

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

STEPHEN BOUJIKIAN

Grievor

and

**TREASURY BOARD
(Citizenship and Immigration Canada)**

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Ann Margaret Oberst, Counsel

Heard at Toronto, Ontario,
April 27, 1998.

DECISION

Mr. Stephen Boujikian, a PM-01 - Immigration Examining Officer, Citizenship and Immigration Canada (CIC), Mississauga, Ontario, is grieving having been denied equitable distribution of overtime (O/T) for a six-month period in 1995.

His grievance dated October 6, 1995 reads:

I grieve that I have been denied equitable opportunity for overtime. I requested overtime in writing. I have not been given overtime since March, 1995 (with one exception).

One officer on my side at Terminal one has received at least 15 hours a week over the past 6 months, as well as two officers at Terminal two.

The grievance does not refer to paragraph 19.02(a) of the PM Group Specific Agreement, Code 308/89, which reads:

ARTICLE 19

OVERTIME

19.02 Assignment of Overtime Work

- (a) *Subject to the operational requirements of the Service, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*

The grievor is requesting the following corrective action:

*I receive overtime from now on, on an equitable basis.
That, I be compensated for lost overtime opportunities since
March, 1995.*

The hearing lasted one-half day with one witness testifying and three exhibits entered on consent: Exhibit E-1, a memorandum dated April 20, 1998, regarding the distribution of O/T hours during the 1995/96 fiscal year, sent to Ann Margaret Oberst, Department of Justice, Toronto, from J. Hillis, Chief Administrative Services, Canada Immigration, L.B. Pearson International Airport (LBPIA); Exhibit E-2, a memorandum dated August 13, 1997 from R. Lavalley, Personnel, Terminal Three, LBPIA, to Bruce Tune, Regional Manager, LBPIA, regarding the grievor's work absences for the period March 1995 to October 1995 and the grievor's O/T from March 1, 1995 to March 31, 1996; Exhibit E-3, an October 11, 1995

E-Mail from H.E. Fiebig, LBPIA, Operations, to D.O. Kellam, LBPIA, Operations, regarding the application of paragraph 19.02(a) of the PM Group Specific Agreement to Mr. Boujikian.

An Agreed Statement of Facts dated April 27, 1998 was also submitted, that reads:

AGREED STATEMENT OF FACTS

The parties agree that the grievance which was referred to adjudication will be heard on the basis of the following facts:

During the period in question, the Grievor was a term Immigration Examining Officer at Pearson International Airport.

An investigation into misconduct began on April 7, 1995. At that time, the Grievor was placed on restricted duties which meant that the Grievor was limited to duties on "point" or the fast flow counter and that a supervisor had to be in the vicinity at all times.

As a result of the investigation, the Grievor was suspended without pay from May 16, 1995 until June 12, 1995.

"Limited duties" included the precautions put in place to ensure that when fingerprinting or photographing of a client had to be done, another officer was available to perform the duties or accompany the Grievor. As well, the Grievor could not be assigned to the escort function (accompanying individuals to an airplane to verify departure) if it involved the United State Immigration and Naturalization Services (USINS). One of their officers had reported an instance of the Grievor's misconduct and the presence of the Grievor was unacceptable to USINS.

I am being asked to decide if the grievor was awarded an equitable amount of O/T, that his bargaining agent explained was for the period April 7, 1995 to October 6, 1995, minus the period of a twenty-day suspension that the grievor served between May 16, 1995 and June 12, 1995. Counsel for the employer agreed on the definition of the period in issue.

Mr. Done claimed that, during the period in question, the employer did not have a system in place that would have allowed for the equitable distribution of O/T. Therefore, he concluded, Mr. Boujikian lost income. Mr. Done added further that,

should I award some form of compensation to the grievor, I should bear in mind that Mr. Boujikian is now an indeterminate CR-05, Program Assistant, in the Toronto Central Office, Canada Employment and Immigration Centre, and works days only, Monday to Friday.

Both parties also referred to all three replies to the grievance that are on file: Level One, dated 20 October 1995, signed by the Manager, Immigration Operations, LBPIA; Level Two, dated December 19, 1995, signed by M.J. Molloy, Director General, Citizenship and Immigration Canada (CIC), North York, Ontario; Final Level, dated January 16, 1997, signed by Raphaël Girard, Assistant Deputy Minister, Operations, CIC, Ottawa.

The parties agreed, for the purposes of this decision, to follow the general rule set down by former Chief Adjudicator of the Public Service Staff Relations Board, Edward Jolliffe, in the *Sumanik* decision (Board file 166-2-395), that a period of one year is appropriate when looking at O/T distribution for comparative purposes. The parties also agreed that the one-year period I should consider in this case is fiscal year 1995/96, that is April 1, 1995 to March 31, 1996, as outlined in Exhibit E-2.

