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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**ROGER BEAL**

Grievor

and

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

Employer

***Before:*** [Guy Giguère, Deputy Chairperson](#)

***For the Grievor:*** Michael Tynes, Public Service Alliance of Canada

***For the Employer:*** Renée Roy, Counsel

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Heard at Moncton, N.B.,  
August 28, 2002.

## DECISION

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[1] Roger Beal is a labour program officer (GL-MAN-06-0-B1) at Dorchester Penitentiary in New Brunswick. On June 16, 1997, Mr. Beal grieved that his penological factor allowance (PFA) was reduced from \$1600 to \$800 per year while in fact he is supervising maximum-security inmates on an on-going basis. He requested that his PFA be reinstated at the maximum level.

[2] Article M-26 of the Master Agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) sets out the terms and conditions of the PFA. It reads as follow:

### 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:

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

### Amount of PFA

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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.*

...

[3] J.G. Mills, the Warden of Dorchester Penitentiary, replied for the employer at the second level of the grievance process. He explained that he reviewed the type of offenders that Mr. Beal supervises as part of his work gang of special-needs offenders. He found that “for purposes of PFA, you have continual contact with medium security offenders, and limited contact with maximum security offenders. Consequently, your PFA remains at \$800 per annum.”

[4] At the third level, the Regional Deputy Commissioner wrote that after a thorough analysis, the employer concluded that Mr. Beal's PFA entitlement differs from what had originally been established. He explained that the PFA is based on where an employee actually works and that for purposes of calculating the PFA the Dorchester Penitentiary is a medium-security institution, with the exception of the Regional Treatment Centre (RTC) and the Segregation/Temporary Detention (TD) Unit, which are considered maximum security. The Regional Deputy Commissioner found that:

*...You are now deemed to have two distinct levels of contact with offenders, i.e. you have frequent contact with medium security offenders, while working in the medium security part of Dorchester Penitentiary, (**\$480 per annum**) and you have limited contact with maximum security offenders, to*

*reflect the percentage of time that you are physically working in the maximum security environment of the RTC (\$480 per annum). Consequently, the total amount of PFA which you are entitled to is \$480.00 plus \$480.00, for a total of \$960.00 per annum.*

...

[5] At the final level of the grievance process, Mr. Beal's grievance was also partially upheld, as the employer explained that upon further analysis it was determined that Mr. Beal has frequent contact with inmates at a maximum-security institution (\$800.) and frequent contact with inmates at a medium-security institution (\$480.) for a total of \$1,280.

[6] Mr. Beal's grievance was referred to adjudication on September 14, 1999. The PSAC and the employer initially agreed that this grievance be dealt through the expedited adjudication process. However, on February 27, 2002, the PSAC informed the Public Service Staff Relations Board (PSSRB) that the parties could not agree on the facts and the grievance therefore could not proceed through the expedited adjudication process. Accordingly, on February 27, 2002, the PSSRB informed the parties that this grievance would proceed through a formal hearing, which was held on August 28, 2002.

### Evidence

[7] Marc Bélanger, Assistant Warden, Management Services, explained that in 1988-89 Dorchester Penitentiary went from a maximum-security to a medium-security institution. This coincided with the opening of the Atlantic Institution at Renous, New Brunswick, which was designated as a maximum-security institution for the Atlantic Provinces. Mr. Bélanger indicated that at the time the Warden did not address the issue of the change in the PFA of employees as a result of the change in the security classification of Dorchester Penitentiary.

[8] Mr. Beal started working at Dorchester Penitentiary in 1994, receiving the PFA at the maximum level. His PFA was reduced to \$800 after he received a memorandum dated April 11, 1997 from the Warden, Mr. Mills. This memorandum to all staff indicated that there was a change in the PFA for the majority of staff, effective June 1, 1997. Mr. Mills indicated to employees that the rates of the PFA resulting from

the change of security level of the penitentiary from maximum to medium would now be \$800 for continual contact and \$480 for frequent contact. Mr. Mills pointed out that:

...

