Date: 20001024

File: 166-34-29529

Citation: 2000 PSSRB 93

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PATRICK MADDEN

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Anne E. Bertrand, Board Member

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

For the Employer: Harvey A. Newman, Counsel

Heard at Halifax, Nova Scotia,
August 29, 2000

DECISION

Introduction

1. This matter was referred to adjudication for an aggrieved one-day suspension imposed upon the grievor after he sent written communications to his supervisor complaining of unfair hiring practices. At the hearing, the employer argued that the one-day suspension was justifiable action given that the writings constituted insubordination, while the bargaining agent found the suspension to be excessive disciplinary action given the absence of prior discipline in this case. The grievor was challenging the employer's decision in not having selected him for a promotion.

I – FACTS

2. At this hearing, the adjudicator heard evidence from Jim McNeely, the Assistant Director of Verification and Enforcement for the then Revenue Canada (now Canadian Customs and Revenue Agency), and Herb Minard, Audit Manager for the Small and Medium Enterprises Program - Enforcement at the Halifax Tax Services office of the Agency. The grievor, Patrick Madden, was not present at the hearing and therefore did not testify.

3. This case stems from memoranda issued by Madden to McNeely back in September of 1997. McNeely was one of several Assistant Directors who reported to the Director, Don Gibson., and McNeely was in charge of some 200 employees and 23 team leaders. Minard was one of his team leaders. Patrick Madden reported to Minard. Madden was an income tax auditor at that time. Madden is now with another group since March of 1998 and he reports to another team leader. An employee of some 23 years of service, Madden had nothing on his employee file.

4. McNeely first met Madden in 1990 when McNeely became Assistant Director. Madden at that time reported to Herb Terris, team leader, who has since retired in 1997 and his position was filled by Minard.

5. On September 26, 1997, McNeely received a memorandum from Madden in which Madden accused McNeely of favouring certain employees for promotion and questioning McNeely's staffing authority. The contents of the memorandum offended McNeely, who testified to his surprise in receiving such a note. McNeely consulted staff relations who suggested that McNeely reply in writing to Madden explaining the promotion practices and procedure for discussion on those issues, and for this reply to be delivered by Madden's team leader who would take the time to explain its contents. The point of this exercise was to ensure that Madden not only be made aware of the Agency's practices but also to impress upon him that he ought to bring concerns to his team leader first in a normal and professional manner. This meeting would warn Madden that his conduct was unacceptable and he would consequently receive an oral reprimand.

6. Minard met with Madden on October 6, 1997. He submitted McNeely's reply in order to explain the practices regarding promotion, and Minard also impressed upon Madden that his memorandum to McNeely was inappropriate. Minard informed Madden that his actions suffered an oral reprimand. According to Minard, the meeting lasted thirty minutes and their discussion was open and amicable. While Minard was clear that he had advised McNeely of this disciplinary action, his notes of such meeting do not indicate that he issued an "oral reprimand", but rather that this conduct could not be accepted as a way of communicating issues of concerns (see Exhibits E-3 and E-12). Minard reported back to McNeely and the latter was satisfied that that was the end of the matter.

7. On October 29, 1997, however, Madden issued another memorandum to McNeely complaining of the same thing and making his displeasure this time more obvious. Once again, McNeely consulted staff relations, and they advised that Madden's communications

probably constituted harassment and insubordination. It was also brought to the attention of staff relations that Madden had been reprimanded once before, back in 1996, for similar conduct, and apparently, it was an oral reprimand. This information was the impetus for the employer to issue more than an oral reprimand to Madden this time. Furthermore, while McNeely had the authority to issue a suspension to Madden, he chose not to be directly involved given Madden's personal attacks upon McNeely and the fact that McNeely could file a complaint of harassment against Madden.

8. McNeely deferred this matter to the Director. Staff relations recommended a one to two day suspension. McNeely was not part of the final recommendation to issue a one-day suspension but he subscribed to such a decision.

