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Citation: 2019 FPSLREB 35

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

TAMMY L. CUMMINGS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Cummings v. Treasury Board (Correctional Service of Canada)

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: Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Employer: Caroline Engmann, counsel

Heard at Victoria, British Columbia,
October 26, 2018.

I. Individual grievance referred to adjudication

[1] The grievor, Tammy L. Cummings, alleged that the employer, the Correctional Service of Canada (CSC), violated clause 26.10 of the agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") that expired on May 31, 2010 ("the collective agreement"), by scheduling her to be off work on a statutory holiday ("stat") when she should otherwise have been offered the opportunity to work (known as "statting-off" or being "statted-off"). That clause no longer exists in the collective agreements that have followed as a new regime for dealing with shifts on stats was established.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) 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; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[3] 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 PSLREB and the titles of the *PSLREBA* and the *PSLRA* 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*.

II. Summary of the evidence

[4] Under the collective agreement, the employer was obligated to assign stats to the correctional officer (CX) who had worked the least number of stat hours. According to the grievor, those hours were to be measured for each and every stat and not at the end of the fiscal year, as the employer did in her case. Working on a stat entitled CXs to their regular pay for the shift plus 1.5 times their pay for every hour

worked, or 2.5 times their pay for the shift.

[5] This dispute arose when the grievor was not called to work the Victoria Day stat in May 2011.

[6] Jason Stewart was a CX-02 at the William Head Institution in Victoria, British Columbia ("the institution"), and was at the time of the grievance was filed a member of the local scheduling committee. As such, Mr. Stewart worked with the institution's management, developing shift rotations and handling scheduling and scheduling policies.

[7] Between 2006 and 2011, the employer notified the CXs at the institution as to the percentage of them who would be statted-off for upcoming stat holidays. Those statted-off received their normal day's pay for that day but were not required to work.

[8] According to Mr. Stewart's testimony, a CX who desired to work a given stat submitted a request. The employer kept a record of the requests and assigned the stats based on the number of stat hours worked in the fiscal year by the CX who requested to work the stat. The CX with the lowest number of stat hours in the fiscal year was assigned to work the upcoming stat.

[9] Statting-off became more complicated when stats fell on CXs' days off, according to their scheduled rotations. In that case, their first scheduled day of work was recognized as their stat, and they were not normally required to work but were paid for the day at the normal rate. A CX wishing to work on his or her alternate stat could also request not to be statted-off on that day, and if called into work, he or she would be paid at the premium rate.

[10] The employer maintained a stat-off list, which reflected those who were willing to work stats. The CXs on it were listed in order of the hours they had worked on stats in the fiscal year. Shift workers were given the right of first refusal of stat hours, followed by those CXs who worked straight Monday-to-Friday day shifts. Shift workers were to be called first because they worked the posts that were statted-off.

[11] Mr. Stewart testified that if a CX was called to work a stat and refused, the number of hours offered and refused was counted against the CX's annual total of

stat hours as having been worked. If the CX was called and the institution received no answer, the CX was not charged the hours.

[12] A stat for a CX who was statted-off was equal to 8.5 hours. CXs who normally worked a 12.75-hour shift and were statted-off were paid for the entire 12.75-hour shift at their regular rates of pay. However, they owed the employer 4.25 hours, which they were required to pay back by working at a mutually agreed time later on or by using annual leave. CXs who normally worked a 12.75-hour shift and worked on a stat were paid for the entire 12.75-hour shift with no need to reconcile the hours.

[13] The grievor testified that she too was a CX-02 at the institution. She was statted-off for the Victoria Day stat in 2011 but requested to be put on the callback list (Exhibit 5). When that list was published, she noticed that her hours had been inaccurately recorded. It showed her as having 25.5 stat hours when it should have been 12.75, according to her evidence.

[14] When she realized the mistake, she emailed the Correctional Manager, Scheduling and Deployment (CMSD) (Exhibit 6), who was in charge of the schedule. She wanted him to correct the hours that had been wrongly charged against her for the Easter weekend earlier that year when she had asked to be statted-off only for Good Friday, which amounted to 12.75 and not 25.5 hours, as shown on the May callback list.

