

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

DONALD VOGAN

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer

Before: P. Chodos, Deputy Chairperson

For the Grievor: Linda Roth, Counsel

For the Employer: Maureen Crocker, Counsel

Heard at Kingston, Ontario,
March 26 to 28, and October 8 to 10, 1996

DECISION

Mr. Vogan was employed at Canadian Forces Base, Kingston, as a Mason (GL-PCF-07) until his employment ceased effective December 17, 1993. At that time Mr. Vogan had been continuously employed as a term employee for three and one-half years and had completed the last of a series of specified period appointments. It is Mr. Vogan's contention that his cessation of employment was motivated by disciplinary considerations arising out of conflicts which he had with his superiors at CFB Kingston. The employer has maintained that this is not a matter within the jurisdiction of an adjudicator under section 92 of the Public Service Staff Relations Act, as Mr. Vogan's cessation of employment resulted from the expiry of his term contract. The parties agreed that the hearing in question and this decision would address exclusively the jurisdictional issue.

In the course of this hearing Mr. Vogan submitted considerable evidence concerning his employment history. The grievor first became employed at CFB Kingston in 1981 as a casual labourer, working six months on, six months off. Beginning in April 1990 Mr. Vogan became employed on a specified period basis as a Tradeshelper (GL-ELE-3). In May of that year he entered into an apprenticeship contract sponsored by the Ontario Ministry of Skills Development ultimately leading to a Certificate of Qualification as a Brick and Stone Mason. Mr. Vogan had sought to have his apprenticeship sponsored by the Department of National Defence; however, at the time there were no apprenticeship sponsorships available in his trade. However, the Department agreed to give him leave without pay in order that he could complete the formal training program and then provide him with practical work in the masonry field as required under the apprenticeship program. Throughout his employment with the Department, Mr. Vogan worked in the Construction Engineering Shop, which was under the direction of Major Alan Raymond. At this time, Mr. Vogan was supervised by Mr. Robert Boomhour.

Mr. Vogan testified that he had considerable difficulties with Mr. Boomhour's supervision; in particular he complained that Mr. Boomhour was not prepared to allow him to do masonry work, or even to use masonry tools, contrary to the arrangement he had in the context of his apprenticeship program. Mr. Vogan ultimately brought these concerns to the attention of Major Raymond; this resulted in a meeting with Major Raymond, Mr. Vogan and the then Union Shop Steward Ms. Herrington in September 1992; as a result of this meeting, Major Raymond issued a memorandum

outlining management's responsibility to ensure that Mr. Vogan received the requisite experience as required by his apprenticeship program. Mr. Vogan testified that one of his other problems while under the supervision of Mr. Boomhour in the Paint Shop was that a relatively new tradeshelper, Mr. Farrell, who was not a certified mason, was given increasingly greater masonry duties, while Mr. Vogan's duties in this area were diminished. Also, according to Mr. Vogan, while he went to trade school in January and February, 1992, a new mason was brought in to the Construction Engineering Section, a Mr. Ron Kellman; as a result of fiscal cut-backs the grievor was advised that he would be let go; however, Mr. Kellman, as a qualified mason, would be retained. Mr. Vogan then learned that Mr. Kellman had not been certified as a mason, and in addition there was another tradesperson who was not certified, who nevertheless was working as a mason on term basis, a Mr. Armino Silva. When Mr. Vogan complained about this he was told by Warrant Officer Bugner that his employment as a tradeshelper would be extended for six months, and that Mr. Kellman's employment as a mason would also be extended.

The relevant Position Analysis Schedule (PAS) for the Mason position (i.e. GL-PCF-07) dating back to March 1987 provides that the incumbent must be a *"licenced mason and plasterer ... or must have a minimum of ten years' work experience in trade."* It was the employer's evidence that, when Mr. Silva was first hired on a term basis in 1988, there was a shortage of masons available to work in the Public Service because of uncompetitive salary rates. Accordingly, the normal requirement of a trade certification was relaxed; Mr. Silva's résumé (Exhibit E-20) indicates that he has the requisite work experience. By 1992 the Department in effect tightened up its qualification requirements and made it a prerequisite that construction trades, including masons, have proper certification (Exhibit E-1).

