Date: November 8, 2004

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Citation: 2004 PSSRB 160

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

J.P. PARSONS, D. MCLEAN AND D. MCLEAN ET AL.

Grievors

and

TREASURY BOARD (National Defence)

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievors: Edith Bramwell, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Winnipeg, Manitoba,
June 29, 2004.
(Written submissions filed on September 16, October 7 and 14, 2004.)

[1] John P. Parsons is a firefighter working at Canadian Forces Base (CFB) Shilo, Manitoba. On October 19, 2001, Mr. Parsons filed the following grievance:

> *The employer is not protecting my safety (article 22.01) as minimum manning problems at CFB Shilo Fire/EMS are not being corrected.*

[2] On January 8, 2002, the employer replied to Mr. Parsons' grievance saying, in part:

> *In summary, an increase in minimum manning is currently not justified, as the specific services the Fire Department is expected to perform are well within the current capability of the station and can be executed safely. But it must be noted that an increase in manning has been authorized and is being executed, which although not related to your grievance, will partially alleviate perceived manning problems in the future. I therefore cannot support your grievance.*

[3] A final-level reply to the grievance was issued, dated November 12, 2002, and although it denied the grievance, it also said, in part:

> *Since your response at the second level of the grievance process, staffing has been completed to increase the minimum manning levels to seven employees per shift as well as for other positions in the fire hall.*

[4] The bargaining agent referred the grievance to adjudication on January 23, 2003.

[5] Clause 22.01 of the grievor's collective agreement reads as follows:

> ***22.01*** *The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Alliance, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*

[6] While Mr. Parsons' grievance was being filed and processed, a similar grievance filed by 17 other Shilo-based firefighters (Dwayne McLean *et al.*) was also processed. Mr. McLean also filed an individual grievance on October 19, 2001, claiming that

minimum manning problems at CFB Shilo were not being corrected. These matters were all heard together.

[7] Attempts at resolving the issue through mediation were, unfortunately, not successful and the matter was set down for a hearing for June 2004.

[8] On June 16, 2004, the employer sent a letter to the Public Service Staff Relations Board (the Board), objecting to the Board's jurisdiction in the matter. The letter states:

> *This is to inform you of the Employer's objection to the Public Service Staff Relations Board's jurisdiction to hear the above-noted references to adjudication.*
>
> *In reading Section 91 and 92 of the Public Service Staff Relations Act (PSSRA), it is clear that the language does not support these references. Subsection 91(1) of the Act sets out a specific bar to the right of an employee to present a grievance. The grievance cannot relate to a matter in respect to which an administrative procedure for redress is provided in or under an Act of Parliament. Given that the nature of the grievances is one of Occupational Health and Safety, it is the Employer's position that Part II of the Canada Labour Code provides an administrative procedure for redress for these matters.*
>
> *Furthermore, the grievances are referred under Article 22 Health and Safety of the collective agreement. It is clear that this specific clause is consultative in nature and cannot be the subject of an individual grievance.*
>
> *In any event, since the time of the grievance, the Department has undertaken a staffing process in order to increase the manning to seven employees per shift. A copy of the competition poster is attached for your information.*
>
> *On the face of the record, these matters are not adjudicable and the Employer respectfully requests that these references to adjudication be dismissed without a hearing for lack of jurisdiction.*

[9] The bargaining agent replied on June 24, 2004, stating, in part:

> [. . .]
>
> *Article 22.01 sets out responsibilities owed to both the individual employee and to the union. As such, it can properly form the basis for either an individual grievance or a complaint under s.99 of the PSSRA. The obligations which are set out in this article, and to which the employer agreed through the process of negotiation, are in excess of the*

> *statutory minimum requirements set out by the Canada Labour Code. Because they are in excess of the minimums provided for in the Code, the Code does not provide "an administrative procedure for redress" (PSSRA S. 91(1)) of these obligations. The restrictive bar of PSSRA S. 91(1) thus has no applicability to the instant grievances. . . .*
>
> [. . .]
>
> *The Alliance submits that Article 22 can properly be the subject of an individual grievance, given the obligations to individual employees which the first sentence establishes ("The Employer shall make reasonable provisions for the occupational safety and health of employees"). Past cases, which have found that the most appropriate avenues for redress of a breach of Article 22 would be a s.99 complaint, have focused more closely on the obligation to consult, which is owed to the Alliance (see Preeper et al. 166-2-21892 and Albus 166-2-16887).*
>
> *However, should the Board find, that these grievances should more properly have been the subject of a s.99 complaint, then the Alliance submits, in the alternative, a respectful request on behalf of the grievors to convert the grievance currently before the Board to a complaint under s.99, or to extend the time limits for filing a s.99 complaint. As the substance of the complaint would be the same as the substance of the grievances, there can be no argument from the employer that it would be in any way prejudiced by an alteration of grounds. The prejudice to the firefighters, if not allowed to convert their grievances to a complaint would, however, be extreme. They will lose their right to enforce sections of the collective agreement because of the employer's delays and broken promises.*
>
> [. . .]

