

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

PAUL MAILLOUX

Grievor

and

TREASURY BOARD
(Solicitor General of Canada - Correctional Service Canada)

Employer

Before: [Guy Giguère, Board Member](#)

For the Grievor: [Alfred La Bissonnière, Public Service Alliance of Canada](#)

For the Employer: [Marie-Claude Couture, Counsel](#)

Heard at Montréal, Quebec,
February 8 and 9, 1999.

DECISION

Paul Mailloux is a driver-stock handler at the GS-ST5-04 group and level who works for Correctional Service Canada at Leclerc Institution, a medium security penitentiary. On September 24, 1996, he filed this grievance, in which he complains that the employer reduced his penological factor allowance (PFA) from the medium security/continual exposure level to the medium security/frequent exposure level, or from \$800 to \$480 a year. Article M-26 of the Master Agreement between Treasury Board and the Public Service Alliance of Canada sets out the terms and conditions of the PFA. It reads as follows:

ARTICLE M-26

PENOLOGICAL FACTOR ALLOWANCE

...

General

M-26.01 A Penological Factor Allowance shall be payable to incumbents in some positions in the bargaining unit which are in Correctional Service Canada, subject to the following conditions.

M-26.02 The Penological Factor Allowance is used to provide additional compensation to an incumbent of a position who, by reason of duties being performed in a penitentiary, as defined in the Penitentiary Act as amended from time to time, assumes additional responsibilities for the custody of inmates other than those exercised by the Correctional Group, and is exposed to immediate hazards of physical injury by assault and other disagreeable conditions.

Degrees of Exposure

M-26.03 The factor recognizes the differences between maximum, medium and minimum security penal institutions, as designated by the Employer, and distinguishes between continual, frequent and limited degrees of exposure, as follows:

Continual - means fulfillment of the conditions described in Clause M-26.02 above throughout the working day and recurring daily.

Frequent - means fulfillment of the conditions described in clause M-26.02 above for part or parts of the working day and generally recurring daily.

Limited - means fulfillment of the conditions described in clause M-26.02 above on an occasional basis.

Formula

M-26.04 The payment of the allowance for the Penological Factor is determined by the following formula:

**

Penological Factor (X)

Type of Institution

<u>Degree of contact</u>	<u>Maximum</u>	<u>Medium</u>	<u>Minimum</u>
<i>Continual</i>	<i>100% X (\$1,600)</i>	<i>50% X (\$800)</i>	<i>30% X (\$480)</i>
<i>Frequent</i>	<i>50% X (\$800)</i>	<i>30% X (\$480)</i>	<i>20% X (\$320)</i>
<i>Limited</i>	<i>30% X (\$480)</i>	<i>20% X (\$320)</i>	<i>10% X (\$160)</i>

Amount of PFA

**

M-26.05 The value of "X" is set at \$1,600 per annum. This allowance shall be paid on the same basis as that for the employee's regular pay.

Application of PFA

M-26.06 Penological Factor Allowance shall only be payable to the incumbent of a position on the establishment of, or loaned to, Correctional Staff Colleges, Regional Headquarters, and National Headquarters, when the conditions described in clause M-26.02 above are applicable.

M-26.07 The applicability of PFA to a position and the position's degree of PFA entitlement, shall be determined by the Employer following consultation with the bargaining agent.

M-26.08 Except as prescribed in clause M-26.11 below, an employee shall be entitled to receive PFA for any month in which he or she receives a minimum of ten (10) days' pay in a position(s) to which PFA applies.

M-26.09 Except as provided in clause M-26.10 below, PFA shall be adjusted when the incumbent of a position to which PFA applies, is appointed or assigned duties in another position to which a different degree of PFA applies, regardless of whether such appointment or assignment is

temporary or permanent, and for each month in which an employee performs duties in more than one position to which PFA applies, the employee shall receive the higher allowance, provided he or she has performed duties for at least ten (10) days as the incumbent of the position to which the higher allowance applies.

M-26.10 When the incumbent of a position to which PFA applies, is temporarily assigned a position to which a different degree of PFA, or no PFA, applies, and when the employee's basic monthly pay entitlement in the position to which he or she is temporarily assigned, plus PFA, if applicable, would be less than his or her basic monthly pay entitlement plus PFA in his or her regular position, the employee shall receive the PFA applicable to his or her regular position.

