

Date: 20020220

Files: 166-34-28710
to 28720
and 28728

Citation: 2002 PSSRB 24

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

CHARLES COQUET ET AL.

Grievors

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Léo-Paul Guindon, Board Member

For the Grievor: Paul Taylor, Public Service Alliance of Canada

For the Employer: Jennifer Champagne, Counsel

Heard at Montréal, Quebec,
October 25, 2001.



DECISION

[1] This decision covers the following grievances:

- grievance of Charles Coquet, filed on April 16, 1997 (Board file 166-34-28710);
- grievance of d'Angelo De Riggi, dated March 10, 1997 (Board file 166-34-28711);
- grievance of Richard Fauteux, dated March 10, 1997 (Board file 166-34-28712);
- grievance of Steve S. Foisy, dated March 10, 1997 (Board file 166-34-28713);
- grievance of James G. Grinham, filed on March 25, 1997 (Board file 166-34-28714);
- grievance of Michel Laprotte, dated March 19, 1997 (Board file 166-34-28715);
- grievance of Roland Legault, dated March 11, 1997 (Board file 166-34-28716);
- grievance of Denis Machabée, dated March 11, 1997 (Board file 166-34-28717);
- grievance of J.G. Yves Mireault, dated March 17, 1997 (Board file 166-34-28718);
- grievance of Mark Solomon, dated March 12, 1997 (Board file 166-34-28719);
- grievance of Denis Trudeau, dated March 12, 1997 (Board file 166-34-28720);
- grievance of Richard Byrne, dated March 10, 1997 (Board file 166-34-28728).

[2] Each of these grievances reads as follows:

[Translation]

STATEMENT OF GRIEVANCE

I hereby object to the work description, Enforcement Officer, received from management on February 18, 1997.

The description received is not current and does not reflect the duties that I carry out regularly. In addition, the documents received, such as the organization chart, do not reflect reality.

CORRECTIVE ACTION

- *Obtain a complete, current and realistic description of the duties that I perform as an enforcement officer (since 1990), which has become, in reality, what management*

now calls an intelligence officer. These two titles actually reflect a single description, which is the same as my position.

- *Obtain an organization chart that identifies my position, and*
- *Obtain a numerical rating, factor by factor, of my real duties.*

[3] The Board withdrew these grievances from the hearing schedule of March 1999 and put them in abeyance upon a joint request of the parties, which had been submitted on December 11, 1998.

[4] Determining that it had not been informed by the parties of any progress in their attempts to reach a resolution, the Board reactivated the file on August 29, 2000 and assigned a mediator to the file on October 6, 2000.

[5] The mediation session scheduled for March 2001 was cancelled at the request of the grievors and the grievances were placed on the hearing schedule of June 2001. The hearing scheduled for June 2001 was postponed at the request of the grievors and without any objection from the employer. I heard these cases on October 25, 2001, because the parties were not available prior to that date.

[6] At the outset of the hearing, the parties clarified the purpose of the grievances as follows:

[Translation]

The grievors want to obtain a complete and current statement of the duties and responsibilities they performed as enforcement officers (classification PM-02) between 1991 and April 1994.

[7] The employer raised a preliminary objection, at the start of the hearing, regarding the following elements:

- (a) the grievances may only relate to the work description for the position of regional intelligence officer (classified at the PM-03 group and level), which the grievors held on an acting basis at the time the grievances were filed in 1997. This is admitted by the grievors. The grievors were appointed to this position on an acting basis in April 1994 (Quebec region) and in September 1994 (Montreal region);

- (b) pursuant to the decisions of the Federal Court in *Canada (National Film Board) v. Coallier* (Federal Court of Appeal file A-405-93, September 13, 1983) and *Stagg v. Canada (Treasury Board)* (Federal Court, Trial Division, T-1604-92, December 15, 1993), grievances may not be retroactive by more than 25 days. This interpretation of the Federal Court decisions is admitted by the grievors. It is the employer's opinion that the adjudicator must restrict his consideration to the period beginning in April 1997, 25 days prior to the filing of the grievances, which prevents consideration of the duties performed during the period between 1991 and 1994, which is outside the 25-day period.
- (c) according to *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (CA), grievors may not alter the nature of their grievances after filing them, even if the parties agree. Thus, the adjudicator may not consider a work description for a position other than that of regional intelligence officer, which was the position held by the grievors at the time the grievances were filed;
- (d) the position of customs enforcement officer was abolished in October 2000 and this element is admitted by the grievors. Since the adjudicator cannot reinstate the position, the grievances are purely academic and are of no use.