Summary of Evidence

1. Stephen Boujikian started working at LBPIA in December 1993 as a term employee, on an eleven-hour shift, and regularly received O/T at all three LBPIA terminals; that is, terminal 1 (T-1), terminal 2 (T-2) and terminal 3 (T-3). On April 7, 1995, the grievor was put on restricted duties pending the outcome of an investigation that ended when he received a twenty-day suspension, from May 16, 1995 to June 12, 1995. During the suspension he had no O/T possibilities.

Mr. Boujikian testified that, during the early part of the investigation, he lost five O/T opportunities, but received 11.75 hours O/T on April 10, 1995, that had been previously scheduled. The grievor added that the brief O/T periods, of 0.25 hours (April 9, 1995) up to 4.00 hours (August 19, 1995), indicated on Exhibit E-2 were mandatory periods for late flight arrivals. He said he was called in for O/T on July 28, 1995, for 5.00 hours, and that all O/T periods he worked after his return from suspension, from June 13, 1995 to October 6, 1995, the date of his grievance, were for late flight arrivals only.

Mr. Boujikian noted the names on Exhibit E-1 represented all PM-01 employees at LBPIA for fiscal year 1995/96; he was ranking twenty-third out of fifty-nine for the amount of O/T worked. The grievor added most of the top twenty-two names were PM-01's from T-2, and that this clearly shows O/T was not distributed equitably between employees of all three terminals. After he grieved, Mr. Boujikian did not notice any increase in O/T distribution for himself, except during the summer months of 1997, just before he left to work in the Toronto Central Office.

The grievor also testified he performed the full range of his duties, without any limitations, after his return from his suspension, in June 1995. He attended a meeting at T-3 on June 13, 1995, with management and his bargaining-agent representative, and was told not to cause any more trouble. Mr. Boujikian added that he sent computer messages to supervisors in T-2 and T-3 once or twice a month after his suspension, saying he was now available for O/T. He said the employer never attempted to do a catch-up of O/T for him before he left for the Toronto Central Office, even though the employer's First-Level response to his grievance, on 20 October, 1995, stressed how concerned management was about the need to "... *offer overtime work on an equitable basis...*", the Second-Level response, of December 19, 1995, stated "... *there still appears to be a problem with the assignment of overtime...*", and the Final-Level response, of January 16, 1997, "... *acknowledged that there were problems in recent past concerning the equitable distribution of overtime...*".

During cross-examination, when asked about the reference in Mr. Fiebig's letter dated October 11, 1995 (Exhibit E-3) to the fact there had been little scheduled O/T lately, Mr. Boujikian responded: "This was possible at the time." When Ms. Oberst brought to the grievor's attention the last sentence of Exhibit E-3, where Mr. Fiebig stated "*I anticipate that close attention to the subject agreement clause, will alleviate concerns in this area...*", Mr. Boujikian added he received more O/T during the 1997 summer because O/T was then assigned by a computer program that called up the next name on the O/T list. When asked if it was possible that in 1997 there was a greater need for O/T, he responded: "No, my co-workers just told me they were getting O/T. O/T was now controlled better." The grievor agreed that, if he had stayed longer at LBPIA, he could have received an equitable distribution of O/T in 1997.

The grievor also admitted that, even though he did not have access to details or records as to who worked where in 1995/96, his memory served him well enough to remember that the majority of the PM-01's listed on Exhibit E-1 worked in T-2.

The grievor reiterated he did the same duties after his suspension that he did before it, that is, he did escorts and fingerprinting by himself and in fact worked in the USINS unsupervised.

During re-examination, the grievor reviewed the O/T hours of all twenty-two PM-01's who ranked above him on Exhibit E-1, indicating to the best of his knowledge where each one worked during 1995. He added that "Stat. Pay", on Exhibit E-2, is O/T that was factored into all O/T calculations for all PM-01's named on Exhibit E-1.

Argument for the Grievor

Mr. Done argued it is clear from the O/T hours on Exhibit E-1 that most persons listed worked in T-2 and that O/T was therefore not distributed equally in all three terminals. He noted that a Ms. Saini received 681.25 hours of O/T, although Mr. Boujikian received only 202.00 hours of O/T. He agreed that equitable O/T distribution does not mean one to one, but should be approximately equal for all eligible employees. He argued that, even if one subtracts the grievor's twenty-day suspension period, during which he could not have received any O/T, he still would not have been close to the amount of O/T worked by Ms. Saini.

