



ONTARIO
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

GRIEVANCE
SETTLEMENT
BOARD

COMMISSION DE
RÈGLEMENT
DES GRIEFS

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GSB#1004/95, 1724/96, 1754/96, 0486/98
UNION#95F005, 96A422, 96A452, 98A528

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Yole et al.)

Grievor

-and-

The Crown in Right of Ontario
(Ministry of the Solicitor General and Correctional Services)

Employer

BEFORE

Felicity D. Briggs

Vice-Chair

FOR THE UNION

Ed Holmes
Counsel
Ryder Wright Blair & Doyle
Barristers and Solicitors

FOR THE EMPLOYER

Andrea Kuprejanov
Staff Relations Officer
Ministry of the Solicitor General

HEARING
TELECONFERENCE

June 28, July 25 & 26, 2001.
January 18, 2002.

DECISION

On June 2, 1995, twenty-eight correctional officers at the Millbrook Correctional Centre filed a grievance that stated:

We grieve that the employer is in violation of Article 3.3.1 and 3.3.2 and as a result we are being paid incorrectly.

The requested redress was:

To be paid at the appropriate Correctional Officer 2 level retroactively from the date that we individually qualified for this rate of pay, with the proper progression through the salary range and interest for all money owed.

At the beginning of the hearings into this matter the parties agreed to consolidate other similar grievances before me. Those grievances were filed by William Yole from Maplehurst, Mr. Cvitkovich from London and a group grievance signed by Mr. Skuce. The policy grievance filed by Mr. Cvitkovich stated:

We grieve that we have not received wages at the rate of the equivalent wages at the rate of equivalent civil service classification as per article 31.2.1 of the collective agreement.

We want the equivalent wage with all benefits owed and full progression through the salary range at the equivalent rate from our start dates to the time of settlement.

The relevant provision in the collective agreement states:

The rate of equivalent civil service classification shall apply. If there is no equivalent classification, the rate shall be set by the ministry involved and the Union shall have the right to negotiate the rate during the appropriate salary negotiations.

All of the grievors held the position of unclassified Correctional Officer 1 (CO1). It was the Union's position that the grievors should be paid at the Correctional Officer 2 wage rate because they were performing the full range of duties of the Correctional 2 classification. The Employer did not dispute the claim that the grievors were performing the full range of duties of the CO2 position. In the Employer's written submission it was stated:

In fact, the Employer acknowledges that the majority of unclassified correctional officers in the Ministry of Correctional Services ("Ministry") who had completed the required training were performing the duties of the CO2 classification. The parties are not in dispute that, at the time the grievances were filed, the Ministry had in place an Underfill Removal Policy that regarded the CO1 classification as the underfill appointment and the CO2 classification the full working level, as described in the class standards of the correctional officer series. In accordance with the Underfill Removal Policy, unclassified correctional officers did not progress to the CO2 classification, because the mandatory requirements for underfill removal were appointment to the classified service, and one year of full-time classified service. Therefore, at the time that the grievances were filed, all unclassified correctional officers employed by the Ministry were at the CO1 classification.

For the purposes of clarity, it is noted that an underfill assignment is defined in the Manual of Administration as one that "occurs where a person, lacking the full qualifications for a position is not required to perform the full range and/or level of duties of the position; and is paid at a classification level lower than that established for the position".

At the commencement of the proceedings the Employer raised two preliminary objections but agreed to argue both at the conclusion of the evidence. The first objection was that the grievances must be found to be inarbitrable because, at their core, they are classification grievances and

therefore, beyond the scope of this Board. The Employer also took the position that the grievances were disposed of as the result of a Memorandum of Agreement signed by the parties on August 26, 1998 and are therefore, inarbitrable.

The Union disagreed that the August 26, 1998 Memorandum of Agreement touched upon the matters at hand in any way. However, the Union submitted that the language of the Agreement was unclear and ambiguous and extrinsic evidence would be needed to determine this matter. The Employer was of the view that the Memorandum of Agreement was clear and unambiguous and was of no assistance to the Union. I reserved my ruling in this regard and evidence was called by both parties regarding discussions held during the negotiations toward the resolution of various grievances.

