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Files: 566-02-11785 and 11786

Citation: 2024 FPSLREB 46

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

ANGELA JONES

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

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

In the matter of individual grievances referred to adjudication

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Zachary Rodgers, counsel

For the Employer: Lauren Benoit, counsel

Heard via videoconference,
September 13, 2023.

REASONS FOR DECISION

I. Introduction

[1] On October 22 and 28, 2013, Angela Jones ("the grievor") filed two separate individual grievances alleging an incorrect payment of an allowance called the Penological Factor Allowance (PFA). This decision concerns a preliminary objection about my jurisdiction to hear these grievances.

[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; "*EAP2*") also came into force (SI/2014-84). Pursuant to s. 393 of the *EAP2*, 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 *EAP2*.

[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*.

[4] At all material times, the grievor was a parole officer working for the Correctional Service of Canada ("the employer") and was subject to the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Program and Administrative Services Group that expired on June 20, 2014 ("the collective agreement").

[5] Article 58 of the collective agreement governs when and how employees are entitled to a PFA. It provides for a payment at three different levels depending on the

security designation of an institution as either maximum, medium, or minimum security.

[6] The context of the grievances is important. They arose after the grievor's work location was moved from the employer's Millhaven Assessment Unit (MAU) to its Joyceville Assessment Unit (JAU) in December 2012. The JAU is part of the employer's Joyceville Institution (JI), which it has designated as a medium-security institution, while the MAU is part of the employer's Millhaven Institution (MI), which is a maximum-security institution. As a result of the change, the grievor's PFA level was reduced.

[7] Each grievance claims an alleged violation of clause 58.08 of the collective agreement, which is essentially the acting-pay provision of article 58. The grievances claim that the grievor should have been paid the maximum amount of the PFA during the periods when maximum-security inmates were assigned to her while she was working at the JAU.

[8] The grievances were set to be heard on September 13 and 14, 2023. During pre-hearing discussions between the parties' representatives, a dispute arose as to my jurisdiction to hear the grievances. The employer objected to my jurisdiction on two grounds.

[9] First, the employer claimed that the grievor sought to change the nature of the grievances by raising new grounds that were not discussed during the internal grievance process. It relied on *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), to argue that the grievor was prohibited from changing the nature of the grievances and that I am without jurisdiction to hear what amount to new grievances.

[10] Second, the employer argued that one of the new grounds that the grievor raised was the subject of a separate grievance and that terms of settlement were reached that fully resolved that matter.

[11] A hearing was held on September 13, 2023, about the preliminary objection. Neither party chose to call witnesses. The employer provided the following documents to support its position:

- a copy of article 58 of the collective agreement;

- the grievor's individual grievance bearing number 50291 and dated February 20, 2013;
- her individual grievance bearing number 51764 and dated October 28, 2013 (Board file no. 566-02-11786);
- her individual grievance bearing number 51732 and dated October 22, 2013 (Board file no. 566-02-11785);
- a group grievance that included her bearing number 52802 and dated June 18, 2014;
- the employer's decision on the group grievance, dated July 3, 2014;
- the final-level hearing notes (undated) for the two grievances at issue;
- handwritten grievance hearing notes dated January 20, 2015; and
- the terms of settlement for the grievor's portion of the group grievance, dated August 26, 2016.

[12] The grievor's representative did not object to any of the employer's documents or provide any additional documentation.

[13] During their submissions, both parties referred to additional facts that were not in the documents listed in the earlier paragraph. Both parties objected as no such evidence was introduced. As such, this decision is based only on the facts that were clearly agreed upon, the documents provided to me (listed above), and the employer's grievance replies that are part of the public record.

[14] The parties requested that the terms of settlement dated August 26, 2016, be sealed as they were agreed to on a without-prejudice basis and are subject to a confidentiality clause.

[15] For the reasons that follow, the employer's preliminary objection is allowed in part, and the terms of settlement dated August 26, 2016, are to be sealed.

II. Chronology of the relevant facts

[16] On February 20, 2013, the grievor filed a grievance that I am not seized of (numbered 50291). Its context is important to understanding the series of events that transpired after it was filed. It is based on clauses 58.03 and 58.04 of the collective agreement.

[17] Clause 58.03 provides that the payment of the PFA is based on the designated security level of an institution as determined by the employer. For institutions with more than one designated security level (i.e. multi-level institutions), the PFA is payable at the highest PFA rate. Clause 58.04 sets three levels for the PFA. For maximum-

security institutions, it is $2000, and for medium- and minimum-security institutions, it is $1000 and $600, respectively.