*This amendment to PFA is a direct result of Dorchester Penitentiary's re-classification from a maximum security to a medium security institution, with the exception of the Regional Treatment Centre, Segregation and TD Units.*

...

[9] Mr. Bélanger explained that, even though by Commissioner's Directive 006, "Classification of Institutions" (Exhibit E-1), Dorchester Penitentiary is classified as a medium-security institution, by local determination, for PFA purposes only, part of the Penitentiary (the RTC and the Segregation/TD Unit) is considered multi-level. Employees working in those units receive a PFA at the maximum level, as explained in Mr. Mills' memorandum of April 11, 1997.

[10] The RTC is a regional site for the treatment of offenders with psychological disorders. Within the RTC there can be inmates at minimum, medium and maximum-security levels who are being treated. As for the Segregation Unit, an inmate (maximum or medium) will be sent there either if he could injure himself or others or for disciplinary reasons (contraband, abusing staff, etc.). The TD Unit is no longer used.

[11] There are about 425 inmates at Dorchester Penitentiary. Of those 425 inmates, 25 are in the RTC. Mr. Bélanger estimated that out of the total number, 15 inmates would be at the maximum-security classification, with about nine in the RTC and six in the general population area.

[12] Mr. Bélanger explained that there are several reasons why maximum-security inmates are at Dorchester Penitentiary. If they are at the RTC, it is for treatment as this is the Regional Treatment Centre where all inmates of the region are sent for treatment. Inmates awaiting transfer to a maximum-security institution could be held in the Segregation Unit until they can be transferred to a maximum-security institution. An additional reason is that an inmate is to be housed in the least restrictive way as possible because of the principle found in the *Corrections and Conditional Release Act* (1992, c.20). In doing so, a team will assess evidence in view of security of staff and

inmates and potential for escape. If the risk is deemed assumable, maximum-security offenders will be housed within a medium-security setting.

[13] Mr. Beal explained that he is responsible for a workshop where he supervises inmates. The inmates employed in this workshop are responsible for the general grounds maintenance of Dorchester Penitentiary (tree pruning; grass cutting; snow removal; moving furniture; assisting in other trades; etc.). Depending on the season, from six to 12 inmates are employed in the workshop.

[14] Mr. Beal testified that he has continual custody of the inmates under his supervision. Medium-security inmates will arrive in his workshop around 8:15 a.m., leave for lunch at 11:45 a.m., come back at 1:15 p.m., and leave for the day at 3:45 p.m. He will pick up maximum-security inmates at the RTC door in the morning and after lunch and escort them to the workshop. He escorts them back to the RTC for lunch and at the end of the workday. Mr. Beal testified that inmates will go out on the grounds to do maintenance work and that every 5 to 10 minutes he can go out to check and see what they are doing.

[15] When Mr. Beal received a copy of the Warden's memorandum concerning the change to the PFA, he went over to the Employment Centre to get a list of the inmates at Dorchester Penitentiary (Exhibit G-3). From that list he was able to identify several inmates who had previously worked in his workshop and were at the maximum-security classification. Some of those maximum-security offenders were housed in the RTC, and would be under strong medication, while others were housed in the general population area. As Mr. Beal was supervising maximum-security inmates, he filed the instant grievance.

[16] The employer conceded, at the hearing, that Mr. Beal had under his supervision two inmates at the maximum-security level since he filed his grievance in 1997. However, Mr. Bélanger specified that Mr. Beal's custody of maximum-security offenders was for interrupted periods (Exhibit E-4). As well, the grievor did concede that he worked for only limited periods of time in the RTC and the Segregation/TD Unit (Exhibits E-5 to E-9).