9. Here are a few passages found in Madden's correspondence to McNeely, cited exactly as presented in handwritten and typewritten form:

> *Look Jim (...) fully satisfactory performance review!! It's a Miracle!! I can audit! I gave you extra copies to let the other 2 assholes read them (D... & A...).*
> *(...) they can talk about the good old days when they screwed a PM for 5 years and got away with it!!*
>
> (Exhibit E-9)

* * *

> As usual YOU made the decision to EXCLUDE ME from any appointments. YOU have a HISTORY of EXCLUDING me getting any permanent appointments from AU-1 lists.(...) As usual YOU SHOVEL the same STANDARD REPLY.(...)
> These same 3 INDIVIDUALS YOU SHOWERED with acting appointments were also given permanent positions from the recent AU-1 list. I am SURPRISED YOU even held a competition for THEM.
>
> (Exhibit E-2)

* * *

> As a result of discussing my situation with some of the auditors, their comments were UNANOYMOUS YOU DON'T HAVE THE COURAGE TO STAND UP AND ADMIT THAT YOU HAVE ME BLACKLISTED. YOU PROVED THEM RIGHT. (...)
> THIRD, your comments about YOUR PROMOTIONS being based on MERIT IS A JOKE. (...) I have been WORKING HERE a LOT LONGER then SOME of YOUR FAVOURITE MERIT PICKS.
> (...) AND SEE HOW IT FEELS BEING EXCLUDED FROM PROMOTIONS ALL OF THE TIME BECAUSE OF YOUR TWISTED PERCEPTION OF MERIT!
>
> (Exhibit E-5)

10. Madden had his communications to McNeely copied to other staff members as well as to the Director.

II – POSITION OF THE EMPLOYER

11. Mr. Newman suggested that the allegations of inappropriate action on the part of Madden were clearly established in the facts and more than justified the carrying out of a one-day suspension. Mr. Newman qualified the tone of the memoranda to McNeely by Madden as extremely disrespectful and sarcastic, with the use of capital letters and underlining for emphasis. The use of language not common in the workplace and the accusations towards McNeely regarding favouritism in the selection process were completely unacceptable and offensive.

12. Mr. Newman argued that employee Madden could have dealt with the staffing issues in a more civilized manner. His choice of becoming hysterical and sending copies of such memoranda to others for general publication was insulting and totally inappropriate. These memoranda clearly constituted insubordination, according to counsel for the employer.

13. While Madden had been placed clearly on notice in September of 1997 after having issued the first memorandum to McNeely that his conduct was not acceptable and that he should deal with such issues in a more professional and appropriate manner, he did not even have the good judgement to stop. He sent yet another memorandum shortly thereafter with the same insulting content, and again, directly to McNeely. Madden did not even attempt to deal with this through his team leader as he should have done, argued Mr. Newman.

14. Mr. Newman depicted such actions as "pre-meditated" as they took place not on the spur of the moment but rather over some time in a repetitive manner. Certainly when one considers that in 1996, when Madden did the same thing and was warned at that time that his employer would not accept such behaviour, it is arguably clear that he knew what he was doing, that he amply considered what he was doing, and that he nevertheless still continued this unacceptable behaviour.

15. The employer advanced that it cannot be disputed that Madden's actions constituted misconduct and that a penalty was warranted. In the circumstances of this case, argues Mr. Newman, the one-day suspension was quite appropriate. Given that Madden had been placed on notice in 1996 and again in September of 1997, there was no need for progressive discipline and the suspension was warranted. Such contempt towards his superiors and disruption in the work place could have attracted a more severe penalty, adds Mr. Newman. In support of this argument, Mr. Newman cites a passage *Canadian Labour Arbitration, 3rd Edition,* by the authors **Brown and Beatty** entitled *Insolent, unco-operative behaviour, obscene language (parag. 7:3660)* in which they subscribe to conduct warranting discipline but not discharge when an employee, without a prior record of discipline, is clearly put on notice, is seen to assume the risk of discipline if he chooses to continue when he ought to have known that penalty could result.

16. Further, Mr. Newman reported that in a case where the employee apologizes for his actions and where there are explanations for the bad conduct, the penalty imposed should reflect the intended corrective measure as opposed to simply being punitive. Such as in the case of **MacLean v. Treasury Board (January 7, 1999) (Board file 166-2-27968)**, a long term employee with no prior records was issued a 15-day suspension after repeated unacceptable behaviour in the work place. The adjudicator in that case reduced the penalty to 10 days on the basis that the 10-day suspension ought to provide the employee the message that his unacceptable conduct ought to stop. That employee had apologized. In contrast, stated Mr. Newman, Madden has never apologized for his actions. And, until he was issued a one-day suspension, his conduct did not stop. The one-day suspension had the intended corrective measure to make Madden realize such conduct was not going to be tolerated given that the oral warnings had not been effective.

