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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector
Labour Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

ALAIN BOUCHARD

Grievor

and

**TREASURY BOARD
(Canada Border Services Agency)**

Employer

Indexed as
Bouchard v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Pamela Sihota, Public Service Alliance of Canada

For the Employer: Joshua Alcock, counsel

Heard at Ottawa, Ontario,
June 5 and August 2, 2018.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Alain Bouchard, grieved the employer's (Canada Border Services Agency (CBSA)) interpretation of the National Joint Council (NJC) directive *First Aid to the General Public - Allowance for Employees* ("the directive"). Specifically, he grieved the employer's decision that retroactively denied him the first-aid allowance ("the allowance") payable as the "Allowance for Employees" in that policy.

[2] The grievance was presented at the first level of the grievance process on April 21, 2013, and the matter was referred to the Public Service Labour Relations Board on September 3, 2015.

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[5] I was informed at the outset of the hearing that there are 300 other similar outstanding grievances. The grievor did not wish to provide evidence or attend the hearing. His representative was given an adjournment on June 5, 2018, until August 2 to determine whether one of the other 300 cases could be substituted for this one. On

the hearing day in August, she advised the Board that she intended to proceed with this grievance, without the benefit of the grievor's testimony. A joint book of documents was submitted of which tabs 1, 2, 3, 4, 6, 9, 10, 11, 12, and 15 were entered as exhibits.

II. Summary of the evidence

[6] Essentially, this matter is a question of the interpretation of section 5.1 of the directive. The grievor, a border services officer (BSO), seeks to be paid the allowance, which is payable to employees employed at a location where there is a lack of readily available emergency medical treatment facilities within a 10 km radius. According to his representative, at the time of the grievance, his workplace met the criteria.

[7] A dispute arose over section 5.1.2, which states that the employer requires eligible employees to be available regularly to provide, in addition to their normal duties, first aid to the general public. The CBSA contends that BSOs do not have that additional duty; they must provide first aid only to fellow employees or to anyone detained or injured via the use of force.

[8] On March 15, 2013, the employer issued a communiqué stating that BSOs no longer met all the requirements of section 5.1 as of June 14, 2011. According to the employer's interpretation, BSOs are not required to render first aid to the general public. This grievance proceeded through the levels of the grievance process. The NJC Executive Committee dealt with it but reached an impasse (Exhibit 1, tab 1).

[9] André Beaulieu is a BSO whose substantive position is at the Port of Woodstock in New Brunswick. He testified that BSOs interact throughout their shifts with members of the general public who seek to enter Canada. BSOs are peace officers. As uniformed law enforcement officers, people turn to them for help when in distress. As a condition of his employment, he is required to maintain a current standard first-aid certificate. The employer schedules and organizes first-aid certification training, which employees are paid to attend by the employer.

[10] According to the evidence, members of the public present themselves for primary examination to a BSO at a land crossing when seeking entry into Canada. They are allowed entry when they meet the requirements of all the applicable laws at either primary or secondary examination. Anyone can be subjected to a secondary

examination, which is an arbitrary detention. That person is not free to go until the BSO conducting either examination authorizes it. If the person attempts to leave, he or she may be charged for failing to submit to the examination. BSOs arrest and detain anyone who fails secondary examination.

[11] If a person in primary or secondary examination becomes ill or requires medical attention, the BSO responds and provides first aid. An ambulance is called. The form for entry and further examination is filled out, and the person's travel documents are seized. Care is rendered until paramedics arrive. The person is directed to return to the port of entry upon discharge from the hospital. When this happens in customs, the person's vehicle is seized. According to Mr. Beaulieu, as a peace officer, he has a duty to provide care to a person in his control.

[12] At other times, people in distress will ask BSOs for assistance. Mr. Beaulieu testified that when the public sees a BSO uniform, it sees a police officer. The public sees BSOs as being there for assistance and protection, for example during medical emergencies.

[13] Urban ports of entry have more volume and more resources. Police, fire, and ambulance services respond more quickly. Conversely, remote ports of entry have fewer officers on duty and considerably slower emergency service response times. They do not have emergency medical facilities available within a 10 km radius.

[14] According to the employer's standard operating procedures on the use of force (Exhibit 1, tab 9), BSOs must render first aid to anyone injured in a use-of-force incident, including anyone not directly involved. This means the detainee involved in the incident, along with co-workers and the public.

[15] Mr. Beaulieu gave examples of medical emergencies that arose when he worked at a remote port of entry and that required him to administer first aid. These included a driver suffering from cardiac symptoms, a tour-bus passenger who could not walk after falling in a duty-free shop, a car with a passenger showing symptoms of a stroke, and someone who lost consciousness and fell at secondary inspection.