[18] The grievance numbered 50291 provides as follows:

> *I received a letter dated November 30 2012 which indicated that with the change of Millhaven Assessment Unit (MAU) to Joyceville Institution (JI) my Penological Factor Allowance (PFA) would be reduced from $2000.00 for maximum to $1000.00 medium as of my reporting date. (Appendix A)*
>
> *On 2012-12-17 I reported to JI as required. We were informed that no maximum security offenders would be held in open population at JAU/JI. They would either be automatically transferred to MI or placed in segregation pending transfer.*
>
> *On 2013-02-14 I processed an offender who was in open population residing in the Special Needs Range for placement to a maximum security institution due to his Custody Rating Scale (CRS) rating of maximum.*
>
> *Therefore, as per clause 58.03 of the collective agreement states that for those institutions with more than one (1) designated security level (i.e., multi-level institutions) the PFA shall be determined by the maximum security level of the institution. It is my belief that I am entitled to my prior PFA of $2000.00 as JAU is not a medium security facility, but a multi-level facility (housing minimum, medium and maximum security offenders). To be made whole.*

[19] To summarize, the grievance claims that on February 14, 2013, while working at the JAU, the grievor was assigned duties relating to a maximum-security inmate and that she is entitled to the maximum PFA under clause 58.03, since the JAU is a multi-level facility housing minimum-, medium- and maximum-security offenders. In other words, the grievance is based on clause 58.03 and challenges the security designation for the JAU.

[20] In October 2013, the grievor filed the two grievances over which I am seized (Board file nos. 566-02-11785 and 11786). In each one, she alleges a violation of clause 58.08 of the collective agreement, which the grievor's representative referred to as the acting-pay provision of article 58.

[21] Clause 58.08 of the collective agreement is reproduced below. I also include clause 58.09 since it is referenced in clause 58.08 and is relevant to this decision. These clauses read as follows:

58.08 *Except as provided in clause 58.09 below, the PFA shall be adjusted when the incumbent of a position to which the PFA applies, is appointed or assigned duties in another position to which a different level of PFA applies, regardless of whether such appointment or assignment is temporary or permanent, and for each month in which an employee performs duties in more than one position to which the PFA applies, the employee shall receive the higher allowance, provided he or she has performed duties for at least ten (10) days as the incumbent of the position to which the higher allowance applies.*	***58.08*** *Sous réserve des dispositions du paragraphe 58.09 ci-dessous, l'IFP est rajustée lorsque le titulaire d'un poste auquel s'applique l'IFP est nommé à un autre poste auquel un niveau différent d'IFP s'applique ou s'en voit attribuer les fonctions, que cette nomination ou affectation soit temporaire ou permanente, et, pour chaque mois au cours duquel l'employé-e remplit des fonctions dans plus d'un poste auquel s'applique l'IFP, il ou elle touche l'indemnité la plus élevée, à condition qu'il ou elle ait rempli les fonctions pendant au moins dix (10) jours en tant que titulaire du poste auquel s'applique l'indemnité la plus élevée.*
58.09 *When the incumbent of a position to which the PFA applies, is temporarily assigned a position to which a different level of PFA, or no PFA, applies, and when the employee's basic monthly pay entitlement in the position to which he or she is temporarily assigned, plus the PFA, if applicable, would be less than his or her basic monthly pay entitlement plus the PFA in his or her regular position, the employee shall receive the PFA applicable to his or her regular position.*	***58.09*** *Lorsque le titulaire d'un poste auquel s'applique l'IFP est temporairement affecté à un poste auquel un niveau différent d'IFP s'applique, ou auquel nulle IFP ne s'applique, et lorsque la rémunération mensuelle de base à laquelle il ou elle a droit pour le poste auquel il ou elle est temporairement affecté, y compris l'IFP, le cas échéant, est moins élevée que la rémunération mensuelle de base, plus l'IFP, à laquelle il ou elle a droit dans son poste normal, il ou elle touche l'IFP applicable à son poste normal.*

[22] The first of the two grievances (Board file no. 566-02-11785) was filed on October 22, 2013, and provides as follows:

> *On 2013-09-16 I processed offender* [G] *for involuntarily transfer to Millhaven Assessment Unit (maximum security facility). He was transferred to MAU on 2013-09-18, but he has remained on my caseload while residing at a maximum security facility. I continued to monitor his case and complete all required assessments mandated by policy. I believe that I should be receive maximum PFA in accordance with Collective Agreement clause 58.0*[8] *which states that …* [quotes clause 58.08 in its entirety].
>
> *Corrective Action Requested*

> *I should receive my PFA at a maximum security rate of $2000.00 and that this should continue for the duration that the offender is assigned to me. I would also request that this be applied to previous offender I have had on my caseload who have been transferred to a maximum a security institution, but have remained on my caseload, as well as any future offenders.*
>
> [*Sic* throughout]

[23] The October 22, 2013, grievance form states that the grievance is based on "Collective Agreement Admin Services 58.09". However, the grievor's representative agreed that this was an error since the language of the grievance quotes clause 58.08.

[24] The grievance form also fails to specify the date on which each act, omission or other matter giving rise to the grievance occurred.

[25] To summarize, the October 22, 2013, grievance claims that on September 16, 2013, the grievor processed a maximum-security inmate and that this inmate remained on her caseload after he was transferred to the MAU on September 18, 2013. It claims that she is entitled to the maximum PFA under clause 58.08, for the entire time that the inmate was assigned to her, as well as on a previous similar occurrence and any future ones. In other words, the grievance alleges a violation of clause 58.08 based on having maximum-security inmates assigned to her while she is working in a medium-security institution.