...

On October 9, 1996, Mr. Mailloux's grievance was dismissed at the first level of the grievance procedure. The following two paragraphs of the decision are especially relevant:

[TRANSLATION]

After reviewing the penological factors, we have found that the factor associated with your duties was inconsistent with management's instructions and the application of the penological factor allowance (PFA).

To be entitled to a "continual" factor, you must assume additional responsibilities for the custody of inmates throughout the day, which is not your case. You are not directly responsible for the custody, monitoring and overseeing of one or more inmates. You work as a stock handler sometimes and as a driver at other times (driver-stock handler position). Although you are in direct contact with inmates, you are not continually exposed to them when performing your duties. Therefore, a frequent factor is justified.

...

On October 18, 1996, Michel Deslauriers, Warden of Leclerc Institution, dismissed the grievance at the second level of the grievance procedure. On December 18, 1996, Jean-Claude Perron, Deputy Commissioner, Quebec Region, also dismissed the grievance at the third level of the grievance procedure on the ground

that management had decided to introduce a rotation of the driver-stock handler positions, resulting in an adjustment to Mr. Mailloux's PFA:

[TRANSLATION]

...

Management has decided to rotate the drivers-stock handlers. Since you presently hold a driver position, your degree of exposure for that is frequent pursuant to the definition of M-26.03 of the Master Agreement. The current job rotation plan indicates that you are scheduled to hold the stock handler position soon, and, in that regard, your allowance will be adjusted accordingly.

...

At the final grievance level, John Rama, Assistant Commissioner, Personnel and Training, Correctional Service Canada, affirmed Mr. Perron's decision. However, he stated the following:

[TRANSLATION]

...

Management has decided to introduce a rotation of the three driver-stock handler positions, and that rotation will occur every four months. When an employee is working as a driver, contact with inmates is not continual and the degree of exposure to inmates therefore becomes "frequent". Once the employee begins working as a stock handler, the degree of exposure becomes "continual" because of additional responsibilities for the custody of inmates. Thus, the penological factor allowance is adjusted based on the duties performed at different times.

...

Paul Mailloux has been working as a driver-stock handler at the Department of the Solicitor General of Canada since January 8, 1996. Prior to that, he worked for the Department of National Defence, at the Collège militaire de St-Jean, but after cuts were made, he was offered a secondment to the Department of the Solicitor General. The terms of Mr. Mailloux's secondment from his GS-BUS-04 position at the Department of National Defence to his new GS-STS-04 position at Leclerc Institution are set out in the retraining protocol (Exhibit E-1). The last paragraph on page 2 of the protocol states that Mr. Mailloux is to receive the penological allowance and will have continual

contact with inmates. In addition, the work description for the position of driver-stock handler (Exhibit E-4) states that the key activities for the position are ordering and receiving items, entering data into a computer system, delivering materiel, driving the Service's vehicles, ensuring that documents are properly completed, taking an inventory of goods and supervising the inmates in his area. Attached to the work description is a document providing "Substantiating Data", which includes a description of the relationship between the driver-stock handler and the inmates. That relationship is described as follows:

[TRANSLATION]

1. SERVICE DELIVERY

1.1 Interaction

- *Discusses canteen items with inmates.*
- *Advises the inmates under his or her supervision.*

...

1.2 Influence

- *Services provided to inmates have an impact on the morale of employees and inmates.*
- *Supervision of inmates has an impact on their safety and the institution's security.*
- *Decisions on the storage and handling of supplies have an impact on . . . smuggling . . .*

...

1.3 Thinking Challenge

...

- *At meetings with inmates, chooses the best approach in the circumstances.*

3. WORKING CONDITIONS

3.1 Environment

- *Contact with inmates in a penitentiary environment and, possibly, work in a hostile atmosphere.*

...

3.2 *Risk to Health*

- *Risk of being assaulted.*
- ...
- *Works with inmates who may have communicable diseases.*

4. *SKILL AND KNOWLEDGE*

...

4.2 *Acts and Regulations*

...

- *Knowledge of the sections of the Criminal Code relating to the responsibilities of peace officers.*

...

