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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Service Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ERIC ENGER

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Corinne Blanchette, Union of Canadian Correctional Officers Syndicat des Agents Correctionnels du Canada Confédération des Syndicats Nationaux

For the Employer: Rebecca Sewell, counsel

Heard at Abbotsford, British Columbia,
December 5 and 6, 2017.

I. Individual grievance referred to adjudication

[1] The grievor Eric Enger filed a grievance (exhibit 2 tab 1) against his employer the Correctional Service of Canada (CSC or the employer) alleging that the employer refused to pay him the Instructor Allowance due him pursuant to article 43.05 of the Agreement between the Treasury Board and the Union of Canadian Correctional Officers – Syndicat des agent correctionnels du Canada-CSN, Group: Correctional Services, expiry date May 31, 2010 (exhibit 1) for hours spent conducting Emergency Response Team (ERT) training for which he received an ERT premium under article 43.06 of the collective agreement.

[2] On June 19, 2017, An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures (S.C. 2017, c. 9), received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the Public Service Labour Relations and Employment Board Act, the Public Service Labour Relations Act and the Public Service Labour Relations Regulations to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") the Federal Public Sector Labour Relations and Employment Board Act, the Federal Public Sector Labour Relations Act ("the Act") and the Federal Public Sector Labour Relations Regulations ("the Regulations").

II. Summary of the arguments

[3] The grievor is employed as a correctional officer (CX) at Pacific Institution in Abbotsford, British Columbia. As a part of his duties at Pacific Institution, the grievor is a member of the Emergency Response Team (ERT) and from time to time is an ERT instructor having completed the three phase ERT instructor qualification course required by the employer. Of note is that only ERT members may qualify to complete this course and be ERT instructors. As mandated by the employer, ERT instructors are responsible for the ongoing certification and recertification of ERT members.

[4] While engaged in training of ERT members as an instructor, Mr. Enger and the other instructors prepare the training by watching relevant videos, setting scenarios, securing munitions and safety equipment. During training instructors are responsible for ensuring that safety protocols are followed, that the national training standards set

by the employer are met, attendance of students is recorded and students are tested. When he is not actively instructing a session, the grievor assists other instructors during their sessions. Mr. Enger instructs all aspects of the ERT certification and recertification course. He is given credit for the hours spent instructing towards his own ERT recertification requirements (see training transcript exhibit 5 page 5).

[5] The language in articles 43.05 and 43.06 was added to the collective agreement in 2006. The language did not change with the most recent collective agreement.

[6] The grievor testified that he was sporadically paid both the allowance under 43.05 for instructing the course and 43.06 as an ERT member on duty before he grieved though he could not categorically state when. Prior to filing his grievance, the grievor spoke to other ERT trainers at other institutions and found out that how they were compensated varied by jail. The grievor spoke to his Assistant Warden Operations (AWO) at Pacific Institution, Claude Demers, who told him that he thought that was strange because at Mountain Institution, where Mr. Demers previously worked as AWO, he paid the ERT instructors both allowances.

[7] Mr. Demers agreed to follow up on this and later advised Mr. Enger that he had contacted National Headquarters and was advised Mr. Enger was entitled to only one allowance for the same period; double-dipping was not allowed. Mr. Enger disagrees with this interpretation as without the ERT instructor there is no training and only an ERT member who has completed the trainer certification may provide this training unless the trainer is a certified expert in a field recognized by the employer. This does not include the non-ERT instructors who teach recertification to line correctional officers who are not ERT members; hence he filed his grievance.

[8] Richard Colledge is the Correctional Manager Scheduling and Deployment at Pacific Institution. He has been in the role on a permanent basis since 2015 and acted in the role off and on between 2010 and 2015. As part of his role, he is responsible for entering training and allowance requests into the employer's scheduling and deployment system (SDS). SDS will not allow him to enter both the ERT allowance under article 43.06 and the instructor allowance under 43.05 because it would violate the collective agreement. SDS ensures compliance with the collective agreement.

[9] Samantha Moore was at the time of the grievance the Acting Compensation Manager for the employer's Pacific Region. Her area was responsible for processing the paperwork related to allowance requests including the ERT and instructor allowances into the pay system. Her employees would receive requests approved by the manager with the section 34 of the *Financial Administration Act*, RSC 1985, c F-11 (FAA) authority for entry into the payment system. When they received requests for both allowances, they returned them to the manager with the direction that only one would be paid; which one was it to be? This process has been in place to the best of her knowledge since 2013.

