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Citation: 2004 PSSRB 145



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

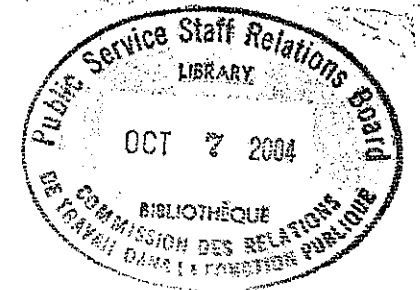
VALMONT BABINEAU

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

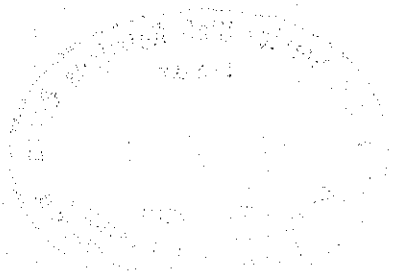


Before: Mary Ellen Cummings, Board Member

For the Grievor: John Mancini

For the Employer: Stéphane Hould

Heard at Moncton, New Brunswick,
July 13, 2004.



DECISION

[1] Valmont Babineau is a correctional officer working at Dorchester Penitentiary, a medium security institution. Mr. Babineau had a disagreement with a supervisor. Although there is a significant dispute about how to characterize the events that happened on February 28, 2002, there is no dispute that Mr. Babineau received a written disciplinary warning. He does not challenge the appropriateness of that warning. However, Mr. Babineau was also not paid for February 28, 2002. He has grieved the non-payment, characterizing it as a further disciplinary sanction, with the result that he has been disciplined twice for the same infraction.

[2] In response, Correctional Service of Canada, ("the employer") argued, first, that the non-payment of wages occurred because Mr. Babineau initiated leaving the workplace, not the employer. In the alternative, the employer argued that if I conclude that the employer sent Mr. Babineau home, the non-payment of wages combined with the written warning is not an excessive disciplinary response, having regard to the seriousness of the incident.

Evidence

[3] Mr. Babineau testified that on February 28, 2002, he was working at his assigned post, when his supervisor, Marc Leblanc, told him that he was needed to conduct an outside medical escort of an inmate who required a bilingual officer. Mr. Babineau asked why another bilingual officer could not be assigned, because Mr. Babineau was aware that others had just arrived on shift who would have been available for the assignment. According to Mr. Babineau, Mr. Leblanc responded "I want you". By his own admission, Mr. Babineau reacted in a manner that was insubordinate, thus attracting some sort of disciplinary response. Mr. Babineau acknowledged that he essentially refused the order and did so in an inappropriate manner.

[4] Mr. Babineau testified that at that point, Mr. Leblanc told him he was going home, without pay. Mr. Babineau asked to let him use a day of his annual leave or sick leave, to which, Mr. Babineau recounted, Mr. Leblanc replied "you're not sick". Mr. Babineau retorted "you're not a physician", and Mr. Leblanc came back with, "you'll have to certify as sick". At that point, Mr. Babineau said, he had to find someone who could drive him home, because he had carpooled in to work. Mr. Babineau explained that he decided not to seek to claim the day as a sick day because he was not prepared to go to an after-hours clinic and lie.

[5] Mr. Babineau said that he expected to get a written reprimand, which he received on April 4, 2002. However, he did not expect not to be paid for the day, as well, particularly when it could have been covered by his annual leave entitlement. On April 19, 2002, Mr. Babineau received notice that he would not be paid for February 28, 2002, and brought this grievance.

[6] The employer did not call Mr. Leblanc to testify. I heard from supervisor Larry Hicks, who overheard part of the exchange between Mr. Babineau and Mr. Leblanc. Significantly, Mr. Hicks said that he could not recall the sequence of events. He was not sure if Mr. Babineau said "I'm sick, I'm going home" or "I need a ride". Mr. Hicks recalled Mr. Leblanc saying that if Mr. Babineau was sick, he would recover the pay for the day. Mr. Hicks then left the office where Mr. Leblanc and Mr. Babineau were meeting.

[7] Mr. Hicks said that he did not specifically know if Mr. Babineau would have had annual leave entitlement to cover a day of absence, but Mr. Hicks would have assumed he did, since most officers would.

