Forced - Medical
Adjudicator found he didn't have the jurisdiction to decide the case on it's merits.

File No: 166-2-8764

JB 6/11/81

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PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

THOMAS D. POWER,

grievor,

AND:

TREASURY BOARD
(Transport Canada),

employer.

DECISION

Before: R.D. Abbott, Board Member and Adjudicator.

For the Grievor: Ms. C.H. MacLean, Counsel.

For the Employer: David P. Olsen, Counsel.

ART 20
CODE 402/79

AI GRIEVANCE

Heard in Gander, Newfoundland, on December 10, 1980, and April 22 and 23, 1981
(Written argument completed June 4, 1981)

FORCED MEDICAL

DECISION

The grievor was an Air Traffic Controller (AI4) employed at the Gander, Newfoundland, Oceanic and Air Traffic Control Centre. In July, 1979, he was ordered by the Centre's Chief, Mr. R. E. Chafe, to undergo a medical examination by a physician designated by the employer. Orally, and in writing, the grievor objected to this order but did submit to the medical examination, under protest. Through his grievance he seeks a declaration that the order he received was given without authority and constituted a breach of the pertinent collective agreement (Air Traffic Control Group, Code 402/79), between Treasury Board and the Canadian Air Traffic Control Association.

By letter prior to the hearing of this reference to adjudication and at the hearing, the employer objected to the adjudicability of the matter. In essence, it was the employer's position that the order given the grievor did not involve the interpretation or application to him of any provision of the pertinent collective agreement. There is no allegation that the order was disciplinary action resulting in discharge, suspension, or a financial penalty. Therefore, the matter does not fall within either paragraph 91(1)(a) or 91(1)(b) of the Public Service Staff Relations Act and cannot be referred to adjudication.

The argument for the grievor may be summarized as

follows. When the grievor asked Mr. Chafe to state his authority for giving the order for the medical examination, Mr. Chafe, in a memorandum to the grievor, referred to

> . . . the Public Service Employment Act, Financial Administration Act, Public Service Terms and Conditions of Employment Regulations, various Transport Canada policies contained in the Personnel Manual and other associated documents.

As well, Mr. Chafe indicated that the authority for the order was "recognized" in the pertinent collective agreement. None of the cited statutes, etc., expressly or by implication, gave authority for the order. There is no express or implied authority given in the collective agreement. The employer therefore must have been relying on the "management's rights" clause of the collective agreement. Therefore, there did occur an interpretation or application in respect of the grievor of a provision of the collective agreement, namely, the "management's rights" clause, and the Public Service Staff Relations Board therefore has jurisdiction to hear and determine the matter pursuant to paragraph 91(1)(a) of the Public Service Staff Relations Act.

Extensive evidence was presented relating to the reasons why the order for a medical examination was given. However, by the agreement of the parties' representatives,

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argument was presented only on the issue of my jurisdiction to hear and determine the matter. This decision accordingly will only deal with the jurisdictional issue.

The way in which the issue is phrased is important in this case. Simply put it is this: Is a grievance which, in effect, alleges that only the "management's rights" clause of the pertinent collective agreement was interpreted or applied in respect of the griever a grievance which can be referred to adjudication under paragraph 91(1)(a) of the Act?

The "management's rights" clause of the pertinent collective agreement in this case reads as follows:

> Article 3
> Management
>
> 3.01 The Association recognizes that the Employer has and shall retain the exclusive right and responsibility to manage and operate the Air Traffic Control Service in all respects including, but not limited to, the following:
>
> (a) to plan, direct and control operations, to determine the methods, processes, equipment and other matters concerning the Air Traffic Control Service, to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;
>
> (b) to direct the working forces including the right to decide on

> the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge,
>
> and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.

It is also desirable at this point to recall the provisions of paragraph 91(1)(a) of the Public Service Staff Relations Act.

