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File: 166-02-33859

Citation: 2007 PSLRB 55



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

KENNETH BUSHORE

Grievor

and

**TREASURY BOARD
(Department of National Defence)**

Employer

Indexed as

Bushore v. Treasury Board (Department of National Defence)

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

REASONS FOR DECISION

Before: D.R. Quigley, adjudicator

For the Grievor: Laurin Mair, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Heard at Edmonton, Alberta,
February 14, 2007.

REASONS FOR DECISION

I. Grievance referred to adjudication

[1] On November 20, 2003, Kenneth Bushore (“the grievor”) filed a grievance against the Department of National Defence (DND or “the employer”) alleging that he was “unfairly compensated for [the] time period of acting position.” As corrective action he requests “fair compensation for [the] time period.”

[2] In his opening remarks the grievor’s representative stated that the issue before me does not concern a classification level or a retroactive date of appointment but rather an error in the employer’s calculations; it is a question of appropriate compensation.

[3] Counsel for the employer stated that the grievor was fairly compensated according to the Treasury Board’s *Terms and Conditions of Employment Policy* (Exhibit E-6).

[4] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

[5] The grievor testified and his representative filed six exhibits. Counsel for the employer called one witness and filed nine exhibits.

II. Summary of the evidence

[6] Prior to April 1, 1998, the grievor was employed as a contract inspector at the GL-COI-10 group and level with the Department of National Defence (DND) in CFB Cold Lake, Alberta.

[7] From April 1, 1998, to May 1, 2001, the grievor assumed the duties and responsibilities of a position at a higher level (a project/contract manager). This position was subject to a classification review but at the time that he first assumed the duties, it was classified at the EG-04 group and level. On June 10, 2003, Lieutenant-Colonel N.E. Russell decided to compensate the grievor for having assumed those duties and responsibilities (Exhibit E-3). Therefore, on September 11, 2003, the grievor received a letter from Tim Stouffer, DND Human Resources Services Manager, offering

him a retroactive acting appointment at the EG-04 group and level from April 1, 1998, to May 1, 2001 (Exhibit E-1).

[8] The grievor testified that the employer had advised him in April 1998 that the work description of his substantive position at the GL-COI-10 group and level was also being reviewed for a possible reclassification to the EG-04 group and level. However, since neither he nor his supervisor could predict what the outcome of the classification review would be, the grievor continued to work the 40-hour workweek provided for in the collective agreement for the GL classification while acting as a project/contract manager from April 1, 1998, to May 1, 2001, despite the fact that the EG collective agreement provided for a 37.5-hour workweek.

[9] In May 2001 a classification review committee recommended that the grievor's substantive position be reclassified from the GL-COI-10 group and level to the EG-04 group and level.

[10] The grievor identified Exhibit G-1 as article 64 ("Pay Administration") and Appendix A ("Annual Rates of Pay") of the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Technical Services group (expiry date: June 21, 2003), which group includes the EG classification. This collective agreement provides for a 37.5-hour workweek.

[11] The grievor identified Exhibit G-2 as article 61 ("Pay Administration") and the hourly rates of pay for the Operational Services group collective agreement between the Treasury Board and the PSAC (expiry date: August 4, 2003), which group includes the GL classification. This collective agreement provides for a 40-hour workweek.

[12] The grievor identified Exhibit G-3 as the employer's calculations for the acting pay he received from April 1, 1998, to May 1, 2001. The employer's calculations were broken down into 20 different time frames because of changes made to either of the collective agreements.

[13] The grievor testified that the employer annualized his hourly rate of pay as a GL-COI-10 based on a 40-hour workweek and then subtracted that amount from the EG-04 annual rate of pay. The difference was then divided by the number of working days in a calendar year and multiplied by the number of days that the grievor acted at the EG-04 level. For example, from April 1 to June 21, 1998:

$$\begin{array}{r}
 \$39,816.00 \quad (\text{EG-04 annual salary}) \\
 - \underline{\$38,005.00} \quad (\text{GL-COI-10 annualized salary}) \\
 \$ 1,811.00 \\
 \div \underline{260.88} \quad (\text{working days in a calendar year}) \\
 \$ \quad 6.95 \\
 \times \underline{58} \quad (\text{number of days acting}) \\
 \$ \quad 402.63
 \end{array}$$

Time period (58 days)	EG-04 annual salary	GL-COI-10 annualized salary	Difference in pay	Total number of acting days	Amount to be paid
April 1 to June 21, 1998	\$39,816.00	\$38,005.00	\$1,811.00	58	\$402.63

[14] Therefore, according to the employer's calculations, the grievor was owed \$402.63.

