

Files: 166-2-27605,
166-2-27606,
166-2-27670

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

WILLIAM CONNORS, AL EVITT, SAM LOVALLO

Grievors

and

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

Employer

Before: [J. Barry Turner, Board Member](#)

For the Grievors: Evan Heidinger, The Professional Institute of
the Public Service of Canada

For the Employer: André Garneau, Counsel

Heard at Winnipeg, Manitoba,
June 12, 1997.

DECISION

At the outset of the hearing, the parties agreed that I could hear the grievances by William Connors, Al Evitt and Sam Lovallo together with the proviso that the facts for Mr. Lovallo will be slightly different. Their representative also agreed that the wording of their grievances were not clear but were “opaque” to use his term. He said the primary intent of their grievances is clear however, in that they are essentially asking to be declared surplus under the Work Force Adjustment Directive (WFAD) that is incorporated into the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (PIPSC), Auditing Group, Code: 204/92 under Article 37.03(28) that reads:

37.03 The following directives, policies or regulations, as amended from time to time by National Joint Council recommendation and which have been approved by the Treasury Board of Canada, form part of this collective agreement:

...

(28) Work Force Adjustment Policy.

The relevant section 1.1.7 of the WFAD reads:

1.1.7 A department shall declare surplus, upon request, any affected employee who can demonstrate that his or her job has already ceased to exist.

The grievance of Mr. Connors and Mr. Evitt reads:

I [We] grieve the denial (received by me [us] verbally) made by the subcommittee of the Human Resources Committee of my [our] requested Early Retirement Incentive (ERI) which was approved by the ADM Prairie Region effective June 23/95.

I [We] further grieve that the AU Group is being excluded for approval by the subcommittee for the ERI.

They are requesting the following corrective action:

To have my [our] ERI approved effective June 23/95 as requested and receive all benefits payable under the present Work Force Adjustment Directive. To be made whole.

Mr. Heidinger agreed with Mr. Garneau that the references in the grievances dealing with requests for consideration under the Early Retirement Incentive (ERI)

were not adjudicable and should not be before me. I agreed and indicated I will not address this part of the grievances.

The grievance of Mr. Lovallo reads:

MY REQUEST FOR EARLY RETIREMENT (ERI) AND PAYMENT IN LIEU (P.I.L.) WAS APPROVED AND RECOMMENDED BY THE DISTRICT DIRECTOR AND REGIONAL ADM TO BE EFFECTIVE JUNE 23/95 BUT WAS DENIED BY THE SUBCOMMITTEE OF THE HUMAN RESOURCES COMMITTEE. THE DIRECTOR AND RADM SUBMITTED A WRITTEN RECOMMENDATION FOR MY ERI AND P.I.L. THE DENIAL WAS COMMUNICATED VERBALLY. NO WRITTEN DENIAL WAS PRESENTED ALTHOUGH I REQUESTED ONE. AS A RESULT OF MODERNIZATION AND CONSOLIDATION THERE IS NO LONGER A REQUIREMENT FOR MY POSITION, THERE IS NO UNENCUMBERED POSITION AT THE AU-3 LEVEL WITHIN MY AREA, THERE IS CURRENTLY 3 AU-3'S HOLDING THE TWO POSITIONS AND UPON MY REQUESTED DEPARTURE THE POSITION I OCCUPY WOULD BE ABOLISHED.

I FURTHER GRIEVE THAT THE SUBCOMMITTEE HAS SINGLED OUT THE AU GROUP TO EXCLUDE AU'S FROM ERI AND PIL.

He is requesting the following corrective action:

TO HAVE MY ERI AND PIL APPROVED WITH ALL BENEFITS THAT WERE IN EFFECT ON MY RECOMMENDED DEPARTURE DATE OF JUNE 23/95.

I am being asked to decide, as was agreed to by the parties, whether or not the grievors were actually deemed to be surplus and therefore whether they qualify for the ensuing benefits under the WFAD, in particular, sections 6.2.1 and 6.3.1 of the new version dated July 16, 1996 that read:

6.2 Pay in lieu of unfulfilled surplus period

6.2.1 When a surplus employee offers to resign before the end of the surplus period on the understanding that he or she will receive pay in lieu of unfulfilled surplus period, the deputy head may authorise a lump-sum payment equal to the surplus employee's regular pay for the balance of the surplus period, up to a maximum of six months.

