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File: 166-2-32061

Citation: 2004 PSSRB 32



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

HAROLD A. HIGGS

Grievor

and

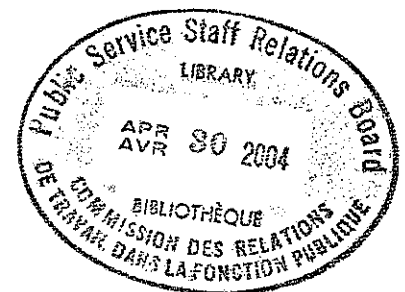
TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

Before: D.R. Quigley, Board Member

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

For the Employer: Rosalie A. Armstrong, Counsel



Heard at Kingston, Ontario,
March 4, 2004.

DECISION

[1] The grievance filed by Harold A. Higgs, a parole officer (WP-04) at Joyceville Institution, places in issue the interpretation and application of clause 34.05 and paragraph 34.11(a) of the Program and Administrative Services group collective agreement, which the parties signed on November 19, 2001, with an expiry date of June 20, 2003. Clause 34.05 and paragraph 34.11(a) read as follows:

Scheduling of Vacation Leave With Pay

34.05

- (a) *Employees are expected to take all their vacation leave during the vacation year in which it is earned.*
- (b) *Subject to the following subparagraphs, the Employer reserves the right to schedule an employee's vacation leave but shall make every reasonable effort:*
 - (i) *to provide an employee's vacation leave in an amount and at such time as the employee may request;*
 - (ii) *not to recall an employee to duty after the employee has proceeded on vacation leave;*
 - (iii) *not to cancel nor alter a period of vacation or furlough leave which had been previously approved in writing.*

Carry-Over and/or Liquidation of Vacation Leave

34.11

- (a) *Where in any vacation year, an employee has not been granted all of the vacation leave credited to him or her, the unused portion of his or her vacation leave up to a maximum of thirty-five (35) days credits shall be carried over into the following vacation year. All vacation leave credits in excess of thirty-five (35) days shall be automatically paid in cash at his or her daily rate of pay as calculated from the classification prescribed in his or her certificate of appointment of his or her substantive position on the last day of the vacation year.*

[2] The grievor's representative entered into evidence two exhibits. Counsel for the employer entered six exhibits. Neither party called any witnesses. The parties did, however, submit an "Agreed Statement of Facts" (Exhibit A-1), which reads as follows:

AGREED STATEMENT OF FACTS

Between:

Harold Higgs ("the Grievor")

and

*The Public Service Alliance of Canada
("the Bargaining Agent")*

and

*Treasury Board (Correctional Service of Canada)
("The Employer")*

The Parties agree to the following:

1. *At all material times, the grievor was employed as a Parole Officer (WP-04) at Joyceville Institution. He began working for CSC in November, 1987.*
2. *The relevant collective agreement is the Program and Administrative Services collective agreement, signed November 19, 2001 and expiring June 20, 2003, which covers the WP group.*
3. *The dispute concerns Article 34 of the collective agreement on vacation leave, and more specifically the question as to the employer's right to schedule (Article 34.05) versus the employee's right to cash out unused leave credits beyond the maximum carry-over of 35 days (Article 34.11(a)).*
4. *The parties agree that Article 34.11(b) does not apply to the grievance.*
5. *As of January 21, 2002, the grievor had 44 days of vacation leave in his bank, which was 9 days over the permissible carryover limit of 35. Mr. Glenn Chambers, the Unit 3 manager at the time, asked for a [sic] annual leave plan to show how he would use the remaining leave. Mr. Chambers gave the grievor until January 25, 2002 to submit his plan.*
6. *The grievor did not want to liquidate his remaining leave credits before the end of the 2002 fiscal year, and indicated to management that it would be done against his wishes if forced to do so. The grievor requested a cash-out of the 9 days.*

7. *The grievor and Mr. Chambers agreed that if Mr. Chambers was going to impose certain dates on the grievor, that the appropriate dates would be March 11 to 15, and March 25 to 28, 2002, for a total of 9 days.*
8. *On March 4, 2002, Mr. Chambers ordered the grievor off on annual leave for the dates outlined above in #7.*
9. *The grievor grieved management's decision on March 7, 2002.*

The parties reserve the right to call any other evidence deemed necessary at the hearing.

[3] The grievor's representative stated that the grievance turns on clause 34.05, whether the employer has the right to schedule an employee's vacation leave, and paragraph 34.11(a), an employee's right to be paid in cash for any unused vacation leave credits once the threshold of 35 days is attained.

[4] The vacation year begins on April 1st and ends on March 31st of the following calendar year. The grievor had 14 years of service and accrues annual leave at the rate of 1.67 days per month in accordance with paragraph 34.02(b) of the collective agreement.

[5] On January 21, 2002, the grievor's manager, Glenn Chambers, sent a memorandum to the grievor indicating to him that his annual leave balance was at 44 days (Exhibit A-3). The grievor was requested to notify Mr. Chambers by January 25, 2002, of his plans to use the remaining nine days of his annual leave allotment before April 1, 2002. According to the memorandum, if the grievor did not submit dates on which he planned to take those nine days, management would schedule the time off for him, as per clause 34.05 of the collective agreement.