> 91. (1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
> (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> (b) . . . [disciplinary action]
>
> and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

As will appear later in this decision, I also consider it essential to make reference to the entirety of subsection 90(1) of the Act, dealing with the right to present grievances:

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<u>Right to Present Grievances</u>

90. (1) Where any employee feels himself to be aggrieved

(a) by the interpretation or application in respect of him of

(i) a provision of a statute or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his terms and conditions of employment, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, he is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

It appears that no other decision concerning adjudicability under section 91 has dealt specifically with an assertion on behalf of a grievor that his entitlement to refer his grievance to adjudication can be based solely on the alleged interpretation or application to him of the "management's rights" clause of a collective agreement. However, a multitude of decisions have dealt with the

question of whether a decision or order of the employer fell within the terms of subsection 91(1) of the Act. The following are cited only as examples:

> Robertson (Board file: 166-2-454): grievor terminated for "reason only of age" under subsection 20(12) of the Public Service Superannuation Regulations. Held: grievance not adjudicable. (Subsection 20(12) was subsequently declared *ultra vires* in a separate suit in the Federal Court Trial Division, whose decision was subsequently affirmed in the Federal Court of Appeal, [1972] F.C. 80 and 796.
>
> Courtney (Board file 166-2-62): alleged violation of Canadian Bill of Rights in denial of promotion. Held: grievance not adjudicable.
>
> Klingbell (Board file 166-2-88): grievor declared to have abandoned his position under section 27 of the Public Service Employment Act. Held: grievance not adjudicable. (A host of other non-disciplinary terminations have likewise been found not to be referable to adjudication.)
>
> Beaulieu (Board file: 166-2-14): grievance concerning classification. Held: not adjudicable.
>
> Nemtin (Board file 166-2-288): grievance concerning lay-off. Held: not adjudicable.
>
> Kosidoy (Board file: 166-2-28): grievance concerning language qualification in a promotion competition. Held: not adjudicable.
>
> Crewe (Board file: 166-2-294): grievor resisted transfer and was declared to have abandoned his position. Held: employer had authority to transfer employees

> under section 7 of the *Financial Administration Act*, the transfer was justified, and discipline was not involved, so that the grievance was not adjudicable.
>
> Moreland (Board file: 166-2-3080): grievor was removed from preferred wicket assignment. Held: grievance not adjudicable either because no financial penalty was involved or because no provision of the collective agreement precluded the employer from removing the grievor from his preferred assignment.
>
> Strahl (Board file: 166-2-97): grievor's working conditions were changed when employer decided not to count a briefing period as credit toward a forty-hour work week. Held: there being no allegation of misinterpretation of the collective agreement, the grievance was not adjudicable.

If one can discern a consistent pattern in these decisions denying jurisdiction, it is that subsection 91(1) must be interpreted strictly and literally. In particular, in order to take jurisdiction under paragraph 91(1)(a) there must be established an interpretation or application of some provision of a collective agreement. Where the employer purported to act under some authority extraneous to the collective agreement, even an authority subsequently demolished through court action as in Robertson (supra), and where the employer was not otherwise precluded from acting as it did by some provision of the collective agreement,

adjudicators have uniformly refused to take jurisdiction.

This invariable approach to jurisdiction is justified not only by a strict and literal interpretation of paragraph 91(1)(a) of the Public Service Staff Relations Act. When that provision is compared with section 90, it becomes quite clear that the legislative intention was to severely limit the type of grievance which can be referred to adjudication. Subparagraph 90(1)(a)(i) entitles an employee to present a grievance concerning the interpretation and application to him of a provision of a statute, etc., and differentiates that sort of grievance from one concerning the application to him of a provision of a collective agreement or arbitral award. Only the latter can be carried to the further stage of adjudication under paragraph 91(1)(a).

In each of the cases I referred to earlier, the grievance was precipitated by some decision made by the employer to the perceived detriment of the grievor. Indeed, it is self-evident that almost any grievance of an individual employee must be a complaint about some decision of the employer. It is asserted on behalf of the grievor that the decision complained of here, the decision to order him to undergo a medical examination, must have been a purported exercise of one of management's rights pursuant to clause 3.01 of the collective agreement. But is is obvious that

in the types of cases I referred to earlier, each involving a decision made by the employer, it could equally have been asserted that the decision must have involved an exercise of management's rights. To accept the argument on behalf of the grievor would open the door to adjudication to test the authority for every decision made by the employer affecting an employee in his terms and conditions of employment. It may be that section 90 of the Act contemplates such a wide-ranging opportunity to question the employer's decisions, but only up to and including the final level of the grievance process, short of adjudication. I cannot accept the proposition that the mere existence of a "management's rights" clause in a collective agreement opens the way to an attack on any and every decision of the employer. Such a proposition flies in the face of the obvious legislative intent to limit the class of grievances that can be referred to adjudication to a much smaller group than those grievances which can be presented pursuant to section 90 of the Act.

