Date: 20070614

File: 561-02-64

Citation: **2007 PSLRB 62**

Public Service Staff Relations Act

Before the Public Service Labour Relations Board

BETWEEN

BARRIE OWEN AND RANDALL DAVID VOTH

Complainants

and

TREASURY BOARD SECRETARIAT LEGAL SERVICES, STU MCLEAN, ALEX LUBIMIV AND MAUREEN HINES

Respondents

Indexed as
Owen and Voth v. Treasury Board Secretariat Legal Services et al.

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Paul Love, Board Member

For the Complainants: Debra Seaboyer, Public Service Alliance of Canada

For the Respondents: Richard Fader, counsel

Heard at Abbotsford, British Columbia,
December 12 and 13, 2006.

I. Complaint before the Board

[1] This is a complaint filed on November 5, 2004, by Barrie Owen and Randall David Voth (also known as Randy Voth) under paragraph 23(1)(*a*) of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former *Act*"), against Treasury Board Secretariat Legal Services, Stu McLean (also known as Stewart McLean), Alex Lubimiv and Maureen Hines.

[2] The complaint reads in part as follows:

. . .

> 1. *The Respondents have slashed the degree of exposure level of the Penological Factor Allowance (the "PFA") paid to the Complainants Barry* [*sic*] *Owen and Randy Voth (the "Grievors") as a direct result of the exercise of their rights under the Public Service Staff Relations Act ("PSSRA") to file and refer to adjudication their grievances in Public Service Staff Relations Board ("PSSRB") Files No. 166-2-31979 and 31980.*
>
> 2. *In doing so, the Respondents have violated:*
>
> *(a) Section 8(2)(a) of the Public Service Staff Relations Act ("PSSRA") in that they have refused to employ, to continue to employ and otherwise discriminated against the Grievors in regard to employment and terms and conditions of employment because they are members of the Public Service Alliance of Canada (the "Union") and exercised their rights under section 92(1) of the PSSRA to file a grievance and refer it to adjudication;*
>
> *(b) Section 8(2)(c) of the PSSRA in that they have sought by intimidation, threat of dismissal and other kinds of threats and by the imposition of penalties and other means to compel the Grievors and other members of the bargaining unit to restrain from exercising their rights under the PSSRA; and*
>
> *(c) Section 6 of the PSSRA in that they have violated the rights of the Grievors and other members of the bargaining unit to be members of the Union and to participate in its lawful activities.*

. . .

[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 39 of the *Public Service Modernization Act*, the Public Service Labour Relations Board ("the Board") continues to be seized with this complaint.

[4] Both counsel have agreed that the filing of the complaint with the Board on November 5, 2004, crystallized the rights of the complainants and that it is to be heard under the former *Act*: *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Workers v. Correctional Service Canada, Treasury Board and Don Graham*, 2005 PSLRB 50; *Rioux v. LeClair*, 2006 PSLRB 12; and *Garcia Marin v. Marshall*, 2006 PSLRB 26.

II. Summary of the evidence

[5] The complainants are indeterminate full-time institutional parole officers (IPO) employed by the Correctional Service of Canada (CSC) at Kent Institution. Mr. Owen has 18 years of service and Mr. Voth has 23 years of service. Kent Institution is a maximum-security penitentiary located near Abbotsford, British Columbia. The complainants name Alex Lubimiv, amongst others, as a respondent in this complaint. Mr. Lubimiv was the Warden at Kent Institution during the relevant time. He did not give evidence at this hearing.

[6] Mr. Owen and Mr. Voth are, in accordance with article 59 of their collective agreement, entitled to be paid a Penological Factor Allowance (PFA) as they are employees, not in the Correctional Group, who ". . .assume additional responsibilities for inmates and who are exposed to the immediate hazards of physical injury by assault and other disagreeable conditions." The entitlement to the PFA is set out both in the collective agreement and in a guideline entitled the *Administration and Application of the Penological Factor Allowance (P.F.A.)*. The entitlement depends on the level of security of the institution and the degree of exposure, which is categorized as continual, frequent or limited. In the guideline, the following definitions apply:

. . .

> *Continual – means fulfilment of the conditions described in Section 3 above throughout the working day and recurring daily.*

> *Frequent – means the fulfilment of the conditions described in Section 3 above for part or parts of the working day and generally recurring daily.*
>
> *Limited – means fulfilment of the conditions described in Section 3 above on an occasional basis.*
>
> . . .

[7] The method of calculating the PFA is set out in an extract from the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) that expired on June 20, 2003 (Exhibit E-2).

[8] This complaint arose out of circumstances occurring immediately after an adjudication hearing on June 29, 2004, where adjudicator D.R. Quigley mediated a settlement (adjudication/mediation hearing). The parties each signed a separate *Memorandum of Settlement* setting the PFA at the continual rate for the period from April 1, 2002, to March 31, 2003, for a grievance set out in PSSRB File No. 166-02-31980 involving Mr. Voth and PSSRB File No. 166-02-31979 in the case of Mr. Owen (Exhibit G-3). The *Memorandum of Settlement* specifically states that its terms are without prejudice or precedent to the rights or interests of the parties in any other matter. Ordinarily one would expect that a *Memorandum of Settlement* arising from mediation would be a confidential document; however, the terms of this memorandum are germane to the complaint and the complainants filed it without objection from the respondents.