17. In closing, Mr. Newman remarked that it is the duty of the reviewing tribunal not to reduce the penalty imposed in any case unless the penalty is determined to be clearly unreasonable or wrong in the circumstances (see **Bousquet v. Treasury Board (April 21, 1987) (Board file 166-2-16316)**. Nothing in this case suggests that the one-day suspension was not reasonable in the circumstances, and consequently, an adjudicator ought not to interfere with the penalty.

III – POSITION OF THE GRIEVOR

18. Mr. Tynes proposed that Patrick Madden was upset and angry over his lack of success in "moving up the ladder" during the selection process for promotions as an auditor with the Agency. It would appear that the memoranda were written and sent when Madden was angry and frustrated. While the grievor did not testify, Mr. Tynes advanced the supposition that Madden accepted some fault for his actions. The only issue was the penalty imposed. Madden was a long term employee with no prior record, and this incident was his first formal discipline.

19. Mr. Tynes did not accept the fact that Madden had been issued an oral reprimand in September of 1997 because the notes of Minard did not reflect this point. Moreover, Madden was not warned that if he continued, he would receive a more severe reprimand. Mr. Tynes argued that if such had been done, it would probably have had the intended effect and Madden would have stopped. The one-day suspension was too severe in such circumstances.

20. In referring to the same passage by the authors **Brown and Beatty**, Mr. Tynes cited factors which ought to be considered in assessing the appropriate penalty for this type of misconduct: the presence or absence of provocation, the existence of progressive discipline, the behaviour pattern of the grievor, the length of his service, the context in which the remarks were made, and so on. Mr. Tynes remarked that there was no provocation nor progressive discipline in this case, and the grievor had no prior behaviour pattern. His length of service is important, 23 years at the time, and the context in which he made the remarks is also important given that he was upset for having been passed over for a promotion. Madden was not trying to insult or hurt McNeely, but rather hurting himself, added Mr. Tynes.

21. As for the matter of oral reprimands, Mr. Tynes referred to the case of **Re Hiram Walker & Sons Ltd. v. Distillery Workers, Local 61 (1973), 4 L.A.C. (2nd) 291** in which it was found that oral warnings are not part of an employee's record and therefore ought not to be used as part of the disciplinary process:

> And in Re Corp. of the County of Norfolk and London District Building Service Workers' Union, Local 220 (1972), 1 L.A.C. (2d) 108 (Palmer), the chairman ruled that an unfavourable annual report on an employee was not disciplinary and proposed that "In order to characterize an employer's action as disciplinary, it must at least have affected the concerned employee's record." For these same reasons, oral warnings or reprimands should not be considered acts of discipline within the meaning of the collective agreement or the letter of February 5, 1971. While oral warnings are intended to induce conformity to acceptable conduct within an enterprise, oral warnings

> are generally not documented, at least not in the same way as written reprimands, and by implication of cl. 15 can never be used against an employee except perhaps in justifying a subsequent written reprimand (the next response of management to improper conduct). Furthermore, if oral warnings were considered to be acts of discipline, the grievance system would be clogged with the unavoidable bickering and cajoling entailed in "front line" supervision and the litigation of minuscule infractions of company rules.

22. Such a view had been shared by many arbitrators according to Mr. Tynes.

23. The discipline imposed ought to have been considered a first discipline in this case, and as such, Madden ought to have been issued a written reprimand only. In support of this position, Mr. Tynes referred to the decisions of **Rainville v. Treasury Board (January 29, 1988) (Board file 166-2-15753)** and **Blagoeva v. Atomic Energy Control Board (April 28, 1987) (Board file 166-3-16482)**.

24. While Mr. Tynes recognized that the memoranda were disrespectful, the written reprimand would have achieved the intended result. The one-day suspension was therefore excessive.

IV – ISSUE

25. Was the penalty of a one-day suspension upon Patrick Madden for his conduct towards his superior in 1997 an appropriate penalty in the circumstances ?