ArgumentsFor the Grievor

[17] Mr. Tynes submitted that Dorchester Penitentiary is really a multi-level security institution even though it is classified as a medium-security institution. The RTC and the Segregation/TD Unit are deemed to be maximum-security units. There are also maximum-security inmates housed in the general population area. What is important in applying the PFA is not where those inmates are housed, but whether an employee has custody of maximum-security offenders. Mr. Beal not only has custody of maximum-security offenders, but his custody is continual as has clearly been shown.

[18] Mr. Tynes submitted that there is an element of past practice that has been established by the employer. While officially Dorchester Penitentiary is classified as a medium-security institution, some areas of Dorchester Penitentiary are considered maximum-security. Mr. Beal was hired and received the maximum FPA on a continual basis since 1994. Nothing changed between 1994 and 1997, and Mr. Beal's PFA was modified arbitrarily.

[19] Mr. Tynes submitted that the employer cannot have it both ways, as it is not applying the medium-security classification throughout Dorchester Penitentiary. What is important is the exposure to maximum-security offenders, not where they are housed.

[20] In support of his arguments, Mr. Tynes relied on the following case law: *Racicot et al.* (Board files 166-2-17294 to 166-2-17303) and *Trudeau* (Board file 166-2-16675).

For the Employer

[21] Ms. Roy submitted that the formula used to calculate the PFA is established in clause M-26.04 of the Master Agreement between the Treasury Board and the PSAC. This formula takes into account the degree of contact that employees have with inmates (continual; frequent; limited) and the type of institution where the employees work (maximum; medium; minimum). There is no reference in the formula to the security classification of inmates. If the bargaining agent wanted the PFA to be based on the classification of inmates, this should have been negotiated.



[22] Ms. Roy submitted that past practice is relevant in a claim for estoppel; however, Mr. Tynes did not make such a claim for estoppel. In the instant case, estoppel cannot be established, as there was no reliance to his detriment by Mr. Beal on the reception of the maximum-level PFA or evidence that Mr. Beal would have acted differently had he known that he would not be receiving the maximum PFA.

[23] In essence, the employer submits that under Article M-26 of the collective agreement, it is the security level of the penal institution that determines the PFA level. However, the employer can determine that part of the institution be deemed at other levels for the purposes of the PFA. In the exercise of its discretion, management at Dorchester Penitentiary decided to be more generous with its employees, presumably because of the inmate profile within the RTC and the Segregation/TD Unit. Therefore, employees working in the multi-level security units of the RTC and Segregation are receiving the maximum level PFA. This is not a breach of the collective agreement and as a result of this decision Mr. Beal has been treated more generously, receiving a blended PFA at the medium and maximum levels.

[24] In response to my question, Ms. Roy confirmed that it was the employer's view that an employee working in a maximum-security unit and having custody of only medium-security inmates should receive a PFA at the maximum level.

[25] Ms. Roy relied on the following case law: *Osmack* (Board file 166-2-17218); *Osmack v. Canada (Treasury Board)*, [1989] F.C.J. No. 814; and *Mailloux* (Board file 166-2-28560).

### Reasons for Decision

[26] I would like to first address Mr. Tynes' argument that there is an element of past practice that has been established by the evidence. Mr. Tynes did not argue that the employer was estopped from modifying Mr. Beal's PFA. However, as Messrs. Brown and Beatty explain in *Canadian Labour Arbitration*, Third Edition, at 3:4430, past practice can be used as an aid to interpretation of a collective agreement provision that is ambiguous. It seems that before May 1997, the PFA paid to employees at Dorchester Penitentiary was at the maximum level. Since there are a limited number of maximum-security inmates (15 out of a total of 425), it appears that the Institution's employees were receiving the maximum level of the PFA irrespective of their custody

of offenders. I therefore find that evidence of past practice of the employer is not helpful here.