[9] On Mr. Voth's first day of work after the mediation he was shocked and dismayed to learn from Stewart McLean, Unit Manager, that his and Mr. Owen's PFA was to be reduced from the continual rate to the frequent rate and that there might be a recovery or "claw back" of the PFA that the CSC claimed was wrongly paid at the higher rate.

[10] At this hearing, I heard from the complainants and also from Bryden Nelmes, Stewart McLean and Maureen Hines, witnesses called on behalf of the employer.

[11] Mr. Voth testified that he has held his current position as an IPO at Kent Institution since 1989. He said that his duties included managing a caseload of 25 offenders and the responsibility of dealing with all case preparation-related matters, including risk assessments for the National Parole Board for conditional releases, day parole, statutory release and detention. He also prepares risk assessments for the

Warden concerning the transfer of offenders, their suitability for transfer and for private family visits. The work also involves counselling offenders and meeting with them in their living units. Mr. Voth said that all the IPOs have similar job duties.

[12] At one time, all the IPOs worked in different parts of the institution and were not located as a group in the same area. During their careers at Kent Institution, the complainants and the other IPOs worked in various parts of the institution. Mr. Voth said that he had worked in several different areas including the administration area, the segregation unit, the office corridor near the segregation unit, the office in the living blocks and the Case Management Area above the CORCAN area. At the time of the filing of this complaint, the complainants worked in the Case Management Area above the CORCAN area. Before moving to the area above the CORCAN, the complainants worked in the hospital area, also described as the area outside of the gym.

[13] Mr. Owen said that he carried out similar duties to Mr. Voth. As an IPO, he was posted to various parts of the institution. He has worked as a living unit officer. He worked first as an IPO in the administration area, in the office outside of segregation, in the area above the CORCAN and in the hospital near the gymnasium. He then worked in the gymnasium as a recreational officer for four or five months before moving back to the offices above the CORCAN area. He has worked above the CORCAN area since July or August 2003.

[14] I am using the acronym "CORCAN" in this decision without providing a definition, as this term has been in use so long at Kent Institution that the witnesses were unable to provide its proper name when asked at the hearing. The CORCAN appears to be an industrial or occupational training area.

[15] Also working in the area above the CORCAN are clerks and clerical staff, unit managers, the Coordinator of Case Management (CCM) and a computer specialist. Mr. Voth was unaware of the PFA rates paid to other employees who were not IPOs who worked near him.

[16] Mr. Voth stated that when he moved from the hospital area to the area above the CORCAN he was not advised by the employer of a PFA review. Mr. Voth stated that he was aware of two people who were, at that time, receiving the PFA at the continual

rate. To the best of his information, the PFA of those individuals has not been changed to the frequent rate.

[17] Mr. Voth testified that following the mediation, Mr. McLean approached him after he attended a management briefing and asked if he could speak with Mr. Voth in private. During the private conversation, Mr. McLean said that he had been advised that there were some IPOs who were being paid the PFA at the continual rate and that he was directed to reduce Mr. Voth's and Mr. Owen's PFA to the frequent rate. Mr. Voth was upset by the discussion, as he believed that this had been settled at the mediation and this was his first day of work after it.

[18] Mr. Voth had a second discussion the same day where Mr. McLean told him that he was conducting a review of the PFA of all of the IPOs located in the Case Management Area above the CORCAN. While it was not a personal issue with Mr. McLean, Mr. Voth was upset; he felt that the employer was retaliating against him for what happened the day previously. He questioned Mr. McLean about the timing and their rationale. Mr. Voth said that Mr. McLean told him he was not sure of the rationale.

[19] Mr. Voth contacted Mr. Owen at some point, at home by telephone, as Mr. Owen was on leave. The change in the PFA affected Mr. Owen as well, and at some point Mr. Voth contacted Glen Chochla, a grievance officer from the PSAC, who had represented them at the adjudication/mediation hearing.

[20] The complainants said that they were never contacted or interviewed by anyone from Kent Institution for a PFA review after the adjudication/mediation hearing. A review of their pay stubs confirmed that the PFA rate had been lowered from continual to frequent on September 23, 2004. Ultimately, the CSC did not "claw back" any money arising from the PFA paid at the higher rate.

[21] Mr. Voth said that the change in the PFA rate did not amount to a lot of money but he felt that there was an injustice done to him and Mr. Owen and he wanted it " . . . corrected for the record."

[22] In his examination-in-chief, Mr. Voth said that there were IPOs who received the PFA at the continuous rate. In cross-examination, Mr. Voth said that one of those persons was Ronan Byrne, the CCM. Mr. Voth was reluctant to reveal the name of the other person. He did so after Mr. Fader, the employer's counsel, stated that he had

instructions that the employer would not seek a "claw back" from other employees if further testimony or investigation revealed that other employees were paid the PFA at an incorrect rate. Mr. Voth then testified that he believed Chris de Haan, another IPO, was still paid the PFA at the continual rate.

