Files: 166-2-26268
166-2-26269

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

HAZEL SCOTT

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs and Excise)

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: Herself

For the Employer: Kathryn A. Hucal and Ann Margaret Oberst, Counsel

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Heard at Toronto, Ontario,
August 27, 1998.

On August 24, 1993, Ms. Hazel Scott, a PM-02, Senior Customs Inspector, working in Toronto at Pearson International Airport, was arrested and charged with the following offences (see page 5 of Exhibit E-7):

> 1. *Conspiracy to Import Cannabis Resin -*
> *Sec. 465 (1) (c) Criminal Code of Canada.*
>
> 2. *Conspiracy to Import Cannabis Marihuana -*
> *Sec. 465 (1) (c) Criminal Code of Canada.*
>
> 3. *Importing Cannabis Resin -*
> *Sec. 5 (1) Narcotic Control Act.*
>
> 4. *Importing Cannabis Marihuana -*
> *Sec. 5 (1) Narcotic Control Act.*
>
> 5. *Breach of Trust -*
> *Sec. 122 Criminal Code of Canada.*

Two days later, Ms. Scott was suspended indefinitely (Exhibit E-8). The letter states, in part:

> *This is to advise you that the A/Assistant Deputy Minister, Customs Operations Branch, has decided to suspend you without pay for an indefinite period following the investigation into allegations that you imported a large quantity of cannabis resin and cannabis marijuana into Canada on or about August 8, 1993.*

Ms. Scott grieved this action on September 21, 1993 and that is one of the two grievances before me.

On October 18, 1993, Ms. Scott's employment was terminated. The letter detailing the reasons for this termination was introduced as Exhibit E-9 and states, in part:

> *The departmental Internal Affairs Division Investigation into allegations that you were involved in the importation of narcotics at Pearson International Airport on the evening of August 8, 1993, has been completed.*
>
> *The report concludes that, by your actions, you conspired with the travellers to import narcotics into Canada and you facilitated this action with the use of your position as an Acting Superintendent at Pearson International Airport Terminal 2.*

> *The duties of Customs Officers require that they enforce the legislation that the Department is mandated to enforce. Customs Officers are also Peace Officers within the meaning of the Criminal Code when carrying out their duties under the Customs Act and related regulations. In view of this, I have concluded that your actions and subsequent charges against you under the Criminal Code and Narcotic Control Act are totally incompatible with the duties and responsibilities of a Customs Officer and with your role as a Peace Officer. You have demonstrated that you lack the trustworthiness, judgment and sense of responsibility necessary to function as a Customs Officer.*
>
> *Accordingly, your actions constitute a serious breach of trust placed in you as a Customs Officer and represents so serious a violation of the Departmental Code of Conduct that the Department can no longer continue to employ you.*

Ms. Scott grieved this action on July 13, 1994 and this is the second grievance before me.

Background

Both grievances were referred to adjudication by the Public Service Alliance of Canada (the Alliance) on behalf of the grievor by way of a letter dated January 10, 1995. The cases were not scheduled for adjudication at that time due to a request by the Alliance that both matters be held in abeyance pending the resolution of the criminal charges.

Ultimately, Ms. Scott was convicted on three counts as identified on the "Certificate of Conviction" (Exhibit E-4). These three counts are as follows:

COUNT #1	*IMPORT NARCOTIC*	*SEC 5(1)*	*NCA*
COUNT #2	*IMPORT NARCOTIC*	*SEC 5(1)*	*NCA*
COUNT #3	*BREACH OF TRUST*	*SEC 122*	*CCC*

The sentence Ms. Scott received is as follows:

> *COUNT #1 - IMPRISONMENT FOR FOUR YEARS.*
> *COUNT #2 - IMPRISONMENT FOR FOUR YEARS CONCURRENT.*
> *COUNT #3 - IMPRISONMENT FOR FOUR YEARS CONSECUTIVE.*
>
> ****TOTAL SENTENCE IS IMPRISONMENT FOR EIGHT YEARS****

On March 12, 1996, the Public Service Staff Relations Board (the PSSRB) sent the following letter to the Alliance:

> *Re: References to Adjudication -*
> *H. Scott (166-2-26268 and 26269)*
>
> *The above-cited cases have been held in abeyance at the request of the Alliance pending the resolution of the criminal charges.*
>
> *A period of approximately one year has elapsed and the Board would like an update as to the status of these cases.*

As no reply was received, a follow-up letter was sent on October 23, 1996. It reads as follows:

> *Re: References to Adjudication -*
> *H. Scott (166-2-26268 and 26269)*
>
> *The above-cited cases were filed with the Board on January 11, 1995 and they have been held in abeyance pending the resolution of the criminal charges.*
>
> *A period of approximately two years has elapsed and the Board would appreciate an update as to the status of these matters.*
>
> *A reply by November 8, 1996 would be appreciated.*

On November 19, 1996, the following reply was received from the Alliance:

> *We have contacted the grievor in order to find out the status of her criminal case. We found out that there has been a mistrial in February of this year and that a new trial is scheduled to start next Monday.*
>
> *In light of the above, we are respectfully requesting that the above-noted case not be scheduled at adjudication before the resolution of the criminal charges.*
>
> *We will keep you informed of any new development in this matter.*

The PSSRB acknowledged receipt of this letter on November 20, 1996 and agreed to hold the references to adjudication in abeyance until June 1997.

On April 16, 1997, the Treasury Board sent the following letter to the PSSRB:

> *SUBJECT: References to adjudication*
> *Hazel Scott*
>
> *On November 20, 1996, you wrote to the Public Service Alliance of Canada agreeing to postpone the scheduling of the above-cited matters until at least June 1997. The PSAC had requested an extension until the resolution of the criminal charges against Ms. Scott.*
>
> *We have now been informed that Ms. Scott has been found guilty and sentenced to eight years in jail. We therefore would appreciate if the Board could contact the Alliance to find out if they still intend to proceed with this case. In the affirmative, we would request that the Board schedule these references as soon as possible.*

On July 3, 1997, the Alliance replied to this as follows:

> *In response to your letter dated April 17, 1997, please be advised that we have communicated with the grievor with a view to obtaining documentation necessary for us to evaluate the case and make a decision concerning its status. The grievor's criminal lawyer is presently in the process of obtaining the necessary documentation from the court and has been advised that this should be ready by the beginning of next week, at which point he will forward it to us immediately. We therefore hope to be in a position to finalize our evaluation of the file by the end of the month. We thank you for your understanding in this matter.*

On September 2, 1997, the Alliance wrote the following letter to the PSSRB:

> *... This is to advise that we have been informed by Ms. Scott's counsel that an appeal will be filed by next week and that the entire appeal process will take anywhere from 4 to 8 months to complete. Accordingly, we respectfully request that the above-mentioned cases remain pending during that period. By way of a copy of this letter to Ms. Scott and to her counsel, we are requesting that they inform us of any development that occur regarding the appeal. We thank you for your understanding in this matter.*

A reply to this letter was issued on September 4, 1997 by the employer. It reads as follows:

> *The request to further delay this matter is completely unacceptable to the employer. The trial of the criminal proceeding has been completed and there is no reason to await the outcome of an appeal. Any delay could further prejudice the employer's ability to present the case and it is requested that this matter be placed on the December schedule.*

The PSSRB decided to proceed with the cases and they were scheduled to be heard January 8 and 9, 1998. The Alliance and Treasury Board were so notified by the PSSRB by way of notice dated December 5, 1997.

On December 17, 1997, the Alliance wrote to the PSSRB and requested that the hearing be postponed. The letter reads as follows:

> *RE: Hazel Scott #166-2-26268/69*
>
> *This letter relates to an earlier (September 2, 1997) request by Evelyne Henry that the Board grant a request for a postponement of the above grievances until the results of her appeal are known. I appreciate that both the Board and the employer/Treasury Board have a legitimate competing interest, but the prejudice suffered by the grievor if we are forced to go ahead so outweigh that which will be suffered by those competing interests that I strongly urge the Board to revisit its earlier decision not to grant Ms. Henry's request.*
>
> *First, the alleged misconduct took place more that four years ago, so a further brief delay will not radically alter things.*
>
> *Second, as this matter was heard at Court where records and transcripts are available, it is not a case of memory of witnesses fading.*
>
> *Third, there appears to be a preclusion to the corrective action requested in the criminal code (Section 748 in my 1992 version) that won't be a bar if our adjournment is allowed and the appeal is allowed (c.c. section 748(6)).*
>
> *Finally, in the best of all possible worlds, if the Board were to allow the grievance, Ms. Scott would not be able to return to work anyway until the appeal is upheld as she is now incarcerated for eight years.*
>
> *Leaving aside that if she were forced to appear as a convict, accompanied by a prison escort team, the devastating impact*