6.3 Separation benefit

During the period beginning on July 15, 1995 and ending on June 22, 1998, the application of section 6.3 of the Directive is suspended.

The following section was in effect prior to July 15, 1995 and will come back into effect on June 23, 1998 unless further changes are brought to the Directive.

6.3.1 When a surplus employee is terminated, in whatever manner, under the provisions of this directive, that employee shall receive a separation benefit of one week's pay for each year of service with a department or agency for which the Treasury Board is the Employer (PSSRA I-I) up to a maximum of fifteen weeks pay, providing that the individual is entitled to opt for or is entitled to an immediate annuity or an immediate allowance under the Public Service Superannuation Act, except where

(a) the employer has arranged continuous employment elsewhere suitable to the employee, or

(b) the employee has received more than one month's retraining pursuant to this directive, or

(c) a non-surplus employee has volunteered to receive pay in lieu of unfulfilled surplus period in the place of a surplus employee.

The hearing lasted one day with six witnesses testifying and fifteen exhibits submitted into evidence.

Summary of Evidence

1. Kevin Mannion was the Assistant Director, Audit, Winnipeg Tax Services, Winnipeg, in June 1995. He identified Minutes of Audit Managers Meeting of May 1, 1995 (Exhibit G-1), in particular item 2, that reads:

2. 1995/96 Budget: At the present time, we are under-funded by approximately \$325,000 on the salary-side for tax and GST. This represents approximately \$110,000 for tax and \$215,000 for GST. There appears to be a problem with the funding of the anti-smuggling initiative on the GST side and we are still negotiating this with the Region. I have provided the Director with a listing of names of people whom, I feel, could be offered a buy-out and whom we would not have to replace. He will not be doing anything in this regard until he has finalized the budgets for the D.O. of which

Finance, Client Assistance, amongst others, have still to be received.

He said the three grievors' names were on the list of names referred to in item 2.

He identified an E-Mail sent on June 13, 1995 (Exhibit G-2) that shows S. Lovallo as a potential buy-out at the AU-3 level. He identified another E-Mail (Exhibit G-3) sent on June 13, 1995 to the managers who report to him that reads:

If any of you or any of your staff are interested in the early retirement package presently available - 41 weeks plus severance pay - please inform Randy Palmquist, Chief of Human Resources, in writing.

This will ensure that consideration is given should any opportunities arise.

Mr. Mannion explained grievor Lovallo worked in Special Investigations. Due to modernization, this section was going to reduce the number of supervisors from three to two who would end up supervising two groups of auditors; one general group and one general/special group. He discussed with grievor Lovallo's boss, Mr. G. Burwood, the possibility of Mr. Lovallo being the supervisor to be declared surplus. A new AU-3 basic file auditor position was being started that Mr. Lovallo may also have been considered for. Mr. Mannion thought Mr. Lovallo would need up to fifty weeks of training for this position. At that point in Mr. Lovallo's career, Mr. Mannion did not think it would have been practical for him.

Witness Mannion added that head office decided to move some business evaluation resources to Calgary. The Winnipeg management asked two business evaluators to move. They declined but grievors Connors and Evitt said they would take a buy-out package if it was offered if their positions were transferred to Calgary. At the end of the day, two AU-2 positions went to Calgary and were lost to Winnipeg. Mr. Mannion said it was eventually recommended that Lovallo, Connors and Evitt be declared surplus. He did not know of any other auditors who were recommended for surplus, but other employees were in fact declared surplus.

Witness Mannion identified a letter from grievor Lovallo dated April 26, 1996 (Exhibit G-4) asking for information about branch staffing matters. He confirmed his response (Exhibit G-5) dated May 23, 1996.

During cross-examination by counsel for the employer, Mr. Mannion said with regard to Exhibit G-3, his E-Mail to his managers, any early retirement packages would be dealt with in about a week but no guarantees were suggested. He said grievors Connors and Evitt were to swap with the two positions that were going to Calgary, they would decline to go and then hopefully be declared surplus. Mr. Mannion agreed that in June 1995, he was considering budgetary constraints outlined in Exhibit G-1. Two AU-2 positions went to Calgary in September 1995 along with seven months of related expenditures from Winnipeg, but no persons left Winnipeg. In other words, they expected to overspend in Winnipeg, and no positions in Winnipeg were declared surplus. He had to find other ways not to go over budget since the individuals in question continued to work in Winnipeg.

