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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DONI HUNT AND STEVE SHAW

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Hunt and Shaw v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievors: Michel Bouchard, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN

For the Employer: Pierre Marc Champagne, counsel

Heard at Kingston, Ontario,
April 21 and 22, 2009.

I. Individual grievances referred to adjudication

[1] Doni Hunt and Steve Shaw ("the grievors") filed individual grievances alleging that the Correctional Service of Canada ("the employer") violated the allocation of overtime provisions of the collective agreement signed by the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN ("the bargaining agent") for the Correctional Services bargaining unit (CX) on June 26, 2006 ("the collective agreement"). The grievors are correctional officers who work at the Millhaven Institution in Bath, Ontario.

[2] On July 3, 2007, Mr. Hunt grieved that the employer violated the collective agreement on June 30, 2007 by not allocating overtime fairly and equitably. He alleged that the employer bypassed him by not calling him to work overtime, and he has claimed 16 hours of overtime at the rate of double time as well as 180 kilometres in mileage. The employer denied the grievance at the final level of the grievance procedure on July 21, 2008. The bargaining agent referred the grievance to adjudication on December 17, 2007.

[3] On October 27, 2007, Mr. Shaw grieved that the employer violated the collective agreement on October 19, 2007 by not allocating overtime fairly and equitably. He alleged that the employer bypassed him by not calling him to work overtime, and he has claimed that the employer reimburse him for all amounts lost. The employer denied the grievance at the final level of the grievance procedure on March 24, 2009. The bargaining agent referred the grievance to adjudication on January 25, 2008.

[4] The relevant clauses of the collective agreement read as follows:

> ***21.10 Assignment of Overtime Work***
>
> *The Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *(b) to allocate overtime work to employees at the same group and level as the position to be filled, i.e.: Correctional Officer 1 (CX-1) to Correctional Officer 1 (CX-1), Correctional Officer 2 (CX-2) to Correctional Officer 2 (CX-2) etc.;*

> *However, it is possible for a Local Union to agree in writing with the Institutional Warden on an another method to allocate overtime.*
>
> . . .
>
> ***21.12 Overtime Compensation***
>
> *Subject to Clause 21.13, an employee is entitled to time and one-half (1 1/2) compensation for each hour of overtime worked by the employee.*
>
> ***21.13*** *Subject to Clause 21.14, an employee is entitled to double (2) time for each hour of overtime worked by him or her,*
>
> *(a) on the employee's second or subsequent day of rest, (second or subsequent day of rest means the second or subsequent day in an unbroken series of consecutive and contiguous calendar days of rest),*
>
> . . .

II. <u>Summary of the evidence</u>

[5] The parties produced 21 documents as evidence. The grievors called Blair Pound and Mark Shipman as witnesses. Mr. Pound is a correctional officer at Millhaven. He is also the local union president of the bargaining agent for Millhaven. Mr. Shipman is a correctional officer at Millhaven. He is also the grievance officer for the local union at Millhaven. Mr. Hunt and Mr. Shaw also testified. The employer called Shauna Dickie and John Houde as witnesses. Both Ms. Dickie and Mr. Houde are correctional managers at Millhaven.

[6] At the time of the grievances, there was a written procedure in place at Millhaven for the allocation of overtime, which was developed by the employer. The bargaining agent at the local level generally agreed that the procedure was an equitable basis on which to allocate overtime among correctional officers, with one exception: the employer offered overtime first to correctional officers who would be paid time and one-half. Overtime would be offered to those to be paid double time only when the employer exhausted the list of officers to be paid at time and one-half. Evidence was presented that the bargaining agent's opposition to that part of the procedure was expressed in writing to the employer before the events that led to the grievances. The

employer and the bargaining agent at the local level confirmed their respective positions in a signed agreement in late 2007.

[7] According to clauses 21.12 and 21.13 of the collective agreement, overtime is normally paid at time and one-half, except when the employee works overtime on a second or subsequent day of rest.

[8] The first step in the Millhaven's well established procedure for the allocation of overtime was to record in writing the availability of correctional officers. That was done at the beginning of each week on the volunteer overtime report. The name of every officer classified at the CX-01 and CX-02 group and level appeared on the form. The officers would indicate, for the seven upcoming days, the days and shifts for which they were available for overtime. The form also included the officer's regular shift and hours; the date of the officer's days of rest; the officer's phone number; and the total number of overtime hours worked during the applicable quarter. Officers started a quarter with zero hours of overtime and from there, every hour of overtime was compiled. The quarters were as follows: January 1 to March 31, April 1 to June 30, July 1 to September 30, and October 1 to December 31.

