Date: 20110107

Files: 166-02-37484 and 37532

Citation: 2011 PSLRB 1

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

BARRY PIKE

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Pike v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Roger Beaulieu, adjudicator

For the Grievor: Ray Domeij, Public Service Alliance of Canada

For the Employer: Karen L. Clifford, counsel

Heard at Winnipeg, Manitoba
January 12 to 15 and February 19, 2010.

I. Grievances referred to adjudication

[1] At the time of the events giving rise to the grievances, Barry Pike ("the grievor") was an enforcement officer with the Canada Border Services Agency ("the employer") in Winnipeg. He referred two grievances to adjudication relating to a suspension for misconduct. In the first one (PSLRB File No. 166-02-37532), he alleges that the employer did not comply with the collective agreement in denying him union representation. In the second (PSLRB File No. 37484), he grieves a thirty-day suspension received after the employer conducted an investigation report into allegations of serious misconduct.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act,* S.C. 2003, c. 22 (the "new *Act*"), was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these grievances must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

II. Summary of the evidence

[3] The facts in this case are not in dispute. The grievor was asked on September 1, 2004, to attend a meeting on September 2, 2004, with Robert Ferguson, Director, Immigration Enforcement for the Prairie Region. At that meeting, the grievor was informed, and received a letter to the same effect, that he was being suspended without pay immediately, pending an investigation into allegations of serious misconduct that had recently surfaced. The Public Service Alliance of Canada ("the bargaining agent") was not informed of the meeting at that time.

[4] On September 14 and 15, 2004, the grievor was interviewed by the committee charged with conducting the investigation. At those two interviews, the grievor was accompanied by a representative of the bargaining agent.

[5] On October 13, 2004, the grievor met with Mike Styre, Regional Director General of the Prairie Region, again in the presence of a bargaining agent representative. The grievor was informed at that meeting that the investigation had concluded that serious misconduct had occurred. On October 15, 2004, the grievor received a letter signed by Mr. Styre informing him that the penalty imposed would be a 30-day suspension, effective September 7, 2004 until October 18, 2004. The grievor was expected to report to work on October 19, 2004.

[6] The investigation revealed the following facts.

[7] On July 23, 2004, the grievor issued a work permit to an American citizen, the fiancée of a friend of the grievor. The recipient of this work permit did not pay the fee, nor had she applied for it in writing. Had she applied for it, she would probably not have qualified. The work permit was issued through a computer system, but it was subsequently erased from the general system.

[8] The recipient of the work permit later crossed the border with her three children, and the Customs Officer at the crossing happened to notice the work permit. Because she was crossing alone with three young children, and because custody can often arise as an issue, the Customs Officer took notice of this entry and photocopied all her documents, including the work permit. Eventually it came to light that the work permit had been issued illegally, i.e, without any of the necessary procedures being followed. It was traced to the grievor's work station.

[9] During the first investigation interview, the grievor immediately admitted the wrongdoing, and produced to the investigator the work permit in question. He told the investigator that after issuing the work permit, he had spent several sleepless nights, to the point that he had contacted the recipient and asked to have the work permit back. She had not used it in any way, such as to apply for a job or a Canadian social security number. She sent it back to him. He did not recall when he had received it from her.

[10] When asked why he had illegally issued the work permit, the grievor gave several reasons. First, he felt sorry for the person to whom he had issued the work permit. She was coming from a difficult marital situation to join a new partner in Canada, and had received very little help from the Canadian immigration authorities when she had sought information on how to obtain a work permit in Canada. Secondly, his own personal life was in turmoil and he was under considerable emotional stress. Finally, his work situation was also very stressful – too much work, too little resources. All these reasons, however, did not excuse his behaviour, for which he was genuinely sorry.

[11] In his second interview, the investigator asked the grievor how the employer could be assured that the situation would not occur again – after all, sympathetic applicants, stress at home and pressures at work were all factors that could easily

reoccur. The grievor replied that the last ten days or so (since the initial suspension on September 2, 2004) had been the worse ones of his life. He had learnt his lesson, he loved his job, and he absolutely did not want to lose it. He also acknowledged that he had made a serious error of judgment, which he had recognized since he had asked the recipient to give him back the work permit.