[23] In cross-examination, Mr. Voth testified that a PFA review was conducted by the employer in February 2001. At that time, he was stationed above the CORCAN area and his PFA was classified at the frequent rate. He filed a grievance at the first level, but was advised by a bargaining agent representative to "drop it" after a grievance meeting at the second level. He discontinued the grievance. Mr. Voth said that his PFA had been paid at the frequent rate previously when he was stationed in the area above the CORCAN but that the rate was bumped up to the continual rate when he was stationed in the segregation unit.

[24] Mr. Voth also testified that he took what Mr. McLean said as a threat, but that Mr. McLean did not threaten him. He described Mr. McLean as ". . . very pleasant about how he presented the issue to me" in the first meeting following the mediation. There is no evidence that Mr. McLean's demeanour changed in the second meeting.

[25] Mr. Owen heard about the review of his PFA from Mr. Voth. He has never spoken to any manager about the change.

[26] Mr. Owen was angry about the change. He said that he " . . . felt there was a personal agenda about it or something." He said that he became party to the complaint because he believed that it was " . . . directed at us" and that he was targeted unfairly. He said that " . . . if they did a proper review and looked at all the positions I would not be sitting here today."

[27] Mr. Owen admitted in cross-examination that he had worked at different locations in Kent Institution. He testified that in the early 1990s, he worked in the offices around the CORCAN and was paid the PFA at the continual rate. Then Warden Paul Urmison conducted a PFA review in 2001 and the PFA rate was changed to the frequent rate. He was moved to a work location outside the gym and his PFA rate was changed to continual. He retained that rate when he was moved back to the area above the CORCAN.

[28] Mr. Owen admitted that the settlement of the earlier grievances on June 29, 2004, covered the period from April 1, 2002, to March 31, 2003, and that was the whole period during which he was in the office outside the gym. He said that when he had worked at the CORCAN area previously, he had received the PFA at the frequent rate before being bumped up to the continual rate when he worked at the office outside the gym.

[29] Mr. Owen was told by Mr. Byrne, another IPO, that his PFA was paid at the continual rate. Mr. Owen also said that he was aware that Mr. de Haan was also paid his PFA at the continual rate and that there was no difference in his job duties compared to the complainants'. Mr. Owen admitted in cross-examination that it was possible that Mr. de Haan was on leave at the time that the PFA was reviewed in 2004 following the adjudication/mediation hearing and that Mr. Byrne was working as the acting unit manager in the segregation unit. Mr. Owen admitted that there were 11 IPOs working in the area above the CORCAN and that as far as he knew, everyone was receiving the PFA at the frequent rate except Mr. de Haan and the CCM.

[30] Neither complainant held an officer position with the PSAC ("the bargaining agent") at the time of the reduction of the PFA rate from continual to frequent following the mediation. Mr. Owen said he had been the First Vice-President of the local of the bargaining agent ". . . two to three years earlier" before his PFA was reduced in September or October 2004.

[31] Bryden Nelmes, Regional Safety Advisor with the CSC in the Pacific Region, testified that he was in a correctional officer (CX-02) position at Mission Institution and was on secondment to Headquarters as a regional safety officer in June 2000. In June 2000, he worked on a PFA review project that was supervised by Maureen Hines, Regional Chief of Staff Relations and Compensation for the CSC. He met with Mr. Urmison and Ms. Hines at Kent Institution, as well as other managers and bargaining agent representatives. As a result of meetings and a study of the PFA, he produced a spreadsheet (Exhibit E-3) which set out the positions at the institution, the person occupying each position and the principle from the *Administration and Application of the Penological Factor Allowance (P.F.A.)*. guideline that applied in each case for the purpose of establishing the relevant PFA rate.

[32] At the time the spreadsheet was created, Mr. Owen and Mr. Voth were working in the office space above the CORCAN area. Mr. Nelmes testified that Principle 9 applied for interviewing inmates, that the rate was ultimately approved by Ms. Hines and that it was adjusted from continual to frequent. Mr. Nelmes testified that it was the intent that all of the IPOs would have the same PFA rate after the 2000-2001 review. He was not aware of any grievances that were filed after the rate was adjusted following this review.

[33] After his initial meeting, the remainder of his project dealt with "quality control" of the PFA forms submitted from the institutions. Mr. Nelmes testified that, as a result of the review, there were a number of adjustments or changes made to the PFA rate at different Pacific Region sites.

[34] Mr. Nelmes testified that he was involved in the earlier grievances filed by Mr. Voth and Mr. Owen that were settled on June 29, 2004. He provided technical support to Ms. Hines at the adjudication/mediation hearing. As part of that hearing, he went on a site tour of Kent Institution and then attended a hearing in Abbotsford. As a result of the site tour, Mr. Nelmes said it was apparent to him and to Ms. Hines that the grievors no longer worked at the site mentioned in their grievances. At the time of the earlier grievances, Mr. Voth and Mr. Owen worked in the area outside the gym. Mr. Nelmes testified that the earlier mediation related to an adjustment of the PFA because Mr. Voth and Mr. Owen had moved from the area near the CORCAN to the area outside the gym. At the time of the 2000-2001 review the complainants were also working in the area near CORCAN.

