

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

RENÉ EDMOND DECAE

Grievor

and

**TREASURY BOARD
(Revenue Canada - Excise)**

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Himself

For the Employer: Ronald Snyder, Counsel

Heard at Saskatoon, Saskatchewan,
April 11, 1996

DECISION

René DeCae, an Audit Unit Manager (AUM), AU-3 classification level, Revenue Canada, Excise, Saskatoon, is grieving an indefinite suspension without pay imposed by the employer in March 1995.

His grievance reads:

Suspension without pay Mar 24/95. As per Department Policy (Managers Handbook) I should have been contacted and investigation completed within 5 weeks.

Also, was not informed as an employee, my rights to grieve.

The letter of indefinite suspension reads:

This is to inform you that the Assistant Deputy Minister, Excise/GST Branch has suspended you without pay for an indefinite period pending resolution of matters concerning you outlined in a Warrant to Search executed pursuant to Section 487 of the Criminal Code during the week of March 20, 1995, at the office premises and storage facilities occupied or controlled by Revenue Canada at 123 2nd Avenue South, Saskatoon, Saskatchewan.

I have asked Mr. E. Schmidt to be my delegated representative in delivering this decision to you. The indefinite suspension is effective at the time you are so informed.

During your indefinite suspension, you are not permitted to enter departmental premises for any reason without the permission of the undersigned or my representative.

A representative of the Pay and Benefits Section will communicate with you concerning the implications this administrative measure will have on your terms and conditions of employment.

Please acknowledge receipt of this letter by signing the duplicate copy in the space provided and returning it to Mr. Schmidt's office.

Mr. DeCae is requesting the following corrective action:

Full reinstatement of salary & benefits from March 24, 1995.

I am being asked to decide if the employer's action was justified under the circumstances.

The hearing lasted one half day with two witnesses testifying and ten exhibits submitted into evidence.

Summary of Evidence

The burden of proof in this matter rests with the employer. Under normal circumstances therefore, the employer would lead its case and the grievor would follow. However, Mr. DeCae, who was representing himself, requested to make a statement after which he intended to leave the hearing. Mr. DeCae had never appeared before the Public Service Staff Relations Board. I granted his request providing he do so under oath. Counsel for the employer did not object.

1. Mr. DeCae testified that after he was suspended on March 27, 1995, he was never notified of his right, even as an excluded employee, to submit a grievance, nor was he given an opportunity to do so. He said when he finally had his grievance signed on June 19, 1995 by a departmental staff relations officer, he complained that his grievance was not responded to by his employer within the time limits set out in the PSSRB Regulations and Rules of Procedure, 1993, subsection 74(1).

Subsection 74(1) reads:

74 (1) Where an employee presents a grievance at any level in the grievance process in accordance with section 71 or 73, other than a grievance that relates to classification, the authorized representative of the employer at that level shall provide the employee with a reply, in writing, to the grievance, no later than on the fifteenth day after the day on which the grievance was presented at that level.

Mr. Snyder advised me here that timeliness was never an issue during the grievance process even though Mr. DeCae submitted his grievance long after the time period of twenty-five days permitted under subsection 71(3) of the PSSRB Regulations and Rules of Procedure from the date of the suspension on March 27, 1995.

Mr. DeCae said that he finally got a response to his grievance on September 12, 1995 from Peter Harrison, Assistant Deputy Minister, Human Resources Branch. He referred his grievance to adjudication on September 19, 1995. He added: "I am here now but I have little interest in being here".

The grievor submitted an excerpt from the Managers Handbook (Exhibit G-1) regarding Removal of an Employee From the Work Site Pending Investigation and referred to section 29, Indefinite Suspension that reads:

29. If the less sensitive duties option has been thoroughly considered and deemed to be unacceptable by the appropriate Regional Collector/Director, or at Headquarters, by the appropriate Director or Director General, placing the employee on indefinite suspension without pay, pending completion of investigation, can be considered, provided that the investigation into the employee's alleged misconduct is within departmental control and can, in all likelihood, be completed within approximately two to five weeks.

He argued that his employer failed to complete its investigation surrounding his suspension within two to five weeks. He said that the department should have suspended him with pay until the date he was formally charged with tax fraud in October, 1995. Mr. DeCae complained that he was "tired and frustrated for talking to deaf ears", and kept reminding me that he worked for the Excise Branch of the department and not for Taxation.