[12] The investigation committee concluded that misconduct had occurred, by identifying the following irregularities:

> *1. Clearly based on the status granted to [the recipient] on May 1 2004 by Rainy River CIC she was not permitted to work in Canada.*
>
> *2. The Work Permit issued was not issued within the Regulatory criteria.*
>
> *3. [The recipient] did not qualify for a Work Permit as she was not an applicant for landing who passed stage 1 of the processing.*
>
> *4. The Work Permit was issued without the proper fee collected.*
>
> *5. [The recipient] did not make a proper application to apply for a Work Permit.*
>
> *6. The Work Permit was deleted from FOSS [Field Operational Support System] once it was issued which is contrary to standard operating procedures.*

[from p.5 of the Investigation report, undated but given to the employer before the October 13, 2004 disciplinary meeting]

[13] The committee found that the grievor had not followed the regulatory requirements, and that he had violated the CIC Code of Conduct by giving preferential treatment to a friend. He was also in violation of the Values and Ethics Code for the Public Service. Being responsible for enforcement, he had placed himself in a situation of conflict of interest and had disregarded all applicable rules and regulations.

[14] The last paragraph of the report, however, sounds a more positive note:

> *The committee investigation confirmed that this was in fact an isolated incident. During the two interviews, the committee found Mr. Pike to be cooperative, forthright, as well as a credible witness who displayed genuine remorse at his actions.*

[15] The committee adds that it was not mandated to recommend disciplinary actions. On a final note, it should be stated that the grievor at that point had nineteen years of service, with a clear disciplinary record.

III. Summary of the arguments

A. Grievance relating to a breach of the collective agreement

[16] The grievor submits that the employer breached clauses 17.02 and 17.03 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services group (expiry date: June 20, 2003) ("the collective agreement"). These clauses read as follows:

> *17.02 When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one (1) day's notice of such a meeting.*
>
> *17.03 The Employer shall notify the local representative of the Alliance as soon as possible that such a suspension or termination has occurred.*

[17] The grievor was not told that he was entitled to have representation from his bargaining agent at the September 2, 2004 interview where a suspension was imposed pending investigation. According to the bargaining agent, this was a disciplinary matter, the bargaining agent should have been advised, and the fact that the employer did not follow the procedure provided in clauses 17.02 and 17.03 of the collective agreement is a breach that should be corrected and that renders the disciplinary measure void.

[18] The employer counters that the September 2, 2004 interview was not a disciplinary meeting, and so the terms of clauses 17.02 and 17.03 of the collective agreement have not been breached. The employer relies on *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 71, as support for the proposition that at the investigative stage, where no discipline is yet considered by the employer since the facts are not yet all known, the protection of clause 17.02 of the collective agreement is not applicable. As it turns out, the grievor did have the support of the bargaining agent during the investigation itself, as a representative attended both interviews as an observer and advisor to the grievor.

[19] The employer argues that clauses 17.02 and 17.03 of the collective agreement came into play once it was decided that disciplinary measures would be imposed, following the investigation. There is no question that the bargaining agent was informed of the October 13, 2004 meeting, which a representative attended.

B. Grievance relating to the 30-day suspension

[20] The employer argues that the disciplinary measure imposed on the grievor was actually rather lenient, and took into consideration several mitigating factors, notably the grievor' long years of service, his clear discipline record and his cooperation throughout the investigation process. Even so, the severity of the misconduct is such that a significant penalty must be imposed.

[21] Other situations where there has been a breach of trust have led to termination, despite long years of service, such as *Pagé v. Deputy Head (Service Canada)*, 2009 PSLRB 26.

[22] The grievor argues that a 30-day penalty is rather steep for a first and isolated incident. The grievor showed genuine remorse, he took steps to correct his mistake, there was no need for deterrence since he had learnt his lesson.

IV. Reasons

[23] For the first grievance, I find the reasoning in *Thompson* applies. In that case, the employee was terminated following an investigation. The employee first grieved the termination itself, without success. She then applied for an extension of time, which was granted, to grieve the fact that the employer had failed to comply with the requirements of clause 17.02 of her collective agreement (same wording as in the instant case).

[24] The employee had been interviewed for the purposes of the investigation over the phone. The bargaining agent was not informed and no representative attended the interviews. The employee claimed that the non-compliance voided the termination. The adjudicator concluded, following other decisions, that clause 17.02 of the collective agreement did not apply to the investigation stage, but was meant for the meeting where discipline would be imposed.

[25] In the instant case, I find that the meeting of September 2, 2004 was not disciplinary in nature. The grievor was informed of the pending investigation, and the

suspension was administrative, not disciplinary, since the employer had not yet concluded whether misconduct had occurred. Moreover, the grievor did have a representative of the bargaining agent present during the investigation interviews. At the October 13 meeting, where the results of the investigation were presented, the grievor was represented by the bargaining agent.

