Date: 20100813

Files: 569-02-51 to 55 and
60 to 85

Citation: 2010 PSLRB 85

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

UNION OF CANADIAN CORRECTIONNAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Bargaining Agent

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)

In the matter of policy grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

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

For the Employer: Richard Fader, counsel

Heard at Ottawa, Ontario,
July 7 to 9, 2010.

I. Policy grievance referred to adjudication

[1] Between May 23, 2009 and November 1, 2009, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") filed 31 policy grievances. The grievances were filed by bargaining agent representatives in 31 establishments of the Correctional Service of Canada ("the employer" or CSC). The grievances were denied by the employer. They were referred to adjudication between November 10 and 27, 2009.

[2] On November 1, 2009, the employer implemented a national policy on the allocation of overtime for correctional officers and rescinded existing local policies, procedures or agreements on overtime allocation. The employer advised the bargaining agent of the upcoming national policy several months before its implementation.

[3] The bargaining agent's local representatives from the Ontario region (PSLRB File Nos. 569-02-51 to 55, 80 and 82) grieved that the employer's national overtime policy violated the collective agreement. The bargaining agent's local representatives from the other regions (all the other files) grieved that the employer's decision to terminate local overtime agreements, policies or procedures violated the collective agreement. As a corrective action, the bargaining agent, through these grievances, requests that the employer rescind its national overtime policy or its decision to terminate local overtime agreements, policies or procedures and that the employer reimburse all sums owed to employees as a result of its decision.

[4] The collective agreement signed by the Treasury Board and the bargaining agent for the Correctional Services Group bargaining unit on June 26, 2006 ("the collective agreement") applies to these grievances. The following provisions of the collective agreement are of interest in deciding the grievances. The asterisks indicating a new provision.

. . .

> ***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.*
>
> *and*
>
> *(c) to give employees who are required to work overtime adequate advance notice of this requirement.*
>
> . . .

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

[5] Most of the evidence adduced by the parties was not contradicted. To better understand the issues, the evidence will be summarized by general topics. The parties jointly presented the local overtime agreements, policies or procedures that were in place before November 1, 2009.

[6] The bargaining agent adduced six documents in evidence, including the national overtime policy. It called Graham Hughes as a witness. Mr. Hughes is a correctional officer at the Collins Bay Institution in Kingston, Ontario. He is also the local union president at that institution.

[7] The employer adduced 74 documents in evidence. Most dealt with the context and the process of implementing a national policy on overtime. The employer called Marc Thibodeau, John Kearney, Amanda Connolley, Barry Niles, Maureen Harris and Andria Hamilton as witnesses. Mr. Thibodeau is an acting senior director at the Treasury Board Secretariat. Between 2004 and 2006, he was the employer's negotiator for the collective agreement. Mr. Kearney is Director of Labour Relations Policy at the CSC. Ms. Connolley is a labour relations advisor at the CSC. Mr. Niles is Manager of Deployment Standards and Scheduling at the CSC. Ms. Harris is a policy analyst at the Treasury Board Secretariat. Ms. Hamilton is a correctional manager at Collins Bay Institution.

A. <u>The local overtime agreements, policies or procedures</u>

[8] Before the implementation of the national overtime policy on November 1, 2009, the employer allocated overtime according to processes developed at the institutional level.

[9] Some of those processes had been negotiated between the local representatives of the bargaining agent and the institution wardens and were outlined in formal agreements signed by the local representatives and the wardens. Among those agreements, some provided for a revision or a revocation on request by either party. Other agreements did not contain any revision or revocation provision.

[10] Other institutions allocated overtime according to formal written local overtime policies. In some cases, those policies were developed by the employer after consulting with the local representatives of the bargaining agent. Finally, some institutions did not have a formal policy or agreement but simply relied on local practices to allocate overtime to correctional officers.