V – DECISION

26. In order to answer the issue of this case, this adjudicator must first address the question of the conduct of Patrick Madden, ie. how would it be qualified. I heard evidence that his conduct amounted to insubordination. The bargaining agent conceded that the memoranda were "disrespectful" , but that they were made in anger and frustration with no intent to insult.

27. While Mr. Tynes was dutifully careful in his choice of words to describe the conduct and intention of Patrick Madden with respect, it is impossible to assess what Madden's true intentions were at the time he wrote the memoranda for the reason that he did not testify. I was therefore unable to hear him describe what he was going through at the time, how he felt, why he wrote those memoranda, what he understood the meeting with Minard to signify, and whether he was apologetic. All that we have is the written evidence which speaks for itself.

28. In this regard, I must say that the memoranda written by Madden to McNeely are insulting, offensive, and clearly inappropriate. Moreover, the fact that such writings were submitted to a superior in the workplace, with copies to other staff and management to ensure that others read what Madden thought of McNeely, clearly points to insubordination. Insubordination is such behaviour which is insolent and contemptuous of members of management with a resistance to or defiance of the employer's authority (**Brown and Beatty, par. 7:3660**). Such conduct is in contrast to a momentary flare-up of temper which does not challenge the employer's authority. This case could not be said to involve momentary flare-ups of temper. Madden took the time to type full length memoranda and placing emphasis on certain words by using capital letters and underlining.

29. Madden's behaviour was insolent in the use of the language in his memoranda which were quite evidently not appropriate for professional offices, and also defiant in that Madden not only questioned McNeely's hiring practices and his decisions on the promotion of his employees, but also was accusing him of being corrupt in this process.

30. Having said this, the behaviour exhibited by Madden was not accompanied by refusal to work, disruption in the workplace, nor threats of violence. Thus, the misconduct can be viewed in a much larger context as minor, but certainly not acceptable by any means.

31. Having determined that Madden's conduct constituted insubordination of a minor type, what

then ought to have been the appropriate disciplinary measure?

32. And, does this adjudicator have the power to review the discipline imposed beyond its "reasonableness"?. Reference is made to authors **Brown and Beatty** and their analysis on the scope of review:

> A second context in which an arbitrator may undertake a review of a disciplinary sanction imposed by an employer on a member of its workforce arises under those statutes which specifically provide for a broad power of arbitral review as to the appropriate discipline to be imposed. In this context, however, arbitrators have expressed significantly differing views as to the legitimate scope of their review of the propriety of a disciplinary penalty. On the one hand, some arbitrators have envisaged their jurisdiction as including a broad and significant power of review, almost in the nature of second guessing, to determine whether the discipline imposed was just and reasonable. The premise upon which this power of review is based has been stated as follows:
>
> > None of these reasons [for a limited scope of review] are present in the area of disciplinary decisions made by management. The parties and the Legislature have explicitly provided for arbitral review. Disciplinary decision-making is not an expert function but rather a true question of fact in light of legal rules. And finally, a standard of deference carries very serious implications for an employee who has been wrongly disciplined but not disciplined in an arbitrary, unreasonable or manifestly unjust fashion.
>
> However, a second group of arbitrators, analogizing with the standard of arbitral review invoked in promotion grievances, have suggested that their review should not be equated with the power to second guess and ought not to be exercised unless the disciplinary action is "arbitrary, discriminatory, manifestly unjust or unreasonable". This view is justified on the grounds that:
>
> > The power conferred on an arbitrator by this section of the *Labour Relations Act, 1995* is wide and consequently it ought to be used cautiously and judiciously. It is hardly necessary to say that honest opinions do vary on the question of what is precisely just and reasonable in any given set of circumstances.

> The section ought not to be construed as an acknowledgement of an overriding omniscience on the part of arbitrators in matters of discipline. It would seem to me that unless the penalty imposed is, viewed objectively, manifestly unjust or unreasonable in all the circumstances, no substitution of penalty ought to be made.

A third standard, which can be seen as a variation of the first, would resolve the determination of whether the measure of discipline was just, not by whether the penalty imposed would be the one selected by the arbitrator herself, but rather on the basis of whether it "fell" within the range of reasonable disciplinary responses to the situation.

