

Date: 20091001

Files: 166-02-32752 and
33820 to 33823

Citation: 2009 PSLRB 117



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

**SYLVAIN LAVIGNE, DANIEL GAUTHIER, MARIO GAUDET, JACQUES GAUVREAU
AND JACQUES ST-PIERRE**

Grievors

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as
Lavigne et al. v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Roger Beaulieu, adjudicator

For the Grievors: John Mancini, Union of Canadian Correctional Officers - Syndicat
des agents correctionnels du Canada - CSN

For the Employer: Hughes Moniz, Treasury Board Secretariat

Heard at Sherbrooke, Quebec,
December 17, 2008.
(PSLRB Translation)

I. Grievances referred to adjudication

[1] The grievors, Sylvain Lavigne, Daniel Gauthier, Mario Gaudet, Jacques Gauvreau and Jacques St-Pierre, are correctional officers classified at the CX-2 level. They work for the Correctional Service of Canada (“the Service”) at Drummond Institution in Drummondville, Quebec. They are asking to be paid at the CX-3 level, like national firearms instructors at the Quebec Regional Staff College in Laval (“the College”), when they provide firearms training to correctional officers at Drummond Institution in an acting capacity. They also seek all other CX-3 rights and benefits when they provide firearms training.

[2] The grievors’ grievances are based on clause 50.07 of the collective agreement signed on April 2, 2001 between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN for the Correctional Services Group bargaining unit (“the 2001 collective agreement”), which reads as follows:

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

[3] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references 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.

[4] The hearing in this case was postponed several times at the request of the parties because they were not available before December 2008.

II. Summary of the evidence**A. For the grievors**

[5] Mr. Lavigne was the only witness for the grievors. He has worked for the Service since 1981 at Drummond Institution, which is a medium-security penitentiary with about 380 inmates.

[6] Mr. Lavigne explained that the level of responsibility for security varies according to the classification level of a correctional officer: CX-1 correctional officers mainly perform static security duties, such as patrols of the penitentiary's perimeter, while CX-2 correctional officers mainly perform dynamic security duties, since they intervene more often with inmates. CX-2 correctional officers are also accountable for their case-management intervention and their interactions with parole officers.

[7] Mr. Lavigne stated that his CX-2 position also includes on-the-job training duties; he relies on his experience and knowledge to pass on what he knows to CX-1 correctional officers. CX-1 and CX-2 correctional officers learn from one another.

[8] The College is one of the Service's many training centres that prepare and establish course plans to standardize the training of correctional officers. The College deals mainly with Quebec Region penitentiaries.

[9] In 2002-2003, six national instructors at the CX-3 group and level provided firearms training at the College. National training ensures the uniformity of firearms training in each penitentiary, whatever its security level. At the time this case was heard, there were only four national firearms instructors left at the College.

[10] Generally, the College provides firearms training at each Quebec Region penitentiary. For example, at Drummond Institution, where the grievors work, five correctional officers have received firearms training at the College. Those five correctional officers then provide the training each year to the other correctional officers at Drummond Institution. At the time this case was heard, there were 150 correctional officers at Drummond Institution.

[11] Thus, national firearms instructors at the College trained the grievors, who became the firearms instructors at Drummond Institution. The grievors provide firearms training at Drummond Institution every year.

[12] Furthermore, the College provides 13 weeks (55 days) of training to Quebec Region recruits every year. That general training covers all aspects of a correctional officer's duties. Once they have finished their general training at the College, recruits from Drummond Institution return to the institution. They subsequently receive

annual firearms training from the grievors, who are Drummond Institution's firearms training experts.

[13] Every year, the grievors provide firearms training to all correctional officers at Drummond Institution. That training covers the following several types of firearms: pellet guns, handguns and rifles. There are four service weapons in all.

[14] Mr. Lavigne noted that correctional officers must "qualify" the first time by successfully completing the firearms training given at the College as part of general recruit training. All correctional officers must then requalify every year in the use of firearms by successfully completing the firearms training they receive in their penitentiary.

[15] Mr. Lavigne is one of the five firearms instructors at Drummond Institution. He noted that he bases his training on that provided by the national firearms instructors at the College but that, when he provides the same training every year to the correctional officers at Drummond Institution, he is not paid at the national firearms instructors' rate of pay. On the date the grievances were filed, the difference between the maximum of his pay scale and the maximum for the national firearms instructors was \$17.82 per day.

