Library

Date: 20041015

Files: 166-2-31136
166-2-31137

Citation: 2004 PSSRB 150

Public Service
Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

MÉLANIE MAROIS and ANNIE HUBERT

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

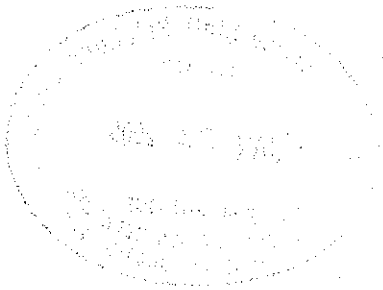
Employer

Before: Léo-Paul Guindon, Board Member

For the Grievors: Giovanni Mancini, Counsel, UCCO-SACC-CSN

For the Employer: Jennifer Champagne, Counsel

Heard at Cowansville and Orford, Quebec,
November 20 and 21, 2003, and May 6, 2004.



[1] At the time of the events leading to the grievances, Mélanie Marois and Annie Hubert held positions as correctional officers (CX-02) at Cowansville Institution of the Correctional Service of Canada.

[2] The grievors contest their employer's decision not to maintain their maternity-related reassignments and to consider them on leave without pay starting on November 19, 2001.

[3] On November 20, 2003, the panel visited Cowansville Institution, in the presence of the parties and their representatives. The institution is located in the Eastern Townships region, near the town of Cowansville, Quebec. It is a medium-security institution made up of a number of blocks inside a fenced perimeter and one building (the A-I building) outside the perimeter. With 424 cells, the institution houses 475 inmates, 100 of whom are serving life sentences.

[4] Article 46 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers-Union des agents correctionnels du Canada-CSN for the Correctional Services Group (non-supervisory and supervisory), bearing the expiry date of May 31, 2002, applies to the present cases (Exhibit F-1). Article 46 reads as follows:

> ***ARTICLE 46***
>
> ***MATERNITY-RELATED REASSIGNMENT OR LEAVE***
>
> ***46.01*** *An employee who is pregnant or nursing may, during the period from the beginning of pregnancy to the end of the twenty-fourth (24th) week following the birth, request the Employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current functions may pose a risk to her health or that of the foetus or child.*
>
> ***46.02*** *An employee's request under clause 46.01 must be accompanied or followed as soon as possible by a medical certificate indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk. Dependent upon the particular circumstances of the request, the Employer may obtain an independent medical opinion.*
>
> ***46.03*** *An employee who has made a request under clause 46.01 is entitled to continue in her current job while the Employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is*

entitled to be immediately assigned alternative work until such time as the Employer:

(a) modifies her job functions or reassigns her,

or

(b) informs her in writing that it is not reasonably practicable to modify her job functions or reassign her.

***46.04** Where reasonably practicable, the Employer shall modify the employee's job functions or reassign her.*

***46.05** Where the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the employee in writing and shall grant leave of absence without pay to the employee for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than twenty-four (24) weeks after the birth.*

***46.06** An employee whose job functions have been modified, who has been reassigned or who is on leave of absence shall give at least two (2) weeks notice in writing to the Employer of any change in duration of the risk or the inability as indicated in the medical certificate, unless there is a valid reason why that notice cannot be given. Such notice must be accompanied by a new medical certificate.*

****

***46.07** Notwithstanding 46.05, for an officer working in an institution where she is in direct and regular contact with offenders, if the Employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the Employer shall so inform the officer in writing and shall grant leave of absence with pay to the officer for the duration of the risk as indicated in the medical certificate. However, such leave shall end no later than at the time the officer proceeds on Maternity Leave Without Pay or the termination date of the pregnancy, whichever comes first.*

[5] Ms. Hubert notified her supervisor (Michel Gagnon) that she was pregnant on August 2, 2001. At that time, she occupied a level 2 correctional officer (CX-02) position. Formerly, she had held, on an acting basis, a parole officer position from

which she had withdrawn. At that time, she had taken advantage of the leave with pay for pregnant employees provided for in section 132 of the *Canada Labour Code.*

[6] A medical certificate signed by Dr. Martel was provided to the institution on August 24, 2001; it indicates the following restrictions (Exhibit F-6):

> [Translation]
>
> *- No night work, maximum 8 hours per day and maximum 40 hours per week*
> *- No contact with prisoners*
> *- No firearms*
> *- No visual contact with scenes of violence*
> *- No lifting of over 20 kilograms and only occasional lifting of 15 to 20 kilograms*

[7] On August 28, 2001, a meeting with Régis Charron (Acting Warden, Management Services) was held, attended by Daniel Guenette (union representative), Pierre Ouellet (occupational safety and health representative) and Ms. Hubert, in order to offer her various positions following her request for reassignment under clause 46.01 of the collective agreement. Mr. Charron agreed to make secure the area where the meeting was to be held, ensuring that no inmates were present by putting a stop to all inmate movements in that area.