4.5 *Communication*

- *Ability to communicate orally or in writing with . . . and inmates.*

...

Mr. Mailloux testified that he had been hesitant to accept the position at the Department of the Solicitor General, since his position at the Department of National Defence was at a higher level and he had to incur additional costs to get to his new workplace. On cross-examination, however, he confirmed that his appointment to the GS-ST5-04 position (Exhibit E-3) stated that he would continue to receive the same salary as before for as long as he held that position at the Department of the Solicitor General or until he received an offer at a level equivalent to his former group and level. According to Mr. Mailloux, when accepting the position, he assumed he would receive a continual PFA, since he had to travel 150 kilometres a day, return trip to Leclerc Institution, whereas he was living not far from his former workplace. On cross-examination, he admitted that the *Relocation Directive* applied to him, but he preferred to travel rather than move closer to Leclerc Institution.

In 1995, Claude Duguay, then Chief, Administration and Materiel Management, at Leclerc Institution, met with Mr. Mailloux during the selection process for the

driver-stock handler position. Mr. Duguay testified that Mr. Mailloux was not promised that he would receive the continual PFA. He stated:

[TRANSLATION]

As far as I can recall, there was no mention of the PFA at the interview and no promise at all. I was not aware of the PFA situation; it wasn't up to me. No, I didn't say it was \$800. I didn't know what the penological factor was. I was new in the position.

In June 1996, following the renovation of the clerks' offices, Manon Bisson, then Chief, Administration and Materiel Management, at Leclerc Institution, asked Claudette Dorais, then an administration officer, to review all the PFAs paid to the employees of Leclerc Institution. Ms. Dorais said that, at the time, there were three driver-stock handler positions at the storeroom of Leclerc Institution, two correctional officers (CX) had been loaned there and two inmates worked there, at the most. Mr. Lavoie, one of the drivers-stock handlers, was receiving a medium security/frequent exposure PFA. He was assigned mainly to the small truck. Mr. Haché was assigned to another driver-stock handler position, the large truck position, and was receiving a medium security/continual exposure PFA, which, Ms. Dorais said, was due to an administrative error. She had reported the error in 1993, but management had decided to maintain the PFA at that level anyway. The third driver-stock handler position was Mr. Mailloux's, and it was created when he arrived in 1995. The PFA granted to Mr. Mailloux was based on the one that had been granted to Mr. Haché.

Ms. Dorais explained why Mr. Lavoie had always received a medium security/frequent exposure PFA. [TRANSLATION] "He didn't meet the standard in the collective agreement. He was not continually inside and in the presence of inmates. He did not have continual custody of inmates." She added that the PFA is paid to [TRANSLATION] "employees who have responsibility for inmates, who have custody of inmates; they are the ones who make the appraisal. That is what I refer to as continual custody."

Sylvie Dion, Regional Manager, Personnel Operations, Correctional Service Canada, explained during her testimony that the PFA was granted to employees who had dealings with inmates. The factors considered in awarding the PFA were the

degree of responsibility, the supervision of inmates, the frequency of contact (that is, the number of times the person was in contact with inmates on a daily basis) and, finally, the security level of the institution. On cross-examination, Ms. Dion said that, to determine the degree of custody as defined in the collective agreement, the employee had to assign work to, supervise and be required to appraise an inmate.

After Ms. Dorais reviewed the PFAs paid to the employees of Leclerc Institution, changes were made in the work organization at the storeroom of that institution. There are no longer any correctional officers loaned to the storeroom to supervise inmates, and there is just one inmate rather than two to help with the handling of goods. The driver-stock handler assigned to the small truck used to pick up the items ordered by inmates at a shopping centre near the penitentiary. That practice has ended, and the items are now delivered by the merchants in question. To ensure that the employees are versatile, a rotation in their duties has also been introduced. The three drivers-stock handlers take turns, for four-month periods, performing duties mainly involving the small truck, then the large truck, then, finally, the storeroom for the whole day in order to enter data into the EQUINOX system. Thus, when Mr. Mailloux is in the storeroom and works on the EQUINOX system, he receives a medium security/continual exposure PFA. When he is assigned to the small or the large truck, he receives a medium security/frequent exposure PFA. Exhibit G-1 provides a list of the periods during which Mr. Mailloux received a penological factor allowance and the corresponding amounts:

<i>01/03/96 to 30/06/96</i>	<i>\$800.00/year (continual contact/medium)</i>
<i>01/07/96 to 31/05/97</i>	<i>\$480.00/year (frequent contact/medium)</i>
<i>01/06/97 to 31/01/98</i>	<i>\$800.00/year (continual contact/medium)</i>
<i>01/02/98 to 30/06/98</i>	<i>\$480.00/year (frequent contact/medium)</i>
<i>01/07/98 to 31/07/98</i>	<i>\$800.00/year (continual contact/medium)</i>
<i>01/08/98 to 30/09/98</i>	<i>\$480.00/year (frequent contact/medium)</i>
<i>01/10/98 to 31/01/99</i>	<i>\$800.00/year (continual contact/medium)</i>
<i>Since 01/02/99</i>	<i>\$480.00/year (frequent contact/medium)</i>

In their testimony, Ms. Dorais and Mr. Mailloux described a typical work day for Mr. Mailloux when he is assigned to one of the two trucks. He begins working at 7:30 a.m. When he is assigned to the small truck, he leaves the storeroom at about 8:00 a.m. to pick up blood at the hospital, which is an administrative building within Leclerc Institution. The blood is collected following blood tests that inmates take. Mr. Mailloux picks up the mail and then heads towards Montée St-François Institution,

a minimum security correctional centre. He picks up the inmates' blood and the mail there as well. He spends about 10 minutes there. He drops off the blood at Cité de la Santé in Laval to be analyzed. He then goes to a private clinic to pick up the results of various blood tests and then to the post office to drop off and pick up the mail. He gets back to the storeroom between 10:30 and 11:15 a.m. Based on her review of Mr. Mailloux's duties, Ms. Dorais testified that, when he is assigned to the large truck, he places orders in the morning and then, at about 10:00 a.m., goes to the regional warehouse, where minimum security inmates work. The rest of his route involves going to the laundry, taking the clothing to the Federal Training Centre and delivering items to Montée St-François Institution. A memorandum dated February 10, 1998 (Exhibit E-13) states that the driver is responsible for supervising the inmates who load the large truck. On cross-examination, Ms. Dorais also admitted that Mr. Mailloux had increased responsibility for the custody of inmates when he was assigned to the trucks, although she said that that custody was not continual.

Leclerc Institution is near maximum security Laval Institution, minimum security Montée St-François Institution, the Immigration Centre, a regional warehouse and the staff college. Within that correctional perimeter, there are minimum security inmates who move about freely. Mr. Mailloux testified that when he drives his truck on Monté St-François Street, which crosses the correctional perimeter, he can see inmates and is therefore exposed to a hazard. He testified that he is also in continual contact with minimum security inmates when goods or inmates' personal effects are being loaded and unloaded; at Montée St-François Institution; at the Immigration Centre; at the regional warehouse; and at the staff college. He said that, in the truck, he is in direct contact and alone with inmates and that he supervises them while they load and unload it.

Mr. Mailloux explained that, even while driving a truck within the correctional perimeter, he is always in the presence of inmates. He added that driving a truck is just as dangerous as staying at the institution, since inmates may try to escape or bring in drugs or other items during the deliveries. In this regard, he described an incident that occurred in February 1998 when \$50,000 worth of drugs were hidden in the truck while he was in a shopping centre. He found the drugs and notified the security department. Ms. Dorais admitted that work on the outside can be dangerous, and Exhibit E-11 was introduced to support that statement. It is a note from

Ms. Dorais to Mr. Mailloux congratulating him on the efforts made to maintain the institution's security when drugs were seized in the institution's storeroom.

A memorandum to Mr. Mailloux from Ms. Dorais dated June 8, 1998 (Exhibit E-12) was introduced by Mr. La Bissonnière. The memo informed Mr. Mailloux that he was not entitled to a medium security/continual exposure PFA because he did not have the responsibilities for the daily custody of inmates for at least 70 percent of the working day. Ms. Dorais calculated that having custody for at least 70 percent of the time meant five and a half to six hours a day. She testified that, after looking at the two trucks' routes, she estimated that Mr. Mailloux had custody of inmates for two hours a day at Leclerc Institution.

