

JUN 17 1983

Files: 166-2-13742
166-2-13743

No. 65

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

F. PLEUNIS AND W.E. SNOW,

Grievors,

AND:

TREASURY BOARD
(Transport Canada),

Employer.

DECISION

Before: J.C. Mayes, Board Member and Adjudicator.

For the Grievor: W.J. Robertson and E.G. Staples; Canadian Air
Traffic Control Association.

For the Employer: H.A. Newman, counsel.

Heard in Ottawa, March 16, 1983.

REIMBURSEMENT OF MEDICAL
FEES FOR DSC'S.
COPT BOB &
RETURN R.A.M.
ART 20
CODE 402/79
MEDICAL FEES FOR DSC'S

DECISION

1. These are two references to adjudication under paragraph 91 (1)(a) of the Public Service Staff Relations Act of grievances presented by Messrs. F. Pleunis and W.E. Snow. The grievors each alleged a violation of clause 20.01 of the collective agreement applicable to them by the employer's refusal to reimburse them the fees incurred by them in obtaining an annual medical examination as provided for in that clause.

2. Mr. Frank Pleunis is an air traffic controller employed by the Treasury Board within the Department of Transport as a Data Systems Coordinator at Moncton Area Control Centre. Mr. Wayne Snow is an air traffic controller employed by the Treasury Board within the Department of Transport as a Data Systems Coordinator at Gander Area Control Centre. Each of the grievors terms the conditions of employment were governed, inter alia, by the provisions of the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association, Code 402/79 which expired on December 31, 1980 but which provisions were continued in force by virtue of section 51 of the Public Service Staff Relations Act.

3. The collective agreement referred to in paragraph 2 above was entered into evidence as exhibit 2 in these proceedings. An Agreed Statement of Fact was also entered and reads as follows:

1. The Grievor, Frank Pleunis is an air traffic controller employed by the Treasury Board within the Department of Transport as a Data Systems Coordinator at Moncton Area Control Centre.
2. The Grievor, Wayne Snow is an air traffic controller employed by the Treasury Board within the Department of Transport as a Data Systems Coordinator at Gander Area Control Centre.

3. At all material times, the terms and conditions of employment of Messrs. Pleunis and Snow were governed, inter alia, by the Collective Agreement between the Canadian Air Traffic Control Association (hereinafter referred to as CATCA or the Association) and Treasury Board Code 402/79 which expired on December 31, 1980, which at the material time was extended during the negotiation for its renewal by virtue of S. 51 of the Public Service Staff Relations Act.
4. At all material times Messrs. Pleunis and Snow were the holders of Air Traffic Controller Licences as follows:

Mr. Pleunis, licence number QMT 598,
issued April 26, 1971
Mr. Snow, licence number QMT 637, issued
November 19, 1971
5. An air traffic controller licence is valid only when accompanied by a valid licence validation certificate (medical).
6. In order to hold a valid Air Traffic Control licence, it is mandatory to pass an approved medical examination by a Civil Aviation Medical Examiner (MD) appointed for such purposes by the Department of Transport.
7. In the instant cases giving rise to these grievances:
 - a) Mr. Pleunis successfully underwent his annual medical examination on February 16, 1982, by Dr. Doyle. Dr. Doyle's fees for this examination were \$25.00.
 - b) Mr. Snow successfully underwent his annual medical examination on December 10, 1981, by Dr. Coxon. Dr. Coxon's fees for this examination were \$30.00.

These seven items were agreed to in a document dated at Ottawa on the 16th day of March, 1983. On the same date and at the hearing in this proceeding counsel for each of the parties also agreed on the following:

- (1) At all material times both the grievors were holders of valid air traffic control licences.
- (2) Neither of the grievors were required by the duties of their positions to be holders of valid air traffic control licences, i.e., either by law or by the employer. They were, however, required as air traffic controllers to hold a licence.

4. Each of the grievors has made reference to article 20 of the applicable collective agreement which reads as follows:

ARTICLE 20

LICENSING

20.01

- (a) The Employer shall reimburse an employee for his payment of fees incurred in obtaining an annual medical examination, including but not limited to electrocardiograms, specialists results and X-Rays, as may be required to maintain the validity of his Air Traffic Controller Licence.