EMPLOYER SUBMISSIONS

Ms. Kuprejanov, for the Employer, submitted that the grievances at issue are clearly classification matters and, according to the *Crown Employees Collective Bargaining Act*, Part IV, Section 52 are inarbitrable. That section states:

Classification Issues - a provision in an agreement entered into that provides for the determination by an arbitrator, a board of arbitration or another tribunal of any of the following matters is void:

1. A classification system of employees, including creating a new classification system or amending an existing classification system.
2. The classification of an employee, including changing an employee's classification.

Furthermore, the Union is contractually barred from pursuing these grievances because of the moratorium on classification grievances the parties agreed to found at Section 10.5 of Appendix 7 of the collective agreement that expired on December 31, 1998.

The Employer argued that in order to determine whether these grievances are actually classification matters it is necessary to consider various definitions and descriptions of “classification” as that term is utilized by these parties. In the 1991 Classification and Position Administration Directive the following is stated:

The classification process determines what a position in the Ontario Public Service is to be paid. Classification systems enable the employer to assess the relative worth of positions and pay incumbents accordingly. Classification standards establish yardsticks against which positions are compared, avoiding the need for time-consuming job-to-job comparisons.

Classification begins when management creates positions as it organizes work. The position duties and responsibilities are determined, compared to typical class standard levels and then assigned appropriately. A salary range automatically applies to each class level.

A review of the schedule of classifications that apply to all bargaining unit employees indicates that each classification is made up of the classification title, the classification code and the salary range. It is evident, the Employer suggested, that a wage rate is not a separate item that can be taken from one classification and applied to another because it is an integral part of each classification. In the instant matter, the grievors are asking to be paid at the CO2 rate while retaining the classification title of CO1. While some of the grievors have, on the face of their grievances, referred to this as an

equivalency matter, it is clear that the real request is to have a determination made as to appropriate classification which is beyond the scope of the jurisdiction of this Board. In this regard the Employer relied upon **Re OPSEU (Aitken et al) and the Ministry of Health**, GSB #678/87 (Gorsky); **Re OPSEU and the Ministry of the Environment**, GST #725/00 (Abramsky); **Re OPSEU (Courte/MacGregor et al) and the Ministry of the Solicitor General**, GSB #1946/93 (Roberts); **Re OPSEU (Theoret) and the Ministry of Finance**, GSB #1674/93 (Roberts).

Ms. Kuprejanov submitted that the only classification matters over which the Board can take jurisdiction are cases that allege discrimination under the *Human Rights Code*. There is no such allegation in the instant grievance nor is there an allegation that the grievors were treated in an arbitrary manner. Indeed, the grievors have all been dealt with fairly and in accordance with the Underfill Removal Policy. This policy has been the subject of a number of Grievance Settlement Board decisions. In this regard the Employer relied upon **Re OPSEU (Bishop et al) and the Ministry of the Correctional Services**, GSB #1432/88 (Fisher); **Re OPSEU (Moore et al) and the Ministry of Correctional Services**, GSB #595/92 (Roberts); and **Re OPSEU (Knaap) and the Ministry of the Solicitor General**, GSB#3164 (Dissanayake). In these decisions each of the Vice Chairs determined that the matter before them was a classification matter and therefore inarbitrable.

The Employer asserted that, in the past the Union has characterized similar grievances that alleged a violation of article 3.3.1 as classification grievances. Pursuant to the *Social Contract Act*, the parties entered into a

Memorandum of Understanding wherein the Union agreed to withdraw all outstanding classification grievances filed prior to August 1, 1993 in exchange for an allocation of a lump sum of twenty millions dollars which was for the purpose of compensating employees whose grievances were withdrawn. Included in the list of withdrawn grievances were some that alleged a violation of article 3.3.1. The Union was unable to offer any evidence or explanation regarding this history during the course of the hearing. Indeed, the evidence before this Board included a letter to the Grievance Settlement Board dated May 25, 1995 from the Union listing grievances that “should be disregarded” because they are “are to be taken up by the Social Contract Forum”. Included in that list were six grievances alleging a violation of Article 3.3.1. Additionally there was evidence of a report from the Ministry of the Solicitor General and Correctional Services dated March 22, 1995 that listed grievances paid out from the twenty million dollar fund. Again, included were grievances alleging violations of Article 3.3.1. It is clear that the mutual understanding of the parties that grievances such as the instant matters are properly characterized as classification matters and not wage equivalency grievances. The Union is now attempting to resile from its agreement.