[10] The Board wrote to the employer, with a copy to the bargaining agent, stating that the question of jurisdiction should be raised at the outset of the hearing, and the matter proceeded as scheduled on June 29, 2004.

[11] At the hearing, Mr. Newman again raised the issue of jurisdiction. He noted that the case law supports the proposition that this reference is more appropriately made under section 99 of the *Public Service Staff Relations Act (PSSRA)*, *Albus* v. *Treasury Board (Solicitor General)*, PSSRB File Nos. 166-2-16887 and 16888 (1987) (QL), and *Preeper* v. *Treasury Board (National Defence)*, PSSRB File No. 166-2-21892 (1992) (QL).

[12] In the alternative, Mr. Newman suggested that Part II of the *Canada Labour Code* provided an administrative procedure for redress, which would therefore render this matter inarbitrable pursuant to subsection 91(1) of the *PSSRA*.

[13] The final point made by Mr. Newman was that staffing action had been undertaken to increase the minimum manning to seven employees per shift, which is what the grievors requested. Although the staffing action had not yet been completed, it was anticipated that a staff increase would occur by September 2004. The grievances would therefore be academic.

[14] Ms. Bramwell replied and agreed that the obligation in this situation was, indeed, one owing to the bargaining agent rather than to an employee. As such, these references should be converted to a section 99 complaint. The employer would not be prejudiced if this were to occur, as not a single ground has been altered from the outset of this matter.

[15] A reading of clause 22.01 suggests that the first sentence is an obligation owed to an employee, with the remainder of the clause suggesting that there is an obligation owed to the bargaining agent. Therefore, it is possible to proceed here with individual grievances, which allege a violation of the first sentence of clause 22.01. However, in the alternative, the bargaining agent should be able to file a section 99 reference.

[16] Mr. Newman replied that the entire clause had to be read, and the words put in their proper context. It is a consultation provision.

[17] Mr. Newman suggested that the hearing be adjourned and the decision on jurisdiction be delayed until after September 2004, in order to allow the employer an opportunity to finalize the staffing issues.

[18] Ms. Bramwell objected to adjourning the hearing at that time and requested the right to call evidence to support her jurisdictional argument. She did agree that the decision deal with the jurisdictional issue.

[19] I ruled that I would hear formal arguments on jurisdiction, including any witnesses Ms. Bramwell felt were necessary to present her case. Following this, the parties were to advise the Board in September and provide an update on the issue of finalizing the staffing. At that point, if the staffing had been completed, the entire issue could be moot.

The Evidence

[20] Dwayne McLean is a firefighter at CFB Shilo, having started there in 1981. At that time, there was a complement of five firefighters on duty at any one time. These five firefighters would respond to emergency concerns at CFB Shilo. If an ambulance was required, a driver and medical aide would be brought to the scene, but neither was included in the complement of five firefighters on duty per shift.

[21] Mr. McLean left CFB Shilo in 1992, transferring to Calgary. Upon returning to CFB Shilo in 2000, he observed that an ambulance service had been incorporated into the fire hall. His firefighter colleagues had received emergency medical training, but the staffing level remained at five firefighters. This meant that when a call for the ambulance occurred, two firefighters would respond and the fire hall would be left with three firefighters.

[22] Mr. McLean raised his concern about staffing levels in April, May and June 2001, both internally (Exhibits G-2, G-3 and G-5) and externally as a *Canada Labour Code* complaint (Exhibits G-4 and G-6). Management attempted to address these concerns by temporarily increasing the minimum staffing levels to a complement of seven firefighters. This would have resolved Mr. McLean's complaint; however, staffing levels fell back to a complement of five.