The Employer will provide an advance approximately equivalent to the amount anticipated to be required to cover the costs of the medical examinations when requested by the employee. An employee who receives an advance will be required to submit the appropriate documentation indicating the payment of the fees incurred within ten (10) days of the examination.

(b) Operational requirements permitting, an employee will be protected against any loss of normal pay in order to undergo such examinations including reasonable expenses for necessary travel outside of his Headquarters area, as normally defined by the Employer.

20.02 The Employer will continue past practice in giving all reasonable consideration to continued employment in the Public Service of a Controller who loses his licence for medical reasons.

20.03 If a Controller who has lost his licence for medical reasons is offered alternate employment in the Public Service at another geographic location, the Employer shall bear the cost of removal expenses in accordance with then current Employer Regulations.

5. The final level reply to each of the grievances reads as follows:

Your grievance of February 10, 1982 was carefully reviewed and discussed with a representative of your Association.

Since your position does not require you to hold a valid Air Traffic Controller Licence and the Employer did not require that you undergo a medical examination, I consider that the Employer is not liable for expenses you incurred.

Accordingly, the corrective action requested is not granted. Your grievance is therefore denied.

ARGUMENT FOR THE GRIEVORS

6. Mr. Robinson argues that the operative clause of the collective agreement respecting the claims made by the grievors is clause 20.01. The single issue to be decided, i.e., the right of the grievors to be reimbursed for the payment of fees incurred in obtaining their annual medical examinations, rests in the clear and unambiguous language of clause 20.01. It is the grievors contention, supported by their bargaining agent, that the collective agreement makes no reference to a precondition respecting duties performed by an air traffic controller regarding the maintenance of the validity of his or her air traffic controller licence. As is admitted in the Agreed Statement of Fact each of the grievors were holders of an air traffic controller licence and happened at the time to hold valid ones. They sought to maintain the validity of these licences. Mr. Robertson drew attention to item 5 of the Agreed Statement of Fact where it is stated that an air traffic controller licence is valid only when accompanied by a valid licence validation certificate (medical). He drew attention also to item 6 which provides that in order to hold a valid air traffic control licence it is mandatory to pass an approved medical examination by a civil aviation medical examination (MD) appointed for such purposes by the Department of Transport. The grievors, he pointed out, are both air traffic controllers and as such must maintain the validity of their licence and are therefore entitled to reimbursement under clause 20.01. The clause he argued does not allow for employer discretion.

ARGUMENT FOR THE EMPLOYER

7. Mr. Newman argues that while the bargaining agent's argument is superficially attractive respecting clause 20.01, in determining the issue raised in these two references one must look to clause 20.01 in the context of all of article 20 regarding "licensing". Clauses

20.02 and 20.03 deal with the continued protection for persons who lose their licences for medical reasons. The whole purpose of the article is to deal with employees who must maintain licences to continue their duties. The article is not designed to provide a windfall gain to employees who don't need a valid licence for the particular job or duties they are required to perform. These examinations are very elaborate in nature. Mr. Newman argues that the reimbursement of payment for such examinations when not needed in the performance of a particular employee's duties would be a "perc". Rather, the purpose of the article is to defray costs where an employee is required by the performance of his particular duties to hold a valid air traffic controller licence. If he is not so required then the employer should not be held responsible to pay. The employer may wish to do so, but would only be required if it chose to return the employees to duties where a valid licence was required by law. It was the intent of the parties to provide financial protection in the more restricted cases and to provide other types of protection if medical validation was necessary. Even if these grievors could not get medical validation for their licences there would be no threat to their continued employment. It is therefore submitted that if an employee is not required to be the holder of a valid air traffic controller licence in the performance of his particular duties, then he is not required to maintain it and the employer is not obliged to meet the cost provided for in clause 20.01. This is a reasonable interpretation of the article and must have been the one intended by the parties.