[16] Lance Markell is the director of the employer's St. Lawrence District, which includes the Prescott, Ontario, port of entry, where of 600 000 people who crossed the border in 2017, 50 were detained. He is responsible for front-line operations and for

overseeing all border-related activities at the district's ports of entry. He testified that BSOs are required to administer first aid to members of the public in their care and custody due to arrest and detention or if they are injured in a use-of-force incident. BSOs are also required to provide first aid to Government of Canada employees in the workplace.

[17] CBSA's policies govern the BSOs' duties and responsibilities as an armed workforce. Most significant are the policies related to carrying out duties, such as the use-of-force policy and those on the care and control of people in custody. The CBSA's enforcement manual (Exhibit 3) is an example of a document in which the employer sets clear and direct boundaries on what BSOs can and cannot do. When transporting detainees, all BSOs require first-aid certification (Exhibit 1, tab 12, paragraph 9). BSOs provide first-response capabilities at ports of entry, including first aid, which is set out in their job description.

[18] The requirement to provide first aid appears in only two CBSA policies, in the CBSA "Enforcement Manual" (at Part 6, Chapter 2, entitled "Care and Control of Persons in Custody Policy and Procedures" (Exhibit 1, tab 11), and Chapter 8, entitled "Vehicular Transport of Persons Under Arrest or Detention") and in the CBSA "Standard Operating Procedures for First Aid and Automated External Defibrillators (AED)" (Exhibit 2), which applies to the obligation to provide first aid to fellow employees.

[19] Members of the public seeking entry into Canada at primary examination are not free to leave until they are discharged. Therefore, they are under the BSOs' care and control during that time, even though they have not been arrested. Again, at secondary inspection, they are not free to leave until the BSOs release them. They have been detained. Once arrested, they are no longer members of the general public.

[20] According to Mr. Markell, BSOs render first aid out of the professionalism for which they are recognized, as a public service, and because they care. The employer has never directed them to render first aid to anyone other than as specified.

[21] BSOs are held to a high ethical and professional standard. They are required to uphold the integrity of the CBSA and the Government of Canada. Failing to act or acting in a way that brings the reputation of the CBSA or the Government of Canada into disrepute is grounds for discipline. A failure to provide first aid could reflect

negatively on the CBSA and the Government of Canada and could possibly warrant disciplinary action.

III. Summary of the arguments

A. For the grievor

[22] Whether BSOs must provide first aid to the general public in addition to their regular duties depends on who constitutes a member of the general public and on the employer formally requiring them to. The grievance response and the evidence make it clear that BSOs are required to provide first aid to all those detained or arrested, who Mr. Markell acknowledged are members of the general public.

[23] The CBSA requires BSOs to provide first aid to everyone passing through a port of entry. The employer's communiqué followed two NJC decisions: decision 20.4.231, of December 15, 2010 ("decision 1"), and decision 20.4.232, of April 20, 2011 ("decision 2"). The outcome of both was that the BSOs met all four criteria and that therefore, they were entitled to the allowance, paid in biweekly increments.

[24] As a result of the comments in decision 2 at page 4, the NJC's Occupational Health and Safety Committee clarified the definition of "general public" in a bulletin. It refers to the population in general. The NJC intended to prevent further grievances on the issue via that document. The employer interpreted it inconsistently with the NJC's two decisions. It is unlikely that the NJC would issue something that would contradict two of its decisions. In the first two grievances in which the question of entitlement to the allowance was considered by the NJC, the NJC Executive Committee reached the same conclusion. Two years later, on this, the third grievance, the NJC split its decision and came to an impasse.

[25] The bulletin, issued on June 14, 2011 (Exhibit 1, tab 3), refers to *Rioux v. Treasury Board (Department of the Environment)*, 2009 PSLRB 57. On page 2, it quotes paragraph 49 of that decision, specifically that entitlement to the first aid allowance is conditional on having a duty to provide first aid to the general public and not to a limited part of that public. BSOs may be excluded from the definition of "general public" as they are public servants employed by the Government of Canada. But travellers are not excluded.

[26] The parties' intention must be gleaned via examining the words they used. This

requires giving those words their ordinary and plain meanings. People seeking entry into Canada through a port of entry are members of the general public, according to Mr. Markell. Even if the employer's interpretation is correct and that definition excludes anyone detained, a BSO in a remote area is still obligated to provide first aid, for the purpose of the allowance.

[27] The job description states that BSOs provide a first-response capability, which Mr. Markell testified includes first aid. Travellers first encounter BSOs at a port of entry. BSOs are in a position of authority as no matter where the traveller is in the process, he or she is in a BSO's care and control the whole time until being cleared. The traveller is not free to leave the port of entry, even if he or she is in medical distress, unless the BSO authorizes it.