[16] Mr. Lavigne stated that, when he performs the duties of a higher classification level for at least one day, he is paid at that higher rate, except when he performs the duties of a firearms instructor at the CX-3 level. In that case, he is paid at the CX-2 level even though he carries out CX-3-level tasks.

B. For the employer

[17] The employer called Mario Tardif and Lucie Vallière as witnesses.

[18] Mr. Tardif has worked at the Service since 1986. In the past, he has performed security-related tasks as a CX-2 correctional officer.

[19] According to Mr. Tardif, the duties of a CX-2 correctional officer include ensuring the proper functioning of the penitentiary's security equipment, including gas, all the institution's security equipment, firearms, locks and ammunition of all kinds, in preparation for the most extreme conditions that arise during incidents such as riots, hostage takings, arsons and any other violent inmate outbursts.

[20] Mr. Tardif confirmed that about 125 correctional officers worked at Drummond Institution in 2002 and that about 150 worked there at the time this case was heard.

[21] On cross-examination, Mr. Tardif stated that only the five grievors hold the position of Firearms Instructor for the annual requalification at Drummond Institution.

[22] Also on cross-examination, Mr. Tardif stated that each of the five firearms instructors at Drummond Institution must take a minimum of two weeks of firearms training at the College before becoming an institutional firearms instructor. He specified that the position of Firearms Instructor is not only important but is also critical to overall security in a penitentiary, which is why the firearms training program is implemented in penitentiaries in a uniform manner.

[23] At the time of the hearing in this case, Ms. Vallière had been employed with the Service for over 20 years. She had also been the director of the College for 11 years.

[24] Ms. Vallière confirmed that national firearms instructors at the College (CX-3), who numbered six in 2002, were responsible for training firearms instructors for all Quebec Region penitentiaries. Responsibility for firearms training is a vital part of the national firearms instructor positions.

[25] Ms. Vallière also confirmed that the number of national firearms instructors at the College had been reduced to four by the time this case was heard partly because firearms instructors at each Quebec Region penitentiary were doing vital work by providing theoretical and practical firearms training on a regular basis. The other reason for the lower number of national firearms instructors at the College was that a reduction in shooting courses saved on instruction time.

[26] Ms. Vallière noted that the College is responsible for training Quebec Region correctional officers. A significant part of that firearms training is provided to correctional officers during general recruit training.

[27] Ms. Vallière agreed with Mr. Tardif when she testified about the importance of annual firearms training in penitentiaries. She noted that the training is necessary and essential to maintaining the security, effectiveness and proper functioning of every penitentiary.

[28] Ms. Vallière confirmed Mr. Tardif's testimony by explaining that annual requalification in the use of firearms was possible because of the firearms training provided by the firearms instructors at Drummond Institution. According to Ms. Vallière, the "Firearms Qualification Standards" (Exhibit P-1) ("the standards"), which are dated June 16, 1998, were still applicable and followed at the time this case was heard. Ms. Vallière stated that the standards came into force on June 1, 1999. In conclusion, she indicated that annual firearms training in every penitentiary requires a minimum of two days of theoretical and practical training for the four service firearms.

III. Summary of the arguments

A. For the grievors

[29] According to the grievors' representative, the employer is altering the scope of clause 50.07 of the 2001 collective agreement and making it impossible to apply that clause in this case. The grievors' representative argued that each annual firearms training session at Drummond Institution lasts at least one full day and that the training is the grievors' only activity on that day. In other words, each time there is a firearms training session, it lasts a minimum of one working day.

[30] According to the grievors' representative, the employer's interpretation of the expression ". . . substantially perform the duties . . ." nullifies clause 50.07 of the 2001 collective agreement because it is impossible to perform all CX-3 duties in the same day.

[31] The grievors' representative submitted that clause 50.07 of the 2001 collective agreement must be given some meaning. Therefore, when CX-2 correctional officers perform a duty at the higher CX-3 level as firearms instructors for at least one working day, they must be paid at that higher level for that working day.

[32] The grievors' representative referred me to the standards, which, he said, are the main basis of the grievances and concluded that they constitute "ironclad" evidence that "the shooting course" is a CX-3 duty.

