

Bullie

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File: 166-2-29120

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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

CARALYNN MORRIS

Grievor

and

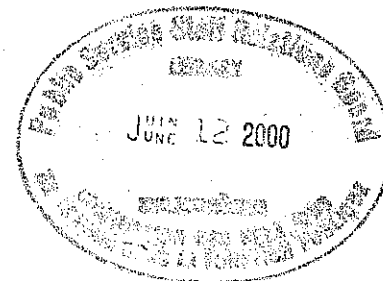
TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

Before: Francine Chad Smith, Q.C., Board Member

For the Grievor: Gail Owen, Public Service Alliance of Canada

For the Employer: André Garneau, Q.C., Counsel



Heard at Vancouver, British Columbia,
April 18 and 19, 2000

DECISION

[1] Caralynn Morris has been employed as a Correctional Officer 1 at the Mission Correctional Institution, a medium security facility, with Correctional Service Canada since July, 1994. As of August, 1998, she was working as an Acting Correctional Officer 2 and continued in that capacity during the relevant period of time.

[2] On April 13, 1999, her employment with Correctional Service Canada was terminated because she disobeyed a direct order to remain on the property on March 28, 1999. It appears from the letter of termination issued by the warden of the institution that he considered her conduct in leaving the property to be a withdrawal of service which amounted to her participating in illegal strike activity. The penalty of termination was pursuant to a directive from the national office of Correctional Service Canada to address problems encountered with staff designated pursuant to section 78 of the *Public Service Staff Relations Act* during a lawful strike which commenced at 0001 hours March 26th, 1999.

[3] Ms. Morris grieved her termination of employment and in the Final Level Grievance Response dated August 18, 1999, the termination was revoked and a \$1,000 financial penalty was issued *in lieu* thereof because Ms. Morris had received incorrect information about the consequences of her actions. Accordingly, her grievance was partially granted insofar as her employment was reinstated effective April 13, 1999, she received the base salary and benefits for a correctional officer 1, and all documentation relating to the termination was to be removed from her personnel file and destroyed. However, the Final Level Grievance Response declined to allow the other corrective action sought by the grievor, specifically:

1. *Reinstatement with all salary [at the correctional officer 2 level due to her acting as such at the relevant time], money, benefits and pensionable time lost ... & lost overtime, shift & weekend premiums*
2. *All costs in job searches be reimbursed*
3. *That all documentation related to this termination be removed from my file and destroyed in my presence*
4. *That I be made whole. (See Grievance, Exhibit G10)*

[4] Following the final level grievance response a second grievance was filed by Ms. Morris. That grievance, although marked as Exhibit E11, was not before me for adjudication. It claimed "[c]ompliance with my Final Level Grievance Response ... in that I be paid owed Acting Correctional Officer 2 pay for April 13, 1999 to September 18, 1999". Over the objection of counsel for the employer, I ruled the grievance before me, together with the final level grievance response, was sufficiently broad to allow me to address the full extent of the compensation claimed by the grievor including whether that compensation should be based upon salary at an acting correctional officer 2 level.

[5] The incident giving rise to the discipline occurred during the course of a lawful strike that affected correctional institutions across Canada. Caralynn Morris was a designated employee pursuant to section 78 of the *Public Service Staff Relations Act* and as such she was prohibited from engaging in strike activity pursuant to section 102 of the legislation. Although the legislation makes provision for the designation of employees, the result of which is to preclude them from engaging in strike activity and thus ensuring the safety and security of the public, there appeared to be a problem at the Mission Correctional Institution from management's perspective insofar as either they felt an insufficient number of correctional officers had been designated, or alternatively, all the designations had not been issued. While the facts surrounding this problem were not clear, it is nevertheless important because management contended it exacerbated the difficulty it was operating under as a result of the strike activity.

[6] In anticipation of the strike, the management at the institution identified all personnel excluded from the bargaining unit and the designated employees. The excluded personnel were prepared for the necessity of remaining on the institution's property on a 24 hour basis during the strike; however, it appears no advance notice of this potential requirement for designated employees was provided to them.