[26] As to the second grievance, I find the employer had reason to impose the 30-day suspension, and I am not inclined to disturb that disciplinary measure, for the following reasons.

[27] In determining whether a disciplinary measure is proper, the adjudicator must consider two things: whether the employer has established the alleged misconduct, and if so, whether the disciplinary measure is proportional to the wrong committed.

[28] On the first point, there is no dispute. By the grievor's own admission, all the elements of the employer's case were made out.

[29] On the second point, I see two components to my analysis. First, how serious is the misconduct, and secondly, whether mitigating factors apply.

[30] There is no question that issuing a work permit without following the requisite regulations, to someone who was not entitled to obtain such a permit, as a favour to a friend, is serious misconduct on the part of someone entrusted with the delegated authority of an immigration officer. The employer must be able to trust employees who in the course of their duties act without supervision. The grievor's action was a serious breach of trust. The fact that the grievor was in a position of trust can certainly be seen as an aggravating factor.

[31] On the other hand, as the jurisprudence has established, an adjudicator must consider whether there are mitigating factors which come into play. Applying factors drawn from *United Steelworkers of America, Local 3527 v. Steel Equipment Co.*, (1964) 14 L.A.C. 356, I find the following facts to be significant in this case:

1) the previous good record of the grievor;

2) the long service of the grievor;

3) according to the investigators, this is an isolated incident unlikely to repeat itself;

4) no harm resulted from the grievor's action (the work permit was never used);

5) the grievor readily admitted his mistake during the investigation;

6) the grievor cooperated with the investigators, and expressed genuine remorse.

[32] Because of those positive factors, I believe, as did the employer, that the bond of trust could be restored. Given other decisions of the Public Service Labour Relations Board (the "Board") and its predecessor, however, I think the mitigating factors have already been taken into account by the employer in imposing the 30-day suspension. Without the mitigating factors, the penalty could well have been more severe, up to and including termination.

[33] In *Pagé*, the adjudicator found that the grievor had altered a record to hide the fact that she had allowed a payment to her half-sister to which the latter was not entitled. The grievor herself did not profit from this misconduct. In that case, the grievor was unwilling to admit wrongdoing; she saw her action as a good faith error. Despite an excellent record and long years of service, the grievor was discharged, and the adjudicator denied the grievance. Although that decision was made under the new *Act*, there is no legislative change which would modify the applicable principles, and so I believe that case can serve as guidance.

[34] In *Treasury Board (Revenue Canada) v. Sample*, PSSRB File No 166-2-27610 (19970604), an auditor with Revenue Canada had imported a truck from the United States and had attempted to evade paying GST on the purchase by registering the truck to a status Indian. The grievor admitted he had made a stupid error, and attempted to pay the GST, backdating the contract in order to avoid detection. The employer dismissed him. The adjudicator found that the grievor's remorse was genuine, and that the bond of trust was not irretrievably broken. He reinstated the grievor, but did substitute an 8-month suspension.

[35] In *Blair-Markland v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-28988 (19991103), the grievor, an immigration counsellor, had personally processed and approved an application for permanent residence for a

family member. The employer imposed a 20-day suspension upon the grievor. The adjudicator found that the employer had taken into account the 32 years of discipline-free service to temper a penalty which otherwise would have been much more severe; he denied the grievance as the penalty fell within an acceptable range in light of all the relevant circumstances.

[36] The decision in *Da Cunha v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-24725 (19931108) presented similar facts. In that case, the employee had 11 years of service, and the employer had discharged him for the inappropriate processing for his nephew's visa application. The adjudicator substituted a suspension without pay, from the date of the discharge to the date of the decision, a period of over eight months.

[37] In conclusion, the breach in the present case was a serious matter, and I believe the employer did apply mitigating considerations in imposing a 30-day suspension, a reasonable sanction in light of all the circumstances. I note that the investigation proceeded quickly, and that the administrative suspension without pay was quite short, since the 30-day suspension was made retroactive to September 7, 2004, despite being imposed on October 15, 2004. The employer had no choice but to denounce through a significant sanction an action contrary to the regulations applicable to Border Services and to the values and ethics of the public service. The sum of the grievor's four misconducts could have warranted a longer suspension or termination. I believe the discipline was restrained and should stand.

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

(The Order appears on the next page)

V. Order

[39] The grievances are denied.

January 7, 2011.

Roger Beaulieu,
adjudicator