Regarding the Lovallo position, Mr. Mannion said he asked someone to move out of Special Investigations to another area to accommodate the reduction of three supervisors to two. No one was declared surplus. About a year later he still had three supervisors for two positions. One would eventually have to be declared surplus. Mr. Lovallo was not guaranteed a surplus position but he and Mr. Mannion were both aware someone had to go. Following June 1995, none of the three supervisory positions were declared surplus even to this day.

Regarding Exhibit G-5, Mr. Mannion's response to Mr. Lovallo's letter of April 26, 1996, he said he had two extra auditors, but if Mr. Lovallo returned from sick leave, he would have returned to supervise a group within Special Investigations. Mr. Mannion said: "There always was work for Mr. Lovallo." He added that if it had become necessary to eliminate someone, he probably would have done a reverse order of merit exercise.

During re-examination, Mr. Mannion said he had one extra AU-3 in Special Investigations in June 1995, but if Mr. Lovallo returned from sick leave, because the Goods and Services Tax (GST) staff were moving in, there would have been a position

for Mr. Lovallo for sure. Mr. Mannion did recommend grievors Connors and Evitt be declared surplus in 1995.

2. William Connors who retired in June 1996, said that after June 23, 1995 when he found out no AU's would be allowed the ERI package, he came to work upset, could not concentrate on his work, started to file grievances, went on sick leave due to stress and never returned. He had been a Senior Business Auditor, AU-2, since 1986 and in the spring of 1995 felt burnt out and wanted to leave with a package since he thought for him there would have been no pension penalty. Mr. Connors volunteered to be declared surplus on March 9, 1995 (Exhibit G-6). Between March and June 1995, Mr. Connors spoke to different managers, Mr. Palmquist, Mr. Mannion, Mr. Purda, about his desire to leave. He had seen the minutes of the Audit Managers meeting (Exhibit G-1), and interpreted them to mean that because of the \$110,000 underfunding for tax, two auditors would have to go.

Mr. Connors saw the 13 June 1995 Mannion memorandum on that day, and volunteered to go that same day to his immediate manager Paul Fenez. He was told he would have to wait since the memorandum was open to all staff. He said he was told by Randy Palmquist he would be put into a position to go to Calgary, could refuse, and be declared surplus. Only 2 AU's volunteered for the ERI. Mr. Connors signed in June but did not date the Request for Pay in Lieu of Unfulfilled Surplus Period (PIL) on page 3 of Exhibit G-8. He attended a farewell luncheon Wednesday, June 21, 1995 during which some retirees congratulated him for his upcoming expected departure. He was informed two days later by Randy Palmquist that his request was denied and that no AU's were approved for surplus. He became upset because at this point he had already cleared out his desk and had been told that once his regional Assistant Deputy Minister (ADM) Mr. Jordan approved it, Ottawa would rubber stamp the decision. Mr. Connors testified that after he learned of the final decision, he went on sick leave, no one replaced him, no one ever contacted him to see how he was doing, or to offer him a new job.

During cross-examination, Mr. Connors testified he was forced to retire on doctors' orders, and took a financial penalty as a result. He admitted that Mr. Palmquist did tell him that a recommendation from the region did have to receive final decision from Ottawa, and that Mr. Palmquist was hopeful at the time that the

grievor's wish would come true on or before June 23, 1995. Mr. Mannion and Mr. Purda also told him how it would proceed. When it was denied, he said Mr. Palmquist told him no AU's were approved for surplus.

Mr. Connors identified a written response to his request that he finally received dated December 21, 1995 (Exhibit E-1), six months after being told his request to be declared surplus had been denied.

During re-examination, Mr. Connors said that approvals for surplus declarations at higher levels around the country were approved.