[9] Before each shift, the correctional manager transcribed the relevant information from the volunteer overtime report onto the overtime hiring sheet prepared for the next shift. That sheet was then used to determine who should be called first for overtime.

[10] According to the Millhaven's procedure, the basis for the allocation of overtime was constantly recalculated. The overtime was offered to readily available officers, starting with the officer who had worked the fewest number of hours of overtime during a particular quarter. However, officers on their first day of rest (time and one-half) would be called first. The employer would then start to call the officers who were on their second or subsequent day of rest (double time).

[11] For the week of June 25 to July 1, 2007, Mr. Hunt indicated on the volunteer overtime report that he was available to work overtime on the day and night shifts of June 30, 2007. He also indicated that June 30, 2007 would be his second day of rest. For the day and the night shifts of June 30, 2007, the employer did not call Mr. Hunt to offer him overtime. By June 30, 2007, Mr. Hunt had worked 27.5 hours of overtime during the quarter. The employer chose to call other officers who had worked more

hours of overtime during the quarter than Mr. Hunt. The employer proceeded in this manner because those officers' overtime hours would be paid at time and one-half and not at double time, as would be the case for Mr. Hunt.

[12] The evidence presented by Mr. Hunt, and not denied by the employer, showed that Mr. Hunt would have worked 16 hours of overtime if the employer would have offered him overtime on June 30, 2007.

[13] For the week of October 15 to October 21, 2007, Mr. Shaw indicated on the volunteer overtime report that he was available to work overtime on the day and night shifts of October 19, 2007. He wrote his home phone number on the voluntary overtime report. When the correctional manager transcribed the information on the overtime hiring sheet for the evening shift of October 19, 2007, he made an error when he wrote another officer's phone number beside Mr. Shaw's name. Mr. Shaw had the lowest number of overtime hours worked during the quarter, and he believes that he should have been called for overtime, considering that other officers were called.

[14] Mr. Shaw testified that he was not called for overtime on the evening shift of October 19, 2007. Mr. Houde was the correctional manager who made the overtime calls for that shift. Mr. Houde testified that he wrote N/A beside Mr. Shaw's name on the overtime hiring sheet for the evening shift of October 19, 2007. Mr. Houde normally writes N/A when an officer is not available to work overtime. He also writes yes in the appropriate column when he leaves a message for an officer. In the case of Mr. Shaw, he did not indicate yes in the message column but he did indicate yes for the officers whose names were above and below Mr. Shaw's name. Mr. Houde cannot confirm if he called Mr. Shaw's phone number, or if he called the wrong number that was written on the overtime hiring sheet. However, he assumed that he would have realized that there was a mistake, and that he would have called Mr. Shaw at the correct number.

[15] Mr. Shaw could not clearly establish how many hours of overtime he would have worked on October 19, 2007, if he had been called to work overtime.

[16] The employer provided some data showing that there was not a large difference in the number of hours of overtime worked between the officers who were available to work overtime for the quarters covering June 2007 and October 2007. Ms. Dickie

admitted that those figures were calculated after the fact. Furthermore, the calculation method used was not confirmed by Ms. Dickie.

[17] Ms. Dickie and Mr. Houde testified that other penitentiaries were using comparable overtime allocation procedures to the one used at Millhaven.

III. Summary of the arguments

A. For the grievors

[18] The collective agreement obliges the employer to make every reasonable effort to allocate overtime on an equitable basis among available employees. At Millhaven, there is a common understanding between the employer and the local union about the meaning of equitable basis. There are detailed procedures in place to calculate the number of hours of overtime worked by employees, and overtime is normally offered to the employee with the lowest number of hours worked during a quarter.

[19] The facts of these grievances are not contested. Mr. Hunt should have been offered overtime on June 30, 2007. The employer did not respect its own procedure in offering overtime to employees who had already worked more hours of overtime than Mr. Hunt during that quarter.

[20] The employer did not make every reasonable effort to allocate overtime on an equitable basis when it did not offer Mr. Hunt overtime for the sole reason that Mr. Hunt would have been paid double time. The employer's practice to prioritize employees who would be paid time and one-half over employees who would be paid double time, violates the collective agreement. When it acts in such a manner, the employer does not make every reasonable effort to allocate overtime on an equitable basis.

[21] The evidence showed that the employer made an error in not writing the correct phone number for Mr. Shaw on the overtime hiring sheet for the evening shift of October 19, 2007. As a result, Mr. Shaw was not called for overtime on that day, even if he was the employee with the lowest number of overtime hours worked during the quarter.

[22] The grievors should be paid for the overtime hours that they would have worked if the collective agreement had been respected. As a remedy, the adjudicator could order that the employer schedule that number of overtime hours for the

grievors, however this would be unfair to other employees who would also have been deprived of those overtime hours.