[35] As a result of the site visit, Mr. Nelmes and Ms. Hines discovered that the complainants were no longer working in the area outside the gym, but were back above the CORCAN area. As a result, they decided to look at all the IPOs working at Kent Institution to see if each PFA was in accordance with the 2000-2001 review. Shortly after that, there was a discussion between Mr. Nelmes, Ms. Hines and Meena Chima, from the Human Resources section. He did not know who conducted the review at Kent Institution but eventually he received a *PFA/OSA Allowance Request for Approval* form for each complainant.

[36] Mr. Nelmes said that there are two parts to the PFA rate: institution security levels and frequency of inmate contact. Kent Institution is a maximum-security institution. Mr. Nelmes said that the complainants were not singled out for harsher

treatment. He said that in the earlier review in 2000-2001 the appropriate PFA rate was frequent. As he did not receive any forms from any other IPOs, he concluded that they were classified at the appropriate rate.

[37] In cross-examination, Mr. Nelmes said that his expectations were that any time that there was a change in the position or location of an IPO, a location review of his or her PFA would take place. His contact at Kent Institution was the Assistant Warden of Management Services (AWMS) but he expected that the location reviews might be delegated to another manager. He said that he had ongoing contact with the AWMS on health and safety issues and would "touch" on the PFA. In cross-examination, Mr. Nelmes said that the question arose as to whether all the IPOs were getting the same PFA rate as a result of the adjudication/mediation hearing. Mr. Nelmes testified that after the PFA review in 2000-2001 neither he nor Ms. Hines were checking to see if the institution complied with the PFA guidelines and the rates established by the review. He admitted that it is possible that if the grievors had not testified at the adjudication/mediation hearing that they may have continued to receive the PFA at the maximum continual rate.

[38] In 2004, Mr. McLean was a unit manager at Kent Institution. He is now a unit manager at Mountain Institution. At the relevant time, he shared the responsibility for managing the Case Management Area with another unit manager and he was managing the parole officers for the general inmate population. He testified that between 2000 and 2005 the IPOs received the PFA at the frequent rate.

[39] Mr. McLean said that at the time of his review, Mr. Byrne was the Acting Unit Manager for the Segregation Unit and he was not working in the area above the CORCAN. Kathleen Duncanson was acting in his position as CCM and was paid the PFA at the frequent rate.

[40] After a morning meeting on the day following the mediation at the institution, the Warden assigned Mr. McLean to review the PFA rates for the IPOs above the CORCAN area. He believes that he was assigned the task because he was the only incumbent unit manager and all the other managers were acting in their positions. He reviewed the PFA rates by writing down the names of the IPOs working for the other unit managers and asked Mark Langer, the Chief of Personnel for Human Resources, to check names with the Pay and Benefits section. He received the results of the review a day or two later and noticed that all the IPOs except Mr. Voth and Mr. Owen were paid

at the frequent rate and that the complainants were receiving the PFA at the maximum continual rate. He passed this information on to Whitney Mullen, Acting AWMS, reviewed it with her and asked for advice as to the next steps.

[41] As a result of the advice received, Mr. McLean filled out a *PFA/OSA Allowance Request for Approval* form for each of the complainants for the PFA at the frequent rate and obtained by email the principle that applied for each of the complainants (Exhibit E-6). On Exhibit E-6, the date the PFA was requested was typed in as 2003-08-01, but this is stroked out and a handwritten date of 04-10-01 is substituted and initialled "MH." I take these to be the initials of Ms. Hines who also signed the form approving the "max frequent" rate for each complainant. Mr. Nelmes testified that the typed date on the form was the date of the move to the area above the CORCAN and that the handwritten date was the effective date of the change in the PFA rate approved by Ms. Hines.

[42] Mr. McLean said that Mr. de Haan was not included in the review as his position was assigned to the segregation unit and that he was paid the PFA at the maximum continual rate. At the time of the review, he was on leave. Mr. Byrne was the CCM working in the segregation unit and was entitled to the PFA at the maximum continual rate.

[43] Mr. McLean confirms that he spoke to Mr. Voth about the PFA review. He said that he told Mr. Voth that it looked like his PFA rate would be changing from continual to frequent. Mr. McLean said that Mr. Voth asked him whether there would be a "claw back," and he was unable to give him a definitive answer. Mr. McLean said that he did not speak to Mr. Owen as he was not supervising him and Mr. Owen was away from the institution on leave. Mr. McLean described the tone of the conversation as cordial. Mr. McLean testified that he did not try to intimidate or harass the complainants as a result of their grievances, which were settled at the adjudication/mediation hearing.

[44] At the time of the conversations, Mr. McLean was not privy to the settlement agreement of the previous grievances. He was apparently coincidentally at the same hotel on the same day on another grievance matter, while Mr. Owen and Mr. Voth were at the hotel for the earlier grievance adjudication/mediation hearing.

[45] In cross-examination, Mr. McLean said that he was not aware of the precise date when he was asked to review the PFA rates of the IPOs. He confirmed that he spoke to Mr. Voth on the same day that he was asked by the Warden to do the review. He said that while it was tough to remember all the names of the persons whose PFA he reviewed, he was able to provide the names of six persons, and he testified that he reviewed the PFA for "11 or so" IPOs. He was provided with the spreadsheet and the PFA principles to conduct the review. However, the spreadsheet was not up to date. Mr. McLean was unaware of any tracking system that the employer had to monitor the PFA rates of employees moving to different work locations within the institution. He confirmed that he conducted a paper review, and he did not interview any of the IPOs. He said that the request for a review did not come as a surprise to him because as a manager you review things from time to time.

