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File: 166-34-37315

Citation: 2007 PSLRB 96



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

WILFRED CUSHNIE

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Cushnie v. Canada Revenue Agency

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: Harinder Mahil, Professional Institute of the Public Service of
Canada

For the Employer: Robert Lindey, counsel

Heard at Vancouver, British Columbia,
June 20 to 22, 2007.

REASONS FOR DECISION

I. Grievance referred to adjudication

[1] Wilfred Cushnie (“the grievor”) filed a grievance on November 29, 2004, alleging that the work description for his position as a real estate appraisal advisor at the SI-05 group and level was not a complete and current statement of his duties and responsibilities. He alleges that this is contrary to article 20 of the collective agreement between the Canada Revenue Agency (“the CRA”) and the Professional Institute of the Public Service of Canada for the Audit, Financial and Scientific (AFS) group (expiry date: December 21, 2003) (Exhibit G-1, tab 4).

[2] As corrective action, the grievor requests a complete and current statement of his duties and responsibilities retroactive to April 1, 2000.

[3] Clause 20.02 of the collective agreement reads as follows:

20.02 Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his position, including the classification level and, where applicable, the point rating allotted by factor to his position, and an organization chart depicting the position’s place in the organization.

[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’s representative introduced 20 exhibits and called the grievor to testify. Counsel for the employer filed five exhibits and called two witnesses. Both parties made brief opening statements.

II. Preliminary matters

[6] At the final-level grievance hearing on January 27, 2006, the grievor presented the employer with additional duties and responsibilities (Exhibit G-19) that he wished to have added to his SI-05 work description.

[7] The grievor's representative filed Exhibit G-20, dated June 20, 2007 — a revision of Exhibit G-19 — that the grievor now wished to be included in his work description. Counsel for the employer objected to the introduction of this document, but after a brief discussion the parties agreed to enter Exhibit G-20 on consent.

[8] In his closing arguments, the grievor's representative conceded that the issue before me was the result of the CRA not having a forestry-related policy in effect. As a result of this void, the grievor was not only providing his expertise and technical advice, but *de facto* providing policy advice on files related to forestry industry.

III. Summary of the evidence

A. For the grievor

[9] The grievor has been working at the CRA and its predecessors since August 1980. In November 1989 he was appointed to a real estate appraisal advisor position, at the SI-05 group and level, in the Verification and Enforcement Branch of the Vancouver Tax Services Office (TSO).

[10] The grievor testified that he chose April 1, 2000, as the effective date because it was from that date onward that he began working on extremely large files that involved large sums of money. He stated that he referred his grievance to adjudication “because the CRA had reviewed the duties and responsibilities of the real estate appraisal advisors across Canada, but it had only dealt with the duties and responsibilities of SI-04s and not those relevant to the SI-05s.”

[11] The grievor identified a document contained in Exhibit G-1, tab 2, as the final-level response to his grievance, which was signed by Elaine Routledge, Assistant Commissioner, Compliance Programs Branch, on April 28, 2006. It reads, in part, as follows:

...

We have thoroughly examined the work description SI-0010, Real Estate Appraisal Advisor (SI-5), which was approved by the then ADM of Verification and Enforcement Branch on July 22, 1998 with the effective date of June 1, 1994. As a result, I am satisfied that it is a complete and current statement of the duties and responsibilities you are expected to perform, and that it is inclusive of all your requested changes.

However, regarding the provision of expert advice on policy and procedures, I would like to confirm that this is a Headquarters' responsibility that has not been delegated to the field and therefore, it does not form part of your assigned work. Steps leading to the issuance of such are a very long process and subject to approvals at different management levels in Headquarters. The expectation of the Real Estate Appraisal Advisor's job is to comply with established policies, guidelines and procedures and those can be discussed between co-workers to ensure that they are well understood.

In view of the above, I cannot grant the requested corrective action and your grievance is thereby denied.

...

[12] The grievor's representative introduced the grievor's work description dated July 22, 1998, as Exhibit G-1, tab 3.