[11] Some of the written agreements or policies were put in place before the collective agreement was signed. Even though the agreements or policies vary in format and details, they contain some prevailing patterns about the allocation of overtime. First, employees fill out a form to indicate the work shifts for which they are available to work overtime. Second, the employer regularly, in most cases daily, compiles the number of overtime hours already worked within a certain period. That period varies from 1 to 12 months, 3 months being the most frequent. At the end of the period, the employer begins a new compilation of hours of overtime worked. Third, the employer offers the overtime to the available correctional officer with the lowest number of overtime hours worked within the period of reference. When possible, overtime is offered by classification level. In most agreements or policies, there is a clause that specifies that overtime is offered in priority to officers working at time-and-one-half over officers working at double time. There are numerous details in those agreements or policies, but I do not find it useful to summarize all of them in this decision.

B. The national overtime policy

[12] The employer implemented its national overtime policy on November 1, 2009. Its immediate effect was to rescind and replace all the local agreements, policies or procedures in place at that time.

[13] The employer adduced abundant evidence on the context of the introduction of the national overtime policy, including three reports from the Auditor General of Canada, two reports of the House of Commons Standing Committee on Public Accounts and three articles published in the media. Those documents all dealt with the cost of managing overtime or with the issue of scheduling and deploying staff. I will not summarize that part of the evidence because it is not of importance in deciding the grievances.

[14] The employer also adduced abundant evidence on the consultation that took place with the bargaining agent on the introduction of the national overtime policy. From day one, the bargaining agent opposed the implementation of the national overtime policy. At the national labour-management consultation committee (NLMCC) meeting in March 2007, the bargaining agent questioned the need for such a policy. The employer argued that it wanted to ensure compliance and consistency in the application of the collective agreement. At the September 2007 NLMCC meeting, the employer raised concerns that in some cases the local agreements on overtime might have gone beyond the authority of the parties as defined by the provisions of the collective agreement. The bargaining agent raised concerns about how the employer could terminate local agreements on overtime. At the NLMCC meeting in September 2007, the employer informed the bargaining agent that it would develop a national overtime policy, taking into account the bargaining agent's comments. A draft version of what was then called the "Overtime Bulletin" was discussed at subsequent meetings of the NLMCC in March and April 2009.

[15] On August 17, 2009, the employer advised the bargaining agent in writing that, effective November 1, 2009, all local overtime policies, understandings or agreements on overtime allocation would be terminated and that the national policy on overtime would apply. On August 20, 2009, the employer provided the same information in writing to the local union presidents. On August 21, 2009, the bargaining agent wrote to the employer asking that each institution sign a local agreement on all matters related to overtime. Among other things, those agreements were to ensure the

equitable distribution of overtime over a three-month period and a precise mechanism for allocating overtime.

[16] At the September 2009 NLMCC meeting, the bargaining agent expressed its disappointment over the employer's unwillingness to change the basic principles of its overtime policy. The employer responded that it had made a decision to go ahead with its national overtime policy because it was no longer acceptable to manage overtime with 58 existing local policies and because there was a need to ensure consistency across the CSC.

[17] The national policy on overtime is based on the following principles: controlling and reducing the need for overtime, giving employees adequate advance notice when they are required to work overtime, making every reasonable effort to allocate overtime at the same group and level, minimizing costs when overtime is required, and discussing overtime results with union local representatives on a quarterly basis. The policy states that managers should make every reasonable effort to offer hours of overtime on an equitable basis among readily qualified employees. Managers are to keep a record of all hours of overtime offered and worked. Recording periods for overtime are quarterly from April 1 of each year to allow for regular adjustments, and equitability is calculated over a 12-month period.

[18] In documents complementary to the national overtime policy, the employer states that correctional managers should offer overtime to employees who have had fewer overtime hours offered and that there is no obligation to hire the person with the fewest hours. In offering overtime, correctional managers must take the following considerations into account: overtime offering list, employee availability, overtime rate to be paid, mileage entitlements, hiring on site, shift adjustments, health and safety restrictions, leave usage, and officers' limitations.

C. <u>Sharing of information under the national overtime policy</u>

[19] In each institution, the employer posts quarterly an overtime report containing a list of all employees by classification group and level indicating the number of overtime hours worked in the quarter. However, that report does not include employees' names. According to the employer, the names of employees do not appear on that report to protect their privacy. Mr. Hughes testified that it is impossible for employees to learn from that report whether overtime was distributed equitably

among employees and to file grievances when needed. Furthermore, when employees make themselves available for overtime, they do not know the names of the other employees who made themselves available as had previously been the case. There is no means for them to determine whether the employer has respected the collective agreement.

