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Date: 20011218

File: 166-02-30740

Citation: 2001 PSSRB 129



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

PAUL COCHRANE

Grievor

and

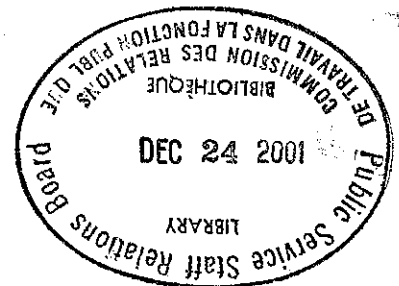
TREASURY BOARD  
(Health Canada)

Employer

**Before:** Yvon Tarte, Chairperson

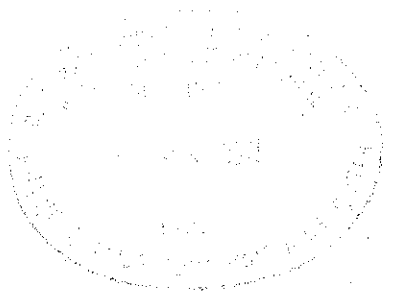
**For the Grievor:** Himself

**For the Employer:** Harvey Newman, counsel



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Heard at Ottawa, Ontario,  
8 November 2001.



## DECISION

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### Background Information

[1] On the 31<sup>st</sup> of May 2001, Mr. Paul Cochrane, formerly Assistant Deputy Minister at Health Canada (EX-4), forwarded a "Reference To Adjudication" form to the Public Service Staff Relations Board (Board or PSSRB) with a handwritten note requesting that the Board take "appropriate grievance action". On the form, the grievor indicated that he believed his reference involved a grievance relating to disciplinary action resulting in suspension or a financial penalty pursuant to subparagraph 92(1)(b)(i) of the *Public Service Staff Relations Act* (the Act or PSSRA).

[2] In July 2001, the employer advised the Board that it was objecting to the jurisdiction of an adjudicator appointed under the PSSRA to hear Mr. Cochrane's grievance on the basis that:

- a) Mr. Cochrane was not an employee at the time he filed his grievance;
- b) the grievance was filed out of time;
- c) no disciplinary measure was imposed on the grievor; and
- d) Mr. Cochrane, in his former position as Assistant Deputy Minister with responsibility to respond to grievances at the second level of the Departmental grievance process, was well aware of the applicable grievance procedures.

[3] The employer added to its jurisdictional arguments in a letter dated September 26<sup>th</sup>, 2001 in which it submitted the following:

*Mr. Cochrane at all material times was an Assistant Deputy Minister and as such was not covered by a collective agreement. Therefore, since he has never made any allegation of a disciplinary action resulting in a suspension, termination or financial penalty, his grievance is non adjudicable ex facie, c.f. Burchill v. A.G., [1981] 1 F.C. 109. It is also clear on the record that the grievance was presented out of time. Therefore, unless Mr. Cochrane can meet these threshold issues no useful purpose would be served by hearing any evidence or argument which does not relate directly to these matters.*

[4] The parties were advised that the jurisdictional issues raised by the employer would be dealt with at the present hearing.

[5] At the commencement of proceedings in this case, Mr. Newman indicated that the employer wished to rely on only two preliminary objections. First, the facts of this case reveal no disciplinary sanction. The grievor himself never raised the issue of discipline until his reference to the Board. Second, should the adjudicator find an element of discipline in this case, the grievor is precluded following the decision of the Federal Court of Appeal in *Burchill (supra)* from changing the nature of his grievance at this late stage.

#### The evidence

[6] Marie Fortier, Associate Deputy Minister at Indian and Northern Affairs Canada was the only person called to testify. Previously and at all material times she was Associate Deputy Minister at Health Canada. As such, she shared many responsibilities with the Deputy Minister and was involved in all major departmental decisions including those affecting the grievor.

[7] Mr. Cochrane was responsible for managing native and inuit health programs. He had authority to enter into health care agreements with First Nations. His budget in this regard was close to one billion dollars. These funds would principally have been allocated for direct health benefits and community based programs.

[8] In early 2000, Health Canada had embarked on a policy review exercise and decided that it needed a fresh approach and new ideas. Mr. Cochrane was deemed to be unsuited for continued employment in the department.

[9] Discussions between Ms. Fortier and the grievor with respect to the latter's career commenced in March 2000. Although the employer attempted to find alternate employment for the grievor elsewhere in the federal Public Service, it became evident by June 2000 that this would not be an easy task.