[15] According to the grievor, she never received a response. After the Victoria Day stat, she found out that another officer who had 25.5 hours had been called back for that stat. She questioned the CMSD about it and was told that the hours reported against her were accurate as she had been called for a previous stat, and the institution had received no response.

[16] The grievor denied receiving a call from the institution over the Easter weekend. She asked her cellphone provider for the records of her calls, both incoming and outgoing, which she testified proved that no calls came to her phone on the day in question. She provided these records to the employer.

[17] As it turned out, a clerical error had been made, and her hours and those for the other CX had been transposed. The other CX was supposed to have been charged 25.5 hours, and she was supposed to have been charged 12.75 hours. But for that,

she would have been entitled to the shift the other CX worked on the Victoria Day stat.

[18] At the second level of the grievance process, the employer agreed to allow her grievance (Exhibit 3, tab 2). It offered her a makeup shift to compensate for the lost shift, which was to be worked within 60 days of the second-level grievance response. The grievor testified that it did not propose a particular makeup shift to compensate for the one she missed when she was not called for the Victoria Day stat. Even if it had done so, it would not have mattered, since she was unable to find daycare to allow her to work the makeup shift within 60 days of the stat, so it was never scheduled.

[19] According to the grievor's testimony, she did not accept the employer's proposal in the second-level response, and for that reason, she seeks to be paid for 12.75 hours at 1.5 times her regular rate of pay.

[20] On the other hand, the employer stated that its obligation was to ensure that stats were equitably distributed for the purpose of overtime. It had in place a system under which stats were distributed via calling the CXs back if they were needed. If they were not called back to work via that system, the CXs were paid for 8.5 hours at their regular rates of pay and were not required to work. Those who did work received premium pay.

[21] An error was made in recording the grievor's callback hours for the Victoria Day stat in May 2011, which resulted in her not being offered work on that stat. The employer offered to correct it by giving her the opportunity to work extra hours, which, according to the employer, she refused. She refused the offer in 2012 and then refused it again when it was offered to her a second time. She refused it once more when it was offered to her on the morning of the hearing. The employer made good-faith attempts to resolve the grievance, but the grievor simply would not accept its offer. She did not want to work the hours; she wanted to simply be paid the equivalent of them.

[22] Stephen Phillips was the CMSD at the institution at the time of the grievance was filed. He was responsible for generating all schedules and producing the stat-off and callback lists. He testified that during the 11 stats each year, the institution is closed for business, and those CXs that are not required are statted-off. Those CXs who make themselves available to work a stat on which they have been statted-off and who, when called, either do not answer or are not available to come in, have the hours available for that stat counted against the number of stat hours on the stat-off list.

[23] According to the grievor's schedule for April 18 to May 30, 2011 (Exhibit 3, tab 3), she booked herself off on April 23 and 25. April 22 was Good Friday that year and her rest day, so her alternate stat was on April 23. Consequently, according to her schedule and the testimonies of the witnesses, she had been statted-off on the two stats at Easter 2011. She was placed on the callback list for April 23 (Exhibit 4). The CMSD's office kept a spreadsheet of all the stats that had been offered to, refused by, or worked by each CX (Exhibit 3, tab 5).

[24] On April 23, 2011, the grievor was called back. The CMSD's office received no answer to the call and was unable to leave a message. Mr. Phillips testified that the call was not actually connected but that it was placed twice. It was recorded as a "no answer", and 12.75 hours were recorded against the grievor in addition to the 12.75 hours she had asked to be off on Good Friday, which explains the total of 25.5 hours noted on the callback list used for the Victoria Day weekend. The error on the list used in May 2011 was not that the hours for the grievor and the other CX were transposed; the issue was that they both should have had 25.5 hours as the other officer had also refused a callback on April 26, 2011, and those hours had not been recorded.

[25] When Mr. Phillips received the grievor's email challenging the callback list for the Victoria Day weekend, he responded to her in person. At their meeting, she told him that she had never received a call or any voicemails from the institution on April 23. He then changed her accumulated hours to 12.75, which she claimed was accurate. He denied the grievance (Exhibit 1) but adjusted her stat hours to reflect the agreed-to tracking method.

