

Date: 20020114

Files: 166-34-29858
166-34-29861
166-34-29863

Citation: 2002 PSSRB 3

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

PAUL JOSEPH BEAULIEU, MICHAEL JAMES HEPNER AND MATTHEW T. PRATT

Grievors

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Yvon Tarte, Chairperson

For the Grievors: Ms. Gail Owen, Public Service Alliance of Canada

For the Employer: Mr. Richard Fader, Counsel

Heard at Vancouver, British Columbia,
November 20, 2001.

DECISION

Background information

[1] These three grievances dealing with standby pay were heard at the same time. The parties agreed at the outset of the hearing that the evidence tendered would apply to all three references to adjudication. In all, four witnesses testified: two for the grievors and two for the employer.

The evidence

[2] At the time he filed his grievance, Matthew Pratt, who no longer works in the federal public service, was employed as a Canada Customs Officer - Dog Handler, Vancouver Marine Operations.

[3] In the fall of 1995, he applied for and obtained a Dog Handler position. The poster which advertized the position stated that applicants “must be willing and able to work irregular hours on various shifts” and “must be willing and able to travel with very little notice”.

[4] In the spring of 1996, Mr. Pratt participated in an 11-week Dog Handler training course at Rigaud, Quebec, during which he was told by the instructors that the Dog Handler position required that its incumbent be on call 24 hours a day.

[5] The *Detector Dog Service Operations Manual* (Exhibit G-3) prepared by the employer contains the following provisions:

[Part 1, chapter 4, page 2]

...

2. *Must be willing and able to work irregular hours on various shifts.*

3. *Must be willing and able to travel with very little notice.*

...

[Part 4, chapter 2, page 3]

...

A dog handler should obtain the following policy and procedures from his/her supervisor when he/she returns to the region/district:

...

- 4) *Regional policy and procedures on providing detector dog service*
 - a) *call-outs for customs*
 - b) *call-outs for other agencies*
 - c) *refusing a call-out*

...

[Part 4, chapter 3, page 15]

...

DOG OUT OF SERVICE

A handler's duty is to provide detector dog services to the line organization for the detection of narcotics and firearms. The handler must be available at all times and must never be used for line inspection or to supplement staff or specialty units when the dog is available for duty.

As a customs officer with the same authorities (search, arrest, etc.) as a regular customs officer, the handler may be assigned regular duties when the detector dog is out-of-service. The regional/district manager may schedule the handler for other appropriate duties.

DOG HANDLER SEARCH REFUSAL

The dog handler must have the authority to refuse to conduct a search with his/her detector dog. The handler will, however, be held accountable for this decision. The search refusal is based on adverse work conditions and/or the condition of the dog to perform a particular task. The dog handler will not jeopardize the health and welfare of the dog or himself/herself through careless exposure to hazardous work areas or through overwork of the dog. If an environment is a health and safety issue for the dog, it is also an issue for the handler and other officers. If a handler continues to refuse searches due to exhaustion or overwork of the his/her dog, this indicates a problem with the dog which can be addressed.

Search refusals will be recorded and the basis for the refusal will be evaluated by the regional/district manager. If the handler unreasonably refuses to conduct searches, corrective action will take place.

...

[Part 4, chapter 12, page 15]

...

WHAT DO YOU NEED TO KNOW TO BE A DOG MASTER?

- You have to be a qualified customs officer and be dedicated to your job. You have to be willing to be on call 24-hours a day and be willing to travel to other locations on short notice. You have to be dedicated to your dog at all times, on and off duty. During the 10-week training, the dog handlers learn how to care for, maintain, and train their dogs. The dog handler is also trained in reading the environment; i.e. which way the wind is blowing, dangerous areas and cone of scent.

...

[Part 4, chapter 13, page 7 (Appendix E)]

D-105 MONTHLY UTILISATION REPORT

This report is to be completed at the end of each month and submitted with the monthly-end report. . . .

...

The following information (indicated in hours or days) should be included on page 2 of the form D-105:

After Hours Calls

...

...

[Emphasis in the original]

[6] Upon his return from training, Mr. Pratt was given a pager and a cell phone. As well, he was asked to provide a home phone number where he could be reached during off-hours. Finally, he was told by Chief Kim Scoville and various superintendents that the Dog Handler position was a 24-hours-a-day job.

[7] Although he was never specifically told that he would be disciplined if he refused a call-back, the grievor was questioned on those few occasions when this occurred. In all cases, Mr. Pratt had valid reasons for refusing a call-back.

[8] In the *Detector Dog Service Training Manual* (Exhibit G-5) prospective dog handlers are told that to be a dog-master:

...

- *You have to be a qualified Customs inspector. Enforcement minded. You have to be willing to be on call 24 hours a day. You have to be willing to travel to other areas on short notice. You have to be dedicated to your dog at all times, on and off duty. During the 10 weeks training the dog-masters are trained on how to care, maintain and train their dogs. The dog-master is also trained in reading the environment; e.g. which way the wind is blowing, dangerous areas and cone of scent.*

...

