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Citation: 2015 PSLREB 14

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ANDRÉ HARVEY AND GISÈLE SÉGUIN

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Harvey and Séguin v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Michael Bendel, adjudicator

For the Grievors: Goretti Fukamusenge, Public Service Alliance of Canada

For the Employer: Pierre-Marc Champagne, Justice Canada

Heard at Montreal, Quebec,
November 20, 2014.
(PSLREB Translation)

I. The grievances and the facts

[1] The grievors, André Harvey and Gisèle Séguin, each filed a grievance, in identical terms, in which each claimed that the Correctional Service of Canada ("the department") did not fairly distribute standby and overtime, which allegedly violated the Program and Administrative Services collective agreement between the Treasury Board ("the employer") and the Public Service Alliance of Canada ("the bargaining agent") that expired on June 20, 2007 ("the collective agreement").

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that *Act* read immediately before that date.

[3] The grievors were parole officers, classified WP-04, and had been assigned for several years to the Laval office in Quebec, where they normally worked from Monday to Friday from 07:00 to 18:00, like other parole officers.

[4] To be able to respond in a timely manner to service requests received during off-duty hours, the department designated employees for standby duties. Those employees, who received the standby premium set out in the collective agreement, were required to quickly answer pager calls. If a designated employee was required to go to work during the standby period, he or she also received compensation for the overtime hours worked.

[5] The following are the relevant provisions of the collective agreement:

ARTICLE 28

OVERTIME

. . .

> ***28.04 Assignment of Overtime Work***
>
> *a. Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*
>
> . . .
>
> ***ARTICLE 29***
>
> ***STANDBY***
>
> ***29.01*** *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.*
>
> ***29.02***
>
> . . .
>
> *b. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.*

[6] On December 21, 1999, the employer and the bargaining agent entered into a memorandum of understanding to resolve several grievances about the distribution of standby duties that some employees in the Quebec Region had referred to adjudication. Among other things, the memorandum established a procedure that was to be used to select the employees who would be designated for standby periods in the future in the entire Quebec region. The following are the provisions of the memorandum that are relevant to these grievances:

> [Translation]
>
> . . .
>
> *2. The employer agrees to consult with all WP-04s in writing to find out their interest in performing standby.*
>
> . . .
>
> *4. That consultation will also provide the sole criteria to be used by the employer, as follows:*
>
> *a) Interested employees must meet the BBB level of bilingualism.*

> *b) Interested employees must hold delegation of authority from the CSC to issue warrants.*
>
> *c) Interested employees must have held a PO position at the WP-04 level for five years.*
>
> *The employer will provide training on the standby process of a maximum of one day.*
>
> . . .
>
> *6. Employees will be informed in writing of the decision of whether or not to include them on the list and the reasons for the decision.*
>
> *7. Based on the list, the employer will ensure equitable distribution under article 29 of the collective agreement.*
>
> . . .
>
> *10. Interested employees who do not meet the BBB language requirement will be tested. Following the test, if the employees meet the BBB language requirement, they will be assessed by the district committee.*
>
> *11. Interested employees who do not meet the BBB language requirement following the test will also be assessed by the district committee. If their applications are retained, the employer will evaluate the possibility of providing them with language training. If they are unable to meet the language requirements, their names will be taken off the list.*
>
> . . .
>
> *14. The terms of this agreement will apply subject to the rights and interests of the parties in any other matter.*

[7] Although the grievors expressed interest in being designated for standby duties, the department did not designate them because they did not meet the level of bilingualism set out in the memorandum.

[8] In his testimony, Mr. Harvey stated that he accepted the merits of the memorandum of understanding, even though he was excluded from the ranks of those designated for standby duties. As president of his union local at that time, he even took part in the negotiations that led to the memorandum. Only in 2009, after the department would have decided to assign two employees, instead of one, to each standby shift, did he decide to complain about the exclusion of employees who did not meet the required bilingualism level. In discussions with management, Mr. Harvey

adopted the position that given the small percentage of service requests in the region that required the knowledge of English, the department could easily respond to any requests it received by assigning one bilingual employee and one unilingual French employee to each shift. In his testimony, Mr. Harvey estimated that 95% of service requests received in the region did not require a knowledge of English. However, at a meeting of the regional management committee on February 17 and 18, 2009, the department decided not to follow up on Mr. Harvey's proposals, without providing any reasons.

[9] Mr. Harvey added that he was at the BBA bilingualism level and that he felt that with appropriate training, he could have attained the required BBB level. He requested language training on several occasions during his career, but he was never offered it, because the position that he held was designated unilingual French. The training mentioned in paragraph 11 of the memorandum was available only in the evening. As a father, he stated that it was too difficult for him to take advantage of it.

[10] Based on data from 2009 and 2010 that the department provided to him as union local president, Mr. Harvey stated that he calculated that the overtime that parole officers worked in the region during their standby periods represented 80% of all their overtime.

[11] According to Mr. Harvey, in the other regions of Canada, parole officers are designated for standby duty regardless of their bilingualism levels.