Mr. Mailloux testified that he found out his PFA had been reduced when he noticed the lower amount on his pay cheque. Exhibit E-6 is a "Personnel Action Request Form" form dated July 18, 1996, which was introduced as evidence and in which it is noted that [TRANSLATION] "the penological factor has been changed from continual to frequent because the employee in question is not responsible for inmates". Mr. Mailloux discussed this with Ms. Dorais, who subsequently added the following by hand on the Action Request Form: [TRANSLATION] "However, the employee will continue to train inmates to produce offence reports, even though he does not have the authority to dismiss or demote inmates" (Exhibit G-6). Ms. Dorais testified that, in July 1998, she gave Mr. Mailloux two documents supporting the decision to reduce his PFA to the medium security/frequent exposure level. One was a paper entitled *Administration and Application of Penological Factor Allowance (PFA)* (Exhibit E-8), and the other was entitled *Guidelines on the Administration and Application of the Penological Factor Allowance (P.F.A.)* (Exhibit E-9). Since Ms. Dorais was subsequently told that Exhibit E-8 was a consultation paper that had not been approved by National Headquarters, Mr. Mailloux said that she had asked him to return it to her. However, Ms. Dorais said that she warned Mr. Mailloux to be cautious in using the consultation paper (Exhibit E-8). She explained that she used the guidelines (Exhibit E-9) when reviewed Mr. Mailloux's PFA and not the paper (Exhibit E-8), which refers to a percentage of time.

ArgumentsFor the grievor

Mr. La Bissonnière said that the criteria set out in article M-26.03 of the collective agreement are not clear when referring to “continual” and “frequent” contact but that the main issue under the PFA provisions is whether the employee is exposed to the danger posed by the inmates. According to Mr. La Bissonnière, the penological factor must be interpreted in its broadest sense for the agreement to have meaning. There have been no substantial changes in Mr. Mailloux’s duties. The only change is that he no longer has to go pick up inmates’ orders at the shopping centre in the four months he is assigned to the small truck. The perimeter security system shows that the danger is there. Exhibit E-6 shows the real reason why Mr. Mailloux’s PFA was changed: he is not responsible for inmates. Giving such a strict interpretation to article M-26.02 would mean that no one would be entitled to the PFA. Employees outside the Correctional Group (CX) who work in institutions are peace officers under the law and have a duty and obligation to respond if an inmate commits a wrongful act. Mr. Mailloux is continually exposed to danger, since it has been shown that such danger exists no matter where he is: when he is in the truck with the inmates who help him load goods, when he drives his truck inside the correctional perimeter on Montée St-François, where the inmates move about freely, and when he picks up or delivers goods in Laval, as shown by the February 1998 incident when drugs were hidden in the truck.

Mr. Mailloux does not have the same custody as a CX; when he performs his duties in the truck, he is in contact with inmates. This is the type of custody provided for in article M-26.02 of the collective agreement. The agreement does not say that he must be responsible for and appraise inmates in order to have custody of them and be entitled to the PFA. If the interpretation given by the employer were accepted, article M-26.02 would be virtually inapplicable.

Mr. La Bissonnière submitted that there are few decisions on the issue of “continual” contact and “frequent” contact and that *Cahill* (Board file no. 166-2-25253) does not really apply to Mr. Mailloux’s case.

For the employer

Ms. Couture said that articles M-26.01 to M-26.04 of the collective agreement must be read as a whole, since the parties did not include those provisions for nothing. Article M-26.02 states that the PFA is used to provide additional compensation to employees who assume additional custodial responsibilities other than those exercised by CXs and who are exposed to immediate hazards. To be entitled to a PFA, an employee must therefore assume an additional custodial responsibility and be exposed to immediate risks of injury. According to Ms. Couture, it is not a matter of mere contact with inmates but additional custodial responsibilities. The term “custody” has a much broader scope [than the term “garde” used in the French version].