[9] In a publication issued some time ago by the employer, in an article entitled *Tools of the trade* (Exhibit G-5), the following is written about Revenue Canada (now the Canada Customs and Revenue Agency) dogs:

...

Like all government employees, the dogs must get used to working eight-hour days. The only difference is that they must be on call 24 hours a day and some do a lot of extra travelling. The fact that they do not receive a bimonthly paycheque does not seem to be a matter of great concern for the dogs. They prefer to be rewarded with love from their handlers and, of course, the occasional game of catch.

...

[10] Mr. Pratt testified that during his time as a dog handler he was called at home on numerous occasions, outside his regular working hours, to return to work with his dog. When called back he was always paid overtime. He did not however, claim or receive any standby pay.

[11] On those few occasions when he did not respond to a call-back (approximately three prior to the filing of his grievance) he was held accountable the next day. On all occasions he had a valid reason for not being able to respond to the call-back. Either he or his dog was sick or he was out of town on vacation. He would normally, even during holidays or vacation, be available for call-back.

[12] During cross-examination, Mr. Pratt acknowledged that the region covered by the dog handlers stretches for approximately 400 kilometres and that the cell phones and pagers are often used to communicate during working hours.

[13] The employer kept a standby log for after-hours general ship clearance. The grievors' name do not appear on those lists.

[14] Mr. Pratt explained that these grievances were presented in response to the employer's failure to deal with a long-standing request that the Dog Handler job description be modified to reflect its 24-hours-a-day nature.

[15] Mr. Pratt believed that he would be disciplined if he failed to respond to a call-back without justification. Mr. Pratt, prior the filing of his grievance, had talked to Chief Scoville, who had indicated at the time that call-back was part of the job and no standby would be paid.

[16] Paul Beaulieu started as a dog handler in May 1993. During training and at work he was told that he would be required to work irregular hours and be available for call-back. He confirmed the evidence of Mr. Pratt with respect to the use of cell phones, pagers and the posting of home phone numbers as well as the discussions surrounding the revision of their job description.

[17] The requests that he return to work caused hardship. He was required on occasion to leave family dinners, his son's hockey games and even once a Christmas celebration.

[18] Following the presentation of these grievances, discussions were held and a new system was put into place. First, the shifts of dog handlers are now staggered. Second, each dog handler is on standby following a worked shift. Even with this new arrangement, Mr. Beaulieu has received call-backs when he was not on standby.

[19] Kim Scoville was at all material times Chief, Marine Operations for the Vancouver District. There are approximately 60 employees in the Vancouver District Marine Operations, which spans some 400 kilometres and covers all major marine ports. Mr. Pratt worked under his command.

[20] Although dog teams are an extremely useful investigative tool, they are not essential to all operations. If a dog team is required for an operation, the examination may be delayed until one is available and in some cases dog teams from other districts or other law enforcement agencies may be called in although that seldom, if ever, happens.

[21] In the marine environment standby is not used except for ship clearance calls and for those situations a standby log (Exhibit E-1) is prepared. According to Chief Scoville the grievors were provided with pagers and cell phones to facilitate

communications during working hours. Furthermore, the grievors were required to give their home phone numbers only so the employer could communicate overtime possibilities to them.

[22] At no time was discipline to be imposed if a dog handler was not available for an overtime offering.

[23] Had the grievors voiced their concerns sooner, the employer's response would have been the same and much aggravation would have been avoided.

[24] Chief Scoville acknowledged that no policy had been given by the employer to the grievors on providing detector-dog service as seems to be called for by Exhibit G-3. The witness gave oral instructions to his managers concerning the use of dog teams, which in fact left it to the discretion of individual manager to decide whether or not to call back a dog handler.

[25] Doug Clarke is the Chief, Traffic Operations, Pacific Highway District. At all material times, he was Acting Chief, Commercial Operations, Pacific Highway District. Paul Beaulieu worked in his command.

[26] An employee on standby is notified of that fact in advance orally or in writing. To his knowledge, the grievors were not on standby during the period covered by their grievances. When dog handlers are contacted after working hours and asked to come in to work, they may refuse without fear of disciplinary consequences.

[27] Mr. Clarke confirmed the testimony of Chief Scoville with respect to pagers and cell phones and the reason why home phone numbers are required. The grievors, according to Mr. Clarke, were never instructed to have their pagers and cell phones on after working hours.

[28] The arrangement entered into by the parties following the presentation of these grievances has greatly reduced the need for call-back or standby. The new procedure relieves the grievors of the burden of believing that they had to be on standby. Under the new system, a dog handler could be disciplined for not being available during a period of standby. Prior to this new procedure, however, the grievors were probably not told specifically they could just turn off their pagers or cell phones and refuse call-backs.

[29] The employer's interpretation of various exhibits is that dog handlers have to be willing to be on call 24 hours a day but are not actually on call or standby at all times. Generally speaking, employees like to work overtime.

The Collective Agreement

[30] Clauses M-30.01, M-30.02, M-30.03, M-30.04 and M-30.05 of the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, the relevant collective agreement in this case (Exhibit G-1) deal with standby. They read as follows:

M-30.01 Where the Employer requires an employee to be available on standby during off-duty hours, an employee shall be entitled to a standby payment of ten dollars (\$10) for each eight (8) consecutive hours or portion thereof that he or she is on standby.