[10] Claude Demers testified that between 1992 and 2007 he was a member of the ERT tactical team though he has never been an ERT instructor. He has been a management instructor and as such is not entitled to allowances under the collective agreement. He corroborated Mr. Enger's description of how the training is delivered to ERT members and by whom. He also testified that he could not remember when the instructor and ERT allowances came into the collective agreement. According to Mr. Demers non-ERT CXs receive the instructor premium under article 43.05 to compensate them for their extra responsibilities while training. In other words the trainers are paid more than the students.

[11] From his understanding team members receive the ERT allowance under article 43.06 when they are called out to an incident and when they are on training to compensate them for the extra duties related to their ERT role. ERT members who are ERT instructors get a separate allowance. Mr. Demers got this information from his labour relations advisor after he received Mr. Enger's grievance. His opinion was that ERT members at training were either team members or trainers but were not both.

[12] As the manager with section 34 FAA authority Mr. Demers verifies and signs off on requests for allowances as part of his regular duties. He does not recall requests for double allowances happening often and if it did he is sure that he sent them back to the employee in question. He never communicated to the ERT members and instructors at Pacific Institution that articles 43.05 and 43.06 were mutually exclusive. He did explain it to the grievor during the grievance process. He does not recall telling the grievor that he was surprised that the grievor did not receive both particularly since SDS which is an employer system built to mirror the collective

agreement would not allow both to be paid. Correctional officers who are not ERT members who instruct courses for other officers will receive the allowances under article 43.05 to recognize the additional duties and responsibilities.

III. Argument

A. For the grievor

[13] To determine what the parties meant by articles 43.05 and 43.06, the simple and ordinary language of the whole collective agreement must be examined. The refusal to pay the grievor both the instructor allowance and the ERT member allowance for the hours of ERT training is based on the employer's opinion that pyramiding is not allowed. Where the employer has intended to prevent pyramiding within the collective agreement, it has expressly stated so as in Part III and more specifically in articles 22.03, 24.03 and 33.02. In each of these cases there is an express prohibition against pyramiding of benefits.

[14] However, the allowances in question are found in Part IV of the collective agreement where no such prohibition is expressly stated. The purposes of article 43.05 and 43.06 are completely different and intended to compensate the officer for different functions. The employer's view is ridiculous and would result in the instructor being paid at the same rate as the student. ERT instructors would not be compensated for the extra work or responsibility inherent in their role as instructor because they are being compensated as ERT members by virtue of article 43.06. If they do receive the instructor allowance under article 43.05, they are not functioning as an ERT member which contradicts the reasoning behind giving the instructors credit for completing their refresher training by delivering the training.

[15] ERT training must be delivered by ERT members (or some other expert recognized by the employer) so they must be called up as ERT members to deliver the training by virtue of the employer's own policies. The opinion from labour relations (exhibit 6) is irrelevant as there is no factual basis to explain upon what it is based. The employer has provided no interpretation from the Treasury Board, the other party to the collective agreement, to explain their interpretation of the article. There is no clear, cogent and compelling evidence to support CSC's interpretation. Mr. Enger's evidence is unchallenged and was corroborated by Mr. Demers. The evidence of Mr. Colledge and Ms. Moore is of little relevance.

[16] According to Brown & Beatty, *Canadian Labour Arbitration*, Fourth Edition at 8:2140 there is a presumption against pyramiding unless the payments have different purposes as is the case here. Article 43.05 compensates instructors for the extra responsibility of teaching courses for the employer while article 43.06 compensates ERT members for the extra responsibility of their roles as ERT members. (See also *Houle v. Manitoba (Treasury Board)*, (1978) 21 L.A.C.(2d) 103*; Beese et. al. v. Treasury Board (Canadian Grain Commission),* 2012 PSLRB 99; and *Jones v. Treasury Board (Correctional Service of Canada),* 2013 PSLRB 70 at para 97).

B. <u>For the employer</u>

[17] It is the employer's stand that the grievor is not entitled to payment of allowances under both article 43.05 and 43.06 for the same hours. He is entitled to the allowance for those hours under one heading or the other but not both. The plain language of the collective agreement is not ambiguous so no evidence of the parties' intentions is required. It is the practise of management to pay only one allowance and SDS has been configured in such a way as to make it impossible to claim both allowances for the same hours. SDS is based on the collective agreement and is the best evidence of the proper interpretation of the collective agreement.