[33] The grievors' representative asked me the following question: Did the firearms instructors at Drummond Institution, who number only five, perform work at a level higher than their own classification for at least one working day? If the answer to this

question is yes, then the grievors must be paid at the CX-3 rate of pay for each working day they provided firearms training.

[34] According to the grievors' representative, it is important to note that, contrary to what the employer alleges, firearms training does not last only two hours but rather a minimum of two hours for each of the four service weapons. It is clear from the standards that there are four service firearms for which all correctional officers must receive annual training to maintain the highest level of security.

[35] The grievors' representative also noted that the title of firearms instructor at each penitentiary is conferred by the employer and is reserved for a very small number of correctional officers. In the case of Drummond Institution, there were only five firearms instructors for the 150 correctional officers working there at the time this case was heard. As the evidence shows, the number of correctional officers is constantly increasing.

[36] Finally, the grievors' representative submitted that the annual training provided by the firearms instructors at Drummond Institution is a duty that is not only important for the security of the penitentiary but is also of central importance among all the duties of national firearms instructors. When the grievors provide firearms training at Drummond Institution in accordance with the standards, they work at a higher classification level for at least one working day.

B. For the employer

[37] The employer's representative stated the following:

- Clause 50.07 of the 2001 collective agreement is clear.
- CX-2 correctional officer positions include training duties.
- The collective agreement signed on June 26, 2006 by the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN for the Correctional Services Group bargaining unit ("the 2006 collective agreement") contains a new clause, clause 43.05, which provides as follows:

43.05 Instructor allowance

When an employee acts as an instructor, he shall receive an allowance equal to two dollars fifty cents (\$2.50) per hour, for each hour or part of an hour.

[38] The employer's representative noted that the burden of proof rests with the grievors and that they did not substantially perform the duties of a higher classification level as set out in clause 50.07 of the 2001 collective agreement.

[39] According to the employer's representative, "transferring knowledge" at the College merits CX-3-level compensation, whereas giving firearms training at Drummond Institution is merely program administration. Thus, annual firearms training at Drummond Institution is only a "refresher" since penitentiary firearms instructors are merely following a recipe already prepared by the College's national firearms instructors. The College's national firearms instructors design and develop the material they use, which is the most difficult task.

[40] The employer's representative referred me to *Moritz v. Canada Customs and Revenue Agency*, 2004 PSSRB 147, ¶ 40, 44 and 45, and *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40, ¶ 68 and 71.

[41] The employer's representative argued that, when a CX-2 correctional officer replaces a CX-3 officer and wants to be paid at the higher level for the acting period pursuant to clause 50.07 of the 2001 collective agreement, the employer is entitled to expect that correctional officer to be able to perform the other CX-3 duties, such as drawing up plans and preparing course material or presentations and not "just to follow a recipe."

[42] The employer's representative concluded his argument by saying that, if I accept the grievors' grievances, I must follow *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.) (QL), to calculate the amounts owing.

IV. Reasons

[43] The issue I must decide is whether the grievors substantially perform the duties of a national firearms instructor when they provide annual training to correctional officers at Drummond Institution. In other words, do they substantially perform CX-3 duties in an acting capacity?

[44] Neither party submitted in evidence the work description of the national firearms instructors, whose positions are classified CX-3.

[45] The grievors have provided firearms training since at least 2003, the year in which they filed their grievances. Firearms training is a critical and important element of the national firearms instructor positions. It must be emphasized that firearms training is critical to maintaining the security of each of the Service's penitentiaries.

[46] The standards are only a summary of the annual requalification requirements for the four service weapons. However, they clearly indicate that the firearms training plan is to train firearms specialists at each penitentiary (five at Drummond Institution) so that they may requalify the other correctional officers at the penitentiary each year in the use of firearms and provide them with mandatory use-of-force training.

[47] The training provided each year by the grievors includes a module on each of the four service firearms and a module on the use of force. Under the standards, a correctional officer cannot requalify before the end of the use-of-force training.

[48] All correctional officers must requalify every year in the use of firearms. Written examinations, in addition to practical examinations, make it possible to ensure that they know the specific policies on security, the use of firearms and the use of force.

