to adjudication where I find that the underlying subject matter is classification.

4. If the subject matter is acting pay, has the grievor demonstrated that the employer has violated the collective agreement?

[114] Given that I have found in favour of the employer's position that the subject matter of the grievance is classification, the final question falls away.

[115] I wish nonetheless to offer the following additional observations: in the event that I have erred in concluding (1) that the grievor improperly changed the nature of his grievance at the hearing, and also (2) that the subject matter of the grievance is classification, my task would instead be to determine whether the grievor had met his burden to establish a continuing breach of clause 50.07 of the collective agreement in respect of the period August 2003 through March 2005 at issue in the reformulated version of the grievance. I note that the grievor testified only generally about training other employees during this timeframe. His evidence did not offer more specific information concerning, for example, the persons trained and supervised, the dates and duration of the acting requirement(s), the extra duties actually performed or the nature of the instructions received from the employer to take on added responsibilities, if any. What I did receive was evidence to the effect that, while 1.5 person-years were assigned to the department, the extra 0.5 person year (in addition to the grievor) was not always present during the grievor's six years there. This evidence casts in some doubt the grievor's assertion that the acting requirement persisted throughout the period for which compensation was claimed.

[116] In sum, without fuller and more consistent factual evidence, I suspect that the grievor could not have met his burden to establish, on a balance of probabilities, substantial performance of the duties of a higher-classification level, as required by clause 50.07, on a continuing basis for the period in question.

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

(The Order appears on the next page)

Order

[118] The grievance is denied for lack of jurisdiction.

June 23, 2006.

Dan Butler,
Adjudicator