

File: 166-2-15066 No. 82.

THE PUBLIC SERVICE STAFF RELATIONS ACT

BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

RICHARD MARCEL LEMAY, grievor,

AND:

TREASURY BOARD
(Transport Canada), employer.

Before: Walter L. Nisbet, Q.C., Deputy Chairman.

For the Grievor: Dougald E. Brown, counsel.

For the Employer: Mylène Bouzigon, counsel.

Heard at Ottawa, June 28, 1985.

ART 28
IN
CONSTRUCTION
WITH
RELOCATION
POLICY

DECISION

1. The grievor is an air traffic controller included in the Air Traffic Control group bargaining unit for which the Canadian Air Traffic Control Association is certified as the bargaining agent. He is employed as a course director in air traffic services at the Transport Canada Training Institute at Cornwall. He is classified AI-5.

2. On March 23, 1984 the grievor presented the following grievance:

TIXP rejected the attached claim with no written reasons given. Vague verbal reasons relating to his interpretations of the Relocation Policy were alluded to but no specific reason was given.

3. The corrective action requested is as follows:

As per the Relocation Policy, I submit that I have met the requirements to qualify to have the attached expense claim honoured and I request that payment be made as claimed. In addition to the principle sum of the claim, I also hold the employer responsible for the interest due on the

set amount commencing thirty days after the date of the grievance calculated at the current bank prime loan interest rate covering the period in question.

4. The attached expense claim referred to in the grievance is a claim submitted by the grievor on February 28, 1984 for removal expenses occasioned by his move from his home in Bells Corners to a new home he purchased in Orleans shortly after his transfer to his present position at Cornwall where he commenced his duties on August 2, 1982. The amount of his claim totalled \$7,604.28 made up as follows:

Legal fees, sale of home at Bells
Corners \$384.75;

Real estate fees \$5555.00;

Legal fees, purchase of home in
Orleans \$1336.33;

Meals and incidentals for two
persons \$67.10;

Non-accountable incidentals
\$200.00;

Cable installation \$32.60;

Telephone installation \$28.50;

Total: \$7604.28.

(Exhibit G-2)

5. There is no dispute between the parties concerning the amount of these expenses.

6. The grievor said he waited until 1984 to make his claim because he wanted to take the time to make sure commuting to Cornwall from Orleans would be acceptable to him. It has turned out to be quite satisfactory. He submitted his claim to Mr. W.T. Bulbeck, Chief, Air Traffic Services at the training centre who approved it. The grievor's claim was later denied by the Head of Personnel at the training centre, Mr. Robitaille.

7. The grievor said that other employees at the Training Centre live at Orleans and commute to Cornwall. He said he has not missed any work because of having to commute from Orleans.

8. The grievor said that all his removal expenses were incurred after the employer's current policy on Relocation became effective on July 8, 1982.

9. Article 29 of the collective agreement applicable to the grievor at the times material to his grievance (Code: 402/82, the expiry date of which was extended pursuant to the Public Sector Compensation Restraint Act to December 31, 1984) provides as follows:

29.01 Agreements concluded by
the National Joint Council of the
Public Service on items

which may be included in a collective agreement, and which the parties to this agreement have endorsed after December 6, 1978, will form part of this agreement, subject to the Public Service Staff Relations Act (PSSRA) and any legislation by Parliament that has been or may be, as the case may be, established pursuant to any Act specified in Schedule III of the PSSRA.

29.02 NJC items which may be included in a collective agreement are those items which the parties to the NJC agreements have designated as such or upon which the Chairman of the Public Service Staff Relations Board has made a ruling pursuant to (c) of the NJC Memorandum of Understanding which became effective December 6, 1978.

10. By virtue of Annex "A" of the Memorandum of Understanding referred to in that article, the Relocation Policy was incorporated into the collective agreement on the date the Memorandum of Understanding took effect, i.e., December 6, 1978. It was common ground between the parties that that Relocation Policy, as amended effective July 8, 1982, was applicable to the grievor at the times material to his grievance.

11. The grievor said he started looking for a new home when his transfer was confirmed orally by his supervisor at the time, Mr. Donald Meredith, on May 5 or 6, 1982. At that time the home he purchased in Orleans was not built.