[13] He also filed Exhibit G-3, an email that the grievor sent on April 8, 2003, to John Weldon, Regional Team Leader in the Real Estate Section of the Vancouver TSO. In this email the grievor provided information on many of the forestry-related files that he had been assigned, as well as forestry-related areas of investigation that he had completed over the past few years. The parties agreed that the grievor had worked, in the manner he outlined, on those files from April 1, 2000, to November 29, 2004.

[14] As requested by the parties, letters and numbers were assigned to the narratives found in Exhibit G-3.

[15] Exhibit G-3 reads, in part, as follows:

...

A1 . . . - Timber Limit allocation problems in Nova Scotia and New Brunswick. Some machinery and equipment involved. 84 separate timber limits comprising +74,000 acres. 1989 valuations. +\$18 million property values.

A2 . . . - Timber Limit allocation problems in Nova Scotia and New Brunswick. In the order of 160,000 acres and many individual parcels. Consultations with Dep't Justice and Appeals in Toronto and Ottawa as well as appraisers etc. in Halifax. Probably + \$2 million in direct tax implications. Both . . . issues may have national impact with regard to Timber Limit and allocation issues.

B . . . **LTD** - Machinery and equipment valuations involving probably 150 vehicles and specialized forestry equipment - loaders, graders, etc. Many different forestry machines.

C . . . **CORPORATION** - Timber and land values and allocations necessary to identify real property values to establish a basis to assess tax for an international tax treaty issue. About 40,000 acres of land in Ontario and Quebec provinces is involved in this issue. The values placed on the land and timber components will determine whether the transfer of many millions (over \$85 million in Canada alone - probably +\$600 million world wide) in Corporate assets is taxed in Canada or in USA. Complex forest lands issues include hardwood and softwood forests and different climatic and geographic factors.

D . . . **LTD. FORMERLY . . . LTD.** - Fully integrated two line Pulp mills, Paper mills, Two saw mills, planer mills, forest and timber tenures, fee simple land, machinery and equipment including all the plant equipment, sewerage, water and complete services - rail, road, shipping and boating equipment, etcetera. Allocation of values to the land, all buildings, timber and equipment in the various Capital Classes for CCA. Water rights, partial interests. Values for logging camps, floating mill equipment.

E . . . **LTD.** - Land and timber values for Valuation day - two or three files in B.C. Timber and land allocations.

F . . . - Timber Limit allocation and valuation issues on . . . Island. Involved about 20 parcels of land involved great variety of property types, geography, sizes etc.

G . . . 850,000 +/- acres of land located north of . . . in NW Ontario. Valuation Day estimate of market value. Huge timber holding with issues of timber volumes, quality, marketability, and other factors. Original railway land grant lands with partial interests, mineral rights issues, timber issues differing from northern townships to the southern townships due to climate differences. Hardwood and softwood forest areas. Complex geography, hydrology, history. Hydro electric power installations on subject property. Flora and fauna interests.

H . . . **LTD.** - Motor vehicles and allocation of values to values declared. Large number of vehicles.

I . . . - Three fully integrated pulp and paper mills located in B. C. Asset valuations including land, buildings, machinery and equipment. Each mill completely individual and unique. . . . Asset valuations on rollovers and CCA schedule analysis. CCA values compared to Fair Market Value issues. Involved a huge range of value issues including many buildings, land,

timber tenures, several lines of pulp, paper and saw milling equipment - different ages and operations. issues eventually expanded to involve international transactions and Sec-85 type rollovers. Cash flow analysis done for 6 or 7 years on each operation. Analysis of efficiency indexes for pulp operations. Huge value differences were discovered in these files.

I . . . INDUSTRIES LTD. - Fully integrated pulp, paper, sawmilling operations. Allocations, valuations, CCA issues and Fair Market Value issues on sale or disposition.

. . .

[Sic throughout]

[16] During his testimony the grievor referred to the above-cited narratives. He stated that the files were unique and extremely complex, as they involved immense tracts of timber holdings, pulp and paper mills, hydroelectric power installations, fleets of vehicles, construction, and heavy duty machinery and equipment in various provinces, as well as in different regions of British Columbia outside the Vancouver TSO's area of responsibility.

