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Citation: 2010 PSLRB 132

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

RYAN WEEKS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Weeks v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Marie-Pier Dupuis-Langis, Union of Canadian Correctional Officers - Syndicat des agents correctionnnels du Canada - CSN

For the Employer: Martin Charron, counsel

Heard at Abbotsford, British Columbia,
October 5 and 6, 2010.

I. Individual grievances referred to adjudication

[1] Ryan Weeks ("the grievor") is a correctional officer (classified CX-01) at the Matsqui Institution in Abbotsford, B.C. Between August and October, 2006, he filed 14 grievances alleging that the Correctional Service of Canada ("the employer") violated the 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") on June 26, 2006 ("the collective agreement"). These grievances relate to the assignment of overtime for shifts between July 14 and September 23, 2006 that the grievor believes was not done equitably. The employer denied the grievances, and they were referred to adjudication on February 12, 2007.

[2] At the commencement of the hearing, the bargaining agent representative advised that she was withdrawing grievance 566-02-834, leaving 13 grievances outstanding.

[3] As a preliminary issue, the employer objected to my jurisdiction to examine the procedure used at Matsqui Institution to assign overtime. The employer stated that the grievor is questioning the method used for distributing overtime among qualified employees. However, the overtime distribution procedure in place at the time the grievances were filed was not part of the collective agreement but was a valid exercise of managerial authority over the allocation of overtime.

[4] Clause 21.10 of the collective agreement provides that the employer shall make every reasonable effort to allocate overtime a) based on an equitable distribution and b) based on classification group and level, subject to the possibility that locals can agree to a different model of overtime allocation. The employer argued that the two provisions in clause 21.10 are independent, and that if one applies, the other cannot. The employer contended that there is no basis to suggest that the collective agreement provides for a local practice for the equitable distribution of overtime. If a local practice or policy exists that is not part of the collective agreement, then an adjudicator does not have jurisdiction.

[5] The bargaining agent argued that the employer's objection to jurisdiction is groundless. She submitted that it is necessary to examine the employer's process for the allocation of overtime to determine whether the collective agreement was applied correctly. The bargaining agent representative noted that were the employer's position

followed to its logical conclusion, the employer could make up any local policy allocating overtime without consequence.

[6] I reserved my judgement on the preliminary objection.

[7] The relevant clauses of the collective agreement provide 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 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. Summary of the evidence

[8] The grievor testified on his own behalf. Gary Dosanjhe, a correctional manager at Matsqui Institution, testified for the employer. Between them, the parties adduced 13 documents in evidence, including the collective agreement, overtime allocation sheets for the months of July, August, September and December 2006, and

duty rosters, overtime reports and an analysis of overtime at Matsqui for the period in question.

[9] The facts of the outstanding grievances are relatively straightforward. On 13 occasions between July 14 and September 23, 2006, the employer offered overtime to correctional officers with more accumulated hours of overtime than the grievor. On all but one occasion, he was on his second day of rest. The employer did not dispute the fact that the grievor was not offered the overtime in question, and it did not dispute that officers with more accumulated overtime than the grievor were given priority over him.

[10] The grievor testified that overtime was offered on shifts on July 14, 15, 16, 22, 23, 25 and 30, 2006. At the end of June 2006, he had 44 hours of accumulated overtime, and at the end of July 2006, he had 48.25 hours, after working 4.25 hours of overtime that month (Exhibit G-2). He testified that he was available to work overtime on each date in question, but that he was not offered the overtime.

[11] On August 19, 27 and 30, 2006, overtime was again offered. The grievor was not offered overtime for any of these shifts, although he was available to work on each date. In August 2006, he worked 3.25 hours of overtime.

[12] The grievor testified that overtime shifts were offered on September 7, 17 and 23, 2006. Although he was available to work, he was not offered overtime on any of those dates. Exhibit G-5 shows that at the beginning of September, he had 51.25 hours of accumulated overtime (although the numbers suggest that he actually 51.5 hours of accumulated overtime). He worked 8 hours of overtime during that month, so at the end of the month, he had 59.25 hours accumulated (Exhibit G-5), which was his total at the end of December 2006 (Exhibit G-6).

