

Date: 20030310

File: 166-2-31338

Citation: 2003 PSSRB 19



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

WAYNE ALEXANDER COPELAND

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer



Before: D.R. Quigley, Board Member

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

For the Employer: Richard E. Fader, Counsel

Heard at London, Ontario,
November 26, 2002.



DECISION

[1] The grievor, Wayne Alexander Copeland, a parole officer (WP-5) with Correctional Service Canada, disagrees with the employer's decision not to recalculate his WP-5 wages during the retroactive period. He alleges that the decision made by the employer is "extremely unfair, is punitive, and unacceptable. Also, it discriminates against me being a represented employee." [grievor's emphasis] The grievor requests that his salary "be adjusted immediately to reflect my proper pay owing and that I receive the retroactive monies I believe I am entitled to."

[2] The parties submitted an "Agreed Statement of Facts" (Exhibit A-1), which reads as follows:

***Agreed Statement of Facts
Between the
Treasury Board
(Correctional Services Canada - CSC)
And the
Public Service Alliance of Canada (PSAC)
Reference to adjudication 166-02-31338
Wayne Alexander Copeland***

- 1- *Wayne Alexander Copeland has been an employee of the Correctional Services since October 28, 1991. As of June 21, 2000, Mr. Copeland was in his substantive position at the WP-04 group and level, salary \$53,006 (rate of pay under revision).*
- 2- *On December 20, 2000, Mr. Copeland was offered an acting appointment effective September 5, 2000 at the WP-05 group and level. Mr. Copeland accepted the offer, which constituted a promotion in accordance with Section 24 of the Public Service Terms and Conditions of Employment Regulations. The salary was calculated at \$56,948 (rate of pay under revision).*
- 3- *Effective July 16, 2001, Mr. Copeland was confirmed as an indeterminate WP-05 position.*
- 4- *On September 10, 2001, as it was Mr. Copeland's twelve month anniversary as a WP-05, he received a salary increment which brought his salary to \$59,148 (rate of pay under revision).*
- 5- *On November 19, 2001, the Collective Agreement for the Program and Administrative Services (including the WP Group) between Treasury Board and PSAC was signed. As a result of the signature of this Collective Agreement and clause 64.03(b)(iii), Mr. Copeland's wages were adjusted as follows:*

<i>Date</i>	<i>Salary</i>	<i>Group and level</i>	<i>Pay Action</i>
<i>June 21, 2000</i>	<i>\$56890</i>	<i>WP-04</i>	<i>Restructure and revision</i>
<i>September 5, 2000</i>	<i>\$58770</i>	<i>WP-05</i>	<i>Revised acting salary</i>
<i>June 21, 2001</i>	<i>\$60416</i>	<i>WP-05</i>	<i>Revision</i>
<i>September 10, 2001</i>	<i>\$62750</i>	<i>WP-05</i>	<i>Statutory Increment</i>

6- On December 11, 2001, Management informed Mr. Copeland that there would be no recalculation of his WP-05 wages during the retroactive period. This response was based on the "Lajoie decision" from the Federal Court of Appeal.

7- On January 11, 2002 Mr. Copeland filed a grievance indicating his disagreement with the interpretation of retroactive payments owed to him.

THE PARTIES RESERVE THE RIGHT TO CALL EVIDENCE NOT INCONSISTENT WITH THE ABOVE.

[3] The opening remarks of the grievor's representative can be summarized as follows. This grievance concerns an entitlement to retroactive revisions of pay while the grievor was acting at the WP-5 group and level.

[4] On June 21, 2000, the grievor's substantive position was at the WP-4 group and level, with a salary of \$53,006 (rate of pay under revision). The grievor began a series of acting appointments in accordance with section 24 of the *Public Service Terms and Conditions of Employment Regulations* (Exhibit E-2), the first from September 5, 2000 to March 31, 2001, and the second from March 31 to September 30, 2001.

[5] When he accepted the acting WP-5 appointment, the collective agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Program and Administrative Services group had expired on June 21, 2000.

[6] On July 16, 2001, the grievor accepted an indeterminate appointment at the WP-5 group and level. The new collective agreement was signed by the parties in Ottawa on November 19, 2001. The salary increases were retroactive to June 21, 2000, and on December 11, 2001, the employer informed the grievor that there would be no recalculation of his WP-5 wages during the retroactive period. The result of that decision

was that the grievor, as a WP-5 supervisor, made less money than his subordinates at the WP-4 group and level did.