[49] The standards state that, each time the grievors are asked to provide firearms training to correctional officers at Drummond Institution, at least two, and in some cases even three, firearms instructors are required, depending on the type of weapon and the number of correctional officers to be trained. The standards also indicate that annual correctional officer training lasts a minimum of two days.

[50] Ms. Vallière also acknowledged that annual firearms training at Drummond Institution requires at least two days of training per correctional officer for the four service firearms. It means that, after the College's general recruit training, the 150 or so correctional officers at Drummond Institution must take several days of firearms training every year to requalify in the use of firearms.

[51] Since the standards cover the use of lethal force, those providing annual training in the penitentiaries have a heavy responsibility. Although voluminous, the standards are only a summary of what the firearms instructors at Drummond Institution have to know and apply rigorously every year to ensure the security of the

penitentiary 24 hours a day, 365 days a year. The security of the penitentiary requires it.

[52] As the employer's witnesses stated, the position of Penitentiary Firearms Instructor is not only important but also critical to the security of penitentiaries, which is why the firearms training program is implemented uniformly in penitentiaries. Ms. Vallière noted that firearms training is vital to maintaining security inside each penitentiary. Annual firearms training is provided in institutions because institutions are where riots, hostage takings, arsons, escape attempts and any other forms of inmate violence take place.

[53] I will now examine whether, in the language of clause 50.07 of the 2001 collective agreement, the grievors “. . . substantially perform the duties of a higher classification . . .”, i.e., the duties of national firearms instructors, when they provide annual training to correctional officers at Drummond Institution.

[54] As already noted at paragraph 44 of this decision, the parties have not submitted in evidence the work description of the national firearms instructors at the College. However, the employer filed the standards in evidence, and the testimony showed that firearms training is one of the key elements of the national firearms instructor position at the College. I am satisfied on the balance of probabilities that, if firearms training is a substantial duty of the national firearms instructor position at the College and the grievors fully perform that duty for at least one working day, even if they do not perform any other duty of the national firearms instructor position during that day, then they meet the requirements of clause 50.07 of the collective agreement, since they “. . . substantially perform the duties of a higher classification . . .” and are entitled to acting pay at the CX-3 level for that working day.

[55] The employer's representative argued that the grievors do not substantially perform the duties of national firearms instructors. The position put forward by the employer's representative would negate clause 50.07 of the 2001 collective agreement.

[56] By arguing at the hearing that annual firearms training at Drummond Institution is merely program administration, the employer's representative demeaned the importance and value of the grievors' training duties. In arguing that the College's national instructors have the difficult task of “putting together and developing” the

firearms training material to transfer “knowledge,” whereas the grievors “simply follow a recipe” prepared at the College when they provide firearms training at Drummond Institution, the employer’s representative ignored part of the evidence adduced at the hearing. His cavalier response to the grievors’ allegations does nothing to foster harmonious labour relations.

[57] The employer’s representative invoked clause 43.05 of the 2006 collective agreement and argued that this new provision settles grievances presented under the 2001 collective agreement. That argument must be rejected, since the 2006 collective agreement does not apply to this case for the following reasons. First, this case requires interpreting the provisions of the 2001 collective agreement and no others. Second, the 2006 collective agreement does not amend former clause 50.07 but maintains it intact in clause 49.07. However, the 2006 collective agreement contains a new clause, clause 43.05, which grants instructors a new premium and nothing more.

[58] If the employer and the grievors’ bargaining agent had wished to replace clause 50.07 of the 2001 collective agreement, they would have done so. Moreover, clause 49.07 of the 2006 collective agreement is identical to clause 50.07 of the 2001 collective agreement.

[59] I have examined the case law submitted by the employer’s representative. *Moritz* and *Bungay et al.* are of little use, since the facts and circumstances of those cases are completely different from those in this case.

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

(The Order appears on the next page)

V. Order

[61] The grievances are allowed.

[62] I order the employer to pay the grievors the difference between the CX-3 rate of pay and the rate they were paid for each working day during which they provided firearms training to correctional officers at Drummond Institution, starting on the 25th day before their respective grievances were filed.

[63] I will remain seized of the matter for 60 days to deal with any disputes over the calculation of the amounts due.

October 1, 2009.

PSLRB Translation

**Roger Beaulieu,
adjudicator**