The grievor said that he had had a good work record from the time he began with the department in 1975 and that the employer did not consider this at the time it suspended him, nor did it take into account the fact that he was undergoing stress because of personal family matters. He added that he has "upheld the law to the best of [his] ability but that red-tape and the bureaucracy have hurt [him]". His criminal case is scheduled for trial on April 22, 1996.

During cross-examination, when asked if as a line manager he had ever been trained to advise a subordinate what to do if a subordinate wanted to submit a grievance, the grievor responded: "Yes, but I have never handled one, even though I knew the Managers Handbook existed with instructions regarding how to handle grievances". Mr. DeCae identified a letter (Exhibit E-1) from Helen Roberts, a

departmental Staff Relations Officer, advising him how to process his reference to adjudication. Her letter had the department's final-level response attached to his grievance.

Mr. DeCae left the hearing at this point even after I advised him three times of his right to stay and cross-examine the employer's witness. He declined.

2. John M. Jordan, retired, was Regional Director General (RDG), Central Region, Revenue Canada, Customs, Excise and Taxation at the time of the grievor's suspension. He identified the Position Description (Exhibit E-2) that Mr. DeCae occupied as an AUM with ten to twelve auditors under him. He said the grievor's role was to enforce the Excise Tax Act, Good and Services (GST) and had no authority and no duties to perform under the Income Tax Act.

The witness identified a Warrant to Search (Exhibit E-3) dated March 20, 1995 issued on the strength of an oath by Barry McKenzie, an income tax investigator. He also identified Exhibit E-4, the information used to obtain the Warrant to Search. He added that the grievor also prepared his former wife's tax returns for the period under investigation.

Mr. Jordan explained the process followed to obtain a warrant to search. He said on the income tax side an investigator must build a "strong and conclusive case" that would have to be concurred in by the senior manager in the district office, in this case Saskatoon, and by Ottawa headquarters and the Justice Department. A similar process exists for an investigation on the excise (GST) side. He added that, as RDG, he could approve the decision to get a warrant to search because they had to move quickly in order to avoid media coverage. Bill Reach, the District Director, Saskatoon, told him in early March that a warrant to search would be needed and that the investigating officers involved in the case would be people who did not know the grievor.

Mr. Jordan said that he removed the grievor from his workplace for five reasons: first, to maintain the integrity of the tax system since the evidence of tax fraud by the grievor between 1990 and 1993 was very strong. Mr. Jordan was concerned how dutifully Mr. DeCae could continue to carry out his duties; second, because the grievor would have lacked credibility with his subordinates. If Mr. DeCae

had been given preferential treatment as a manager, there may have been negative backlash from staff; third, there may have been a negative impact in dealing with taxpayers since the grievor had to resolve disputes with taxpayers and sometimes negotiate paybacks; fourth, to remove potential damage to the department's reputation since taxation and excise are now in the same office. The taxpayer lumps them together for tax purposes. He added that Canadian taxes are paid on a voluntary compliance system and since the department has been attacking the underground economy, their employees need to demonstrate the highest degree of integrity and confidence. If Mr. DeCae had been allowed to stay in his position while the investigation continued and the media picked up on the case it could be "devastating to the department"; fifth, he wanted to take a cautious approach to the potential for abuse of Mr. DeCae's position since many taxpayers in Saskatchewan are in a GST tax credit position. Mr. DeCae's limit as an AUM to authorize a GST refund is \$50,000. Mr. Jordan said he could not ignore the potential to abuse this authority under the circumstances. He said an AUM is difficult to closely supervise since they have a lot of direct control over their programs. Based on the above, Mr. Jordan ordered the suspension of the grievor.

The witness said he was aware of the Managers Handbook excerpt (Exhibit G-1) that also refers to the possibility of "re-assignment to less sensitive duties". He said that he discussed this option with Mr. Reach but they felt it was not viable since Mr. DeCae would still have to access tax information and deal with taxpayers. On the finance and administration side, he said the department had a surplus of staff due to the consolidation of work. The Calgary regional office was being closed, and the customs side was also undergoing downsizing. He concluded therefore there was no viable area to re-assign the grievor as is written in Exhibit E-5.

Mr. Jordan said if the investigation and subsequent criminal charges prove false, Mr. DeCae will be reinstated with full back pay and benefits.