[7] In conclusion, the grievor's representative stated that the decision in *Buchmann*, 2002 PSSRB 14 (166-34-30637) should apply in this case.

[8] Counsel for the employer's opening remarks can be summarized as follows.

[9] This employer is not bound by the decision of the Canada Customs and Revenue Agency (CCRA), a separate employer, not to apply for judicial review of the *Buchmann* decision. Treasury Board holds that the *Buchmann* decision is wrongly decided. The decisions in *Attorney General v. Lajoie*, [1992] F.C.J. No. 101 and *Buchmann* cannot stand together and an adjudicator appointed under the *Public Service Staff Relations Act (PSSRA)* is bound by the judgement rendered by the Federal Court of Appeal in *Lajoie*.

[10] The grievor testified that as of June 21, 2000, he was employed as a parole officer at the WP-4 group and level, at the maximum pay level of \$53,006 (fifth step). A few days before September 5, 2000, Area Director Dan MacDonald solicited his interest in acting as a parole officer supervisor at the WP-5 group and level. The grievor agreed to a series of continuous acting appointments, starting September 5, 2000 and ending on September 30, 2001.

[11] On July 16, 2001, the grievor was appointed to an indeterminate WP-5 position pursuant to the *Public Service Terms and Conditions of Employment Regulations* (Exhibit E-2).

[12] On November 19, 2001, the PSAC and Treasury Board signed a collective agreement with salary increases retroactive to June 21, 2000. The result of the collective agreement negotiations (Appendix "A") set the new annual rates of pay (in dollars) with effective dates noted for restructure and revisions (economic increases) as follows:

**APPENDIX "A"
WP - WELFARE PROGRAMMES GROUP
ANNUAL RATES OF PAY
(in dollars)

- X) Restructure: Effective June 21, 2000
- A) Effective June 21, 2000
- Y) Restructure: Effective June 21, 2001
- B) Effective June 21, 2001
- C) Effective June 21, 2002

WP-4								
From:	\$	45707	47539	49362	51184	53006		
To:	X	45707	47539	49362	51184	53006	55126	
	A	47170	49060	50942	52822	54702	56890	
	Y	47170	49060	50942	52822	54702	56890	59166
	B	48491	50434	52368	54301	56234	58483	60823
	C	49703	51695	53677	55659	57640	59945	62344
WP-5								
From:	\$	54759	56948	59148	61348	63548		
To:	X	54759	56948	59148	61348	63548	66090	
	A	56511	58770	61041	63311	65582	68205	
	Y	56511	58770	61041	63311	65582	68205	70933
	B	58093	60416	62750	65084	67418	70115	72919
	C	59545	61926	64319	66711	69103	71868	74742

[13] On June 21, 2000, the grievor was at the maximum rate of pay at the WP-4 group and level (\$53,006); that is, the fifth step in the salary scale. As a result of the signing of the new collective agreement, he was entitled to the "X" restructure, effective June 21, 2000, which would move him to the "new sixth step" of the WP-4 classification (\$55,126). As well, effective June 21, 2000, there was an "A" economic increase (revision) and the grievor's salary was adjusted to \$56,890.

[14] On September 5, 2000, while the grievor was acting at the WP-5 group and level, the employer used a straight down method of calculating the acting appointment and set his salary at \$58,770, the second step in the WP-5 salary scale. The grievor believes that on September 5, 2000, the acting appointment recalculation should be at the third step of the WP-5 salary scale (\$61,041).

[15] In the grievor's opinion, on June 21, 2001, he was entitled to a "B" economic increase (revision) to bring him to the third step of the WP-5 salary scale (\$62,750).

[16] On September 10, 2001, the grievor celebrated his one-year anniversary at the WP-5 group and level and again in his opinion should have moved to the fourth step of the salary scale (\$65,084). The grievor stated that the employer's calculations on Jun 21, 2001 fixed his salary at the WP-5 group and level (second step) at \$60,416 while one of his subordinates, at the WP-4 group and level (seventh step), was being paid \$60,823; that is, \$407 more than the grievor, and the grievor was the one who had been promoted.

[17] On December 11, 2001, the grievor was notified that the employer was not recalculating his WP-5 wages during the retroactive period. The grievor stated that at no time was he cautioned that accepting an acting assignment at the WP-5 group and level would have negative pay consequences.

[18] During cross-examination, the grievor admitted that when he accepted the WP-5 acting assignment he did not consult with his bargaining agent with respect to the pay implications. He stated: "It is not normal to approach the union on acting appointments regarding pay."