[10] The employer then looked at the possibility of an interchange assignment outside the Public Service. It was eventually decided that Mr. Cochrane would be loaned to the Anishinaabe Mino-Ayaawin Inc. (AMA), a corporate entity created by several Indian bands to provide common services. The grievor would go to the AMA for two years in a senior position to help with business development. The interchange assignment was to commence on September 1, 2000 and be fully funded by Health Canada. Mr. Cochrane was allowed to commence work with the AMA without the benefit of a signed interchange agreement.

[11] Sometime in September 2000, Health Canada became aware of a number of transactions involving five or six million dollars which had been recently authorized by the grievor to be taken from an emergency reserve fund. These transactions many of which were to the benefit of the AMA and the Virginia Fontaine Addictions Foundation (VFAF, an organization set up to help natives with drug and alcohol problems) left the emergency reserve fund depleted.

[12] On September 29, 2000, then Deputy Minister David Dodge wrote to the grievor to express the department's concerns and to advise him not to act on the proposed interchange agreement (Exhibit E-1):

*It has come to my attention that during the last weeks of your tenure significant amounts of money were transferred to the Manitoba region for the AMA and its affiliates. These transfers may be perceived as unusual in terms of timing and therefore as preferential treatment. This raises concerns relating to the possible appearance of conflict of interest. I would therefore like to discuss the matter with you as well as the terms and conditions which would apply to any eventual interchange agreement.*

*I would like to meet with you after the Thanksgiving weekend. My office will contact you regarding the exact time. In the meantime, you should consider yourself on leave with pay and I would ask you not to act in any way in consequence of your proposed interchange agreement.*

[13] A meeting between the Deputy Minister and the grievor took place on October 12<sup>th</sup>, 2000, at which time Mr. Cochrane agreed to provide justification for the transfers he had authorized. The grievor stated at the meeting that he had planned a vacation and could only commence work on the justification exercise on October 24, 2000.

[14] On Wednesday, October 18, 2000, Ms. Fortier became aware as a result of a Globe and Mail article entitled Taxpayer-funded staff take cruise, that Mr. Cochrane was participating in a Caribbean cruise "professional retreat" sponsored by the VFAF (Exhibit E-2).

[15] The employer immediately became concerned that departmental funds might have been used for the cruise and that the grievor's presence on the cruise created the appearance of a conflict of interest whether he had paid for his participation or not.

[16] Ms. Fortier contacted the grievor in the afternoon of October 18<sup>th</sup> and ordered him back to Ottawa as soon as possible. Mr. Cochrane returned to Ottawa on October 19<sup>th</sup> to meet with the Deputy Minister and Ms. Fortier. At this meeting the grievor was asked to provide evidence of his payment for the cruise, to sign a vacation leave form for the days he had been off work and to attend a meeting concerning conflicts of interest on the following day. The grievor produced a medical certificate (probably on the 20<sup>th</sup> of October) indicating that he would be on sick leave for an indeterminate period of time. He never returned to work at Health Canada.

[17] On December 8, 2000, the grievor was suspended indefinitely without pay pending investigation into further allegations that he had also accepted from the VFAF the payment of a trip to Hawaii in September 2000 (Exhibit E-5). The grievor was advised in writing that he could grieve the decision to suspend him. Ms. Fortier testified that Mr. Cochrane did present a grievance against his indefinite suspension (Exhibit E-8) but she was not aware if that grievance had been referred to adjudication.

[18] There was an exchange of correspondence between Health Canada and the grievor's counsel during December 2000 dealing with, among other things, the nature of the grievor's expenses related to the October cruise and his forced return to Ottawa.

[19] On January 17, 2001, counsel for the grievor wrote two letters to the employer indicating that Mr. Cochrane had decided to retire from the Public Service effective December 30, 2000. This letter also states that the grievor is owed "the sum of approximately \$7,500, being his foregone costs and expenses relating to his return from vacation in October 2000 at the request of the Deputy Minister". This was the first time that a formal claim for reimbursement for expenses related to the October cruise was being made by the grievor.

[20] On January 25, 2001, the grievor was advised that the employer had accepted his resignation as of that day. On the same day, Health Canada wrote to Mr. Cochrane's counsel to state that it believed it owed no money with respect to the October 2000 cruise.

[21] On February 6, 2001, in response to the second January 25<sup>th</sup> letter from Health Canada, Mr. Cochrane wrote to Ian Green, who had by then replaced Mr. Dodge as Deputy Minister, setting out in detail his claim for \$6,726.36 to reimburse him for

expenses associated with his forced return to Ottawa from the Caribbean in October 2000.