[17] The grievor stated that as a result of being assigned these files, he was asked to provide advice to senior CRA officials, lawyers and colleagues, on forestry-related matters. He noted that he "provided policy advice on evaluations of timber and timber holdings, cost methodologies, forestry methods and procedures, and possible tax implications which was beyond providing technical advice." To support his allegations, he referred to a series of emails (Exhibits G-4 to G-18 - note: Exhibit G-17 is a memorandum).

[18] In cross-examination, the grievor agreed that he had approached Mr. Weldon to express his interest in working on forestry-related files. He also agreed that there are tax specialists within the CRA who would deal with any tax implications concerning the larger files.

[19] In rebuttal, the grievor stated that he had discovered tax anomalies in excess of \$100 million that had been overlooked by the auditors. He was able to do so because of his understanding of tax implications.

B. For the employer

[20] Mr. Weldon is Regional Team Leader of the Real Estate Section of the Vancouver TSO. He reports to Yvon Lamontagne, Manager of the Valuations Section in Ottawa. Mr. Weldon has been employed with the CRA for approximately 28 years and supervises one CR-04, two SI-04s and five SI-05s, one of whom is the grievor.

[21] Mr. Weldon testified that his staff conducts appraisals under the *Income Tax Act* and the *Excise Tax Act* and reviews declarations of market values. A request for an appraisal may come from the Internal Audit Division, the Collections Appeal Branch or the Client Services Branch.

[22] Appraisals are conducted so that the CRA can decide on a course of action, if necessary, following an audit, or challenge declared or non-declared income and assets, the payment or non-payment of GST, or for capital gains purposes.

[23] Mr. Weldon testified that attached to the Real Estate Appraisal Advisor SI-05 work description (Exhibit G-1, tab 3) is Appendix “A”. This appendix defines the three categories for work assignments among the SI-03 Residential Appraiser (“residential”), the SI-04 Real Estate Appraiser (“complex”) and the SI-05 Real Estate Appraisal Advisor (“most complex”). In assigning work to his staff, Mr. Weldon stated that judgement is required “to determine the level of complexity of the file and to assign it to an appraiser at the appropriate group and level.” As an SI-05, the grievor was assigned appraisals that were considered as most complex. Appendix “A” lists examples of the most complex appraisals:

...

1. *Commercial*
 - *large commercial residential complexes*
 - *shopping centres*
 - *recreation facilities, e.g. golf course*
 - *large hotels*
 - *large office buildings*
2. *Industrial*
 - *large special purpose buildings for manufacturing, assembling*
 - *heavy industry*

3. *Land Assemblies*
 - *highly speculative land varying in size and purpose*
4. *Agricultural*
 - *farm enterprises involved in food processing, etc., high priced livestock (breeding horses, pure bred cattle, etc.)*
5. *Other types*
 - *leasehold interests etc.*

...

[24] Mr. Weldon stated that the grievor had approached him on a number of occasions to convey his interest in working on forestry-related files. As a result, he assigned the grievor a number of files, including the ones described in Exhibit G-3.

[25] During his testimony, Mr. Weldon elaborated that in the document titled "Appraisal of Real Estate and Other Tangible Property" (Exhibit E-2) a definition is given for the most complex appraisals, which includes examples such as large industrial special-purpose buildings for manufacturing and assembling, heavy industrial properties, land assemblies, highly speculative lands, etc. In other words, the files assigned to the grievor (Exhibit G-3) were categorized as "most complex". He stated that the Key Activities section of the grievor's work description reads, in part, as follows: "conducting all types of real estate appraisals including the most complex. . . ."

[26] Mr. Weldon stated that the grievor was not responsible for developing policies and procedures or providing advice, and at no time did he assign him this responsibility. If the grievor had difficulty interpreting a policy or procedure, he or staff at Headquarters would provide direction to the grievor.

[27] With respect to the grievor's work on files from other provinces, Mr. Weldon conceded that the grievor did provide technical advice on valuation methods used for specialized properties. He did not, however, provide advice on policies or procedures.

[28] Mr. Weldon recognized that the grievor, who is a senior appraiser with a specialty in the forestry-related field, interacted with a number of appraisers located across the country, and that he provided training, mentoring and advice in his area of expertise.