As I understand it, the argument for the grievor has two alternative branches. First, it was argued that the statutory and other authorities referred to by the grievor's Chief, Mr. Chafe, do not authorize the ordering of a medical examination by a physician designated by the employer; therefore, the only other basis for the order must have been the

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exercise of a management right recognized in clause 3.01 of the collective agreement. Secondly, the employer expressly relied on its management right, as evidenced by Mr. Chafe's assertion that the employer's right to order the medical examination, derived from the statutory and other authorities he cited, ". . . is also recognized in the Collective Agreement . . ."

Both of these arguments must be rejected. First, whether or not there existed authority outside the collective agreement for Mr. Chafe's order, it cannot have been the legislative intention behind paragraph 91(1)(a) to permit the review through adjudication of every employer decision affecting employees in their terms and conditions of employment. Secondly, for me to reach a consideration of the existence or non-existence of authority for the order, it must first be shown that there was an interpretation or application in respect of the grievor of the management's rights clause. I am quite satisfied that this has not been shown. The testimony of Mr. Chafe could only go as far as suggesting that he was unsure of the authority for his order but that he thought, perhaps mistakenly, that it was within his powers pursuant to the statutes and other sources he cited in his answer to the grievor's query. Clearly, in his memorandum to the grievor, he indicated that his prime

reliance was on the sources he cited; his reference to his authority also being "recognized" in the collective agreement by no means indicates that he was interpreting the management's rights clause of that agreement or applying that clause to the grievor.

In reaching my conclusion that I have no jurisdiction to hear and determine this reference to adjudication, I have relied heavily on my inference from the significant difference in wording between subsections 90(1) and 91(1) of the Public Service Staff Relations Act. I would restate this inference as follows. Any employee grievance attacks a decision of the employer; any such decision can be characterized as an exercise of a management right; if all exercises of management's rights were adjudicable pursuant to paragraph 91(1)(a) of the Act the scope of subsection 91(1) would equal that of subsection 90(1). But the two sections are differently worded, conveying a clear intention to severely limit the class of grievances which may be referred to adjudication. It must follow that where it is only the "management's rights" clause which allegedly was interpreted or applied in respect of a grievor a grievance attacking that alleged interpretation or application cannot have been contemplated as falling within the class of grievances referable to adjudication pursuant to paragraph 91(1)(a).

Counsel for both parties have submitted extensive and careful argument on the issue of whether an employer has a right to compel its employee to undergo a medical examination by a physician of the employer's choosing. Both have cited numerous awards and judicial decisions in the private sector. On the one hand, there are many decisions which disapprove of compulsory medical examinations, tracing back to the pronouncement of McRuer, C.J.H.C. in Re Thompson and Town of Oakville [1964] 1 O.R. 122 (Ont. H.C.). In question there was an order by the Town's Chief Constable requiring his constables to submit to an annual medical examination by a doctor chosen by the Chief Constable. Characterizing a medical examination against the will of the examinee as a "trespass," Chief Justice McRuer held that an employer's right to compel employees to submit to an examination by a doctor chosen by the employer "must depend on either contractual obligation or statutory authority" regardless of the reasonableness of requiring the examination. On the other hand, some decisions in the private sector have upheld the employer's right to require a medical examination by a doctor chosen by the employer where there were reasonable grounds for requiring the examination, for example, upon the return of an employee from absence due to illness when the employee produced unsatisfactory or incom-

plete medical evidence of his fitness for work. See Brown and Beatty, Canadian Labour Arbitration, Page 308, fn. 169, and pages 310 and 311, fns. 183 to 187.

The foregoing considerations, so carefully explored in the arguments of counsel for the parties, have to be disregarded. They concern the "merits"--whether Mr. Chafe had authority for his order to the grievor. But if this grievance is not adjudicable, I am precluded from taking account of these considerations.

