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File: 166-02-32094

Citation: 2004 PSSRB 164



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

CARL JAMES BURGESS

Grievor

and

TREASURY BOARD

(Department of Indian Affairs and Northern Development)

Employer



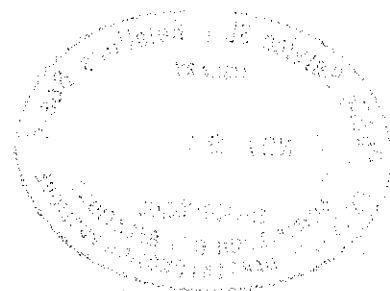
**Before:** John Steeves, Board Member

**For the Grievor:** Evan Heidinger, Professional Institute of the Public Service of  
Canada

**For the Employer:** Harvey Newman, Counsel

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Heard at Vancouver, British Columbia,  
September 30, 2004.



## DECISION

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[1] This is a decision about the denial of the grievor's application for leave for personal needs. It involves an interpretation of Article 17.10, Leave Without Pay for Personal Needs.

[2] The parties agree that the collective agreement that expired on September 30, 2002, *Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada*, contains the provisions that are applicable to this grievance.

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### Background

[3] The employer has a number of responsibilities in the Yukon. These included forest resources (up to April 2003) and the specific agency responsible was the Forest Resources Division. The grievor began work for the employer as a Forest Ecologist in the fall of 1998, in Whitehorse.

[4] In September 2000, he began a rotational assignment as a Forest Planner. About the same time, the Forest Resources Division began to have a number of internal problems that affected the morale of the staff. For example, the Division went through a number of managers in a short period of time. According to the grievor, things grew increasingly stressful and "continually more poisoned".

[5] The grievor found the planning duties stressful and this was exacerbated by the problems within the office. By January 2001, he felt that he needed a change.

[6] The Yukon Territorial Government (YTG) advertised for the position of Forest Resources Planner. The grievor testified that he was interested in the position because he "needed a break" and he "saw it as a great opportunity to expand my horizons and to continue to make a contribution". He applied for the position and advised the YTG that he was interested in a secondment. There had been secondments in the past. The initial response from YTG was positive and the grievor applied to the employer.

[7] During this time, there were negotiations underway between Canada and the Yukon about the devolution or transfer of forest resources from Canada to the Yukon. It was "common knowledge", according to the testimony of the grievor, that staff and programs would be transferred to the YTG when devolution occurred.

[8] On or about March 15, 2001, the grievor found out from a co-worker that his request for a secondment had been denied by the employer. He wrote to his Director

of Human Resources to get more details. The Director advised the grievor that the secondment was "not on or not off" and suggested waiting until later in March. The grievor interpreted this response to be another indication of the disarray within the Division.

[9] The grievor testified that he then received a call from the YTG to advise him that the secondment was "off". He again asked for and was granted a meeting with the Human Resources Director, where he asked for an explanation. He testified that he said he "needed a break because his stress levels were very high". The grievor asked for leave for personal needs at the meeting. This was denied. The grievor responded that someone else had taken leave for personal needs and he was told that the request would be rescinded. The grievor also said that he was not the Planner; he had taken it on a one-year rotation only and he did not wish to continue it. The leave request was still denied. The grievor testified that he was told he could not have leave for personal needs because of operational requirements. He took this to be "an allusion to getting the work out and supplying clients".

[10] On March 29, 2001, the grievor filed a grievance about the denial of leave for personal needs. The grievance also contested the denial of the secondment or "interchange" to the YTG.

[11] The grievor set about trying to meet the operational requirements of the employer. He "tried to elicit a better understanding of operational requirements other than 'get the work out' " to clients, he testified. He thought he was in a "great position to explain why it was not as dire as they perceived".

[12] The result of the grievor's attempt to meet the employer's operational requirements was a document dated April 5, 2001, and titled, "Proposed Pre-Interchange Work Plan for the period between April 9 - 13, 2001". It was submitted to the Regional Manager. The introduction of the plan stated:

*Due to the Forest Resource's re-organization and recent resignations of other Forest Management Staff, there are needed deliverables that can only be developed in a timely fashion by Carl Burgess. This work plan outlines the solution to the perceived conflict between operational constraints and Carl Burgess's professional development in time to respect Carl Burgess's grievances and develop interchange agreement with the Yukon Territorial Government.*

[13] This report was discussed at a Level 1 grievance meeting around the middle of April 2001. According to the grievor's testimony, he was "met with astonishment" that he thought his proposals would meet the operational requirements of the Division. He asked what more he could do. He testified that he was told that it was a "circular argument" and there would not be any further discussion.