[13] Both parties agreed that, at the time covered by the grievances, no system was in place for employees to indicate in advance their willingness to work overtime, although employees could advise the employer that they did not wish to be considered for overtime. Mr. Dosanjhe gave a couple of examples of employees who had asked not to be called to work overtime. The grievor was not identified as an employee who did not wish to work overtime.

[14] Mr. Dosanjhe testified that the parties had attempted to negotiate a local overtime allocation process but that the local union refused to sign the agreement. He also testified that in 2006 the local union instructed its members not to volunteer for overtime. He admitted that he was not a union member and had no direct knowledge of the negotiations or of the local union's instructions to its members.

[15] Because there was no sign-up system for overtime the employer was required to call employees one by one, according to its established process and based on accumulated hours of overtime. The evidence established that notations were generally made on the overtime sheets (Exhibits G-2 to G-6) to indicate when an employee refused to work overtime or was not reachable when called. However, Mr. Dosanjhe stated that not all supervisors marked the sheets, as it was not required.

[16] The number of overtime hours that employees actually worked was tracked annually but was updated monthly. Correctional supervisors also had access to the monthly overtime reports (Exhibits G-2 to G-6) that the supervisors updated daily. The supervisors also recorded the overtime worked by correctional officers on the daily overtime rosters (Exhibit E-7).

[17] Mr. Dosanjhe testified that, at Matsqui Institution, the employer's long-standing practice was to offer overtime first to employees on shift with the lowest number of accumulated overtime hours, then to employees on their first day of rest with the lowest number of accumulated overtime hours and finally to employees on their second day of rest with the lowest number of accumulated overtime hours. He testified that an attempt was made to reach an agreement with the local union on the overtime allocation procedure, but it refused to sign the agreement. As a result, the overtime allocation process was an unwritten employer practice.

[18] Mr. Dosanjhe testified that fiscal responsibility motivated the practice, as employees who worked overtime as an extension to their shifts, or on their first day of rest were paid at time-and-a-half, while employees on their second day of rest were paid double time. He also explained that the employer was required to pay mileage and meals to employees who worked overtime on a day of rest, which gave rise to the preference of offering overtime to employees as an extension of their regular shifts.

[19] Both the grievor and Mr. Dosanjhe agreed that a practice was in place at Matsqui Institution that limited employees to working no more than 16.5 hours in a 24-hour

period. Employees at Matsqui Institution could work either an 8-hour shift or a 12.75-hour shift; the grievor testified that he worked a 12.75-hour shift by choice.

[20] For 10 of the 13 overtime shifts in question, employees with more accumulated overtime hours than the grievor were offered the overtime because, as Mr. Dosanjhe explained, they were either on shift, and so worked the overtime as a shift extension, or on their first day of rest. On those occasions, the grievor was on his second day of rest. Consequently, he would have been paid at the double time rate.

[21] The employer's explanation for the reason that the grievor was not offered overtime on the remaining three shifts was somewhat different, however. On July 15 and 23, 2006, two officers with more accumulated overtime than the grievor, and also on their second day of rest, were offered the overtime. On July 30, 2006, overtime was again offered to an officer on his second day of rest who had more accumulated overtime hours than the grievor, who was on his first day of rest. Although he was not on duty and he did not offer the overtime in question, Mr. Dosanjhe provided a number of possible explanations, such as the experience level of the officers called in to work, the need to have someone on duty quickly or the possibility of a mistake based on a misreading of the duty roster.

[22] The employer introduced evidence that another correctional officer with fewer accumulated hours of overtime than the grievor filed grievances alleging that she should have been called to work for the overtime shifts on July 15 and 23, 2006 (Exhibit E-10). Those grievances were referred to adjudication and have yet to be scheduled (Exhibits E-11 and E-12).

III. Summary of the arguments

A. For the grievor

[23] The bargaining agent representative reiterated at the outset of the hearing that these grievances concern the application of clause 21.10 of the collective agreement, which requires the employer to make every reasonable effort to distribute overtime equitably among readily available, qualified employees. She repeated the bargaining agent's position that the provisions of clause 21.10 are cumulative, not mutually exclusive.