[15] The grievor, however, based his calculations on an hourly rate of pay (Exhibit G-4):

$$\begin{array}{r}
 \$ 20.35 \quad (\text{EG-04 hourly rate}) \\
 - \$ \underline{18.21} \quad (\text{GL-COI-10 hourly rate}) \\
 \$ \quad 2.14 \\
 \times \quad 58 \quad (\text{number of days acting}) \\
 \underline{\times \quad 7.5} \quad (\text{daily hours}) \\
 \$930.90
 \end{array}$$

Time period (58 days)	EG-04 annual salary ÷ 1956.6 *	GL-COI-10 annualized salary ÷ 2087.04**	Difference in pay	Total number of acting days	Amount to be paid
April 1 to June 21, 1998	\$39,816.00 = \$20.35	\$38,005.00 = \$18.21	\$2.14	58	\$930.90

*1956.6 = hours for one calendar year based on a 37.5-hour workweek.

**2087.4 = hours for one calendar year based on a 40-hour workweek.

[16] According to the grievor's calculations, he should have been paid \$930.90, and therefore the employer owes him an additional \$528.27 in compensation for that time frame.

[17] As another example, the grievor referred to Exhibit G-3 covering the period from December 23, 1999, to March 29, 2000, in which he worked a total of 70 days. According to the employer's calculations he was paid \$925.21:

$$\begin{array}{r}
 \$43,081.00 \quad (\text{EG-04 annual salary}) \\
 - \underline{\$39,632.89} \quad (\text{GL-COI-10 annualized salary}) \\
 \$ \quad 3,448.11 \\
 \div \quad \underline{260.88} \quad (\text{working days in a calendar year}) \\
 \$ \quad \quad 13.21 \\
 \times \quad \underline{70} \quad (\text{number of days acting}) \\
 \$ \quad 925.21
 \end{array}$$

[18] The grievor noted that if he divided \$925.21 by the 70 days that he had worked, the difference in the daily rate of pay would be \$13.21. If he then divided that daily rate of pay by a 7.5-hour workday, the difference in the hourly rate of pay would be \$1.76. However, if he divided the daily rate of pay by an 8.0-hour workday, the difference in the hourly rate of pay would be \$1.65:

$$\begin{array}{r}
 \$925.00 \\
 \div \quad \underline{70} \\
 \$ \quad 13.21 \\
 \div \quad \underline{7.5} \\
 \$ \quad 1.76
 \end{array}
 \qquad
 \begin{array}{r}
 \$925.00 \\
 \div \quad \underline{70} \\
 \$ \quad 13.21 \\
 \div \quad \underline{8.0} \\
 \$ \quad 1.65
 \end{array}$$

[19] The grievor referred to Exhibit G-5, the compensation paid by the employer for approved overtime from March 21 to 31, 2000, where the employer used an hourly rate of pay (\$3.03) in its calculations. He stated that since he continued working his 40-hour workweek he was entitled to be paid overtime for the additional 0.5 hours per day that he worked. According to both collective agreements, overtime is calculated on the basis of 1.5 hours for every hour worked, so the grievor calculated that he was owed $0.5 \times 1.5 = 0.75$ hours per day of overtime compensation. For example, his calculations for the overtime that he worked from April 1 to June 21, 1998, are as follows:

$$\begin{array}{r}
 \qquad \qquad 58 \quad (\text{days}) \\
 \times \quad 0.75 \quad (\text{overtime compensation}) \\
 \times \quad \underline{\$ \quad 20.35} \quad (\text{EG-04 hourly rate}) \\
 \qquad \qquad \$885.23
 \end{array}$$

[20] On October 22, 2003, the grievor sent an email (Exhibit G-6) to R.D. Thompson, with a copy to Janice Clapp, a DND compensation advisor, requesting payment of overtime in the amount of 0.5 hours per day for the entire period that he had acted - from April 1, 1998, to May 1, 2001.