Mr. Vogan received certification as a plasterer in 1992; he had completed his program of study at Sir Sandford Fleming College in February 1992 as a Brick and Stone Mason Apprentice (Exhibit G-2), and also received his certification in that trade effective February 12, 1993 (Exhibit G-3). There is conflicting evidence as to when Mr. Vogan's certificates were made known to management and placed on his personal file. The certificates were initialled by Mr. Lemieux, the Base Civilian Personnel officer, and by Major Raymond; Mr. Vogan testified that he requested in February or March, 1992 that they be placed on his personal file. In cross-examination he stated that they

were initialled individually by Mr. Lemieux and Major Raymond as he received them, some time in early 1993. Ms. Herrington, the shop steward at the time, testified that in late 1992 she was advised by Major Raymond that he was unaware of Mr. Vogan's certification; she then met with Mr. Lemieux and learned that copies of the certificates were not on file. They then had both Mr. Lemieux and Major Raymond initial the documents. She had been told by the grievor that he had originally given the certificates to CWO Storms, a subordinate of Major Raymond. In cross-examination Ms. Herrington acknowledged that she did not know prior to her discussions with Mr. Lemieux that he or Major Raymond had been given the certificates. Mr. Lemieux testified that he saw the certificates for the first time in the spring of 1993 and that he was unaware that the certificates were missing from the files.

In 1992 Mr. Vogan began to raise concerns to the effect that he was not given an opportunity to compete for the mason's position, while others, in particular Mr. Silva, received extensions to their term employment, without competition, even though they were not certified in that trade. In September, 1992, Mr. Vogan filed a grievance which, among other things, raised the issue of the hiring practices for construction trade employees in the Construction Engineering Section. He received the following reply dated November 13, 1992 and signed by Major Raymond in his capacity as the First Step in the grievance procedure (Exhibit G-10):

...

3. In your grievance ref B relating to unfair hiring practices you have pointed out possible inconsistencies in our hiring practices. Even though we followed the advice from staffing and looked at seniority and experience when extending three tradeshelpers after the 20 Sep 92, we were not made aware of the third option which was to also take into consideration the aptitude of the available candidates.

4. I am upholding your grievance however the requirement for a mason helper does not exist at this time. You are requested to report to work on Monday 16 Nov 92 in the PMQ Service Centre where you will be employed as a carpenter tradeshelper. Should a demand for a mason helper or a plasterer become available, you are encouraged to consider applying for one of these positions.

5. Because this grievance is upheld you will be given complete back pay from the date of your release. Your seniority will not be affected by this time off work nor will

you be penalized in any way for using this complaint procedure.

...

By March, 1993, Mr. Vogan was in a position as an acting Mason, although his substantive position and classification were as a Tradeshelper (GL-ELE-3); in that month, he was advised that he would be laid off although apparently Mr. Silva would not be. Mr. Vogan filed another grievance respecting the *"bypassing best qualified and meritorious persons"* contrary to the Public Service Employment Act; by way of corrective action Mr. Vogan requested *"either appointment to position of Mason or lay off both affected parties to come back & compete fairly on qualifications"*. On April 6, 1993 Major Raymond replied to Mr. Vogan's grievance as follows (Exhibit G-12):

...

2. You informed management on 23 March 93 of your successful completion of your apprenticeship program and of the (sic) your certification as a brick and stone mason, effective 12 Feb 93. In light of this new information, your grievance is upheld.

3. In the interest of fairness, both you and the other person involved have been placed on leave without pay and a decision on who shall be extended will be postponed until 3 May 93. If you are not satisfied with my findings, you may pursue the matter at the second level.

Notwithstanding the above-noted grievance reply, apparently Mr. Silva was not placed on leave without pay. Major Raymond, who has since retired from the military, testified that he fully intended to follow through with his decision to place both Mr. Vogan and Mr. Silva on leave without pay. However it was his understanding that he would need the authorization of Training Systems Headquarters at Trenton, Ontario to place Mr. Silva on leave without pay, as he was a four-year continuous term employee. When he sought that permission, apparently Training Systems Headquarters, in the person of Mr. J.R. Stewart, the Civilian Personnel Officer at Trenton, thought that Major Raymond was seeking permission to terminate Mr. Silva, which was contrary to the Department's rule that four year continuous specified term employees would be protected. Major Raymond received a message from Mr. Stewart (Exhibit E-17) directing that *"Mr. A. Silva's employment can not yet be terminated for the reasons outlined ... Mr. Silva's SPA should be extended for a suitable period to permit him*

to attempt to acquire his applicable journeyman certification. Should Mr. Silva be successful and repeat and if sufficient funding is available his SPA should be continued for as long as management feels that he is suitable/qualified for masonry work. If in the event that Mr. Silva's attempts to obtain his certification are unsuccessful ... Mr. Silva's continued employment will be reconsidered at this time."