[24] The bargaining agent representative noted that both the grievor and the employer's witness agreed that no written institutional overtime policy was in place at the relevant time. Instead, the employer had a practice of allocating overtime to officers on shift with the lowest accumulated overtime hours first, then to officers on their first day of rest with the lowest accumulated hours, and finally to officers with the lowest accumulated hours on their second day of rest. The bargaining agent representative noted that the practice arose from the employer's belief that fiscal responsibility had to be taken into account when allocating overtime.

[25] At the times of the circumstances that gave rise to the grievances, no system was in place to allow employees to identify when they were not available to work overtime. Instead, correctional supervisors had to call employees one by one to see if they were available to work on a particular date. The bargaining agent representative observed that the employer's witness also confirmed that employees could ask not to be called to work overtime, and he gave a couple of examples of employees who had done so. The grievor was not one of them.

[26] The bargaining agent representative contended that overtime was not offered on an equitable basis among readily available qualified employees. The employer's practice could be divided into the following two parts: 1) allocating overtime based on the lowest number of hours and 2) allocating overtime by prioritizing between officers on shift, then officers on their first day of rest and, finally, officers on their second or subsequent day of rest. The first part of the practice, allocating overtime based on the lowest number of accumulated hours, could be accepted as equitable, but the second part of the practice, prioritizing based on shifts and specific days of rest, breached the collective agreement.

[27] The bargaining agent representative noted that employees called to work overtime as an extension of their shifts are paid at time-and-a-half, while employees on their first day of rest, also paid at time-and-a-half, receive compensation for mileage and meals, and officers on their second and subsequent days of rest are paid at double time and mileage and meals. The employer's witness stated several times that the employer had to be fiscally responsible and that the best method for allocating overtime ensured the lowest cost.

[28] The bargaining agent representative contended that an equitable method for allocating overtime should not be based on the applicable overtime rate, as it could

lead to an inequitable allocation. The financial impact for the employer should not be considered when defining equitability for employees.

[29] In reviewing the facts of these grievances, the bargaining agent representative argued that it was clear that overtime was distributed inequitably. Considering first grievances 566-02-824, 827 and 829, she pointed out that the employer initially acknowledged at the second level of the grievance process that a mistake had been made about overtime allocation. However, at the hearing the employer's witness, Mr. Dosanjhe, suggested that in those particular circumstances some officers could have been called ahead of the grievor because of their experience. But the bargaining agent representative noted that all the officers called in to work overtime on the occasions in question were CX-01s, as was the grievor. Given that fact, experience was not a factor; nor is it a factor in the collective agreement.

[30] With respect to the facts of the remaining grievances, the bargaining agent representative submitted that, for each overtime shift in question, correctional officers with more accumulated overtime hours than the grievor were offered the overtime, not the grievor. The grievor testified that he was readily available on each date in question. Furthermore, as she noted, since there was no sign-up sheet system in place, it has to be assumed that each employee was available to work overtime as long as he or she did not refuse it. The employer's witness explained the letters on the overtime sheets (Exhibits G2 to G6) and stated that letters indicating a refusal or lack of availability next to employees' names are written after the correctional supervisor calls them. None of the sheets for the shifts in issue has a letter beside the grievor's name indicating that he refused to work the overtime. In fact, the employer never called and offered him overtime for those shifts.

[31] The bargaining agent representative concluded by stating that, since the collective agreement was breached, the appropriate corrective measure is compensation at the applicable overtime rate for each missed overtime opportunity, as well as compensation for other missed payments, such as meals, mileage and shift differentials.

[32] The bargaining agent representative referred me to *Mungham v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 106, and *Hunt and Shaw v. Treasury Board (Correctional Service of Canada),* 2009 PSLRB 65.

B. For the employer

[33] Counsel for the employer submitted that the only question at issue was whether the grievor was treated equitably when overtime was assigned during the period in question, which was January 1 to December 31, 2006, in accordance with clause 21.10(a) of the collective agreement. The burden of proof rests with the grievor to show that he was treated inequitably.