12. The grievor said he moved from his home in Bells Corners, at the western fringe of Ottawa to Orleans at the eastern fringe of the city, on or about October 1, 1982. He said he rented a truck and moved his belongings himself. He did not claim for the rented truck because the amount was minimal and he did not wish to bother obtaining the estimates he would have required had he wished to claim for this expense.

13. The grievor said he came to Ottawa in 1976 when the training institute was located there. The institute was moved to Cornwall in 1979. At that time he did not move to Cornwall because his wife was teaching in Ottawa and did not wish to give up her position. She still teaches in Ottawa.

14. The grievor reports to work at Cornwall at 7:40 a.m. To arrive at work at this time he leaves his home in Orleans at 6:15 a.m. He says he usually arrives at Cornwall at 7:30 a.m.

15. The grievor met with Mr. Donald Meredith the day after Mr. Meredith had discussed the grievor's transfer to Cornwall with Mr. Bulbeck. The details of the transfer were discussed and the grievor signed a written request for the transfer that day or shortly thereafter. That request is dated May 18, 1982 and is marked Exhibit E-1.

16. The grievor made an offer to purchase his Orleans home on May 12, 1982 and that offer was accepted on May 18, 1982 (Exhibit E-2).

17. The grievor said he talked to Mr. Bulbeck about his plan to commute from Orleans. There was no disagreement with that plan as far as claiming removal expenses was concerned.

18. The grievor said he knew of five employees who are commuting from various locations to Cornwall temporarily and two employees who have been commuting to Cornwall for six months. He said he didn't know whether or not any of these employees had claimed removal expenses.

19. Mr. Walter Theodore Bulbeck testified for the employer. He said he has been employed as Chief of Air Traffic Services, Training Centre, Cornwall, since November 1977. He said he had discussions with his supervisors concerning the acceptance of the grievor as a member of the staff of the training centre. That transfer was agreed upon on May 26, 1982 as a result of the Request for Staffing Action dated May 21, 1982 signed by Mr. Bulbeck (Exhibit E-3). Mr. Bulbeck identified his memorandum dated May 31, 1982 in which he requests that the grievor be placed on the staff at Cornwall (Exhibit E-4).

20. Mr. Bulbeck had a discussion with the grievor in early August 1982 concerning the latter's intentions about his relocation to Cornwall. Mr. Bulbeck said the grievor advised him that he intended to commute to Cornwall for a period of time before making a final decision to relocate there.

21. Mr. Bulbeck said he signed the grievor's travel expense claim (Exhibit G-2) on the basis of his discussion with the grievor in which the latter indicated he had moved very close to 40 kilometres closer to

Cornwall. Mr. Bulbeck said some discussion followed with the Finance Section at the training institute after which he was advised that the grievor's claim should not have been approved because the distance of his move was not as great as had been anticipated. Mr. Bulbeck said he had authority to commit funds for the payment of relocation expenses but that the relocation itself had to be approved by the Director of the Training Institute. He said the Director of the Institute approved the staffing of the position there by the grievor and that the latter came to Cornwall to fill a vacant position.

22. Mr. Bulbeck confirmed the memorandum dated December 13, 1982 signed by Mr. D.C. Timms, Acting Director of the Institute (Exhibit G-3) which approves the relocation of the grievor. He said no problems had arisen as a result of the grievor's commuting from Orleans to Cornwall and that he had no objection to it.

23. Mr. Claude Martin Doth testified for the employer. He is the Supervisor of Finance at the training institute in Cornwall, a position he has held for the past two years. Prior to that he was Manager of Finance and Materiel Management in Ottawa and Cornwall. He said the Director of the training institute has authority to approve relocation of employees to the institute. He said no authority was exercised in respect of the grievor.

24. Mr. Doth identified a list of locations from which employees at the training institute commute to the institute (Exhibit E-5). He said that for relocation purposes Ottawa includes Nepean, Gloucester, and an area within 15 miles of those municipalities.

25. Mr. Doth said the grievor's relocation expenses were refused because no letter had been received at the institute approving the relocation of the grievor in advance of his move to Orleans and because the distance he had moved from Bells Corners was less than 40 kilometres.