[14] The employer provided a final reply to the grievance and it concluded:

*Generally, the Department is very supportive of education and/or career development for its employees. However, in this instance, the Division was relying on your knowledge and experience to provide client services and could not agree to either the Interchange or leave without pay. Therefore, your grievance and corrective action are denied.*

[15] On April 17, 2001, the grievor resigned. He testified that he felt that he had been "alienated and marginalized" and he been treated in a "terse" manner. He interpreted the denial of his leave and the interchange as meaning there was a strong likelihood that the rotational assignment in planning would be continued. The planning function caused him stress and he "needed to get out of it".

[16] The grievor took the position with the YTG and he continues to work for that employer.

[17] On April 17, 2003, the devolution of forest services from Canada to the Yukon became effective. The evidence did not give details of the transfer of staff, but there were economic incentives for staff to move from the employer to the YTG.

#### Collective Agreement Provisions

[18] The relevant parts of Article 17.10, "Leave Without Pay for Personal Needs", is as follows:

##### **17.10 Leave Without Pay for Personal Needs**

*Leave without pay will be granted for personal needs, in the following manner,*

...

(a) ...

- (b) *Subject to operational requirements, leave without pay of more than three (3) months but not exceeding one (1) year to an employee for personal needs.*

### Arguments of the Parties

[19] The grievor advises that the only issue in the grievance before me is the entitlement to leave for personal needs. That is, the issue of the grievor's request for a secondment or interchange is not before me. With regard to the leave for personal needs, it is submitted that the grievor did all that he could to satisfy the operational requirements of the employer. Despite this, the employer never articulated an adequate reply. With regard to remedy, it is submitted that the grievor should be "made whole", which means that he should be returned to the state he was in when he grieved. Following this reasoning, the grievor should be reinstated as an employee of the employer.

[20] The employer acknowledges that there were morale problems in the Forest Resources Division and there was "a fair amount of unhappiness". However, the main concern of the employer and the reason for the denial of the leave for personal needs was the need to get the work done. At the time, there was a shortage of staff and this is a valid operational requirement to deny the leave request. With regard to remedy, if the grievor is entitled to the leave for personal needs, he voluntarily resigned and reinstatement is not available to him.

[21] With regard to remedy, there was an exchange of submissions between the parties after the hearing in order to discuss a recent decision, *Rinke and Vanderwoude*, 2004 PSSRB 143.

### Decision and Reasons

[22] As a starting point, it is useful to consider the language of Article 17.10(b).

[23] Employees have a contractual right to personal needs leave and it is an unearned benefit. On the other hand, it is "Subject to operational requirements". I note that it is not subject to operational "constraints" or similar wording. The language is broader than "constraints". The test is what is required to operate the workplace for the time of the leave. I agree with the following statement:

*The term "operational requirements" implies that the priority and amount of work to be performed by the grievor*

would prevent the employer from approving a leave of absence. It is not for me to substitute my judgement for that of the employer in determining the importance attached to the work being performed by the grievor. I can only consider the evidence adduced in support of the employer's decision.

*D. Nichols-Nelson and Treasury Board (Agriculture Canada), Board File No. 166-2-21429 (1991) (QL).*

[24] Every leave will result in some inconvenience or perhaps more serious consequences to the employer. Article 17.10 contemplates leaves for up to one year, which may result in relatively lengthy changes at the workplace. The need, generally, to make changes to the workplace in order to adapt to an employee who requests leave is not a bar to that leave. If the employer could never adapt the work or was unwilling to do so, it would not have agreed to Article 17.10 at all. The employer must take into consideration its contractual obligations when determining the number of staff required when a leave is requested (*Degarais and Treasury Board (Transport Canada), Board File Nos. 166-2-22490 - 91 (1993) (QL).*

[25] Some other considerations are noteworthy. Some unpaid leave for personal needs may involve urgent, personal circumstances and only short notice from the employee is possible. These obviously involve difficult situations for employees and also for the employer. It may also be that an employer is reluctant to grant leave to an employee because she or he has important supervisory functions, is involved in a project that is critical or is otherwise considered "valuable". There may be genuine cases where an employee is critical to the operations of the employer. For example issues such as workload, peak periods of work, an inability to train (or find) a replacement within a reasonable time or other circumstances may be critical to the operation of the organization. They may also be valid operational requirements which prevent an employee from taking leave. Whether the situation is genuinely critical is a question of fact which requires a careful review. From a more practical point of view, these circumstances may also be relevant to the length of notice required by an employee when making the application for leave for personal needs.

