

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

GERALD JOSEPH CLEARY

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer

Before: Richard Labelle, Board Member

For the Grievor: Derek Dagger, Counsel, Public Service Alliance of Canada

For the Employer: Lyndsay Jeanes, Student-at-Law



Heard at Ottawa, Ontario,
March 21, 1995.

DECISION

Mr. Gerald J. Cleary, employed with the Department of National Defence, Integrated Logistics Support Section, Ottawa, Ontario, classification level EG-ESS-05, is grieving the denial of acting pay at the same level as the Senior Maintenance Planner (ILS 2).

For his acting appointment to that position, Mr. Cleary is claiming acting pay under clause M-27.07 of the Master Agreement between Treasury Board and the Public Service Alliance of Canada which was entered into by the parties on May 17, 1989. His claim covers the period March 1, 1993 through to August 31, 1993.

Mr. Cleary's grievance reads as follows:

I grieve that I was denied acting pay at the same level as the Senior Maintenance Planner (ILS 2) during my acting appointment to his position.

Re: M27.07

*Precedent: PSSRB File # 166-2-23158 and 23592
Julie Francoeur vs Treasury Board
Adjudicator: M.K. Wexler*

Corrective Action Requested

That I receive acting pay at the level of the military member occupying the substantive position in which I acted.

There is no dispute on the facts. The issue here is does a civilian employee receive the military rate of pay of a Major when on an acting basis he is performing the duties of a position previously held by a Major.

The grievor's acting assignment was at the EG-06 group and level which has a salary range of \$45,415. to \$55,254. per annum. The rate of pay for a Major is higher (Exhibit E-2). In support of his grievance, the grievor cited the decision in Francoeur (Board files 166-2-23158 and 166-2-23592).

The issue here is the level of pay to which a civilian employee is entitled when he performs on an acting basis the duties previously performed by a member of the military. The grievor performed the duties previously done by a Major.

Evidence

The facts are not contested. Mr. Cleary has been employed with the Department of National Defence for the past 15 years. Prior to that, he was a Chief Warrant Officer in the military. Mr. Cleary worked for the Project Management Office (Light Armoured Vehicles, DND).

In 1993, Mr. Cleary was preparing to enter into negotiations with General Motors, Diesel Division, to purchase Light Armoured Vehicles.

Mr. Cleary's immediate supervisor was Major Denis Boisvert. In March 1993, Major Boisvert decided to take his release from the army. Mr. Cleary was then asked by Lieutenant-Colonel (now retired) William Tate to take over the duties of Major Boisvert for an acting period of approximately six months. Lieutenant-Colonel Tate gave the statement of duties of the military position to Mr. Cleary (Exhibit G-2).

Mr. Cleary then proceeded with the negotiations. Mr. Cleary stated that he thinks that he helped save the Government approximately \$2.5 million in these negotiations. He also stated that he performed most of the duties specified in Exhibit G-2 during the period of his acting assignment.

The grievor learned of the level of his acting pay in a letter dated 31 March 1994 which indicated his salary at the EG-06 group and level (Exhibit G-3). He was paid at the low level of the EG-06 classification.

In cross-examination, the grievor said that he was not told that he was going to be paid the military salary for the acting assignment; pay and classification were not mentioned. The grievor said that he accepted the position without knowledge of the salary. The position was classified at the EG-06 level (basic) by the employer for the purpose of the acting assignment. Mr. Cleary said that he wanted 75-80% of a Major's salary. He wanted the top end of the EG-06 salary. The grievor said that he often worked from 8:00 a.m. to 10:00 p.m. during negotiations and he never asked for overtime. He also mentioned that he was not required to do military duties in that job; they are not on the statement of duties (Exhibit G-2).

Mr. William Tate (Lieutenant-Colonel - retired) testified that he was with the Department of National Defence from 1966 until May 1994. (His last working day was

November 15, 1993.) He was the Integrated Logistics Support Manager. He testified that, when Major Boisvert decided to take his release, he (Mr. Tate) was looking for a military replacement but could not find one at that time for the six-month period. Mr. Tate asked the grievor to take the acting assignment because he was the only one suitable for the job. The grievor said he would take the acting assignment and signed the "Acting Assignment/Appointment" form (Exhibit E-1). Exhibit E-1 indicates that Mr. Cleary would be "performing the duties of a military position".

Mr. Robert Sparling, DND Pay Policy Development, who determines pay rates and pay policy for the Canadian Forces, created the policy for a Major's pay in the Canadian Forces (Exhibit E-2). This document would not explain pay for civilian determination of pay. Military personnel have no choice in the position they fill since they are required to serve wherever they are assigned.

Under cross-examination, the witness testified that he takes positions at random, between civilian and military, to determine the difference between military and Public Service pay.

Under redirect, the witness testified that the Compensation Comparability Elements of Exhibit E-2 are taken into account to determine the pay factor.

Mr. Mitchell Yakovishin is a classification officer with DND. He evaluates job descriptions for the group and level for civilian employees. He was asked to classify the position (Exhibit G-2) for the purpose of the acting assignment. He uses civilian evaluations to classify positions. He assessed the statement of duties (Exhibit G-2) as an EG-06 position.

Under cross-examination, the witness testified that he did not use any information other than the statement of duties to determine the grievor's acting pay status.

Arguments

Mr. Dagger argued that the facts are clear. The position identified in the statement of duties (Exhibit G2) is normally filled by a Major. Mr. Tate testified that he at first tried to fill the position with a Major but he was advised that no one was

available at that time. Mr. Tate then asked the grievor if he would fill the position in an acting capacity since he was the only person suitable for the job.