26. Mr. Doth identified a letter dated December 21, 1982 signed by a Staffing Officer of the Department of Transport, by which the grievor is offered the position at Cornwall and in which he is advised that his relocation expenses would be borne by Transport Canada Training Institute (Exhibit E-6).

27. Mr. Doth explained that the offer letter dated December 21, 1982 (Exhibit E-6) arrived too late to permit the acceptance of the grievor's relocation claim, even though such claims have been approved after the fact. Mr. Doth said the grievor should have waited until he received the offer letter (Exhibit E-6) before selling his house in Bells Corners.

ARGUMENT FOR THE GRIEVOR

28. Counsel for the grievor submitted that the only issue to be determined is whether or not the grievor's move from Bells Corners to Orleans is covered by the Relocation Policy. He said the relevant provisions of that Policy are the following:

(a) .1.1.8(b), the applicable part of which reads as follows:

. . . an employee-requested transfer that results in an authorized relocation to a position at the appropriate group and level which is vacant on arrival at the new place of duty shall be deemed to be an employer-requested relocation and the employee thus relocated shall be reimbursed relocation expenses within the limits prescribed in the relocation policy. . . ;

(b) .1.5 definition of 'employer-requested relocation' means all other geographic relocations within Canada, including employee relocations other than on appointment, that result from staffing actions. Where an employee requests consideration for a transfer to a different geographic location, a relocation which may eventually result from that request shall be an employer-requested relocation if the employee is appointed to a position at the appropriate group and level that is vacant on arrival at the new place of duty, unless the Deputy Head provides written certification, as described in article 1.1.8(b);

(c) .1.1.11 -- If an employee incurs expenses related to a specific relocation before having received written authorization to relocate, the employer shall not be responsible for such expenses, unless and until the relocation is subsequently authorized;

(Counsel submitted that this provision disposes of any argument that the grievor acted prematurely in relocating from Bells Corners to Orleans).

(d) .1.2.1 -- Unless specifically stated otherwise, the relocation provisions shall apply to all relocations within Canada resulting from a transfer or an appointment that originated in the Public Service of Canada as defined in section 7(9) of the Financial Administration Act;

(e) .1.1.9 -- There is no minimum distance qualification which governs the eligibility of an employee to be authorized to relocate under the terms of this policy. However, the general rule is that a relocation should not be considered unless the new principle residence is a minimum of 40 kilometres closer to the new workplace. This rule is consistent with section 62(1) of the Income Tax Act which states in part, . . . 'so that the distance between his old residence and his new work location is not less than 25 miles greater than the distance between his new residence and his new work location, . . .'; and

(f) .1.1.5 -- The relocation provisions and any limitations thereto are published as directives, not permissive

guidelines. Managerial and departmental discretion shall be confined to those provisions where discretion is specifically authorized.

29. Counsel submitted that the controlling provision of the Relocation Policy is 1.1.9 which provides that there is no minimum distance qualification which governs the eligibility of an employee to be authorized to relocate. Although the general rule is that a relocation should not be considered unless the new principal residence is a minimum of 40 kilometres closer to the new workplace, this limit is not made mandatory.

30. Counsel submitted that the factors to consider that favour the grievor's claim are:

1. Did the move make it significantly easier for the grievor to get to work? The answer must be in the affirmative as it not only reduced his commuting time by 45 minutes but also made his travel easier.

2. The employer benefitted because it was able to staff a position it had not been able to staff at Cornwall. The grievor could not have remained available at Cornwall had he not moved to Orleans. There is no question that the employer would have paid the grievor's claim if he had relocated to Cornwall.

3. The purpose of the grievor's move to Orleans was solely to facilitate his travel to Cornwall. He had no other reason for that move.

4. The employer has not suffered any detriment because the grievor's move was less than 40 kilometres closer to his work location at Cornwall. The employer had made no complaint nor raised any objection to the grievor commuting to Cornwall. There have been no attendance or time loss problems.