[34] The employer's counsel noted that, in 2006, no written policy or agreement was in place with the local union for the method to be used to allocate overtime because the union refused to sign an agreement. The employer allocated overtime based on its established practice of offering it first to officers with the lowest number of accumulated overtime hours who were already on shift, and therefore paid at time-and-a-half, followed by officers on their first day of rest, also paid at time-and-a-half, followed by officers on their second day of rest and therefore paid at double time. During the period in question, correctional officers refused to provide the employer with information as to their availability to work overtime. As a result, the employer had to call officers one by one to offer them overtime, based on its system of prioritization.

[35] Counsel argued that the method of allocating overtime is not a determining factor when it comes to deciding equitability. The collective agreement does not cover the process or policy that should be used to determine whether overtime is offered equitably. Regardless of the method used, it is the factual result calculated over a reasonable period that determines whether an employee is negatively affected compared to his or her colleagues. The simple fact that employees paid at time-and-a-half are called before those paid at double time is not relevant and is far from proof that overtime is not assigned equitably. Furthermore, the grievor did not present any evidence to suggest that the process was incompatible with the collective agreement or that it led to inequity.

[36] The employer's counsel also argued that sections 7 and 11.1 of the *Financial Administration Act,* R.S.C. 1985, c. F-11, required the employer to be fiscally responsible and suggested that taking fiscal responsibility into account is reasonable and consistent with the collective agreement requirement in clause 21.10 to make "every reasonable effort" to allocate overtime equitably.

[37] The employer's counsel submitted that the grievor founded his argument solely on the fact that some officers with more accumulated overtime hours were called to work overtime and that he was not called. The employer did not contest that fact because that is the result of the application of its practice. Equity does not mean equality. It would be virtually impossible for the employer or other similar employers to give all employees the same amount of overtime. Nor, he argued, is it required.

[38] Counsel suggested that it is possible to determine equitability only by comparing things that are comparable. It would be illogical to compare an employee with very few overtime hours worked because he or she did not want to work overtime with an employee who is always available. Therefore, it is not enough to provide a set of numbers for comparison purposes without taking into account all the variables that might explain why some employees have worked more overtime than others, such as availability, shifts or leave or the voluntary nature of the overtime or exceptional circumstances.

[39] In applying those factors to this case, the counsel noted there was no way to assess the grievor's availability. While he may allege that he was available, it cannot be verified since it was a statement made after the fact, and there were no lists to show which employees were available. Further, the grievor worked a 12.75 hour shift, so he was limited in the amount of overtime that he could work as a shift extension, which could also explain why he might have fewer hours of overtime than other employees. Approved leave and emergencies should also be considered when explaining the differences between employees. Mr. Dosanjhe offered examples of situations in which employees with more experience might be required for overtime or in which it is necessary to replace employees quickly. Those situations could impact equitability.

[40] The employer counsel submitted that, for grievances 566-02-823, 825, 826, 828 and 830 to 836, the employer applied its overtime practice appropriately and correctly. Despite the grievor's sense that he was treated inequitably, he was, in fact, on his second day of rest on all those occasions and therefore was not eligible to work overtime in priority over correctional officers already at work or on their first day of rest.

[41] With respect to grievances 566-02-824, 827 and 829, which concern overtime shifts on July 15, 23 and 30, 2006, certain anomalies were identified. Did those anomalies create inequity? Counsel submitted that they did not. The assessment of

equitable distribution of overtime must be made over a reasonable period. At Matsqui Institution, the practice was to accumulate overtime over a calendar year. At the end of 2006, which is the year in question, the grievor had accumulated 59.25 hours of overtime. The average at the institution, calculated by adding all the overtime hours worked and dividing by all the CX-01s, was 52.61 hours. Furthermore, the employer must only make a reasonable effort to assign overtime equitably. That requirement was respected at Matsqui.

[42] The employer's counsel submitted that, for all the reasons given, the grievances must be dismissed. However, should a finding be made that overtime was not distributed equitably, counsel argued the grievor should not be awarded a remedy because he did not demonstrate his availability to work overtime at the times in question and because other correctional officers with even fewer hours of accumulated overtime were available, at least one of whom has grieved. On that basis, counsel argued that the grievor is not entitled to compensation.