III. Summary of the arguments

A. For the grievor

[26] Stats and overtime are two different things, and the CXs' availabilities to work them are maintained on two separate lists. Stats are covered by clause 26.10, which the Board has consistently interpreted. If a callback error was made, the proper remedy is payment in cash. That is what the grievor sought in her grievance, not the opportunity to work an extra shift at the premium rate.

[27] The denial of the grievance at the first level of the grievance process was overturned at the second level. The proper remedy for the breach, which the employer had admitted to, was missing. The language and the practice related to clause 26.10

are clear; there is a pecking order of whom to call to work on a stat. CXs who refuse an offer to work are deemed to have worked, and the hours are counted against them for distribution purposes. The evidence of Mr. Stewart and the grievor was that if no contact is made with a CX, the hours are not counted against that CX.

[28] Mr. Stewart is a member of both the bargaining agent executive and the scheduling committee. His evidence should be given more weight than that of Mr. Phillips, who has no scheduling committee role. Mr. Stewart has a privileged and preferential position and is better able to apply the collective agreement. The grievor had the same understanding as Mr. Stewart and pointed out Mr. Phillips' error to him. If Mr. Phillips' interpretation was correct, why was it not upheld at the second level?

[29] Mr. Phillips referred to two actions related to working stats, which can be called "we offered, they refused"; they indicate an expression of an unwillingness to work. He testified that the grievor was called and that the calls did not go through, yet the Board is in the dark about them. The question is what fits best with the harmony of the evidence. The Deputy Warden accepted that the employer made an error, so the issue is only about the remedy.

[30] This Board has decided that the appropriate remedy in a case such as this is payment at the appropriate rate for the shift (see *Saindon v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 73; *Purchase v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 66; and *Hopkins v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 50). Payment in cash is supported by the decision in *Federal White Cement Ltd. v. United Cement Workers, Local 368* (1981), 29 LAC (2d) 342. The correct remedy would be 12.75 hours paid at 1.5 times the grievor's regular hourly rate in April 2011.

[31] If there is any doubt as to which version of the story to accept, the grievor's or Mr. Phillips', the Board must look at the conduct of the parties (see *Hunt v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 65). The entirety of the testimony must be examined, and how it fits together must be determined (see *Faryna v. Chorny*, [1952] 2 DLR 354). When viewed in its totality, the grievor's version is more believable and consistent with the truth, especially given that the employer allowed her grievance at the second level.

B. <u>For the employer</u>

[32] The facts of this case are straightforward. It is a question of interpreting

clause 26.10; was an offer of work on a stat made to a qualified and readily available employee, and did the employer start with the employee with the least number of stat holiday hours since the beginning of the fiscal year when offering the work?

[33] The grievor was qualified, as was the CX who was offered the hours. They both had the same number of hours, 25.5. At that point, they were equally situated. The question becomes, under clause 26.10, what does "readily available" mean? A list is in place (Exhibit 3 tab 7) of the hours for each CX, which includes the hours offered to and either refused by the CX or deemed refused.

[34] According to the employer, if a CX is called with an offer of hours and cannot be reached, then the hours count against the CX. On that point, the bargaining agent and the employer have divergent views. The bargaining agent insisted that if no contact is made, as for the grievor, the hours do not count against the CX. The employer insisted that if a CX has offered to be available to work a stat but cannot be reached when called, it is commensurate with refusing the hours, which are recorded against the CX.

[35] All CXs on the list have indicated that they are available for work. If the employer calls one and there is no answer, then the CX is not available, and therefore, there is no entitlement. If there is no answer, the employer concludes that the CX is no longer available or has refused the shift. The purpose of CXs putting their names on the stat-off list is to indicate their willingness and readiness to work, if called. It would be impossible for the employer to manage callbacks on a stat if even though the CXs place their names on the stat-off list, they are not indicating their willingness to work, if needed. A failed attempt to contact a CX in a callback is deemed a refusal of work, which is completely consistent with the collective agreement.

[36] There is clear, cogent, and compelling evidence that Mr. Phillips called the grievor twice on April 23 to offer her work. She had the burden of proof of establishing that the calls were not made. She could have requested the phone logs from the institution to establish whether they had been made.

