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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

KAREN SPARLING

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer



Before: Ken Norman, Board Member

For the Grievor: Andrea Dean, Counsel, Public Service Alliance of Canada

For the Employer: Harvey Newman, Senior Counsel, Treasury Board

Heard at Vancouver, British Columbia,
November 28, 2001

DECISION

[1] The sole issue presented to me by this grievance is a question of fact under the provisions of article 64.07 of the Program and Administration Services (all employees) collective agreement between the parties. [Code: 300/98] It was agreed that my task was to determine whether Karen Sparling had been "required by the Employer to substantially perform the duties of a higher classification level in an acting capacity" from January 18, 1999, to October 18, 1999. Thanks to collaborative efforts on the part of the representatives of the parties, this hearing was able to proceed expeditiously on the footing of many agreed facts and joint exhibits.

[2] Karen Sparling took up employment, at the CR-03 level, with Revenue Canada, the predecessor to the Canada Customs and Revenue Agency [CCRA], at the Pacific Highway location, in August of 1989.

[3] From some time in 1997 to January of 1999, Ms. Sparling occupied the position of an Administrative Services Clerk CR 2120 [CR-03 level] in the downtown Vancouver Office. Ms. Sparling had acted in a CR-04 position from July 28, 1997, to September 30, 1998.

[4] In January of 1999, Ms. Sparling was offered a temporary transfer assignment to the new Surrey Campus office. This offer was made by Tim Philp, Assistant Director, Materiel Management & Administrative Services, in response to a request from Georgina Turcotte, Assistant Director, Facilities, Accommodations & Telecommunications, for a clerk to help organize the new Surrey Campus location.

[5] Karen Sparling gladly accepted the transfer opportunity as the Surrey Campus was much closer to her home than was the downtown office. No formal documents were executed with regard to the assignment. Tim Philp advised that the assignment would be for approximately six months. He further advised that the assignment would be at the CR-03 level.

[6] Karen Sparling took up the assignment at the new Surrey Campus on these understandings. She was part of a team first supervised by Bill Dixon, Coordinator, Accommodations & Telecommunications - until June 16, 1999 - and then by Brenda Hermann - until October 15, 1999, when the grievor left the team and took up an assignment at the CR-03 level in Collections at the Surrey Campus.

[7] From early days of the assignment, Karen Sparling came to the conclusion that she was "substantially performing" the duties of a CR-04 Facilities, Accommodations & Telecommunications Clerk [CR 2091], for which there were four positions identified in the organization chart for Finance and Administration, Facilities, Accommodations & Telecommunications, beneath the office of Coordinator, Accommodations & Telecommunications, occupied first by Bill Dixon and then by Brenda Hermann. During the course of her evidence, Karen Sparling volunteered the information that, when she first raised

a question about this matter with Bill Dixon, he cut the discussion short with the comment "Don't go there".

[8] Ms. Sparling approached Bill Dixon informally seeking a statement of duties. In the summer, she renewed this request with Brenda Hermann. On June 28, Ms. Hermann reviewed a list of job duties provided to her by the grievor and, in response, advised Ms. Sparling that she was not responsible for all of those duties. She was not being required to do them. And, if she could not live with that, "the bottom line would be that she would have choices to make whether she stayed or not." The next step was that the minutes of a Facilities Team Meeting of August 3, 1999, record that "Brenda will be giving Karen a list of responsibilities when Karen gets back. Possible duties include: filing; invoices for BC Tel, Cantel and BC Mobility; inventory of current phones and headsets; voice mail report; archiving; ordering of supplies for the unit." The minutes of the Facilities Team Meeting of August 10, 1999, note that "Clarification and a list of responsibilities was provided to Karen."

[9] On August 25, 1999, the grievor formally transmitted to Brenda Hermann a request for CR-04 acting pay.

[10] At the request of Brenda Hermann, a classification assessment of the work being done by the grievor, as described by Brenda Hermann, was conducted by Pam Makortoff, Classification & Organizational Consultant, Pacific Regional Operations. Ms. Makortoff concluded in a report of October 15, 1999, that, though Ms. Sparling was performing additional duties outside her CR 2120 work description that justify additional points in rating for Contacts, the work "still fits in the CR-03 point band."

[11] On November 4, 1999, this grievance was filed. It was received at first level on December 1, 1999.