5. Consideration ought to be given to the family circumstances of the grievor. His wife had her legitimate career interests as a teacher in Ottawa and it was desirable that the disruption of his family be minimized, one of the objectives of the Relocation Policy. This factor is reflected by paragraph 1.1.1(a) of the Relocation Policy which reads as follows:

(a) in any relocation, the aim shall be to relocate the employee in the most efficient fashion, that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family.

31. Counsel submitted that the grievor's relocation expense claim is a proper one for full reimbursement by the employer.

ARGUMENT FOR THE EMPLOYER

32. Counsel for the employer submitted that the evidence adduced by the grievor leaves some doubt about the sole purpose of his move from Bells Corners to Orleans. He did not advise his supervisor he was moving because of his transfer from Ottawa to Cornwall. The grievor's wife had to advise the Board of Education by which she is employed in advance of any move she intended to make. The grievor said he was taking time to assess his situation. He did not claim his moving expenses for the move from Bells Corners to Orleans.

33. Counsel referred to paragraph 10.5.1(a) of the Relocation Policy which provides as follows:

An employee claiming relocation expenses must submit a detailed and itemized account, in the form required by the Deputy Head. The claim must conform to the following requirements:

(a) the account must be submitted within thirty days after the date of the employee's arrival at the new place of duty, or the date the dependant(s) arrive, whichever is later;

The grievor did not submit his relocation expense claim until February 1984. This late submission of his claim gives the grievor's action the appearance of being an afterthought.

34. Counsel referred to article .1.1.5 of the Relocation Policy quoted, above, which provides that the relocation provisions and any limitations thereto are published as directives, not permissive guidelines. Counsel also referred to the definitions of 'relocate' and 'place of duty' contained in article .1.5 of the Policy. They read as follows:

'Relocate' or 'Relocation' means the authorized geographic move of an employee from one place of duty to another place of duty or the authorized move of an appointee from his place of residence to his first place of duty upon appointment to a position in the Public Service.

'Place of duty' means the location of the official station or headquarters at or from which an employee ordinarily performs his duties, or to which an appointee is required to report for duty, and includes any area which, according to local custom, is within commuting distance of the place of duty. The place of duty of employees employed as Ship's Officers or Ship's Crews is defined in article .8.8.1 of the Travel Policy, Chapter 370.

Counsel submitted that, according to local custom, the place of residence of the grievor is not within commuting distance of Cornwall. The grievor travels 60 to 80 miles one way to report for work. Counsel referred to Exhibit E-5. She submitted that commuting distance is variable and depends upon geography and location.

35. Counsel submitted that the grievor made a choice to remain near Ottawa for the sake of his wife's employment. That was his decision. He did not 'relocate' within the meaning of that expression as defined by the Relocation Policy and is therefore not entitled to reimbursement of his claim.

36. Counsel submitted that, if I should find that Orleans is within commuting distance of Cornwall, it must follow that the employer was in error in offering to move the grievor to Cornwall because Cornwall, it may be argued, is the same 'place of duty' as Ottawa.

37. Counsel argued that the proper interpretation of article .1.1.9 of the Relocation Policy which provides that there is no minimum distance qualification which governs the eligibility of an employee to be authorized to relocate is that, although the employer did not wish to establish a rigid minimum distance, it cannot ignore the general rule that a relocation should not be considered unless the new principle residence is a minimum of 40 kilometres closer to the new workplace.

38. Counsel argued that the employer's position is not unreasonable and that the grievance must be dismissed.

39. Finally, counsel submitted that the grievor's claim for the payment of interest on the amount of his claim commencing 30 days after the date of the grievance calculated at the current bank prime loan interest rate must be rejected. She referred to Ogilvie (Board File 166-2-14268). In that case it was held that, in the absence of a contract or statute stipulating for the payment of the interest claimed on the salary not paid to Mr. Ogilvie as a result of his suspension upon his reinstatement, an adjudicator does not have the authority to order the payment of such interest.

REPLY FOR THE GRIEVOR

40. Counsel submitted that the definition of 'place of duty' and the inclusion within the scope of that expression of any area which, according to local custom, is within commuting distance of the place of duty is simply designed to cover such moves as may occur from Hull to Ottawa. Bells Corners is not within commuting distance of Cornwall.