[8] Various reassignment positions were then offered to Ms. Hubert: CX-01 at the main gate, central control, main camera control, assistant to the correctional supervisor, case management clerk, and stores clerk. In Ms. Hubert's opinion, these positions did not meet the restrictions indicated in the medical certificate, and the parties agreed to allow her to check with her physician the restrictions he had imposed. On September 14, 2001, Dr. Martel specified as follows (Exhibit F-7):

> [Translation]
>
> *Reassignment to work in an administrative department to which no inmates have access. P.S.: Former memorandum still valid.*

[9] On September 18, 2001, a meeting was held between Lucette L'Espérance (Chief, Administration and Materiel Management, CAMM) and Alexandra Aless (Unit Manager), representing the employer, and Ms. Hubert and her representatives. Prior to that meeting, Ms. L'Espérance assured Ms. Hubert in writing that no inmates would be in the area. A training and inmate file clerk position, involving work with a computer and

files, was offered to Ms. Hubert. Training would be given to her for a period of one and one-half to two weeks, in the offices located on the second floor of the Administration-I building. She would then perform the work in the A-I building.

[10] The work Ms. Hubert performed during the training period was similar to that described in Exhibit E-3, as follows:

> [Translation]
>
> *Clerical work in the Administration-I building (second floor):*
>
> *We offer these employees the possibility of performing clerical and administrative work, 37.5 hours per week, five days per week, with no hard physical effort, no weapons, no gases and no lifting.*
>
> *The Administration-I building is a building that contains the main gate, visiting room, and main gate control on the first floor, and the offices of the Warden, Deputy Warden of Management Services, the Chief of Finance, the Chief, Administration and Materiel Management, and their assistants on the second floor. Each employee works in an enclosed office.*
>
> *The only inmate with authorized access to this building is the cleaner, a selected inmate who has the security classification required for this cleaning position. His presence in our offices is minimal, being limited to emptying wastebaskets daily and vacuuming once or twice per week.*
>
> *The other instances of inmates being present that may occasionally occur are when an inmate is released or leaves on temporary absence: these inmates report, escorted by an officer, to receive the money to which they are entitled. This wicket is located beside the exit door leading to the stairs and, since the inmates are escorted, they do not move around the second floor. They remain at the wicket and they are present for approximately five minutes. We estimate that approximately two or three inmates per week report to this wicket.*

[11] During the training period, no inmate occupied the cleaning position in the Administration-I building. An agreement was reached in order to ensure that Ms. Hubert would have no contact with inmates throughout her training period. A memorandum was sent to the correctional supervisor in charge of the main gate asking that person to notify those responsible (Ms. L'Espérance or Ms. Venne) when an inmate was to have access to the second floor of the Administration-I building

(Exhibit E-1). When an inmate was to have access to that floor, the door to the office where Ms. Hubert was being given her training was then closed and locked during the time the inmate was present. This procedure was applied during the entire training period. Brigitte Dubé, the warden of the institution, explained in her testimony that, despite these precautions, Ms. Hubert apparently was frightened when she encountered a new employee whom she mistook for an inmate.

[12] Around September 26, 2001, Ms. L'Espérance informed Ms. Hubert and her representative that an inmate had been selected to work as a cleaner in the Administration-I building for four hours per day. At that time, the employer would have liked Ms. Hubert to agree to continue to perform the work of a training clerk in the Administration-I building. No changes to the initial agreement were acceptable to Ms. Hubert and her representative; she performed her work from the A-I building starting on September 27, 2001. During the discussions on this matter, the employer informed Ms. Hubert that her medical certificate would be contested.

[13] The A-I building is located outside the fenced security perimeter of the penitentiary. It contains meeting rooms and office spaces. The facilities were improved in order to allow Ms. Hubert to perform the work of a training and file clerk in this location. For example, higher performance computers were apparently installed there. The employer pointed out, in Exhibit E-3, that five persons worked in this location and that no inmate had access to them. During her testimony, Ms. Dubé noted that an inmate might be assigned to groundskeeping in the area of the A-I building and would always be accompanied by a training clerk and that, at certain times, a cleaning inmate might be assigned there. In the grievors' opinion, the restrictions indicated in the medical certificates were respected when the employer asked them to perform their work in the A-I building.

[14] Mélanie Marois, who occupied a CX-02 position in block 8 (a block located inside the perimeter and containing cells housing inmates), notified the employer that she was pregnant on September 11, 2001. She took advantage of the leave with pay provided for in section 132 of the *Canada Labour Code* during the time she required to obtain a certificate from her physician. In the certificate issued on September 20, 2001, Dr. Chagnon indicates the following restrictions (Exhibit F-3):

[Translation]

- No inmates in the same area
- No exposure to toxic gases or firearms
- No visual contact with scenes of violence
- No night work

[15] Late in September or early in October 2001, Ms. Bisson (Unit Manager) offered Ms. Marois reassignment to a case management clerk position, the workplace of which was located in the Administration-III building. The work of this position is described in Exhibit E-3 as follows:

[Translation]

*1. **Case management clerk***

Works days, Monday to Friday, 7.5 hours per day.

The offices are located inside an isolated administrative area; the opening and closing of the door to this area is monitored by a correctional officer. Approximately 20 persons work in this area. An inmate cleans there every day from 1:00 to 2:30 p.m.; inmates authorized to work in this area are persons whose files have been examined by preventive security officers only and whose security classification is not typical of our client group (inmates with minimum security classification, or post-suspension inmates).

Work to be performed includes:

- performing general office work;
- using a computer (often seated);
- making photocopies;
- filing documents (seated or standing);
- sending facsimile messages;
- sending and receiving internal mail;
- writing internal memorandums;
- entering data; and
- opening files.