[43] The employer's counsel referred me to the following decisions: *Brescia v. Canada (Treasury Board),* 2005 FCA 236; *Canada (Attorney General) v. Nitschmann,* 2009 FCA 263; *Archer v. Canada (Treasury Board),* [1984] F.C.J. No. 352 (C.A.) (QL); *Archer et al. v. Treasury Board (Transport Canada),* PSSRB File Nos. 166-02-13812 to 13817 (19830811); *P.S.A.C. v. Canada (Canadian Grain Commission),* [1986] F.C.J. No. 498 (T.D.) (QL); *Peck v. Parks Canada,* 2009 FC 686; *Sumanik v. Treasury Board (Ministry of Transport),* PSSRB File No. 166-02-395 (19710927); *Lay v. Treasury Board (Transport Canada),* PSSRB File No. 166-02-14889 (19861124); *Evans v. Treasury Board (Solicitor General Canada - Correctional Service),* PSSRB File No. 166-02-17195 (19881007); *Armand v. Treasury Board (Solicitor General Canada – Correctional Service)* PSSRB File No. 166-02-19560 (19900629); *Farcey v. Treasury Board (National Defence),* PSSRB File No. 166-02-21050 (19920212); *Bérubé v. Treasury Board (Transport Canada)* PSSRB 166-02-22187 (19930215); *Roireau and Gamache v. Treasury Board (Solicitor General Canada - Correctional Service),* 2004 PSSRB 85; *Hunt and Shaw*; *Union of Canadian Correctional Officers - Syndicat des agent correctionnel du Canada - CSN v. Treasury Board, 2010 PSLRB 85*; and Brown and Beatty, *Canadian Labour Arbitration,* 4th ed., at para 5:3220 and 5:3224.

C. Reply

[44] The bargaining agent representative agreed that there was no written policy and argued that the reasons for not having a written policy are not relevant. Further, the speculation of the employer's witness as to the reasons that the local union refused to sign an overtime allocation agreement were simply speculation, as he was not a member of the bargaining unit, was not involved in the negotiation and therefore cannot testify as to the local union's motives.

[45] The bargaining agent representative reiterated her position that the method of allocating overtime directly impacts equitability. She noted that much of the case law cited by the employer's counsel was quite old, and she suggested that *Hunt and Shaw* was more persuasive because it involved the same employer, same bargaining agent and same collective agreement and was from 2009. Even though the employer relied on *Hunt and Shaw* for the proposition that prioritizing overtime based on overtime pay rates is not necessarily inequitable, the bargaining agent representative believes that she demonstrated an inequitable distribution of overtime on a daily, monthly and yearly basis. She submitted that the employer's practice led to that inequity.

[46] In response to the employer's argument that a number of factors need to be considered when determining whether overtime was allocated equitably, the bargaining agent representative submitted that the evidence did not support any negative inference from an analysis of the factors. The grievor's evidence was that he was available but was never called. Leave was not a factor because he was not on leave. There was no evidence to support that shifts were a factor; nor was there any evidence of unforeseen emergencies.

[47] With respect to the employer's argument that other officers were entitled to overtime before the grievor, the bargaining agent representative conceded that was possibly true but that it was not relevant. Further, with respect to the other officer that grieved, the bargaining agent noted that more than one shift was available on the dates in question, so that officer's case would not affect the outcome of the grievor's claim.

[48] The bargaining agent repeated her submission that the grievor should be paid for the overtime hours that he would have worked had the collective agreement been respected.

IV. Reasons

[49] The 13 remaining grievances allege that the employer failed to offer overtime equitably, pursuant to clause 21.10 of the collective agreement, which provides 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 another method to allocate overtime.*
>
> . . .

[50] At the beginning of the hearing, the employer's counsel raised a preliminary objection to my jurisdiction, on the ground that the grievor was questioning the method of assigning overtime, which is a local practice that falls within the valid exercise of management rights. As such, it is not part of the collective agreement and does not fall within the jurisdiction of an adjudicator.

[51] I reject the preliminary objection. It is clear that the core issue in these grievances is the allegation that the employer failed to allocate overtime equitably, in compliance with clause 21.10 of the collective agreement. The fact that overtime at Matsqui Institution, at the time of the grievances, was allocated in accordance with a management practice does not and cannot negate the obligation in the collective agreement to allocate it equitably. As such, the issue falls squarely within the jurisdiction of an adjudicator.