Ms. Couture referred to various dictionary definitions of the term “garde”, to support the recurrence of the concept of supervision. The following definition can be found in the second edition of the *Grand Robert de la langue française*: [TRANSLATION] “action of watching over carefully while supervising or protecting. . . . Action of keeping or safeguarding (an object). . . . **Safeguarding, preservation, protection, supervision. . . .**” On the other hand, the fourth revised edition of *Black’s Law Dictionary* defines the term “custody” as follows: “. . . Detention; charge; control; possession. The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. . . .” Thus, the definition provided by Ms. Dorais does not contradict the definitions contained in the dictionary; what is involved is supervision, control or monitoring of an inmate’s work.

Ms. Couture asked who had custody of the inmate in the storeroom and noted that Ms. Dorais had testified that the drivers-stock handlers all had custody. She added:

[TRANSLATION]

Custody is not the issue, because it has been acknowledged that he is entitled to the penological factor. The issue relates to article M-26.02 of the collective agreement. The issue involves the degree of exposure.

Ms. Couture said that she did not agree with Mr. La Bissonnière that only the concept of danger should be considered: that is not the meaning of article M-26.02;

there must be custody. In addition, article M-26.03 states that the level of exposure must be determined by the employer. Thus, the crux of the problem is to determine the degree of exposure when there is custody. Ms. Couture argued that article M-26.03 provides that, for the exposure to be continual, it must be daily and all day, without interruption. Frequent exposure is defined as exposure “for part or parts of the working day”; it is therefore interrupted. *A contrario*, for exposure to be continual, there must be no interruption. In this regard, the word “continual” is defined by dictionaries as meaning “not interrupted”, “which is not interrupted” or “uninterrupted”. Driving on Montée St-François and seeing prisoners there does not entitle Mr. Mailloux to a medium security/continual exposure PFA, because all employees would be so entitled if that were the case.

Ms. Couture argued that there are few decisions on this issue. There is the *Osmack* case (Board file no. 166-2-17218) and *Cahill, supra*, particularly at page 5, which is directly relevant to the decision to be rendered by the Adjudicator in this case. As commented by Vice-Chairperson Chodos (then Deputy Chairperson) in *Cahill*, the PFA is not immutable and can be amended.

With respect to Mr. Mailloux, once he leaves the storeroom, his exposure is interrupted, since he no longer has custody of the inmate working there. When he is in the presence of minimum security inmates at Montée St-François Institution and other centres, he does not have their custody. Moreover, when he leaves the correctional perimeter to go to the private clinic, Cité de la Santé or the post office, his exposure to inmates is thus interrupted. The employer has acknowledged that Mr. Mailloux’s exposure is continual when he works in the storeroom on the EQUINOX system, since he is in continual contact with an inmate he has to supervise. When he is assigned to the large or the small truck, surely there are interruptions in his exposure, which then becomes frequent. Ms. Dorais explained that the statement on the Personnel Action Request Form (Exhibit E-6) that [TRANSLATION] “... is not responsible for inmates” should have read “does not have custody”. In 1995, an administrative error was made with respect to Mr. Mailloux’s medium security/continual exposure PFA, but that error did not create any rights. There was no justification to continue to pay him a PFA at that level; the employer had to apply the agreement and rectify the situation.

Ms. Couture concluded by saying that the grievor had the burden of proof; Mr. Mailloux had to show that he has continual custody of inmates. According to Ms. Couture, Mr. Mailloux has not proved this and, therefore, his grievance must be dismissed.

Reasons for decision

First of all, I have to determine whether Mr. Mailloux assumes additional responsibilities for the custody of inmates within the meaning of article M-26.02 of the collective agreement and whether he is exposed to an immediate danger. Secondly, if so, I must determine the degree of exposure when he assumes such responsibilities.

I find that, in reading article M-26.02 of the collective agreement, it is clear that an employee must have additional custodial responsibilities and not just be exposed “to immediate hazards of physical injury by assault and other disagreeable conditions” in order to be entitled to a PFA. The employer did not contest Mr. Mailloux’s exposure to such hazards; what remains to be clarified is whether he assumes additional custodial responsibilities.

Ms. Couture admitted that Mr. Mailloux has custodial responsibilities when he is in the storeroom of Leclerc Institution, because an inmate is there and all of the drivers-stock handlers have to supervise him. She argued that Mr. Mailloux’s exposure is interrupted when he leaves the storeroom, since he no longer has custody of the inmate working there, and that he is entitled to a medium security/frequent exposure PFA. Moreover, according to Ms. Couture, Mr. Mailloux does not have custody of other inmates when he goes to Montée St-François Institution and other centres where there are minimum security inmates.