[23] The grievors referred me to the following case law: *Mungham v. Treasury Board (Correctional Service of Canada*, 2005 PSLRB 106; *Greater Sudbury Hydro Plus Inc. v. Canadian Union of Public Employees, Local 4705*, (2003) 115 L.A.C. (4th) 385; *Federal White Cement Ltd. v. United Cement Workers, Local* 368, (1981) 29 L.A.C. (2d) 342; *3M Canada Inc. v. Energy and Chemical Worker's Union., Local* 294, (1984) 15 L.A.C. (3d) 316; and *Cambridge (City) v. Amalgamated Transit Union, Local* 1608, (1997) 65 L.A.C. (4th) 13.

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

[24] The burden of evidence is on the grievors to prove that the employer did not respect the collective agreement in allocating overtime on an equitable basis. Based on the evidence submitted, the grievors did not meet that burden.

[25] Equitable allocation of overtime should not be calculated on a daily basis, but rather for a longer period of time. Furthermore, the employer always followed the same practice: to allocate overtime to employees who would be paid at time and one-half first, then to call employees who would be paid at double time.

[26] The Millhaven's procedure on the allocation of overtime was not yet the subject of an agreement with the local union in June and October 2007. Such an agreement was not signed by the parties until later in 2007.

[27] Mr. Shaw did not produce any evidence that he was not called for overtime on October 19, 2007 because of the error in his home phone number. He did not prove that he was available for overtime work that day. Furthermore, there was no evidence presented to prove that the employer did not make every reasonable effort to offer Mr. Shaw overtime on that day.

[28] There was no evidence presented by the grievors that the manner in which the employer applied its overtime procedures created a discrepancy in overtime allocation. When hours of overtime are compared for available employees on a long-term basis, it shows that the grievors were treated on an equitable basis.

[29] The employer referred me to the following case law: *Armand v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-02-19560 (19900629); *Roireau and Gamache v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 85; *Evans v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-02-17195 (19881007); *Lay v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-14889 (19861124); *Sturt-Smith v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-15137 (19860731); and *Sumanik v. Treasury Board (Ministry of Transport)*, PSSRB File No. 166-02-395 (19710927).

IV. Reasons

[30] Both parties agree that the employer should make every reasonable effort to allocate overtime on an equitable basis among available employees. However, according to their arguments, they have a different point of view on the meaning of the words "equitable basis".

[31] In *Sumanik*, the adjudicator concluded that equitable does not mean equal. Rather, it means that over a period of time, equitable could mean "approximately equal". Adjudicators in *Armand*, in *Evans*, and in *Lay* also concluded that equitability should be examined over a period of time that could be as long as a year.

[32] However, there was a common understanding at Millhaven between the employer and the local union regarding the meaning of what constituted an equitable basis. There was a detailed procedure in place to calculate the number of hours of overtime worked by employees on a weekly basis. Furthermore, the weekly overtime list was updated daily. In doing so, the employer established equitability every day, before offering overtime to available employees. Faced with a comparable procedure to allocate overtime at the Fenbrook Institution, the adjudicator in *Munghan* wrote the following:

. . .

> *[31] This suggests that the overtime policy represents the common understanding of how overtime is to be allocated equitably, as required under the collective agreement. Although the document does not form part of the agreement, it is relevant to its interpretation and application (see* Canadian Labour Arbitration (supra), *paragraph 4:1220). The procedures manual (Annex "D" of the* Agreed Statement

> of Facts*) states that, should the use of overtime become necessary, ". . . the Duty CS shall ensure that all overtime is hired in a cost effective manner and further that all overtime hours are distributed evenly amongst staff. . . ." The employer has limited its discretion to assign overtime hours by this policy. There was testimony from Mr. Mungham that the bargaining agent accepted this policy as the method of equitable allocation of overtime opportunities. There was evidence that this policy is used on a regular basis, notwithstanding that there may be other grievances outstanding. In this way, the overtime policy represents the common understanding of what equitable allocation of overtime means. I therefore find that the overtime policy is binding on the employer. There was no dispute that, according to the policy, Mr. Mungham should have been given the overtime assignment on December 30, 2003. I therefore find that there was a breach of the collective agreement.*
>
> . . .