[26] The second grievance (Board file no. 566-02-11786), was filed on October 28, 2013, and provides as follows:

> *On 2013-02-22 I inquired if I would receive PFA at a maximum security rating ($2000.00) related to an offender which was transferred from JAU to MAU due to his maximum security rating and I remained assigned as his parole officer. I was informed that this along with other issues pertaining to these types of cases (transferred from JAU to max due to being classified as maximum security) was under discussion.*
>
> *It had been 6 months since I made this inquiry and believe that this has been a sufficient amount of time for a decision to be made. I was informed by S. Layne on 2013-10-22 that no decision has been rendered to date.*
>
> *It is my belief that in accordance with the Collective Agreement clause 58.08 which states that …* [quotes clause 58.08 in its entirety].

> *The offender in question was* [L]*. He was transferred to the Millhaven Assessment Unit on 2013-03-08 and then to Kingston Penitentiary on 2013-05-09. He was eventually transferred to Port Cartier on 2013-08-26.* [L] *remained assigned to me for the duration of the period of time he was in maximum security custody in Ontario. I completed several reports on this offender during this period of time and also travelled to Kingston Penitentiary to meet this offender, but never paid at maximum security PFA rate.*
>
> *I ask that I receive my PFA at a maximum security rate ($2000.00) for the period of time I was identified as the parole Officer assigned to* [L]*'s case. Additionally, I also ask that for any period of time in which I have been identified and remained the case management officer for any offenders transferred to maximum security institutions, current as well as in the past that I receive PFA at a maximum security rate of $2000.00 per year as per Collective Agreement clause 58.08.*

[27] The grievance form states that it was based on "[clause] 58.08" and that the date on which each act, omission or other matter giving rise to the grievance occurred started March 18, 2013, to August 26, 2013.

[28] The October 28, 2013, grievance is based on the same issue raised in the October 22, 2013, grievance. It claims that on March 8, 2013, the grievor was assigned a maximum-security inmate and that this inmate remained on her caseload until August 26, 2013. It claims that she is entitled to the maximum PFA under clause 58.08, for the entire time that she was assigned as L's parole officer, as well as any previous similar occurrence and any future ones. In other words, the grievance once again alleges a violation of clause 58.08 based on having maximum-security inmates assigned to her while she is working in a medium-security institution.

[29] On November 8, 2013, the employer provided a joint first-level reply to the October 22 and 28, 2013, grievances. It made no mention of clause 58.08. Rather, it assumed that these two grievances were the same as the one that was filed in February 2013 about the institution's security level (the grievance numbered 50291). The reply reads as follows:

> …
>
> *On a preliminary matter, Article 18.15 of the PA Collective Agreement allows that an employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 18.08 not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances*

> *giving rise to the grievance. You were advised in writing on 30 November 2012 regarding the change to your PFA.*
>
> *As your grievance was not presented within the defined timeframes of your Collective Agreement, your grievance is deemed to be untimely.*
>
> *Furthermore, you previously submitted a grievance on this very issue in February 2013 and transmitted it to Level 3 of the grievance process on 29 April 2013. That grievance (#50291) is still active.*
>
> *As a result of you currently having a previous active grievance on this issue and this grievance being untimely, your grievance is rejected.*

[30] The October 22 and 28, 2013, grievances were transmitted to the second level of the grievance process on November 14, 2013. On either November 22 or December 22, 2013 (the date was scratched out, making it difficult to determine), the employer provided its second-level reply. Once again, the reply did not refer to clause 58.08. It reiterated the content of the first-level reply and added the following:

> …
>
> *However, I will respond to the content of your grievance.*
>
> *PFA is not defined by the security classification of an inmate. PFA is determined by Article 58.03 of the* [*sic*] *your Collective Agreement which states that PFA payment is determined by the "designated security level of the penitentiary as determined by the Correctional Service of Canada (CSC)". CSC has determined the security level of all institutions in CD 706 Classification of Institutions where Joyceville Institution (JI) is designed as a Medium Security institution. JI is not classified as Multi-Security level in CD 706. Article 58.04 of your Collective Agreement states that Medium Security PFA is $1000. You are in receipt of $1000 medium level PFA. Therefore, the Employer is not in violation of your Collective Agreement.*

[31] The two grievances were transmitted to the third and final level of the grievance presentation process on January 24, 2014.

[32] However, before they were presented at the final level, another grievance was filed, which is also of relevance to this matter. On June 18, 2014, the bargaining agent filed a group grievance, the scope of which included the grievor. The group grievance refers to letters that she and others received dated June 10, 2014, which were related to the change of work location from the MAU to the JAU. I was not provided a copy of the letter. The group grievance provides as follows:

…

> *… The letter also noted that we had to submit our names to determine of we are entitled to Relocation Assistance in Accordance with the NJC Directive.*
>
> *The question has yet to* [be] *answered which is what authority is the application of the Relocation Directive being applied and under what authority/directive were we relocated from MAU to JI. Additionally, have we been on travel status since the first day of our arrival at JAU.*
>
> *Given the vagueness of this letter; the admission of CSC that they have misinterpretation and misapplication directives we are submitting a group grievance under Collective Agreement articles; 7.01, 7.02, 7.03, 7.04 as well as 18.01 and NJC By-Laws Article 15-resolution of grievances as we still have yet to receive any clear direction.*
>
> …
>
> [*Sic* throughout]

[33] In terms of corrective action, the group grievance requests as follows:

> *Clear indication by CSC as to what Directive and under whose Authority we were relocated from MAU to JI. We want also all identified Directive which apply to this relocation be followed with no exception or in only part. To be made whole.*
>
> [*Sic* throughout]

[34] I was provided with a copy of the employer's second-level reply to the group grievance dated July 3, 2014, which reads as follows:

> *This is in response to your grievance lodged on June 18, 2014 in which you are grieving your relocation entitlements and authority used regarding your physical relocation from Millhaven Institution (MAU) to Joyceville Institution (JAU).*
>
> *With regards to your relocation entitlements I refer each of you back to the letter you received from A/Assistant Deputy Commissioner, Integrated Services Mr. Scott Edwards on June 10, 2014. The letter clearly articulates that a grievance was upheld by the National Joint Council related to the Relocation Directive for employees that were moved from one work unit to another. It clearly indicates you each may be entitled to relocation assistance and identifies Lisa Littlefield as the regional point of contact in this regards. My understanding is that two of you have, in fact, already been in contact with RHQ Finance and advised of your qualification regarding entitlements following the National Joint Council grievance being upheld.*

> *The authority regarding the physical relocation of your work unit from Millhaven Institution to Joyceville Institution belongs with the Correctional Service of Canada. I will note that in your grievance submission you indicate you have been on travel status since arrival to JAU. I must note that you have not been on travel status since arrival to Joyceville Institution as travel status must be pre-approved and no approval/signed Travel Authorities are in place for any of you.*
>
> *For the noted reasons stated above, I am denying your grievance and the corrective action sought.*

[35] The group grievance resulted in terms of settlement. However, before the settlement was reached, a final-level grievance presentation was held on January 20, 2015, for the October 22 and 28, 2013, grievances at issue.

[36] According to the document entitled "Angela Jones Final Level Hearing Grievance 51732 & 51764" (corresponding to the October 22 and 28, 2013, grievances and Board file nos. 566-02-11785 and 11786 respectively) and the handwritten notes dated January 20, 2015, the grievor told the employer that it had not responded to the correct grievances in its first- and second-level replies. Both documents indicate that the two grievances at issue are based on clause 58.08 and that the grievor claims to be owed 14 months at the maximum PFA level. They state that the 14-month period is for the total time she was assigned to maximum-security inmates while working at the JAU. The document entitled "Angela Jones Final Level Hearing Grievance 51732 & 51764" adds this:

> …
>
> *The issue surrounding the PFA allotted allowance has been an issue since her relocation to JI. As far back as February 2012, she has made inquiries and filed grievances to resolve this issue. She believes that her allowance should be increased to a maximum rating for the period of time in which she is assigned a maximum offender's parole officer. She has had maximum offenders assigned to her while at JAU and then transferred to Millhaven Institution (MI) and then transferred to Kingston Penitentiary and similar situations have arisen on more than one occasion. Nevertheless, for the duration of his maximum security custody in Ontario an offender remained assigned to her caseload (approximately 8 months) see (1). She completed several reports on the offender, travelled to Kingston Penitentiary to interview the offender. She has been also consulted on maximum level offenders' interactions, involved in case conferences, consultation from various departments at both maximum security facilities as well as being notified of any behaviour concerns relating to this level*

offender by staff from higher classification facilities. ***This occurred on 2 additional occasions related to 2 different offenders.*** [G] ***who was transferred to MI and remained assigned … to perform all case management duties for these cases similar to the first case.***

Although she was not appointed or assigned to another higher level position to which a different level of PFA applies, for a consecutive period of at least 10 days, she perform [***sic***] ***all required duties that a Parole Officer in a higher level of security institutions is required to do.***

Upon her ***order to report to*** *JAU the grievor was informed that no maximum security inmates would be held at the Joyceville Assessment Unit (JAU).* ***Once maximum security offenders began to reside at JAU*** *she was then led to believe that no offenders would be held in open population at JAU once identified as a maximum offender by Intake. They would either be automatically transferred to Millhaven Institution or placed in segregation (MI). The grievor and her colleagues expected to work in a medium security institution and would therefore be dealing with medium security offenders. The grievor only became aware of the fact that she was dealing with maximum security offenders on the day that she processed a maximum security offender, in* ***2013****.*

The main argument is that while some maximum level inmates are processed through to Millhaven Institution (MI) there remain a significant number of inmates who are in the ***Assessment Unit*** *and Temporary Detainee Population at Joyceville* ***who are later identified as maximum security offenders by virtue of the assessment process.***

…

The only thing that changed when the ***assessment*** *unit was transferred to Joyceville was that all lifers were directed to Millhaven instead of Joyceville, since lifers are automatically deemed to be maximum security upon sentencing. The Parole Officers in the* ***assessment areas*** *at Joyceville Institution continue to assess and process other offenders who may later be deemed to be maximum security offenders and in some cases remain on their caseload for several months.*

…

Conclusion

…

JAU is a medium security facility, evidence demonstrate that a Parole Officer's responsibilities and assignments and custody of offenders of higher level of security then the institution on their caseload should be entitled to a PFA at the higher level, regardless of the security level of security of the institution ***they are assigned to****.*

