

**Date:** 20000511

**Files:** 161-2-850  
166-2-28309  
166-2-28310  
166-2-28311  
166-2-28312

**Citation:** 2000 PSSRB 42

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

---

BETWEEN

**JOHN B. KING**

Complainant/Grievor

and

**TREASURY BOARD**  
**(Revenue Canada - Customs, Excise & Taxation)**

Respondent/Employer

***Before:*** Rosemary Vondette Simpson, Board Member

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

***For the Respondent/Employer:*** Debra Prupas, Counsel

---

Heard at Toronto, Ontario,  
October 26 to 29, 1998;  
April 13 to 16 and November 23 to 26, 1999.

## DECISION

---

[1] John King, a customs officer (PM-02) and President of the Toronto local of the Customs and Excise Union, Local 0024, wrote and posted a notice in the workplace dated May 28, 1997 (Exhibit E-14) advising customs officers at Pearson International Airport in Toronto not to touch passengers' goods and not to conduct passenger searches without a witness present. The employer suspended him for 10 days without pay for this action and he submitted several grievances as a result of that suspension.

[2] As well as grieving, John King also launched a complaint under section 23 of the *Public Service Staff Relations Act (P.S.S.R.A.)* (Board file 161-2-850) against numerous members of management and two cabinet ministers. Those named were: "Revenue Canada; The Honourable Jane Stewart; The Honourable Herb Dhaliwal; Rob Wright; Rudy Howard; Barbara Hébert; Norm Sheridan; Bonnie Glancy and their advisors & administrators".

[3] The complaint states that the employer and persons acting on behalf of the employer:

*have failed to comply with section 8 of the Act in that they have harassed, interfered, restricted access and movement, intimidated and disciplined the complainant for carrying out his duties as president of CEUDA 0024, Toronto District Branch, P.S.A.C.*

[4] At the beginning of the hearing in November 1999, counsel for the employer pointed out that John King was using two procedures under the *P.S.S.R.A.* (grievances and a complaint under section 23 of the *P.S.S.R.A.*) to deal with the same fact situation. She alleged that I lacked jurisdiction to proceed with the grievances in light of the complaint. I reserved on the question of jurisdiction until I had heard all the evidence. Accordingly, there was a full hearing on both issues.

[5] Just prior to argument, John King's representative, Barry Done, and John King himself informed me that he wished to withdraw the complaint under section 23 of the *P.S.S.R.A.* (Board file 161-2-850) and proceed only with the grievance against the 10-day suspension (Board file 166-2-28310).

[6] Since all of the grievances that he submitted have now been consolidated and dealt with in this and previous decisions, the proceedings related to the complaint and the other three grievances are terminated and I direct that these files be closed (Board files 161-2-850; 166-2-28309; 166-2-28311 and 166-2-28312).

---

Summary of Evidence

[7] The notice which John King posted was in the form of a letter dated May 28, 1997 to his membership and advised customs officers as follows (Exhibit E-14):

*PLEASE POST*

To: *All Members* *May 28, 1997*  
*Toronto District Branch*

*This is a caution to all civil servants regarding the application of the Canadian Charter of Rights and Freedoms as well as a reminder of your right to procedural fairness during internal investigations.*

*Revenue Canada is one example of a department that continues to demonstrate an unwillingness to respect employee's rights when conducting investigations into work related allegations. It appears that we Canadians who are employed to administer and enforce the legislation of this country have fewer rights than others in Canada, in comparison to visitors or those with criminal records.*

*Numerous requests have been made by myself seeking clarification of our legal rights and obligations. This is not an unreasonable request yet officials of Revenue Canada continue to be unwilling or unable to provide us with this information. It is more disturbing that the Minister of Revenue, the Minister of Justice and the Office of the Prime Minister are also not willing or able to answer these fundamental questions. Why?*

*The following two incidents will help explain our point and hopefully increase your awareness of the potential risk you face while working for the government.*

- 1) A passenger is referred by Canada Customs for an examination. Three days after the traveller returns home, the individual notices over \$5,000 missing from their baggage. The individual has a lawyer draft a letter to the department accusing an inspector of theft. This is a criminal offence which could result in criminal charges being laid. While being investigated, officers requests for counsel are ignored. The employees are then put in a line up to be observed by the passenger and lawyer. We felt that this was a violation of our civil rights and a request was made for clarification. An answer was never provided. It is*