[33] The parties presented abundant evidence that they both considered that equitability was applied on a daily basis. Surprisingly, when it came time for argument, the employer argued that overtime allocation should be examined on a long-term basis. In putting an overtime allocation procedure in place, and using it for a long period of time, the employer has limited its discretion to assign overtime hours according to this procedure, as long as the procedure does not contravene the collective agreement. The employer was not obligated to put in place such a sophisticated system of compiling daily overtime hours worked, but it did. That system is now the official and legal interpretation of what equitable allocation of overtime means at the Millhaven Institution. The only evidence presented to the effect that the policy indicated that equitability had to be calculated on a longer-term basis was the fact that the hours were cumulated during each quarter before being re-set to zero. I find that the parties applied the policy by calculating equitability on a daily basis and that the "counters" were re-set at zero for each quarter only for reasons of convenience.

[34] Having established that, does it mean that the employer does not respect the collective agreement when it offers overtime first to employees who are on their first day of rest over employees who are on their second day of rest?

[35] Evidence was presented to the effect that the long-standing procedure of the employer was to prioritize employees on their first day of rest. In *Lay* and in *Evans*, the adjudicators concluded that this way of allocating overtime did not violate the

collective agreement, and did not represent an inequitable criterion to allocate overtime. However, in *Evans*, the adjudicator wrote that had he been convinced that prioritizing employees on their first day of rest would create an inequitable allocation of overtime, he would have allowed the grievance. In *Sturt-Smith*, the adjudicator concluded that the grievor should have been offered overtime, even if he had been on double time. In *Sumanik*, the adjudicator stated that cost should not be a factor in defining the equitable allocation of overtime.

[36] Millhaven's procedure on overtime is clear: overtime will be offered first to available employees who would be paid time and one-half. Does this constitute a criterion which in the case of Mr. Hunt, leads to an inequitable allocation of overtime? Even if it is obvious that Mr. Hunt was not offered overtime on June 30, 2007, for the sole reason that he would have been paid double time, it does not necessarily mean that the employer was not equitable in its offer of overtime.

[37] The overtime distribution policy divides employees into two distinct categories based on whether an employee is on his of her first or subsequent day of rest, and prioritizes the former in the distribution of overtime opportunities, The grievor has not demonstrated to me that this division leads to inequitability, nor has it proven that the grievor's situation on June 30, 2007 was in violation of the collective agreement.

[38] As in *Evans,* if the grievor had presented evidence that prioritizing employees on their first day of rest created inequitable overtime allocation, I would have allowed the grievance. The employer's procedure might create an inequitable system to allocate overtime, however the grievor needs to prove it on a balance of probabilities, and he did not. The employer did not prove that it was equitable, but it did not have to.

[39] Mr. Shaw's grievance is based on a different series of facts. He was not offered overtime on October 19, 2007, even if he would have worked at time and one-half, and he had worked fewer hours than the employees who were called for overtime. On a balance of probability, I believe Mr. Shaw when he says that he was not called for overtime for the evening shift of October 19, 2007.

[40] Mr. Shaw testified that he was not called. Mr. Houde believes that he would have called Mr. Shaw, even if he is not sure that he did. The overtime hiring sheet for the evening shift of October 19, 2007 does not indicate that Mr. Houde left Mr. Shaw a telephone message, even if Mr. Houde did so for other employees. Furthermore, the

same overtime hiring sheet does not have the correct phone number for Mr. Shaw. Mr. Hunt testified that he assumes he would have noticed the error.

[41] On the one hand, Mr. Shaw's testimony is categorical: he was not called. On the other hand, Mr. Houde based his testimony on the assumption of how he would have normally acted, rather than on his memory of what actually happened that day.

[42] Mr. Shaw should have been offered overtime on the evening shift of October 19, 2007, but he was not, solely because of an administrative error made by the employer. Mr. Shaw was not offered overtime on an equitable basis and in accordance with the employer's policy. The employer should compensate him for that.

[43] I have reviewed the jurisprudence submitted by the parties, and I conclude that the remedy should be that the employer pay Mr. Shaw for the overtime that he would have worked, as if he had been called for overtime on the evening shift of October 19, 2007. I agree with the grievor that to offer, as a remedy, an overtime shift to Mr. Shaw, could create prejudice to other employees who would be deprived of being offered that overtime shift.

[44] From the evidence submitted to me, I cannot establish the number of hours of overtime that Mr. Shaw would have worked that day, and I will leave it to the parties to calculate them. If they cannot agree, I will make the decision, based on further submissions on the question.

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

(The Order appears on the next page)

V. Order

[46] Mr. Hunt's grievance is denied.

[47] Mr. Shaw's grievance is allowed. The parties will determine together the number of hours of overtime that the employer must pay Mr. Shaw.

[48] I will remain seized of Mr. Shaw's grievance for a period of 60 days from the date of this decision to intervene if the parties cannot agree on the number of hours of overtime to be paid to Mr. Shaw.

May 29, 2009

Renaud Paquet,
adjudicator