Mr. Done argued, even after the employer's admission in December 1995 in its Second-Level response to the grievance, there still appeared to be a problem with the assignment of O/T and, during the months that followed, the employer did not rectify the problem for the grievor. He argued the employer is obliged to distribute O/T equitably, pursuant to paragraph 19.02(a) of the PM Group Specific Agreement; that Mr. Boujikian often brought his wish for O/T to the attention of the employer; and that the employer had time to do catch-up for the grievor with more O/T, but did not until the summer of 1997. He argued the delay in catching-up was not done in bad faith, just that there was no system in place to distribute O/T equitably to the grievor.

Mr. Done argued that when Mr. Boujikian came back to work after his suspension, he performed his full range of duties and should therefore have been

given an equitable distribution of O/T. Mr. Done referred me to the *Haufschild* decision (Board files 166-2-20418 to 166-2-20444) and asked that I award O/T in kind, although this will be difficult since the grievor now works days only, Monday to Friday, or award a cash lump-sum payment.

Argument for the Employer

Ms. Oberst argued that no employee has an absolute right to O/T; that equitable distribution of O/T does not mean equal distribution; and that O/T does not arise in a predictable way for an employee. She concluded therefore that I must look at the individual circumstances of the grievor in the case before me.

Firstly, she argued, during the grievor's suspension, that lasted a month, other PM-01's could get O/T; Mr. Boujikian could not. Secondly, counsel argued the grievor's misconduct caused a problem of mistrust in him. The employer placed him on restricted duties during the investigation, from April 7, 1995 until May 16, 1995, as is indicated in the Agreed Statement of Facts. His O/T possibilities during this period were restricted to a supervisor being available to supervise him. Counsel argued that he was in fact awarded O/T on April 10, 1995, even though he was on restricted duties, and Ms. Oberst argued that, after his suspension, he returned to perform limited duties that could have limited his potential for O/T. Counsel argued that the grievor received O/T every month from April 1995 until March 1996, as is indicated on Exhibit E-2, with the exceptions of May and June 1995, and reminded me that the collective agreement does not specify what kind of O/T is to be distributed equitably, and that the number of O/T opportunities does not necessarily equate to equitable hours of O/T. Counsel concluded that, in spite of the grievor's limited duties during investigation, his suspension, and his limited duties after his suspension, Mr. Boujikian received 202.00 hours of O/T, which placed him twenty-third out of fifty-nine PM-01's having worked O/T, as per Exhibit E-1. She argued, because of his circumstances, it is unfair to compare the grievor's hours of O/T to Ms. Saini's hours of O/T, and concluded that there was equitable O/T distribution. Ms. Oberst reminded me there is no evidence the grievor was denied O/T or overlooked for O/T, and that, in fact, he received many O/T opportunities.

Counsel reminded me that I must also take into account the periods listed on Exhibit E-2, where the grievor was away on sick leave and therefore unavailable for O/T.

Counsel also argued I must look closely at the wording of the grievance, that makes no reference to the collective agreement. In spite of the employer's Second-Level grievance response reference to the ongoing "*... problem with the assignment of overtime...*", Mr. Boujikian still received 202.00 O/T hours for 1995/96 fiscal year.

Counsel concluded the onus was on the grievor to prove he was denied O/T, but has not done this. Ms. Oberst also wondered if I could actually grant the remedy request for O/T "from now on".

Rebuttal Argument for the Grievor

During rebuttal argument, Mr. Done reminded me what the employer said in the Second-Level response to the grievance "*... overtime will be offered to the person with the lowest overtime hours until there is an equitable distribution amongst the shift...*", and concluded that distribution of O/T was not done equitably at the time in question. Mr. Done argued there is no evidence the employer tried to address the grievance with an operational-requirement argument, and that the employer made no effort to distribute O/T more equitably.

Mr. Done reminded me of the grievor's uncontested evidence that he did not perform limited duties after his suspension, but rather performed the full range of his duties. He added there is no evidence before me that the grievor could not have performed O/T because of the lack of availability of a supervisor after the grievor returned from his suspension. Mr. Done also argued that the employer cannot rule out more O/T during the period of investigation, from April 7, 1995 to May 16, 1995, since the grievor, in fact, received some O/T during this period.

Decision

According to the grievor's representative, the period of requested redress is from April 7, 1995 to October 6, 1995, minus the period of the twenty-day suspension served between May 16, 1995 and June 12, 1995.

Although the grievance makes no specific reference to paragraph 19.02(a) of the PM Group Specific Agreement, I believe both parties are in agreement that what the grievor is grieving is the employer's failure to distribute O/T equitably to him during the period April 7 to October 6, 1995, contrary to his Group Specific Agreement.