[20] Mr. Hughes also testified that, as a local president, he does not receive more detail on the overtime worked by employees and that he cannot help them when they feel that they were unfairly treated. He would like to be able to negotiate a local agreement on overtime with the warden, but he cannot because the employer prevents the warden from entering into a local agreement. Mr. Hughes testified that he did not receive from the employer a detailed report of overtime hours worked from November 2009 to March 2010 by employees. He admitted that he was away from work for a while in spring 2010.

[21] Ms. Hamilton testified that a detailed report of overtime hours worked by the correctional officers from November 2009 to March 2010 was sent to Mr. Hughes by email on April 12, 2010. That email was adduced in evidence. Ms. Hamilton sent similar emails to Mr. Hughes on May 11, 2010 and June 1, 2010, updating the information sent on April 12, 2010.

[22] The employer has advised all institutions in writing to provide the local bargaining agent representatives with complete monthly overtime reports so that they may address the concerns of employees and to prepare for quarterly meetings with the employer to discuss overtime issues.

[23] Ms. Connolley testified that it is possible for employees to file grievances under the new overtime policy. In support of her testimony, the employer adduced in evidence a list of 370 overtime grievances filed by employees from November 1, 2009 to March 31, 2010.

D. Clause 21.10 of the collective agreement

[24] Clause 21.10 of the collective agreement states that it is possible for a union local to agree in writing with the institution warden on another method to allocate overtime. Evidence was adduced at adjudication on the meaning of that clause, especially on the question of applying the sentence starting with “However” to

paragraph (a) and (b) or only to paragraph (b). Some of that evidence is extrinsic, which was produced during the last round of bargaining between the parties. For clarity, it is useful to again reproduce clause 21.10 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.*
>
> *and*
>
> *(c) to give employees who are required to work overtime adequate advance notice of this requirement.*

[25] Mr. Thibodeau pointed out that paragraph (b) of clause 21.10 of the collective agreement is preceded by two asterisks, which means that it was changed during the last round of bargaining. The employer adduced in evidence the proposal tabled during the last round of bargaining by the bargaining agent to amend clause 21.10. That proposal was to amend that clause by adding a new paragraph (d), which was to read as follows:

> *A local may agree in writing with the institutional warden on another method than set out in 21.10 b) for the distribution of overtime. A copy of such an agreement shall be sent to the Union's national office for approval.*

[26] Mr. Thibodeau testified that the addition proposed by the bargaining agent became, in its final form, the paragraph starting with "However," added after clause 21.10(b) of the collective agreement. Mr. Thibodeau also testified that he was aware of the case law on clause 21.10, including *Mungham v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 106.

[27] The evidence shows that all the local agreements on overtime cover a lot more than the issue of allocating overtime "at level" as per clause 21.10(b) of the collective agreement. In cross-examination, Mr. Kearney testified that, after the signing of the collective agreement, the employer did not advise the wardens that the local overtime agreement could not cover more than the "at level" issue.

[28] Ms. Harris was present at the grievance hearing. She took detailed notes of the discussion that took place during the grievance hearing between the bargaining agent representative and the employer representative. Those notes were adduced in evidence. Ms. Harris testified that the bargaining agent argued at the grievance hearing that, according to clause 21.10 of the collective agreement, the parties could negotiate local agreements on overtime allocation between employees, and they were not limited to the "at level" issue. The bargaining agent also argued at the grievance hearing that the employer did not have the right to unilaterally cancel the local overtime agreements. Ms. Harris testified that the bargaining agent did not argue at that grievance hearing that the national policy on overtime violated the collective agreement.

III. Summary of the arguments

A. For the bargaining agent

[29] The bargaining agent argued that the local overtime agreements or policies are binding on the employer and that they establish how overtime must be allocated. The case law is clear. In rescinding the local agreements and policies, the employer has unilaterally set aside part of the collective agreement. One party alone cannot change the collective agreement; otherwise it creates unstable labour relations.

[30] An outside office, the Auditor General of Canada, examined the employer's practices on overtime and concluded that there was a problem. The employer reacted and changed how overtime allocation was managed. The employer can make all the policies it wants, but it is limited by the collective agreement and the case law.