> *on any credibility issues..... For all the above reasons and to allow Ms. Scott a real opportunity to regain her job, I must ask that the Board reconsider its decision and grant an adjournment. Ms. Scott's lawyer today advised me he expects her case will come on as early as March 1998 and not later than May 1998.*
>
> *I regret the need for this delay but it seems a smaller price to pay than the alternative.*

The employer responded on December 18, 1997 asking that the matter proceed as scheduled. This letter reads:

> *Re Hazel Scott #166-2-26268/69*
>
> *I write in response to a letter dated December 17, 1997 from Barry Done in the above-noted matter.*
>
> *The request to further delay the hearing is completely unacceptable to the employer. The hearing has been postponed for over three years and the employer will be irreparably prejudiced if any further delay is allowed. Certain witnesses are already no longer available. If another adjournment is granted, there is a strong possibility that more witnesses will be unavailable to testify.*
>
> *Contrary to Mr. Done's submission, there is no indication that Ms. Scott's appeal of her criminal conviction will result in a brief delay. An appeal could cause a further delay of 6-8 months or more.*
>
> *Most importantly, Ms. Scott has had two bail hearings, both of which have been denied. Each of the judges of the Ontario Court of Appeal who presided over the bail hearings have clearly stated that there are no arguable grounds for Ms. Scott's appeal of her criminal conviction. Enclosed please find copies of the findings of Justice Rosenberg and Justice Holden.*
>
> *Finally, the fact that Ms. Scott is currently in prison serving an eight-year sentence for her criminal convictions relating to the importation of 95 kilograms of cannabis marihuana and 6.5 kilograms of cannabis resin, and will need to make special arrangements to secure her attendance at the hearing, is insufficient to warrant special consideration. She has already delayed the hearing for over three years.*
>
> *The employer maintains that the appeal must proceed as scheduled, on January 8-9, 1998.*

The PSSRB issued a decision on December 22, 1997 which denied the Alliance's request for postponement. The matters were to proceed as scheduled on January 8 and 9, 1998.

On January 7, 1998, the PSSRB was advised by the Alliance that they were no longer representing Ms. Scott in either reference to adjudication. In light of this, as well as other pertinent reasons, the Board decided to postpone the hearing and so advised the parties by way of a letter dated January 7, 1998. It reads:

> *Re: References to Adjudication -*
> *Hazel Scott (166-2-26268 and 26269)*
>
> *Enclosed is a copy of a fax from Mr. Done dated January 7, 1998 advising the Board that the Alliance is no longer representing the grievor in the above cited references to adjudication.*
>
> *Mr. Done indicated during our telephone conversation that the grievor still intends to continue with her reference to adjudication before this Board but that she would not be present at the hearing scheduled for January 8th in Toronto. Ms. Scott has also pointed out to Mr. Done that she will attempt to obtain counsel who would make alternative arrangements for a hearing before the Board.*
>
> *The Board has communicated with counsel for the employer and Ms. Hucal has indicated that she is opposed to any further postponement of these matters.*
>
> *The matter was submitted to the Board and I was directed to inform the parties that under these circumstances the hearing scheduled for January 8 and 9 is hereby postponed.*

Due to the fact Ms. Scott was no longer being represented by the Alliance, the PSSRB sent the following letter directly to the grievor on January 13, 1998. This letter, which was sent to Ms. Scott, c/o Grand Valley Institution for Women where she was incarcerated, provides:

> *The hearing of your reference to adjudication scheduled for January 8 and 9, 1998 was postponed in order to allow you to obtain counsel.*