Major Raymond testified that he misinterpreted this message as a direction not to place Mr. Silva on leave without pay; that is, he confused leave without pay with termination. Mr. Silva received a Provisional Certificate of Qualification as a Brick and Stone Mason effective April 14, 1993, to expire July 14th, 1993. The provisional certificate provided that following expiry the holder of the certificate would be required to write an examination to obtain a regular certificate of qualification. Mr. Silva received a Certificate of Qualification as a Plasterer with an effective date of June 10, 1993.

When Mr. Vogan learned that, contrary to Major Raymond's grievance reply, Mr. Silva had not been placed on leave without pay, he submitted another grievance; in his reply to that grievance Major Raymond stated:

(Exhibit G-14)

...

4. Management had determined that only one mason could be kept on due to severe budget cuts that came into effect in Apr 93. Mr. Silva did receive a temporary certification within the prescribed two week period as was required and because of his seniority he was extended to 16 Jul 93. A written explanation could have been sent to you explaining that the decision of the previous grievance could not be imposed and that Mr. Silva would be kept on strength. A verbal explanation was given to you once you requested an explanation.

...

As a result of these events, Mr. Vogan submitted a complaint to the Public Service Commission whose Investigations Directorate issued a report (Exhibit G-15) in September 1993. Among other things, this report observed the following:

(Exhibit G-15)

13. Mr. Lemieux confirmed that Mr. Silva has been consistently reappointed on the basis of his success on these two open competitions. The Department did not consider these reappointments as "without competition", even though the eligibility lists had long since expired. As a result, the Department has not posted Notices of Appointment Without Competition, or Right To Appeal Notices for any of his reappointments. Mr. Lemieux stated that it is Departmental policy to reappoint specified period employees in this manner.

18. Both Mr. Lemieux and Ms. Wolff stated that Mr. Silva was reappointed for this period as a result of guidance received from Mr. Jim Stewart, Senior Staff Officer, Civilian Operations Personnel Support, Trenton. Mr. Stewart explained that, in his view, the Department has erred in not urging Mr. Silva to obtain his certification during the many years he had been employed on the Base, and, that it would not be fair to an employee with more than four years of continuous service to terminate his employment without allowing him the opportunity to obtain his certification. Mr. Stewart stated that he was not aware that Mr. Silva was being extended two weeks with pay, in contradiction to the grievance reply.

CONCLUSION

When management at Construction Engineering at CFB Kingston became aware that, due to budget restraints, it was not feasible to extend all specified period contracts, a determination had to be made regarding which work units would suffer the reduction of staff.

The reply to Mr. Vogan's grievance notwithstanding, it was certainly within management's purview to decide that it would be necessary to keep one Mason on staff for the two week period in question in April 1993. Further, it is reasonable that the Department chose to keep Mr. Silva, whose substantive position was that of a Mason. Although Mr. Vogan was acting as a Mason during this period, his substantive position was that of a Trades Helper.

Based on the information gathered in the course of investigation and presented above, the complainant allegation as stated is unfounded.

There were a number of anomalies discovered in the staffing practices surrounding Mr. Silva's reappointments that demonstrate a lack of fairness, equity, and transparency. These anomalies will be addressed to the Department under separate cover.

The “anomalies” referred to in the report were outlined in a letter dated September 7, 1993 to Mr. J.G. Lemieux, the Base Civilian Personnel Officer at Kingston. The letter was critical of several staffing practices at CFB Kingston. The Investigations Officer noted that, while Mr. Silva’s reappointments were made on the basis of his success on an open competition in 1988, it was inappropriate to rely on the eligibility list established from this competition which had expired at least three years ago. The letter also was critical of the Department for not posting notices of appeal in respect of Mr. Silva’s various appointments. The Investigations Officer also observed that *“By neglecting to hold a closed competition prior to one month before his (Silva’s) five-year anniversary as a specified period employee, the Department has failed to consider that other employees could have been proven to be as, if not more, qualified as Mr. Silva. Further, by virtue of his impending “rollover” into indeterminate status, Mr. Silva has not had to demonstrate his qualifications to the Department since his performance on an open competition in 1988. It is very likely that, even should he fail to qualify on the current closed competition, he will be guaranteed indeterminate status through the rollover process.”*(Exhibit G-40). Mr. Lemieux testified that it was a department wide policy not to post notices of appeal with respect to term extensions. He also stated that he had been directed by Training Command to appoint Mr. Silva to an indeterminate position. He also acknowledged that the Department in effect did nothing in response to the Public Service Commission letter.