[7] At 0001 hours on March 26th, 1999, a picket line was formed on the access road into the institution. Although discussions had taken place and continued to take place between the employer and the union regarding the flow of personnel through the picket line, no specific agreement was reached with respect to the passage of designated employees through the line. Without attributing blame to either side, I regard this situation as appalling and one that should not be tolerated in light of the

specific objective under the *Public Service Staff Relations Act* of protecting the safety and security of the public during lawful strike activity. This situation strikes me as being particularly pernicious given the obvious concerns about the safety of the designated employees and the excluded employees, not to mention the public at large and the inmates of the institution.

[8] As a result of the picket line being up and the resulting lack of certainty with respect to whether and when the designated employees could get through the line, management was concerned about maintaining its staff complement.

[9] The particular facts that gave rise to the discipline occurred on the morning of March 28, 1999. Ms. Morris had worked the 1500 to 2300 hour shift on March 27 and had been required to remain on thereafter to work the 2300 to 0700 hour shift. At approximately 0630 on March 28th she was in the staff office of the Douglas Manor Residence with two other correctional officers, Mr. Ralph Evans and Mr. Allan Edwards. Supervisor Surge Cumiskey and Supervisor Marvin MacNeill entered the Douglas Residence; Cumiskey went into the staff office while MacNeill remained just outside the door to the staff office. MacNeill, Edwards and Morris testified as to what occurred at that time. While none of those parties gave the same account, the accounts provided by Edwards and Morris were quite consistent and accordingly, based primarily on their evidence I find the following events transpired.

[10] Supervisor Cumiskey, upon entering the staff office, laid three letters upon the desk and said words to the effect, "I'm sorry to have to do this to you people". Both Edwards and Evans each picked up the letters addressed to them and Morris picked up the third letter. It appears it was through inadvertence that the third letter on the table was addressed to Correctional Officer Finlay and not to Morris. When Edwards picked up his letter and noted it required him to remain on the institution property, he entered into a conversation with Cumiskey explaining how he required medication which was at his home. That conversation became somewhat heated and after it ended, both Cumiskey and MacNeill left the building. At no time did Ms. Morris advise either Cumiskey or MacNeill that the letter she received was addressed to Finlay; nor did she inquire with respect to whether or not she was required to remain on base. After Cumiskey and MacNeill left the Douglas Residence, Morris recalled the three officers engaging in discussion pertaining to concluding their shift; whereas Edwards recalled some discussion at that time or while Cumiskey and MacNeill were around

about Morris's need to go home to attend to her dogs. In this regard I accept the evidence of the grievor that the discussion about her dogs occurred after Cumiskey and MacNeill left.

[11] At 0700 when the three correctional officers' shift ended, Morris went to the supervisor's office on the property to turn in a brew mash she had confiscated earlier in the day and a report regarding it. As no one was in the supervisor's office, she left both items on the desk and then, in keeping with regular procedure, went to the yard shack to turn over her keys to the officer coming on to relieve her. When she arrived at the yard shack, neither Edwards or Evans were there. As it turns out, those two officers, in keeping with the written instructions given to them, had boarded a bus to be transported to the adjacent Ferndale Institution where they would be billeted until it was time for their next shift.

[12] Officer Morris went to her vehicle and proceeded to leave the institution by the access road. As she approached the picket line she saw Mr. Duncan Palmer, the Institution Preventative Security Officer, who waved her over to the management vehicle. She pulled up alongside the management vehicle and when asked where she was going, advised Mr. Palmer that she had to go home to look after her two dogs. He then asked whether she had been relieved and Officer Morris replied that she had. Mr. Palmer then backed away from her vehicle and called the institution's strike central where he engaged in a conversation with Deputy Warden Brown. While he was engaged in the conversation Officer Morris proceeded to drive through the picket line. Once she was on the far side of the picket line she pulled over on to the side of the road and went into the union strike office. There she spoke with Officer Monahan, the president of the local Union of Solicitor General Employees and the local's assistant strike co-ordinator, and gave him the letter she had picked up from the office at the Douglas Residence. She then left and went directly home where she attended to her dogs, made arrangements with her brother-in-law to look in on them as might be required, and then slept.

[13] Officer Monahan testified confirming that he was in the union's strike office at the picket line and that he had received from Officer Morris a letter addressed to Officer Findlay requiring him to remain on the institution's premises on May 28th in between his shifts. Officer Monahan kept the letter in his possession and tendered it during his evidence. (Exhibit G16)

[14] Officer Morris's next shift was at 1500 hours on March 28. She presented herself at the picket line prior to that time and was eventually allowed through the picket line at 1600 hours. Prior to her shift ending at 2300 hours, she was requested to remain on the institution's property in order to be available to work the 0700 shift the next day. When her 1500 hour shift ended, Officer Morris chose to spend the night in her vehicle in the parking lot as opposed to spending the night at the Ferndale institution. The evidence was that the billet accommodations at Ferndale were not ideal - a number of mattresses were on the floor, separate accommodations were not available for men and women, and the sleeping conditions were crowded.