[16] According to the testimony, the work of the case management clerk position is similar to that of the "Clerical work in the Administration-III building" position described in Exhibit E-2. The following description of the work in the Administration-III building is applicable to the position offered to Ms. Marois, adjusted as required for specific job functions (Exhibit E-2):

[Translation]

Clerical work in the Administration- III building

> *Performs clerical and administrative work, 37.5 hours per week, five days per week, with no hard physical effort, no weapons, no gases and no lifting.*
>
> *The Administration-III building contains the offices of the Deputy Warden, Correctional Operations and the Co-ordinator, Correctional Operations, the case management office, the computer division, the offices of the preventive security officers, the records room, and the Parole Board hearing room. Access to the building is controlled by central control, and only inmates who have an appointment with an employee working in the building have access to it, on presentation of a written pass to this effect. Each employee works in an enclosed office. A cleaning inmate is present on a daily basis, but enters the offices to clean only if the employee provides access and permission.*
>
> *The Administration-III building is located approximately 200 feet from the main gate and close to central control in which an officer monitors inmates' comings and goings, checks their movement passes, and controls the opening of the doors to the buildings and the gates. Inmates moving in the exterior corridor in front of the Administration-III building are going either to the health care centre, to the social and cultural centre to participate in training, or to the Administration-I building for visits.*
>
> *The work offered involves no direct contact with inmates, but does involve visual contact when the employee uses the corridor in order to leave the building and move to the main gate.*

[17] In her testimony, Ms. Marois specified that inmates with passes are not always escorted when they report to the second floor of the Administration-III building for their appointments. Ms. Marois turned down this assignment, which in her opinion did not meet the restrictions indicated in the medical certificate. On October 12, 2001, an assignment to a position as assistant to the transportation co-ordinator, in an office located in the Administration-I building, was offered to her. That assignment was turned down, because the restriction that there be no inmates in the area was not met. Ms. Marois was eventually assigned to the A-I building, where she was to assist Ms. Hubert with the work of a training and file clerk.

[18] Ms. Dubé, Warden of Cowansville Institution, notified those responsible on September 10, 2001, that, starting on that date, she no longer considered it necessary for inmates working at the Administration-I building to have a minimum security classification. She considered it of the utmost importance, however, that candidates

for these positions submit an assessment demonstrating a secure level of trust (Exhibit F-8).

[19] Other employees were pregnant during that period: Ms. Richard (a parole officer) continued her work in block 9; Ms. Simard (a parole officer) was assigned to a clinical co-ordinator position in the Administration-III building; and Ms. Vaugeois (a CX-02) accepted reassignment to a position in the Administration-I building but never performed the work assigned since she was absent for health reasons.

[20] Ms. Dubé disagreed with the "no inmates in the area" restriction indicated in the medical certificates. She testified that what creates a problem is defining what constitutes contact with an inmate. In her opinion, it seems clear that pregnant correctional officers cannot be in control of inmates, in order to protect the health of the mother or that of the foetus or child. Reassignment of pregnant correctional officers to safe positions is in accordance with the policy applicable in these circumstances. In her testimony she stated that, strictly speaking, a condition of "no contact with inmates" is impossible to respect in a prison setting and that giving all pregnant workers paid leave is certainly not the meaning to be given to clause 46.07.

[21] On October 15, 2001, Ms. Dubé wrote to Serge Doyon (a senior labour relations advisor at Regional Headquarters) in order to forward a request to Health Canada for assessment of the reassignment positions offered to the pregnant correctional officers. She writes as follows (Exhibit E-2):

> [Translation]
>
> ***REQUEST FOR OPINION FROM HEALTH CANADA***
>
> *At present we have three correctional officers (CX-01) who are pregnant and are taking advantage of section 132.(1) of the* Canada Labour Code*: they believe that continuing their job functions may pose a risk to their health or that of the foetus. They have therefore decided to cease to perform their work.*
>
> *They have sent us medical certificates stating that they should be reassigned to other, safe positions during their pregnancy and noting the following restrictions:*
>
> - *week of less than 40 hours*
> - *work of 8 hours per day (maximum)*

- *no night shifts*
- *maximum lifting of 10 to 15 kilograms*
- *avoid hard physical effort*
- *no contact with inmates (risk of attack)*
- *avoid gases and firearms*
- *avoid work at the MCCP.*
- *preferably a position outside the penitentiary.*

Clearly, these restrictions were written at the employees' request, since the attending physicians have no way of knowing what an "MCCP" is, or of assessing the degree of risk of attack inherent in a proposed assignment.

[N.B.: Signatory's emphasis.]

While we recognize that the work of a correctional officer may not be suitable for pregnant women, there is other, safe work they can perform. However, the list of restrictions has led to a great many questions from management and should be reviewed by Health Canada experts in order to ascertain whether there is a medical counterindication to the work to be performed or the positions to which we wish to assign these employees, as follows.

[N.B.: Signatory's emphasis.]

Clerical work in the Administration-I building (second floor):

...

[Work description already reported in this decision.]

We therefore consider that the position being offered is reasonable and safe and does not pose a risk to the health of the employee or that of her foetus.

Clerical work in the Administration-III building

...

[Work description already reported in this decision.]

Work at the MCCP:

This type of work was verified by Health Canada experts in the case of another employee at another institution, and there was no medical counterindication to her performing the work of the Main Communication Control Post (MCCP).