*important to note that no officer was found guilty of any wrongdoing.*

- 2) *A collections officer accesses the computer in the performance of his/her regular duties. The manager noticed a pattern that he/she felt was suspicious. The employee is suspended without pay until an investigation is completed by Internal Affairs. Again, no wrongdoing was found. The individual was just an above average employee doing his/her job. Was this fair?*

*In lieu of these and other incidents, it is incumbent on all employees to protect themselves while performing their duties. Least we forget one of our brothers who was recently deemed guilty of an offence and discharged from duty without a hearing. We offer the following advice that will minimize the risk while performing your duties.*

- 1) *Do not touch the contents of any travellers luggage. Have the passenger remove the contents from his/her bag and then have them re-pack the contents once your examination is complete.*

- 2) *If a passenger refuses to cooperate, request assistance from your Superintendent. A witness will be your protection from false accusations and will also provide a safer work environment. You have the option of delaying the passenger until your assist is available. Only when you deem it safe, proceed with the examination. If there is not adequate staff available to provide you with an assist, discretion can be used to release the passenger without conducting an examination.*

*We have exhausted all internal avenues for the last two years and are left with no choice but to exercise our last option. It must be understood that the purpose of this is for no other reason than to protect the welfare of those who are serving to protect this country.*

[8] The parties agreed that, if there had been a strike or a job action at the time this incident took place, it would have constituted an illegal strike since the collective agreement governing the parties was in place. No strike or job action took place.

[9] Norm Sheridan, Manager, testified that during a period of time that he was acting on behalf of Barbara Hébert, Regional Director, Customs, he called John King, on her behalf, and warned him against advising his members to do anything that could be considered "job action".

[10] Norm Sheridan and Barbara Hébert testified that on numerous occasions passengers coming through customs have contraband hidden in their luggage, in a number of ingenious ways. A diligent customs officer must be prepared to pick up objects, feel their texture and weight and conduct searches when it is deemed necessary. In their evidence, the witnesses gave actual examples of how contraband of passengers coming through customs had been hidden in unusual ways and the lengths to which customs officers had gone to discover the illegal items.

[11] Norm Sheridan and Barbara Hébert stated that a customs officer cannot carry out his/her duty to search for substances and objects being illegally brought into the country if the customs officer has decided not to touch passengers' luggage. Customs officers would essentially have to work in pairs in order to have witnesses before they would touch a passenger's luggage. This, they contended, was impossible given the staff available. An attempt to implement this arrangement would slow traffic to unacceptable levels.

[12] Both Norm Sheridan and Barbara Hébert agreed that John King was an excellent customs officer and a dedicated union officer.

[13] John King testified that prior to its posting he did change the notice to the customs officers, which he issued, to reflect the warnings he had received from Norm Sheridan and others. He also claimed that his instructions to the customs officers not to touch the passengers' baggage reflects the content of the "I Declare" booklet (Exhibit G-9) and was therefore not advising job action.

[14] John King's position was that, when he had the notice put up in various locations in the workplace for the customs officers to see, he just wanted to advise them of their rights and he did not intend to incite them to job action. Had he wished to cause a stoppage of work, he could have done so. He did not. There was no job action taken by anyone at all. He had asked some members to place this notice to the customs officers at various locations at the airport. He himself did not know how many copies were actually posted but he was aware that they did not stay posted for very long; management found them and took them down very quickly.

[15] John King testified that he felt that there was nothing wrong with the advice he gave the customs officers. With regard to his advice that passenger searches not be conducted without a witness, he stated that customs officers had a wide discretion to

search or not to search passengers. Not every passenger had to be searched. Therefore, since no customs officer was obliged to search any particular passenger, then a customs officer could use his/her discretion to release a passenger without a search. Regarding his advice that customs officers not touch the passengers' baggage, he stated that this was taken right out of the "I Declare" booklet (Exhibit G-9) which is given to passengers.