3. Al Evitt at the end of June 1995, had over 29 years of public service and had been an AU-2 since 1976. Mr. Evitt volunteered to leave the Public Service under the ERI in a memorandum to his immediate supervisor Bruce Mogg on April 6, 1995 (Exhibit G-9). Near June 13, 1995 the grievor testified that he was aware two AU-2's were to go to Calgary and be lost from Winnipeg. He recalled seeing Exhibit G-3, Mr. Mannion's June 13, 1995 memorandum to the managers who reported to Mr. Mannion. Mr. Evitt said he informed Mr. Randy Palmquist on June 14, 1995 that he was interested in retiring, and he later signed a document agreeing to resign. He identified Exhibit G-10, the recommendation from his interim Assistant Deputy Minister Mr. Jordan that he be given early retirement. He also attended the same luncheon that Mr. Connors was at and was congratulated for what was presumed to be his impending early retirement. Mr. Evitt said that his supervisor, Mr. Mogg, asked him to process as many files as he could before he left and to clean out his desk. He had done all this.

He learned on the afternoon of June 23, 1995 that no departures for auditors was approved and he was very disappointed. He said the positions that were to go to Calgary were lost, but that these individuals stayed on in other positions. He was never offered a transfer to Calgary.

During cross-examination, Mr. Evitt said Randy Palmquist had told him that there would be a recommendation for his early retirement but that it had to be approved by Ottawa. After this was refused, he went back to work in his same job until May 3, 1996 when he went on sick leave until October 3, 1996. He then went on disability and retired May 30, 1997 for medical reasons. Witness Evitt identified the

letter he received on December 21, 1995 from L. Lamirande (Exhibit E-2) explaining the employer's rationale for not granting early retirement.

4. Sam Lovallo had been an AU-3 since 1981. When he retired in December 1996 as a supervisor, Special Investigations, he had eight investigators reporting to him. Grievor Lovallo testified that in either late 1993 or early 1994, Mr. Mannion spoke with him and his manager regarding a problem of how to solve three supervisors working in what was going to be only two positions. He added that a subsequent meeting between himself, George Burwood, and Mr. Mannion in May 1995, they discussed an opportunity for a buy-out during which he expressed he was interested depending on the situation and that he wished to be further consulted. Witness Lovallo testified he met in June 1995 with John Purda, to discuss a possible buy-out. Mr. Lovallo said he was advised to make a formal request, and once this was approved, he would have to go immediately. He said Mr. Purda told him it would have to go through headquarters in Ottawa but that he felt the grievor met all the criteria and that he would be recommended. He identified the recommendation for his early retirement signed by Mr. Jordan (Exhibit G-11). He was advised to get all his investigations ready for takeover by one of his colleagues. He did that. He also cleaned out his desk and was making preparations to leave by the end of June. Witness Lovallo testified that on June 23rd he was also informed by Mr. Palmquist that the recommendation for his early retirement had been denied. No auditors were getting early retirement.

Witness Lovallo testified that he had mounting medical problems since February 1995, and that on June 26, 1995, three days after being advised he was not being given early retirement, he saw his doctor. His condition had worsened. He stayed at home for two weeks. His sick leave was extended until September 1995 when he was advised he would be on indefinite sick leave. He never returned to his workplace. Mr. Lovallo testified that he could not have been reappointed to the Business Audit because his specialty was in investigations and there was a difference of night and day between the two positions. He felt he could not be trained for Business Audit as he had no computer training, had been a supervisor for 17 years, and was never involved in Business Audit.

Witness Lovallo wrote a letter to Mr. Mannion (Exhibit G-4) in April 1996, because he was getting incorrect information in response to his grievance since he felt his position was now gone. Mr. Lovallo said he was confused how things could have changed so much between June 20th and June 23rd, 1995, regarding his work status. He said Mr. Mannion's response (Exhibit G-5) in May 1996 still does not answer the question he has regarding the status of his former position.

During cross-examination, Mr. Lovallo identified a similar letter that the two other grievors received from L. Lamirande in December 1995 explaining why his request for retirement was denied (Exhibit E-3). He added that he took Exhibit E-3 into consideration when he wrote Mr. Mannion in April 1996. Mr. Lovallo testified that during the initial discussions in early 1994 regarding the need to no longer have three AU-3's, he said his medical problems were beginning for him then, but at that time he did not want to retire and there was no discussion about retirement. In 1995 he applied for early retirement partly for health problems and partly to help the department solve its overstaffing problem. When asked by Mr. Garneau if it was suggested to him in 1995 that his position would be abolished if he did not volunteer to retire, Mr. Lovallo responded: "The position was abolished." Mr. Garneau reminded the grievor that Mr. Mannion said the position was not abolished. Mr. Lovallo disagreed. Mr. Lovallo added that his sick leave ran out in 1996 and that for most of 1996 he had no income other than his wife's pension.

