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File: 166-34-30747

Citation: 2001 PSSRB 126



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

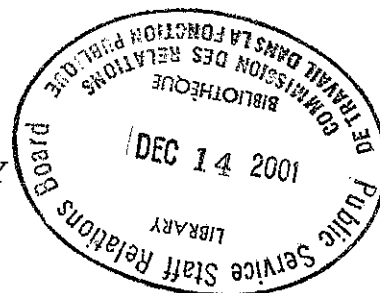
CHERYLL LEE FOON

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

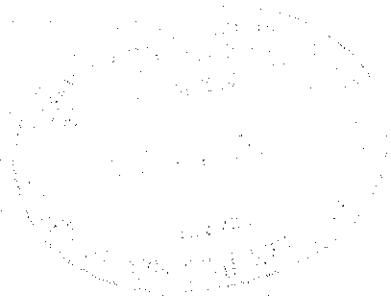


Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Jennifer Champagne, Counsel

Heard at Toronto, Ontario,
November 26 and 27, 2001.



DECISION

[1] This decision concerns a grievance filed by Cheryll Lee Foon, on September 29, 1999, in relation to a three-day suspension. At the time of the suspension, Ms. Lee Foon was with the Revenue Collections Section of the Canada Customs and Revenue Agency (C.C.R.A.) and was classified as a PM-02. While the grievance was filed on September 29, 1999, it was only referred to the Board for adjudication, with the consent of the employer, on July 11, 2001.

[2] The letter of suspension was signed by the Director of the Kitchener-Waterloo Tax Services Office, Mark Deakin. At the hearing, counsel for the employer stated that the reason for the suspension was because the grievor inappropriately accessed taxpayer records. More specifically, the letter of suspension stated, in part:

...

Furthermore, it has been determined through an investigation by Internal Affairs, that you accessed the taxpayer records of both family members and other acquaintances. I am prepared to accept your reasoning for accessing your own account and that of your husband. However, the remaining accesses are a direct contravention of the Department's Standards of Conduct. For the following reasons, I can not support your argument that you were developing leads on the individuals in question.

- (1) No leads were forwarded by you on any of these individuals.*
- (2) No diary entries were made to any of these accounts in support of your actions.*
- (3) You did not discuss specific reasons for suspecting these individuals with management in order to determine an appropriate course of action.*

Consequently, I am hereby giving you notice that you are being suspended from work without pay for a period of 3 days. This suspension will begin on September 15, 1999 and will end on September 17, 1999. You can return to work on September 20, 1999.

During this period you are not to be on the Employer's premises for any reason. Should you need access to personal items or material you are to make arrangements through your current supervisor by telephone.

Any further action of this nature on your part may result in further disciplinary action being taken, up to and including discharge.

...

[3] Ms. Lee Foon has never denied accessing these taxpayer accounts; consequently, the action she is accused of is not in dispute. At issue here is the contention made by Ms. Lee Foon that the accesses she made did not contravene any policy and in fact such action was expected of her and was contained in her job description.

[4] The Internal Affairs Division of the C.C.R.A. conducted an investigation into Ms. Lee Foon's activities and submitted its report in May 1999. This report was entered upon consent and is identified as Exhibit E-1. The report contains the results of an "audit trail search" which identifies activities Ms. Lee Foon conducted on her computer. It is the basis of this audit trail search that led to the imposition of the disciplinary sanction.

[5] Two witnesses testified for the employer, and three witnesses testified for the grievor. The employer submitted 11 exhibits and the grievor three. No request was made for the exclusion of witnesses.

Background

[6] Ms. Lee Foon commenced her employment in 1979 with the precursor to the C.C.R.A., Revenue Canada. At the time of the suspension, the grievor was employed as a Rulings Officer. Her job description was identified as Exhibit E-9, and one of her key activities concerned the making of rulings for issues related to the Canada Pension Plan and Unemployment Insurance Act and Regulations.

[7] The grievor has a discipline-free record. The one performance report introduced (Exhibit G-1) was positive, and there was no dispute other performance reports were satisfactory as well.