Mr. Vogan was appointed to a substantive Mason position in May, 1993 again on a specified term basis. At about this time, he also became a Union Steward and was actively involved in representing other union members before Major Raymond; Mr. Vogan testified that a number of these matters concerned allegations of abuse of authority. He recalled one particular meeting in July, 1993 where he represented a Mr. Michael Ferguson in respect of a complaint about abuse of authority by Mr. Boomhour. Mr. Vogan testified that Major Raymond’s first comment to him at that meeting was *“Are you still here in the Section. Maybe we’ll get you next time.”* At the end of the meeting, which lasted about twenty minutes, according to Mr. Vogan, Major Raymond then said to Mr. Ferguson that it was in his best interest not to associate with Mr. Vogan at all. Mr. Vogan produced a written statement signed by Mr. Ferguson which referred to these comments from Major Raymond (Exhibit G-16); however, Mr. Ferguson did not testify in these proceedings. Mr. Vogan stated that he

viewed Major Raymond's comments as threatening in nature. Mr. McAuliffe, who had been the President of the local at the time, testified that when he raised this incident with Major Raymond a couple of weeks later, Major Raymond responded that it was just a joke.

Major Raymond had a vague recollection of this grievance hearing. He recalled that it concerned Mr. Boomhour expressing criticism of Mr. Ferguson's work; he did not remember what was actually said during the meeting, although does not believe that he made the remarks attributed to him by Mr. Vogan; he agreed that these words could be considered intimidating; however, he stated that there would be no reason for him "to get" Mr. Vogan; he noted that he was six levels up in the chain of command from Mr. Vogan.

Ms. Lorraine Wolff who was the Administration Officer for the Construction Engineering Section from September, 1985 to May, 1994 was present at this meeting on July 13th. She recalled in detail the purpose of the meeting. It was her testimony that Major Raymond did not make these statements in question during this meeting.

In July, 1993 a competition for an indeterminate appointment to a Mason position was posted. It provided that the candidates must have a Certificate of Qualification as a Mason - either Brick and Stone or Plasterer. Mr. Vogan competed for this competition, as did Mr. Silva, Mr. Kellman and a Mr. Norgaard. As a result of the competition only Mr. Vogan was placed on the eligibility list, dated September 3, 1993; Mr. Norgaard filed an appeal which was ultimately upheld.

Until the Spring of 1993, it would appear that Mr. Vogan's concerns about his treatment in the workplace were not directed at Major Raymond, but rather at Mr. Boomhour. However, following his grievance in April 1993, Mr. Vogan began to have some concerns about Major Raymond. According to Ms. Herrington, who had represented Mr. Vogan in her capacity as Chief Steward throughout 1991 to 1993, Mr. Vogan and she also had some concerns about Ms. Lorraine Wolff, the Administration Officer in the Construction Engineering Section. It was Ms. Herrington's observation that Ms. Wolff would not recognize that Mr. Boomhour was the problem; Ms. Herrington attributed that to Ms. Wolff's husband having been a successful candidate as a tradesman's helper in the Construction Engineering Section;

Ms. Herrington noted that in the competition in which Ms. Wolff's husband had participated, Ms. Wolff had acted as an interpreter and this called into question the propriety of the competition. According to Ms. Wolff she had been asked by the Base Civilian Personnel Officer to act as a translator if necessary for one candidate who was not fluent in English. She stated that she did not have the answers with respect to the competition questions and did not communicate in any way with her husband during the competition process. Mr. McAuliffe testified that he had participated in this competition and had initially appealed on the basis of Ms. Wolff's involvement. He withdrew that appeal when he was advised that eleven positions would be filled rather than the three or four positions that were initially the subject of the competition. One of the successful applicants was a Mr. Farrell who, according to Mr. McAuliffe, although he was appointed as a Tradeshelper was assigned mason's work by Mr. Boomhour in preference to Mr. Vogan.

Mr. Vogan filed another grievance dated August 3, 1993 in which he alleged "*harassment and abuse of authority by systematically denying my chance at full time status opportunities - C.P.A.O. 7.18(8) & Article M-16 & any other article in the collective agreement that might apply. I chose to waive first level*". (Exhibit E-4). Ms. Herrington testified that she and Mr. Vogan met with Major Raymond at his request on August 12, for the purpose of advising him that they wanted the first level of the grievance procedure to be waived in accordance with clause M-16.02 of the PSAC/TB Master Agreement. Ms. Herrington explained that it was their view that Major Raymond was the subject of the grievance and that therefore it would be inappropriate for him to respond to that grievance. Ms. Herrington's recollection was that the August 12th meeting only dealt with their request that the first level grievance procedure be bypassed. Major Raymond has a somewhat different recollection of the events, which is reflected in his memorandum dated August 23, 1993 to Mr. Vogan, wherein he stated "*... After a lengthy discussion on the rights to bypass the first level, you agreed to bring forward substantiation concerning this grievance and to have it responded to at the first level. On the deadline date the Adm O contacted you and asked again for your substantiation but was informed that you would not be able to bring those forward at this time.*" Major Raymond testified that in his view the parties intended to continue the formal grievance hearing once the information concerning the allegations in the grievance had been gathered and provided to him. It was his experience that while a