Accordingly, the grievances should be dismissed.

[8] The grievors submitted to the adjudicator that the essence of the grievances relates to the position of customs enforcement officer. There is no confusion around the duties of the regional intelligence officer position since the facts show that the duties performed by the grievors flowed from one position to the other.

[9] The grievors performed these duties from 1991 to 1994 and requested that their work description be updated in 1993. Throughout this period, they held positions as customs enforcement officers, which became regional intelligence officer positions (acting) in 1994. The employer responded that it was reorganizing and that everything would be clarified in the new organization. In these circumstances, the grievors argued that they were entitled to a work description for the customs enforcement officer

position and that that work description could have a practical scope, that might lead to the filing of a classification grievance before another body.

[10] The grievors alleged that the adjudicator can consider elements preceding the 25 days based on the decisions in *Macri* (Board file 166-2-15319), *Costain* (Board files 166-2-18508 and 18511); *Muir* (Board file 166-2-17714) and *Lee* (Board files 166-2-21814 to 21816), which set out the exceptions to the principle established in *Coallier* (*supra*). The issue of fairness was raised since the employer had given the grievors the impression that it would resolve the matter.

[11] I took the preliminary objection under advisement and indicated to the parties that I would receive evidence on the merits of the grievances and that the objection would be dealt with in my decision.

The Facts

The Grievors' Evidence

[12] Richard Fauteux testified for all of the grievors. The matter began in 1990 when Mr. Fauteux was performing the duties of a customs inspector (classified at the PM-01 group and level) and wanted to obtain a work description reflecting the tasks performed. Mr. Fauteux was subsequently appointed as a customs enforcement officer (classified at the PM-02 group and level). Work descriptions were completed for the customs enforcement officer position in March 1991 (Exhibit F-1) and for the regional intelligence officer position (classified at the PM-03 group and level) in February 1991 (Exhibit F-2).

[13] From 1991 to 1993, duties were gradually added: controlled sources, monitoring informers, transportation of drugs and transportation of prisoners. The grievors performed the same duties between 1991 and 1993, while developing new expertise by working with various police corps through the training of specialized work units. More than 60% of the duties performed in 1993 had allegedly been added since 1991.

[14] Mr. Fauteux prepared a statement of duties (Exhibit F-3) and submitted it in 1993 to Robert Lapierre, Manager, Interdiction and Intelligence Division for the Quebec Region. According to the witness, more than 90% of the duties carried out in 1993 were the duties of the intelligence officer and the grievors wanted to be recognized as such. At the time, Mr. Lapierre agreed with the content of the statement of duties and sent it

to Ottawa for approval. The new GE classification standard, that was to be implemented, was supposed to resolve the issue. The grievors believed that the file would be resolved with the implementation of the new classification standard and, consequently, no grievance was submitted.

[15] The duties described in the following paragraphs of the statement of duties prepared by Mr. Fauteux (Exhibit F-3) are added to those contained in the work description for the customs enforcement officer position (Exhibit F-2): A.3, A.9, B, B.2, B.3, B.4, B.5, C.1, C.8, D, D.3, D.4 and D.5.

[16] In 1994, there was follow-up with Mr. Lapierre but the statement of duties prepared by Mr. Fauteux was scrapped, since a new structure was supposed to be implemented. In about April 1994, the Interdiction and Intelligence Division became the Intelligence and Investigation Division and the number of employees increased from 40 to approximately 80. A new investigator position (classified at the PM-04 group and level) was added to the regional intelligence officer positions. The customs enforcement officer positions disappeared from the new structure and the employees holding these positions were appointed as regional intelligence officers on an acting basis.

[17] The GE classification standard was never applied and a new reorganization took effect in 1996. Investigations responsibilities were removed from the grievors and their duties became essentially intelligence. The positions were filled by competition and employees from other divisions applied for them. The grievors were worried about job security and filed the grievances.

[18] A new work description was prepared in May 1997 (Exhibit F-4) for the regional intelligence officer position (reclassified at the PM-04 group and level) and took effect on June 30, 1997 (Exhibit F-5). This new work description was a perfect imitation of the statement of duties prepared by Mr. Fauteux (Exhibit F-3).