> *Case management officer: (work description attached to this request)*
>
> *Works 37.5 hours per week, five days per week, with no gases, no weapons and no lifting.*
>
> *Although this position requires the worker to be in direct contact with inmates and to work in a block that houses inmates, this type of work has been performed and is now performed by other pregnant women employees who are members of another union and who have never experienced health problems because of the type of work performed.*
>
> *Lastly, we would like the restriction that there be no contact with inmates assessed in order to ascertain whether visual contact can pose a risk to the health of these employees or that of their foetus, notwithstanding all existing security controls.*
>
> [N.B.: Signatory's emphasis.]
>
> *Two of these pregnant employees were also pregnant two years ago. During their pregnancies, they were reassigned to safe administrative positions with no weapons, but had direct contact with inmates; they never mentioned feeling that these positions posed a risk to their health or that of their foetus, and their pregnancies progressed very well.*
>
> *We therefore request that Health Canada experts assess whether the assignments requested pose a risk to the health of these pregnant workers or their foetus, taking into account the fact that many pregnant employees in other employee groups perform similar work under the same conditions.*
>
> *As well, since these situations may recur in future, it would be advisable for a Health Canada expert to visit us in order to assess on site the various positions offered, and for a consolidation to be made for the use of the union and the employer.*

[22] The request for assessment was sent to Health Canada on October 15, 2000, by Mr. Doyon. A document setting out the work descriptions of the case management clerk, preventive security clerk, general office clerk, technical services clerk, services building clerk, visits and correspondence clerk, and main gate control positions was attached to the request (Exhibit E-3). An addendum was sent to Health Canada on November 6, 2001, specifying that, in addition to the inmate working as a cleaner and clerk, an inmate working as a financial clerk had been assigned to the second floor of the Administration-I building. It provides the following details (Exhibit E-4):

[Translation]

> *At that time, we indicated that only one inmate was working on that floor, as a cleaner and clerk, and that his presence was minimal, being limited to emptying wastebaskets daily and cleaning the offices and corridors. All the offices are enclosed, and this inmate is authorized to enter them only to do the cleaning work, which amounts to approximately five minutes per day.*
>
> *However, since the beginning of this week, another inmate, working as a financial clerk, has been assigned to this floor. This selected inmate has the security classification required to work on this floor and in this building. He is assigned to this position five days per week and works under the supervision of the acting Chief of Finance. He works in an enclosed office located beside the finance department, 45 feet away from the office where we wish to assign a pregnant CX employee. He always works alone in this office, which is enclosed, and he has no direct or continual contact with employees of the other departments on this floor. The only possibility of contact is encountering him en route to the women's washroom, which is located beside the office in which he works.*
>
> *We therefore wish to ascertain Health Canada's opinion on whether the presence of this inmate working as a financial clerk may pose a risk to the health of the foetus or that of the mother.*
>
> [N.B.: Signatory's emphasis.]

[23] That same day, Mr. Doyon confirmed to Ms. L'Espérance that he considered that the employer could assign a CX employee to a case management clerk position in the Administration-I building. He notes (Exhibit F-10):

> [Translation]
>
> *Similar positions have been submitted to Health Canada, and the conclusion was that these positions did not pose a risk to the health of the employee or that of the foetus. As well, headquarters agrees with this position, to the extent that the CX employee is not subjected to continual exposure to inmates.*

[24] Health Canada apparently submitted an oral report to Mr. Doyon following his request dated October 15, 2001. These conclusions were submitted to Ms. Dubé and Ms. L'Espérance, who called the pregnant employees to a meeting to be held on November 13, 2001, in the conference room of the Administration-I building. Ms.

L'Espérance specified the purpose of the meeting in an e-mail message dated November 8, 2001 (Exhibit F-4), as follows:

> [Translation]
>
> *The purpose of this meeting is to inform you of new details provided by Health Canada concerning the assignment of pregnant women CX employees.*

[25] Through their union representatives, the grievors asked that the area be made secure, that is, that the doors of the offices be closed and locked, in order to ensure that there would be no contact with the inmates working as a cleaner and a financial clerk or with any other inmates who might have access to the second floor of the Administration-I building. This request was refused because Ms. Dubé refused to lock the inmates into the offices where they were working. In her opinion, the area is secure and a number of persons could intervene if required.

[26] The union representatives (France Fortin accompanied by Mario Martel, Danielle Verrette, Pierre Ouellet and lawyer John Mancini) met with the employer's representatives (Ms. Dubé, Mr. Guérin and Ms. Bisson), and the information was conveyed that Ms. Hubert and Ms. Marois declined to attend the meeting since the restrictions indicated in their medical certificates (no inmates in the area) had not been met. Concerning the details provided by Health Canada, the union representatives told the employer they had no mandate in that regard.