> *As you are aware, this matter has been held in abeyance since January 1995 and the Board has directed me to inform you that you are to submit the name of your counsel together with his/her address, telephone and fax number by no later than February 6, 1998.*
>
> *I was also directed to advise you that the Board will not grant further postponements in this matter. Failure to respond to this letter by February 6th may result in the termination of these proceedings and the closing of your files.*

Ms. Scott replied on February 6, 1998:

> *This is a follow-up as per our telephone conversation today. As I have requested to you that I still wish to proceed through adjudication.*
>
> *Due to my present situation, I cannot retain and instruct counsel financially. Therefore, I would like to have the hearing at a much later date. My release date will be April 10, 1998. The schedule date for my "APPEAL" is not yet finalized. My understanding of this issue is, if my case is heard before my "APPEAL" I have no recourse when I am exonerated. In light of this, I am requesting again that you give this some consideration.*
>
> *As promised, I will communicate with you upon my release and furnish you with my new address and telephone number.*
>
> *Trusting this information will help to prevent the termination of the proceedings and the closing of my files.*

The employer was asked for its position concerning this request for a further postponement, and issued its response on February 12, 1998. In this letter, the employer asked that the proceedings be terminated.

The PSSRB asked Ms. Scott for her position on this request and her lawyer, Mr. P. Daniel Lawson, responded on March 6, 1998. In this letter, Mr. Lawson asks "... that the Board continue to accommodate Ms. Scott within the reasonably foreseeable future so as to allow the criminal appeal to be perfected, listed and heard".

The employer responded to this letter by way of correspondence dated March 11, 1998. In this letter, counsel stated the PSSRB should terminate the proceedings.

On March 18, 1998, Ms. Scott was advised by the PSSRB that a request for a further postponement was denied, and the matter was scheduled for hearing on August 27 and 28, 1998, in Toronto. This letter was sent to Ms. Scott at the Grand Valley Institution for Women. On June 17, 1998, a further letter from the PSSRB was sent to Ms. Scott advising her once again of the hearing dates. This letter was also sent to the Grand Valley Institution for Women as no information had been received from Ms. Scott concerning her release or another address, and this letter was not returned to the PSSRB as undelivered, in spite of the fact Ms. Scott had suggested her release was to be April 10.

On July 21, 1998, the employer sent Ms. Scott a letter (addressed to the Grand Valley Institution for Women) asking her if she intended to ask for a further adjournment. In the letter, counsel for the employer stated:

> *...*
>
> *If you intend to seek an adjournment, I would greatly appreciate if this request could be made as soon as possible.*
>
> *In light of the position the PSSRB has taken in the past, the Department would not oppose an adjournment, if one is requested.*

On July 24, 1998, a notice of hearing was sent by the PSSRB to Ms. Scott by Priority Post and also addressed to the Grand Valley Institution for Women. It too was not returned as undelivered.

On August 14, 1998, counsel for the employer sent a letter to the PSSRB requesting a postponement of the scheduled adjudication. In this letter, counsel indicated that Ms. Scott was no longer being held at the Grand Valley Institution for Women, and her current address was unknown.

The PSSRB sent a letter to Ms. Scott on August 17, 1998 asking for her position with respect to the request for a postponement. This letter was sent by Priority Post to the last known address for the grievor, namely the Grand Valley Institution for Women. The correspondence was returned with the notation "Moved; Address unknown".

Counsel for the employer wrote to the PSSRB on August 17, 1998 and stated that it was withdrawing its request for a postponement. The PSSRB sent a copy of this letter to Ms. Scott, and informed her that "...[I]n light of the previous decision of the Board to deny any further postponement, please note that failure to appear at the hearing may result in a decision of the Board to proceed with the employer's evidence in your absence".

This letter was also returned to the PSSRB, marked "Refused by addressee".

The last piece of correspondence received by the PSSRB was a letter from counsel for the employer dated August 24, 1998 stating "... that the employer will be raising a preliminary objection to jurisdiction based on the doctrine of abuse of process and the doctrine of issue estoppel".

The Hearing

The hearing commenced at 9:30 a.m. on August 27, 1998 as scheduled. Representatives for the employer were in the hearing room, but neither Ms. Scott nor her counsel was in attendance. Accordingly, I ruled that we would wait 15 minutes before commencing, to allow for the possibility that Ms. Scott was simply late.