The Employer's Evidence

[19] Roger Giguère, Assistant Director (Head) of Intelligence Operations, explained the various positions and responsibilities of customs employees:

- customs inspector: at ports of entry to the country to inspect and seize;

- customs enforcement officer: supports the inspectors, searches goods, intercepts travellers and makes seizures;
- regional intelligence officer: gathers, evaluates and analyses information from various sources, which is then provided to customs inspectors and enforcement officers.

[20] Work descriptions are prepared at the national level (Ottawa) and a work description was prepared in May 1990 for the position of customs inspector (Exhibit E-3).

[21] During a reorganization in 1994, customs inspectors performed the customs enforcement duties (interception, search and seizure, investigation) that had been included in their 1990 work description.

[22] Customs enforcement officers were appointed on an acting basis to regional intelligence officer positions (PM-03) in April 1994 for Québec, St-Armand and the Eastern Townships, and in September 1994 for the Montréal region. These acting appointments were necessary because responsibilities associated with the work of the regional intelligence officer had been assigned to them (information collection, evaluation and compilation of intelligence, analysis and dissemination of results).

[23] All of the employees holding customs enforcement officer positions from 1991 to 1994 were appointed on an acting basis to regional intelligence officer positions at the time of the reorganization.

[24] A working group established in December 1996 submitted its report in February 1998, confirming what had been done since 1994. The customs enforcement duties were assigned to customs inspectors and the positions of customs enforcement officers were abolished.

[25] As for the elements described by Mr. Fauteux in the statement of duties he prepared in 1993 (Exhibit F-3) and which he identified as additional responsibilities assigned to customs enforcement officers between 1991 and 1993 (see paragraph 12), Mr. Giguère found them in Exhibit F-1 (work description for the position of customs enforcement officer - March 1991):

§ A.3 of Exhibit F-3: [translation] "Apply new investigation techniques . . ." is a responsibility belonging to customs enforcement officers and customs inspectors;

§ A.9 of Exhibit F-3: is found verbatim in § A.7 of Exhibit F-1;

§ B1.2 of Exhibit F-3: is found verbatim in § B.2 of Exhibit F-1;

§ B1.3 of Exhibit F-3: is found verbatim in § B.3 of Exhibit F-1;

§ B1.4 of Exhibit F-3: is found fundamentally in § C.3 of Exhibit F-1;

§ B1.5 of Exhibit F-3: is included in the general description of § B of Exhibit F-1;

§ C.1 of Exhibit F-3: is included in the general description § C of Exhibit F-1;

§ C.8 of Exhibit F-3: is found verbatim § C.3 of Exhibit F-1;

§ D.3 of Exhibit F-3: is found verbatim § A.15 of Exhibit F-1;

§ D.4 of Exhibit F-3: is found verbatim in § A.14 of Exhibit F-1;

§ D.5 of Exhibit F-3: is found verbatim in § A.15 of Exhibit F-1.

[26] According to Mr. Giguère, the statement of duties prepared by Mr. Fauteux and filed as Exhibit F-3 covers the duties of a customs enforcement officer (PM-02). These duties are at a tactical level and were part of the duties of a customs enforcement officer between 1991 and 1994. The elements of the work description of a customs enforcement officer (Exhibit F-1) were at a tactical level and not at a strategic level.

Arguments

[27] The grievors argued that the principle of fairness could be applied against the maximum 25-day deadline set out in decisions of the Federal Court in *Coallier* and *Stagg* (*supra*). They submitted the following decisions: *Costain*, (*supra*), *Macri* (*supra*) and *Muir* (*supra*).

[28] According to the grievor's evidence, the employer gave the impression that it agreed with the statement of duties prepared by Mr. Fauteux in 1993 (Exhibit F-3) and that the matter would be resolved. The grievors trusted that the employer would resolve the matter as promised and the doctrine of the binding effect of a promise

should be applied. The adjudicator must consider this promise and make the grievances retroactive to the entire period of 1991 to 1994.

[29] With respect to the facts presented, the grievors' evidence showed that the tasks they performed were more of a strategic nature (relating to intelligence) than a tactical nature (relating to enforcement). The employer confirmed that both components (strategic and tactical) were part of the customs enforcement officer and regional intelligence officer positions. Mr. Fauteux's testimony must be given preference because it is more credible than that of the manager with respect to the tasks actually performed.

[30] The adjudicator must therefore allow the grievances and order the employer to update the work description for the position of customs enforcement officer for the period of 1991 to 1994.