[15] As required, Officer Morris reported for her next shift at 0700 hours. Because an injunction restraining picketing had been issued and served out at the institution just before 2400 hours on March 28, she was given the option of remaining to work or going home. She chose to remain at work as she had spent the night on the premises for that express purpose.

[16] The explanation offered by Ms. Morris for her failure to ask about her status after picking up the letter addressed to officer Finlay was that around 0230 or 0300 hours, she had encountered Supervisor Cumiskey in the washroom and had engaged in a discussion with her at that time about the prospect of being ordered to remain on the property. Officer Morris explained to Cumiskey her concerns about not being able to do that because she had to attend to her dogs, which had been in their kennels since approximately 1400 hours the preceding day. Supervisor Cumiskey advised at that time that it was most unlikely that she would have to be required to stay. Officer Morris also testified that at the time she was very tired having just concluded two straight shifts and that her mind was fuzzy and not operating as it usually would.

THE ISSUE:

[17] As in most disciplinary cases, the primary issue was whether the conduct of the grievor supported disciplinary action being taken and if so, whether the discipline imposed was within the acceptable range for such conduct. There was also the preliminary issue of fact regarding what occurred at 0630 hours on March 28th when supervisors Cumiskey and MacNeill attended Douglas Residence for the express purpose of giving instructions to officers Morris, Edwards and Evans to remain on the property.

ARGUMENT FOR THE EMPLOYER:

[18] Counsel for the employer argued the \$1,000 financial penalty which was substituted for the dismissal at the Final Level Grievance Response, was in fact a suitable penalty. He filed a number of cases dealing with the significance of designated employees attending at work during a strike and complying with directives, including the prohibition against them participating in strike activities. In this regard, he also relied upon the policy decision made by the employer with respect to penalties for designated employees in the event they fail to comply with oral or written orders during the strike. Lastly, appreciating that credibility would be a matter that the adjudicator would have to deal with, counsel relied upon *Guimond and Treasury Board (Agriculture Canada)*, [1993] C.P.S.S.R.B. No. 41 (1993) 23 PSSRB Decisions 27 (Digest) PSSRB File Nos. 166-2-22760 to 166-2-22764, at pages 5 and 6, where the guiding principles expressed by O'Halloran, J. in *Faryna v. Chorney* [1952] 2 D.L.R. 354 are quoted.

[19] The other cases relied upon by counsel for the employer were: *MacDonald and Treasury Board (Employment and Immigration Canada)*, [1992] C.P.S.S.R.B. No. 160, (1992) 22 PSSRB Decisions 31 (Digest) PSSRB File Nos. 166-2-22510, 166-2-22511, 166-2-22512; *Wilson and Treasury Board (Solicitor General Canada-Correctional Service)*, [1995] C.P.S.S.R.B. No. 23 (1995) 27 PSSRB Decisions 23 (Digest) PSSRB File No. 166-2-25841; *Martini and Treasury Board (Revenue Canada-Customs and Excise)*, [1992] C.P.S.S.R.B. No. 161 (1992) 22 PSSRB Decisions 30 (Digest) PSSRB File No. 166-2-22507; *Miller and Treasury Board (Employment and Immigration Canada)*, [1993] C.P.S.S.R.B. No. 2 (1993) 23 PSSRB Decisions 32 (Digest) PSSRB File Nos. 166-2-22853, 166-2-22880 to 166-2-22903; and *Jones and Treasury Board (Department of Transport)*, [1980] File Nos. 166-2-9010, 166-2-9011, 166-2-9012, 166-2-9030 to 166-2-9037.

[20] The employer's case was based upon the grievor's failure to follow explicit orders to remain on the property. In the alternative, counsel for the employer argued that even if Officer Morris had not received an explicit verbal or written order, nevertheless, under the circumstances she knew that she was expected to be governed by the requirement to remain on the premises. That being so, given the policy of the employer with respect to penalties and the serious nature of the conduct, the imposition of discipline, specifically a \$1,000 financial penalty in keeping with the employer's policy, was appropriate.