[8] I heard the evidence of David Niles, the Regional Administrator Security, who conducted the disciplinary investigation of the incident. His evidence was introduced not to prove the events, which he had not observed, but to provide context to the events. Mr. Niles concluded that Mr. Babineau had been guilty of misconduct. Mr. Niles recounted that Mr. Babineau's supervisors had recommended against a disciplinary response, because they believed Mr. Babineau had reacted out of frustration in respect of historical events, which could have been alleviated with better communication from the supervisors. Mr. Niles testified that he separated the misconduct — refusal to obey a lawful order to conduct an outside escort — from the reasons for the misconduct. Mr. Niles said that staff can challenge direction, in non-emergency situations but, in the end, the employee must obey, and then grieve. Mr. Niles concluded that a written reprimand was appropriate. Mr. Niles said that his knowledge that Mr. Babineau was losing a day's pay was one factor in his choice of discipline, but the most significant reason for the relatively mild penalty was the views of Mr. Babineau's supervisors.

[9] The employer introduced Mr. Babineau's disciplinary record of a previous written warning, over the objections of Mr. Babineau's representative. I noted that Mr. Niles had not relied on the previous discipline in the written warning given to

Mr. Babineau. Mr. Niles testified that he would normally have taken the "next step" in the progressive discipline set out in the Code of Conduct, which is "Suspension (or financial penalty)", but for the views of Mr. Babineau's supervisor and the knowledge that Mr. Babineau had already lost the day's pay.

[10] On April 4, 2002, Mr. Niles issued a written reprimand. On April 19, 2002, Darrell Blacquiére, Acting Unit Manager, issued the following to Mr. Babineau:

Leave Without Pay Action-Leave without Pay for February 28, 2002

As noted in the Warden's memorandum dated 2002-09-21 which was distributed to all staff, effective 15 October 2001 a new PeopleSoft Leave System was implemented at Dorchester Penitentiary. As part of this system, at any time that an employee does not have the required leave credits of the type requested to cover his/her absence, the absence will be registered as Unauthorized Leave Without Pay and pay action will be taken immediately. In your case, you were sent home from the workplace as a result of your refusal to perform assigned duties as required by your Correctional Supervisor.

On Thursday, 28 February 2002, you were absent from work for this reason. Accordingly, this memorandum will serve as notice to you that pay action is being taken to recover 8 hours in the form of Leave Without Pay.

Argument

For the Grievor

[11] Mr. Babineau's representative argued that the only issue to be determined is whether the employer can discipline twice for the same misconduct. He noted that arbitrators have long held that an employer may not subject an employee to "double jeopardy". In this case, there is no evidence to dispute Mr. Babineau's testimony that he was sent home, without pay, after the disagreement with his supervisor. Mr. Babineau did not choose to go home and was denied the opportunity to cover the absence with a day from his annual leave. That, I am asked to conclude, was a disciplinary response, which the employer was entitled to carry out. Then, the employer conducted a disciplinary investigation, which resulted in a further disciplinary response, in the form of a written reprimand. What is not permitted, said Mr. Babineau's representative, is two disciplinary responses.

For the Employer

[12] The employer's first position is that the denial of pay for February 28, 2002, was not disciplinary. Counsel asked me to conclude either that Mr. Babineau had initiated leaving the workplace, or even if he had not initiated it, he was prepared to have it treated as a sick day. Since the non-payment of wages for February 28, 2002, was an administrative matter and not disciplinary, the Public Service Staff Relations Board ("PSSRB") has no jurisdiction.

[13] In the alternative, the employer argued that the PSSRB has not considered a loss of pay for a day coupled with another disciplinary action as "double jeopardy". Instead, following the decision in *Evans and Treasury Board (Solicitor General)*, Board File Nos. 166-2-17075 and 17076 (1998) (QL), I should review the disciplinary responses and decide whether, taken together, they are appropriate. Counsel for the employer argued that they were. Moreover, counsel submitted that in deciding to give Mr. Babineau a written reprimand instead of a greater level of discipline, as his history would warrant, Mr. Niles testified that he had taken into consideration that Mr. Babineau had suffered the loss of a day's pay. Essentially, then, if I were to conclude that the loss of a day's pay was disciplinary, I should look at it in conjunction with the minor written reprimand and conclude that together, they amounted to an appropriate disciplinary response to Mr. Babineau's refusal to follow a direct order.

Decision

[14] I have no hesitation in concluding that Mr. Babineau was sent home and did not initiate leaving. First, Mr. Babineau testified that his supervisor sent him home. He gave his evidence in a straightforward manner. Given that Mr. Babineau did not have transportation back to his home in Moncton that day, it seems unlikely that he would have initiated leaving.