During re-examination, Mr. Lovallo explained that before 1995, two of the three groups in the Special Investigations area, were combined into one, and one of his former colleagues took over the combined group. Therefore one position was abolished. He said the buy-out opportunity came along and he saw an easy way to solve the problem for the employer and for himself by taking early retirement. Mr. Lovallo added that in 1995 Mr. Kingsley, one of his colleagues, was on secondment and he, the grievor, continued to supervise in Mr. Kingsley's absence.

5. Randy Palmquist, was Chief, Human Resources, Winnipeg Taxation Office, from April 1995 to March 1996. Mr. Palmquist testified that for financial year 1995/1996, they had too many auditors for their budget allocation. He said the department looked at ERI packages and this is why Exhibit G-3 was sent out to all managers to determine who was interested in early retirement. He said as a result of staff

feedback, the office prepared three surplus packages based on a possibility of two relocations to Calgary, and to solve the AU-3 problem in Special Investigations which had been ongoing since 1994. He testified that Mr. Connors, Mr. Evitt and Mr. Lovallo, were the three persons they identified as being additional to their needs. He knew Mr. Connors' and Mr. Evitt's interest from early discussions he had had with them. They were in fact the only two AU-2's to come forward to seek early retirement. He testified that they were to become the incumbents for two positions that were going to go to Alberta.

Mr. Palmquist testified that Exhibit G-8, the recommendation for early retirement for grievor Connors, was written up as if he was in the position that would go to Calgary in the event that it was approved. He said the same was done for Mr. Evitt in Exhibit G-10. He said the function would move to Alberta but the position would be declared surplus, and that he discussed this process with each of them separately. Mr. Palmquist said he discussed the same process on the same day with Mr. Lovallo with respect to Exhibit G-11. In the case of Mr. Lovallo, he said they were dealing with a 1993/1994 problem of modernization and that it would solve their financial overspending. With respect to Mr. Lovallo, the witness testified: "If the process had been successful for Mr. Lovallo, we would have declared him surplus, and deleted his position that he was in at the time in 1995." Mr. Palmquist said that he prepared all of Exhibits G-8, G-10 and G-11 since this is what they wanted to do from Winnipeg. Overall he had a total of 12 to 14 requests for early retirement all of which were approved by Ottawa except the three AU positions. He was advised on June 23rd that funding was going to be made available for the Audit Program in spite of the over expenditure forecast for financial year 1995/1996.

During cross-examination, Mr. Palmquist testified that he wrote the rationale on page 2 of Exhibit G-11 that briefly explains the Work Force Adjustment situation regarding grievor Lovallo because he anticipated an over expenditure in the Audit section. Since Mr. Lovallo's departure was not approved he did not know how the over expenditure had been compensated for. Witness Palmquist identified a memorandum from Marge Sopko to himself dated September 3, 1996 (Exhibit G-12) that reads in part:

According to Kevin today he maintains that Lovallo was extra when the Dept. put in for ERI/PIL last year. Today there is no vacant AU-3 position in SI.

Mr. Palmquist confirmed they had determined there was the need for only two AU-3's in the Special Investigations Branch.

6. Linda Lamirande was the Senior Human Resources Advisor to the Assistant Deputy Minister, Prairie Region in December 1995. She identified Exhibits E-1, E-2 and E-3 as being the explanatory letters to the three grievors regarding why their requests for early retirement were not approved. She testified she prepared the letter signed by Mr. Jordan on Exhibits G-8, G-10 and G-11, and that they were accurate and correct. Witness Lamirande testified Mr. Lovallo was not entitled to ERI at the time because of his age, but he was entitled for Pay in Lieu (PIL). These changes were handwritten on Exhibit G-11. She testified that during a conference call on June 23, 1995 with Assistant Deputy Ministers from across Canada, they were informed that resources were going to be directed to cover the Audit Program shortfalls. When Mr. Jordan was advised of this by Assistant Deputy Minister Harrison in Ottawa, he requested to withdraw the early retirement applications for the three grievors on the telephone. She said other requests for ERI were however dealt with. She added that during the conference call, the committee never reviewed the three recommendations for the grievors. Since the funds were found for the Audit Program Mr. Jordan withdrew all three recommendations. It was her understanding that submissions in other regions of the country for auditors were also withdrawn since the funds were found to keep auditors working.