[12] By an email of December 7, 1999, the grievor challenged Ms. Makortoff's assessment. Ms. Sparling attached a Written Performance Review that had been signed on November 9, 1999, by Elma Philps, as Team Leader, and invited Ms. Makortoff to be guided by its contents. The proper person to have so signed was Brenda Hermann.

[13] Ms. Hermann testified that she initiated a disciplinary response to this action by Ms. Philps. Ms. Philps was an AS-01, Facilities, Accommodations & Telecommunications Officer, not a supervisor and had no right to hold herself out as a Team Leader in the execution of a Written Performance Review. No doubt, Elma Philps worked most closely with the grievor and was interested, as a "good heart", in supporting her claim for acting pay. This likely explains why, under the heading "Results Achieved" in

the Written Performance Review, Ms. Philips had endorsed a text that was largely a copy of a list of job functions and responsibilities that the grievor had transmitted to Ms. Hermann on June 28, 1999.

[14] In response, Brenda Hermann had interviewed the other team members and then had spoken to Karen Sparling. Ms. Hermann learned from the other team members that many of the items in the list of June 28, 1999, fell under the responsibilities of the two AS-01 Officers. Further, when Ms. Sparling was engaged in these activities, it was not on her own initiative. Rather, it was under the direction of the Officers.

[15] Ms. Hermann testified that, in a meeting of August 10, 1999, Ms. Sparling conceded these points to her, as well as conceding that some of the listed activities had only been done once by her. Finally, Ms. Hermann testified that neither she nor Bill Dixon had ever assigned these duties to the grievor. Ms. Hermann made this point plain in her meeting with the grievor on August 10, 1999, and added that management was simply not requiring Ms. Sparling to take on functions beyond the CR-03 level.

Argument for the grievor

[16] Andrea Dean's central argument for the grievance was that, by all accounts, Karen Sparling had effectively functioned, for several months, as an integral part of a transition team at the Surrey Campus whose organization chart contained four empty CR-04 positions and not even one CR-03 position. Ms. Sparling had acted as a CR-04 in the past. The work that she had performed at the Surrey Campus was beyond what she had done as a CR-03. Further, she had seen a number of job postings for CR-04 Facilities Management Clerks and Accommodation, Telecommunication Clerks that contained job descriptions and duties similar to the work that she was doing at the Surrey Campus. Ms. Dean also submitted that the employer's assessment process was flawed because the grievor was not interviewed by Ms. Makortoff. In sum, the employer should not be allowed to solicit a CR-03 clerk to "volunteer" for a temporary assignment beyond her level and not compensate the person with acting pay at the CR-04 level.

[17] In support of these submissions, on the question of what it is to "substantially perform the duties of a higher classification", Ms. Dean cited *Macri* (Board file 166-2-15319) (Young) and my decision in *Shanley* (Board file 166-2-3044), as approved in *Vanier* (Board file 166-2-23562) (Simpson).

Argument for the employer

[18] Harvey Newman, for the employer, took no issue with these cases. However, the facts of this case differ. In *Macri*, it was common ground that the grievor had performed duties beyond her CR-3 level; the issue was whether the proper level was AS-1 or AS-4. In *Shanley*, I concluded that the grievor

had "stood in the shoes" of a person at a higher classification level. In *Vanier*, the grievor's uncontradicted evidence was that he had been assigned to work with a team at a higher classification level and had participated in all of the team's work activities. The question in this case is whether the grievor has shown, on a balance of probabilities, that she was required to substantially perform the duties of a higher position.

[19] Mr. Newman conceded that, in all of the circumstances, he could understand why Karen Sparling felt entitled to acting pay at a higher level. There can be little doubt but that her new responsibilities at the Surrey Campus involved more work than she had been performing in the mail room at the downtown Vancouver Office. And, it is clear from the evidence that management appreciated her extra efforts. However, both when the grievor raised her concerns with Brenda Hermann on June 17 and June 28 and again when the grievor put forward her formal request for acting pay on August 25, 1999, management acted promptly and properly to investigate and assess the situation. First, Ms. Hermann made it clear to Ms. Sparling on June 28 that she was not being required to perform CR-04 duties. Then, Ms. Makortoff determined that, though the grievor was performing additional duties that justified additional points in rating for Contacts, the work still fit into the CR-03 band.