[31] When the collective agreement was negotiated, a change was made to clause 21.10(b) to enable the local union and local management to negotiate agreements on overtime allocation. The employer's interpretation that those local agreements can apply only to allocating overtime "at level" verges on the absurd. That interpretation

would provide absolutely no benefit to the bargaining agent and would make the changes to the collective agreement in 2006 useless.

[32] When they signed the collective agreement, it is clear that the parties intended to give the authority to their local representatives to arrive at local agreements on overtime allocation. The employer knew then that those agreements existed, and it explicitly or implicitly authorized them. The employer also knew the case law when it signed the collective agreement.

[33] In previous decisions, adjudicators have considered local overtime agreements as part of the collective agreement. Those agreements were the basis from which the employer had to allocate overtime and interpret clause 21.10 of the collective agreement. The same applied to institutions with employer policies or local understandings on how overtime would be allocated. The employer has to respect those agreements and policies. It cannot change them without the bargaining agent's consent.

[34] The bargaining agent also argued that local overtime agreements are ancillary documents that should be considered as constituting or forming part of the collective agreement.

[35] The bargaining agent asks that the adjudicator declare that the employer violated the collective agreement, order the employer to cease its violation, and order the employer to interpret and administer the collective agreement in compliance with local agreements, understandings and policies on overtime that existed before the national policy on overtime was implemented. The bargaining agent also asks the adjudicator to reserve jurisdiction on monetary losses incurred by employees since the implementation of the national overtime policy.

[36] The bargaining agent referred me to the following decisions: *Mungham*; *Hunt and Shaw v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65; *Lauzon v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 126; *Bowater Canadian Forest Products Inc. v. United Steel Workers, Local 1-2693* (2008), 175 L.A.C. (4th) 168; *Alberta Wheat Pool v. Grain Workers' Union, Local 333* (1994), 44 L.A.C. (4th) 382; and *Eurocan Pulp & Paper Co. v. Communications, Energy and Paperworkers of Canada, Local 298* (1998), 72 L.A.C. (4th) 153. The bargaining agent also referred me to Brown and Beatty, *Canadian Labour Arbitration* 4th edition, at 4:1200.

B. For the employer

[37] The employer argued that local agreements, understandings and policies are not part of the collective agreement. Consequently, an adjudicator is without jurisdiction under section 220 of the *Public Service Labour Relations Act* ("the *Act*") to adjudicate these grievances since they do not involve the interpretation or application of the collective agreement. Clause 21.10 of the collective agreement provides for entering into local agreements as they relate to the "at level" allocation of overtime. However, the collective agreement does not speak to the terms of such agreements or to how they are terminated. Consequently, the question of their terminations by the employer is outside the ambit of the collective agreement. Had the parties intended to provide for a specific term or limitation on the revocability of the local agreements, they could have done so in the collective agreement. The parties did not, and as a result, the issues raised by the grievances are not within the jurisdiction of an adjudicator.

[38] It is important to note that, when the parties intended to incorporate documents in the collective agreement, they did so specifically. The employer gave the example of article 41, which states that National Joint Council directives form part of the collective agreement. It also referred me to Appendix "K" of the collective agreement. For a document to be considered part of the collective agreement, it must be clearly intended and expressed by the parties that it is a part of the collective agreement. It is clear that the employer never intended that those local documents on overtime be part of the collective agreement.

[39] The employer also argued that clause 21.10(b) of the collective agreement only provides for the possibility of locally agreeing in writing to the "at level" allocation of overtime. Contrary to the bargaining agent's view, the employer argued that the collective agreement does not provide for the possibility of local agreements in clause 21.10(a). If the provision relating to local agreements were to apply to paragraphs (a) and (b) of clause 21.10, the clause would have been laid out differently.

[40] The employer argued that, pursuant to sections 7 and 11.1 of the *Financial Administration Act* (*FAA*), R.S.C., 1985, c. F-11, it has the unilateral authority to amend terms and conditions of employment, subject to specific limitations in a statute or collective agreement. The parties can enter into local agreements on a variety of issues, but those agreements do not form part of the collective agreement and do not limit the employer's authority under the *FAA* to amend the terms and conditions of

employment. While the employer takes the position that in all cases it had the authority to rescind the local agreements, it gave reasonable notice to the bargaining agent and to its local representatives of its decision to rescind the local overtime agreements and to implement a national overtime policy.