Ms. Kuprejanov contended that it is helpful to utilize one of the rules of interpretation, that is, that where there is a choice of two linguistically permissible interpretations, reasonableness should prevail. Once that rule is applied it is evident that the most reasonable interpretation of the grievances is that they are classification matters.

The Employer's second preliminary objection was that the grievances were previously resolved. On August 26, 1998 the parties signed a Memorandum of Settlement and Release regarding the conversion of unclassified positions to classified positions. At paragraph six it was stated:

In recognition of the fact that unclassified Correctional Officers receive the equivalent basic training as classified Correctional Officers, existing unclassified Correctional officers who have worked at least 1912 hours as a Correctional Officer will be reclassified from CO1 to CO2 effective the signing of this Memorandum of Settlement in accordance with the principles of Article 7 (Pay Administration) of the collective Agreement.

Notwithstanding that this Memorandum of Settlement is without prejudice or precedent, the parties agree that the above paragraph can be relied upon at the Grievance Settlement Board as being without prejudice for the purpose of determining only those previously filed grievances pertaining to the difference between CO1 and CO2 pay levels of unclassified Correctional Officers who have completed the required training.

There was no dispute between the parties that paragraph 6 could be relied upon by the parties in this hearing. The issue was what paragraph 6 meant. It was the Employer's submission that the matters at hand were resolved because, in accordance with the Memorandum of Settlement the grievors were reclassified from CO1 to CO2 on August 26, 1998. The Union agreed that the grievors were reclassified but did not agree that this fact resolved the grievances at issue. In the Employer's view, the dispute then becomes whether paragraph 6 has retroactive application beyond August 26, 1998 and, in its view, it does not. The Union forfeited its right to pursue any remedies that would allow for a retroactive remedy that predated August 26, 1998. It was the Employer's view that the effective date for the complete remedy agreed upon in the Memorandum of Settlement was expressly stated

as August 26, 1998. The Union is attempting to have this Board read into paragraph 6 that “the parties agree that the above paragraph, except for the effective date stated therein, can be....”. It was contended that various canons of construction are of assistance in determining this dispute. The five suggested by the Employer were:

- Words should be given their ordinary meaning;
- Each word should be given some meaning: The rule against redundancy;
- Unless specifically stated, provisions of a Collective Agreement should not be given retroactive effect;
- Clauses should not be implied into an agreement; and
- The Collective Agreement should be read as a whole.

An application of each of those rules would lead this Board to find that the Union cannot now imply an effective date other than August 26, 1998.

Further, according to the Employer, the Union cannot now ask this Board for retroactivity when all unclassified correctional officers were prospectively reclassified as of August 26, 1998 if they met the criteria under paragraph 6. It would be unfair to find that paragraph 6 only applied retroactively to a small fraction of employees and to not others in the same circumstance.

It was the Employer’s view at the time that there is no latent or patent ambiguity in paragraph 6 of the Memorandum of Agreement and therefore extrinsic evidence ought not to be admitted. The Union had indicated that paragraph 6 was ambiguous in two areas. The first was the word “reclassified” in the phrase “reclassified from CO1 to CO2” and the entire phrase “in accordance with the principles of Article 7 (Pay Administration)