[8] From November 1998 until June 1999, Ms. Lee Foon was supervised by Mary Anne Morrison. During that period of time, Ms. Lee Foon teleworked from her home. While teleworking, Ms. Lee Foon had a laptop computer and printer at her home, both of which belonged to the C.C.R.A.

[9] In March 1999, Ms. Lee Foon was on sick leave and contacted Ms. Morrison to inquire about going on disability, saying she had the necessary forms signed at that point in time. Ms. Morrison indicated there was a need to have the laptop computer and printer returned to the office.

[10] Ms. Lee Foon asked if she could keep the computer a while longer to complete her personal income tax, and she also indicated that a friend had installed a tax program on the computer. The installation of the software on the computer was problematic for Ms. Morrison as well as for her supervisor, David Bell.

[11] When informed of the installation of software on a C.C.R.A. computer, Mr. Bell felt there may have been a breach of security and he instructed Ms. Morrison to have the computer returned to the office forthwith.

[12] Following the return of the computer, Mr. Bell asked that an audit trail search be done on Ms. Lee Foon's activities on the computer between the period April 1998 and March 1999. This search would reveal all the taxpayer accounts that Ms. Lee Foon accessed or attempted to access during that period of time.

[13] Ms. Morrison was asked to review the results of the audit trail search, and did so in April 1999.

[14] In those situations where an access was made that was related to the work Ms. Lee Foon was doing, an entry would be made in the computer and appear on the screen.

[15] Ms. Morrison noted that there were a number of accesses, which she felt were not work related. Rather, some had an address in the same vicinity as the grievor's cottage, while others worked and lived outside the jurisdiction of the Kitchener-Waterloo Tax Office where Ms. Lee Foon was situated.

[16] The results of the audit trail search were sent to the Internal Affairs Division in the C.C.R.A. for investigation. Their report (Exhibit E-1) indicates, at pages 4 to 6, that Ms. Lee Foon, on eight occasions between April 14, 1998 and March 6, 1999, accessed taxpayer accounts that did not relate to files she was working on.

[17] As stated earlier, Ms. Lee Foon has never denied accessing those accounts. Her reason for doing so was, as she testified, to follow up on possible leads of individuals who may have, in one fashion or another, attempted to avoid paying income tax.

[18] Some examples of the leads which Ms. Lee Foon decided to follow up on were instances where fellow cottagers had bragged about non-reported income.

Ms. Lee Foon accessed their accounts, saw the T-4 and saw that the proper deductions were in fact applied. No follow up was done as all appeared in order.

[19] Another example concerned an access Ms. Lee Foon made on June 16, 1998 with respect to a fellow cottager who had purchased a number of items that he claimed he had deducted on his business tax return but was using those items for personal use at the cottage.

[20] The accesses she made indicated this was a *bona fide* lead, but Ms. Lee Foon testified she did not advance the lead due to the investigation being conducted on her. In cross-examination, Ms. Lee Foon admitted the access was made June 16, 1998 and the investigation was May 1999 and she had not advanced the lead in the interim period.

[21] Ms. Lee Foon attempted to locate the file of an individual who had asked her to get his name off the tax records so he would not have to pay taxes anymore. She was not able to locate his file and took no further action when she realized the individual was only joking.

[22] Ms. Lee Foon was told that an individual she knew was part of the underground economy as a singer at private engagements. She attempted to access the tax accounts of this individual but did not find the correct account; therefore she did not report this person. In cross-examination, she agreed that accessing these accounts would not show if the individual had earned but had not declared the income.

[23] Mr. Bell stated that these accesses were totally inappropriate. The recommended format for an employee to follow, in the event the employee feels he/she has a lead on someone the employee believes has evaded paying income tax, is to complete a form called a T-133 (Exhibit E-2). Accesses such as this were a violation of the *Standards of Conduct* (Exhibit E-3).

[24] It was admitted by Mr. Bell that an employee could forward a lead in a format other than via a T-133, and the lead could still be investigated. Indeed, the grievor indicated that she had forwarded a lead via a two-way memorandum in 1996 and it was investigated (Exhibit G-2).

[25] According to Mr. Bell, an employee's involvement in the process would halt after submitting the lead. It is not up to the employee to verify or investigate the lead; that responsibility rests with the Audit Section of the C.C.R.A.