ARGUMENT FOR THE UNION:

[21] Counsel for the union relied upon the evidence tendered by Officer Morris, Officer Edwards and Mr. Monahan demonstrating that no direct order was given to Officer Morris, either verbally or in writing. That being the case, she argued that Officer Morris cannot now be sanctioned for failing to obey a direct order.

[22] While acknowledging Officer Morris could have done something once she realized she had received a letter directed to Finlay, counsel argued her failure to do so did not justify discipline.

[23] In support of the grievor's conduct, counsel for the union noted her concern about having left her two dogs in excess of 16 hours in kennels without food, water or relief; and the fact that she was the only person with a key to the house. The union also relied upon the less than desirable conditions at the Ferndale Institution.

[24] In the alternative, should it be found that the grievor should be subject to discipline, her good employment record was relied upon. Not only had she not been subject to previous discipline, she had been acting for some time in a position above her rank and had received numerous citations for effective performance of duty, including the fact she often went beyond the strict requirements. Lastly, the union pointed out that the concern the employer had in requiring the designated employees to remain on the premises was to make them available for their scheduled shifts. In fact, Officer Morris was available for her next scheduled shift, having presented herself to the picket line at 3:00 p.m. that afternoon. Although she was not allowed in until 4:00 p.m., she was not deducted any pay.

[25] In conclusion, the union advanced the argument that in the absence of any direct order, the grievor did what she was entitled to do when she left the institution's premises, and even so, she was still available for her scheduled shifts and performed her shifts as required. The remedy sought on behalf of the grievor was that she be made whole, specifically that her loss of salary at her acting rate of a Correctional Officer 2 be paid, and that she be made whole with respect to salary at the acting correctional officer 2 level, pension, lost overtime and lost shift premiums.

REASONS FOR DECISION:

[26] As noted previously, the cases relied upon by counsel for the employer, without exception, stress the importance of designated employees fulfilling their obligations to report for duty as required and refrain from participating in strike activity. The reason this position is taken is clear from the *Public Service Staff Relations Act* itself, the history prohibiting the public service from participating in strikes, and in the case authority. As noted by L.M. Tenace, then Vice Chair, in *Martini and Treasury Board (Revenue Canada-Customs and Excise)*, *supra*, at page 9:

In 1967, federal public servants were given the right to bargain collectively; they were also given the right to strike. But that right to strike was not absolute and total. It was tempered by the introduction of the "designated employee" who was prohibited from participating in a strike if his or her duties consisted in whole or in part of duties the performance of which was considered necessary in the interest of the safety or security of the public. The legislators gave the right to strike but also provided a mechanism to ensure the safety and security of the public. It was and is the law. To willfully disregard it cannot be considered a minor transgression. As was stated by then Deputy Chairman Kates in Jones, Board file 166-2-9010, at page 32:

Secondly, it is of some concern to me that the grievors as designated employees, their non-designated colleagues and their bargaining agent have seen fit to treat in so irresponsible a manner the obligation to assure the public of minimal designated services during the course of a lawful strike. I need not remind the parties that the scheme for the designated status of selected employees during the anticipated period of a lawful strike, as envisaged by the Public Service Staff Relations Act, represents a compromise (warts and all) that is designed to enable public servants, where they have not otherwise been prohibited, to use the strike as leverage in resolving negotiating disputes with their employer. A minimum standard of service determined by process of law is deemed necessary during the course of the strike in the interests of the safety and security of the public.

[27] Also significant is the fact that Correction Service Canada, having encountered some problems in the past with designated employees failing to fulfill their duty, adopted a national policy to address any infringements during the strike. The discipline following the final level grievance response was in keeping with that policy.

[28] In arguing that Officer Morris failed to comply with a direct order, counsel for the employer relied upon the evidence of Supervisor MacNeill who testified he distributed a letter (Exhibit E-3) addressed to Officer Morris containing instructions to remain on the institution's property. In addition, there was a memo prepared by Supervisor Cumiskey dated March 30, 1999 (Exhibit E-7) wherein she delivered verbal instructions to Officer Morris to remain on the property and that there would be consequences if she chose not to. This exhibit was admitted as proof that it was part of the disciplinary process but not as truth of its contents. Supervisor Cumiskey did not give evidence. It was clear from the testimony of MacNeill and Deputy Warden Brown that instructions had been given to Cumiskey and MacNeill to deliver instructions to a good number of correctional officers at the time in question and also on at least one other occasion. There were also some discrepancies between MacNeill's testimony and notes he prepared sometime after the incident. In light of those facts, and given the testimony of Morris, Edwards and Monahan, I have made findings of fact that do not support oral or written orders having been given to Officer Morris at 0630 hours on March 28th, the time in issue.