complaint of harassment might be directed at a particular individual, often the facts would indicate otherwise; he wanted to be in a position to become aware of the facts and, if he was actually viewed as the source of harassment, he would simply gather the information and refer it to his superior Colonel O'Keefe to act at the first level. He did not recall Ms. Herrington stating to him that he was not in a position to give an unbiased decision. He testified that had she so advised him he would not have heard the matter but rather would have referred it to Colonel O'Keefe as an alternate first level. He also stated that it was his understanding that the waiving of the first level in some circumstances requires agreement of the parties where there is not a real issue of alleged discrimination.

Shortly thereafter Mr. Vogan filed another grievance dated August 12, 1993 in which he alleged that Major Raymond had prevented him from exercising his right under clause M-16.02: he again requested that the first level of the grievance procedure be waived in accordance with that provision. Major Raymond again denied the request to bypass the first level on the ground that "*the Article in M-16 refers to discrimination and M-16.02 allows the waiving of any level only in cases of discrimination.*" (Exhibit G-18).

Mr. Vogan was offered a further term appointment in September to expire on December 1, 1993; on November 30, 1993 Mr. Vogan received his final offer of a term appointment which expired on December 17, 1993. On December 14th he received the following memorandum from Major Raymond:

(Exhibit G-23)

1. *In the letter of offer in the reference you were offered an extensnion (sic) to your contract until 17 Dec 93. The purpose of this memo is to inform you that you will not be offered another extension. Work priorities have been reviewed in detail and term masonary positions have not been identified as essential at this time. I would like to take this opportunity to thank you for your hard work and dedication to the CE section over the past few years.*

2. *The BCPO has indicated that, for the competition for an indeterminate mason's position, the appeal heard on 26 Nov 93 was decided in favour of the appellant. This has resulted in the cancelling of the existing eligibility listing for the mason's position. A new eligibility list will be created once the competition is finalized.*

...

It was Mr. Vogan's understanding that he received a two-week extension on his term appointment until December 17 to await the outcome of a competition in respect of the mason's position. Major Raymond testified that Mr. Vogan was hired as a casual day labour and paid from a maintenance budget set up for that purpose; there were very severe budget cuts at the time and he was in danger of overspending but Mr. Vogan's appointment was extended because of a competition which was then being appealed by Mr. Norgaard. Major Raymond also stated that it was his staff who defined what jobs were needed and would seek his approval for staffing; however, he would have no direct involvement in the hiring process. He also noted that his operation had gone through five sets of reductions in a three year period, and this required a continuous review of the paint shop operations where the grievor worked to find additional savings. A decision not to renew Mr. Vogan's term appointment resulted from the conclusion that they had enough indeterminate masons to do the essential work. He stated as well that the mason's competition had a high profile; he was directed to hold the competition notwithstanding that in his view the position was no longer necessary. It would appear however that management decided to retain the services of Mr. Silva rather than Mr. Vogan, the reasons for which are outlined in the memorandum dated November, 1993:

(Exhibit E-21)

...

. *The action to terminate an indeterminate employee with satisfactory performance for the last 5 years in order to allow the hiring of a successful term candidate is not logical.*

. *TSHQ SO INFRA has indicated that they would not be providing funds to increase the CE section to 5 masons on a permanent basis.*

. *It therefore seems more logical to allow Mr Silva to remain as an indeterminate employee and to reserve the eligibility list of the mason's competition for future employment such as retirement replacement. Mr Vogan would then be terminated at the end of his contract i.e. 1 Dec 93.*

Major Raymond noted that from the first time he met Mr. Vogan in 1992 until his cessation of employment he had attempted to resolve his grievances thoroughly

and honestly at all times; he further noted that he never took disciplinary action against Mr. Vogan, that he had no problem over the fact that Mr. Vogan had frequently exercised his rights under the collective agreement, and he did not have any negative animus towards him.

Ms. Wolff testified that Mr. Silva's position, unlike Mr. Vogan's position, had always been part of the establishment rather than paid out of the casual labour budget; as a result, the Construction Engineering management had considerably less flexibility in cutting that position. As well, Training Command had indicated that it was not prepared to fund another indeterminate position for a mason.