[41] Finally, the employer argued that the bargaining agent cannot allege that the specific issue of the implementation of the national overtime policy or its content violates the collective agreement because it was not grieved or argued at the grievance hearing. Furthermore, any allegation that the national policy violates the collective agreement in any particular case is not a proper matter for a policy grievance. In the alternative, there is simply no evidence that the national policy does not provide for the equitable distribution of overtime. Such a determination would require evidence from the bargaining agent of a systematic pattern of inequitable distribution of overtime attributable to the national policy.

[42] The employer referred me to the following decisions: *Mungham*; *Hunt and Shaw*; *Canada Paperworkers' Union, Local 298 v. Eurocan Pup and Paper Co.* (1990), 14 L.A.C. (4th) 103*; Roireau and Gamache v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 85; *Canada (Attorney General) v. Amos*, 2009 FC 1181; *Vaughan v.* Canada, 2005 SCC 11; *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.); *Canada (Attorney General) v. Assh*, 2005 FC 734; *Roberts v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-18241 (19890728); *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2007 CanLII 50603 (On. S.C.); *Brescia v. Canada (Treasury Board)*, 2005 FCA 236; *Public Service Alliance of Canada v. Canada (Canadian Grain Commission)* (1986), 5 F.T.R. 51; *Appleby-Ostroff v. Canada (Attorney General)*, 2010 FC 479; *Peck v. Canada (Parks Canada)*, 2009 FC 686; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Darragh et al. v. Treasury Board (Transport Canada)*, PSSRB File No. 161-02-700 (19931021); *Canada (Treasury Board) v. Nitschmann*, 2009 FCA 263; *Raymond v. Treasury Board*, 2010 PSLRB 23; *McAuliffe v. Treasury Board (National Defence)*, PSSRB File No. 166-02-21431 (19911105); *Ball et al. v. Treasury Board (Canada Post)*, PSSRB File Nos. 166-02-12997 to 13014 and 13017 to 13051 (19850325); *Bérubé v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-22187 (19930215); *Armand v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-19560 (19900629); *Foote v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 142; *Lapointe v. P.S.S.R.B.*, [1978] 1 F.C. 56

(C.A.); *Burchill v. Canada (Attorney General)* (1980), [1981] 1 F.C. 109 (C.A.); *Shneidman v. Canada (Attorney General)*, 2007 FC 192; *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 84; *Thompson v.Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-21779 (19920916); *Chan v. Canada (Attorney General)*, 2010 FC 708; *Babcock v. Canada (Attorney General)*, 2005 BCSC 513; and *Farcey v. Treasury Board (National Defence)*, PSSRB File No. 166-02-21050 (19920212).

IV. Reasons

[43] These 31 policy grievances raise two issues. The first group of grievances (PSLRB File Nos. 569-02-51 to 55, 80 and 82) allege that the employer's national overtime policy violates the collective agreement. The 24 other grievances allege that the employer's decision to terminate local overtime agreements, policies or procedures violated the collective agreement. Those two allegations must be addressed separately.

A. Does the national overtime policy violate clause 21.10 the collective agreement?

[44] The employer argued that the bargaining agent cannot claim that the national policy violates the collective agreement because it did not argue so at the grievance hearing. It supported its argument by *Burchill* and *Shneidman*. At adjudication, the bargaining agent also did not argue that the national policy violated the collective agreement.

[45] I agree with the employer that the bargaining agent cannot argue at adjudication that the national policy violates the collective agreement for the other 24 grievances when that issue was raised neither in those grievances nor at the grievance hearing. The principle stated in *Burchill* directly applies to those grievances. To accept at adjudication that those grievances challenged the national policy as a violation of the collective agreement would be to accept an alteration or a substantial amendment to those grievances.

[46] However, on the same question, I disagree with the employer about the other seven grievances because they directly addressed the issue of the national policy violating the collective agreement. Because the bargaining agent did not raise that question at the grievance hearing nor at adjudication, I could conclude that it abandoned the question of the national overtime policy violating clause 21.10 of the

collective agreement. However, I believe that this is an important question that needs to be addressed and that this issue is still very alive between the parties.