[27] Ms. Dubé notified Ms. Hubert and Ms. Marois in writing of her decision concerning their reassignments on November 14, 2001. She writes as follows (Exhibit F-5):

> [Translation]
>
> *As was indicated to your union representatives, I am therefore obliged to inform you in writing of my decision concerning your reassignment, in light of the medical opinions obtained from Health Canada experts.*
>
> *After receiving the medical certificates you sent to me, as is provided for in clause 46.02 of your collective agreement I obtained an independent medical opinion, which has found that there is no medical counterindication to a pregnant CX employee being assigned to a clerical position in either the Administration-I or the Administration-III building. I remind you that the inmates who work in these two buildings*

> *have been selected in accordance with the security criteria required to perform the work and that your contact with the inmates working in this area will not be regular.*
>
> *In other words, starting on Monday, November 19, 2001, at 8:00 a.m., you will be reassigned to clerical or administrative work in either the Administration-I or the Administration-III building until the start of your maternity leave or the termination date of the pregnancy, whichever comes first. Therefore, on November 19, 2001, you must report to the office of Lucette L'Espérance, CAMM., so that she can assign work and a workplace to you.*
>
> *If you refuse to comply with this decision, you will then be considered as being on leave without pay starting the same day, that is, November 19, 2001.*

[28] The grievors notified Ms. Dubé that they disagreed with the reassignments. Ms. Hubert explained her position in the memorandum sent to Ms. Dubé on November 19, 2001 (Exhibit E-6):

> [Translation]
>
> *I hereby acknowledge receipt of your letter dated November 14, 2001. Following that decision, on November 19, 2001, Ms. L'Espérance offered me the same position I had occupied until now (for two months, in the A-I building), but in a different location, that is, in the Administration-I building.*
>
> *I wish to emphasize that I completely disagree with that decision, which consists in reassigning me a second time, but to a different location where inmates are regularly present.*
>
> *In summary, it must be clearly understood that the reason I cannot comply with your decision does not have to do with the work requested, but rather with the location in which you ask me to perform the work, since it does not correspond at all to my medical certificate.*

[29] Ms. Marois stated in her testimony that, on three occasions, the employer refused to provide her with a copy of the opinion issued by Health Canada.

[30] Ms. Marois and Ms. Hubert received the employer's response at their workplaces, which at that time were in the A-I building. Following their refusal, they were told that they would have to leave the premises (by Ms. L'Espérance for Ms.

Hubert; by Ms. Bisson for Ms. Marois). They were on leave without pay until the termination date of the pregnancy or the start of maternity leave.

[31] On November 20, 2001, Health Canada confirmed in writing its recommendations concerning the positions that could be offered to pregnant women. Dr. Carole Leclair writes as follows (Exhibit E-5):

> [Translation]
>
> *We acknowledge receipt of your letter dated November 7, 2001, in which you asked us for our opinion concerning work positions that could be offered to correctional officers during their pregnancy.*
>
> *After analysing the proposed work descriptions, and following our telephone discussions, we recommend to you the following positions (or equivalent positions), since these positions do not pose a risk to the health of pregnant women or that of their foetus:*
>
> - *case management clerk*
> - *preventive security clerk*
> - *general office clerk*
> - *technical services clerk*
> - *building services clerk.*
>
> *On the other hand, we advise against the following positions (or equivalent positions):*
>
> - *visits and correspondence clerk*
> - *main gate control.*
>
> *If you require further information, do not hesitate to contact us.*

[32] Ms. Dubé described at length in her testimony the reasons the reassignments offered to the grievors were safe. In addition to the details already provided in this decision, Ms. Dubé emphasized the fact that the offices located on the second floor of the Administration-I building were completely secure and were designed to be used as a crisis management centre. The Administration-III building is also a secure area in which inmate access and movement are controlled. According to Ms. Dubé, the attending physicians simply included in the medical certificates the restrictions dictated to them by the grievors.

[33] As evidence in rebuttal, Annie Poirier, the bargaining agent's regional representative responsible for the status of women in the Quebec Region, testified that

she had seen the document adduced as Exhibit E-3 during a dispute concerning the assignment of pregnant correctional officers working at the Donnacona penitentiary in July 2001. She noted that the Correctional Service of Canada had been aware of the response provided by Health Canada in the present cases since that date.

Arguments for the grievors

[34] Clause 46.07 was added to the collective agreement during the most recent round of bargaining. It provides that a pregnant employee shall be granted leave with pay if it is not reasonably practicable for the employer to reassign her in order to avoid the conditions indicated in the medical certificate.

[35] Clause 46.02 provides that the employer may obtain an independent medical opinion concerning the duration of the possible risk and the activities or conditions to avoid in order to eliminate the risk that are indicated in the medical certificate provided by the attending physician.

[36] In the present cases, the employer claimed that the medical certificates indicating "no inmates in the area" were obtained as certificates of convenience. The employer argued that, in the positions offered in the Administration-I or the Administration-III building, the presence of inmates is occasional and does not pose a risk to the mother or the child or foetus. The employer therefore contested the restrictions indicated in the medical certificates.

[37] Management at the Cowansville Institution wishes to determine what are reasonable conditions itself, and to have its position endorsed by Health Canada.

[38] The employer was aware of the opinion issued by Health Canada in the case of the Donnacona Institution in July 2001 and hoped for the same response in the case of the Cowansville Institution.

[39] Reassigning Ms. Marois and Ms. Hubert to work to be performed in the A-I building met the restrictions indicated in the medical certificates and had been accepted by them. Subsequently, the employer stated that this work was no longer possible and wanted to reassign them to the same work to be performed in locations in the Administration-I or the Administration-III building. Cowansville Institution is a medium-security institution, the inmates are considered violent or very violent, and they clearly have access to the locations in the Administration-I and the

Administration-III building, which thus runs counter to the restrictions indicated in the medical certificates.