of the collective agreement”. The Union’s view was that “reclassified” is ambiguous because it suggests one is classified to begin with and this clearly is not the case and the later phrase is ambiguous because Article 7 of the collective agreement does not apply to unclassified employees. The Employer submitted that the word “reclassified” is not ambiguous because it is later clarified by the phrase “from CO1 to CO2”. That qualification makes very clear that this is not a conversion from unclassified to classified status but a change in pay from the CO1 to CO2 classification. Regarding the suggested ambiguity in the phrase “in accordance with the principles of Article 7”, the Employer agreed that Article 7 does not apply to unclassified employees. However, it is very important to realize that the phrase at issue does not suggest that it does apply to this group of employees. It is simply a clear statement that the parties agree to apply those principles that are set out in Article 7. It was suggested that in this context, the word “principles” means the rule or doctrine to be followed. The parties intended that reclassification from CO1 to CO2 would be treated as a promotion. There was no evidence put forward by the Union to suggest otherwise and therefore this Board must find that there is no latent or patent ambiguity found at paragraph 6 of the August 26, 1998 Memorandum of Settlement. Accordingly, the extrinsic evidence heard by the Board cannot be admitted or considered in determining this matter. In this regard, the Employer relied upon **Re OPSEU (Conversion Grievance) and the Ministry of the Attorney General**, GSB #461/96 (Briggs); **Re Ontario Liquor Board Employees Union (Sheridan et al) and the Liquor Control Board of Ontario**, GSB #2299/93 et al (Briggs); **Re OPSEU (Union Grievance) and the Ministry of Transportation**, GSB# 320/98 (Mikus); **Re Health**

Employers Association of British Columbia and Simon Fraser Lodge and Hospital Employees' Union, (1998), 77 L.A.C. (4th) 1 (McPhillips); **Re Government of the Province of Alberta and Alberta Union of Provincial Employees** (2000), 90 L.A.C. (4th) 380 (Price).

UNION SUBMISSIONS

Not surprisingly, Mr. Holmes, for the Union, characterized the outstanding matters as issues of equivalency, not classification or re-classification grievances. He noted the fundamental agreement between the parties that the grievors perform the full range of duties associated with the CO2 classification and that they had the requisite year of experience and/or service. Therefore, the Union has discharged its onus and unless this Board upholds one of the Employer's preliminary objections the grievances must be upheld.

The Union conceded that classification grievances are inarbitrable. However, the grievors are unclassified staff and therefore cannot be reclassified unless they are moved from the unclassified to the classified service. The grievors do not seek classified status. They will remain unclassified irrespective of the result in this matter. In this regard the Union relied upon **Re OPSEU (Greer) and the Ministry of Natural Resources**, GSB #877/86 (Dissanayake). The issue for this Board to determine is what is the equivalent civil service classification and resulting appropriate rate of pay for these grievors.

Mr. Holmes asserted that Sections 51 and 52 of *CECBA* have no application in this dispute because the Union is not seeking a new or altered classification system for employees. Neither is it attempting to have this Board make a change to any employee's classification. Finally, the Union is not requesting the creation of a new, or an amendment to an existing, classification system. Accordingly, the *Act* is not determinative of this matter and does not prohibit a finding in favour of the grievors.

It was the Union's contention that an identical fact situation was before the Board in **Re OPSEU (Barker et al) and the Ministry of the Attorney General**, GSB #2476/92 (Kaplan). In that case, as in the instant matter, the Employer raised a preliminary objection regarding arbitrability because the grievances were classification in nature while the Union asserted the issue at hand was one of wage rate of the equivalent civil service classification. Vice Chair Kaplan dismissed the Employer's objection stating at page 11:

We also find that these grievances are clearly arbitrable, and that the employer's second objection must also be dismissed. These grievors are not challenging their classification. What they are doing is seeking the review of their compensation, which is determined by management selecting an "equivalent" classification. This is the only sense in which the grievances pertain to classification, and in no way can they be described as classification grievances of the kind that frequently come before this Board. The grievors are entitled, under 3.3.1 of the Collective Agreement, to be paid the wage rate assigned to an equivalent classification, and that entitlement carries with it a corresponding entitlement to grieve the comparator classification assigned to them for the determination of wages where the allegation is made that is it not equivalent. The matter of equivalence is an issue for the Board to decide.