Reasons for decision

[20] On the face of the facts summarized by Andrea Dean, at paragraph [16] of this decision, there is something suspect about what actually happened in the months following Karen Sparling's move, as a CR-03, to the Surrey Campus on January 18, 1999. That she believed she was substantially performing functions at a level higher than that of a CR-03 comes as no surprise given the fact that the applicable organizational chart at the Surrey Campus contained no CR-03 position but contained four vacant CR-04 positions. In terms of the initial months, I did not hear evidence from Bill Dixon. Nor did I hear testimony from Elma Philps. With regard to Mr. Dixon's role, all that I did hear was evidence from Karen Sparling that when she first broached the matter of her additional duties with Mr. Dixon, he admonished her "Don't go there". Without more by way of explanatory evidence from Mr. Dixon, there is ambiguity in this direction. It is consistent both with the view clearly taken subsequently by Brenda Hermann and with the position criticized by Ms. Dean in summation. I take her point that the employer should not be permitted to solicit a person to "volunteer" for what amounts to an acting assignment but with no acting pay attached to it. As for Elma Philps, I do have before me the Written Performance Review that she illegally executed as Team Leader. Under the heading Team Leader's Comments (optional) Ms. Philps sings the grievor's praises noting that "you became an integral part of this team and proved to both the team and our internal client base that you are more than capable and can be counted on to follow through with requests and resolve problems quickly and efficiently." In this light, I take Ms. Dean's point that this case looks quite like *Vanier*.

[21] However, once Brenda Hermann makes it plain to the grievor, on June 28, 1999, that she was not being required to do anything beyond her CR-03 level, the situation changes. From that point on, whatever the daily practices were between Ms. Philips and Ms. Sparling, it is clear that Ms. Sparling was not being "required" by her employer to substantially perform the duties of a higher classification level in an acting capacity. This is made explicit in the list of duties proposed by Ms. Hermann in her meeting with the grievor on August 10, 1999. For my part, suffice it to say that it is too bad that Karen Sparling was not prepared to take "no" for an answer. Elma Philips paid a price for supporting this intransigence. I can understand why Ms. Sparling felt frustrated by what she was advised. As she put it in cross-examination, Ms. Hermann's instruction not to do any more than CR-03 duties "would leave me with very little to do". However, Ms. Hermann, as the supervisor, must be respected as the proper judge of that question. I take Mr. Newman's distinguishing points about the cases submitted by Ms. Dean with regard to events subsequent to June 28, 1999. In those cases, the employer made no clear statement to the grievors as to what was and what was not being required of them. Article 64.07 is not just about whether an employee was substantially performing the duties of a higher classification level; it stipulates first that such activity must have been "required by the Employer" in order for there to exist an entitlement to acting pay.

[22] For the reasons that I have provided, this grievance is sustained in part. I declare that Karen Sparling is entitled to acting pay at the CR-04 level from January 18, 1999, to June 28, 1999. I am persuaded by the evidence that, during this period of time, she substantially performed the duties of a CR-04, as a Telecommunications Clerk, within the applicable organizational chart. She worked effectively with Elma Philips, AS-01, as an integral part of the team. All that I have by way of contradiction on the point as to whether the employer required this work to be done is the grievor's testimony concerning Bill Dixon's ambiguous "Don't go there" admonition and Brenda Hermann's subsequent assertion, on Mr. Dixon's behalf that he had never assigned CR-04 duties to the grievor. In effect, the story from January 18, 1999, to June 28, 1999, seems very close indeed to that in *Vanier*. However, that story changes as and from June 28, 1999, when Brenda Hermann firmly advises Karen Sparling that she is not being "required" to perform CR-04 duties and that "the bottom line would be that she would have choices to make whether she stayed or not". Thereafter, though, as indicated by Elma Philips' Written Performance Review, apparently Karen Sparling continued to function as an integral part of the team at a CR-04 level, it was by her choice. Such activity was not being "required" by the employer. This position was reinforced by Ms. Hermann's investigation and subsequent meeting with the grievor on August 10, 1999, and by Ms. Makortoff's classification analysis. For the purposes of this conclusion, nothing turns on the process argument that Ms. Makortoff conducted her assessment without the benefit of an interview with Ms. Sparling. I must say that, in light of the extraordinary illicit step taken by the grievor and Elma Philips in drafting the so-called Written Performance Review for

consideration by Ms. Makortoff, it is perhaps just as well that no such interview process was engaged in by Ms. Makortoff. After all, she is a Classification and Organizational Consultant, not an arbitrator.

[23] For all these reasons, this grievance is allowed in part. I will remain seized of this decision in order to resolve any conflicts that may arise between the parties as to the amount of acting pay due to the Karen Sparling.

Ken Norman
Board Member

SASKATOON, January 3, 2003.