This lack of an arbitral consensus as to the appropriate standard of review also prevails where the grievance arises under special pieces of labour legislation, such as Police Acts or Public Sector Labour Relations Acts, or legislation relating to teachers or health care workers, which do not specifically empower the arbitrator with a broad scope of review. Traditionally, in circumstances such as these, the courts determined that the scope of arbitral review was much more limited. Following that direction, some arbitrators adopted the position that management was only required to prove that there was some misconduct for which some discipline could be imposed, and that the particular sanction selected should not be the subject of any review. Others asserted that in such circumstances the scope of arbitral review, though limited, should ensure that the particular form of discipline chosen by the employer was selected in good faith, and was not unreasonable in the sense of being out of all proportion to the particular offence. Under either of these latter standards, it was assumed that in the absence of some express statutory mandate permitting arbitrators to review the propriety of the discipline invoked, the scope of permissible review was much narrower than it had historically been assumed to be, and in all events, would not include the power to substitute some lesser penalty should just cause not exist for the discipine [sic] initially imposed. Ironically, under the latter of these two standards of review, although it was assumed that some deference should be shown to the choice of discipline imposed by the employer, if the arbitrator determined that the penalty imposed did not meet the standard of reasonableness, he was constrained to make the grievor whole even though he might be of the view that some lesser discipline would otherwise have been proper.

> However, following the decision of the Supreme Court of Canada in *Heustis v. New Brunswick Electric Power Com'n*, the fact that the grievance arises under a statutory regime which does not expressly include a mandate to the arbitrator to review the question of penalty as well as cause may no longer be a relevant basis of distinction for purposes of determining the appropriate standard of review. While not overruling its earlier *Port Arthur Shipbuilding* decision, the court did distinguish it in such a way as to relegate it, in the words of one commentator, "to the back of the jurisprudential closet". Advancing arguments of both institutional competence and labour relations policy, the court authorized arbitrators to exercise their full powers of review, notwithstanding that there was no explicit statutory authorization to do so. In the result, rather than the two traditional approaches pursued by arbitrators following *Port Arthur Shipbuilding*, it seems likely arbitrators can and will substitute penalties in the same manner and on the same tests as they presently do when they are expressly so authorized by statute.

33. I subscribe to this suggestion. Reviews of disciplinary penalties may include substitute penalties in cases where the tribunal will find it to be just to do so.

34. In this case, however, I see nothing unreasonable nor wrong in the one-day suspension issued to Madden. Madden had shown similar inappropriate conduct in 1996 at which time he was warned that his employer did not approve. Again, in September of 1997, he chose to conduct himself in a same manner. He ought to have known that management would not approve. He was warned again that such conduct would not be tolerated, and was issued an oral reprimand.

35. While Minard testified that he specifically told Madden that he was being issued an oral reprimand, the notes of this meeting do not so reflect, and I agree with Mr. Tynes that Madden may not have clearly understood that he was being issued an oral reprimand. Madden, however, did not testify and we are left with the evidence of the employer. I am satisfied from such evidence that Madden was warned once again in September of 1997 that his conduct was unacceptable. There was nothing in the evidence to suggest that Madden did

not comprehend nor fully understand the point of that meeting.

36. For Madden to persist in his misconduct just a few days after receiving the second warning was surprising. He either got the message that his conduct was unacceptable and he did not care what happened to him when he persisted - or - he did not get the message and simply continued to act in this way. In either scenario, Madden ought to have been disciplined. In the first instance, a more severe penalty than a warning was clearly warranted. In the second instance, a more severe penalty was equally warranted for the purpose of ensuring that he understood that such conduct had to stop. The employer made sure that it would not condone this type of behaviour the very first time Madden acted in this way. Further, there was no provocation in this case. An employee aggrieved of a decision ought to follow the appropriate course of action to resolve the issue, and the employee ought not to resort to personal attacks and insults upon his superiors for making such a decision. There is no evidence of any provocation on the part of Madden's superiors in this case.

37. With due regard to the arguments advanced on behalf of the grievor, I cannot find that the one-day suspension in his case was an excessive disciplinary penalty given all of the circumstances surrounding the insubordinate conduct. It is neither unreasonable nor wrong, and in fact, I find it to be an appropriate penalty in the circumstances.

38. On the basis of the foregoing, the grievance of Patrick Madden is denied.

ISSUED at Fredericton, New Brunswick, this 24th day of October, 2000.

ANNE E. BERTRAND
Member
PUBLIC SERVICE STAFF RELATIONS BOARD