When the hearing resumed at 9:45 a.m., Ms. Scott was present. I indicated I would deal with any preliminary issues at the outset and asked Ms. Scott if she had any points she wished to raise.

Ms. Scott, who was not accompanied by anyone representing her, stated that just two days previously she had received Ms. Oberst's August 14 letter requesting a postponement as well as Ms. Oberst's August 17 letter withdrawing the request. Ms. Scott informed me she could not get anyone to represent her on such short notice and was requesting an adjournment until the appeal from her criminal conviction was heard which, she stated, may be argued in December 1998. She had been released from the Institution for Women in April 1998 after being incarcerated for some four years.

Ms. Hucal requested that the hearing continue as scheduled. Counsel informed me that she had contacted Corrections Canada in order to have the above-referenced correspondence delivered to Ms. Scott simply as a matter of professional courtesy, and both letters were delivered at the same time.

Furthermore, counsel argued that the March 18 letter (cited earlier) from the PSSRB to Ms. Scott stated there would be no further adjournments, and Ms. Scott had some five months to secure a representative. She cannot claim that she has had insufficient time to prepare.

Counsel also said there was no evidence to show that the appeal was likely to be heard in December, and in any event bail had been denied while she was incarcerated with two different judges ruling that there were no appealable issues in the decision and therefore the likelihood of success in filing an appeal was negligible.

Counsel stated that further delays could prejudice the employer's case as memories fade with time and witnesses may not be available to testify. I was told one witness was currently no longer in Canada and therefore could not testify.

Ms. Scott replied that a previous adjournment had been necessary because she was incarcerated. This should not be held against her in her current quest to seek another postponement. Ms. Scott questioned why Ms. Oberst had offered a postponement initially, and now wanted to continue, when she would have known that one of her witnesses could no longer attend. Finally, she concurred that there was no documentation which would indicate when her appeal would be heard.

I recessed to ponder this request.

Upon resumption, I ruled that Ms. Scott would be given time to call her lawyer's office and see if there was someone who could attend as her representative. If so, I indicated we would adjourn the proceedings for the remainder of the day and resume the hearing the following morning. If we did not finish, future dates would have to be scheduled. If no representative was available to assist Ms. Scott, I indicated that we would proceed. This ruling was based on the fact that the March 18 letter from the PSSRB to Ms. Scott had been delivered to her in the Institution and consequently she was aware then that the hearing was to proceed on August 27 and 28, 1998.

Following a 30-minute recess, Ms. Scott informed me that she was not able to contact her lawyer and, as he was a sole practitioner, it was not possible to get assistance. However, she also informed me that she had spoken to a Mr. Ouellette at the Alliance some two days previously and inquired about representation.

Counsel for the employer stated they opposed any postponement and the Alliance was on record as not supporting the grievor.

Following another short recess, I ruled that the matter had been scheduled in March and both parties were aware of this. Furthermore, the Alliance is on record as withdrawing its support and there is nothing to indicate they have altered their position. The hearing would proceed and Ms. Scott would be offered the opportunity to cross-examine any witnesses and present evidence to support her position as she saw fit. I indicated the proceedings were much less formal than those of a criminal court.

Ms. Scott stated she would not have anyone to represent her and she could not remain at the hearing without representation.

I indicated I would assist her in whatever way I could throughout the hearing, but she replied that she could not stay. Ms. Scott left the hearing room and did not return.

I instructed counsel for the employer to proceed in the absence of the grievor and, as it was a discharge case, the employer had the burden of proof.

Ms. Hucal had two preliminary objections she wished to raise. The first had to do with the issues cited in the August 24 letter (referred to earlier) and the second had to do with remedy and the impact of section 750 (formerly section 748) of the *Criminal Code.*

With respect to the first issue, Ms. Oberst's letter of August 24 stated it would be an abuse of process if the employer was required to re-prove the criminal charges. Her letter states: "... A criminal conviction is prima facie evidence of the acts underlying a specific charge". She cited the Ontario High Court of Justice ruling in *Demeter v. British Pacific Life Insurance Co. and Two Other Actions* (1983), 43 O.R. (2d) 33, wherein it states, at page 48:

> *... if the action is to go forward, proof of the conviction of the plaintiff for the murder of his wife may be adduced in evidence and, if this is done, should be regarded as prima facie proof of that issue, subject to rebuttal by the plaintiff on the merits.*

Counsel also cited *Ontario v. Gray* (May 9, 1996), Doc. 92-CQ-18457 (1996), 5 O.T.C. 248 (Ont. Gen. Div.), wherein Justice Jennings wrote, at paragraphs 13 and 14:

> *... to allow the same question to be litigated in this proceeding as was determined in the criminal proceeding, would constitute an abuse of process.*
>
> *It is trite law to say that a criminal conviction is prima facie proof of the facts underlying the specific charge.*

This decision was affirmed on appeal to the Ontario Court of Appeal [1997] O.J. No. 4286.

Ms. Oberst's letter requested that the adjudication be dismissed at the outset or, in the alternative, that the criminal conviction will be accepted as prima facie evidence of the factual elements of the charges in this matter.

I ruled that the "Certificate of Conviction" could be introduced as prima facie evidence of the charges and conviction in this case, subject to any rebuttal. The employer would not have to re-prove the events which led up to the charge and subsequent conviction. However, the grievances would not simply be dismissed out-of-hand as the employer still had to prove that the events which took place were so serious as to warrant discharge.

The second preliminary matter had to do with the impact of section 748 (currently section 750) of the *Criminal Code*. This section states (see Exhibit E-1):

> *748.(1) Where a person is convicted of an indictable offence for which he is sentenced to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.*

Ms. Hucal, for the employer, argued that in this case the grievor was seeking reinstatement and the effect of section 748 was that, even if I were to grant the relief sought, the grievor would immediately be removed from her public office as she was sentenced to some eight years in prison.

I reserved my decision with respect to this issue.

Prior to the evidentiary portion, I inquired about exclusion of witnesses and counsel for the employer stated that there would be two witnesses, both of whom had been excluded throughout the proceedings.

The Evidence

Mr. Kelly Helowka testified and stated he was a narcotics enforcement officer with the Royal Canadian Mounted Police from 1990 to 1997. He worked at Pearson International Airport from September 1991 to May 1995, and was on duty on August 8, 1993. The witness testified that around 10:00 p.m. that evening, he received notification by customs of a huge seizure of 50 to 60 pounds of narcotics in Terminal 2. The street value of the narcotics was estimated in excess of one million dollars.

Constable Helowka proceeded to Terminal 2 where two passengers, one male and one female, were being detained following the discovery. Each of the two passengers was interviewed separately and it was learned that the grievor, Ms. Hazel Scott, had recruited them to smuggle in the narcotics. Furthermore, Constable Helowka learned that Ms. Scott had attempted to utilize her position to facilitate the entry of the narcotics into Canada. It was learned that Ms. Scott exchanged her shift with another co-worker to ensure she would be at Terminal 2 on August 8, 1993 between 3:00 p.m. and midnight (see Exhibit E-11).

Constable Helowka testified he also discovered that another customs inspector, Mr. Paul Theoret, had been instructed by his supervisor, Ms. Hazel Scott, to process the two passengers without delay and to code their customs declaration cards so they would be free to leave the customs area. Mr. Theoret complied with his supervisor's request, but as we know the two passengers were arrested anyway.

Constable Helowka testified both of the two passengers who had imported the narcotics were ultimately convicted and received sentences of up to four years in prison.

Ms. Scott received four years for importing narcotics and an additional four years for breach of trust (see Exhibit E-4). Constable Helowka identified Exhibit E-5 as the section in the *Criminal Code* dealing with breach of trust and noted the maximum penalty is five years imprisonment.

I then heard testimony from Mr. Al Campbell, the Regional Staff Relations Advisor. He indicated he had been involved in providing advice to senior management with respect to the grievor's situation. Mr. Campbell testified he recommended that the grievor be suspended indefinitely pending the results of an investigation being conducted by Internal Affairs. The investigation report was identified as Exhibit E-7 and Mr. Campbell said he reviewed it upon its completion on September 7, 1993.