41. Counsel argued that paragraph 10.5.1(a) of the Relocation Policy requiring accounts for relocation expenses to be submitted within thirty days after the date of the employee's arrival at the new place of duty

is nothing more than an administrative requirement which does not preclude the submission of a claim after the expiry of the thirty days. Counsel referred to paragraph .4.5.1(a) of the Policy which provides as follows:

When an employee purchases a replacement residence at the new place of duty, a number of the costs related to the purchase of that principal residence shall be reimbursed, provided that:

(a) the legal commitment to purchase the replacement residence is made prior to or within two years from the date the employee and/or dependants departed from the old place of duty;

This paragraph must be interpreted to mean that the grievor had two years to acquire a new residence after his relocation to Cornwall. The expenses he incurred in the acquisition of that new residence at Orleans may be claimed within that two year period. The thirty-day time limit prescribed by paragraph .10.5.1(a) for the submission of the account claiming relocation expenses does not apply.

42. Counsel referred to paragraph .4.4.1(d) of the Relocation Policy which provides as follows:

When a home owner employee is authorized to relocate within Canada and sells the principle residence at the old place of duty, reimbursement shall be authorized for a number of the costs related to the sale of the home, provided that:

(d) there was an agreement of purchase and sale which became a binding agreement within two years from the date the employee and/or dependants departed from the old place of duty;

Again, counsel submitted that the thirty day time limit mentioned in paragraph 10.5.1(a) of the Policy does not apply to the grievor.

43. Counsel argued that the 40 kilometre limit mentioned in article 1.1.9 of the Policy does not authorize the employer to establish that limit unilaterally after the relocation of the grievor occurred.

REASONS FOR DECISION

44. The grievor started looking for a new home when his transfer to Cornwall was confirmed orally by his supervisor at the time, Mr. Donald Meredith, on May 5 or 6, 1982. He made an offer to purchase his Orleans home on May 12, 1982 and that offer was accepted on May 18, 1982 (Exhibit E-2).

45. The grievor's transfer to Cornwall was agreed upon on May 26, 1982 as a result of the Request for Staffing Action dated May 21, 1982 signed by Mr. Bulbeck (Exhibit E-3). By memorandum dated May 31, 1982, Mr. Bulbeck requested that the grievor be placed on staff at Cornwall

(Exhibit E-4). The grievor moved into his new home in Orleans on or about October 1, 1982.

46. The grievor had a discussion with Mr. Bulbeck early in August 1982 concerning the former's intentions about his relocation to Cornwall. The grievor said he intended to commute to Cornwall for a period of time before making a final decision to relocate there. The grievor stated that he waited until February 1984 to make his claim because he wanted to take the time to make sure commuting to Cornwall from Orleans would be acceptable to him. It has turned out to be quite satisfactory.

47. The grievor's claim for reimbursement for a number of the costs related to the purchase of his home at Orleans was made well within two years from the date the grievor departed from his old place of duty (Ottawa) on August 2, 1982, as provided by paragraph .4.5.1(a) of the Relocation Policy quoted above in this decision. In my view, the thirty day time limit within which a detailed and itemized account claiming relocation expenses must be submitted applies only to the costs incurred by the grievor to move himself and his family to his new residence. It does not apply to a claim for reimbursement of the costs related to his purchase of a replacement residence at Orleans and the sale of his former residence at Bells Corners. A careful examination of the wording of paragraphs .10.5.1(a), .4.5.1(a) and .4.4.1(d) of the Relocation Policy supports the conclusion that a claim for reimbursement of the costs

related to the purchase of a replacement residence and those related to the sale of an existing one are separate and distinct from those incurred by an employee to move himself and his family to the replacement residence.

48. The grievor said he did not claim for the cost of moving his belongings from his former residence in Bells Corners to Orleans because the amount was minimal and he did not wish to bother obtaining the estimates he would have required had he wished to claim for this expense. In effect, the grievor waived his right to claim these moving expenses, thus making the thirty day time limit prescribed by article 10.5.1(a) of the Policy irrelevant.

49. Only two reasons were given by the employer at the hearing for refusing the grievor's claim :

(a) no letter had been received at the Training Institute approving the relocation of the grievor in advance of his move to Orleans and,

(b) the distance he had moved, from Bells Corners to Orleans, was less than 40 kilometres.