Accordingly, Mr. Holmes submitted, according to the principles set out in **Re Amalgamated Transit Union (Blake et al) and Toronto Area Transit Operating Authority**), GSB #1276/87 (Shime), the Employer's first preliminary objection must be dismissed. All of the jurisprudence put forward by the Employer in this matter involved a classified employee seeking re-classification. The instant matter is clearly distinguishable.

The Union submitted that the same reasons apply when considering the Employer's argument regarding the social contract moratorium.

The Union denied that it had previously characterized similar grievances as classification grievances as asserted by the Employer. There was no evidence that the grievances are similar, no evidence that the Union agreed to forgo claims similar claims in the future, no evidence of detrimental reliance by the Employer, and no evidence that the previous agreement was to preclude future grievances.

Regarding the Employer's second objection that this matter has been previously resolved, the Union stated that the Memorandum of Agreement dealt with other grievances. Turning to the language of the Memorandum of Settlement, there are three latent ambiguities to be found at paragraph six. The words "with prejudice", "re-classified" and "in accordance with the principles of Article 7" result in latent ambiguities. The Union took no issue with the Employer's view of when extrinsic evidence is admissible. However, it was the Union's submission that while the above mentioned

phrases might appear clear on their face, each becomes ambiguous in their application.

In the alternative, if the words found at paragraph six are not ambiguous, the Union submitted that its interpretation is the most reasonable and probable. The parties agreed that one part of the settlement is prejudicial. Read together, the two paragraphs mean that those grievors who filed their grievances prior to August 26, 1998 who have completed training and have worked 1912 hours as a correctional officer can rely on those factors when advancing and establishing their case for an appropriate wage equivalency. That is to say that where a grievor meets the stated criteria then wage equivalency is established at the CO2 classification. The language is written to limit potential liability for the Employer to those grievances already filed. Therefore, paragraph six is not about retroactive application but about protecting the grievors' rights to have their grievances that were filed prior to the Memorandum of Agreement determined. Mr. Holmes noted that the only reference in the settlement between the parties about a non-conversion matter is that of equivalent wage rate wherein the specific individual grievance rights were protected. Those are the grievances at issue and it is clear that the parties agreed they would be adjudicated.

EMPLOYER REPLY SUBMISSIONS

The Employer submitted that the three GSB decisions relied upon by the Union can be distinguished on three bases. First, each was determined and issued prior to the Social Contract Memorandum of Agreement. Second,

they were issued before the Salary Schedules were negotiated into the collective agreement between the parties. Finally, because of the statutory changes made to the *Crown Employees Collective Bargaining Act*. As a result of these events the decisions the Union put forward as compelling are no longer of assistance because a new contractual and statutory framework exists.

DECISION

I have given this matter much consideration. Turning first to the issue of arbitrability, I am of the view that the Employer's preliminary objection in this regard must fail. Vice Chair Kaplan stated, in **Barker et al** at page 11:

We also find that these grievances are clearly arbitrable, and that the employer's second objection must also be dismissed. These grievors are not challenging their classification. What they are doing is seeking the review of their compensation, which is determined by management selecting an "equivalent" classification. This is the only sense in which the grievances pertain to classification, and in no way can they be described as classification grievances of the kind that frequently come before this Board. The grievors are entitled, under Article 3.3.1 of the collective agreement, to be paid the wage rate assigned to an equivalent classification, and that entitlement carries with it a corresponding entitlement to grieve the comparator classification assigned to them for the determination of wages where the allegation is made that is not equivalent. The matter of equivalence is an issue for the Board to decide. Obviously, the grievors have every right to file grievances pertaining to the overtime provision of the collective agreement.

That is precisely the case before me. These grievors are not asking to have their classification changed or modified. They merely grieve that they have not received wages at the appropriate rate of equivalent civil service

classification. I disagree with the Employer that a finding of arbitrability contravenes Section 52 of *CECBA*. I am not being asked to amend a classification system, create or amend a new classification, classify an employee or change an employee's classification. I am being asked to determine if the wage rate of CO2 is the appropriate civil service equivalent for these grievors. Having found that the grievances at issue are not classification matters, the Employer's submissions regarding the Social Contract have no application.

