Date: 20200819

File: 566-02-3417 and 3418

Citation: 2014 PSLRB 77

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

TOM DOHERTY and RALPH HAWKES

Grievors

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Doherty v. Treasury Board (Department of National Defence)

In the matter of individual grievances referred to adjudication

Before: Beth Bilson, adjudicator

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

For the Employer: Pierre-Marc Champagne, counsel

Heard at Saskatoon, Saskatchewan,
March 27, 2014.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] This decision relates to grievances filed by the Public Service Alliance of Canada ("the bargaining agent") on behalf of Tom Doherty and Ralph Hawkes, who are civilian employees of the Department of National Defence ("the employer") at the Canadian Forces (CF) base at Dundurn, Saskatchewan. In the grievances, the bargaining agent alleged that the employer had violated the provisions of the collective agreement relating to the equitable distribution of overtime. The collective agreement provided to me was an agreement between the Treasury Board and the Public Service Alliance of Canada (Group: Operational Services), with an expiry date of August 4, 2007; the parties were in agreement that the relevant provisions of the agreement had not undergone any changes since that time.

[2] At the outset of the hearing on March 27, 2014, the representative of the bargaining agent noted that one of the grievors, Mr. Doherty, could not participate in the proceedings because of illness. He said that the circumstances of Mr. Doherty and Mr. Hawkes were identical, and that the bargaining agent would proceed with the hearing for both grievors based on the testimony to be given by Mr. Hawkes; in this decision, therefore, Mr. Hawkes will be referred to as "the grievor."

[3] It should be noted that counsel for the employer raised the question of which provisions of the collective agreement were put in issue by the grievances. Both grievance forms state the alleged infraction in the following terms:

> *I grieve the fact that my employer is not including me in the fair distribution of overtime and callout situations in my workplace.*

Counsel for the employer pointed out that, in his opening statement, the representative of the bargaining agent had described the issue in terms of both overtime (the subject of article 29 of the collective agreement) and a "standby list" (addressed in article 31).

[4] In the "corrective action requested" section of the grievance forms, the following appears:

> *I request that I be given the opportunity to be included in overtime and callout situations as per the collective agreement.*

Article 29.04 (a) (b)
And to be made whole.

In addition, on the form pertaining to the grievor, there is a handwritten notation which reads "(List) for equal O/T among civ/mil."

[5] There are certainly distinctions between the concepts of overtime, callout and standby. In both the evidence presented and the argument advanced, the bargaining agent alluded both to an entitlement for the grievors to be included in a standby rotation and to the allocation of overtime. The wording of the grievances themselves suggests that the question before me is whether or not the employer has complied with the obligations set out in clause 29.04 of the collective agreement:

> ***29.04 Assignment of Overtime Work***
>
> *Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *(a) to allocate overtime work on an equitable basis among readily available qualified employees,*
>
> *and*
>
> *(b) to give employees who are required to work overtime adequate advance notice of this requirement.*

Clause 31.01 of the collective agreement, regarding standby duty, reads as follows:

> ***31.01*** *Where the Employer requires an employee to be available on standby during off-duty hours, such employee shall be compensated at the rate of one-half (1/2) hour for each four (4)-hour period or part thereof for which the employee has been designated as being on standby duty.*

Though counsel for the employer stated in his opening argument that the distinction between overtime and standby was an important one, the replies by the employer to the grievances, and the oral testimony of witnesses for both parties at the hearing, addressed both issues. I find that the grievance concerns both overtime and standby, and have examined the evidence with this in mind.

II. Summary of the evidence

[6] The bargaining agent called the grievor as its only witness. He testified that he had worked as a civilian employee of the employer in the GLT-MD0-6 classification as a machine operator/driver since November 1984. His employment in that classification

became indeterminate in 1987. He worked at the CF base in Moose Jaw, Saskatchewan, until 1989, and then he moved to the transportation unit at the Dundurn base.

[7] The grievor said that he had performed similar duties throughout his career. He was certified to operate a number of types of vehicles and equipment (Exhibit U-3); these included, graders, excavators, tractor-trailer units and snowplows. He was not certified to operate military vehicles such as armoured personnel carriers, but he had a "training certificate" for many of these vehicles, which permitted him to load them onto trucks.