[19] During cross-examination, counsel for the employer stated and the grievor agreed that as of the date of this hearing the grievor's salary at the WP-5 group and level (\$66,711) was more than the salary of a WP-4 at the maximum step (\$62,344). Counsel for the employer also suggested that there were instances with some overlap; for example, a person hired from outside the Public Service at the WP-5 group and level (step one) would be paid \$59,545, while a WP-4 at the maximum step would be paid \$62,344, as in this case, where the grievor was paid less than his subordinates for a period of time.

[20] Suzanne Marchand-Bigras testified on behalf of the employer. The witness is currently a policy analyst in the Labour Relations Division, Human Resources Branch of the Treasury Board of Canada Secretariat. The witness stated that after the wage freezes of the 1990s, collective bargaining for this group resumed in 1997 and for today's purposes, this is the third collective agreement negotiated since 1997. The witness also stated that Article 64 of this and the previous collective agreements has remained unchanged. Article 64 states as follows:

**ARTICLE 64
PAY ADMINISTRATION**

64.01 Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.

64.02 An employee is entitled to be paid for services rendered at:

(a) the pay specified in Appendix "A", for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment;

or

(b) the pay specified in Appendix "A", for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.

64.03

(a) The rates of pay set forth in Appendix "A" shall become effective on the dates specified.

(b) Where the rates of pay set forth in Appendix "A" have an effective date prior to the date of signing of this Agreement, the following shall apply:

(i) "retroactive period" for the purpose of subparagraphs (ii) to (v) means the period commencing on the effective date of the retroactive upward revision in rates of pay and ending on the day this Agreement is signed or when an arbitral award is rendered therefore;

(ii) a retroactive upward revision in rates of pay shall apply to employees, former employees or in the case of death, the estates of former employees who were employees in the groups identified in Article 9 of this Agreement during the retroactive period;

(iii) rates of pay shall be paid in an amount equal to what would have been paid had this Agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay;

(iv) in order for former employees or, in the case of death, for the former employees' representatives to receive payment in accordance with subparagraphs (b)(iii), the Employer shall notify, by registered mail, such individuals at their last known address that they have thirty (30) days from the date of receipt of the registered letter to request in writing such payment, after which time any obligation upon the Employer to provide payment ceases;

(v) no payment or no notification shall be made pursuant to paragraph 64.03(b) for one dollar (1\$) or less.

64.04 Where a pay increment and a pay revision are effected on the same date, the pay increment shall be applied first and the resulting rate shall be revised in accordance with the pay revision.

...

[21] According to the witness, the *Terms and Conditions of Employment Policy* (Exhibit G-1) forms part of the collective agreement and except for some minor editing and

numbering, the language has remained the same since 1991. (The parties agreed to this during the hearing.)

[22] The witness explained that as of June 21, 2000, the grievor's salary was \$53,006. Pay Note 4 of the collective agreement under "Restructuring" states: "Employees at levels WP-1 to WP-6 who have been at the maximum rate of pay for their level for more than twelve (12) months on June 21, 2000 will move to the new maximum rate of pay effective June 21, 2000."

[23] The grievor had been at the WP-4 maximum level (fifth step of the salary range - \$53,006) since 1998; therefore, he would be entitled to the restructuring bonus. As such, the grievor moved to the new WP-4 maximum level (\$55,126; sixth step). Also, on June 21, 2000, as a result of negotiations, an economic increase (revision) would be incorporated into the grievor's salary, which would now be set at \$56,890.

[24] On September 5, 2000, the grievor began an acting appointment at the WP-5 group and level; as such, he fell under sections 22, 23 and 24 of the *Terms and Conditions of Employment Policy (Rate of pay on appointment or deployment)*, which state (Exhibit G-1):

Rate of pay on appointment or deployment

22. *Subject to these regulations and any other enactment of the Treasury Board, the rate of pay of a person on appointment to Part I Service shall be the minimum rate applicable to the position to which the employee is appointed.*

23. *The rate of pay on appointment or deployment of an employee, a person in the Public Service, a member of the Royal Canadian Mounted Police or of the Canadian Armed Forces to a position to which these regulations apply, shall be established in accordance with the promotion, deployment and transfer by appointment or demotion rules as applicable.*

Rate of pay on promotion

24.(1) *The appointment of an employee described in Section 23 constitutes a promotion where the maximum rate of pay applicable to the position to which that person is appointed exceeds the maximum rate of pay applicable to the employee's substantive level immediately before that appointment by:*