[52] Both the bargaining agent and the employer's counsel focused a good deal of attention at the hearing on whether the employer's practice of ensuring fiscal responsibility by allocating overtime based on the applicable overtime rate violated the collective agreement. There is a fair amount of arbitral jurisprudence on point, which

is well summarized in *Hunt and Shaw.* I agree with the adjudicator in that case that it is the result, not the method, which is determinative. Evidence must be presented to demonstrate that the overtime allocation process creates an inequitable distribution of overtime. It is clear that, based on decisions such as *Hunt and Shaw* or *Mungham,* it is possible to create a process for allocating overtime that takes into account the applicable overtime rate without resulting in an inequitable distribution. However, where the evidence demonstrates that the cost-saving measures lead to an inequitable distribution, the fact that managers have a general statutory responsibility to manage responsibly will not outweigh the specific provisions of the collective agreement.

[53] In my view, absent an agreement with the local union as to the process to allocate overtime, the employer at Matsqui Institution was free to use whatever method it wished, as long as it resulted in an equitable distribution of overtime among readily available qualified employees, in keeping with clause 21.10 of the collective agreement. Did the process used at Matsqui in the period in question result in an equitable distribution of overtime? I do not believe so.

[54] Whether the numbers are analyzed monthly, quarterly or annually, based on the evidence before me (Exhibits G-2, G-4, G-5 and G-6), it is clear that employees differed widely in the number of accumulated overtime hours. For example, at the end of July 2006, of the roughly 100 employees listed on the overtime sheet, about 12 employees had no accumulated overtime, about 35 had between 20 and 50 hours of accumulated overtime, and about 7 had over 100 hours of accumulated overtime, including 2 who had over 150 hours of accumulated overtime. By the end of December 2006, which was the end-of-year for overtime purposes, the number of employees with over 100 hours of accumulated overtime had grown to about 13 and included 2 employees with over 200 hours of accumulated overtime. About a quarter of the employees had between 20 and 50 hours of accumulated overtime. At the end of July 2006, the grievor had 48.25 hours of accumulated overtime, and at the end of December 2006, he had 59.25 hours. Based solely on these numbers, it is not possible to say that overtime was allocated equitably.

[55] Relying on *Sumanik* and *Roireau and Gamache,* the employer's counsel argued that equitable does not necessarily mean equal. He suggested that it is not enough to simply look at the numbers; an analysis of equitability must take into account a

number of variables, such as the availability of employees and the nature of the shifts, among other factors.

[56] However, an analysis of such factors to explain wide differences in overtime hours assigned does not assist the employer. For example, because employees did not provide the employer with information as to their availability to work overtime during the period in question, there is simply no evidence to suggest that large numbers of employees simply did not wish to work overtime. As a result, availability cannot be used as a factor to explain the wide variations in overtime worked. Nor can the differences in shifts at Matsqui Institution be relied on to justify the wide variations in overtime, since that would become an issue only because the employer prioritized those officers already at work when assigning overtime as a cost-saving measure, which the bargaining agent argued was part of the problem. In any case, the impact of the different shifts is purely speculative, since no evidence was presented that showed that officers working an eight hour shift accumulated more overtime than other officers.

[57] In the end, I have only the numbers, which clearly indicate that overtime was not being distributed equitably over the three-month period in question or over the year. The employer's counsel relied on *Sumanik* to argue that equitable does not mean equal but failed to read the entire passage at page 16:

. . .

> *…What may be equitable is not necessarily equal. Overtime, however, should be shared equitably in the sense that over a 28-day cycle there would be no wide gaps between one employee and others. Over a period of one year the results should be approximately equal, and I stress the word "approximately"….*

. . .

In this case, very wide gaps in overtime hours worked exist between employees and they continue over the year. To use the grievor as only one example, at year's end he had 59.25 hours of overtime accumulated, as opposed to the 289.25 hours of accumulated overtime of the employee with the highest number of hours. It cannot be said that, at the end of the year, the results were "approximately equal." It is precisely because of these wide gaps in overtime hours worked that I reject the employer's

argument that the grievor had worked more than the average number of accumulated overtime and therefore was not treated inequitably.