Following the expiry of his employment Mr. Vogan filed the subject grievance as well as others of a related nature. Again, Mr. Vogan sought to bypass Major Raymond at the first level; Major Raymond however continued to seek information from Mr. Vogan concerning these grievances and to respond at the first level. According to Mr. Vogan he had filed five grievances in total alleging abuse of authority, and seeking waiver at the first level; he stated that he was denied that right on each occasion. With respect to the current grievance (93-D-KGN-090) Major Raymond responded as follows:

(Exhibit E-7)

1. In your grievance presentation 93-D-KGN-090 you grieve your improper dismissal from the Public Service. As corrective measures you wish to be reinstated to your former position with pay and benefits retroactive to 17 Dec 93.

2. You also requested that your grievance be heard at the final level only, in accordance with Master Agreement M-38.19. This section of the agreement deals with discharge. In order to evaluate at which level your grievance should be heard you are requested to demonstrate in writing how you perceive that your termination of contract can be considered as discharge.

3. It is requested that you agree to a two week extension in order to allow you the time to prepare for your presentation of the facts. If you agree to this extension, a meeting scheduled for 7 Jan 94 at 0830 hrs in the BCEO's office to discuss the matter can be arranged.

It appears that Mr. Vogan's grievance respecting his cessation of employment was not responded to at the final level until August, 1995 (Exhibit E-13). Mr. Guy Beasley, a Regional Representative for the Alliance, stated that it came to his

attention in March, 1995 that there had been no reply to Mr. Vogan's grievances beyond the first level. Accordingly, he raised this matter with Mr. Gil Lemieux. Mr. Lemieux testified that it was assumed that Mr. Vogan had abandoned his grievance when they did not receive a second level transmittal, given that there had been no agreement to waive any of the levels of the grievance procedure. Mr. Beasley produced a copy of a transmittal form dated December 17, 1993 and apparently signed by management representative, referring the subject grievance to the third level. No explanation was forthcoming as to what had happened to this transmittal form following December 17, 1993.

Subsequent to his cessation of employment, Mr. Vogan applied, in July 1995, for a mason's tradeshelper position which was advertised at the local Manpower Centre. In August of 1995 he was advised by Ms. Julie Faubert, the then Civilian Personnel Officer, that "*due to a change in operational requirements, this competition has been cancelled*". In April 1995 he had applied again through the Manpower Centre for a carpenter's tradeshelper position at CFB Kingston but was advised that he was not qualified. More recently, in February 1996 he made two applications for a general labourer position at CFB Kingston; however, he was not appointed to either position. Ms. Faubert testified that with respect to the competition posted in July, 1995, management had examined their budget and concluded that they did not have the funds to complete the relevant project. Accordingly the Notice of Cancellation was sent to all the applicants. With respect to the General Labourer positions she noted that the original notice at the Manpower Centre was withdrawn because there had been a mix up as a result of the absence of the manager at the time; this process was cancelled as the manager decided that she could reassign the duties without filling the position; Ms. Faubert stated that no screening was initiated with respect to this position.

Argument

Counsel for the grievor submitted that an examination of Mr. Vogan's employment history from the beginning of 1991 until his termination in December 1993 in its totality reveals that the grievor was the recipient of disguised discipline culminating in his termination, and that the persons acting on behalf of the employer were motivated by improper considerations when they decided not to renew Mr. Vogan's appointment. Ms. Roth reviewed in detail the evidence concerning Mr. Vogan's attempts to challenge the employer's staffing actions, and in particular his efforts to be appointed as a mason, a position for which he had the demonstrated qualifications since 1992. In particular, counsel pointed to the department's actions in favouring and protecting the employment of Mr. Silva, who did not have the requisite qualifications of a mason, which Mr. Vogan did possess.

Ms. Roth also reviewed in detail Mr. Vogan's relationship with Major Raymond. She noted that Mr. Vogan had frequently grieved Major Raymond's actions in systematically denying Mr. Vogan a chance to obtain indeterminate status. Ms. Roth characterized Major Raymond's response as being defensive, later becoming aggressive and abusive. In this respect she pointed to the July 13th meeting concerning Mr. Ferguson, as well as Major Raymond's repeated refusal to waive the first level in the grievance procedure, contrary to the collective agreement.