[15] Mr. Babineau's testimony was not contradicted. Mr. Leblanc, the supervisor, did not testify. Mr. Hicks candidly admitted that he had only heard part of the conversation and could not recall the sequence of events. Second, the memorandum I quoted at paragraph 10 above sent by the employer in respect of the Leave without Pay Action tells Mr. Babineau that "...you were sent home from the workplace as a result of your refusal to perform assigned duties". That memorandum from the employer affirms Mr. Babineau's testimony that the employer initiated Mr. Babineau's departure.

In the memo, the employer has characterized the sending home as a disciplinary response to a failure to follow an order. I find that Mr. Babineau was sent home without pay for disciplinary reasons. Consequently, I have jurisdiction to inquire into whether what amounts to a one-day suspension, combined with a written warning, is an appropriate disciplinary response.

[16] As Mr. Babineau's representative argued, arbitrators in Canada have generally ruled against employers who have imposed more than one discipline for the same offence. In an often-quoted passage, Brown and Beatty's text, *Canadian Labour Arbitration*, (3rd ed., loose-leaf Aurora: Canada Law Book, August 1996) states, at para. 7:4240:

It is generally accepted that an employer may not impose more than one penalty for the same offence. Arbitrators have taken the position that when a responsible member of management, possessing the requisite authority, metes out a specific sanction for certain misconduct and specifically so advises the employee, it is not proper for higher levels of management, on being apprised of the events, to subsequently substitute a more severe penalty.

Arbitrators have permitted employers to impose an initial sanction, such as a suspension, followed by a discharge, where it was made clear to the employee at the time the suspension was imposed that no final disciplinary decision had been made.

[17] In this case, no such explanation can be argued. On February 22, 2002, Mr. Babineau was sent home without pay as a disciplinary action by his supervisor, confirmed in a memo he received April 19, 2002. On April 4, 2002, Mr. Babineau received a written reprimand, in respect of his conduct arising out of the same events, imposed by a more senior member of management. I conclude that Mr. Babineau was disciplined twice for the same offence. Is there any basis to depart from the jurisprudence of labour arbitrators and permit this "double jeopardy"?

[18] As set out above, the employer relies on the decision in *Evans and Treasury Board (Solicitor General)* (*supra*), for the proposition that the PSSRB has not adopted the "double jeopardy" prohibition in similar circumstances. In *Evans and Treasury Board (Solicitor General)* (*supra*), a correctional officer was sent home without pay because he refused to perform acting duties. The officer was also fined \$100. The Board concluded that the officer was not justified in his refusal to perform the acting duties. The Board also found that both sending the grievor home against his wishes

and imposing a fine were disciplinary responses. Then, on page 11 of the decision, the Board wrote "There is no double jeopardy involved here. Both the suspension without pay for the balance of his shift *pending investigation* and the fine of \$100 were warranted" [emphasis added]. Although the decision is not entirely clear on this point, it appears that the Board concluded the employer had met one of the exceptions to the "double jeopardy" rule. As I set out in paragraph 16, arbitrators have not characterized an initial suspension pending investigation and possible imposition of further discipline as "double jeopardy" when the employer advises the employee of that possibility at the time of the suspension. In the facts set out in *Evans and Treasury Board (Solicitor General) (supra)*, the Board noted that the grievor "...was denied his pay for the balance of his shift and was suspended until the completion of an investigation and was asked to leave the institution". In my view, *Evans and Treasury Board (Solicitor General) (supra)* stands for the proposition that the PSSRB does recognize and apply the prohibition against "double jeopardy", including recognizing the exception.

[19] In the case before me, there is no evidence that Mr. Babineau was sent home pending an investigation. Instead, two penalties were imposed.

[20] I decline the employer's invitation to consider whether, in all of the circumstances, including regard to Mr. Babineau's disciplinary record, a one-day suspension and written warning were appropriate. The rule against "double jeopardy" is one of fairness. The employer possesses all the controls over the disciplinary process. It can unilaterally send people home and deny them their wages. Employees are generally required to obey and grieve, with all of the attendant delays, as this 2-year-old case demonstrates. To balance that power, employers must proceed with a degree of fairness. One of the elements of fairness that has developed over the years requires employers to gather the information necessary and impose discipline once. If an employer needs more time to investigate, arbitrators have permitted interim penalties, like suspension, so long as the employee is informed.

[21] This case, however, is a classic example of two levels of management imposing separate penalties, in separate memos, weeks after the conduct which gave rise to the discipline. I am satisfied that Mr. Babineau has been subject to "double jeopardy" and, therefore, his grievance is allowed.

Disposition

[22] The employer is directed to reimburse Mr. Babineau his regular wages for the day of February 28, 2002.

**Mary Ellen Cummings,
Board member**

Dated at Toronto, October 4, 2004.