Jurisdictional Argument - For the Grievors

[23] One of the points raised for the employer was that an adjudicator is barred by virtue of subsections 91(1) and 92(1) of the *PSSRA* from hearing this grievance because another avenue of redress exists. The employer has argued that the proper avenue of redress is under the *Canada Labour Code.*

[24] The obligations under the *Canada Labour Code* are different from the obligations under the collective agreement, and the language used in each is different. In the collective agreement, consultation occurs because "the employer shall make reasonable provisions for the occupational health and safety of employees." This obligation cannot be enforced under the *Canada Labour Code.*

[25] The second point raised by counsel for the employer is that this subject matter would more appropriately be dealt with as a section 99 reference. The first sentence of clause 22.01 opens the door for a finding that the employees themselves can grieve.

This is a highly technical issue, one which should not be used simply to invalidate a grievance. The employer has an obligation and the employees have continually stated that this obligation has been breached.

[26] In the alternative, if it is found that a section 99 reference is more appropriate, then these grievances should be allowed to be converted into a section 99 complaint without delay. The employer would not be prejudiced in any way by allowing the employees to do so. The main issue all along has been the lack of provisions for the health and safety of employees when the manning stands at five.

[27] Ms. Bramwell referred me to the following case law: *Macko and Others* v. *Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-2-25571, 25573, 25575 and 25577(1994) (QL); *Cohen-Patterson et al* v. *Treasury Board (Health and Welfare Canada)*, PSSRB File Nos. 166-2-22692 to 22715(1993) (QL); *Labelle et al* v. *Treasury Board (Canada Labour Relations Board, Supply and Services Canada, Statistics Canada, Consumer and Corporate Affairs Canada and Agriculture Canada)*, PSSRB File Nos. 166-2-19059, 18630, 18631, 18750, 18882 and 169-2-483(1990) (QL) and *Re: Timberjack Inc. and Glass, Molders, Pottery, Plastics and Allied Workers Union, Local 446* (1996), 62 L.A.C. (4th) 438.

For the Employer

[28] Clause 22.01 is a consultation provision. The employer is obliged to consult with a view to making reasonable provisions on health and safety. Section 124 of the *Canada Labour Code* is essentially the same thing, with perhaps even a higher onus on the employer. Therefore, it is not a proper reference under subsection 91(1) of the *PSSRA*.

[29] If this were to become a section 99 reference, the question to be answered is "was there meaningful consultation", and it could not deal with the issue of minimum staffing. The only obligation owed to the bargaining agent is to consult. Therefore, it makes no sense to convert this to a section 99 reference.

Follow-up

[30] Pursuant to the oral request made and granted to the employer that this matter be held in abeyance until September, pending finalization of the staffing matter, the

Board wrote to the parties on July 8, 2004, stating that it would correspond with the parties in September "... to determine what progress, if any, had been made ...".

[31] On September 16, 2004, Ms. Bramwell wrote to the Board, stating that "...the Employer has failed to fulfill the staffing commitment which it made during the hearing". A request was made for the decision to be issued.

[32] The employer replied on October 7, 2004, stating that six names had been placed on an eligibility list; however, conditions of employment were still being verified. Once that was completed, hiring would be done. The employer's reply concluded by saying "...it would be premature to release a decision at this time."

[33] Ms. Bramwell replied on October 14, 2004, stating in part:

> *There is no basis in law for granting the Employer's request, which is, in essence, an attempt to obstruct the proper processes of the Board, and the bargaining agent respectfully submits that the Employer's request should be denied.*

Jurisdictional Decision

[34] It is unfortunate that the staffing process has been so protracted, but I can appreciate that the skill sets needed to do this job must be verified and this takes time. When the hearing took place in June, I was told by the employer that action had been taken to staff additional positions which would address the grievors' concerns. This action was expected to be completed by September; therefore, I agreed to delay issuing a decision until that time. In October, I am told action is still underway to fill the positions but the end is in sight. While it appears that a resolution to this is not too far off, the bargaining agent, nevertheless, has requested a decision. My task is to render a decision if the matter has not been resolved, and I do not believe it is appropriate simply to delay writing this decision because it appears that the staffing action is nearing completion. When the parties come to a hearing, they expect and are entitled to a decision on the matter, one that is rendered on a timely basis. I will endeavour to do so.

[35] The employer argues that the grievors are barred from referring this matter to an adjudicator under subsections 91(1) and 92(1) of the *PSSRA*. Subsection 92(1) reads, in part:

> *92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> > *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
> >
> > *(b) . . .*
> >
> > *(c) . . .*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

. . .

[36] The employer advances this proposition because clause 22.01 is an obligation owing to the bargaining agent, not the employee. Therefore, any violation of clause 22.01 would be one incurred by the bargaining agent and not by the employee. This being the case, the employee cannot grieve, according to the employer.