[29] In cross-examination, Mr. Weldon agreed that appraisers generally work within their TSO area and that it is unusual for them to work on files from other provinces.

[30] Mr. Weldon stated that in his opinion the grievor did not provide policy advice. Rather, he provided technical advice, which is part of his duties and responsibilities as noted in the Key Activities section of his work description.

[31] In reply, Mr. Weldon stated that in addition to Mr. Lamontagne, Glendon Todd, the Senior Appraisal Consultant in the Valuations Section at Headquarters, and himself provided advice on policies or procedures.

[32] Mr. Lamontagne joined the CRA in June 1980. Since July 2004, he has managed a staff of six, including three senior valuations consultants, one senior real estate appraiser consultant and two subject-matter experts. He is also responsible for business equity valuations, real estate appraisals and technical support, as well as interpreting legislative issues and CRA policies and procedures.

[33] Mr. Lamontagne explained that before a policy, procedure or guideline is invoked by the CRA, consultations are held with various directorates. Any comments received are sent to a compliance policy committee and then forwarded to the CRA Policy Committee.

[34] Counsel for the employer referred Mr. Lamontagne to the real estate appraisal consultant SI-06 work description (Exhibit E-5), and specifically to the Key Activities section where it states, in part: "Providing professional appraisal consultant services, technical support, policy application advice. . . ." Mr. Lamontagne stated that advice on CRA policies and procedures is provided either by himself or by staff at Headquarters. This is a Headquarters function that is not delegated to a region.

[35] In cross-examination, Mr. Lamontagne stated that there was no policy on real estate involving forestry-related timberlands.

IV. Summary of the arguments

A. For the grievor

[36] The grievor's representative stated that the grievor's work description is not current or complete as required by clause 20.02 of the collective agreement.

[37] The evidence is clear that the grievor was assigned numerous forestry-related files that involved timber allocations, machinery and equipment, including pulp and paper mills, as well as saw mills, in a number of provinces. The files were unique and extremely complex and were beyond the SI-05 work description. They involved hundreds of thousands of acres of timber and assets and millions of dollars.

[38] Mr. Weldon testified that the grievor provided advice on evaluations of specialized properties and methods. Mr. Lamontagne testified that there was no CRA policy on timber, timberlands or associated real estate assets. As such, the grievor provided policy advice regarding a specialized area. His advice was solicited, accepted and acted upon by various persons employed at the CRA.

[39] In support of his arguments, the grievor's representative cited the following cases: *Breckenridge v. Library of Parliament*, PSSRB File Nos. 466-LP-225 to 233 and 241 to 245 (19960912); *Hughes v. Treasury Board (Natural Resources Canada)*, 2000 PSSRB 69; *Taylor v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-20396 (19901221); and *Littlewood et al. v. Treasury Board (Revenue Canada)*, PSSRB File No. 166-02-16044 (19870528).

B. For the employer

[40] Counsel for the employer argued that there are only three levels of complexity in work assigned to an appraiser, with "most complex" being the highest. As an SI-05, the grievor was assigned these files. The files described in Exhibit G-3 fit that category. Management has the right to assign duties to an employee, and for this grievance to be allowed, the grievor has to demonstrate that he provided advice on policies or procedures.

[41] Counsel further argued that in his evidence the grievor did not refer to any policy upon which he had provided advice. Mr. Weldon and Mr. Lamontagne both testified that policy advice and direction are their responsibility or that of Headquarters. In the case at hand, the grievor may have given technical advice rather than policy advice, since policy advice is a course of action or a principle developed and adopted by the CRA.

[42] Counsel for the employer argued that Exhibit G-1, tab 3, is a generic SI-05 work description and as such the work description is broad enough to cover all the duties that the grievor performs.

[43] Counsel for the employer cited the following cases: *Taylor v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-20396 (19901221); *Jaremy et al. and Currington et al. v. Treasury Board (Revenue Canada - Customs, Excise & Taxation)*, 2000 PSSRB 59; *Kerswill v. Treasury Board (Natural Resources Canada)*, 2000 PSSRB 91; and *Barnes et al. v. Canada Customs and Revenue Agency*, 2003 PSSRB 13.