[47] No evidence was adduced at adjudication demonstrating that the national overtime policy violates the collective agreement. Such evidence would have been necessary for me to conclude a violation of the collective agreement. Specifically, the bargaining agent needed to prove on a balance of probabilities that, as a result of the policy, overtime had not been allocated on an equitable basis among readily available qualified employees. There might be some elements of the policy that could, when applied, create equitability issues, but no evidence was presented in support of that allegation.

[48] Those seven grievances are denied since there is no evidence that the national overtime policy violates the collective agreement.

B. Did the employer violate the collective agreement by rescinding the local overtime arrangements?

[49] That question applies to the 24 grievances that alleged that the employer violated the collective agreement by adopting a national policy that rescinded the local overtime arrangements. That question raises several sub-questions. The first relates to the meaning of the new paragraph added in the last round of bargaining to clause 21.10 of the collective agreement. Does that paragraph refer to the whole issue of allocating overtime, or does it refer only to the "at level" issue? The second question relates to the status of the local agreements. Are those local agreements part of the collective agreement? Third, if I conclude that they are not, do I have jurisdiction to hear the grievances? And fourth, if I conclude that they are, did the employer have the authority to unilaterally rescind them?

1. Are the agreements referred to in clause 21.10 limited to the "at level" issue?

[50] Under paragraph (b) of clause 21.10 of the collective agreement, the parties added the following wording when they renewed the collective agreement in June 2006:

> *However, it is possible for a Local Union to agree in writing with the Institutional Warden on another method to allocate overtime.*

That wording is located under paragraph (b) of clause 21.10 of the collective agreement. Its structure suggests that it refers only to the method of overtime allocation specified in clause 21.10(b), which is to allocate overtime "at level." If the parties intended that that wording also apply to paragraph (a), which deals with the equitable distribution of overtime among readily available qualified employees, the wording would have been part of a new paragraph (c) or would have specifically referred to paragraphs (a) and (b) of clause 21.10.

[51] The employer introduced extrinsic evidence to support its position that that wording refers only to paragraph (b) of clause 21.10 of the collective agreement. Even if that evidence is not required to conclude that the reference to local agreements is limited to the "at level" issue, I find it useful to consider it since it helps solidify that conclusion. During the last round of bargaining, the bargaining agent proposed to add the following new paragraphs, paragraph (d), to clause 21.10:

> *A local may agree in writing with the institutional warden on another method than set out in 21.10 b) for the distribution of overtime. A copy of such an agreement shall be sent to the Union's national office for approval.*

The amendment proposed by the bargaining agent specifically refers to another method than that set out in clause 21.10(b) of the collective agreement. Mr. Thibodeau testified that the proposed amendment became the sentence added under clause 21.10(b) of the collective agreement. The extrinsic evidence supports the logical conclusion that comes from examining the structure of the wording of clause 21.10. The local agreements referred to in clause 21.10 apply only to the "at level" issue specified in paragraph (b).

[52] The local agreements, procedures or policies on overtime allocation cover a lot more than the "at level" issue. An analysis of some of the cases submitted by the parties and involving correctional officers shows that some of those polices or agreements were implemented long before the amendment to clause 21.10 of the collective agreement in June 2006. In *Mungham*, the grievor challenged the employer's decision not to call him for overtime in December 2003. He testified that the employer's local overtime policy had been in place since at least 1998. In *Armand*, the facts showed that a local overtime policy had been in place in 1987. In *Roireau and Gamache*, the grievances referred to a similar overtime policy in place in 2002.

Furthermore, some of the local policies or agreements submitted in evidence refer to the pre-2006 wording of clause 21.10, or are dated or refer to dates before June 2006.

[53] Even if according to clause 21.10(b) of the collective agreement, local agreements may be made on the "at level" issue, local agreements or policies that existed before November 1, 2009 covered a lot more. Furthermore, some of those existed long before clause 21.10(b) was amended in 2006. Those two facts lead me to believe that the local agreements on overtime do not derive from the amendment made to clause 21.10 in 2006 but rather originated from a need to clearly outline at the institutional level the rules to be applied to the allocation of overtime. In some cases, the rules were negotiated locally and were put in a signed agreement. In other cases, they were developed by local management in consultation with local union representatives, and in other cases, they were decided by local management alone.