[21] On October 23, 2003, Ms. Clapp replied that if the 0.5-hour daily difference had been worked and approved as overtime, then extra duty sheets for all the periods had to be completed and signed.

[22] The grievor testified that since his supervisor for that period had left the DND, he brought his concerns to his current manager. He was informed that to compensate him for the additional 0.5 hours per day that he had worked, he could take one and a half hours for lunch every day for the next three years. The grievor stated that it was at this point that he decided to stop pursuing overtime compensation for the acting appointment period.

[23] In cross-examination, the grievor acknowledged that the letter of September 11, 2003 (Exhibit E-1), offering him the retroactive acting appointment did not state that he would be compensated for working a 40-hour workweek. He stated, however, that he only received this letter five years after he had begun working the additional hours.

[24] The grievor agreed that the EG-04 rate of pay is based on an annual salary and that the GL-COI-10 rate of pay is based on an hourly rate. His calculations (Exhibit G-4) were based on the EG-04 annual rate of pay converted to an hourly rate of pay.

[25] The grievor agreed that as a GL-COI-10 his workweek consisted of 40 hours and that if he had to work overtime he needed to seek prior approval from his supervisor and an approval form had to be completed.

[26] In reply, the grievor confirmed that all the overtime that he worked and was compensated for was authorized.

[27] Lise Pelletier has been a Treasury Board policy analyst in the compensation labour relations field since April 2006. She noted that she has over 32 years of experience in compensation-related matters.

[28] Ms. Pelletier identified Exhibit E-5 as the calculations that she used to determine the grievor's rate of pay for the period April 1, 1998, to May 1, 2001. Her calculations were as follows:

CALCULATION TO DETERMINE RATE OF PAY

1. *Determine the annual salary rate for COI-10 classification in order to establish the new rate of pay on appointment to the EG-4 classification.*

(COI-10) - hourly rate

$\$18.21 \times 52.176 \times 40h p. w. = \$38,004 P.A.$

2. *Because the maximum of the EG-4 (\$48,441) is greater than the COI-10 (\$38,044)* [sic] it is a promotion and the employee is to receive the lowest increment amount in the EG4 range, i.e. \$1530, added to his COI-10 salary rate.*
3. $\$38,004 + \$1530 = \$39,534$. *The nearest rate of pay in EG-4 scale closest to but not less than his current rate is the 2nd rate of \$39,816.*

Amount of Annual Salary = \$39,816

[*The parties recognized that this was an error and the correct rate is \$38,004.]

[29] Ms. Pelletier explained that 52.176 represents the weekly rate of pay (including .176 for a leap year) used to annualize the grievor's GL-COI-10 salary.

[30] According to section 24 of the Treasury Board's *Terms and Conditions of Employment Policy* (Exhibit E-6), Ms. Pelletier had to determine the rate of pay on promotion. Section 24 states the following:

Rate of pay on promotion

24. (1) *The appointment of an employee described in Section 23 constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed exceeds the maximum rate of pay applicable to the employee's substantive level immediately before that appointment by:*

- a. *an amount equal to at least the lowest pay increment for the position to which he or she is appointed, where that position has more than one rate of pay; or*
 - b. *an amount equal to at least four per cent of the maximum rate of pay for the position held by the employee immediately prior to that appointment, where the position to which he or she is appointed has only one rate of pay.*
24. (2) *Subject to Sections 27 and 28, on promotion, the rate of pay shall be the rate of pay nearest that to which the employee was entitled in his or her substantive level immediately before the appointment that gives the employee an increase in pay as specified in subsection (1) above; or an amount equal to at least four per cent of the maximum rate of pay for the position to which he or she is appointed, where the salary for the position to which the appointment is made is governed by performance pay.*

[31] Ms. Pelletier testified that the grievor met the definition of promotion referred to in the Treasury Board's *Pay Rate Change Policy* (Exhibit E-7) that she described as a pay administration guide:

...

2 Promotion

On promotion, an employee is entitled to the rate of pay nearest the rate of pay received immediately before the appointment, that gives an increase in pay that is at least equal to the lowest pay increment for the new position, where the new position has more than one rate of pay. (Public Service Terms and Conditions of Employment Regulations (PSTCE Regs. 24.1)).