Counsel concluded that key management players were not impartial judges of Mr. Vogan's skills and ability and were in positions of conflict of interest on a regular basis vis-à-vis the grievor. Accordingly they refused to recognize that Mr. Vogan was more qualified than others, for example Mr. Silva. Counsel contended that in accordance with the decision of the Federal Court of Appeal in Attorney General of Canada v. Judith Penner [1989] 3 F.C. 429 an adjudicator can take jurisdiction in the face of an ostensible termination of employment under the Public Service Employment Act, where bad faith has been demonstrated. Counsel also noted the Laird decision (Board file 166-2-19981) where the adjudicator found that the budgetary cut-backs could not mask a bad faith termination. Ms. Roth urged a similar finding in this case.

Counsel for the employer submitted that Mr. Vogan's employment was terminated in accordance with the provisions of his letter of employment; that is, his

term appointment ceased at the end of his last specified period of employment. In accordance with section 25 of the Public Service Employment Act he was then no longer an employee. In support of this submission counsel referred to the Federal Court of Appeal decision in The Queen v. Marion Zinck (Court File 8-384-79), as well as the decisions in Dionne (Board files 166-2-24975, 24976), Ouellet (Board file 166-2-1950) and the Federal Court of Appeal decision in Dansereau v. National Film Board et. al [1979] 1 F.C. 100.

Counsel also contended that subsection 92(3) of the Public Service Staff Relations Act constitutes a bar to hearing this grievance. Ms. Crocker noted that this provision became law in 1993, subsequent to the Federal Court decision in Penner (supra). Counsel also referred to the decision of the adjudicator in Perreault (Board file 166-2-26094).

In the alternative, counsel for the employer argued that the essence of Mr. Vogan's complaint is discrimination on the ground of union activity, contrary to Article M 16 of the collective agreement. As such, in accordance with subsection 92(2) Mr. Vogan is precluded from referring this grievance to adjudication without the agreement and support of his bargaining agent. If Mr. Vogan's dispute is in respect of the employer's staffing practice then it is a matter within the jurisdiction of the Public Service Commission under the Public Service Employment Act, and again would not be adjudicable in accordance with Chopra v. Canada (Treasury Board) 100 F.T.R. 226. In support of this submission counsel noted the adjudication decisions in Rodney (Board file 166-2-25911) and Lawson (Board file 166-2-25530).

With respect to the issue of bad faith Ms. Crocker submitted that the grievor must show that the employer's representative acted with malicious intent to terminate his employment as a form of punishment. Ms. Crocker maintained that the evidence does not demonstrate any conspiracy on the part of Major Raymond and Ms. Wolff to get rid of Mr. Vogan. At no time was there any disciplinary action taken or contemplated by management in respect of any of Mr. Vogan's actions. Ms. Crocker noted that the Laird decision (supra) predated the 1993 amendments; in any event the facts are distinguishable from the instant case. Ms. Crocker also submitted that the Penner decision (supra) has no relevance in this instance as the question of intention in

respect of a specified period of contract is irrelevant; the contract ends by operation of law alone.

In rebuttal, Ms. Roth maintained that subsection 92(3) of the Act should not be interpreted so restrictively as to close the door on an employee who has suffered bad faith, and who would then be left with no recourse. She also maintained that a consideration of all of the incidents taken together demonstrates a malicious intent, namely that management decided that it did not want Mr. Vogan around any more.

Reasons for Decision

In essence, it is the employer's principal contention that Mr. Vogan's employment came to an end as a result of the expiry of his last specified period of appointment, and as a consequence, by operation of law, he can no longer be considered an employee. The employer also maintains that the question of good or bad faith is irrelevant in light of this fact. The issue of whether in the face of evidence of bad faith an adjudicator under the Public Service Staff Relations Act (as amended in 1993) has jurisdiction to address a termination purportedly under the Public Service Employment Act has been raised squarely in two recent and contradictory adjudication decisions: Perreault (supra) and Rinaldi (Board files 166-2-26927, 26928). The Rinaldi decision is currently before the Federal Court (Court file T-761-96); therefore it is likely that this issue will be resolved by the courts in the near future. In light of my conclusions set out below, I do not think it is either necessary or desirable to enter into the debate on this issue, and I shall refrain from doing so.

In my view, the grievor has not discharged the burden of establishing bad faith. In considering the case for the grievor in this respect, it must be kept in mind that such allegations are of a very serious nature as they suggest a lack of moral rectitude and a conscious act of wrongdoing. (see for example the definition in *Black's Law Dictionary* quoted in Kerr (Board file 166-2-23131) and Dusseault, Administrative Law, 2nd ed., noted in Chamberland (Board file 166-2-21290).

Much of the allegations respecting bad faith are directed at Major Raymond, in particular the incident involving Mr. Ferguson's complaint, as well as Major Raymond's decisions respecting the grievor's request to waive the first level of the grievance procedure. The evidence surrounding the Ferguson incident is contradictory at best.