[37] In an effort to resolve the situation at the lowest level, the employer offered the grievor the opportunity to work an additional shift. There is little to no evidence that she could not have taken the remedy offered to her at the second level and resolved this issue within the same fiscal year. Because of that, she should not be entitled to a cash award (see *Baldasaro v. Treasury Board (Correctional Service of Canada),* 2012 PSLRB 54 at paras. 60 and 61).

[38] Even if she is entitled to a cash award, it should be for only 8.5 hours and not 12.75 hours as she claimed. The evidence is clear that there is a pecking order of whom to call in when work is available on a stat (Exhibit 3, tab 7). There is no guarantee that had the grievor been called back on the day in question, she would have been offered a 12.75-hour shift. In addition, she was credited 4.5 hours of annual leave that she used for the stat in April 2011, but in her remedy request (set out in Exhibit 9), she insisted that she receive credit for it again. The employer offered her exactly what she was looking for, which was 12.75 hours of overtime. It is not the employer's fault that she did not make herself available and that she snubbed the opportunity.

[39] The grievance should be dismissed. The employer's decision to offer the grievor the opportunity to work an additional shift should not be held against it as an expression against its interests.

IV. Reasons

[40] This grievance deals with collective agreement language that no longer exists, and it falls within the legal category of *de minimis*, which means "trifling" or "minimal". A lengthy treatise on the proper interpretation of clause 26.10 would serve no purpose when the employer determined that it violated that clause and granted the grievance during the grievance process. Nor is there any conclusive way of determining at this late date whether the grievor was called for the shift in question as claimed by Mr. Phillips, even though I believe based on his testimony that the call was in fact made since that was the process followed at the institution, and no evidence contradicted it.

[41] The true issue to be resolved is the proper form of the remedy to be paid to the grievor as a result of the grievance having been granted at the second level. Neither party argued that since she did not accept the offer at second level and act on it that it was null and void. To the contrary, both seemed to have accepted it as a matter of fact.

[42] The remedy was stated in the second-level response (Exhibit 3, tab 2) as the reimbursement of 4.5 hours of annual leave and the offer of a 12.75-hour overtime shift to be worked within 60 days of the date of that response, which was February 28, 2012. The grievor did not make herself available to work that overtime shift and, except for a very limited reference in her testimony to being a single mother

at the time, few reasons were provided as to why she was not available. Most likely, the motivator was the interpretation of the appropriate remedy rather than her availability.

[43] At the hearing, I stressed to the parties that the bottom line is that the second-level grievance reply granted the grievance. The employer continued to insist that the grievor did not make herself available to work the offered overtime shift, that she frustrated the agreement, and that it had met its obligations under the commitment in the second-level response. On the other hand, the bargaining agent relied on the Board's rulings in other cases to support its argument that the grievor was owed the money and did not have to work a shift.

[44] According to the reasoning in *Hunt*, at para. 43, the rationale for a payment is to avoid any prejudice that creating a shift for the grievor to work would create for others who were deprived of being offered that overtime shift. Unlike in *Baldasaro*, the grievor could not have worked the overtime within the fiscal year, which ended on March 31, 2012. The second-level response was dated February 28, 2012, and she received it only on April 18, 2012, which was in the fiscal year 2012-2013. It was a completely new year for the accumulation and calculation of stat-off hours.

[45] At the second level, the employer granted the grievor a 12.75-hour overtime shift to be worked within the next 60 days, plus the return of 4.5 hours of leave used for the May 23, 2011, stat. It argued that if a payment is to be made, it should be for only 8.5 hours, which is the normal number of hours paid on a stat to CXs who are not required to work but are still paid.

[46] I cannot see any ambiguity in the second-level response with respect to the number of hours the grievor was to be paid and credited. The employer did in fact credit the 4.5 hours of leave as it committed to do. Now it must pay the 12.75 hours at the overtime rate of time and one-half of the grievor's regular rate of pay as it was in 2011.

[47] Had it not been for the second-level response (Exhibit 3, tab 2), the outcome of this grievance would have been different.

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

(The Order appears on the next page)

V. Order

[49] The grievance is allowed.

[50] The employer must pay the grievor the 12.75 hours at the overtime rate of time and one-half of the grievor's regular rate of pay as it was in 2011.

March 15, 2019.

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