Note:

Former employees are not to be paid retroactively on promotion unless the appointment certificate is authorized prior to the effective date of termination of employment.

2.1 Procedure

Determine the lowest pay increment of the position to which the person is appointed.

Determine the difference between the maxima of the positions appointed to and from.

If the difference between the maxima of the positions exceeds the lowest pay increment, the appointment constitutes a promotion.

Add the amount of the lowest pay increment to the rate of pay applicable to the position held immediately prior to the appointment.

Select the rate of pay in the pay range for that position which is nearest to but not less than that calculated above.

If the position is subject to an equalization adjustment, the annual equalization amount must be added to each of the rates of pay before applying the above procedures.

...

[32] Ms. Pelletier referred to the following example in the *Pay Rate Change Policy* that a compensation specialist would use in an instance such as the grievor's:

...

Example 2

A GG MMM-2 is appointed to a CC-3 position.

GG MMM-2 rate of pay:

\$14.58 per hour (zone 2)

CC-3 rates of pay:

\$30,224 - 30,540 - 30,856 - 31,173

Establish the equivalent annual rate for the GG MMM-2 position by applying the formula:

52.176 X standard work week X hourly rate.

Using the standard work week and the hourly rate for a GG MMM-2, the equivalent annual rate is \$30,314.46 (52.176 X 40 X \$14.58).

This annual rate is regarded as a maximum in applying regulations to determine the annual rate in the new classification.

Determine the lowest pay increment in the range for the position to which the employee is appointed:

$$\$30,540 - \$30,224 = \$316$$

Determine the difference between the maxima of each position:

$$\$31,173 - \$30,314.46 = \$858.54$$

Since the difference between the maxima (\$858.54) exceeds the lowest pay increment (\$316) of the CC-3, the appointment constitutes a promotion.

The pay rate for this employee would be \$30,856 based upon the following:

<i>Annual GG MM-2 rate of pay</i>	<i>\$30,314.46</i>
<i>Plus lowest CC-3 increment</i>	<i>\$ 316.00</i>
<i>Total</i>	<i>\$30,630.46</i>

The rate of pay in the CC-3 pay range which is nearest to but not less than the total of \$30,630.46 is \$30,856.

...

[33] Ms. Pelletier noted that the *Terms and Conditions of Employment Policy* (Exhibit E-6) determines the rate that applies, and that the *Pay Rate Change Policy* (Exhibit E-7) determines how to proceed on the application of that rate.

[34] In arriving at her calculations (Exhibit E-5), Ms. Pelletier determined that the nearest rate of pay in the EG-04 scale closest to, but not less than, the grievor's current rate of pay was \$39,816.00 according to Appendix A ("EG Annual Rates of Pay (in dollars)") of the Technical Services group collective agreement (expiry date: June 21, 1999) (Exhibit E-8).

[35] Ms. Pelletier identified Exhibit E-9 as her calculations for the period April 1 to June 21, 1998:

...

Amount of Salary Owed for the period from 01.04.98 to 21.06.98

$\begin{aligned} & \$39,816 - \$38,004 = \\ & \$1,812 \text{ p.a. } (\$6.95 \\ & \text{per day}) \times 58 \text{ days} = \\ & \underline{\$402.85} \end{aligned}$	$\begin{aligned} & \$38,286 - \$38,004 - \$282 \\ & \text{p.a. } (\$1.08 \text{ per day}) \times 58 \\ & \text{days} = \underline{\$62.69} \end{aligned}$ <p><i>If you were to compensate for the 2.5 hours per week for the 58 days it would =</i></p> $\begin{aligned} & \$38,286 - \$38,004 = \$282 \\ & \text{p.a. } (\$0.145 \text{ per hour or} \\ & \$0.08 \text{ per } \frac{1}{2} \text{ hr. per day}) \times \\ & 58 \text{ days} = \$4.64 \end{aligned}$ $\$62.69 + 4.64 = \underline{\$67.33}$
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[36] In that same exhibit Ms. Pelletier provided an example of a comparison between a GL-COI-10 working a 40-hour workweek and an EG-04 working a 37.5-hour workweek from April 1 to June 21, 1998:

**Calculation when determining the rate of pay for
COI-10 (40 h.p.w.) to EG-4 - (37 ½ h.p.w.)**

<p><i>For the purpose of this explanation the calculation will be for the period from 1/4/98 to 21/6/98. This calculation would apply for the entire period of acting pay.</i></p> <p><i>The rate of pay is determined in accordance with the Public Service Terms and Conditions of Employment.</i></p>	<p><i>For comparison purposes only the following calculation is based on a 37 ½ hour work week.</i></p>
<p>1. Determine the annual salary rate for COI-10 classification in order to establish the new rate of pay on appointment to the EG-4 classification.</p> <p>(COI-10) - hourly rate $\\$18.21 \times 52.176 \times 40\text{h.p.w.} = \underline{\\$38,004}^* \text{ [sic]}$ P.A.</p> <p>[*The parties recognized that this was an error and the correct rate is \$38,044.]</p>	<p>1. Determine the annual salary rate for COI-10 classification in order to establish new rate of pay on appointment to the EG-4 classification.</p> <p>(COI-10) - hourly rate $\\$18.21 \times 52.176 \times 37.5\text{h.p.w.} = \underline{\\$35,629} \text{ P.A.}$</p>

<p>Because the maximum of the EG-4 (\$48,441) is greater than the COI-10 (\$38,044) it is a promotion and the employee is to receive the lowest increment amount in the EG-4 range, i.e. \$1530 added to his COI-10 salary rate.</p> <p>2. \$38,004 + \$1530 = \$39,534. The nearest rate of pay in EG-4 scale closest to but not less than his current rate is the <u>2nd</u> rate of \$39,816.</p> <p>Amount of Annual Salary = \$39,816</p>	<p>It is a promotion and the employee is to receive the lowest increment amount in the EG-4 range, i.e. \$1530 added to the COI-10 salary rate.</p> <p>2. \$35,629 + \$1530 (lowest increment) = \$37,159. The nearest rate of pay in the EG-4 scale closest to but not less than the current rate is the <u>1st</u> rate of \$38,286.</p> <p>Amount of Annual Salary - \$38,286.</p>
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...

[37] Ms. Pelletier stated that all of her calculations were made in accordance with the *Terms and Conditions of Employment Policy* (Exhibit E-6), specifically the *Rates of Pay on Promotion*, and the relevant collective agreements.

[38] Ms. Pelletier disagreed with the grievor’s calculations (Exhibit G-4) in which he divided the EG-04 annual rate of pay by the number of hours worked in a 37.5-hour workweek (1956.6) to determine the hourly rate of pay. He then converted the hourly rate of pay of a GL-COI-10 to an annual rate of pay and divided it by the yearly number of hours worked in a 40-hour workweek (2087.04) to determine the hourly rate of pay. The grievor then subtracted the hourly rate of pay of a GL-COI-10 from the hourly rate of pay of an EG-04. His final calculations were the number of days worked, multiplied by 7.5 hours, multiplied by the difference.

[39] Ms. Pelletier noted that the *Terms and Conditions of Employment Policy* (Exhibit E-6) only allows a compensation specialist to make calculations based on an annual rate of pay.

[40] Ms. Pelletier stated that when the grievor applied for annual or sick leave during the time that he was acting he based his leave request on a 40-hour workweek. She noted that this did not imply that the employer retroactively recalculated the grievor’s leave request based on a 37.5-hour workweek.

[41] Ms. Pelletier confirmed that the overtime that the grievor worked was calculated using the EG-04 annual rate of pay, as there is no hourly rate of pay for that classification.

[42] With respect to the grievor's testimony concerning the approved overtime from March 21 to 31, 2000 (Exhibit G-5, column 1), Ms. Pelletier stated that the rate used (\$3.03) was based on the grievor's annual rate of pay as a GL-COI-10.

[43] In cross-examination, Ms. Pelletier agreed that a GL-COI-10 is compensated on an hourly basis for a 40-hour workweek and that an EG-04 is paid based on a 75-hour bi-weekly basis or a 7.5-hour workday. In other words, the EG-04 rate of pay is calculated on a daily basis. That bi-weekly calculation is derived by dividing the number of working days in a calendar year (260.88) into the EG-04 annual salary and multiplying it by 10 days.