In Adjudicator Galipeault’s decision *Osmack, supra*, the issue was whether Mr. Osmack was responsible for the custody of inmates who loaded or unloaded his truck pursuant to clause M-26.02 of the Master Agreement. Adjudicator Galipeault concluded as follows:

...

It is very clear to me that when Mr. Osmack was alone with inmates at the time of the loading and the unloading of goods to and from his truck, at Kent Institution, he was

responsible for the custody of the said inmates. When a correctional officer was present, said correctional officer was responsible for the custody of the inmates.

Counsel for the employer argued that nowhere, in Mr. Osmack's position description, do we see that he was responsible for inmates. Clause M-26.02 of the relevant Master Agreement does not say that one has to have the full responsibility for inmates in order to qualify for the Penological Factor Allowance. One only has to have, when he performs duties with inmates, "custody" of the said inmates. Having custody of a group of inmates for periods of approximately thirty minutes (time taken for loading and unloading of goods at Kent Institution, according to testimony of supervisor I. Shantz) does not mean having responsibility for the said inmates in the manner, for instance, that a supervisor has the responsibility for his subordinates.

...

Moreover, in *Cahill, supra*, it can be seen that custody is determined by the nature of the employee's duties and not the contact the employee may otherwise have with inmates:

...

I accept Mr. Cahill's assertion that he is now more visible to inmates and would have more direct access to them. However, the evidence is that Mr. Cahill's duties, as assigned to him by his superiors, have not changed as far as his contact with, and responsibility for inmates are concerned. Mr. Morey testified that the great bulk of the duties of the CMO involves preparation of reports. Mr. Cahill himself further acknowledged that, in his words, "I am a paper pusher", though he also insists that his "modus operandi" changed when he moved to B-4. I am not satisfied that, given the essential nature of Mr. Cahill's job as described by him and Mr. Morey, and as outlined in detail in his position description, the grievor can be said to warrant a penological factor allowance at the "continual" level. While I accept that he now has more contact with the inmates, in the absence of any corroborative evidence from his supervisors or others, I cannot conclude that this additional contact since his relocation to B-4, is a necessary part of his duties, rather than being, in his own words, a change in his "modus operandi". In any event, I am not satisfied that the additional contact involves the assumption of additional custodial responsibility, as envisaged in clause M-26.02. Mr. Cahill acknowledged that when he visits the inmates in their workshops, the workshop supervisor has custody of the

inmate; also, at the security post or on the range, it is the correctional officer who has that responsibility. It is only when seeing inmates in his office that Mr. Cahill has custody. This aspect of his job did not change appreciably when he had relocated from B-8 to B-4.

...

On the basis of these decisions, I therefore conclude that Mr. Mailloux has additional custodial responsibilities as described in article M-26.02 of the Master Agreement when, as part of his work, he is in direct contact with inmates and must supervise, control, or monitor their work. However, he no longer has those responsibilities when he drives his truck within the correctional perimeter or goes to the post office, the private clinic or Cité de la Santé. It must be inherent in his duties that he have custody of inmates by supervising their work in handling goods or being alone with them when the truck is being loaded or unloaded; that is the nature of the custody referred to in article M-26.02 of the Master Agreement.

Turning to the second issue, I believe that the wording of article M-26.03 of the collective agreement is clear, especially when reading the definitions of continual and frequent exposure. For the term “continual” to have any meaning, the exposure must last all day. However, as soon as the exposure is for part or parts of the day, it becomes frequent. Relying on previous decisions, and particularly *Turgeon and Vaillancourt* (Board files no. 166-2-15624 to 15639 and 166-2-15775), Adjudicator Brown concluded that the words “continual” and “frequent” must be given their ordinary meaning; he stated the following at p. 6 of his decision:

...