[26] Ms. Lee Foon testified she was not investigating these leads. Rather, she was trying to ascertain whether or not they were *bona fide*. She indicated her job description encompassed a responsibility to refer leads, and she specifically referred to page 3 of Exhibit E-9, her job description, where it states:

...

- *Identifying and referring lead information about non-filers and suspected evaders to other internal areas.*

...

[27] Ms. Lee Foon said she had provided leads in the past and, as evidenced in the two-way memorandum concerning a lead (Exhibit G-2), she attached copies of the taxpayer's T-1s for 1994 and 1995. No one ever suggested she should not do this.

[28] In cross-examination, Ms. Lee Foon said she made the various accesses to determine the potential of the lead. Some were not very good leads, while others were more promising. She cited the example of a fellow cottager that bragged about deducting personal items as a business expense. She felt this was potentially a good lead, yet admitted she never filled out a T-133 form on this lead. She told Internal Affairs, while she was being investigated, that she had planned to refer the case as a lead upon her return to work, but admitted in cross-examination she has not yet referred this matter onward.

[29] Ms. Lee Foon stated she was evaluating leads, not investigating them. This, she felt, was a step before investigating.

Arguments

For the Employer

[30] This is a case where the grievor has admitted accessing tax accounts of individuals that were neighbours and acquaintances. The files of these individuals

were not ones Ms. Lee Foon was working on, and they were not specifically assigned to her. No leads were forwarded to management in any of these situations.

[31] One of the basic rights of the C.C.R.A. clients is to have tax information they submit treated as confidential.

[32] At best, this is a case where someone went on a crusade for the C.C.R.A. to discover nasty non-filers. This, though, was not what was expected of her. Employees cannot decide for themselves what their mandate is.

[33] With respect to searching for undeclared income, nothing could be verified by what would be shown on the computer. With respect to searching for non-reported income, or fraud, again nothing would show up to verify this.

[34] It is not up to an employee to snoop in files to see if something is wrong. If the employee does not have serious grounds to believe something is wrong, the employee should not be accessing files to see if something is amiss.

[35] If the employee feels something is wrong, the employee can provide the lead, but not access confidential information.

[36] No leads were ever provided. In one case, Ms. Lee Foon stated she intended to provide a lead but in the year that passed between the time she accessed the file and the investigation, no leads were forwarded. This in spite of the fact she stated it was a good lead.

[37] The decision to impose a three-day suspension is within a reasonable response and should not be interfered with.

[38] A book of authorities was presented listing cases which counsel for the employer relied on in support of her case.

For the Grievor

[39] There has never been any attempt by Ms. Lee Foon to hide the fact she has made these accesses. She did so because part of her work is to identify and report on leads, as stated in her job description. In fact, nowhere in the job description does it limit reporting on leads to only those files you work on.

[40] What we have here is an employee who was, perhaps, a little keen in doing her duties. The employer is suggesting the grievor was doing more than she was required to do, but in reality she was simply keen to do her job.

[41] The form (T-133) that the employer claimed employees should fill out to provide leads requires the employees to include the S.I.N. of the person suspected of tax evasion. The only way to include this information is to access their account, which is what Ms. Lee Foon was doing.

[42] Ms. Lee Foon gained nothing personally from accessing this information, nor did she disclose any information she discovered.

[43] Nothing Ms. Lee Foon did in accessing files is different from what she did in 1996 in submitting a lead via the round-trip memorandum (Exhibit G-2). The round-trip memorandum did not attract discipline, and neither should these events. This amounts to condonation.

[44] There are no rules or policies forbidding what Ms. Lee Foon did. An employee can not be prevented from breaking a rule when none exists.

[45] As an employee of the C.C.R.A., it is not open to Ms. Lee Foon to disregard information which comes to her attention concerning possible tax evasion. This is further spelled out in the employer's policy titled *Standards of Conduct* (Exhibit E-3, at page 6). She can not provide preferential treatment to friends.

[46] There are many mitigating factors here which should be taken into account. These include the fact Ms. Lee Foon has 20 years of service without ever having any discipline imposed. She did not gain personally and never disclosed the information she discovered. No one has complained about her actions outside the C.C.R.A., and no embarrassment accrued to the C.C.R.A. In short, no harm was done.