> *Although the grievor is assigned a position at JI (medium security facility) she was assigned duties **at** a maximum security institution by virtue of the Memo of Agreement between the Wardens of JAU and MI and as such should be entitled to PFA at a maximum security level for the period of time she was assigned as a Parole Officer to an offender of a higher security level and in transition to a higher security level institution.*
>
> *As detailed above the grievor was assigned duties of a Parole Officer in a maximum security institution for several offenders and as such should be entitled to PFA at a maximum security level for such period of time as she remained assigned as the Parole Officer to the offenders who have been places at a maximum security facility in Ontario pending inter-regional transfer to other provinces.*
>
> …
>
> [Emphasis in the original]

[37] During the final level presentation, the grievor also argued that maximum-security inmates should not find themselves in medium-security institutions and that if this has taken place, then the employer should revisit the institution's security designation and provide her and her colleagues with the PFA at the appropriate rate. She argued that she should be entitled to the maximum PFA as the JAU was a multi-level institution that housed minimum-, medium-, and maximum-security inmates.

[38] The employer provided a third-level reply on August 20, 2015, in which it reiterated its timeliness objection but nevertheless addressed the merits of the grievances, as follows:

> …
>
> *I understand that you were assigned maximum security offenders at the Joyceville Assessment Unit (JAU), following the relocation of the Millhaven Assessment Unit (MAU) to Joyceville Institution (JI). I note that your PFA was reduced from $2000 to $1000 rate, given that JI is not classified as a Maximum Security Institution as per Commissioner's Directive 706. In accordance with clause 58.03 of the PA collective agreement, it is the designated security level of the penitentiary and not the security level of the inmates that determines the appropriate level of PFA entitlement. Since the applicable PFA in this context is at the medium level, I find that management was justified in informing you of the change to your PFA, and that article 58 of the PA collective agreement was not contravened.*
>
> …

[39] On November 27, 2015, the October 22 and 28, 2013, grievances were referred to the Board for adjudication. In the referral, their subject was identified as "Article 58 – Penological Factor Allowance." Of note, the employer did not raise any timeliness objections.

[40] The grievance dated February 20, 2013, (numbered 50291) has not been referred to the Board for adjudication.

[41] On August 26, 2016, the parties entered into terms of settlement to resolve the part of the group grievance that related to the grievor. It provides that the settlement's terms and conditions are "… in full satisfaction of all claims against the Employer in any way related to these matters and the issues giving rise to this grievance, namely, the relocation of the assessment unit (MAU) from the Millhaven Institution to the Joyceville Institution."

[42] The terms of settlement contains a carve-out provision that reads as follows:

> …
>
> *… grievance nos. 51732, 51764* [Board file nos. 566-02-11785 and 11786]*, 55911 and 56068 remain unaffected by the terms of this settlement. However, the employer reserves the right to raise objections to the PSLREB, Canadian Human Rights or any other relevant partie*[s] *if applicable in relation to the above referenced grievance files.*
>
> …

[43] I was not provided with copies of the grievances numbered 55911 and 56068, and so, I am unaware of their topics.

[44] Both parties agreed that in the weeks before the scheduled hearing dates, the grievor's representative informed the employer for the first time that they intended to raise an alternative argument based on clause 58.09. Specifically, they planned to argue that the grievor is entitled to the PFA at the maximum rate since her work location was not properly relocated from the MAU to the JAU. Framed differently, they planned to argue that the grievor's position remained at the MAU, but that she was assigned to the JAU until her relocation was rectified.

III. Summary of the arguments

A. For the employer

[45] The employer states that the dispute arose from the grievor's move from the MAU to the JAU. It states that that resulted in her filing several grievances, in which she claimed that she should receive the higher PFA rate.

[46] The employer argues that the true nature of the October 22 and 28, 2013, grievances concerns the grievor's allegation that the JAU did not have the proper security designation level.

[47] In support of its position, the employer refers to the first grievance (numbered 50291), which specifically challenged the JAU's security level. The employer states that although the wording of the two subsequent grievances (the October 22 and 28, 2013, grievances at issue in this decision) differs from the first one, nonetheless, the grievor maintained the same argument that she should be entitled to the maximum PFA rate, based on the JAU's incorrect security designation. It refers to the notes of the final-level grievance presentation as evidence of this. It argues that the first grievance (numbered 50291) and the October 22 and 28, 2013, grievances are all about the same issue.

[48] The employer relies on *Burchill* and argues that since the true nature of the grievances is the grievor's challenge to the JAU's security level, she could not make new arguments that changed the grievances' nature.

[49] The employer argues that this situation is identical to the one in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2017 PSLREB 41 ("*PIPSC*"). In *PIPSC*, the Board declined to hear a grievance after concluding that its true essence was the security designation of a medical centre located within a penitentiary, over which it had no jurisdiction.

[50] The employer states that in the weeks before the scheduled hearing dates, it provided the grievor's representative with a copy of *PIPSC*. It states that it was then informed for the first time that the grievor intended to argue that she was entitled to the maximum PFA under clause 58.09 because she was not properly relocated to the JAU in December 2012.

[51] The employer refers to the grievances' wording and the final-level grievance presentation notes as evidence that the grievor never raised that issue at any time during the internal grievance process.

[52] The employer argues that it is clear from the case law that a grievor cannot change the true nature of a grievance at adjudication. In addition to *Burchill* and *PIPSC*, it also relies on *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, and on *Smith v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 116. Those decisions are examples of grievors not being allowed to raise at adjudication issues that were not discussed during the different levels of the internal grievance process.