[44] The employer's calculations for a normal two-week pay period (10 days) would be as follows:

$$\begin{array}{r}
 \$39,816.00 \text{ (EG-04 annual rate)} \\
 \div 260.88 \text{ (days in a calendar year)} \\
 \times \underline{10} \text{ (days)} \\
 \$ 1,526.21 \text{ (bi-weekly or \$152.62 daily)}
 \end{array}$$

[45] When Ms. Pelletier was asked by the grievor's representative to hypothetically calculate the amount that the grievor would have been paid if he had worked 60 hours during a two-week period, she replied that her calculations would be as follows:

$$\begin{array}{r}
 \$39,816.00 \text{ (EG-04 annual rate)} \\
 \div 1956.6 \text{ (hours in a calendar year)} \\
 \times \underline{60} \text{ (hours worked)} \\
 \$ 1,221.35
 \end{array}$$

OR

$$\begin{array}{r}
 \$39,816.00 \text{ (EG-04 annual rate)} \\
 \div 260.88 \text{ (days in calendar year)} \\
 \div 7.5 \text{ (hours in a workday)} \\
 \times \underline{60} \text{ (hours worked)} \\
 \$ 1,221.35
 \end{array}$$

[46] For the purposes of retroactive calculations for classifications that have either an hourly or a daily rate, she stated that the salaries must be annualized.

[47] When referred to the grievor's statement of earnings from March 21 to 31, 2000 (Exhibit G-5), Ms. Pelletier agreed that the amount used to determine the overtime entitlement was the EG-04 hourly rate of pay minus the GL-COI-10 hourly rate of pay multiplied by the number of hours worked.

III. Summary of the arguments

A. For the grievor

[48] The grievor's representative stated that on September 11, 2003 (Exhibit E-1), the employer offered the grievor a retroactive acting appointment from April 1, 1998, to May 1, 2001, as a project contract/manager at the EG-04 group and level.

[49] The issue in dispute is the arithmetic error made by the employer when it calculated the rate at which the grievor was entitled to be paid for the retroactive period claimed. The employer's calculations to determine the grievor's EG-04 annual rate of pay (Exhibits E-5 and E-9) are accurate since the amount of \$39,816.00 is reflected in the EG collective agreement. It is the calculation of the grievor's retroactive pay that is incorrect.

[50] The employer's calculations for the period from April 1 to June 21, 1998, amounted to \$402.63. If that amount is calculated backwards - that is, dividing the amount by the 58 days that the grievor worked and then dividing the amount by the hours in a day - it amounts to an additional 92.5 cents per hour. For example:

$$\begin{array}{r} \$402.63 \\ \div \quad 58 \\ \hline \$ \quad 6.94 \\ \div \quad 7.5 \\ \hline \$ \quad .9255 \end{array}$$

[51] At the time, the grievor's hourly rate of pay at the GL-COI-10 level was \$18.21. By adding 92.5 cents, his hourly rate of pay would be \$19.14. If one were to multiply the hours worked in a calendar year (1956.6) by the hourly rate of pay (\$19.14), the annual salary would be \$37,449.32 and not \$39,816.00. Thus, there is a flaw in the employer's calculations and the grievor is entitled to approximately \$8,000.00 for the three years that he acted as a project/contract manager at the EG-04 group and level.

[52] The employer chose to use the EG-04 annual rate of pay to annualize the grievor's GL-COI-10 rate of pay to determine his retroactive acting pay. However, when it calculated overtime or partial hours worked in a two-week pay period, the employer chose to use the difference between the EG-04 hourly rate of pay and the GL-COI-10 hourly rate of pay.

[53] The grievor's representative argued that the employer is not consistent in its application of the *Terms and Conditions of Employment Policy* and the *Pay Rate Change Policy*.

[54] The grievor's representative acknowledged that the additional 2.5 hours per week that the grievor worked from April 1, 1998, to May 1, 2001, is not in dispute since the grievor recognizes that he did not approach his supervisor for approval.

[55] In conclusion, the grievor's representative referred me to *Rooney v. Treasury Board (Environment Canada)*, PSSRB File No. 166-02-25979 (19950306).

B. For the employer

[56] Counsel for the employer stated that the grievor has been fairly and properly compensated.