REPLY ARGUMENT FOR THE GRIEVORS

8. According to Mr. Robertson counsel for the employer's reference to clauses 20.02 and 20.03 are irrelevant to the issue to be decided in the instant case. By vague reference to irrelevant clauses counsel

for the employer is attempting to insinuate that the parties had agreed on preconditions with respect to the wording of clause 20.01. Clauses 20.02 and 20.03 deal with a completely separate consideration, i.e., certain protection for employees who, for medical reasons, lose their air traffic controller licences. That is a matter completely divorced from the issue to be decided with respect to the current references. Regarding counsel for the employer's contention that the reimbursement of examination fees to the grievors would be a gratuitous benefit, such argument can hold no water. Each of the grievors can, at any time, be assigned as air traffic controllers to those types of duties which would require them, by law, to hold valid air traffic controller licences. In support of this statement Mr. Robertson referred to Ager v. The Queen [1979] 1 F.C. 475 and in particular to page 480 where he contended it is made clear that employees such as the grievors have no say with respect to the assignment of duties within the same classification level and the same rate of pay. Such examinations, rather than being a gratuitous benefit to employees, are a direct benefit to the employer. Through them the employer knows at any time how many of its employees are capable of assuming full duties as air traffic controllers when required (which is consistent with the employer's right to assign them at any time), and also provide to the employer medical assurances where the invocation of clauses 20.02 and 20.03 may become necessary.

REASONS FOR DECISION

9. In Ager v. The Queen (supra), part of the issue to be determined was whether the transfer of an employee had not met the procedural requirements of section 31(1) of the Public Service Employment Act and whether or not the transfer had been subject to that section. The case dealt with issues completely different from the one to be decided in the instant case. However, Mr. Robertson's

argument respecting the employer's right to transfer employees to other duties within the same classification level and pay level seems to be supported in the reasons for judgement rendered by Cattanach J. in that decision. At page 480 section 3 of the Department of Transport Act, R.S.C. 1970, c.T-15 is quoted as follows:

.3.(1) There shall be a department of the Government of Canada called the Department of Transport over which the Minister of Transport appointed by commission under the Great Seal shall preside.

(2) The Minister has the management and direction of the Department and holds office during pleasure.

Cattanach J. comments as follows in the two subsequent paragraphs of the decision.

In the absence of any limitation thereon by statute, regulation or contract, the words "management and direction" would confer all necessary authority for the efficient operation of the Department under the Minister's control including the transfer of employees to positions within the Department in which their abilities would result in more efficient management.

I also accept as a corollary premise that there is no vested right in any particular position in the Public Service but that the tenure is in the Public Service rather than in a position within that service.

The decision goes on to make reference to a limitation upon the employer's otherwise unfettered right to transfer an employee to be

found in section 31 of the Public Service Employment Act. Such limitation, of course, has no application in the instant references to adjudication.

10. Mr. Robertson has argued that the alleged precondition respecting duties of a particular job performed by an air traffic controller cannot be found anywhere in the wording of clause 20.01 nor can it be implied by reading article 20 as a whole. It is clear that the words "required by the duties they perform" are not to be found in the language of clause 20.01. I agree with the position taken by the grievor's representative that article 20 deals with two separate issues; the first being the reimbursement to employees for payment of fees incurred in obtaining an annual medical examination and the second, quite exclusive from the first, the protection of continued employment in the Public Service of controllers who lose their licences for medical reasons.

11. Clause 20.01 simply mentions employees. In considering the argument raised by Mr. Robertson respecting the Ager decision, supra, I have looked to the definition of operating and non-operating employees to determine the effect on employees of the employer's right to transfer employees from one job to another. They are defined as follows:

- (1) For the purpose of this Agreement the following shall be considered as operating employees:
 - (a) all shift supervisors and controllers in Area Control Centres and Terminal Control Units;
 - (b) all shift supervisors and controllers including Unit Chiefs who are required to perform Control duties in Control Towers;

- (c) all shift supervisors and controllers in the Airspace Reservation Unit;
- (d) all Air Traffic Controllers-in-Training in Area Control Centres, Terminal Control Units or Control Towers;
- (e) Performance Development Officers and Data Systems Co-ordinators.

All employees other than those listed above shall be considered non-operating employees.

It is to be noted in the Agreed Statement of Fact that both grievors are described as Data Systems Coordinators. Assuming that any of the employees above described may be required at any time (see Ager v. The Queen) (supra), to perform those types of duties requiring that they hold a validated air traffic controller licence, then it must also be assumed that these above listed employees (at least) are those to whom clause 20.01 of the collective agreement was intended to apply.

12. For the reasons set out in paragraphs 9, 10 and 11 above I find that these two references must succeed. Each of the grievors is to be reimbursed for the fees incurred for their annual medical examination as they have requested in their grievances.

For the Board,

J.C. Mayes,
Board Member and
Adjudicator.

OTTAWA, June 15, 1983.