[40] It appears from Exhibit E-2 that the employer is critical of the employees for having provided to their physicians the details required for them to assess the risks of the proposed assignments.

[41] The employer wishes to substitute its own assessment of the risk inherent in the positions offered for the assessment by the attending physicians. The solution involving assignment to the A-I building had been demonstrated to be practicable and effective. If the employer argues that this solution is too complicated to effect, it has no choice but to grant the employees leave with pay.

[42] Health Canada did not address the basic issue, that is, whether contact with inmates poses a risk. Health Canada responded that certain positions do not pose a risk to the health of the pregnant women or to that of their foetus (Exhibit E-5). The employer may not contest the content of the medical certificate on its own initiative under clause 46.02 and, in this regard, Health Canada may not assess whether the restrictions indicated in the medical certificates have been met. In obtaining an opinion from Health Canada, the employer did not obtain an independent medical opinion.

[43] The warden of the institution has continually refused to consider as realistic and acceptable the restriction that there be no contact with inmates. Instead, she has tried to sidetrack the debate by considering contact with inmates who have a security classification as acceptable. She wishes it to be accepted that contact with inmates in certain areas, which she describes as safe, does not pose a risk to the pregnant employees. These assessments clearly run counter to the opinions of the attending physicians.

[44] By refusing to apply the restrictions indicated in the medical certificates to the reassignment positions, the employer itself is making it impossible to arrange reassignments that meet the restrictions. Accordingly, the employer must grant the grievors leave with pay.

Arguments for the employer

[45] The employer acknowledges that clause 46.07 applies to pregnant correctional officers who, in the course of their job functions, are called upon to control inmates.

The policy applicable to women correctional officers implies reassignment to positions where they are not called upon to control inmates or to have direct and regular contact with them.

[46] On an interim basis, the employer assigned the pregnant employees to clerical work to be performed in the A-I building, located outside the security perimeter of the institution. This accommodation was made on a temporary basis in order to assess whether other assignments were safe in Health Canada's opinion.

[47] In the employer's opinion, the positions offered in the Administration-I or the Administration-III building meet the restriction on direct contact between the pregnant women and the inmates. The inmate working as a financial clerk and the inmate working as a cleaner are not under the control or responsibility of the pregnant women, and other inmates who may be in these areas are escorted or under the responsibility of other employees. If an inmate is disruptive, the other employees can realize that fact and control the inmate in an area that is secure.

[48] It is not the adjudicator's responsibility to determine what may pose a risk to the pregnant woman or her foetus. The Health Canada physicians made that assessment and determined which positions were safe. The employees and their representatives refused to discuss possible reassignments and the details provided by Health Canada. The employer obtained an independent medical opinion stating that the reassignments offered to Ms. Hubert and Ms. Marois on November 14, 2001, were safe. In these circumstances, the employees' refusal does not entitle them to leave with pay under clause 46.07, because it was practicable to reassign them in order to avoid the risks.

[49] In *Joannisse v. Veilleux et al. (Solicitor General Canada)*, Board File No. 161-2-444 (1987) (QL), the adjudicator dismissed the employee's complaint on the ground that it was the employee who declared himself no longer able to work in a prison atmosphere, after the employer offered him a position that was not in direct contact with inmates. In the present cases, it is the grievors who refused the assignment to positions assessed as safe for the mother and her foetus, and they must suffer the consequences.

[50] The concept of direct and regular contact with inmates, which is considered in *Cahill v. Treasury Board (Solicitor General - Correctional Service)*, Board File No. 166-2-

25253 (1994) (QL), could be applicable to the present cases. *Fontaine v. Canadian Food Inspection Agency*, 2002 PSSRB 33 points out that medical certificates are not Holy Writ. The adjudicator may assess their content and scope, particularly when physicians are unfamiliar with the setting and rely on facts related by their patients (*Re Fishery Products (Marystown) Ltd. and Newfoundland Fisherman, Food & Allied Workers, Local 1245* (1979), 22 L.A.C. (2d) 439, and *Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 1520* (1975), 8 L.A.C. (2d) 149).

[51] In *Gallivan and Cape Breton Development Corporation*, [1982] 1 Can LRBR 241, the Canada Labour Relations Board points out that the basis of grievances having to do with matters subject to bargaining must be given very close scrutiny in order to identify the interests at stake clearly. In the present cases, the grievors appear to wish to promote matters subject to the present round of bargaining, and the grievances should be given very close scrutiny.

Reasons for decision

[52] In the medical certificates issued for Ms. Hubert and Ms. Marois, the attending physicians indicated the restriction that their patients should not have any contact with inmates. The employer considers that this restriction was obtained as a restriction of convenience and that it is inapplicable and unrealistic in a prison setting. The employer verified certain positions with Health Canada to which it would be possible to reassign the pregnant correctional officers, in order to establish whether these positions pose a risk to the health of the pregnant women or to that of their foetus (Exhibit E-2). It also asked that the restriction that there be no contact with inmates be assessed. A list of the positions was sent to Health Canada and a document setting out the work descriptions was attached (Exhibits E-2 and E-3). According to Ms. Poirier's uncontradicted testimony, it would appear that Exhibit E-3 was identical to the document used in the case of the Donnacona penitentiary in July 2001.