M-30.02 An employee designated by letter or by list for standby duty shall be available during his or her period of standby at a known telephone number and be available to return for duty as quickly as possible if called. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.

M-30.03 No standby payment shall be granted if an employee is unable to report for duty when required.

M-30.04 An employee on standby who is required to report for work shall be paid, in addition to the standby pay, the greater of:

(a) the applicable overtime rate for the time worked,

or

(b) the minimum of four (4) hours' pay at the hourly rate of pay, except that this minimum shall apply only the first time that an employee is required to report for work during a period of standby of eight (8) hours.

M-30.05 Other than when required by the Employer to use a vehicle of the Employer for transportation to a work location other than an employee's normal place of work, time spent by the employee reporting to work or returning to his or her residence shall not constitute time worked.

ArgumentsFor the grievors

[31] Clause M-30.01 of the collective agreement (Exhibit G-1) states that, where the employer requires an employee to be available on standby during off-duty hours, the employee shall be entitled to a standby payment of ten dollars for each consecutive eight hours, or portion thereof, that he or she is on standby.

[32] The grievors, all dog handlers, were supplied with pagers and cell phones and were required to provide home phone numbers, all with a view to communicating with them outside working hours.

[33] The evidence of the grievors clearly shows that they were informed both in writing and orally that they were on call at all times. The employer's witnesses were not the direct supervisors of the grievors and therefore had no direct knowledge of what was specifically said to them with respect to call-back and standby.

[34] The employer's written material and oral directions led the grievors to believe that they would be disciplined if they were not available at all times outside their regular working hours.

[35] In support of their position, the grievors' representative referred to *Larade et al.* (Board file 166-2-887), *Lemire* (Board file 166-2-350) and *Churchill et al.* (Board files 166-2-18540 to 18543).

For the employer

[36] The grievors have failed to prove that the employer has violated the standby provisions in their collective agreement. Pursuant to the *Financial Administration Act*, R.S.C., 1985, c. F-11, the employer is responsible for setting the hours of work of its employees.

[37] The grievors have not shown that they were required to be on standby as is called for by clause M-30 of the collective agreement. The order to be on standby cannot be implied. There must be a clear obligation to be available for work in order for the standby provisions to apply.

[38] Although the employer may not have been as clear as it could have with respect to the consequences of refusing a call-back, the fact remains that the grievors were not

required or expected to be on standby 24 hours a day, seven days a week, 365 days a year.

[39] The employer's practice was to post standby duty rosters when required. It was not reasonable for the grievors to assume that they were on standby without such posting. Although there appears to have been a communications problem in this case, the grievors were never required to be on standby. If the grievors had a problem with the situation, they could have raised it in a timely manner.

[40] The material tendered by the grievors is promotional and does not constitute a direction to be on standby.

[41] In support of its position the employer referred to *Jackart* (Board file 166-2-6147), *Parcells* (Board file 166-2-15060), *Hatton* (Board files 166-2-17717 to 17721), *Mullins* (Board file 166-2-17752), *Bélanger et al.* (Board files 166-2-21257, 21258 and 21300 to 21302) and *Kettle* (Board file 166-2-21941).

Reason for decision

[42] For a period of some five years, the employer created an environment which led to confusion as to the nature of the responsibilities of dog handlers during off-duty hours. Although the grievors were never officially asked to be on standby, manuals, texts and job posters were crafted in such a way as to convince conscientious employees that their presence at work might be required at any time, day or night. The employer gave no specific written instructions to its dog handlers with respect to standby duty but willingly reaped the benefits of their sense of duty.

[43] The provisions of the collective agreement dealing with standby do not require the existence of a standby list to create standby entitlement. Clause M-30.01 merely states that an employee who is required by the employer to be on standby, shall be entitled to the appropriate standby payment.

[44] Clause M-30.02 covers the specific situation where the employer has decided to create a standby list. It does not preclude the creation of standby situations in some other manner.

[45] It is clear that an employee cannot, of his or her own volition, decide to be on standby. However, there can exist situations, such as this one, where the employer, by its actions, must be deemed to have required an employee to be on standby.

[46] According to the uncontested testimony of Mr. Pratt, the grievors were held to account on those rare occasions when they were unable to respond to the employer's request that they return to work during off-duty hours. Furthermore, the employer failed to clarify a situation which it knew or should have known led the grievors to believe that they were on duty 24 hours a day.

[47] The employer was remiss in its duty to provide clear direction on this issue to its employees. Even though the employer's own manual (Exhibit G-3) refers to policies for refusing call-outs, the evidence shows that no such policy existed or was ever provided to the grievors.

[48] I wish to add that these cases should have been settled long before they reached adjudication. Unfortunately, opportunities for mediation were not seized. The Board, the employer and the bargaining agent have spent several thousands of dollars in the adjudication of a matter which begged for settlement. I find this to be truly unfortunate.

[49] The grievances are allowed.

**Yvon Tarte,
Chairperson**

Ottawa, January 14, 2002.