[18] When ERT instructors are called up for ERT training they are there as instructors and not as ERT members. They are not performing ERT duties. Regardless of whether the instructor is an ERT member, when instructing ERT training he or she is acting as an instructor.

[19] There must be a clear expression of intent to confer a financial benefit (*Wallis v. Treasury Board (Correctional Service of Canada),* 2004 PSSRB 180 at para 37). The onus is on the bargaining agent to establish on the balance of probabilities that what they have alleged actually took place (*Arsenault et. al. v. Parks Canada Agency*, 2008 PSLRB 17 at para 29). In this case the bargaining agent has failed to demonstrate the entitlement the grievor claims.

[20] Where entitlements are clear new conditions cannot be added even if the provision in question seems unfair (*Chafe et. al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras 50 and 51). The collective agreement contains no indication that the allowances in question are to overlap. The collective agreement was renewed with no changes to the language. Mr. Demers stated that it was

his position that only one allowance applied at a time. There is no consistent past practice established to the contrary.

[21] This board must respect the clear meaning of the collective agreement regardless of whether it is obnoxious or not. In the event that the grievance is allowed, the employer submits that the principles in *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 applies and the retroactivity of any award is limited to 25 working days prior to the date of filing of the grievance.

IV. Reasons

[22] Both parties are correct that in order to determine the appropriate interpretation of articles 43.05 and 43.06, the entire collective agreement must be examined and the words given their plain and normal meaning. The modern principles of interpretation focus on the words, in their grammatical and ordinary sense, within the entire scheme of the agreement, its object and the intention of the parties. The modern principles of interpretation are a method of interpretation rather than a rule and encompass many well-recognized interpretation conventions. The modern principle directs interpreters to consider the entire context of the agreement, read its words in their entire context and in their grammatical and ordinary meaning, harmoniously with the scheme and object of the agreement and the intention of the parties (*Beese* at para 23).

[23] The question before me is whether or not the language in articles 43.05 and 43.06 prohibit pyramiding of benefits, as argued by the employer, or whether or not the plain language of the collective agreement creates two distinct benefits to which the presumption against pyramiding of benefits would not apply, as argued by the grievor.

[24] On their face the language of the two articles in question is very simple:

> **
>
> ***43.05 Instructor allowance***
>
> *When an employee acts as an instructor, he shall receive an allowance equal to two dollars fifty cents ($2.50) per hour, for each hour or part of an hour.*
>
> **

> ***43.06 Allowances for employees who accept to be Emergency Response Team Members***
>
> *The employee who is a member of the Emergency Response Team shall receive a premium of two dollars fifty cents ($2.50) per hour for each hour or part of an hour, as soon as he is called up as a member of the emergency team.*
>
> *This premium shall likewise apply during all training periods provided to emergency team member employee.*
>
> ****

[25] Articles 43.05 and 43.06 were both introduced into the collective agreement in 2006 as is clear from the asterisks which precede both in the printed version of the agreement submitted as exhibit 1. There are no headers to assist in the interpretation of these articles or to indicate whether or not they are to be read in conjunction or separately. If the parties had intended them to be read in conjunction so that ERT instructors would not be entitled to both the instructor allowance under articles 43.05, and the ERT allowance for attending the ERT training one would expect that it would be specified here as the two articles follow each other. It is silent.

[26] I note that the employer has taken steps to limit other allowances. Article 43.03 Clothing Allowance, which was also introduced at the same time as articles 43.05 and 43.06, limits CX01 and CX02 uniform entitlements if they claim the allowance in this article: "Any employee receiving this allowance **shall not be eligible** to receive points toward a uniform issue" (emphasis added).

[27] Elsewhere in the collective agreement, most notably in Part III Working Conditions the employer has taken positive steps to prevent pyramiding of benefits as pointed out by the grievor. Article 22.03 reads:

> *Article 22*
>
> *Reporting Pay*
>
> *. . .*
>
> *22.03 Payments provided under Call-Back and Reporting Pay* ***shall not be pyramided****, that is an employee shall not receive more than one compensation for the same service.* (emphasis added)
>
> *. . .*

[28] Similar language is found at Article 24.03:

Article 24

Call-Back Pay

. . .