### Arguments

#### For the Employer

[16] Counsel for the employer indicated that the employer recognizes that no strike or job action actually took place. This did not preclude the employer from charging John King with counselling job action. This is a separate offence and not dependent on an actual "job action" taking place. John King had been warned by Norm Sheridan not to proceed with advising his members to take any measures which could be considered a "job action" and yet he went ahead and had a notice posted (Exhibit E-14).

[17] John King should have taken the time to run the notice by management to see what management's concerns might be. He did not.

[18] The "I Declare" booklet does not tell customs officers not to touch baggage. It tells passengers of their obligation to pack and unpack their own luggage if told by a customs officer to do so. The booklet shows that it is not inappropriate for customs officers to ask passengers to do this. Customs officers cannot search passengers properly if they have decided not to touch the goods.

[19] The main duty of customs officers is to ensure that people entering Canada are in compliance with the law. They must do what is necessary to ensure this and any discretion they have to search or not to search must be exercised in conformity with this. The customs officers must be satisfied there is compliance with the law.

#### For the Grievor

[20] John King's representative argued that John King's actions were not blameworthy. He had indeed heeded the advice of Norm Sheridan and had made changes to the notice he had originally contemplated sending.

[21] John King is a dedicated union officer who has a real passion for what he does. He is also a good customs officer.

[22] John King never intended for the employees to engage in strike action. His notice was a caution to his members to protect themselves.

[23] The grievor's representative argued that John King believes strongly that the employer's manner of imposing discipline offends the Canadian Bill of Rights (not the Charter) because suspensions without pay are imposed without due process. In his case, he was deprived of 85 hours of pay, which amounts to being deprived of property without due process. His suspension took place before there was a proper investigation.

#### Reasons for Decision

[24] I do not accept John King's allegation that the employer's manner of imposing discipline offends the Canadian Bill of Rights. I refer to the Reasons for Judgment of the Federal Court of Appeal in *Tipple vs. The Queen (Treasury Board)* (Court File No.: A-66-85):

*Assuming that there was procedural unfairness in obtaining the statements taken from the Applicant by his superiors (an assumption upon which we have considerable doubt) that unfairness was wholly cured by the hearing de novo before the Adjudicator at which the Applicant had full notice of the allegations against him and full opportunity to respond to them....*

[25] Although John King made some modifications to his proposed notice, the notice that was posted advises customs officers not to touch passengers' baggage without an attending witness.

[26] While it would appear that there is a wide discretion in customs officers to search or not to search, and to decide on the level of thoroughness of any search of incoming passengers, that discretion is to be exercised in accordance with the main mandate of the customs officer: the customs officer must be satisfied that the *Customs Act* is being complied with.

[27] It is the individual customs officer's discretion which must be exercised in accordance with what the customs officer is mandated to do. This discretion can not be fettered by a pre-determined resolution not to touch baggage and not to search passengers if another officer is not there to assist.

[28] While John King is right in saying that searches do not always take place and that a customs officer is not in breach of his/her duty if the customs officer decides not to conduct a search, he is mistaken in maintaining that the customs officer is free to search or not and that, if the customs officer decides not to search a passenger on the basis that another officer is not available to observe the search, the customs officer is entitled to do so. The only discretion the customs officer has to exercise is based on the requirement for ensuring compliance with the *Customs Act* and the operative condition for the exercise of this is that the customs officer is satisfied that the *Act* is being complied with.

[29] I must, therefore, conclude that John King's posted notice to the customs officers advised job action. For this, the employer imposed a 10-day suspension. This penalty, although substantial, is far lighter than the penalties that might have been imposed had the employer sought the laying of charges under the *P.S.S.R.A.* In recognition, however, of the fact that John King, who is acknowledged by management to be an excellent customs officer, and is recognized as a dedicated union officer, had the interest of his union members in mind, I feel that the 10-day suspension should be reduced to five days. Since there are many measures, other than the briefly posted notice, that John King could have taken and did not, I have concluded that his attempt to counsel job action was essentially half-hearted.

[30] For all these reasons, John King's grievance against the 10-day suspension is allowed in part and a five-day suspension is substituted therefor.

**Rosemary Vondette Simpson,  
Board Member**

OTTAWA, May 11, 2000.