During cross-examination, Ms. Lamirande testified that all three recommendations were supported by the region until the conference call took place. She reiterated only the auditors were given more money to be covered in the forecast overexpenditure.

Argument for the Grievors

Mr. Heidinger argued that I should declare the grievors surplus under section 1.1.7 of the WFAD. They would therefore qualify for the benefits that would ensue from this under section 6.2, Pay in lieu of unfulfilled surplus period, and section 6.3, Separation benefit. He argued that headquarters in Ottawa made

decisions at the highest level without consideration for the regional or district level. He further argued that Mr. Mannion had said as early as May 1995 that they would be in an over expenditure position and were determined to do something whereby they had individuals who were ready to leave their offices immediately, particularly Mr. Lovallo. He argued that when the grievors officially heard through Exhibit G-3 that those who were interested in taking an early retirement package should present themselves as soon as possible all three grievors complied. He argued that Mr. Mannion described what was needed for the grievors to be declared surplus and that the plans to shift resources to Calgary were all in place and that individuals would be declared surplus accordingly. He further argued that the office had more individuals than positions in the Special Investigation unit long before May 1995, whereby they had three supervisors but only needed two. He argued that according to Exhibit G-5, number 1, the fact that one supervisor from the Special Investigation unit was working short term in the Underground Economy group, was not going to fulfill their needs in the long term. He argued that Mr. Lovallo was identified as the AU-3 who wanted to take early retirement to suit his needs and the needs of Revenue Canada. Mr. Heidinger concluded it was obvious in May and June 1995 that the office in Winnipeg had too many people for the resources that they had been allocated. He argued that resources were transferred from Winnipeg to Calgary even after new money was found to keep auditors on across the country. He argued that none of the three grievors were offered any other positions and that they have corroborated all of what Mr. Mannion had told me.

Mr. Heidinger argued that the Exhibits G-8, G-10 and G-11 were very powerful in that they were all filled out accurately at the local level as was verified by witness Lamirande. He in fact argued they were meticulously filled out so that they could not be rejected for any reason once they were sent on to Ottawa for final approval. Mr. Heidinger concluded that the evidence is clear that the grievors were therefore in a surplus situation in June 1995. Mr. Palmquist and witness Lamirande did not dispute the evidence on Exhibits G-8, G-10 and G-11. Mr. Heidinger reminded me that other positions in the department were cashed out in June 1995. He argued that since all three grievors requested to be declared surplus, but were not, despite the fact that they were in a surplus situation, is contrary to the intention of section 1.1.1 of the Work Force Adjustment Directive that indicates indeterminate employees are to

be treated equitably. In these cases the grievors were not. Section 1.1.1 of the Work Force Adjustment Directive reads:

1.1.1 Since indeterminate employees who are affected by work force adjustment situations are not themselves responsible for such situations, it is the responsibility of departments to ensure that they are treated equitably and given every reasonable opportunity to continue their careers as Public Service employees.

He argued it was unfair for headquarters in Ottawa to have vetoed all requests by auditors across the country. Mr. Heidinger referred me to the *Roessel and Treasury Board (Canadian Heritage)* (Board file 166-2-27341) as an example of the same principle that is before me now. He argued that the case before me is even stronger since regional management had all agreed that the three grievors were in fact in a surplus situation. He therefore asked me to uphold the grievances.

Argument for the Employer

Mr. Garneau argued that the reference in section 1.1.7 of the Work Force Adjustment Directive “ceased to exist” is not what went before the National Joint Council (NJC). Mr. Garneau argued that I should examine closely the definition of an affected employee under the Work Force Adjustment Directive that reads as follows: “An *affected employee* is an indeterminate employee whose services are, or will no longer be, required because of a work force adjustment situation.” He asked me if the grievors have demonstrated that their jobs ceased to exist in June 1995 and concluded that even the NJC said that they had not ceased to exist. Mr. Garneau argued that the Winnipeg district Taxation Office had in fact concluded it was over budget in the Audit area, and it considered ERI for some employees including the grievors, but at that point in the process no one had been declared surplus and no positions were abolished. He said three volunteers came forward, namely the grievors, and they were advised of the process to be declared surplus. Mr. Garneau acknowledged that Mr. Palmquist and Ms. Lamirande both testified that if the grievors could have been declared surplus this would have solved their problem, but neither of them knew Ottawa was going to find money to keep these persons in their positions. If they would have known that in advance, Exhibit G-3, Mr. Mannion’s memorandum to all of his managers, would never have been sent in the first place. Mr. Garneau agreed that