[54] Those facts and the interpretation of clause 21.10(b) of the collective agreement lead me to conclude that the local overtime agreements, policies or procedures did not derive from clause 21.10(b) but originated from local needs and wishes for elaborate mechanisms to allocate overtime. Those formal mechanisms were in place long before June 2006, and they covered a lot more that the "at level" issue.

2. <u>Are those local agreements part of the collective agreement?</u>

[55] The bargaining agent argued that the local overtime agreements, policies or procedures on overtime are part of the collective agreement. It based its argument on *Mungham*, *Hunt and Shaw*, and *Lauzon*, in which adjudicators used the local understandings on overtime to interpret the overtime provisions of the collective agreement.

[56] At paragraph 31 of *Mungham*, the adjudicator 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.*

In *Mungham*, as in the other decisions referred to by the bargaining agent, the adjudicator stated that the local overtime policy was not part of the collective agreement. However, he decided that it had to be used to interpret the overtime provisions of the collective agreement because it represented the common understanding of the parties' local representatives of how overtime was to be allocated equitably, as required by the collective agreement.

[57] The bargaining agent also argued that those local agreements or policies are ancillary documents that should be considered part of the collective agreement. On that question, Brown and Beatty wrote the following at paragraph 4:1230:

> *For an ancillary document to be part of the collective agreement, it must be intended by the parties to be part of the collective agreement and either meet the formal requirements of a collective agreement, or be incorporated by reference into it. . . Conversely, an ancillary document will be part of the collective agreement if it explicitly states that it is to be part of the agreement or if the main contract does so . . . .*

None of the local agreements, policies or procedures meets those criteria. In most cases, there are no written agreements between the parties' local representatives. None of the local agreements specify that they are part of the collective agreement.

[58] Other situations have occurred in which the parties agreed to incorporate other documents in the collective agreement. In article 41, the parties explicitly agreed to include a series of National Joint Council directives in the collective agreement. Those directives are ancillary documents that form part of the collective agreement. In Appendix "K," the parties agreed to establish a national committee on scheduling. They

also agreed that their local representatives would determine how employees are assigned to modified schedules but that the schedules would need to be reviewed and certified by the national committee before implementation.

[59] That analysis leads me to conclude that the local overtime agreements, understandings and policies which are at issue in these grievances are not ancillary documents to the collective agreement and that they are not part of the collective agreement.

3. Do I have jurisdiction to hear the 24 grievances alleging that the employer violated the collective agreement by rescinding the local overtime arrangements?

[60] In the previous section, I concluded that local overtime arrangements are not part of the collective agreement. I now have to decide if I have jurisdiction to hear the 24 grievances for which the local bargaining agent representatives alleged that the employer violated the collective agreement in adopting a national policy that rescinded the local overtime arrangements. My jurisdiction is outlined in subsection 220(1) of the *Act*, which reads as follows:

> ***220.*** *(1) If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.*

[61] Having concluded that the local overtime arrangements, which are at issue here, are not part of the collective agreement, the employer's decision to adopt a national policy that rescinds them is not a matter relating to the application or interpretation of the collective agreement. Rather, it is a decision in which the employer exercised its managerial authority on a question for which that authority is not specifically limited by statute or the collective agreement.

[62] In interpreting paragraph 21.10(b) of the collective agreement, I could have concluded that I had jurisdiction if a local written agreement that was rescinded by the national overtime policy had contained a provision on a method to allocate overtime other than the "at level" method of paragraph 21.10(b) of the collective agreement. Some of the written agreements before me dealt with the "at level" allocation of

overtime but none of them included a method to allocate overtime different than the "at level" method of paragraph 21.10(b).

[63] Therefore, these 24 grievances do not relate to the interpretation or application of the collective agreement, and I do not have jurisdiction to hear them as they are not policy grievances as defined by the *Act*.

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

(The Order appears on the next page)

V. Order

[65] The seven grievances alleging that the national overtime policy violates the collective agreement are denied.

[66] I declare that I do not have jurisdiction to hear the other 24 grievances, and I order those files closed.

August 13, 2010.

Renaud Paquet,
adjudicator