There were apparently four individuals present at the meeting in question - Mr. Vogan, Mr. Ferguson, Major Raymond and Ms. Wolff. Mr. Vogan's recollection is that Major Raymond had made an indirect threat concerning Mr. Vogan's employment tenure and Mr. Ferguson's association with him. Major Raymond had little or no recollection of these events but he maintained that this is not consistent with his view of, or treatment of Mr. Vogan; Ms. Wolff on the other hand recalls the meeting in detail and testified that Major Raymond did not make the statements as alleged by Mr. Vogan. Then there is the written statement of Mr. Ferguson which supports Mr. Vogan's version of what occurred: Mr. Ferguson did not testify in this matter and accordingly little weight can be accorded to his statement. On balance, I have concluded that Major Raymond did not make this comment, at least not in the manner and with the import attributed to it by the grievor. In this respect I have examined Major Raymond's conduct towards the grievor in its totality, as urged by the grievor's counsel. That examination points to a number of attempts by Major Raymond to accommodate the concerns of the grievor throughout their relationship. I note for example the occasions when Major Raymond upheld Mr. Vogan's grievances, including awarding him back pay in September, 1992. At no time did Major Raymond or any other representative of management discipline, criticize or chastize Mr. Vogan. Major Raymond has categorically denied that he had any negative animus against Mr. Vogan; I have had an opportunity to observe Major Raymond testifying at some length in these proceedings; Major Raymond impressed me as a credible witness who was not attempting to obscure or hide the facts in any way. While I do not necessarily agree with Major Raymond's refusal to immediately respond to the grievor's request to have the first level of the grievance procedure bypassed, I am not prepared to conclude that these actions were motivated by anything other than Major Raymond's understanding as to the proper interpretation and procedure to be followed in respect of grievances alleging harassment and abuse of authority.

The other major allegation respecting bad faith is the perception that Mr. Silva was favoured over Mr. Vogan in respect of employment opportunities for the mason position. It is beyond the purview of an adjudicator to investigate and come to conclusions concerning staffing procedures and actions, which is a matter governed by the Public Service Employment Act. The sole question which I am addressing in this context is whether those actions amount to bad faith on the part of the employer in

respect of the cessation of employment of Mr. Vogan. In my view they do not. It is clear both from the testimony of the employer's witnesses, as well as from the documentation, that throughout the employer was motivated by its policy to provide some form of employment security protection for long term specified period employees, such as Mr. Silva who had been employed continuously since 1988. On the other hand, Mr. Vogan had been continuously employed for approximately three and a half years when his employment ceased, upon the expiry of his final specified period of employment in December, 1993. While there may have been anomalies, as the Public Service Commission investigation report notes, in the staffing actions engaged in at CFB Kingston in respect of Mr. Silva's employment, in my view they do not demonstrate bad faith in respect of Mr. Vogan.

Evidence was also led by the grievor concerning his efforts to obtain employment at the Base subsequent to his cessation of employment in December, 1993. In light of the testimony of Ms. Faubert, I am satisfied that Mr. Vogan's efforts to become re-employed at the Base were not thwarted by any considerations on the part of the employer which can be characterized as demonstrating bad faith. Indeed, it is clear that the various actors whom Mr. Vogan alleges were responsible for his cessation of employment in 1993, had no involvement at all in the decisions concerning his re-employment after 1993.

Finally, there is the matter of Mr. Vogan's grievances which went astray following Major Raymond's response at the first level. It is by no means clear to me exactly what happened in respect of the transmittal of Mr. Vogan's grievance to subsequent levels of the grievance procedure. It is the employer's evidence that an assumption was made that Mr. Vogan had abandoned his grievance after the reply at the first level. I am not entirely satisfied by that response; however, I am not prepared to conclude that there was a concerted attempt to sabotage Mr. Vogan's right to pursue the grievance process. I would note that when Mr. Beasley had brought the matter of the wayward grievance to the attention of the employer's representatives, efforts were made to respond to the grievance, albeit belatedly. The evidence does not establish that this was other than an ordinary communications or administrative foul-up which had no improper motive associated with it.

In summary, without commenting on the several other grounds for objecting to my jurisdiction in this matter, I find that the grievor has not met the threshold burden of establishing that the employer was motivated by bad faith when it did not renew his specified period of employment, upon its expiry in December, 1993.

Accordingly, this grievance is dismissed for want of jurisdiction.

**P. Chodos,
Deputy Chairperson.**

OTTAWA, December 11, 1996.