Upon reviewing the report, Mr. Campbell concluded that Ms. Scott had effected a shift exchange to ensure she would be at Terminal 2 on the evening of August 8, 1993 when the two passengers carrying the narcotics were scheduled to arrive. While at Terminal 2, she instructed a subordinate to expedite the clearance of the two passengers. Finally, she relieved another customs inspector early to be in a position to deal directly with the two passengers as they were clearing customs.

Mr. Campbell testified the report also indicates it was Ms. Scott who recruited the two passengers to import narcotics in the first place.

Mr. Campbell testified he drafted the termination letter (Exhibit E-9) for the signature of Mr. J.G. MacDonald, the Regional Collector. Mr. Campbell stated that the actions of the grievor in conspiring with travellers to import narcotics and in using her position to facilitate this action were so serious as to warrant discharge, coupled with the fact she had violated sections 7, 8, 9 and 11(a)(i) of the Customs and Excise "Code of Conduct" (Exhibit E-10).

The witness stated that the Department did consider the grievor's approximate 20 years of service and fair performance record before deciding on discharge. However, the grievor's lack of remorse and her lack of cooperation, coupled with the fact she did not refute the allegations, led management to conclude discharge was the only appropriate penalty.

Argument

Ms. Hucal stated the grievor had occupied a position of trust. She abused this trust by making arrangements to change her shift so as to ensure she would be in Terminal 2 when the two passengers who were importing narcotics arrived. She also used her position to instruct a subordinate to clear the two passengers without an inspection. Finally, she relieved another customs inspector 10 minutes early, again so as to ensure it would be she who dealt directly with the two passengers. She, in short, abused the trust her employer had placed in her.

An internal investigation was done and it concluded she did assist in the importing of narcotics and used her position to facilitate this activity. The Certificate of Conviction is proof of the charges as laid. This action on the part of Ms. Scott is incompatible with customs inspection duties and she has displayed a lack of honesty and integrity and committed a serious breach of trust. The employer was left with no choice but to discharge her.

Decision

I will deal firstly with the preliminary issue concerning the application of section 748 (as it then was) of the *Criminal Code.* In *Foster* (Board file 166-2-26267), Deputy Chairperson (as he then was) Yvon Tarte wrote, at page 5:

> *I am of the view that section 748 of the Criminal Code effectively terminates the employment of a public servant who, following conviction for an indictable offence, is sentenced to imprisonment for more than five years....*

An application by the employee for judicial review of this decision was denied by the Federal Court, Trial Division: *Foster v. Canada (Treasury Board)* (1996), 118 F.T.R. 285.

I believe this section would be applicable to a public servant who occupies a position at the time a conviction is rendered. In the instant case, Ms. Scott was discharged for misconduct prior to her criminal conviction, and therefore section 748 (as it then was) could not operate to vacate her position. Counsel for the employer stated this section could be invoked if I were to reinstate the grievor to her position, as she has requested in her grievance.

In view of the fact I do not believe reinstatement to be appropriate, the impact of section 748 of the *Criminal Code* is, in this circumstance, not at issue.

The grievor was discharged because she conspired with travellers to import narcotics into Canada and she facilitated this action with the use of her position (see letter of discharge, Exhibit E-9). Counsel for the employer stated she was convicted of importing narcotics and a breach of trust (see "Certificate of Conviction", Exhibit E-4). Since the facts leading to the convictions are also the reasons for her discharge, counsel stated the simple production of the "Certificate of Conviction" was prima facie evidence that the events took place as stated. She cited extensive jurisprudence to support this position and, after deliberation, I concurred.

Therefore, I find the employer has proven the facts which formed the basis for discharge. Are these events so serious as to warrant discharge? In this case, in spite of a lengthy service record, and absent any other mitigating factors which the grievor may have presented, I believe discharge is appropriate.

It is axiomatic to say that a customs officer is a trusted, front line of defence official, so to speak, serving to guard against the illegal importation of narcotics and other goods. Ms. Scott has violated this bond of trust so severely by using her position to facilitate this activity that discharge is the only appropriate response by the employer.

While disciplinary action is designed, for the most part, to be corrective and not punitive, there are occasions when the actions of an individual are so egregiously wrong that the only appropriate response is to sever the employment relationship. I believe that this is such a case.

For these reasons, the grievances are hereby dismissed.

Joseph W. Potter,
Deputy Chairperson

OTTAWA, September 23, 1998.