Reasons for Decision

[47] There is no dispute with respect to the actions of Ms. Lee Foon accessing taxpayer accounts for files she was not actually working on. For this she received a three-day suspension and I must determine if this was warranted.

[48] Ms. Lee Foon stated that her job description allows her to identify and refer information pertaining to leads, and in these instances she was evaluating the potential of the leads. Furthermore, she states this is no different from what she did in 1996 in submitting a lead, and attaching relevant documentation, via the two-way memorandum.

[49] With respect to the 1996 situation, there was no evidence to indicate whether or not Ms. Lee Foon was working on that file. It may have been part of her regular workload, and in reviewing the situation she discovered something amiss and forwarded it via the two-way memorandum. The memorandum indicates the grievor did forward a lead to her supervisor, but no details were put in evidence as to how she came upon this information. If it related to files she was working on, then it is vastly different from the present situation. In any event, there was not sufficient evidence produced to allow me to conclude the facts of the two situations were alike.

[50] The grievor's job description with respect to leads states:

...

- *Identifying and referring lead information about non-filers and suspected evaders to other internal areas.*

..

Is this sufficient to justify the grievor accessing files of individuals whose files she was not working on? I think not.

[51] In *Ward* (Board files 166-2-16121 and 16122), the grievor was discharged for accessing a file and then communicating information to a taxpayer in a non work-related situation. While there are differences between those circumstances and the case at hand, some aspects, I believe, do apply. The adjudicator wrote, at pages 12 and 13:

...

From the evidence presented before me, I find that the grievor without authorization or consent of the persons earlier named, with the possible exception of Rhonda Maracle, unlawfully accessed the computers at her disposal and obtained from tax accounts contained therein information which was highly confidential and which she

was forbidden to obtain. By so doing, she put in jeopardy the tax system in Canada which is a unique and delicate system based on voluntary personal input by taxpayers of matters of an utmost confidential nature, including financial, marital and other personal information which the taxpayers of Canada have every right to have protected. Such an infringement cannot be tolerated if the tax system is to survive and have any credibility and, in addition, it is a criminal offence to access such information or divulge such information to third parties.

...

[52] I believe the same applies here. I simply can not find any justification whatsoever for an employee of the C.C.R.A. to peruse files of taxpayers other than those files which the employee is working on.

[53] This does not mean that leads can not be forwarded on suspected tax evaders. When such information comes to light, employees fill out a form (T-133) with as much information as they can. The form then goes to the appropriate section for further investigation, if necessary. I find it abhorrent to think an employee of the C.C.R.A. would access the file of a friend or acquaintance on the basis of some personal remarks made.

[54] In this case, I am left wondering whether or not Ms. Lee Foon was really pursuing leads, or whether there was some other reason for accessing the files. For the eight accesses she made, and for which she was disciplined, no leads were submitted whatsoever. Now in six of those cases she did not uncover any information which would justify her referring the matter for further review. However, in two cases she felt they were potentially good leads.

[55] The two accesses were made in June 1998 and February 1999, but neither lead was referred for further investigation in spite of their potential. The grievor stated she did not do so because of the investigation into her actions. However, the investigation began in May 1999, which meant there was adequate time before the investigation for Ms. Lee Foon to advance the information on these potential leads, yet she never did so.

[56] Having found that it was inappropriate for Ms. Lee Foon to access the files of taxpayers who did not form part of the grievor's regular workload, I must now turn to the penalty itself to see if it was appropriate.

[57] The grievor's representative has advanced a number of mitigating circumstances that should be considered when determining quantum. With respect, this is a very serious matter. In *Ward (supra)*, the grievor was discharged for accessing confidential taxpayer information and revealing same to the taxpayer. Here there was no revelation of the information uncovered, but, in my view, there is a vast difference between a discharge (which, by the way, was upheld) and a three-day suspension.

[58] Given all of the above, I find the three-day suspension to be within an acceptable range of responses issued by the employer. In the circumstances, I see no reason to modify the penalty.

[59] In light of the above, the grievance is dismissed.

Joseph W. Potter,
Vice-Chairperson

OTTAWA, December 11, 2001.