[53] As a secondary ground for its objection, the employer argues that the grievor was precluded from arguing that she is entitled to a higher PFA on the basis that she was not properly relocated since this matter is the subject of separate terms of settlement between the parties.

[54] The employer relies on the wording of the terms of settlement, which provides that the settlement is in full satisfaction of all claims against the employer in any way related to the relocation of the assessment unit from MI to JI.

[55] The employer acknowledges the carve-out provision in the terms of settlement. However, it argues that it is based on the stated grounds contained in the October 22 and 28, 2013, grievances and that the grievances make no mention of a challenge to the formality of the relocation of the grievor's position.

[56] The employer states that it would not have agreed to the carve-out provision had it known of the grievor's intention to change the nature of the grievances.

[57] The employer urges the Board to apply the same reasoning as in *PIPSC* and to dismiss the grievances. Alternatively, it requests that the grievor be precluded from raising arguments about the relocation of her position based on *Burchill* and the terms of settlement.

B. For the grievor

[58] The grievor's representative states that they do not intend to challenge the JAU's security level. They state that the grievance numbered 50291, about the JAU's security level, was not referred to adjudication. They acknowledge that the security

level of the JAU was discussed during the final-level grievance presentation for the two grievances at issue (the October 22 and 28, 2013, grievances). However, they argue that the grievance process is meant to allow the parties to discuss issues broadly and that the parties should not be tied to the contents of those discussions, as they were not legal proceedings.

[59] The grievor's representative states that the grievances are related to clauses 58.08 and 58.09 of the collective agreement. They state that those provisions act in concert with each other. Clause 58.08 provides for the payment of the PFA at a higher rate when an employee is assigned higher-level duties, while clause 58.09 is the inverse and protects an employee's salary when they are temporarily assigned lower-level duties.

[60] The grievor's representative states that the core of the grievor's argument is that her work did not meaningfully change when she was moved from the MAU to the JAU. They argue that the move was essentially an assignment and that she was assigned to work at the JAU.

[61] The grievor's representative confirms that before the scheduled hearing dates, the employer provided them with a copy of *PIPSC*. They further confirm that after seeing that decision, they informed the employer that they would not contest the JAU's appropriate security level. However, they informed the employer that they would argue that the grievor was assigned duties under clause 58.08, or alternatively, because she was not officially relocated to the JAU, she could be entitled to the PFA on the basis of clause 58.09.

[62] The grievor's representative points out that the grievances were filed in 2013, while *PIPSC* was rendered in 2017. They argue that it is important that the parties be able to adjust their arguments based on the evolution of the law.

[63] The grievor's representative states that these grievances have always been about clause 58.08 and the acting pay to which the grievor is entitled. In support, they refer to the grievances' wording and the final-level grievance presentation notes. However, the grievor's representative believes that they are also free to raise as an alternative argument an entitlement to the PFA under clause 58.09, since the issue has always been the proper payment of the PFA as a result of her move from the MAU to the JAU. They argue that the remedy has remained the same.

[64] The grievor's representative states that *Burchill* stands for the principle that a grievor cannot present a new or different grievance at adjudication. However, there is a distinction between a new grievance and a new argument. They rely on *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56, and *Anderson v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 75, and states that the case law is clear that as long as the grievance's subject matter and the remedy are the same, it is open to the parties to introduce new arguments to support their claims.

[65] The grievor's representative states that the grievances are about clause 58.08. However, the grievor is free to refine her arguments as the hearing approaches. They argue that she has stated consistently that if she was assigned MAU inmates, then she should be paid the PFA at the MAU's rate. They state that *Burchill*'s primary concern is to protect the employer from surprise. However, the employer had notice from the start that the grievor disagreed with a number of things with respect to how the move was effected.

[66] With respect to the terms of settlement, the grievor's representative argues that the settlement's intention is clear. It resolved everything related to the grievor's relocation except for four specific grievances, including the two at issue (Board file nos. 566-02-11785 and 11786). They argue that the parties have effectively agreed to keep their powder dry with respect to these grievances, and the employer reserved the right to raise objections.

[67] For these reasons, they request that the employer's preliminary objection be denied on all grounds.

IV. Analysis and reasons

[68] The grievor seeks to be paid at the maximum PFA rate for the periods of time she was assigned as the parole officer for maximum-security inmates while she was working at the JAU, a medium-security institution. Her October 22 and 28, 2013, grievances specifically refer to clause 58.08 as the foundation for her claim. However, in the weeks leading to the hearing on the merits of these grievances, the grievor's representative informed the employer that it would argue as an alternative argument that the grievor was entitled to the maximum PFA rate under clause 58.09 in light of procedural irregularities regarding the grievor's relocation from the MAU to the JAU.

[69] The employer raises two grounds for dismissing the October 22 and 28, 2013, grievances. The first is based on the principles enunciated in *Burchill*, and the second is based on the terms of settlement reached between the parties on August 26, 2016.

[70] For the reasons that follow, I disagree with the employer that the grievances should be dismissed, however, I agree that I am without jurisdiction to hear the grievor's arguments under 58.09 of the collective agreement to the extent they flow from the grievor having been improperly relocated to the JAU.