He said the Saskatoon office facilities were consolidated in 1995 as the GST and Taxation came together, but the AUM (GST) position is not consolidated now, nor was it prior to both operations moving in together.

The witness said that Barry McKenzie referred to in Exhibit E-4, is an income tax investigator and that none of Mr. McKenzie's information was provided to

Mr. Jordan before he suspended the grievor, even though the Income Tax Act, paragraph 241(4)(h) makes a provision to provide taxpayer information for disciplinary purposes. He added that since Mr. DeCae did not administer the Income Tax Act, Mr. Jordan was given no investigatory information.

Paragraph 241(4)(h) reads:

An official may

...

(h) use, or provide to any person, taxpayer information solely for a purpose relating to the supervision, evaluation or discipline of an authorized person by Her Majesty in right of Canada in respect of a period during which the authorized person was employed by or engaged by or on behalf of Her Majesty in right of Canada to assist in the administration or enforcement of this Act, the Canada Pension Plan or the Unemployment Insurance Act, to the extent that the information is relevant for that purpose;

Mr. Jordan said that he relied only on the Warrant to Search information (Exhibit E-3) to support his decision to suspend the grievor. The grievor never offered any personal income tax information to help carry out the investigation.

He identified a summons (Exhibit E-8) to the grievor dated October 23, 1995 and an Information form (Exhibit E-9) sworn by Gilbert Hertlein on October 20, 1995.

When asked why it took from March until October to finally charge Mr. DeCae, Mr. Jordan explained that it usually takes a year to go through all the records to solidify a case in order to be one hundred percent certain before charging someone. Mr. DeCae's case was in fact expedited since it was processed in seven months. He concluded that it was impossible to have met the two to five weeks to complete the investigation referred to in Exhibit G-1, section 29, because paragraph 241(4)(h) of the Income Tax Act did not allow the release of taxpayer information in the circumstances of Mr. DeCae's case. He had no other means at his disposal to assess the grievor's guilt or innocence until a court determined this.

Argument for the Employer

Mr. Snyder argued that Revenue Canada was served with the Warrant to Search (Exhibit E-3) on March 20, 1995, after Mr. Barry McKenzie's investigative work (Exhibit E-4), led Mr. McKenzie to believe the grievor had committed income tax fraud as outlined in the summary on page 21 of Exhibit E-4.

Mr. Snyder argued therefore that there are two questions to resolve: was it reasonable to have removed the grievor in the first place, and if so, is it reasonable to keep the grievor suspended until the outcome of his court case?

Counsel referred me to: Griffiths (Board file 166-2-7949); Nolan (Board file 166-2-17895); Arseneault (Board file 166-2-1615); Leclair appeal under Public Service Employment Act, section 31, file 91-PEN-0268R; Re Air Canada and International Association of Machinists, Lodge 148, (1973), 5 L.A.C. (2d) 1973.

Mr. Snyder asked me to consider the five reasons Mr. Jordan gave to suspend the grievor. First, the integrity of the system. He referred me to Exhibit E-2, the statement of duties for the grievor, in particular 1.e), f), g), i), j), l). He concluded that these duties relate to the heart of the department's operations and that it was reasonable for the employer to doubt the grievor's ability to carry on his duties since the nature of the alleged offense was prejudicial to his duties of collecting taxes. As in Griffith (supra) he could have been temporarily removed, and as in Leclair (supra), the perception of performance of duties justifies removal.

Second, the other employees may have seen special treatment of Mr. DeCae as a double standard; third, Mr. DeCae's ability to deal with the public was impaired and if the media found out he was still on the job "they'd have a field day" according to Mr. Snyder; fourth, the reputation of Revenue Canada would be exposed to serious embarrassment. There have been no media reports to date, but at the time the decision to suspend was taken, this had to be taken into consideration since the department is very visible; fifth, there was the threat that Mr. DeCae may have abused his position since he is very autonomous in terms of close supervision.

He reminded me that being re-assigned to less sensitive duties was not an option (Exhibit E-5). He argued that because of paragraph 241(4)(h) of the Income Tax

Act that does not allow the release of taxpayer information, the employer had no choice but to wait for the outcome of the court case regarding the possible full re-instatement of the grievor.

For all these reasons counsel asked me to dismiss the grievance.