[8] When he began his career in Moose Jaw, the grievor said that he worked at the aerodrome, so many of his duties were associated with clearing and maintaining runways. At the Dundurn base, there was no aerodrome, so his duties changed somewhat. At Dundurn, there was an extensive training area, and it was necessary to maintain and monitor an extensive fireguard; there was also a requirement for fire suppression, as the exercises conducted in the training area resulted in a number of fires each year. In addition, the grievor was involved in road maintenance and snow clearance in both the training area and the detachment area. He said that, on occasion, he had also operated a tractor-trailer unit delivering ammunition to other CF bases, as well as the bus that took personnel who lived in Saskatoon to and from the Dundurn base.

[9] The grievor testified that, when he began working at Dundurn, there were two civilian employees and a Master Corporal (who acted as supervisor) in the Special Purpose Vehicle (SPV) Section. At the time of the hearing, there were two civilians and six military members (including the Master Corporal).

[10] The grievor said that the civilian employees in the SPV Section ordinarily worked a regular Monday-to-Friday workweek. When he began in 1989, the three members of the SPV Section were on a regular callout rotation of one week in three between approximately mid-October and the end of April, when snow removal activities were most pressing. The callout rotation was intended to cover periods when the members of the section were not on their regular shifts. In the mid-1990s there was an increase in the number of military personnel in the SPV Section, and the rotation was changed to one week in five. The grievor said that, for the callout rotation, employees were compensated in time in lieu calculated according to the standby provision of the collective agreement (article 31), which granted one-half hour of pay for every four

hours of standby. If the employees were actually called out, they would be compensated at the overtime rate set out in the collective agreement. The grievor's evidence was that he could rely on a minimum of 20 hours per month in standby or overtime compensation under this system. However, when shown the payment record of overtime payments to him (Exhibit E-4), he calculated that he had worked a total of 29 hours of overtime in 2008. Though Mr. Doherty did not provide any testimony, the payroll information concerning his hours in Exhibit E-6 does not indicate that there was a regular pattern of overtime allocation to him.

[11] The grievor said that there was a change in the system around 2006 or 2007, when more of the work outside regular hours was assigned to military personnel. He said, for example, that he still carried out snow removal, but only for a regular eight-hour shift; if there was still snow to be cleared, the military personnel in the SPV Section were assigned to do it. He said that the two civilian employees in the SPV Section now have almost no opportunities for overtime work, and are not assigned to any standby status. He said that his understanding is that other civilian employees on the base, notably an electrician and a water treatment plant employee, still qualified for overtime and standby compensation. The grievor did not give any precise date for the alleged shift in the overtime and standby system; it should be noted that the employer did not raise any issue of timeliness in filing the grievance.

[12] The grievor testified that he lived on an acreage at Blackstrap, approximately 14 minutes from the base, and that this was comparable to the distance many others working at the base had to travel. He also stated that he was more qualified than the military drivers; he had generally been asked to train and assess them when they joined the unit.

[13] In cross-examination, the grievor was asked about his statement that he had not complained about the changes that had taken place in the years before 2006. He acknowledged that he had filed a grievance in 2003 alleging a violation of the standby provisions of article 31 of the collective agreement. He said that that grievance had been resolved and he had been put back onto the "standby list." He conceded that the employer's response to the grievance (Exhibits E-2 and E-3) indicated that the employer's position was that civilian employees would be assigned overtime in emergency situations only, but his understanding was that the grievance had ultimately been settled on a different basis.

[14] The employer called two witnesses, Robert Barrett, who retired from the CF in 2012 at the rank of Major, and Major Kevin Mead. Mr. Barrett became the Commanding Officer of the Dundurn base in 2004 and served in that capacity until August 2010. As the Commanding Officer, he had general responsibility of supervising both military and civilian personnel. He said that there were 65 to 68 civilian employees when he arrived in 2004. In the SPV Section during his time, there were two civilian employees, one of whom was the grievor, and seven to nine military personnel.