[22] The Deputy Minister's reply, dated March 1, 2001 (Exhibit E-14), stated:

*I am writing to you concerning your letter dated February 6, 2001.*

*At no time did you seek authorization to participate in a cruise organized by the Virginia Fontaine Addictions Foundation Inc. As well, Health Canada did not at any time authorize your participation in a cruise with the staff of the Foundation.*

*Consequently, the Department has no obligation to reimburse you for any travel costs you incurred, nor to reinstate any annual leave.*

[23] On March 27, 2001, Mr. Cochrane wrote back to Mr. Green to advise that he wished to grieve the employer's decision to refuse reimbursement and also to obtain information on how to grieve.

[24] On May 31, 2001, Mr. Cochrane filed his reference with the Board.

[25] Ms. Fortier testified that in her mind the refusal to reimburse the grievor was merely the administrative consequence of Mr. Cochrane's inappropriate behaviour.

### Arguments

#### For the employer

[26] The employer's position is that no disciplinary sanction was imposed in this case. There is no question that the employer believed that it was inappropriate for the grievor to participate in the October Caribbean cruise sponsored by the VFAF. The employer states that, although Mr. Cochrane's inappropriate conduct warranted discipline, it decided not to impose discipline upon him. The evidence presented by the only witness supports that view.

[27] The discussions surrounding the reimbursement of expenses for the shortened October cruise commenced some three months after the fact without any mention by either side that discipline was involved.

[28] The grievor knew or should have known that his participation in the VFAF cruise in October was problematic. Yet he carefully failed to mention the trip to Mr. Dodge during their discussions the week previously.

[29] The grievor's participation caused embarrassment to the employer. It was therefore appropriate for the employer to ask Mr. Cochrane to leave the cruise immediately and return to Ottawa. The grievor would not have incurred any expenses had he acted properly in the first place. Mr. Cochrane put himself in this unfortunate situation and is therefore responsible for the consequences.

[30] The grievor has only characterized the employer's actions in this case as disciplinary at a very late stage in order to bring his claim under section 92 of the PSSRA and get to adjudication.

[31] In the event that the employer's refusal to reimburse the grievor is found to be disciplinary in nature, then the sanction imposed was warranted. This grievance should therefore be denied.

For the grievor

[32] The department has shown through its own evidence that the refusal to reimburse him for expenses incurred as a result of the cancelled October cruise was a disciplinary sanction.

[33] Given that he was suspended indefinitely in early December, the employer's action amounts to double jeopardy.

[34] Finally, the penalty imposed (the refusal to reimburse) was not warranted since his status and situation were not clear at the time he decided to go on the VFAF sponsored cruise.

Reasons for Decision

[35] I find it extremely disconcerting that the grievor, with his experience and at his level, would not appreciate the totally unacceptable conduct that he engaged in, in October 2000.

[36] At the time he went on the VFAF sponsored cruise the grievor had been told in writing by his Deputy Minister in no uncertain terms (Exhibit E-1) "not to act in any way in consequence of (the) proposed interchange agreement...". In October 2000,



Mr. Cochrane was an employee of Health Canada who owed loyalty to his employer and who was bound by the Public Service Conflict of Interest Guidelines (Exhibit E-3).

[37] His conduct was inappropriate and reprehensible. The very nature of his position required that he conduct himself in a manner that did not give rise to conflicts of interest or the appearance of such conflicts. Mr. Cochrane failed miserably on all counts.

[38] I am satisfied on the basis of the unchallenged testimony of Ms. Fortier and the complete lack of evidence to the contrary that the employer's response to the grievor's inappropriate conduct was administrative in nature and not disciplinary. The consequent refusal to reimburse the grievor for expenses incurred as a result of the shortened cruise was not disciplinary although in the circumstances discipline could have been imposed.

[39] In situations such as this, the employer has the choice to impose a disciplinary sanction or take administrative action, which is what it did in this case. I recognize that it may be difficult in some cases to determine whether discipline was imposed or not. No such difficulty arises in this case. The oral and documentary evidence tendered led me to conclude that no discipline was imposed on Mr. Cochrane for his participation in the VFAF sponsored October cruise.

[40] The indefinite suspension imposed by the employer on Mr. Cochrane dealt with different acts of misconduct relating to a VFAF sponsored trip to Hawaii in September 2000. The grievor cannot therefore claim to have been punished twice for the same offence (double jeopardy).

[41] Even if I had concluded that discipline was involved in this case, I would not hesitate to conclude that it was warranted and constituted a light penalty for such egregious conduct.

[42] Accordingly, for all these reasons the grievance is denied.

**Yvon Tarte,  
Chairperson**

Ottawa, December 18, 2001.