[53] The Health Canada response (Exhibit E-5) lists a series of positions that do not pose a risk to the health of pregnant women or that of their foetus. This response advises against certain other positions. It is noted that the list of positions does not specify the locations in which the work is to be performed or make any mention of the issue of contact with inmates.

[54] As well, it was acknowledged that clause 46.07 may be applied to pregnant correctional officers and that they must be granted leave with pay where the employer concludes that it is not reasonably practicable to modify their job functions or to reassign them in order to avoid the activities or conditions indicated in their medical certificates.

[55] It was not contested that certain inmates are present in the locations where the employer offered to reassign Ms. Marois and Ms. Hubert to clerical and administrative work starting on November 19, 2001. It was established that reassigning the employees to work performed in locations in the A-I building, located outside the security perimeter of the penitentiary, would meet the restrictions indicated in the medical certificates.

[56] The employer argued that assignment to the A-I building would create some inconvenience for it (distant dealings with the employees, problems with direct supervision). In the employer's opinion, this accommodation could be only temporary pending the medical certificates and Health Canada's opinion on the available reassignment positions. Similarly, according to Ms. Dubé's testimony, the directive setting out ways to make the area on the second floor of the Administration-I building secure, where Ms. Hubert was given her training for the training and inmate file clerk position, could not be extended indefinitely.

[57] The employer agreed to make the area secure (to ensure that the employees had no contact with inmates) for the duration of the meetings held on August 28 and September 18, 2001. These accommodations, requested for the meeting called for November 13, 2001, were refused, and the grievors refused to attend the meeting on the ground that the restrictions indicated in the medical certificates had not been met.

[58] Under clause 46.02, the employer may obtain an independent medical opinion concerning the possible risk and the activities or conditions to avoid in order to eliminate the risk. In the present cases, the employer argued that it obtained such an opinion from Health Canada, while the union argued that that opinion is not an independent medical opinion. Since the expression "independent medical opinion" is not defined in the collective agreement, it must be given the usual meaning found in everyday language in resolving this issue.

[59] The Department of Health, which identifies itself as "Health Canada" in the opinion issued on November 20, 2001 (Exhibit E-5), falls under the same Government of Canada authority as the Correctional Service of Canada. It is legal knowledge that the employer is Her Majesty as represented by the Treasury Board in respect of the departments listed in Schedule I of the *Financial Administration Act*, and as provided in Part I of Schedule I of the *Public Service Staff Relations Act*. Therefore, the Department of Health and the Correctional Service of Canada both report to the Treasury Board, which acts as the employer in bargaining for collective agreements. As well, both organizations form part of the same government structure and, thus, Health Canada cannot be considered "independent" from the employer. On this point, I find that a medical opinion issued by a physician employed by Health Canada (Dr. Carole Leclair in the present cases) cannot be considered an independent medical opinion within the meaning of clause 46.02 of the collective agreement. According to the common meaning given to the expression "independent", this independent medical opinion must be obtained from a physician with no connection to either of the parties bound by the collective agreement.

[60] I prefer to give priority over the medical opinion issued by Dr. Leclair to the medical certificates issued by Dr. Martel and Dr. Chagnon. Dr. Martel and Dr. Chagnon are Ms. Hubert's and Ms. Marois's attending physicians and were able to observe the state of their health. The medical certificates issued by these attending physicians indicate restrictions based on details of the particular state of health of each of the two grievors. I assume that these restrictions are justified by the medical findings Dr. Martel and Dr. Chagnon observed in their patients. There is no evidence allowing me to assess whether details of Ms. Vaugeois's particular state of health or that of the other pregnant employees might justify similar restrictions or limitations. I believe that there may be details of the particular state of health of certain pregnant women that make them more vulnerable to certain factors that might be completely harmless to other pregnant women. No detail supports the employer's allegation that the restrictions indicated in the certificates were restrictions of convenience.

[61] In her opinion dated November 20, 2001, Dr. Leclair notes that she made her recommendations following an analysis of the proposed work descriptions and telephone discussions with Mr. Doyon (Exhibit E-5). Nothing in that opinion, or in the evidence adduced by the parties at the hearing, indicates that Health Canada took into consideration Ms. Marois's or Ms. Hubert's particular state of health, except for the fact

that they were pregnant. Nothing shows that their medical records or the results of certain tests that may appear in these records were assessed in order to verify what might, for either of them, pose a risk to their health or that of the foetus. Therefore, Health Canada's recommendations are general in scope for all pregnant employees and do not reflect the particular state of health of Ms. Marois or Ms. Hubert.

[62] The independent medical opinion that the employer may obtain must be dependent upon the "particular circumstances of the request", according to the wording of clause 46.02. The request at issue is necessarily the particular request for modification of job functions or reassignment made by a pregnant employee, according to the wording of clause 46.02. Therefore, the medical opinion sought by the employer must relate to the particular request by a pregnant woman, accompanied by a medical certificate indicating the risks and the restrictions applicable to her particular case. In this regard, the November 20 medical opinion issued by Health Canada cannot be a medical certificate described in clause 46.02 because it deals with a general assessment of risk to the health of pregnant women and their foetus posed by certain work or positions, not with the particular circumstances of the requests made by Ms. Marois and Ms. Hubert.