[15] Mr. Barrett testified that, when he assumed command at the base, his understanding of how overtime was to be assigned to the civilian employees in the SPV Section was that they would generally be called on only in emergency circumstances – fires being the usual scenario – subject to the requirement that any overtime be divided equitably between them. Any overtime had to be approved either by him or by the manager responsible for the unit (in the case of the SPV Section Warrant Officer Phillips). He said he understood that that was the system before he arrived, and he did not make any changes when he took over or subsequently. He said he was not sure whether there was any specific directive that civilian employees were not to be assigned overtime hours; he saw civilian employees as part of the resource pool that could be used to carry out the work that needed to be done. During his time at Dundurn, Mr. Barrett was the co-chair of the labour relations management committee, and the grievor was the president of the local union. Mr. Barrett did not recall the issue of overtime assignments being raised in that forum or any directives being issued from it.

[16] Mr. Barrett said that he was not responsible for the detailed tracking of overtime payments, though they were tracked in the payroll system for employees covered by the collective agreement. He testified that the hours worked by military personnel were not specifically tracked, though supervisors would probably have a “rough idea” of how long they worked and would make some effort to distribute work accordingly. Their regular workday would be from 8:00 to 16:30, Monday through Friday, though there would be some who had different hours (military police, for example). If a particular person was identified as having worked additional time, the supervisor could recommend “short leave” (also referred to as “compensated time off” (CTO)) in recognition of this. Short leave had a cap of two days per month; it was not granted on an hour-for-hour basis, but was rather awarded on a discretionary basis.

[17] Major Mead testified that, when he became the Commanding Officer in August 2012, there were two civilians in the SPV Section and eight or nine military personnel. He understood that overtime would be assigned to civilian employees in emergency circumstances when military personnel were not available or could not manage the duties. He said that he did not change anything when he arrived and had not made changes to the policy since. He said that, in his time, there was no need to assign overtime to the civilian employees in the SPV Section, since military personnel were adequate to cover the needs. He said that military personnel were notionally on duty at all times, and that the concept of overtime did not truly apply to them; he assumed that their supervisors tried to adjust their work schedules in a fair way.

[18] He said that there were approximately 70 military personnel under his command and that he would assume that 40-50% of those lived in Saskatoon. There were 28 family homes on the base itself. In cross-examination he acknowledged that there had been standby and overtime compensation for civilians employed as firefighters, electricians and water treatment specialists. He said, however, that this was because of the particular requirements associated with those occupations or because there was only one employee (as in the case of the water treatment plant) who was qualified to do the work.

III. Summary of the arguments

[19] The representative of the bargaining agent argued that, prior to 2007, there was a well-established system under which the civilian employees and the military personnel in the SPV Section were treated as equivalent for the purposes of maintaining a standby list and allocating overtime work. The amount of standby duty changed as the number of people in the section changed, but the principle remained the same. At some time in 2006 or 2007, a change occurred, and civilian employees were no longer on a standby list and were given overtime work only in extreme circumstances. The representative of the bargaining agent argued that this is a violation of the collective agreement because it is a departure from the principle of allocating the work equitably.

[20] The representative of the bargaining agent referred me to several cases in support of this argument. One of these is *Weeks v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 132. In that case, the employer relied in part on an earlier decision in *Hunt and Shaw v. Treasury Board (Correctional Service of Canada)*,

2010 PSLRB 85, as supporting the argument that it is not in itself a violation of the equitable distribution principle in the collective agreement for an employer to allocate overtime based in part on the overtime pay rates for individual employees; in *Weeks*, the adjudicator said that this does not excuse the employer from an overall responsibility to ensure that employees have a fair share of available overtime hours. The representative of the bargaining agent also referred me to *Public Service Alliance of Canada v. Treasury Board (Department of Employment and Social Development)* (the ACE case), 2014 PSLRB 11, and *Macadams v. Treasury Board (National Defence)*, PSSRB File No. 166-2-26601 (19951127), in which the adjudicators expressed the same sentiment.