[28] The BSO is the closest person in a position of authority who must have a current first-aid certification. The CBSA is aware that BSOs provide first aid to the general public; it likes to recognize its employees for this service. Mr. Markell's statement that no officer is required to offer first aid except in the limited circumstances specified was disingenuous and contrary to a BSO's expected conduct. It may not be explicitly stated, but it is certainly implied by including first-responder capability in the BSO job description.

[29] A BSO who meets the other three requirements in the directive also meets the second one and is entitled to the allowance. The rationale for paying the allowance to BSOs at remote ports of entry is the heightened and prolonged need to render assistance. If it takes longer for medical care to arrive, the BSO is required to provide first aid for a longer time, during which more things could go wrong. The majority of people who pass through a port of entry will never require first aid, but when they do, a BSO must respond.

B. For the employer

[30] The Board heard no evidence from the grievor and is missing valuable context, since this grievance is personal to him. There is no evidence that he has ever been required to provide first aid to anyone in the course of his BSO duties. Without this evidence, the grievance must be dismissed.

[31] If the CBSA formally requires BSOs to render first aid, regularly and as part of

their normal duties, then they are not entitled to the allowance. The questions to be decided are whether first aid is formally required of BSOs and whether that is in addition to their regular duties, along with the definition of “general public”.

[32] BSOs provide first aid to anyone in detention or injured in a use-of-force incident and to their co-workers. Mr. Markell explained the extent of the employer’s requirement. If the obligation to provide first aid exists, it would be found in the employer’s policies and procedures. If it is not found there, then the directive’s requirement that the employer formally require BSOs to administer first aid to the general public is not met.

[33] If as peace officers, BSOs are required to render first aid, or if doing so is in the job description, then they are not entitled to the allowance. If it is an inherent part of their duties to provide first aid, then they are not entitled to the extra compensation.

[34] To determine what “general public” means, a textual, contextual, and purposive interpretation must be used, which takes into account the legislative scheme as a whole (see *Grand River Enterprises Six Nations Ltd. v. Canada*, 2012 FCA 239). If the employer wanted BSOs to render first aid to the general public, it would have been specified in their job descriptions (see *Rioux*, at paras. 47 to 54). There is no evidence that the duty to provide first aid applies only at remote ports of entry and that BSOs at urban ports are not required to provide it.

IV. Reasons

[35] Counsel for the employer is correct. This grievance must be dismissed for lack of evidence concerning the grievor. The directive establishes that the allowance will be paid to each employee who qualifies by meeting the four requirements it sets out. Mr. Beaulieu testified about how he qualified for it in his interpretation of the directive and stated that had I dealt with his grievance, the results might very well be different. Sadly, I did not deal with Mr. Beaulieu’s grievance.

[36] While I have not been asked to directly, I assume that the grievor’s representative would have me accept that Mr. Beaulieu’s evidence details essentially the same experience the grievor had at Prescott. I cannot do that, especially since I have no evidence of how the Woodstock and Prescott ports of entry compare, let alone how the employer’s expectations of the grievor were similar or how they varied from

those it had of Mr. Beaulieu.

[37] On June 5, 2018, the perils of proceeding without the grievor's testimony were explained to his representative. She was given an adjournment until August 2 to either convince him to testify or to find another of the 300 interested employees whose grievances are being held in abeyance to come forward. The Board agreed to facilitate the substitution of the files and would have proceeded to hear the evidence on the other person but was advised on August 2 that the grievor's representative intended to proceed with the grievance before me.

[38] As set out in the evidence, above, there is no question that the grievor meets the directive's first requirement to be a public servant and third requirement to be employed at a remote work location. However, I cannot make a determination as to whether the grievor also meets the third and fourth requirements. Specially, I have no evidence as to what the grievor's regular duties are, in order to be able to determine whether he is formally required by the department to be available on a regular basis to provide, in addition to his regular duties, first aid to the general public. Further, I have received no evidence as to whether the grievor is required by, and at the expense of, the department to undertake and complete first aid training and maintain such level of first aid capability.

[39] Despite that this grievance has been denied, based on the information that I did hear, I can conclude that the ordinary meaning of "general public" would include the travelling public seeking entry into Canada. While purporting to apply the generally accepted rules of interpretation, in my opinion, the employer put too narrow and strict an interpretation on "member of the public". I am sure that if someone waiting in line at a port of entry were asked if they were members of the general public, they would respond in the affirmative.

[40] I disagree that the BSOs' rendering of first aid is limited to only the two situations that Mr. Markell identified in policy. Employee obligations are found not only in the employer's policies and SOP's but also in the job descriptions that it creates. BSOs are clearly responsible for providing first-response capabilities, which according to Mr. Markell includes delivering first aid when needed. This, then, makes administering first aid to any traveller an inherent part of a BSO's job duties. BSOs are required to administer first aid not because they are peace officers but because the

employer included it in their job description.

[41] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[42] The grievance is dismissed.

January 17, 2019.

**Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board**