[12] The bargaining agent intended to have a second witness testify, Yvon Lacombe, but he was not available. Rather than schedule another adjudication session, the parties agreed that had Mr. Lacombe testified, he would have stated the following:

> [Translation]
>
> *I worked standby for the Correctional Service of Canada in the Quebec Region from December 2004 to July 2009. As for the number of calls received during those periods, I can affirm that about 5% of those calls required a knowledge of English.*

[13] In her testimony, Marie Sarrasin, the Laval office parole officer supervisor since 1990, explained how the department ensured that it was able to respond to service requests at any time. The Quebec Region was divided into two districts, Montreal and

"East-West." Two employees in each district were designated for standby duties for each week. The four employees thus designated, in cooperation with a manager, shared the standby hours between themselves, such that one of them was available at all times during those hours and was responsible for responding to all calls received, regardless of where in the region they originated. The only exception was that between 23:00 and 03:00, a second officer was available to authorize suspension warrants. According to Ms. Sarrasin, thus, it was incorrect to suggest that two officers were available at all times and that only one bilingual officer would have sufficed.

[14] Ms. Sarrasin gave the following examples of service requests that arise outside parole officers' normal work hours: an offender on parole who is late returning home asks for an extension, a different offender seeks travel authorization or a police officer wants to know if an offender has violated parole conditions. The requests are made by the offenders, by the police, by border services officers, etc., as the case may be. When she was on standby duty, Ms. Sarrasin had to respond to American police officers and American customs officers who had questions about offenders. Although the vast majority of calls received in the region did not require a knowledge of English, many did, including those from American authorities and those involving Anglophone offenders.

II. The arguments

[15] According to the grievors, the evidence adduced showed that the collective agreement was violated, particularly its clauses 28.04(a) and 29.02(b). The department was required to assign standby duties and overtime in an equitable manner under those provisions. The memorandum of agreement no longer served the interests of the parties, particularly with respect to the bilingualism requirement. The memorandum blocked the grievors' interests by excluding them from standby duties. The grievors submitted that the parties should seek a resolution that would include all employees, but the department rejected Mr. Harvey's proposals to amend the agreement. Regardless, according to the grievors, the department did not comply with paragraph 11 of the memorandum, as it did not offer Mr. Harvey language training. The grievors were entitled to compensation for being excluded from standby duties.

[16] According to the employer, the collective agreement was not violated. It was necessary to distinguish between the premium set out at clause 29.01 of the collective agreement and the compensation for working overtime hours. As the parties had

accepted certain terms for allocating standby duties in the region, the bargaining agent could challenge them only by attempting to renegotiate the memorandum. Although the conditions in place when the memorandum of agreement was signed have changed, the memorandum remains in effect, and the adjudicator does not have the jurisdiction to amend it. In his arguments, counsel for the employer referred to *Cardinal and Leclerc v. Treasury Board (Public Works and Government Services Canada)*, 2001 PSSRB 133, and to *Scanlon and Christianson v. Canada Revenue Agency*, 2009 PSLRB 42.

III. Reasons and decision

[17] It was uncontested that the department respected the 1999 memorandum of understanding when it assigned standby duties to parole officers in the Quebec Region. The grievors' representative argued that, instead, the adjudicator should rule that clauses 28.04(a) and 29.02(b) of the collective agreement were violated, without considering the memorandum's provisions. She submitted two reasons for that position. First, she claimed that the bilingualism requirement found in paragraph 4(a) of the memorandum was no longer justified due to the low percentage of service requests that required a knowledge of English and because two officers were assigned to each standby shift, instead of just one. She then argued that Mr. Harvey was unable to take the language training set out at paragraph 11 of the protocol.

[18] It is impossible to find in favour of the grievors' position.

[19] Even if the conditions in which standby duties are carried out have changed significantly since 1999, which the evidence did not convincingly establish, the memorandum continues to apply. No evidence indicated that when renewing the collective agreement, the bargaining agent disavowed the memorandum. It is not up to an adjudicator to weigh changes that have occurred since an agreement was entered into and to judge whether the parties would have wanted it to continue in effect in the new context. Under these conditions, I cannot conclude that the memorandum was still in effect when the department refused to designate the grievors for standby duties. Contrary to the suggestions by the grievors' representative, the regional management committee's refusal in February 2009 to follow up on Mr. Harvey's proposals did not open the door to a unilateral repudiation of the agreement.

[20] As for the department's alleged violation of paragraph 11 of the memorandum, the evidence did not establish that the department violated it. The department's

obligation under paragraph 11 is "[translation] [to] evaluate the possibility of providing . . . language training" to employees who request it. Nothing indicated that the department did not comply with that obligation for Mr. Harvey. However, more fundamentally, the violation of paragraph 11, even for all employees to whom the agreement applied, would not invalidate the agreement, just as a violation of one provision of a collective agreement would not nullify the agreement; see *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, at 726 and 727.

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

(The Order appears on the next page)

IV. Order

[22] The grievances are dismissed.

January 30, 2015.

PSLREB Translation

Michael Bendel,
adjudicator