[6] Although the grievor and Mr. Chambers subsequently agreed that the nine days would be taken from March 11 to 15 and March 25 to 28, 2002, the grievor made it clear to Mr. Chambers that he did not wish to take vacation leave on the dates imposed but wanted to have the leave paid out in cash instead.

ArgumentsFor the Grievor

[7] The grievor's representative stated that paragraph 34.11(a) provides the right to an employee, providing the 35-day unused limit has been met, to have his/her remaining and unused vacation leave credits automatically cashed out. Mr. Done stated that there are two questions that need to be answered in this case:

- (1) Does the grievor have a right to automatically carry over unused vacation leave credits beyond 35 days?
- (2) Does the employer have the right to schedule the grievor to exhaust unused vacation leave credits before the end of the fiscal year (March 31st)?

[8] The grievor's representative argued that paragraph 34.05(a) does not give the employer an unqualified right to schedule an employee's vacation leave. Paragraph 34.05(b) restricts the employer's right with the words: "Subject to the following subparagraphs, ...(i) to provide an employee's vacation leave in an amount and at such time as the employee may request."

[9] The grievor requested that his vacation leave be liquidated through a cash-out. He did not request that the employer prepare a schedule for him to take vacation leave. Therefore, the employer could not unilaterally schedule time for the grievor to take vacation leave if the grievor did not request such leave.

[10] Clause 34.01 states: "The vacation year shall be from April 1st to March 31st, inclusive, of the following calendar year". The grievor's representative stated that the employer jumped the gun on January 25, 2002. At that time, the grievor did not have an excess of vacation leave credits and Mr. Chambers' imposed deadline was two months before the expiry of the vacation year.

[11] Paragraph 34.05(a) states that: "Employees are expected to take all their vacation leave during the year in which it is earned." [Emphasis added] There is no mandatory requirement such as "should" or "shall"; employees are expected to take their vacation leave during the year but are not obligated to.

[12] Paragraph 34.11(a) states that: "All vacation leave credits in excess of thirty-five (35) days shall be automatically paid in cash..." [Emphasis added] In 2002, the grievor used 11 days of his vacation leave credits from his 20-day entitlement. Therefore, the remaining nine days that were not used should have automatically been paid in cash.

[13] As remedy, the grievor is requesting that the employer be ordered to pay him the nine days in question or credit back the nine days as vacation leave.

[14] The grievor's representative referred me to the following case: *Bozek v. Canada Customs and Revenue Agency*, 2002 PSSRB 60.

For the Employer

[15] Counsel for the employer stated that the employer did not violate the collective agreement. Clause 34.05 and paragraph 34.11(a) are interrelated and must be read together. If one reads paragraph 34.11(a) on its own, it is not crystal clear: "...the unused portion of his or her vacation leave up to a maximum of thirty-five (35) days credits shall be carried over into the following vacation year..." The employer agrees that annual leave may be carried over from one vacation year to the next. The limit, however, is the ability to carry over a maximum of 35 days.

[16] Paragraph 34.11(a) is a protection for employees who are unable to take vacation leave during the year; it is not an employee-right clause. It is to ensure that employees take a vacation, to have a rest from the workplace. It is not a bonus fund. Without clause 34.05, paragraph 34.11(a) has no meaning.

[17] Clause 34.05 gives the employer the right to schedule vacation leave. There is no suggestion here that the employer acted unreasonably in providing vacation leave to the grievor. The grievor would not request vacation leave; he wanted a cash-out. If an employee schedules vacation leave before the end of the fiscal year (March 31st), then paragraph 34.11(a) does not become an issue.

[18] The grievor did not have an excess of vacation leave credits because his manager scheduled dates for him to take the nine days of vacation leave. The right of the employer to do so is contained in clause 34.05. If paragraph 34.11(a) were meant to create rights for employees, it would have said so. Clause 34.05 states the employer's rights.

[19] The employer did not jump the gun on January 25, 2002, by scheduling the grievor's vacation leave. Management has the right to organize its work and workforce and to ensure that vacation leave is managed properly.

[20] The relief the grievor is seeking would be a double recovery and it should therefore not be granted.

[21] Counsel for the employer referred me to the following cases: *Low and Duggan v. Treasury Board (Department of Manpower and Immigration)*, PSSRB File Nos. 166-2-855 and 166-2-886 (1973); *Stoykewich v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-14983 (1985) (QL); *Ladouceur v. Treasury Board (National Defence)*, 2000 PSSRB 51 (QL); and *Marin v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 109 (QL).

Reply

[22] The grievor's representative argued that the remedy requested is not unusual. The employer made a mistake and the grievor wishes to be made whole.

[23] Paragraph 34.11(a) provides an employee with two contractual rights: (1) "credits shall be carried over into the following vacation year", and (2) "vacation leave credits in excess of thirty-five (35) days shall be automatically paid in cash."