A. Should the grievances be dismissed on the basis of *Burchill*?

[71] The employer relies on *Burchill* and argues that the true nature of the grievances is the grievor's challenge to the JAU's security level and as such she cannot make new arguments at adjudication that changes the grievances' nature. For clarity, it claims that the grievor's claims under clauses 58.08 and 58.09 are both new.

[72] The employer argues that the facts in this case are identical to those in *PIPSC* where the Board applied *Burchill* and declined to hear a grievance after concluding that its true essence was the security designation of a medical centre located within a penitentiary, over which it had no jurisdiction.

[73] It is well established that *Burchill* stands for the principle that only those grievances that have been presented in the internal grievance process may subsequently be referred to adjudication.

[74] In *Shneidman*, the Federal Court of Appeal elaborated on the role of the internal grievance process to clarify issues raised in a grievance where its wording lacks clarity. It provides the following helpful guidance:

> …
>
> *[24] In my view, however, before considering the breadth of the grievance, it was necessary to ask whether Ms. Shneidman "presented a grievance" regarding the violation of her rights under article 17.02 of the collective agreement to the final level within the meaning of the opening words of subsection 92(1) of the PSSRA. Whether or not the language of the grievance is potentially broad enough to include a complaint that the collective agreement has been violated, the complaint will not be permitted to proceed to adjudication, and thus will not be in the adjudicator's jurisdiction, unless it has been specifically raised at the final level. Neither the Adjudicator nor Justice Simpson considered this preliminary question of whether the specific claims relied upon by Ms.*

> *Shneidman before the Adjudicator had been raised at the final level. After considering this question, I find no basis for interfering with Simpson J.'s conclusion that the Adjudicator erred in taking jurisdiction over Ms. Shneidman's complaint that her collective agreement rights were violated.*
>
> …
>
> *[26] To refer a complaint to adjudication, the grievor must have given her employer notice of the specific nature of her complaints throughout the internal grievance procedure ….*
>
> …
>
> *[27] Where the grievance on its face is sufficiently detailed, the employer will have notice of the nature of the employee's grievance at all levels. However, where, as here, it is not clear on the face of the grievance what grounds of unlawfulness will be relied upon by the employee, the employee must provide further specification at each stage of the internal grievance process as to the exact nature of her complaint if she intends to refer the matter to adjudication.*
>
> …

[75] The Federal Court of Appeal went on to hold that although Ms. Shneidman's grievance might arguably have been broad enough to encompass the new ground that she sought to rely upon, a person reading the grievance would not have known that she intended to allege a violation of the collective agreement provision in question. As a result, the Court held that Ms. Shneidman was required to make submissions to this effect during the internal grievance process. Since she did not, she could not raise this argument at adjudication.

[76] In the case at hand, it is clear from the plain reading of the grievances and the final-level grievance presentation notes that the grievor is relying on two grounds for her entitlement to the maximum PFA rate. First and foremost, she claims that she is entitled to the maximum PFA rate under clause 58.08 of the collective agreement since she was assigned inmates from a maximum-security institution while she was working in a medium-security institution. She also claims that she is entitled to the maximum PFA rate since the JAU is improperly designated as a medium-security institution since it houses maximum security inmates.

[77] The facts in this case are therefore clearly different than those in *PIPSC*. It is clear from the grievances and the grievance presentation notes that the essence of the grievances is grounded on clause 58.08.

[78] It is therefore clearly within my jurisdiction to hear the grievor's claim that she is entitled to be paid the maximum PFA rate under clause 58.08 based on being assigned inmates from a maximum-security institution while she was working in a medium-security institution. Since the grievor's representative stated that he did not intend to raise any arguments regarding the JAU's security level, I do not need to address my jurisdiction over that matter.

[79] Turning now to the grievor's alternative argument that she is entitled to the maximum PFA rate under clause 58.09 of the collective agreement due to issues surrounding the status of her relocation from the MAU to the JAU.

[80] It is undisputed that this issue was not raised in the October 22 and 28, 2013, grievances or in the final-level grievance presentation.

[81] Based on the limited information provided to me, it appears that the issue of the grievor's relocation status came to light in June 2014, approximately nine months after the grievances had been filed. However, the final-level grievance presentation occurred in January 2015, well after that information had emerged. If she believed that a potential violation of clause 58.09 arose from it, she should have made that point during her final-level grievance presentation. Since she did not, she cannot raise it at adjudication.

[82] The grievor's representative relied on *Delage* and *Anderson* to argue that as long as the grievance's subject matter and the remedy are the same, the parties are open to introduce new arguments to support their claims.

[83] I find that both decisions can be distinguished from this case.

[84] *Delage* concerned a grievor whose position was reclassified while he was on parental leave but was only provided a retroactive payment following his return to work. The grievance claimed that under the collective agreement, the retroactive payment should have included the period when he was in receipt of parental benefits. At adjudication, Mr. Delage raised for the first time the argument that the collective agreement provision that he sought to enforce could not be interpreted in a discriminatory manner contrary to the *Canadian Human Rights Act* (*CHRA*) (R.S.C., 1985, c. H-6). The employer objected, based on *Burchill*, and claimed that it had not been raised during the internal grievance process. The adjudicator held as follows:

…

> *14 The grievor's failure to present a human rights argument at the various levels of the grievance process and the fact that he only did so at the adjudication stage does not change the nature of the grievance. The details of the grievance and the corrective action requested remain exactly the same.*

…

[85] The adjudicator held that the argument that the collective agreement clause that was being grieved could not be interpreted in a manner that violated the *CHRA* provisions was just that — an argument. It did not seek to change the grievance's nature by claiming an entitlement under a different collective agreement provision or seek a new remedy.