No Pyramiding of Payments

24.03 Payments provided under the Overtime, Reporting Pay, Designated Paid Holiday and Standby provisions of this collective agreement and clause 24.01 above ***shall not be pyramided****, that is an employee shall not receive more than one compensation for the same service.* (emphasis added)

[29] Similarly at Article 33.02 there is an even stronger specific prohibition against pyramiding of benefits:

Article 33

Severance Pay

. . .

33.02 Severance benefits payable to an employee under this Article shall be reduced by any period of continuous employment in respect of which the employee was already granted any type of termination benefit. ***Under no circumstances shall the maximum severance pay provided under clause 33.01 be pyramided.*** (emphasis added)

. . .

[30] The employer has demonstrated a clear pattern in the past and in the introduction of new language in this collective agreement of stating when pyramiding of benefits is prohibited. They have chosen not to do so in the case of the instructor allowance and the ERT allowance. This is sufficient according to the grievor to establish that the grievor is entitled to both.

[31] This unfortunately is not sufficient in my opinion to come to this conclusion though it is highly persuasive. According to Brown and Beatty, at 8:2140, when benefits are paid for the same purpose and for the same time period under two different provisions does pyramiding occurs. No issue of pyramiding will arise where the claims for premium pay relate to different hours and/or different work.

[32] Article 43.05 is of narrow application. It applies only to those CXs who provide training to other CXs on behalf of the employer. Its purpose is to compensate that employee for acting as an instructor and nothing else. Article 43.06 likewise is

of narrow application, it applies only to those CXs who are members of the ERT. Not all instructors are ERT members and not all ERT members are instructors. In the grievor's case he is both. The allowances are clearly intended to compensate employees for different functions and roles. As stated by the adjudicator in *Jones* at para 97:

> *. . . the parties recognized that instruction is a task that a correctional officer covered by the collective agreement might be called upon to provide for which there was no other compensation, . . .*

[33] It is the employer's policy that ERT training is to be provided to ERT members by ERT members certified as instructors. If ERT training was provided by ERT members and there was no requirement for certification as an instructor, there would not be an issue of pyramiding. That is not however the case. The instructor must be an ERT member. What distinguishes ERT members from other CXs from a compensation perspective is that they receive a premium under article 43.06 for all hours when they are called up as a member of the ERT including hours spent in employer mandated training.

[34] It is interesting to note that the uncontested evidence of Mr. Enger was that the employer recognizes the hours he spends providing training to ERT members towards the required number of his recertification hours as an ERT member. This confirms to me that while instructing the grievor is an active ERT member; otherwise, he would have had to fulfill the retraining obligations at a different time.

[35] The employer has conceded that while at the training sessions, the grievor is there as an instructor and is therefore entitled to the instructor allowance. By their actions in recognizing the training for recertification purposes and requiring ERT instructors be ERT members the employer has created a situation where pyramiding of allowances should be allowed as the allowances are for distinctly different work and purposes, thereby rebutting the presumption against pyramiding as set out in Brown and Beatty.

[36] The employer's representative argued that *Wallis* requires a clear expression of intent to confer a financial benefit. How much more clear can articles 43.05 and 43.06 be; there is a clear intent to confer a financial benefit setting out what that benefit will be.

[37] The employer's representative also argued that where entitlements are clear new conditions cannot be added even if the provision in question seems unfair (*Chafe)* According to her the collective agreement contains no indication that the allowances in question are to overlap. However, the collective agreement does not indicate that they are not to overlap, as it does elsewhere when that is the intention of the parties, and when the purposes are distinct as they are here, they do overlap. If I accept the employer's argument I would be imposing conditions on the collective agreement which do not otherwise exist.

[38] The employer relied extensively on its SDS system as proof of the correctness of its interpretation and application of the collective agreement. The argument that the only correct interpretation of the collective agreement rests entirely on the fact that an employer scheduling system will not permit the entry of two allowances for the same period of time is not one to which I can assign any weight. SDS is nothing more than an employer created scheduling tool; it is not evidence or proof of the proper interpretation of the collective agreement.

[39] The grievance is allowed however, consistent with the decision in *Coallier,* any retroactive payment will be limited to the time period 25 working days preceding the filing of the grievance.

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

(The Order appears on the next page)

V. Order

[41] The grievance is allowed with retroactive payment of allowances under Article 43.05 of the collective agreement retroactive to 25 working days prior to January 6, 2015.

[42] I shall retain jurisdiction to deal with matters arising out of this order for a period of 120 days from the date of this decision.

January 29, 2018.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board