[46] Mr. McLean recalls that a number of the IPOs moved from the area outside the gym to the area above the CORCAN on June 7, 2004. He looked up this information. Mr. McLean was not advised by anyone at the institution that a PFA review needed to be conducted each time an employee moved to a different work location within the institution. He said that there was no system in place to track the PFA of employees who moved to different work sites in the institution. Prior to his arrival at Kent Institution, Mr. McLean had been an AWMS at another institution and was responsible for managing the PFA for those employees. He was not at Kent Institution at the time of the 2000–2001 PFA review.

[47] Mr. McLean confirmed that he did not review the PFA rate of Mr. de Haan when he came back from leave. He said that he did not talk to Mr. Byrne and that this was an oversight on his part, as Mr. Byrne was not working in the area.

[48] From a review of an email string dated July 28, 2004, filed as Exhibits E-4 and E-6, it appears that on that date at least, Mr. McLean was uncertain of whether there would be a "claw back," and he was unclear why the PFA rate was being reviewed. In an email dated July 28, 2004, at 12:47, Mr. Nelmes wrote to Mr. McLean and Ms. Mullin as follows:

. . .

> *I'm trying to confirm exactly what information was relayed to the IPO's in reference to their PFA level as the result of the recent mediation stemming from the PFA adjudication.*

> *Specifically, were they advised that any overpayment would be clawed back? Our normal procedure is to make any decrease effective the time of the review.*
>
> . . .

[49] Mr. McLean wrote back at 13:20 with the following:

> . . .
>
> *The recent PSSRB mediation with Randy and Val is not sharable they tell me. As to the current situation, Randy Voth and Barrie Owen have been on Max constant because they were working in a different area but have since moved up above Corcan. I was asked to change their PFA to frequent, my question to HR was what is my justification as I have no document that tells me that this is the level or how is was decided for that area, I am signing for this with nothing to support it. Both staff have indicated they will grieve it if it is done, so I need the info so I can justify what I am doing. I have no idea about claw back, HR is requesting the date they moved up to the area to be on the PFA from. . . .*
>
> *I know you and Dave did this review some time ago at Kent but no one here has been able to provide this information.*
>
> . . .
>
> [*Sic* throughout]

[50] Ms. Mullin emailed Mr. McLean that the Case Management Area was rated as frequent under section 4, "Degree of Exposure", from the *Administration and Application of the Penological Factor Allowance (P.F.A.)* guidelines. Principle 12 applied, as the IPOs were required to interview inmates.

[51] Ms. Hines was delegated the responsibility of approving the PFA by the Deputy Commissioner of the CSC. Ms. Hines was involved in a site-by-site review of the PFA within the Pacific Region commencing in June 2000. She delegated the responsibility to Mr. Nelmes to meet with management and bargaining agent representatives at the Pacific Region sites. Management at Kent Institution did the work and provided the PFA forms to Mr. Nelmes. He then prepared a spreadsheet. Mr. Nelmes presented his review to her and when she had questions, he would go back to Kent Institution for further information. Once she was satisfied, she would sign off on the PFA rate for each position. Ms. Hines signed off on the spreadsheet, filed as Exhibit E-3, on February 12, 2001.

[52] Ms. Hines became involved with the complainants' grievances that were settled at mediation. She testified that the settlement covered the PFA rate for the complainants at the time when they were located outside of the gym. She said that the employer did not negotiate the PFA rate for any other location during the mediation.

[53] Ms. Hines testified that it was not true that the grievors' PFA rates were reduced as a result of their filing grievances. She said that it became apparent at the mediation meeting that the PFA rates for the IPOs may not be consistent and she concluded that ". . . we should have the Institution take a look at the PFA rates to ensure consistency."

[54] Ms. Hines testified that at the time of the mediation, she had worked for the employer for 22 years and had been involved with hundreds of grievance settlements. She was not upset by the settlement reached with the complainants on June 29, 2004.

[55] In cross-examination, Ms. Hines testified that the AWMS was tasked with ensuring that the PFA rates were current and up to date within Kent Institution. She said that the AWMS would have received information on the PFA during the 2000 review. From her perspective, she expected that the AWMS would ensure that the PFA change forms were completed if there were any changes in the locations of employees. Ms. Hines testified that there was no tracking system or follow up by her to ensure that the PFA rates were kept current. For example, while the name of the institution shows up on the employee's pay stub, the work location within the institution does not appear. When it came to her attention at the adjudication/mediation hearing that there were issues with the consistency of the PFA rates for the IPOs, she did not order an institution-wide review of the PFA rates for all employees and she is not aware of any other institution-wide review.

III. Summary of the arguments

A. For the complainants

[56] The complainants acknowledged that the burden of proof rests with them to establish a breach of section 23 of the former *Act*. The complainants said that the respondents violated paragraphs 8(2)(*a*) and (*c*) of the former *Act* immediately following the mediation.