[86] In *Anderson*, the issue concerned grievances alleging that the employer had failed to grant pay increments on the appropriate dates. At adjudication, the grievors changed their argument. They chose to rely on a strict reading of the pay-increment clause in their collective agreement rather than the continuous-service argument that they had discussed during the internal grievance process. As in *Delage*, the Board held that the grievors were free to raise the new argument at adjudication as the topic of the grievance, and the remedy remained unchanged (i.e., the payment of the first pay increment based on the grievors' initial start dates). It is noted that the new argument concerned the same clause in the collective agreement and did not rely on facts not raised during the grievance presentation process.

[87] The same cannot be said in this case. The grievor's new argument concerns a different collective agreement clause, clause 58.09, and relies on a different fact scenario — her relocation status.

[88] The remedy is also different as the remedy for a violation of clause 58.08 is not the same as for one under clause 58.09.

[89] The grievances under clause 58.08 seek compensation only for the periods in which the grievor was assigned maximum-security inmates. The remedy under clause 58.09 is much broader as it is based on the entirety of the time assigned to a position with a lower PFA rate.

[90] The principles enunciated in *Burchill* and *Shneidman* ensure fairness and sound labour relations by making sure that the employer is aware of what is being grieved and that it is provided with the opportunity to address those concerns during the internal grievance process. When the true nature of a grievance has changed, the Board is without jurisdiction to hear it, as it is not the grievance that was presented and discussed during the internal grievance process.

[91] In this case, no mention was made in the October 22 and 28, 2013, grievances or during the internal grievance process of a violation of clause 58.09 or of issues surrounding whether the grievor had been properly relocated. This is by all accounts a new issue, not simply a new argument. As a result, I am without jurisdiction to hear any argument on those stated grounds.

B. Should the grievances be dismissed on the basis of the terms of settlement reached between the parties?

[92] As a secondary ground for its objection, the employer argues that the grievor is barred from raising any new arguments associated to her relocation as a result of the terms of settlement reached by the parties on August 26, 2016. I agree.

[93] Indeed, in the event I am mistaken on my interpretation of *Burchill*, I also find that I am without jurisdiction as a result of the August 26, 2016, terms of settlement. I find so for the following reasons.

[94] On June 10, 2014, questions appear to have come to light regarding the grievor's relocation when a letter was sent to her from her employer. This was grieved in a group grievance on June 18, 2014, and resulted in terms of settlement between the employer and the grievor on August 26, 2016.

[95] Prior to entering into these terms of settlement, the grievor had the opportunity to raise issues regarding the status of her relocation during the final level grievance presentation that occurred on January 20, 2015. However, she did not. As a result, and as I have found above, she cannot now seek to raise the issue.

[96] The terms of settlement were made expressly "… **in full satisfaction of all claims** against the Employer **in any way related to** these matters and the issues giving rise to this grievance, namely, **the relocation of the assessment unit** (MAU) from the Millhaven Institution to the Joyceville Institution" [emphasis added].

[97] The carve-out provision in the terms of settlement provide that the October 22 and 28, 2013, grievances (along with two other grievances) remain unaffected by the terms of settlement.

[98] The October 22 and 28, 2013, grievances and the final-level grievance presentation notes only refer to (1) an alleged a violation of clause 58.08 based on having maximum-security inmates assigned to her while she is working in a medium-security institution, and (2) that the JAU is improperly designated.

[99] The grievor had the opportunity to raise additional grounds to support her claim for a higher PFA during the final-level grievance presentation process. Having failed to do so, these issues are caught by the scope of the terms of settlement as it was in full satisfaction of all claims in any way related to the relocation of the assessment unit (MAU) from the Millhaven Institution to the Joyceville Institution.

[100] The carve out only protected her grievances, as they were defined up until August 26, 2016, the date on which the terms of settlement were agreed upon. After this date, she was no longer at liberty to expand on her October 22 and 28, 2013, grievances as a result of the scope of that agreement.

V. Sealing order

[101] The parties requested that the terms of settlement be subject to a sealing order.

[102] The Board adheres to the open court principles. The test to grant a confidentiality order was stated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, and recently recast by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, in the following terms:

> …
>
> *[38] … the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[103] I believe that the elements of the test are met in this case.

[104] The terms of settlement were negotiated on a confidential and without-prejudice basis. I agree that they should be sealed as the benefits of maintaining the confidentiality of such agreements outweighs the negative effects of making them available in a public forum.

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

(The Order appears on the next page)

VI. Order

[106] The preliminary objection is allowed in part. The grievances are limited to the grounds stated in them and clarified during the internal grievance process.

[107] The terms of settlement are to be sealed.

[108] The grievances will be scheduled for a hearing per the Board's usual practice.

March 27, 2024.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board