[21] The representative of the bargaining agent argued that the spirit of the provision in the collective agreement requires that the concept of equitable distribution take into account the extra hours worked by military personnel. It is not in keeping with the concerns underlying the inclusion of clause 29.04 of the collective agreement to permit the employer to ignore the reality that military personnel in fact have fairly regular schedules and do perform extra work, for which they are compensated in short leave. To shut the civilian employees out of this system of allocation and compensation is not consistent with the obligations of the employer under clause 29.04. Both grievors satisfy the requirements under that clause of being readily available and qualified, and are entitled to a fair share of opportunities to be compensated for extra hours. The bargaining agent is not asking that the employer create overtime opportunities, only that the grievors be equitably allocated the overtime work that is available.

[22] The representative of the bargaining agent urged me not to take into account the grievance that was filed in 2003 raising the standby issue. That grievance is not the one before me at this time, and it is not clear how it was resolved. The representative of the bargaining agent referred to the grievor's testimony that he thought the 2003 grievance had been submitted to an alternate dispute resolution process, in which case it should be considered out of bounds as a factor in this proceeding.

[23] Counsel for the employer argued that an employer is free to take a particular approach to staffing and management issues unless there is some restriction in the collective agreement that prevents it. He pointed out that there is no dispute that the two grievors are qualified to do any work available for the SPV Section, and the

bargaining agent has not raised any issue about the allocation of overtime work between them.

[24] Counsel for the employer stated that the picture painted by the bargaining agent of a longstanding practice of compensation for standby duty and allocation of overtime to civilian employees does not reflect the reality established by the evidence. To begin with, the testimony of the grievor was that there were changes in the allocation of standby duty in the mid-1990s, reducing the allocation from one week in three to one week in five; it therefore could not be said that the practice has been stable over time, even if there was a "good old days" period sometime in the past. The position taken by the employer in response to the 2003 grievance was that civilian employees would be assigned extra duties on an exceptional basis only; this further showed that there was no established practice of the kind perceived by the grievor. Moreover, counsel said that the payroll records for the period leading up to 2007 (Exhibits E-4 and E-6) do not show the steady level of compensation for standby and overtime that the grievor has suggested.

[25] In this case, Major Mead testified that many of the military personnel at the Dundurn base do work on a fairly regular schedule, but that this is not always the case. If a CF member works beyond what is regarded as usual, a supervisor may recognize this by recommending short leave. This does not derogate from the principle that military personnel are not regarded as ordinary employees, and are expected to be available for service as required. There is no concept of "overtime" or "extra hours" that can accurately be applied to them. The obligations under the collective agreement apply only to the civilian employees who are represented by the bargaining agent; the fact that the employer has chosen to manage the assignment of work in a way that does not necessitate the use of overtime does not mean that the agreement has been breached.

[26] Counsel for the employer referred me to *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, in which the adjudicator found that a practice followed by local managers did not bind the employer as a party to the collective agreement. If there was some local practice at Dundurn at one time, it does not mean that a subsequent change represented a breach of the collective agreement; it may just have been a pragmatic way of getting the necessary work done by the limited number of personnel, civilian and military, available at that time.

IV. Reasons

[27] The parties have presented me with two quite different scenarios concerning the system for the assignment of standby duty and the allocation of overtime hours at the Dundurn base. According to the version put forward by the bargaining agent, there was a system in place going back 25 years, under which there was a well-understood entitlement to a share of standby duty and an equitable portion of any overtime hours. In this system, civilian and military personnel in the SPV Section were essentially treated as equivalents, and a fairly significant and steady amount of compensation was available for the extra duties performed. It was not in dispute that the two grievors were "readily available qualified" employees as required under clause 29.04 of the collective agreement for the work in the SPV Section.

[28] The approach described by the employer differs from this considerably. At least as early as 2003, employer representatives were taking the position that overtime would be offered to civilian employees only in exceptional circumstances and that military personnel would be considered first to meet the demands of the SPV Section. Mr. Barrett and Major Mead both said that they understood this to be the policy; they had accepted it as such when they assumed command and had not changed it during their respective tenures.