[57] The complainants said that the issue is whether the respondents, by actions or words, attempted to intimidate or punish them for exercising their rights in relation to the adjudication in PSSRB File Nos. 166-02-31979 and 31980. The uncontested evidence of the complainants was that they felt that the employer retaliated against them and point to the timing right after the mediation and their feelings of shock. The decision-maker should apply the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), in assessing the credibility of the witnesses.

[58] The complainants said that the breach of rights is subtle and that in many cases, breaches of section 23 involve subtle fact patterns, as blatant fact patterns never get to adjudication. The complainants rejected the employer's argument that it was simply fixing a problem with the administration of the PFA when it was brought to their attention and that it was within their management rights to do so. The complainants say that the speed at which the employer reacted to the information obtained at the mediation session was completely at odds with the employer's normally lax method of administering the PFA at Kent Institution prior to that time. This was the first time that Mr. McLean was required to review the PFA, and he required training to do so. Mr. McLean did this work at a different institution, and it strains credibility to suggest that he would not know the rationale for the change in the PFA when he was directed to make it. On their own testimony, Ms. Hines and Mr. Nelmes are incompetent or negligent about the administration of the PFA in the region by not following up in the four or five years after the 2002 review to ensure that the PFA met the standard. It would be an incredible waste of resources to have a first review in 2002 and then not follow up with another review.

[59] The complainants were the only two individuals whose PFA rate was reduced. The employer singled them out. The fact that ultimately the employer did not "claw back" the PFA that was incorrectly paid does not change the fact that the employer initially intended to claw it back. Surely, this issue would have been fresh in the mind of the employer when Mr. de Haan returned from leave, yet his PFA rate was not corrected. This differential treatment supports a finding that the complainants were singled out. The only distinction between the situation of the complainants and Mr. de Haan was that they filed grievances on the PFA, which went to a hearing.

[60] Further, Ms. Hines' action in changing the effective date of the change of the PFA was an attempt to prevent the filing of a grievance by ensuring that the change in the PFA rate would not result in a recovery or claw back of the incorrect rate paid to the employee.

[61] Further, the complainants said that Mr. McLean conducted a paper review of the PFA for the IPOs only and the failure to conduct a review of the PFA for the entire institution demonstrates that the respondents were targeting the complainants.

[62] The complainants acknowledge that the unfair labour practice allegations are serious and findings against the respondents may have a negative effect on the respondents' careers. This is true of any unfair labour practice complaint; it should have an impact. The adjudicator should weigh the evidence carefully to ensure no further injustice. The evidence supports the complaints.

[63] The complainants rely on *Dubreuil v. Treasury Board (Correctional Service of Canada) et al.*, 2006 PSLRB 20, at paras. 62 and 70. The complainants asked that if I found that there was a violation of sections 8 and 23 of the former *Act* that I order the respondents cease and desist from violating the former *Act*, that a copy of the decision be distributed to all members of the bargaining unit and that I retain jurisdiction over the implementation of the decision.

B. <u>For the respondents</u>

[64] The employer argued that unfair labour practices are the ". . . high crimes of labour relations." The burden was on the complainants to establish the breach of their rights and they failed to do so.

[65] The decision-maker should not draw an inference of anti-union animus from the employer's failure to justify a difference in how employees were treated; there must be some evidence giving credence to the allegation that the distinction was motivated by anti-union animus. There must be an intent to discriminate: *Social Science Employees Association v. Canada (Attorney General)*, 2004 F.C.J. No. 741 (FCA). The complainants' subjective belief of unfair treatment is not sufficient proof of anti-union animus. The complainants must show actions, words or written communication that demonstrates anti-union animus and the intent to prevent or intimidate the complainants from exercising a right conferred by the former *Act*: *Cloutier v. Leclair*, 2006 PSLRB 5.

[66] The decision-maker should not infer anti-union animus or any intent to prevent or intimidate the complainants from exercising their rights under the former *Act* because of the timing of the mediation and the PFA review. The concept of *res ipsa loquitor* does not apply to assist the complainants in discharging their burden of proof. There was a complete explanation of why the employer reviewed the PFA that applied to the IPOs. There was an innocent explanation or defence for conducting the review and changing the complainants' PFA rate after a mediated settlement. The respondents only became aware of the lack of a consistent application of the PFA and the misapplication of the PFA to the complainants' workplace assignment as a result of the grievances and mediation. The practical reality is that with many movements of employees in a dynamic workplace, the failure by the employer to monitor the consistent application of the PFA was a red herring. Once the consistency problem came to light, the employer's representatives could not ignore the lack of consistency, as this would be a violation of the *Financial Administration Act*, R.S.C. 1985, c. F-11. The complainants working in the area above the CORCAN had been assessed in 2002 with a PFA rating of frequent; they did not grieve that rating, and the evidence is overwhelming that the intention of the employer was to apply the PFA rating universally to all the IPOs. It cannot be said that there was any intent to violate the complainants' rights or that there was an intent to discriminate against them.