[57] The authority to compensate an employee is found in the *Terms and Conditions of Employment Policy* (Exhibit E-6) and the *Pay Rate Change Policy* (Exhibit E-7), both of which, as Ms. Pelletier testified, were followed.

[58] Counsel for the employer noted that acting as a project/contract manager was a promotion for the grievor. The grievor's salary was annualized based on a 40-hour workweek that was then multiplied by his hourly rate of pay and by the number of weeks in a calendar year. For example:

$$\begin{array}{r} 40 \\ \times \$ 18.21 \\ \hline \times 52.176 \\ \hline \$38,005.00 \end{array}$$

[59] The lowest increment amount in the EG-04 pay range (\$1,530.00) was added to the grievor's GL-COI-10 salary to arrive at an annualized salary of \$39,816.00.

[60] The grievor's calculations (Exhibit G-4) are incorrect since he divided the EG-04 annual salary by the hours in a work year (1956.6) and not by the number of days. Counsel for the employer stated that this is not "an apples-to-apples based equivalency." The grievor has not discharged the onus of proving that he was unfairly compensated from April 1, 1998, to May 1, 2001.

[61] Counsel for the employer referred me to *Rooney and Cross v. Treasury Board (Royal Canadian Mounted Police)*, 2006 PSLRB 32.

C. Rebuttal for the grievor

[62] The grievor's representative stated that the employer shows no consistency in the application of its compensation calculations. For straight time (full two weeks worked) the employer uses an annualized salary, but for overtime or part-time hours (less than two weeks worked) the employer bases its calculations on an hourly rate of pay.

IV. Reasons

[63] This grievance concerns the amount of retroactive compensation owed to the grievor while he was acting as a project/contract manager, at the EG-04 group and level, from April 1, 1998, to May 1, 2001.

[64] The employer recognized that the grievor assumed all the duties and responsibilities of that position and on September 11, 2003, offered him, in writing, a retroactive acting appointment, at the EG-04 group and level, from April 1, 1998, to May 1, 2001, which the grievor accepted. The letter of offer stated: "Your salary on appointment will be determined in accordance with the Public Service Terms and Condition of Employment Regulations." The employer introduced this letter into evidence (Exhibit E-1).

[65] Ms. Pelletier testified that the *Terms and Conditions of Employment Policy* (Exhibit E-6) and the *Pay Rate Change Policy* (Exhibit E-7) dictate the application of various pay rate changes resulting from promotions, demotions, transfers or special situations.

[66] Both the grievor and the employer agreed that acting as a project/contract manager was a promotion. I am satisfied, as was the grievor from his evidence, that the employer's calculations for the rate of pay on promotion conformed to the above policies and that the grievor's annualized salary of \$39,816.00 is accurate.

[67] The employer calculated the retroactive acting pay for different pay periods as follows: it subtracted the grievor's GL-COI-10 annualized salary from the EG-04 annual salary, divided the difference by the number of working days in a calendar year and then multiplied that amount by the number of days that the grievor worked. For example, from April 1 to June 21, 1998:

$$\begin{array}{r}
 \$39,816.00 \quad (\text{EG annual salary}) \\
 - \$38,005.00 \quad (\text{GL-COI-10 annualized salary}) \\
 \hline
 \$ 1,811.00 \\
 \div \underline{260.88} \quad (\text{working days in a calendar year}) \\
 \hline
 \$ \quad 6.95 \\
 \times \underline{58} \quad (\text{number of days acting}) \\
 \hline
 \$ \quad 402.63
 \end{array}$$

[68] The grievor, however, calculated his acting pay on an hourly rate (Exhibit G-4):

$$\begin{array}{r}
 \$ 20.35 \quad (\text{EG-04 hourly rate}) \\
 - \$ \underline{18.21} \quad (\text{GL-COI-10 hourly rate}) \\
 \hline
 \$ \quad 2.14 \\
 \times \quad 58 \quad (\text{number of days acting}) \\
 \hline
 \times \underline{7.5} \quad (\text{hourly rate}) \\
 \hline
 \$930.90
 \end{array}$$

Time period (58 days)	EG-04 annual salary ÷ 1956.6 *	GL-COI-10 annualized salary ÷ 2087.04**	Difference in pay	Total number of acting days	Amount to be paid
April 1 to June 21, 1998	\$39,816.00 = \$20.35	\$38,005.00 = \$18.21	\$2.14	58	\$930.90

*1956.6 = hours for one calendar year based on a 37.5-hour workweek.