[24] The employer's argument is circular. If clause 34.05 gives the employer the unilateral right to schedule vacation leave, then paragraph 34.11(a) would never kick in. The provision for a cash-out would never happen. The grievor's representative suggested that it is not what the parties intended when they negotiated this clause.

[25] The grievor's representative stated that Mr. Chambers and the grievor had ongoing discussions with respect to the dates the grievor would choose, albeit against his will, to take as vacation leave.

[26] With respect to Exhibit A-2, a memorandum dated April 6, 2000, from Donna Morin, the Warden of Joyceville Institution, advising all staff that, "The financial situation at Joyceville Institution does not provide for sufficient finding to cash out unused annual leave credits. Therefore, in an effort to control a potential deficit situation, all staff are expected to use all annual leave credits earned in this fiscal year by March 31, 2001", Mr. Done argued that the grievor should not be held liable for

insufficient funding to cash out unused vacation leave credits. He noted that the memorandum did state that collective agreements now provide for the mandatory cash-out of unused annual leave credits at the end of the fiscal year.

Reasons for Decision

[27] This grievance centres on clause 34.05 and paragraph 34.11(a) of the Program and Administrative Services group collective agreement. Clause 34.05 refers to the scheduling of vacation leave with pay, whereas paragraph 34.11(a) refers to the carry-over and/or liquidation of vacation leave credits.

[28] In my view, clause 34.05 and paragraph 34.11(a) are interrelated. In order to understand their meaning, I must review the nature of the provisions, as well as the context and the general interpretation rules for collective agreements.

[29] In the instant case, as of April 1, 2001, the grievor had accumulated 55 days of vacation leave credits. Of those 55 days, 35 days were carried over from the previous vacation year. As of April 1, 2001, he was credited with 20 days of vacation leave, as per his years of service and the relevant collective agreement.

[30] As of January 21, 2002, the grievor had taken 11 days of vacation leave, thereby leaving a balance of 44 days. Although the employer requested that he schedule nine days of vacation leave before the end of the fiscal year, the grievor did not want to. Instead, he requested that the leave be paid out in cash.

[31] Paragraph 34.05(a) is very clear: "Employees are expected to take all their vacation leave during the vacation year in which it is earned." [Emphasis added]

[32] The grievor received 20 days of vacation leave credits for the vacation year April 1, 2001 to March 31, 2002. He was expected to use all his vacation leave during the year but as of January 21, 2002, he had only used 11 of those 20 days.

[33] The word "expected" in paragraph 34.05(a) interrelates with paragraphs 34.05(b) and 34.11(a). The grievor was expected to use all his vacation leave during the year, as per paragraph 34.05(a) of the collective agreement. The employer has the right to schedule an employee's vacation leave. However, the onus on the employer is to ensure that the scheduling of an employee's vacation leave be reasonable in that:

- (1) it is in an amount and at such time as the employee may request;
- (2) an employee will not be recalled to duty after he/she has proceeded on vacation leave; and
- (3) an employee's vacation leave will not be cancelled or altered if it had been previously approved in writing.

[34] Although an employee is expected to use his vacation leave during the year in which it is earned, in reality there are instances when this is not always possible. Operational requirements may demand that an employee be recalled to work, an employee's vacation leave may be cancelled or altered, or an employee may request that vacation leave be replaced by other leave such as bereavement, sick or family-related leave (clause 34.07). Therefore, the parties agreed upon subclause 34.11, the carry-over and liquidation of vacation leave.

[35] The parties chose not to prescribe additional reasons to justify the carry-over of vacation leave, such as time for building a house, extended vacation plans, etc. It is clear by the absence in this collective agreement of such provisions that the intent was to expect employees to use all vacation leave credits during the fiscal year in which they are earned.

[36] The grievor was not denied vacation leave by the employer. Although requested to do so, he chose not to submit dates to exhaust the nine days in question. If the employer had decided not to grant all of the grievor's vacation leave because of operational requirements or if the grievor requested that his vacation leave be replaced by bereavement or family-related leave, then he could have carried over those days to the next vacation year providing he did not exceed the maximum of 35 days.

[37] If the employer had refused to grant the grievor vacation leave and the grievor had reached the 35-day limit, then the employer would automatically be obligated to reimburse the grievor in cash for any vacation leave remaining on the last day of the vacation year.

[38] In this case, the grievor was not denied vacation leave in an amount and at such time he so chose.

[39] In response to Mr. Done's argument that the employer jumped the gun by imposing a deadline (January 25, 2002) for the grievor to use his vacation leave credits when, according to Mr. Done, the grievor did not have an excess of vacation leave credits at that point in time during the vacation year, I wish to refer Mr. Done to the "Agreed Statement of Facts", particularly paragraph 5, which states that the grievor had 44 days of vacation leave in his bank. The issue of the imposed deadline two months prior to the end of the vacation year was a plea from management that the grievor schedule his leave in accordance with the collective agreement and was not to liquidate the credits prior to the deadline.

[40] In the circumstances, this grievance is dismissed.

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

OTTAWA, April 27, 2004.