[67] Ms. Hines had been involved in hundreds of grievance settlements prior to the adjudication hearing in June 2004. She was not upset by the settlement in this case. There is no proof of intent to violate the former *Act* where the employer sought to uniformly apply the same PFA rate to all the IPOs working at the same work site. There was no evidence that the respondents forced, threatened or intimidated the complainants: *Sabir et al. v. Richmond et al.*, 2006 PSLRB 118.

[68] At the time when the review was conducted, Mr. Byrne's PFA level was properly set at continuous as he was in the Segregation Unit. Mr. de Haan had a continuous stint of work in the Segregation Unit prior to going on extended leave. He was on leave at the time of the review. In a dynamic and challenging workplace with day-to-day concerns of managing the safety and security of inmates, the ". . . practical reality is that you can't expect a batting average of 100." The policy of not clawing back a PFA overpayment is recognition that there are no resources to track the PFA; any overpayment is a mistake, and the employees should not have to suffer.

[69] The complainants have argued that the "speed" of the employer's review demonstrated discriminatory treatment; however, once the issue was brought to the employer's attention, it was a very simple and speedy exercise to compare the position to the grid, and Regional Headquarters had delegated this responsibility to the institution. Everybody is supposed to get the same rate and the employer has not clawed back any money. Placing the complainants in the position of any other IPO in the area above the CORCAN cannot form the basis of an unfair labour practice complaint.

[70] The decision-maker should not draw an adverse inference from the failure of the employer to call the Warden or the AWMS. The burden of proof rests with the complainants. The decision to review the PFA following the mediation was a decision undertaken by Ms. Hines at Regional Headquarters.

C. Reply of the complainants

[71] In reply, the complainants said that employees had no burden to notify the employer that their PFA rate was incorrect. It was a simple matter for the employer to do a paper review of the PFA of all employees. The intent to discriminate is demonstrated by the timing of the review, the lack of a wide review, the lack of oversight and the failure to change Mr. de Haan's PFA rate when he returned from leave: *Social Science Employees Association*. This is subtle discriminatory treatment of the complainants, but nevertheless, there is a violation of sections 8 and 23 of the former *Act*.

IV. Reasons

[72] The operative sections of the former *Act* are section 23 and subsection 8(2), which read as follows:

> ***23.****(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> > *(*a*) to observe any prohibition contained in section 8, 9 or 10;*
>
> . . .

> *(2) Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*
>
> . . .
>
> ***8*** *(2) Subject to subsection (3), no person shall*
>
> (a) *refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act.*
>
> . . .
>
> (c) *seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means to compel an employee*
>
> . . .
>
> *(ii) to refrain from exercising any other right under this Act.*
>
> . . .

[73] The protections under the former *Act* for the exercise of collective agreement rights are important. The burden of proof, however, rests with the complainants to establish a breach of their rights on a balance of probabilities. I find that they have failed to do so.

[74] I have considered the credibility of all the witnesses, and I find that they gave credible and reliable evidence. This is a case primarily of inferences to be drawn from the basic facts.

[75] In my view, the parties settled the PFA for Mr. Voth and Mr. Owen at the adjudication/mediation hearing for the workplace setting near the gym. The proper PFA rate for this location was the maximum continual rate. During the course of the adjudication/mediation hearing on June 29, 2004, Ms. Hines and Mr. Nelmes learned

that there was an issue concerning the consistency of the PFA rate for the IPOs at Kent Institution, and also that the complainants worked at a different site from that mentioned in their grievances. As a result, the employer decided to conduct a PFA review of all of the IPOs at Kent Institution. Mr. McLean's review determined that the proper PFA rate was the maximum frequent rate for the work location above the CORCAN. The complainants had been paid at that rate for work performed above the CORCAN, where they had worked before moving to the gym area.

[76] The employer failed to adjust the PFA rate when the complainants moved from the CORCAN to the area outside the gym but also failed to adjust the PFA rate when the complainants moved back to the area above the CORCAN. It was clear from the evidence of Ms. Hines and Mr. Nelmes and Mr. McLean that the employer had no system in place to monitor the PFA impacts when employees moved to different work sites within the institution. In Ms. Hines' view, it was the AWMS's task to provide her with a new *PFA/OSA Allowance Request for Approval* form when an employee's work assignment was changed to a different location within an institution.

[77] The change in the PFA rate occurred after the mediation meeting but was not part of the mediation settlement and Ms. Hines, the person with the delegated responsibility to administer the PFA in the Pacific Region, only became aware of the error in the rate after the site inspection during the course of the adjudication/mediation hearing.

[78] The complainants were suspicious of the timing of the PFA review conducted by Mr. McLean as they had just settled the issue at mediation; however, the evidence before me conclusively demonstrates that the complainants were paid incorrectly at the continual rate when they were stationed above the CORCAN. This only came to the attention of Ms. Hines during the grievance process and the mediation. It is true that the review took place after the mediation and that perhaps but for the adjudication/mediation hearing, Mr. Voth and Mr. Owen would have been paid the PFA at the maximum continual rate. The PFA rate is not static and relates in part to changes in the work location of an employee.