Major Boisvert was required to perform the duties outlined in the statement of duties (Exhibit G-2). Mr. Tate testified that the grievor and Mr. Boisvert were interchangeable, that the position in question is that of a Major in the Canadian Forces. There is no evidence to suggest any other rate of pay. Mr. Dagger referred me to clause M-27.07 of the Master Agreement (acting pay). The grievor is seeking the pay of a Major for performing the duties identified in Exhibit G-2. Mr. Dagger indicated that the grievor said that he would be satisfied with the top end of the EG-06 salary range, which is about \$1,600. less than what is shown at the bottom end of a Major's salary (Exhibit E-2). Mr. Dagger indicated that the employer's witness, Mr. Yakovishin, was not qualified as an expert witness and can not come before an adjudicator on opinion evidence. The witness does only classification and he decided that the position was an EG-06.

The grievor performed all the duties done by a Major in his acting assignment. Mr. Dagger asked that the grievance be sustained.

In support of his arguments, Mr. Dagger cited subsection 12.(3) and section 35 of the *National Defence Act* and also page 40 of the *Queen's Regulations and Orders for the Canadian Forces*.

Ms. Jeanes for her part argued that the collective agreement is the issue.

The question to be decided is the rate of acting pay to which the grievor is entitled pursuant to clause M-27.07 of the Master Agreement. Clause M-27.01 of the Master Agreement (pay administration) deals with terms and conditions of payment. The substance of clause M-27.07 specifies that an acting assignment entitles an employee not to the pay of a military rank but to the pay for the equivalent classification level of a Public Service job.

Ms. Jeanes argued that under subclause M-27.07(b) of the Master Agreement (days for acting pay) there is no group for the rank of Major. She added that there is a difference in the language, between the English and French versions, of clause M-27.07. Is the grievor performing the duties of another employee?

According to the statement of duties (Exhibit G-2), the grievor performed the duties of an EG-06 and not an EG-05 which was the grievor's substantive classification level at the time. The employer was free to bring the classification level into line with the collective agreement and this is what it did.

The statement of duties resulted in the classification of the position as an EG-06. There were no military duties required to be performed on the part of the grievor in this position. Ms. Jeanes added that it is not within my jurisdiction to change the pay rates.

The employer did not contravene clause M-27.07 of the Master Agreement and the employer fulfilled its obligation under the collective agreement. Ms. Jeanes asked that the grievance be dismissed.

In support of her arguments, she cited the French version of subclause M-27.07(a); LOEB I.G.A. Southgate and United Food & Commercial Workers, Local 175 (1991), 22 L.A.C. (4th), 209; and the adjudication decisions in Francoeur (Board files 166-2-23158 and 166-2-23592) and Francoeur (Board file 166-2-25922). It should be noted that subsequent to the hearing of the reference to adjudication of this grievance the latter decision was set aside by the Federal Court, Trial Division, on judicial review: Court file T-382-95 (unreported). An appeal to the Federal Court of Appeal is pending: Court file A-224-96.

Reasons for Decision

I have reviewed the evidence and the submissions of the parties as well as the decision of the Federal Court, Trial Division, in Francoeur (supra). It is clear that Mr. Cleary performed the duties described in Exhibit G-2 and that those duties had also been performed by Major Boisvert.

Clause M-27.07 of the Master Agreement (Exhibit G-1) stipulates the following:

- (a) *When an employee is required by the Employer to substantially perform the duties of a higher classification level in an acting capacity and performs those duties for at least the period specified in (b) below, the employee shall be paid acting pay calculated from the date on which he or she commenced to act as if he or*

she had been appointed to that higher classification level for the period in which he or she acts,

- (b) for the number of consecutive working days as follows:

<u>Group</u>	<u>Levels</u>	<u>No. of Days or Shifts</u>
LS	ALL	10
AS	ALL	10
IS	ALL	10
PM	ALL	10
PG	ALL	10
DD	ALL	4
EG	ALL	4
GT	ALL	4
PY	ALL	4
PI	ALL	4
SI	ALL	4
TI	ALL	4
CM	ALL	4
DA	ALL	4
CR	ALL	4
OE	ALL	4
ST	ALL	4
CX (S&NS)	1 to 6	1
	7 & 8	4
FR (S&NS)	ALL	1 shift
GL (S&NS)	ALL	2
GS (S&NS)	ALL	2
HP (S&NS)	ALL	3
LI (S&NS)	ALL	3

The Master Agreement binds the Treasury Board, the Public Service Alliance of Canada and the employees subject to this agreement. The employer is the Treasury Board.

The issue here is that of the level of pay to which a civilian employee is entitled when he substantially performs on an acting basis the duties of a member of the military. The grievor was performing the duties previously done by a Major. Mr. Tate testified that he could not find a replacement at that rank in such a short period of time and that no one else was as suitable as the grievor to fill that position.

The evidence established that Mr. Cleary substantially performed on an acting basis the duties of the position of a Major, apart from any military duties which were not a prerequisite as outlined in the statement of duties (Exhibit G-2).

Pursuant to its policy, the employer evaluated the duties performed by the grievor on an acting basis and gave the grievor pay as an acting EG-06 but at the low scale of that salary range. (His substantive classification was at the EG-05 level.)

In the instant case, the grievor performed on an acting basis the duties of a position that was classified at the rank of Major and the Master Agreement provides that Mr. Cleary is entitled to acting pay as if he had been appointed to that higher classification level.

Accordingly, Mr. Cleary's grievance is allowed and I direct the employer to compensate him, as he requested, at the top level of the EG-06 classification for the duration of his acting assignment.

**Richard Labelle,
Board Member**

OTTAWA, May 29, 1996.