Mr. DeCae did not return to the hearing to put forth any additional information or argument.

Decision

At the outset, as difficult as it may have been for the grievor to represent himself in this matter, he was given every opportunity to do so. His decision to leave the hearing early was a voluntary, conscious one on his part. I note that for whatever reasons he may have submitted his grievance in an untimely manner, but this was not an issue for the employer. Mr. DeCae knew that the grievance procedure was explained in the Managers Handbook. The employer felt it was not possible for it to respond within the fifteen day time frame under the PSSRB Regulations and Rules of Procedure until it had more information surrounding the circumstances of the alleged tax fraud. In any event, in view of the employer's delay in responding, the grievor had the right to refer his grievance to adjudication at an earlier point in time pursuant to paragraph 76(1)(b) of the PSSRB Regulations and Rules of Procedure.

The question then for me to decide is whether there were reasonable grounds for the employer to indefinitely suspend the grievor without pay, pending the outcome of the investigation and subsequent charges of income tax fraud. I have no evidence to suggest that the employer acted on other than reasonable grounds. While it would be customary for an adjudicator to weigh the hardship to the employee caused by a suspension of such length against the negative effect on the employer of criminal charges, the employer's actions were not sufficiently tested before me.

Although the results of the internal departmental investigation were not completed within the two to five weeks called for in the Managers Handbook (Exhibit G-1), I find that the time frame of seven months referred to by Mr. Jordan, was not unreasonable. Two to five weeks was an unrealistic expectation under the circumstances of alleged income tax fraud. The indefinite suspension without pay is

within the guidelines of the Managers Handbook. I note that section 29 of the Managers Handbook does allow for an investigation of 2 to 5 weeks "provided that the investigation into the employee's alleged misconduct is within departmental control". The evidence in this case suggests that the police controlled the investigation.

The factors Mr. Jordan described that led him to conclude there was no option but to suspend Mr. DeCae without pay, coupled with the inability of the department to re-assign him to less sensitive duties, merit a brief review.

The integrity of the Canadian tax system has to be maintained. Preferential treatment could not have been given to Mr. DeCae. If the issue had become public, the perception of how Mr. DeCae performed his duties, the confidence, and the integrity that taxpayers put in Revenue Canada employees would have been jeopardized, and the department brought into disrepute. There was also potential for Mr. DeCae to abuse his position as an AUM when dealing with GST credits, since the nature of his position lent itself to little direct supervision.

The Re Air Canada and International Association of Machinists, Lodge 148, decision (supra) is helpful. I refer to a section of this decision as follows:

In the case: Re Dorr-Oliver-Long Ltd. and U.S.W., Local 4697 (1973), 3 L.A.C. (2d) 193 (O'Shea), the board dealt with a grievance in which an employee had been suspended pending the disposition in a criminal Court of a charge against him of possession of narcotics for the purpose of trafficking. It referred, [at p. 199], to Re Millhaven Fibres Ltd., Millhaven Works, and Oil, Chemical and Atomic Workers Int'l Union, Local 9-670 (1967), 1 (A) Union-Management Arbitration Cases, 328 (Anderson), and quoted the following passage:

"...if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the Company to show that:—

- (1) the conduct of the grievor harms the Company's reputation or product*
- (2) the grievor's behaviour renders the employee unable to perform his duties satisfactorily*

- (3) *the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him*
- (4) *the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees*
- (5) *places difficulty in the way of the Company properly carrying out its function of efficiently managing its Works and efficiently directing its working forces."*

It is my interpretation that it is not necessary for a company to show that all five of the criteria in the Millhaven Fibres case have followed on the employee's conduct; rather, any one of the consequences named may warrant discipline.

I believe that it was reasonable for the employer to find that (1), (2), (3), (5) above would all have resulted if Mr. DeCae had been allowed to stay in his position pending the outcome of criminal charges.

I also believe the employer's decision to suspend the grievor without pay, was motivated by the department's concerns for its reputation as in Griffiths (supra), and was not a reflection on the guilt or innocence of Mr. DeCae. This is for the court to decide. If he is innocent, Mr. Jordan indicated that he will be fully compensated with back pay and benefits. Therefore I find that the employer was justified to suspend the grievor until his trial is resolved.

This grievance is therefore denied.

**J. Barry Turner,
Board Member.**

OTTAWA, May 13, 1996.