[79] In my view, once the employer learned of the inconsistency and the incorrectly paid PFA rate, it made good sense for it to determine whether there was a problem with the PFA rates paid to the IPOs by conducting a PFA review at Kent Institution. As a person with the delegated authority to administer the PFA, Ms. Hines had a

responsibility to ensure that the PFA was correctly administered in the region. I see no attempt by Ms. Hines or the other respondents to undermine the settlement of the earlier grievances at mediation or to penalize the complainants for participating in the grievance, adjudication or mediation processes and no attempt to intimidate or penalize the complainants for exercising their rights under the collective agreement. The *Memorandum of Settlement* specifically states that the terms of the memorandum ". . . are without prejudice or precedent to the rights or interests of the parties in any other matter." The issue settled was the grievances related to the proper PFA rate at the work location near the gym and not the proper PFA rate for the work site above the CORCAN. The settlement did not bind the employer to not review or change the PFA applicable to the complainants in the future.

[80] In fact, the employer did not penalize the complainants by recovering the money advanced for the incorrect rate for the PFA at the area above the CORCAN. From the oral evidence of Mr. McLean, it is clear that he did not know of the policy about the PFA "claw backs" at the time when he conducted his review. This evidence was unchallenged, and it had a ring of truth. It is clear from the oral and documentary evidence before me that "claw backs" occurred from the point at which the employer discovered the mistake and that the employer did not retroactively "claw back" the PFA paid at an incorrect rate from the date of the move that should have triggered a PFA review. According to Mr. Nelmes, this was the policy, and it was communicated to Mr. McLean in the email dated July 28, 2004, at 12:47 (Exhibit E-5). While Mr. McLean submitted the *PFA/OSA Allowance Request for Approval* dated for the date of the move back to the area above the CORCAN, Ms. Hines approved it only for October 1, 2004. Ms. Hines was not cross-examined with the suggestion that she did this to deny a grievance, and her approval of a different date seems to be in accordance with the policy expressed by Mr. Nelmes that the employer did not retroactively "claw back" the PFA incorrectly paid. This is consistent with an approach that the employer did not penalize an employee for the employer's failure to monitor the effects of a change of the PFA rate arising from movement within the institution.

[81] The employer did not conduct a system-wide review of the PFA rates after discovering the problem with the complainants' rates. This was a problem at least for Mr. Owen and a rationale for his complaint. I have considered whether this is discrimination from which I can infer anti-union animus or a penalty that was imposed on the complainants for exercising their rights to grieve. In my view, failing to conduct

an institution-wide or a region-wide audit following the discovery of a problem with the complainants' rates and simply conducting an audit of the IPOs' PFA rates does not establish anti-union animus or a penalty to the complainants for exercising their rights to grieve the PFA rate in the earlier grievances. In changing the complainants' PFA rate to the frequent level, the employer was simply restoring the correct PFA rating and a rating which the complainants had previously received for work in the same venue. It was the employer's intent that all the IPOs should be treated equally regarding the PFA rate.

[82] It is unfortunate that the employer did not review the PFA rating for the two other IPOs who were working in the Segregation Unit or on leave and who would have been entitled to the PFA at the maximum continual rate. Unfortunately, due to a lack of a monitoring system, Mr. de Haan's PFA rate was not adjusted when he returned to work in the area above the CORCAN. In light of the evidence, I do not accept that the grievors were deliberately singled out for a change in their PFA as punishment or penalty for grieving the PFA rate at an earlier time.

[83] In a perfect world, perhaps an employer might conduct an institution-wide review or regional audit once learning of a lack of consistency in the PFA rates paid within a group of IPOs. It is odd that the employer had no system in place to effectively monitor and update the PFA rates paid to employees. An audit would require the expenditure of management resources. It is for the employer, however, to manage its workforce and to decide whether to monitor or audit the PFA paid. An audit or review does require the use of resources, and it is a management decision to review or not review the PFA. The review of the IPOs' rate when there was no monitoring system or region-wide audit does not establish anti-union animus or an unfair labour practice concerning the complainants.

[84] The complainants' representative has invited me to drawn an adverse inference from the failure of the employer to call Mr. Lubimiv, the Warden, or the AWMS. I decline to draw an adverse inference in this case. The burden of proof in a section 23 case rests with the complainants. In this case, the evidence clearly demonstrates that the decision to review the PFA rates of the IPOs was a decision initiated by Ms. Hines as a result of the site review showing that both complainants had moved to the area above CORCAN and information communicated at mediation that the PFA rates were paid inconsistently to the IPOs. The AWMS was tasked with ensuring that the PFA rates

were current and up-to-date after the 2000 review. It is also clear that there was no tracking system in place to monitor any ongoing changes in the PFA rate arising as a result of movement of employees' work locations within the institution. The policy was that once a change in the PFA rate was detected, the change would be made but there would be no retroactive effect of the change in terms of clawing back money from the employee. Mr. McLean was tasked by the Warden with the PFA review following the mediation, but it is clear that the review arose as a result of information that came to light during the mediation process, including a change in the employees' work location from the date of the grievances to the time of the mediation. In my view, the evidence of the Warden or the AWMS was unnecessary for the employer to defend the complaint made given that the change was initiated by Ms. Hines, For all the above reasons, I decline to draw an adverse inference in this case.

[85] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[86] The complaint is dismissed.

June 14, 2007.

Paul Love,
Board Member