C. Rebuttal by the grievor

[44] In reply, the grievor's representative stated that the grievor not only provided technical advice and his expertise to Mr. Weldon, to lawyers, to colleagues and to other senior CRA officials but he was in essence providing policy advice because the CRA does not have a policy on the timberland or forestry-related sector. His advice was solicited, accepted and acted upon.

[45] The grievor's representative cited the definitions of policy and advice found in *Black's Law Dictionary* and in the *Concise Oxford Dictionary*:

Black's Law Dictionary

Policy *The general principles by which a government is guided in its management of public affairs, or the legislature in its measures.*

Advice *View; opinion; ... an opinion expressed as to wisdom of future conduct.*

Concise Oxford Dictionary

policy *1 a course or principle of action adopted or proposed by a government, party, business, or individual, etc. 2 prudent conduct; sagacity*

...

advice *1 words given or offered as an opinion or recommendation about future action or behavior.*

V. Reasons

[46] The grievor grieves that the CRA violated article 20 of the collective agreement because he has not been provided with a complete and current statement of his duties and responsibilities. As a result of these proceedings, the grievor specifically requests that retroactive to April 1, 2000, the following duty and responsibility be added to his SI-05 work description: “provides technical advice and expertise concerning policies and procedures.”

[47] Ms. Routledge’s final-level response reads, in part, as follows:

...

However, regarding the provision of expert advice on policy and procedures, I would like to confirm that this is a Headquarters’ responsibility that has not been delegated to the field and therefore, it does not form part of your assigned work. Steps leading to the issuance of such are a very long process and subject to approvals at different management levels in Headquarters. The expectation of the Real Estate Appraisal Advisor’s job is to comply with established policies, guidelines and procedures and those can be discussed between co-workers to ensure that they are well understood.

...

[48] It is clear from her response that Ms. Routledge was not aware that the CRA did not have an established policy, guidelines or procedures concerning the forestry-related sector that the grievor could comply with. In fact, Mr. Lamontagne confirmed during his testimony that the CRA did not have a forestry-related policy.

[49] Mr. Weldon assigned the grievor numerous forestry-related files that at times required the grievor to work in regions and provinces outside the Vancouver TSO. Mr. Weldon testified that this was an unusual practice. The evidence adduced supports the grievor’s contention that senior CRA officials, lawyers and his colleagues relied on his expertise, knowledge and advice, and acted on it. Indeed, the employer never disputed this fact in cross-examination or through its own witnesses.

[50] In my review of the evidence adduced, I find that the grievor provided technical advice and shared his expertise with senior officials, lawyers and colleagues within the CRA. As there was no policy, procedure or guidelines concerning forestry-related matters, the result was that, in reality, the grievor was providing policy advice.

[51] I also find that the grievor's work description is not a generic one. But even if it was a generic job description, this does not absolve the employer of its obligation to comply with article 20 and make his job description current and complete. If the duty is not contained in either the grievor's generic or specific job description, it needs to be added.

[52] As noted earlier in this decision, both parties agreed that the grievor had worked on forestry-related files (Exhibit G-1, tab 3) from April 1, 2000, to November 29, 2004.

[53] At no time during these proceedings did counsel for the employer state that the grievor had discontinued providing what I have decided is advice on policy, procedures or guidelines in respect of the forestry-related industry after November 29, 2004.

[54] Counsel for the employer did not argue the application of the *Coallier* case ((*Canada*) *National Film Board v. Coallier*, [1983] F.C.J. No. 813 (F.C.A.)), to the redress in this case, despite the clear wording of the grievance which requests that the job description be revised back to April 1, 2000. Given this, I can only assume that the employer has decided not to raise this issue, preferring instead to argue the case on the basis of the merits.

[55] Therefore, the grievance is allowed in part. The following wording will be added to the grievor's SI-05 work description: "provides technical and policy advice concerning the forestry-related industry."

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

(The Order appears on the next page)

V. Order

[57] The grievance is allowed in part.

[58] The grievor's SI-05 work description shall be amended as of April 1, 2000, to include the following under the Key Activities section: "provides technical and policy advice concerning the forestry-related industry."

September 13, 2007

**D.R. Quigley,
adjudicator**