The Employer would have me find these matters inarbitrable because there was reference in some documents to grievances that alleged a violation of article 3.1.2 as being withdrawn at the same time as classification grievances. I must agree with the Union's contention that I simply have insufficient evidence to be persuaded by this assertion. In any event, the inclusions relied upon by the Employer cannot lead me to find that the grievances are actually classification matters and therefore inarbitrable. Indeed, none of the Employer's able submissions convinced me that I should vary from **Barker et al** or that I should find it no longer applied.

The next issue to address is the Employer's second preliminary objection concerning whether this matter was resolved by a prior settlement. In this regard, it was the Union's view that certain words and phrases within the Memorandum of Settlement dated August 26, 1998 were latently and patently ambiguous and therefore extrinsic evidence was necessary to assist in its interpretation. I disagree. In my view, the words and phrases referred to by the Union are clear and unambiguous. Mr. Holmes suggested that

while the words might appear clear on their face they are ambiguous in their application. If that were the standard to be applied, there would always be a finding of ambiguity. As I stated in the February 10, 1997 **Conversion** grievance at page 8:

It is not sufficient for there to be a dispute as to the meaning of the collective agreement. If this was the case, extrinsic evidence would be allowed in virtually all cases.

Specifically I find nothing ambiguous about the phrase “with prejudice”, the phrase “reclassified from CO1 to CO2” or with the phrase “in accordance with the principles of Article 7”. I agree with the Employer’s submissions in this regard. Therefore, I will not consider the evidence proffered by a variety of witnesses regarding the discussions that took place during the negotiation of the August 26, 1998 Memorandum of Agreement.

In my view, the two paragraphs found at #6 in the Memorandum make clear that the parties agreed that, notwithstanding the other provisions of the Memorandum of Agreement, the instant grievances would proceed to litigation in their own right and would not be resolved by the Memorandum. If these sophisticated parties intended that these grievances would be resolved by the Memorandum of Agreement, they would have specifically said so. They did not. It is worth setting out again the provisions of paragraph six:

In recognition of the fact that unclassified Correctional Officers receive the equivalent basic training as classified Correctional Officers, existing unclassified Correctional officers who have worked at least 1912 hours as a Correctional Officer will be reclassified from CO1 to CO2 effective the signing of this Memorandum of Settlement in accordance with the principles of Article 7 (Pay Administration) of the collective Agreement.

Notwithstanding that this Memorandum of Settlement is without prejudice or precedent, the parties agree that the above paragraph can be relied upon at the Grievance Settlement Board as being without prejudice for the purpose of determining only those previously filed grievances pertaining to the difference between CO1 and CO2 pay levels of unclassified Correctional Officers who have completed the required training.

The first paragraph at paragraph 6 applied to all correctional officers prospectively, including the grievors. It is clear that the parties agreed to protect the right to litigate the matter at hand for those CO1s who had filed these grievances prior to the signing of the Memorandum of Settlement.

The Employer asserted that the Union was attempting to change the effective date of the August 26, 1998 Memorandum of Agreement for the grievors. I disagree. As stated above, paragraph six serves to protect the rights of those employees who filed their grievances prior to August 26, 1998. Further, it is not unfair, as the Employer suggested that as a result of this decision some employees will receive a greater remedy than others. There will be a disparity in remedy because some employees elected to grieve their wage equivalency and others chose not to do so. It cannot be said that this is an unfair situation. Indeed, it is a common labour relations result.

At the outset of the hearing the Employer agreed that while all of the grievors were classified at the CO1 level, they were performing the full range of duties of the CO2 classification. It was the Union's position that given that concession, the Union has discharged its onus and barring a

dismissal of the grievances on preliminary grounds, the grievances must be upheld. I am inclined to agree.

For all those reasons, the grievances are upheld. I will remain seized in the event that there are difficulties implementing this decision.

Dated in Toronto this 23rd day of August, 2002.

A handwritten signature in cursive script, reading "Felicity Briggs". The signature is written in black ink and is positioned above the printed name.

Felicity D. Briggs

Vice-Chair