[27] The main issue raised in this grievance is how to determine the appropriate penological factor in the context of a multi-level institution such as Dorchester Penitentiary. Under clauses M-26.03 and M-26.04 of the Master Agreement, the PFA is calculated by the degree of contact and the security classification of the institution (maximum; medium; minimum). The employer agrees that Mr. Beal has had custody of inmates at the maximum-security level in a medium-security environment (his workshop and the Institution's grounds). This has occurred from time to time since the filing of the grievance in 1997.

[28] The first question to be answered in determining penological factors is the degree of exposure to inmates. There has been some confusion by the employer's assessment of Mr. Beal's degree of contact, which went from continual to frequent to limited. The grievor has submitted that he has continual exposure to inmates at the medium and maximum-security levels and therefore is entitled to a PFA at the maximum level. The evidence before me is that Mr. Beal has custody of inmates on a continual basis throughout the day, which is only interrupted when the inmates return to their units for lunch and after work. He is responsible for them throughout the working day. I therefore find that Mr. Beal has a continual exposure to inmates for the purposes of the PFA.

[29] The second question to determine is the security level of the institution. The evidence has shown, and it was submitted by the employer, that even though Dorchester Penitentiary is officially classified as a medium-security institution, it is in fact a multi-level security institution. Dorchester Penitentiary is a multi-level institution where there are certain units classified as maximum-security while the rest of the Institution is classified as medium-security. Inmates are placed in maximum-security or medium-security units. For purposes of penological factor, the employer pays maximum-security penological factors when an employee is physically performing his or her duties within a maximum-security unit, and medium-security penological factors when physically performing duties in a medium-security unit. The difficulty with this approach is that it fails to recognize that at various times employees such as Mr. Beal have custody of inmates who are housed in one area of the penitentiary (maximum-security) in areas outside of the unit (medium-security).

[30] The employer's approach to penological factors in such situations is to pay employees based on where the duties are performed. This can lead to absurd and unjust results. Mr. Beal could be supervising only maximum-security inmates and be paid one PFA if the work is on one side of a fence (maximum-security unit) and a different PFA if the work is on the other side (medium-security unit). In each case the risk for which the PFA is being paid is the same.

[31] In the absence of a provision in the collective agreement dealing with multi-level institutions, I believe that we have to look at the general principles upon which the PFA's are based. These principles are found in clause M-26.02 of the collective agreement. To receive a PFA, an employee has to have custody of an inmate and be exposed to "immediate hazards of physical injury by assault and other disagreeable conditions". The underlying reason for such factors is the risk posed by inmates in the variously classified institutions. Inmates in a maximum-security institution pose a greater risk than those in a medium-security institution. In a multi-level institution such as Dorchester Penitentiary, there are different units with different security classifications. It is as if each unit is a different institution. And as noted above, inmates are placed in one unit or the other.

[32] The *Osmack* and *Mailloux* decisions (*supra*) are helpful in resolving the issue of this grievance. In these cases it has been determined that employees working in differently classified institutions and having custody of inmates in these different institutions are to receive a different PFA for each level of security. I find that similar reasoning should apply in the present institution, where inmates are temporarily moved from one "institution" to another. Instead of the employees working in one institution and then another institution, the inmates move back and forth. In this situation, the employee is exposed to the same risk as if the employee worked in one institution and then another institution.

[33] As a result Mr. Beal is entitled to a continual maximum-security institution penological factor allowance for the periods of time he had custody of inmates housed in maximum-security units, regardless of where in Dorchester Penitentiary the work was performed. To this extent the grievance is allowed. As requested by the parties, these periods will be established by them, and I will retain jurisdiction of this matter for a period of 60 days in the event that they have difficulties in its application.

[34] It is apparent from the evidence that there is some confusion in dealing with the PFA in a multi-level security institution such as Dorchester Penitentiary. I believe that, in the interest of good labour relations, the parties should quickly address in negotiations the issue of the PFA payable in a multi-level security institution.

**Guy Giguère,  
Deputy Chairperson**

OTTAWA, October 25, 2002.