**2087.4 = hours for one calendar year based on a 40-hour workweek.

[69] On the basis of the evidence before me and an analysis of the relevant policies (Exhibits E-6 and E-7), I am satisfied that the grievor's rate of pay on promotion and the subsequent calculation of retroactive compensation at the EG-04 level for the period from April 1, 1998, to May 1, 2001, are accurate. No evidence was adduced that there is

anything in this calculation that contravenes any provision of the relevant collective agreements.

[70] Having accepted that the employer correctly calculated the grievor's retroactive acting pay entitlement, I turned my mind to the employer's calculations with respect to the authorized overtime that the grievor worked during that period and accept that it was earned at the EG-04 level. As an example, according to the grievor's statements of earnings for various time frames (Exhibit G-5), the employer calculated the grievor's overtime entitlement (13.25 hours x 1.5) for the period from April 28 to May 3, 2000, as follows:

- EG-04 annual salary (37.5-hour workweek):

$$\$44,806.00 \div 1956.6 = \$22.90 \text{ (hourly rate)}$$

- GL-COI-10 annual salary (40-hour workweek):

$$\$39,632.89 \div 2087.4 = \underline{\$18.99} \text{ (hourly rate)}$$

$$\$ 3.91 \text{ (difference)}$$

$$\begin{array}{r} \$ 3.91 \quad \text{(difference)} \\ \times \underline{19.875} \quad \text{(overtime at 13.25 hours x 1.5)} \\ \hline \$ 77.71 \quad \text{(amount to be paid)} \end{array}$$

[71] Had the employer calculated the grievor's overtime entitlement for the same period using the formula that determined the grievor's retroactive compensation for the acting appointment period, the grievor would have been entitled to receive only \$52.55:

$$\begin{array}{r} \$44,806.00 \quad \text{(EG-04 annual salary)} \\ - \underline{\$39,632.89} \quad \text{(GL-COI-10 annual salary)} \\ \hline \$ 5,173.11 \quad \text{(difference)} \\ \div \underline{260.88} \quad \text{(working days in calendar year)} \\ \hline \$ 19.83 \quad \text{(per day)} \\ \div \underline{7.5} \quad \text{(hours in workday)} \\ \hline \$ 2.64 \quad \text{(per hour)} \\ \times \underline{19.875} \quad \text{(overtime at 13.25 hours x 1.5)} \\ \hline \$ 52.47 \quad \text{(amount to be paid)} \end{array}$$

[72] The calculation of overtime payment must necessarily be calculated on an hourly basis given the fact that the language in the collective agreement provides for overtime payment on the basis of 1.5 or two times the hourly rate of pay.

[73] On September 11, 2003, the grievor accepted a retroactive acting appointment with the caveat that his salary would be determined in accordance with the *Public Service Terms and Conditions of Employment Policy* (Exhibit E-6). The employer has therefore fulfilled its obligation under the policy and in so doing has not violated the terms of any collective agreement and I conclude that the grievor has been fairly compensated.

[74] For the reasons noted above, this grievance is denied.

[75] As an aside, I would note that I find it disturbing that although the employer asked the grievor on April 1, 1998, to perform the duties of a higher classification level (project/contract manager) and that on May 1, 2001, a classification committee recommended that his substantive position be reclassified to the EG-04 group and level, it was only on September 11, 2003 - five years after he began acting at the higher level - that the grievor finally received the offer in writing.

[76] In my opinion, the employer knew, or ought to have known, that if the grievor's substantive position at the GL-COI-10 group level was reclassified to the EG-04 group and level then the hours of work (40 hours versus 37.5 hours) would be in conflict. The fact that the employer suggested to the grievor in cross-examination that he had to seek overtime approval from his supervisor and submit the appropriate forms should be noted by other public service employees who might be asked to perform acting duties where there is a conflict in the hours of work and leave credit accrual and usage between different classification groups.

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

(The Order appears on the next page)

V. Order

[78] The grievance is denied.

May 18, 2007.

**D.R. Quigley,
adjudicator**