(a) *an amount equal to at least the lowest pay increment for the position to which he or she is appointed, where that position has more than one rate of pay; or*

(b) *an amount equal to at least four per cent of the maximum rate of pay for the position held by the employee immediately prior to that appointment, where the position to which he or she is appointed has only one rate of pay.*

24.(2) Subject to Sections 27 and 28, on promotion, the rate of pay shall be the rate of pay nearest that to which the employee was entitled in his or her substantive level immediately before the appointment that gives the employee an increase in pay as specified in subsection (1) above; or an amount equal to at least four per cent of the maximum rate of pay for the position to which he or she is appointed, where the salary for the position to which the appointment is made is governed by performance pay.

[25] The grievor, whose salary at the sixth step of the WP-4 group and level was \$56,890, moved to the second step of the WP-5 salary range (\$56,948). On June 21, 2001, the grievor was not entitled to the restructure, as he did not meet the requirements of Pay Note 4; he was not at the maximum rate of pay for his level for 12 months. However, he would be entitled to the economic increase revision and move to the next salary level (\$58,770).

[26] On June 21, 2001, there was another restructure; however, pay notes 5 and 6 came into effect. Pay Note 5 states: "All employees for whom a restructuring is effective June 21, 2001 will move to the rate of pay shown immediately below the employees' former rate of pay at the "Y" range shown in Appendix "A" or at the closest rate, but not lower than the employees' former rate of pay."

[27] Pay Note 6 states: "Employees at levels WP-1 to WP-6 who have been at the maximum rate of pay for their level for more than twelve (12) months on June 21, 2001 will move to the new maximum rate of pay effective June 21, 2001."

[28] The grievor did not meet Pay Note 5 or 6; however, he would receive the economic increase revision and his salary now was \$60,416.

[29] On September 10, 2001, the grievor was entitled to his statutory increment (one-year anniversary as a WP-5) and moved to the third step (\$62,750).

[30] The witness conceded through cross-examination that in the calculations of retroactive pay the employer used the pay notes and the decision in *Lajoie (supra)*. The effect is that history is not recreated; revisions are paid retroactively but the rate of pay upon promotion remains calculated as it was at the time of appointment and it should not be recalculated.

ARGUMENTSFor the Grievor

[31] The arguments on behalf of the grievor can be summarized as follows.

[32] The relevant articles in the collective agreement are paragraph 64.03(a), which states: "The rates of pay set forth in Appendix "A" shall become effective on the dates specified.", and subparagraph 64.03(b)(iii), which states that the "rates of pay shall be paid in an amount equal to what would have been paid had the Agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rate of pay."

[33] Subparagraph 46.(C)(1) (*Recalculation of pay*) of the *Terms and Conditions of Employment Policy* (Exhibit G-1) states:

46.(C) *Recalculation of pay*

(1) *An employee in receipt of acting pay is entitled to a recalculation of the acting rate of pay pursuant to Sections 24 or 26 when increments within and revisions to the salary range for the substantive level occur. If following recalculation the rate of pay in the higher classification level is less than the rate of pay received immediately prior to the recalculation, the employee shall be paid at the rate of pay received immediately prior to the recalculation.*

(2) *An employee in receipt of acting pay is entitled to revisions to the salary range of the higher classification level.*

[34] As paragraph 46.(C) is incorporated into the collective agreement, there is a strict entitlement to have a recalculation of the acting rate of pay.

[35] The employer's use of the *Lajoie* decision (*supra*) lends itself in this case to absurdity in as much as the grievor, a WP-5 supervisor on June 21, 2000, supervising eight subordinates at the WP-4 group and level, was making less money. This is absurd; in reality, and possibly in the future, employees might decline to accept acting assignments during a retroactive period because of the employer's negative pay administration decision.

[36] If a reasonable person considers procedural fairness, why did the employer, who solicited the help of the grievor in accepting the WP-5 acting assignment, promote him to an indeterminate position and two years later apply a pay calculation detrimental to him? The employer gave no notice before or during the grievor's acting appointment of the

change to be applied to his retroactivity. Not only is there an immediate financial loss in the new rules being applied, but also it has an effect on the grievor's best five years for pension purposes under the *Public Service Superannuation Act*.

For the Employer

[37] Counsel for the employer analyzed and dissected the *Lajoie* decision and reminded me that I was bound by that decision. Counsel also stated that the wording in paragraph 46.(C) (*Recalculation of pay*) of the *Terms and Conditions of Employment Policy* (Exhibit G-1) is in the present tense, forward looking and it does not address retroactivity.