[31] According to the employer, the grievors had the burden to show that the 1991 work description for the position of customs enforcement officer (Exhibit F-1) did not reflect the duties performed. The grievors identified which elements were new in the statement of duties prepared by Mr. Fauteux in 1993 (Exhibit F-3). Each of these elements was found in the 1991 work description of customs enforcement officers (Exhibit F-1). Based on the following decisions, a work description must describe the duties in general terms and must not be detailed to the point of including synonyms: *Jaremy* (Board files 166-2-28628 and 29291) and *Fedun* (Board files 166-2-28278 to 28288).

[32] With respect to the 25-day time limit set out in the *Coallier* and *Stagg* (*supra*) decisions, none of the arguments presented make it possible to set aside the principle established by the Federal Court. Mr. Lapierre's agreement with the statement of duties prepared and submitted to him by Mr. Fauteux in 1993 (Exhibit F-3) did not mean that a clear promise was made by the employer to give retroactive effect to a new work description. In this instance, the evidence of a clear promise from the employer to this effect was not provided.

[33] No corrective action can be granted since the position of customs enforcement officer, which the grievances are attempting to clarify through a new work description, was abolished and does not exist since October 2000.

[34] Accordingly, the grievances must be dismissed.

Reasons for Decision

[35] The duties that the grievors want included in the work description for the position of customs enforcement officer were clarified through Mr. Fauteux's testimony (§ 15 *supra*). The majority of these tasks were found verbatim in the work description established for the position of customs enforcement officer in 1991 and submitted as Exhibit F-1 (§ 22, 25 *supra*). Therefore, I must find that the 1991 work description includes these elements. The evidence presented to me does not allow me to distinguish between the duties described by identical terms in both the work description (Exhibit F-1) and the statement of duties prepared by Mr. Fauteux in 1993 (Exhibit F-3).

[36] With respect to the involvement in training and projects with law enforcement agencies and other departments and/or agencies (§ B.5 of Exhibit F-3), these duties are included in the statement found in § B of Exhibit F-1: [translation] "*Is involved in joint official operations . . .*".

[37] The duties set out in § C.1 of Mr. Fauteux's 1993 statement of duties (Exhibit F-3) are found in § C [translation] ("*Maintain sources of information . . .*") and in § C.5 and C.6 [translation] ("*Maintain sources of information . . . Identify persons who could be informers . . .*") of the 1991 work description (Exhibit F-1). Although the words used in the work description are different from those in Mr. Fauteux's 1993 statement of duties, the grievors' proposal covers essentially the same elements as those in the work description without adding any new element.

[38] The duties described in § D.3 of Mr. Fauteux's 1993 statement of duties (Exhibit F-3) [translation] ("*Explain to our counsel the various grounds that led to the detention and arrest of the swallows*") are substantially included in § A.15 of the work description (Exhibit F-1) [translation] ("*Appear in court . . . to defend the enforcement measures taken*"). In practice, I do not see how the defence of enforcement measures taken by the grievors could lead to their testimony in court without having these grounds explained first to counsel representing the government.

[39] I cannot accept the grievors' argument that some of the duties assigned to customs enforcement officers were allegedly more strategic in nature than tactical for

the period from 1991 to 1994. The examples given as part of the grievors' evidence do not allow me to assess whether these duties were carried out regularly or occasionally and whether such strategic duties represented a significant part of all of the duties performed. On the other hand, the duties set out both in the work description for the customs enforcement officer position (Exhibit F-1) and in Mr. Fauteux's 1993 statement of duties (Exhibit F-3) do not define or refer directly to the concepts of strategy or tactics. Therefore I cannot accept this allegation that some of the duties would have been part of the position of regional intelligence officer, because of their strategic nature, rather than the position of customs enforcement officer, because of their tactical nature.

[40] As for the merit of the grievances, I find that the grievors did not prove that they were carrying out duties not included in the 1991 work description for the position of customs enforcement officer.

[41] Accordingly, the grievances are dismissed.

[42] Given that the grievances are dismissed on the merits, I don't have to deal with the preliminary objection. However, I must point out that the issue of fairness submitted by the grievors with respect to the maximum 25-day time limit set out by the Federal Court in *Coallier and Stagg (supra)* would have little chance of success. The fact that the manager of the Interdiction and Intelligence Division of the Quebec Region allegedly gave the impression that he would resolve the matter cannot be considered as a formal promise by the employer because work descriptions in this instance are the responsibility of managers at the national level and the grievors were aware of this.

Léo-Paul Guindon
Board Member

OTTAWA, February 20, 2002

PSSRB Translation