[63] The purpose of article 46 of the collective agreement is to protect pregnant employees who establish, by means of a medical certificate, that their current job functions pose a risk to their health or that of the foetus or child, according to the wording of clauses 46.01 and 46.02. These provisions apply to the extent that the employee obtains a medical certificate, indicating the possible risks and their duration, as well as the activities and conditions to avoid in order to eliminate those risks. Therefore, the basis of the right to reassignment or modification of job functions provided for in the collective agreement is the potential risks to a particular pregnant employee who can establish that certain activities or conditions of her job functions pose these risks to her, in her physician's opinion. The correctional officers concerned have met the requirement of providing this medical certificate, and thus they are entitled to modification of their job functions or reassignment in order to meet the restrictions indicated.

[64] According to clause 46.02, the employer could have obtained an opinion on whether the restriction that there be no contact with inmates was justified. Such an opinion was not obtained, as I have noted earlier in this decision. In the absence of an

independent medical opinion that this restriction is not justified by the particular state of health of the individual correctional officers or their foetus, there is no ground for the employer's not applying the provisions of clause 46.04. According to article 46, the employer is required, to the extent possible, to modify the employees' job functions or to reassign them in order to meet the restrictions indicated in their medical certificates.

[65] The collective agreement provides in clause 46.07 that it is the employer's prerogative to conclude that it is not reasonably practicable to modify the employees' job functions or to reassign them in order to avoid the activities or conditions indicated in their medical certificates. Although the acting reassignments given to Ms. Marois and Ms. Hubert consisting of work that could be performed from the A-I building establish that it is possible to meet the restriction that there be no contact with inmates, the employer was allowed to conclude that these reassignments created some inconvenience for it (distant dealings with employees, problems with direct supervision) that did not make it reasonably practicable to keep them in these positions for the entire duration of their pregnancies or until the start of their maternity leave without pay.

[66] In its memorandum dated November 14, 2001 (Exhibit E-5), the employer acknowledges that inmates work in the Administration-I building and the Administration-III building and points out that contact with these inmates will not be regular. In light of this information, reassignment to a clerical position in those locations does not meet the restriction that there be no contact with inmates indicated in the medical certificates provided by each of the correctional officers concerned. Furthermore, the consequences of this situation are covered by the provisions of clause 46.07 of the collective agreement.

[67] The employer, by stating that the temporary reassignment of Ms. Hubert and Ms. Marois to clerical work performed in the A-I building caused some inconvenience for it, therefore concluded that it was not reasonably practicable for it to modify their job functions or to reassign them in order to meet the restrictions indicated in the medical certificates. Similarly, the employer's attitude in refusing to make the area for the November 13, 2001 meeting secure showed that the employer considers it not reasonably practicable to modify these employees' job functions in order to meet the restrictions indicated in the medical certificates. These factors satisfy the conditions

set out in clause 46.07, which entitle the correctional officers concerned to leave with pay.

[68] Therefore, by wishing to impose reassignment to clerical positions in the Administration-I or the Administration-III building on Ms. Marois and Ms. Hubert starting on November 19, 2001, the employer contravened clause 46.07 of the collective agreement. It might have been otherwise if, under clause 46.02, the employer had obtained an independent medical opinion that the restriction that there be no contact with inmates was not justified by the state of health of the mother or the foetus.

[69] The decisions cited by the parties are of no assistance in interpreting the collective agreement in the present cases. First, the provisions of article 46 of the collective agreement have no relation to those considered in the decisions cited. Second, the facts in the present cases differ in all respects from those considered in the decisions cited. In *Joannisse* (*supra*), the employer assigned the employee to a position that respected his inability to work directly with inmates, in accordance with the opinion of the attending physician. The employee left the penitentiary, stating that he was unable to work in a prison atmosphere. In the present cases, the employer offered positions that do not meet the restrictions indicated in the medical certificates. *Cahill* (*supra*) has to do with the application of clauses concerning the penological factor, which takes into account the degree of exposure by penitentiary employees to the risk of bodily injury and other unpleasant conditions. The distinctions in the various degrees of exposure considered in that decision are not relevant to the present cases. Although I may find that medical certificates are not Holy Writ, as is emphasized in *Fontaine* (*supra*), the employer must respect the opinions of the attending physicians unless it obtains an independent medical opinion in accordance with the interpretation of the specific clauses of the collective agreement in the present cases. Although specific facts may contradict a medical certificate, according to *Re Fishery Products* (*supra*) and *Re Ford Motor Co.* (*supra*), the employer submitted no facts establishing that the restriction that there be no contact with inmates would have been a restriction of convenience in the cases of Ms. Marois and Ms. Hubert. Similarly, the employer adduced no evidence establishing that the purpose of the grievances forming the basis of the present cases was to promote certain interests in matters subject to the collective bargaining process. Therefore, the decision rendered in the complaint in *William Gallivan* (*supra*) is of no use in the present cases.

[70] In acting as it did, the employer did not respect the provisions of clause 46.07 of the collective agreement. Consequently, Ms. Hubert and Ms. Marois are entitled to be considered on leave with pay for the entire duration of the period starting on November 19, 2001, until the start of their respective maternity leave or the termination date of the pregnancy, whichever comes first. The employer is ordered to grant the grievors all the rights and benefits to which they are entitled.

Léo-Paul Guindon,
Board Member

OTTAWA, October 15, 2004

P.S.S.R.B. Translation