[58] The employer's evidence was clear that overtime was tracked daily and that the correctional supervisors had access to the updated overtime information when they offered overtime assignments. Given that fact, it cannot be said that every reasonable effort was made to assign overtime equitably. The employer stuck to its overtime policy in spite of clear evidence that it created extremely wide gaps in distribution.

[59] Since the employer did not make every reasonable effort to distribute overtime equitably during the period in question, it is necessary to consider the specific circumstances of the grievances. The employer presented an analysis of the overtime shifts noted in the grievances (Exhibit E-8). It is clear from that document that, on each relevant shift, employees with significantly more accumulated hours of overtime were offered the shifts in preference to the grievor. The employer did not dispute that fact, arguing instead that it had appropriately followed its own overtime policy. As I have already found, that policy did not respect the obligation in the collective agreement to allocate overtime equitably. As a result, I find that the grievor was improperly bypassed on each occasion grieved. He should have been offered the opportunity to work the overtime shifts in question.

[60] Three overtime shifts in particular stand out from the others because, on those occasions the employer did not, in fact, follow its policy. On July 15, 23 and 30, 2006, overtime shifts were offered to employees on their second day of rest who also had more accumulated hours than the grievor. In the response to the grievances concerning those shifts (566-02-824, 827, and 829) at the second level of the grievance process, the employer conceded that the grievor should have been called but held that, over the period of a year, overtime was distributed equitably, and so, no remedy was required. However, the evidence is clear that, over the course of the year, the distribution of overtime was not equitable.

[61] At the hearing, the employer's counsel took a different position, arguing that special circumstances occurred that justified calling in employees other than the grievor. However, the only evidence offered by the employer on those special circumstances was speculation by Mr. Dosanjhe as to why the grievor might not have been called in. Mr. Dosanjhe was not on duty on the shifts in question and did not make the decisions with respect to the overtime allocation. His evidence on this point

was based on what he thought might have happened and on his institutional experience. Given that fact, I do not find the explanations either convincing or helpful. They do not change my finding that the grievor was improperly bypassed for overtime opportunities for each of the shifts grieved.

[62] The employer's counsel argued that, even if I found that the grievor should have been offered the overtime opportunities in question, he is not entitled to a remedy because other correctional officers had fewer accumulated overtime hours than the grievor, one of whom has also filed grievances. Counsel for the employer also contended that the grievor had not established his availability for the shifts in question.

[63] To deal with the last point first, I find that the grievor was available. He testified that he was available. He was not challenged directly on that evidence, and no other evidence was offered that would have called into question his statement that he was available and that he wanted to work overtime on each occasion in these grievances.

[64] As to whether the grievor is entitled to a remedy because other correctional officers had fewer accumulated overtime hours than the grievor, I believe that I can deal only with the grievances that are in front of me. I do not know the circumstances of the other correctional officers with less accumulated overtime hours than the grievor, but only one seems to have grieved the loss of overtime opportunities (Exhibit E-10). Her grievances are not before me and do not, in my opinion, impede the grievor's right to a remedy. In any case, I note that more than one overtime opportunity existed on each date identified in Exhibit E-10, so her grievances would not change the facts of these grievances in any relevant manner. I have found that the grievor was improperly bypassed. As a result, he is entitled to be compensated.

[65] In circumstances such as this, in which overtime is allocated according to a process calculated on a recurring cycle, an in-kind remedy is not appropriate because it would interfere with the current overtime cycle. Therefore, the appropriate remedy in this case is monetary. I order that the grievor be compensated at the appropriate overtime rate for each missed overtime opportunity grieved, and that he receive any other applicable payments, such as mileage, meals and shift differentials.

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

(The Order appears on the next page)

V. Order

[67] All 13 grievances are allowed. I leave it to the parties to determine the number of hours of overtime that the employer must pay the grievor as well as any other applicable compensation.

[68] I will remain seized of the grievances for a period of 90 days should the parties require assistance in determining the number of hours of overtime to be compensated or with any other issue that arises from implementing this decision.

December 17, 2010

Kate Rogers,
adjudicator