According to the employer, the letter dated December 21, 1982 (Exhibit E-6) offering the position at Cornwall to the grievor arrived too late to permit the acceptance of the grievor's relocation claim, even though

uncontradicted evidence indicated that such claims have been approved after the fact. According to the employer, the grievor should have waited until he received the offer letter before selling his house in Bells Corners. I reject that contention. Mr. Doth testified that no letter had been received at the Training Institute approving the relocation of the grievor in advance of his move to Orleans. He then said that the grievor should have waited until he received the offer letter before selling his house in Bell's Corners. Mr. Doth apparently regarded the offer letter as the letter approving the relocation of the grievor to Cornwall. The offer letter contains nothing more than a standard offer made to the grievor of the position at Cornwall. The offer letter does state that the grievor's relocation expenses will be borne by the Department of Transport. It does not approve his relocation. By virtue of the definition of "employer-requested relocation" contained in paragraph .1.5 of the Relocation Policy, a relocation requested by an employee becomes an employer-requested relocation if the employee is appointed to a position at the appropriate group and level that is vacant on arrival at the new place of duty. This is precisely what happened in the case of the grievor. I find that that relocation, according to the evidence, had been approved no later than August 2, 1982, the date on which the grievor commenced his performance of the duties of the Cornwall position. The grievor moved from Bell's Corners to Orleans on or about October 1, 1982, almost two months after his relocation to Cornwall had been approved. He was not required to wait until he received the offer

letter before selling his house in Bell's Corners in order to become eligible to make his claim pursuant to the Relocation Policy. The employer cannot be heard to say that the grievor should have waited until he received the offer letter before selling his house in Bell's Corners, particularly when it admitted that relocation claims similar to that made by the grievor have been approved after the fact.

50. I have no difficulty in rejecting the employer's argument that it was justified in rejecting the grievor's claim because his move from Bell's Corners to Orleans did not exceed a distance of forty kilometres. Article .1.1.9 of the Relocation Policy expressly provides that there is no minimum distance qualification which governs the eligibility of an employee to be authorized to relocate under the terms of the Policy. Moreover, article .1.1.5 of the Policy provides that its provisions and any limitations thereto are published as directives, not permissive guidelines. Managerial and departmental discretion is to be confined to those provisions where such discretion is specifically authorized. No discretion is given to establish forty kilometres as the minimum distance an employee must move to be eligible for reimbursement under the Policy.

51. Accordingly, I agree with counsel for the grievor that the factors to consider, in addition to the provisions of the Relocation Policy to which I have referred, are as follows:

(1) The grievor's move made it significantly easier for him to get to work;

(2) The employer benefitted from the grievor's move because it was able to staff a position it had not been able to staff at Cornwall. The grievor could not have remained available at Cornwall had he not moved to Orleans;

(3) The purpose of the grievor's move to Orleans was solely to facilitate his travel to Cornwall;

(4) The employer has not suffered any detriment because the grievor's move was less than forty kilometres closer to his work location at Cornwall. The employer made no complaint nor raised any objection to the grievor commuting to Cornwall from Orleans. There have been no attendance or time loss problems.

(5) The policy of the government, according to paragraph .1.1.1(a) of the Relocation Policy, is to relocate an employee in the most efficient fashion, that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family. By moving to Orleans the grievor's wife was able to continue in her teaching position in Ottawa, thereby lessening the detrimental effect of the move on her.

52. The grievor's claim for the payment of interest on the amount of his claim commencing thirty days after the date of the grievance calculated at the current bank prime loan interest rate must be rejected. Counsel for the grievor did not argue that the grievor was entitled to any such interest. He made no attempt to establish the existence of a contract or statute stipulating for the payment of the interest claimed. In the absence of any such contract or statute, an adjudicator does not have the authority to order the payment of such interest; Ogilvie (Board File 166-2-14268).

53. For all of these reasons the grievor's relocation expense claim is a proper one and he is entitled to full reimbursement by the employer in accordance with it.

Walter L. Nisbet, Q.C.,
Deputy Chairman.

OTTAWA, March 18, 1986.