[26] Similarly, a delay in a project which is not attributable to the employee seeking leave may not be a valid operational requirement to deny a leave for personal needs (*Abi-Zeid and Treasury Board (National Defence), Board File No. 166-2-23655 and 161-2-685 (1994) (QL); this case considered education leave but the language is comparable).*

[27] It is also the case that chronic short-staffing or budgetary constraints are not, on their own, sufficient as operational requirements to deny leave for personal needs. Short-term staffing shortages may be a reason to deny leave:

*Short-staffing can only be used to justify the employer's refusal on the ground of operational requirements of an employee's request for a benefit under the collective agreement if the employer, through no fault of their own, find themselves short-staffed to the extent that they could not deliver the services required by their clients. In this case the employer has been short-staffed for many years and even when the grievor was absent [for six months] his position was not filled. ... the refusal of leave under clause 10.09 using operational requirements was not justified.*

*Degaris, supra, page 18 (QL).*

[28] In this case, it is accepted that there were problems with the management of the Forest Resources Division in March 2001 and earlier. I also conclude that the grievor's request for leave was treated in a perfunctory way, undoubtedly as a result of the other pressures on the Division.

[29] Nonetheless, the grievor was aware of the nature of the employer's operational requirements at the relevant times. In his report of April 5, 2001, he identified the re-organization of the Forest Resources Division and "recent" resignations of other management staff. The evidence supports a conclusion that the re-organization and the resignations were the operational requirements relied on by the employer to deny the grievor's application for leave. These undoubtedly exacerbated the problems with the management of the Division. However, I cannot conclude that the reorganization and the resignations were chronic as described in *Degaris (supra)*. In that case, the short-staffing had occurred over "many years". In this case, the resignations were recent, as noted by the grievor and, according to the employer's final grievance response, the reorganization was effective April 6, 2001.

[30] The grievor's report of April 7, 2001, went to considerable lengths to try to meet what the grievor perceived as the operational requirements of the employer. He testified that his report was met with "astonishment" by the employer. He apparently understood that the reorganization and resignations in the Division could be properly dealt with by demonstrating to the employer a work plan to "finalize [the] present stage of Resource Report processes underway" in four forest management units.



[31] The employer disagreed that the grievor could extricate himself from all of his duties in this way, either for a secondment or a leave. It clearly had a different, longer term idea of the operational requirements of the workplace than completing the work during the period identified by the grievor, April 9 - 13, 2001. The grievor interpreted this to mean that he was going to continue to work as a Planner after the completion of his rotation. He strenuously opposed this idea and he very much wanted to get out, either with a secondment or a leave. In some ways, that was his primary objective.

[32] The grievor may have been correct that the employer intended him to continue in the planning position and he was entitled to object to this in appropriate ways. However, a conflict between the grievor and the employer about future duties is not a valid reason to override the operational requirements of the workplace, as part of an application for leave. Further, as the grievor stated in his April 5, 2001 report, he may have been the "only" person who could do the work on time. This was not clearly explained by the Employer but it was obvious enough that the grievor knew about it.

[33] The grievor also took exception to the idea that he was providing "client services". For example, the final response of the employer stated that it was relying on the grievor's knowledge and experience to "provide client services". The grievor points out that this is a separate function within the Forest Resources Division and it had nothing to do with his responsibilities. The grievor's point is well taken. However, I think that the employer's reference to "client services" was intended to be more general than the grievor read it.

[34] In summary, on the evidence I cannot find that the operational requirements raised by the employer in response to the grievor's application for leave did not exist or were unreasonable. It was entitled to make a determination about the priority and amount of work that was required to operate the workplace for the time of the leave. There were immediate operational requirements that required the grievor to be available. These were the reorganization and the resignations and the grievor knew about them at the material times. There were problems with the management of the operation but the operational requirements that are relevant to the application for leave can be considered separately from those problems.

[35] For all of the above reasons, the grievance is denied. As a result of this finding, I cannot examine the issue of remedy.

**John Steeves,  
Board Member**

BURNABY, November 19, 2004.