[29] I have been referred to several previous decisions, such as the *Weeks* case and the ACE case, in which adjudicators cautioned that, where an employer has an obligation like the one here to ensure equitable distribution of opportunities for overtime hours, the employer cannot evade these obligations by considering the costs associated with individual employees as the sole basis for assigning overtime. I accept that principle, and the witnesses for the employer have made it clear in this case that financial management was one of the triggers for the policy that has been adopted for allocating overtime. Since members of the military can be assigned to perform duties without reference to a systematic calculation of overtime – a concept which those witnesses see as having no meaning in the military context – there is presumably a financial saving in using military personnel as much as possible.

[30] However, the previous decisions do not suggest that an employer is required to ignore financial factors, nor, as the adjudicator pointed out in *Lahnalampi v. Treasury Board (Department of Employment and Social Development)*, 2014 PSLRB 22, is an employer obligated to create overtime work in order to permit employees to perform

it. It is also necessary to treat the *Weeks* case and the ACE case with caution, because they deal with scenarios in which the allegation of unfairness relate to the allocation of overtime hours among employees who are members of the same bargaining unit and whose duties and hours are directly comparable.

[31] In *Macadams*, the circumstances are more similar to the ones in the case before me, in that the grievance involved an allegation that standby duty had not been equitably distributed in the setting of a military base. In that case, however, it should be noted that there was a departure from a clear and well-understood practice for the allocation of standby duty.

[32] The bargaining agent has argued that the *Macadams* situation is on all fours with the one in this case and purported to outline a longstanding practice at the Dundurn base for the division of standby duties and overtime opportunities between civilian employees and military personnel.

[33] The onus of establishing that the claim of inequitable distribution should stand lies with the grievors; in this case, meeting the onus depends on the testimony of a single grievor, Mr. Hawkes. I find that he has failed to meet the burden of showing that there was a regular practice of the kind he described. Though the employer did not rule out that there might have been some understanding in the distant past, at least as early as 2002 it seems to have been the policy to allocate standby and/or overtime to civilian employees only when the work could not be carried out by military personnel. Though the grievor claims that there was a "standby list" with a regular rotation of standby duty, no documentary evidence has been produced in support of this statement.

[34] It may be the case, as the representative of the bargaining agent argued, that the grievance raised in 2003 was not directly before me. It is open to me, however, to consider this episode in relation to the claim that there was a 25-year period in which the employer followed the policy that the grievor said was in place. We do not know, of course, what the outcome of the 2003 grievance was. The obvious possibilities would be that the grievance was withdrawn or that it was settled; in either case, the bargaining agent must have been able to live with the result. The grievor said that he thought the result of the grievance was that he was put back on the "standby list," although his recollection was not clear. The evidence of Mr. Barrett was that, when he arrived in 2004, the policy was as he described it and there was no regular standby list

or assignment of overtime on a proportionate basis to civilian employees and military personnel. Furthermore, the evidence advanced in this case does not support the claim that there was a change in the way things were done in 2006 or 2007, the period when, according to the grievances, the inequities arose.

[35] The grievor stated that his recollection was that his usual allocation of standby and overtime hours over a long period before 2007 was approximately 20 hours per month. The pay records for the few years prior to 2007 do not substantiate this, however. The records show that both grievors did, on occasion, work overtime hours from 2004 to 2007, but they were not in any regular pattern and certainly did not amount to 20 hours per month.

[36] Clause 29.04 of the collective agreement obliges the employer to make "every reasonable effort" to attain an equitable distribution of overtime hours among employees covered by the agreement. It is clear, as indicated by the *Macadams* case, that it is open to the parties to the agreement to arrive at a mutually acceptable interpretation of this provision that factors in the duties performed by military personnel, to arrive at an appropriate allocation. In the absence of such an established interpretation or practice, however, the employer is entitled to manage the required work in a way that minimizes overtime hours – in this case, by relying primarily on military personnel who are not specifically compensated for "extra" work. The grievor failed to show that some other understanding was in place that was dislodged in 2006 or 2007.

[37] I find that the grievances must be dismissed.

[38] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[39] The grievances in files 566-02-3417 and 3418 are dismissed.

August 19, 2014.

Beth Bilson,
adjudicator