Were the terms “Continual” or “Frequent” not defined in the collective agreement, there would be reason, no doubt, to look outside the collective agreement for some understanding of what exactly these terms mean. The definitions given to these terms are, however, clear and unambiguous and must, accordingly, be given their ordinary meaning. To be “Continual”, exposure to inmates must be “throughout the day and recurring daily” or, as stated in the French version of the collective agreement, must be “pendant toute la journée et les jours suivants”. This was not so for the grievors according to the evidence before me. Frequently they would spend only some 42 hours of their shift in contact with “maximum” security inmates. . . .

...

The evidence shows that Mr. Mailloux is exposed to medium security inmates for only part of the day, and it is therefore my view that he is not entitled to receive a medium security/continual exposure PFA. The employer is properly giving him a medium security/frequent exposure PFA when he is assigned to the trucks.

Although the parties did not argue this issue, I must consider the fact that the *Turgeon and Vaillancourt, supra* decision was judicially reviewed (Federal Court of Appeal, file no. A-343-88). In its judgment, the Court stated that frequent or limited exposure at one level of security does not exclude the possibility of frequent or limited exposure at another level of security. Thus, the Court concluded that:

...

As we read article 26 and Appendix A, they provide for payment of a P.F.A. and prescribe the rates at which it is to be determined in accordance with the actual degree of exposure of an employee to inmates and the actual level of security at which that exposure takes place.

Clearly a degree of exposure which is "continual" at whatever level of security excludes any lesser degree of exposure at any other level of security. But where the degree of exposure is "frequent" or "limited" at one level of security, that does not exclude the possibility of the same employee having frequent or limited exposure at another level of security. Since the allowance is stated to be given in compensation of additional responsibilities and exposure to hazard, it would seem both logical and equitable to allow the rates to be cumulative in such cases. The quoted passage of the Adjudicator's decision would seem to amount to a holding that the grievors had frequent exposure to inmates in both maximum and minimum security institutions; applying those findings to the grid would give an entitlement of 50% for frequent-maximum and of 20% for frequent-minimum, for a total of 70%. To hold, as the Adjudicator seems to have done, that a lesser rate is always subsumed by a greater and disappears into it is to deny any compensation for the admitted responsibility and exposure that the agreement recognises in even limited contact with minimum security inmates.

...

Following that decision, in *Osmack, supra*, Adjudicator Galipeault concluded that when Mr. Osmack loaded and unloaded his truck, he was entitled to a PFA at both

the medium security/frequent exposure and maximum security/frequent exposure levels.

Ms. Couture argued that when Mr. Mailloux is with inmates at minimum security institutions, he does not have their custody. However, the evidence showed that Mr. Mailloux generally has frequent exposure to minimum security inmates at Montée St-François Institution, the Immigration Centre, the regional warehouse and the staff college. Mr. Mailloux testified that he supervises those inmates when they load goods into or unload goods from the small and large trucks, and that evidence was not disputed by the employer. Such supervision is similar to the supervision he must exercise over the inmates who load goods into the truck at Leclerc Institution. Ms. Dorais acknowledged that the supervision he exercises over those inmates, as described in the memorandum from the storeman (Exhibit E-13), represents an additional custodial responsibility.

Accordingly, when Mr. Mailloux supervises the inmates who load or unload goods at minimum security institutions, he is exposed to a hazard. In view of the Federal Court of Appeal's decision in *Turgeon, supra*, Mr. Mailloux is also entitled to a minimum security/frequent exposure PFA for that hazard, which would be added to the medium security/frequent exposure PFA he receives at Leclerc Institution. Under article M-26.04 of the Master Agreement, Mr. Mailloux is rightfully entitled to a PFA of 30 percent, or \$480 a year, for Leclerc Institution and another PFA of 20 percent, or \$320 a year, for Montée St-François Institution and other institutions where he is in contact with minimum security inmates. In his grievance, Mr. Mailloux asked for a PFA of \$800. When the two PFAs I have just set out are added together, he is entitled to a PFA of 50 percent, or \$800 a year.

Mr. Mailloux's grievance is therefore allowed, since he is entitled to a PFA of \$800 a year as of August 30, 1996, that is, the 25th day prior to the filing of his grievance (see *Canada (National Film Board) v. Coallier*, Federal Court of Appeal, file no. A-405-83, September 13, 1983).

**Guy Giguère,
Board Member**

OTTAWA, June 9, 1999

Certified true translation

Serge Lareau