The parties also agreed with the general principle established in the *Sumanik* decision (supra), that the review of the allocation of O/T should be done over a one-year period. The parties agreed that the one-year period I should consider in this case runs from April 1, 1995 to March 31, 1996. The fifty-nine PM-1's listed on Exhibit E-1 show ranges of O/T from 681.25 hours to 12.00 hours during this period. The grievor, who worked at T-1, ranked 23rd on the list, putting him in the upper one-half. The grievor missed twenty working days on suspension, which, for all intents and purposes, is one month, when days off are included. He also missed seventy hours due to illness during the period April 7 to October 6, 1995, or approximately six and one-half work days, based on an eleven-hour shift. He could not have performed O/T while on suspension or while he was ill.

The parties agreed that, during the investigation, from April 7, 1995 up to the suspension date of May 16, 1995, the grievor was on "restricted duties". This would have limited the grievor's opportunities for O/T leading up to his suspension. The grievor did however receive his pre-scheduled O/T for April 10, 1995.

The evidence before me shows that Mr. Boujikian was no longer on "restricted duties" when he came back to work after his suspension. Such restricted duties may also have limited his opportunities for O/T. The grievor's testimony that he performed all his regular duties after his suspension was not challenged, nor was his assertion that he wrote to terminal supervisors to let them know he was available for O/T. I can only conclude that he was not given more O/T for the months of July, August, September and October 1995, for some unknown reasons. During these four months, Mr. Boujikian received O/T for late aircraft arrivals and Stat. Pay, as is indicated on Exhibit E-2.

The employer readily admitted, in its Second-Level response of December 1995, that there still seemed to be a problem with the assignment of O/T. This was the

employer's problem to rectify not the grievor's, since the employer is compelled by paragraph 19.02(a) of the Group Specific Agreement to distribute O/T equitably. A more equitable distribution of O/T was apparently not carried out until the summer of 1997, when a computer program, seemingly in an objective fashion, corrected the problem of inequitable O/T distribution. Unfortunately for Mr. Boujikian, this was a little late, since he left the LBPIA for the Toronto Central Office in the fall of 1997.

I am left to decide whether or not Mr. Boujikian should or should not be awarded some remedy for the period between April 7, 1995 and October 6, 1995.

I believe that Mr. Boujikian should be awarded something, and have determined with some creativity the following. Since, generally, the review of O/T distribution is done over a one-year period, Mr. Boujikian averaged approximately 17.00 hours of O/T per month (202.00 hours divided by 12 months). Also, the grievor missed 6.50 days work due to illness, which represent a lost O/T opportunity of 5.50 hours (6.50 days divided by 20 work days per month, multiplied by 17.00 hours of possible O/T opportunity per month). Now, when adding the potential O/T of 17.00 hours, lost because of the one-month suspension, with 5.50 hours of potential O/T lost due to illness (total 22.50), plus the O/T of 202.00 hours he had acquired, one reaches a total of 224.50 hours. This would have hypothetically placed the grievor in sixteenth position out of fifty-nine on Exhibit E-1. If he had been available for work for the full fiscal year, I have already calculated he could have received in the area of 224.50 hours of O/T, or approximately 18.50 hours/month.

For the purposes of my decision, I have excluded for further consideration the months of April, May and June, 1995 and Stat. Pay periods. I am neither taking into consideration any Stat. Pay, as it was not explained to me what they are. In July 1995 the grievor received a total of 9.75 hours of late aircraft arrival O/T as per Exhibit E-2. In August 1995, he received 7.50 hours of late aircraft arrival O/T, and in September 1995, 1.50 hours of late aircraft arrival O/T pay, for a total from July, August, September of 18.75 hours O/T pay. Based on my earlier calculated average of potentially 18.50 hours/month O/T for the grievor, I am awarding him the difference between what he could have potentially received for July, August, September, that is 55.50 hours (18.50 hours x 3 months), and what he did receive, that is 18.75 hours, for a difference of 36.75 hours of O/T. This 36.75 hours of O/T is to be paid at the

PM-01 Group Specific rate in 1995. Coupled with what he did receive, that is, 202.00 hours of O/T, this will give the grievor 238.75 hours of O/T for fiscal year 1995/96 and put him in sixteenth place according to Exhibit E-1.

I cannot and have not attempted to accommodate Mr. Boujikian beyond October 6, 1995.

I will remain seized with this award in the event the parties have difficulty calculating what I have determined.

To the extent indicated above, this grievance is allowed.

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

OTTAWA, June 15, 1998.