Finally, numerous cases in the private sector have dealt with the more general question of the role of the arbitrator in reviewing employers' decisions purported to have been taken under a "management's rights" clause. Considerable differences of opinion on this matter have existed among arbitrators and among judges. The most recent decision in this regard which has been called to my attention is Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (Ontario C.A.; MacKinnon A.C.J.O., Houlden and Zuber JJ.A.; June 9, 1981, unreported). The case was referred to the Court of Appeal by the Divisional Court, which had been applied to for a review of an award of the arbitrator M. K. Saltman. Mrs. Saltman's award had found that the employer unfairly discriminated in the distribution of overtime. No provision of

the collective agreement placed limits on the distribution of overtime. However, Mrs. Saltman determined that the employer had to exercise its management's rights, recognized by a "management's rights" clause in the pertinent collective agreement, in a fair manner. The Court of Appeal quashed Mrs. Saltman's Award. At page four of the Court's Reasons for Judgment, delivered orally for the Court by Mr. Justice Houlden, there appears this pronouncement:

> In our opinion, the management rights clause gives management the exclusive right to determine how it shall exercise the powers conferred on it by that clause, unless those powers are otherwise circumscribed by express provisions of the collective agreement. The power to challenge a decision of management must be found in some provision of the collective agreement.

Standing alone, it would not be clear from that passage whether the Court thought that the arbitrator had jurisdiction to consider in any way the interpretation and application of the "management's rights" clause. However, this question is answered in the following passage of the reasons for judgment, at pages five and six.

> The arbitrator erred, therefore, in finding that the grievance could be founded on a failure by the Board to exercise fairly and without discrimination the rights conferred on it by the management rights clause. When the arbitrator

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> determined that there was no provision in the collective agreement that governed the taking of inventory and the distribution of overtime, she should have ruled that she had no jurisdiction to deal with the dispute because of an alleged improper exercise of management rights.

The significance of the judgment just discussed for the purpose of the present decision is this: it can be argued on the basis of that judgment that even if Mr. Chafe had no legal authority for his order to the grievor and relied solely on the "management's rights" clause of the collective agreement, nevertheless, I have no jurisdiction to review the fairness (or, implicitly, the reasonableness) of the way in which he exercised those rights. Of course, I am not bound by the judgment of the Ontario Court of Appeal. But, I would owe it great deference as a persuasive guide in determining the present case if I had reached a consideration of the merits. In any event, I prefer to rest this decision on my interpretation of sections 90 and 91 of the Public Service Staff Relations Act. Were it not for the juxtaposition of these sections, and the significance of their difference in wording, then I would have been strongly persuaded by the foregoing decision of the Ontario Court of Appeal to hold that the limits on the exercise of rights under a "management's rights" clause

must be found in the collective agreement, when the route of attack on a management decision is the grievance process and adjudication. I need scarcely add that employers' actions which are alleged to be otherwise contrary to law may be attacked in other ways, as was subsection 20(12) of the Public Service Superannuation Regulations following the Robertson adjudication decision (supra).

Finally, I must acknowledge the carefully reasoned arguments of counsel for the parties on the issue of whether there existed authority outside the collective agreement for Mr. Chafe's order. I was tempted to launch into an academically satisfying analysis of whether Mr. Chafe's order was an infringement of a common law right (Chief Justice McRuer, in his Oakville judgment, indicated it would be), whether the sources cited by Mr. Chafe as his authority for the order did, as a matter of interpretation, empower him to make the order, and whether a common law right may be taken away by those sources without express or necessarily implied statutory authority. I was also tempted to consider whether submission to forced medical examinations by physicians of the employer's choice was an implied term of employment for air traffic controllers: see Brown and Beatty, Canadian Labour Arbitration, p. 352, where the issue of searching employees is considered in that light.

However, having determined that I have no jurisdiction to hear and determine this reference to adjudication, I was forced to resist these temptations.

To sum up, the grievor was ordered to undergo a medical examination by a physician designated by the employer. He complied with this order under protest. His grievance attacking the order is not one which can be referred to adjudication pursuant to paragraph 91(1)(a) of the Public Service Staff Relations Act. In effect, it was alleged for the grievor that only the "management's rights" clause of the pertinent collective agreement was interpreted or applied in respect of the grievor. A comparison of paragraph 91(1)(a) with subsection 90(1) of the Act led me to conclude that to entertain a grievance alleging only violation of the "management's rights" clause would enlarge the scope of paragraph 91(1)(a) to include all the grievances described in subsection 90(1). This would be contrary to the obvious legislative intention to restrict the class of grievances which may be referred to adjudication to only a limited portion of those grievances which may be presented pursuant to paragraph 90(1)(a). Grievances which allege a violation of only the "management's rights" clause, therefore, do not fall within the intended limited group described in paragraph 91(1)(a).

Accordingly, I have no jurisdiction to hear and determine this reference to adjudication.

For the Board,

R.D. Abbott,
Board Member and Adjudicator.

OTTAWA, September 3, 1981.