[37] With the exception of the first sentence of clause 22.01, the bargaining agent agrees that the obligation is owed to itself and not to the employee. However, the bargaining agent says it is the first sentence that opens the door for the employee to grieve.

[38] A tenet in interpreting collective agreement language is that the agreement has to be read as a whole. In *Canadian Labour Arbitration* (Third Edition), authors Brown and Beatty write, at paragraph 4:2150:

> *The context in which words are located is critical to their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole.*

In looking at clause 22.01 as a whole, I have no difficulty in determining that it is an obligation owed to the bargaining agent, not the employee. Therefore, an alleged violation of the clause would be one about which the bargaining agent would complain.

[39] Two previous decisions of the Board in an almost identical issue reached the same conclusion as I have.

[40] In *Albus (supra)*, at pages 3 and 4 of the Quicklaw version, the adjudicator wrote:

> *I have considered article 25.01 of the Agreement. It reads that the employer will "continue to make reasonable provisions for the occupational safety and health of employees" and it provides for suggestions and consultations with a view of carrying out reasonable procedures and techniques. The article relates in this regard to the employer and the Institute or to the parties to the Agreement. It does not refer to the employees individually and in my mind it does not create rights to individuals personally.*
>
> *It would seem from the article that provisions were to be kept in force. Such is the statement at the beginning of the article. The article then goes on to say that suggestions will be welcome by the employer. The suggestions however are not to be made by the employees but rather by the Institute. Clearly any failure on the part of the employer can only be interpreted as a breach of duty owed to the Institute (one of the parties) and not to the grievors as individuals.*

[41] In *Preeper (supra)*, the same issue arose again and the adjudicator wrote, at page 3 of the Quicklaw version:

> *Upon the resumption of the hearing in this matter on January 17, 1992, I advised the parties orally that, after due deliberation, I was of the opinion that the obligations created by article 20 of the collective agreement were those of consultation and as such were between the parties to the collective agreement, the employer and the bargaining agent, and that obligations to consult could be the subject only of a reference to the Board under paragraph 99 of the Act. It was not appropriate for the grievors to refer to adjudication under section 92 of the Act questions which arise as the result of a failure to consult.*

[42] Each of these two decisions, in my view, clearly indicates that the obligation is one owed to the bargaining agent. Also, each of these two decisions dealt with language that was almost identical to the language in the instant case. In each of these two decisions, the adjudicator found that a section 99 reference would be the appropriate method of proceeding, and I agree. This is a situation where a section 99 reference would have to be made, as opposed to a grievance under subsection 92(1) of the *PSSRA*.

[43] The employer also argued that the grievors were barred from presenting a grievance under subsection 91(1) of the *PSSRA* because there was another administrative avenue of redress available to them. In light of my findings with respect to the section 99 reference, I do not feel it is necessary to address this point.

[44] The bargaining agent requested that I turn these grievances into a section 99 reference if I felt I had no jurisdiction under subsections 91(1) and 92(1) to hear them. The employer stated that a section 99 reference cannot deal with minimum staffing; therefore, there is no point in converting these into a section 99 reference.

[45] The bargaining agent has asked the Board to extend the time limits for the filing of a section 99 reference. One of the issues the Board must look at when responding to such a request is the prejudice each side would suffer if the request were or were not granted.

[46] In the instant case, I was not made aware of any prejudice the employer would suffer if I were to grant the request for an extension of the time limits to file a section 99 reference. Certainly, the historical facts are known, and I was led to believe that there is no dispute regarding these facts. Counsel for the employer said that there is no point in converting these into a section 99 reference because the only issue that can be dealt with is whether there was consultation or not. The bargaining agent does not agree and said the issue can be broader than that. These two views can be argued, and decided, by the Board when hearing the section 99 reference. It is not, in my view, a valid reason to reject the bargaining agent's request to extend the time limits for the filing of a section 99 reference.

[47] In summary, I find I have no jurisdiction to hear these matters under subsections 91(1) and 92(1) of the *PSSRA*. However, I will extend the time limits and allow the bargaining agent to file a reference under section 99 of the *PSSRA* if, at the time of rendering of this decision, the bargaining agent is not satisfied that the matter has been resolved. Upon receipt of a section 99 reference, the Board will then schedule the matter to be heard.

[48] These grievances are, therefore, dismissed for want of jurisdiction.

Joseph W. Potter
Vice-Chairperson

OTTAWA, November 8, 2004