Reply

[38] The grievor's representative stated that the *Buchmann* decision (*supra*) applies to this case and not the *Lajoie* decision.

[39] Also, he stated that paragraph 46.(C) does not mention levels but states: "An employee in receipt of acting pay is entitled to a recalculation of the acting rate of pay...."

REASONS FOR DECISION

[40] The grievor bears the burden of proof in a case involving the interpretation or application of the collective agreement. The grievor was at the maximum rate (fifth step) of the WP-4 group and level until June 20, 2000, at a salary range of \$53,006, pursuant the collective agreement. This was the salary the employer determined as the starting point when the grievor began an acting appointment as a WP-5 on September 5, 2000. The employer applied paragraph 24.(1)(a) (*Rate of pay on promotion*) of the *Terms and Conditions of Employment Policy* (Exhibit G-1), as well as paragraph 46.(B), which states:

46.(B) Rate of pay

Acting pay is the rate of pay that the employee would be paid on deployment or appointment to such higher classification level, as calculated pursuant to Sections 24 or 26 of these regulations.

[41] The employer applied the said provisions to the grievor's salary when he started acting at the WP-5 group and level, and his salary went from \$53,006 to \$56,948. His new salary was in effect until November 19, 2001, when the Treasury Board and the PSAC signed a new collective agreement for the Program and Administrative Services group.

[42] Subparagraph 46.(C)(1) of the *Terms and Conditions of Employment Policy* states:

46.(C) Recalculation of pay

(1) An employee in receipt of acting pay is entitled to a recalculation of the acting rate of pay pursuant to Sections 24 or 26 when increments within and revisions to the salary range for the substantive level occur. If following recalculation the rate of pay in the higher classification level is less than the rate of pay received immediately prior to the recalculation, the employee shall be paid at the rate of pay received immediately prior to the recalculation. [Emphasis added]

[43] In my view, on June 21, 2000, as a result of the new collective agreement, the grievor should have moved, and did, from the fifth step of the WP-4 group and level (\$53,006) to the sixth step (\$55,126), as indicated on the pay grid as a result of a restructure. Also, on June 21, 2000, still at the fifth step of the WP-4 group and level, his salary was \$56,890, as a result of an economic increase (revision).

[44] On September 5, 2000, the grievor began an acting assignment at the WP-5 group and level, which constituted a promotion in accordance with section 24 of the *Terms and Conditions of Employment Policy*, as well as paragraph 46.(B). He should have started at the salary range of \$59,148 and with the economic increase (revision) indicated on the pay grid, his salary would be \$61,041.

[45] The recalculation of pay pursuant to paragraph 46.(C) is applicable in this collective agreement, as indicated by clause 64.01, which states:

64.01 Except as provided in this Article, the terms and conditions governing the application of pay to employees are not affected by this Agreement.

[46] Subparagraph 64.03(b)(iii) states:

(iii) rates of pay shall be paid in an amount equal to what would have been paid had this Agreement been signed or an arbitral award rendered therefore on the effective date of the revision in rates of pay;

[47] The *Terms and Conditions of Employment Policy* (Exhibit G-1) deals with the recalculation of pay and states that there is an entitlement to recalculation of acting pay "when increments within and revisions to the salary range for the substantive level occur." Therefore, effective September 5, 2000, after the revision to the salary level of the grievor's substantive position occurred, effective June 21, 2000, the grievor was entitled to a recalculation of his acting pay as of that date.

[48] I have considered the *Lajoie* and *Buchmann* decisions (*supra*) and neither decision provides an interpretation of subparagraph 46.(C)(1) or an interpretation of the recalculation of the acting pay rate required in this case.

[49] The grievor's substantive revised rate of pay on June 21, 2000 was \$56,890 (Exhibit A-1); therefore, the grievor's acting pay rate as of September 5, 2000 should have been \$61,041.

[50] For all of the above reasons, this grievance is allowed. The employer is ordered to pay the grievor the salary owed to him based on the following calculations:

<u>Date</u>	<u>Salary</u>	<u>Group and Level</u>	<u>Pay Action</u>
June 21, 2000	\$56,890	WP-4	restructure and revision
September 5, 2000	\$61,041	WP-5	acting appointment (recalculation)
June 21, 2001	\$62,750	WP-5	revision
September 10, 2001	\$65,084	WP-5	increment

**D.R. Quigley,
Board Member**

OTTAWA, March 10, 2003.