[29] That being so, I must consider the grievor's actual conduct; whether it warranted the imposition of discipline; and if so, whether the \$1,000 financial penalty and the grievor's related loss of backpay at her acting level, loss of pension benefits, overtime and shift premiums during her period of termination were appropriate.

[30] Given the grievor's good employment record and particularly noting her tendency to often provide service beyond the minimum requirements, I have difficulty accepting her explanation for her failure to verify her orders when her supervisor inadvertently delivered the letter directed to Officer Finlay to her. She was certainly sufficiently in possession of her faculties when she thought she should stop at the union's office at the picket line to report the matter and turn over the letter to Mr. Monahan.

[31] The issue then as it relates to discipline generally becomes did the grievor's failure to clarify her position following the delivery of the letter addressed to Officer Findlay with her supervisors or someone else in authority, justify the imposition of discipline. Although a responsible employee would be expected to do so, I am reluctant to make an abstract observation that failure to do so would automatically result in conduct deserving of discipline. However, the particulars of this situation were that the institution's usual operations were constrained because of a strike. Although specific evidence was not tendered with respect to how many less corrections officers the institution had to operate with, it was clear from the evidence of Deputy Warden Brown that the number was less than management thought necessary. Again, while there was no specific evidence, it was also apparent that other usual services were curtailed; and that management personnel excluded from the union and at least some correctional officers were required to remain on the premises to ensure their timely availability. While the institution was not locked down, the strike had a significantly negative impact on its operations requiring management to operate in crisis or near crisis mode. I find Officer Morris was aware of these facts or should have been aware of them.

[32] Under those circumstances, I find her failure to clarify the issue of her status with her supervisor or someone in authority was conduct that could warrant discipline. The discipline imposed was clearly for serious misconduct, specifically outright insubordination and possibly *quasi* criminal conduct under sections 102 and 105 of *The Public Service Staff Relations Act*.

[33] Although Officer Morris failed to take proper action under the circumstances, her conduct was not motivated by *mala fides* (bad faith). She was worried about her two dogs which had already been left in kennels for some 16 hours at that time without food, water, or relief; and she had not left a key with anyone whom she could call to look after the animals. In addition, there were a number of mitigating circumstances: Officer Morris presented herself for her next shift (although she was delayed for one hour at the picket line); she stayed on the property (but not at the Ferndale institute) when required to do so following that shift; she had a good employment record; and it appeared management personnel were forewarned they might have to remain on the property during the strike, while the designated employees were not.

[34] In counterbalance to the interests of the employee, I must also consider the employer's concerns, particularly that when it finds itself operating in a crisis or near crisis mode, it should be able to expect a high degree of responsibility from its employees. Secondly, the number of correctional officers on duty is a significant factor in fulfilling the employer's responsibility to ensure the safety of all employees and inmates, and the public. And lastly, management could not rely upon the union to allow the designated employees to pass through the picket line in a timely fashion or at all.

[35] Then of course those factors must be measured in relation to the disciplinary policy management had in place to address infractions during the strike. That policy according to the evidence was a \$1,000 fine for disobeying a direct order if the employee had not been advised of the consequence of such conduct, and dismissal where the employee been advised that would be the consequence.

[36] Taking all of the circumstances into account, I conclude a written reprimand would have been an appropriate penalty. I direct the employer to substitute that penalty and to do all things necessary to make the grievor whole in her status as an acting correctional officer 2 at the time of her initial termination with respect to regular salary, pension benefits and other unspecified benefits. However, I specifically reject the grievors' claim for reimbursement of shift and weekend premiums as those are benefits that generally accrue for the inconvenience of actually working on those occasions. In the event the parties cannot resolve any other outstanding claims of relief contained in the grievance I reserve my jurisdiction to deal with them if either party makes a request to the Public Service Staff Relations Board on or before September 30th, 2000 for me to do so.

Francine Chad Smith, Q.C.
Board Member

REGINA, June 6, 2000.