the recommendations did go forward to Ottawa for approval, but they were still dependent on whether or not there was work or alternate employment for the employees affected, even though the district office felt that there were no funds available in their financial year 1995/1996. He argued Ottawa decided that no AU working positions would be considered surplus since all of the auditors were needed in their workplaces. Mr. Jordan therefore withdrew the three recommendations regarding the grievors. Mr. Garneau reminded me that Mr. Mannion said no positions were ever declared surplus, even the two that were supposed to have gone to Calgary. Mr. Garneau argued that Exhibit G-5, Mr. Mannion's response to grievor Lovallo, tells us exactly what happened to Mr. Lovallo's position. He concluded therefore that under section 1.1.7 the department cannot declare the grievors surplus because the positions were still there.

In rebuttal argument, Mr. Heidinger said with respect to Mr. Lovallo's position, that there are now only two positions for Special Investigation supervisors, and that since Mr. Lovallo was on sick leave, this allowed another person to come back in to fill his position. There was no need for a reverse order of merit exercise by the department. He concluded that it was not just a simple case of moving Mr. Lovallo elsewhere and that under the Work Force Adjustment, I should declare all three grievors surplus.

Decision

To substantiate my decision, I believe it is helpful to refer to Exhibit E-1, Ms. Lamirande's December 21, 1995 letter to all three grievors. It reads:

On June 16, 1995, a Request for Early Retirement and Payment in Lieu of Unfulfilled Surplus Period was received in this office signed by yourself and John Purda, Director, WTSO. The documentation recommending approval of this request was signed by Mr. Jordan, Interim ADM Prairie Region, and forwarded to Peter Harrison, ADM Human Resources on June 20th, 1995 for consideration by the Human Resources Adjustment Committee. The delegated authority for approval of these requests rests with the Assistant Deputy Minister, Human Resources.

The Human Resources Adjustment Committee met on June 22nd and in consultation with the function determined that the Department was not in a surplus situation in relation

to the Audit Program. On a conference call the following day between the Regional ADMs and Headquarters, which included Barry Lacombe, ADM Verification, Enforcement and Compliance Research Branch this information was communicated. There was agreement that the Audit program was not impacted, funding was available to support the programs, and therefore no surplus situations existed.

Although regional management had forwarded your request for Payment in Lieu of Unfulfilled Surplus Period and Early Retirement to headquarters for approval, these requests have to meet certain criteria before being approved; one of which is that the position must be surplus to the organization's requirements. As this was not the case, Mr. Jordan advised Peter Harrison to withdraw our submissions.

It should be noted that the Early Retirement Incentive (ERI) program is available to assist managers in resolving difficult work force adjustment situations (i.e. where no reasonable job offers will be available in the foreseeable future) by providing a means for "surplus" employees to leave the Public Service through retirement without the usual penalties. It is available only to surplus employees.

I hope this addresses your questions.

It is clear to me, that even though the grievors were all considered to be in a surplus situation by their local district and regional managers, including ADM Jordan, they were never declared surplus by Ottawa which is the last step in the process. They may have been led to believe that they would be accepted for early retirement, and this was described by Mr. Heidinger as unfair treatment under the WFAD. However, all AU's were in fact spared from being declared surplus by a miraculous eleventh hour discovery of money to keep them on strength. If these new monies had been found sooner, considerable grief and expense could have been spared to all.

I have not been given any evidence that demonstrates to me the grievors were in fact declared surplus. I am therefore in agreement with not only their employer, but with the NJC's decisions in these matters as well.

As unfair as the whole process may have seemed to the grievors, especially since their expectations were raised so high when they were told to clear out their desks and get their work loads up to date, I am not persuaded that they were surplus to their department within the meaning of the Workforce Adjustment Policy.

For the above reasons, the grievances are denied.

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

OTTAWA, July 16, 1997.