Pay (Retroactive)

File: 166-2-92

PUBLIC SERVICE STAFF RELATIONS ACT

ADJUDICATION

Between:

N.R. ADDAWAY AND H.G. BATT,

Grievors,

And:

THE TREASURY BOARD
(DEPARTMENT OF TRANSPORT),

Employer.

Before

J.F.W. Weatherill, Adjudicator.

For the Grievors

J.P. Nelligan, Counsel.

ART 14

For the Employer

W.L. Nisbet, Counsel.

Date and Place of Hearing: Ottawa, June 3, 1969

Date of Decision: June 12, 1969

CLASSIFICATION ARGUMENT

In their grievance dated November 29, 1968, the grievors allege that their established classifications have been retroactively downgraded, and that they have not received the compensation, including retroactive pay, to which they are entitled under the collective agreement. They allege that the employer has violated article 14.02 (b) of the collective agreement.

Counsel for the employer raised the preliminary objection that these grievances may not be referred to adjudication under section 91 of the Public Service Staff Relations Act. That section provides as follows:

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

A similar provision with respect to the adjudication of grievances is set out in article 5.15 of the collective agreement in effect between the parties.

Certainly the instant grievances do not come within the scope of section 91(1)(b) of the Act. Had the grievances arisen before the execution of the collective agreement, which is the first such agreement between the parties, then I have no doubt that they

could not have been the subject of adjudication pursuant to section 91 of the Act. In the comparable case of Segodnia & Kunder, Files 166-2-23 and 166-2-24, such a conclusion was reached, there being then no collective agreement in effect. In the instant case, however, there is a collective agreement in effect, and the grievance is expressly brought with respect to the alleged violation of a specific provision of that agreement. Patently, therefore, it is a matter which may be referred to adjudication under the provisions of the collective agreement as well as under the provisions of section 91(1)(a) of the Act. Counsel argues that the article of the collective agreement alleged to have been violated has no application to the grievors' situation. This argument, however, goes to the merits of the grievance and not to the preliminary question of jurisdiction. The grievance procedure having been exhausted, it falls to the adjudicator to determine whether or not the allegation of violation of any provision of the agreement is well-founded and entitles a grievor to the relief sought. There is such an allegation before me, and in my view my jurisdiction as adjudicator is properly invoked.

The events giving rise to these grievances are as follows: Mr. Batt has been employed in the Public Service in air traffic control work since 1946; Mr. Addaway since 1954. In 1960 each of them became classified as an Air Traffic Controller, Group 5, at Winnipeg. In 1962, by virtue of a general upgrading of their positions, each became classified as an Air Traffic Controller 6. In 1963 the employer reviewed its requirements for personnel at the grievors' level in its various stations. It was ultimately determined that the require-

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ment for Air Traffic Controllers 6 at Winnipeg Centre was to be reduced by two. The grievors were the two lowest in seniority in their classification at Winnipeg Centre, and it was proposed to transfer them to work in the classification of Air Traffic Controller at the Winnipeg Tower. This proposal was effected in 1964, apparently by authority of a memorandum dated June 3, 1964, from the Director of Civil Aviation to the Regional Director of Air Services at Winnipeg. The material portion of that memorandum is paragraph 2 thereof:

> 2. Authority is granted to transfer Messrs. H.G. Batt and N.R. Addaway in their present centre positions to the Winnipeg Tower, these positions to be at the Air Traffic Controller 6 level on present incumbent basis only. You may also take the necessary action to run a competition for a third supervisor at the Air Traffic Controller 5 level.

It will be noted that although the grievors were transferred to positions involving work at the level of Air Traffic Controller 5, they retained their personal classifications as Air Traffic Controller 6, on a "present incumbent only" basis. That is to say, although their daily work was in a lower-rated job, they were allowed to maintain their higher classification until another job at that level became available or was offered to them. There is no complaint as to the transfer, nor as to the "present incumbent only" status of the grievors. From 1964 until the time of the grievance, the grievors performed the work of Air Traffic Controllers 5, but retained their personal classifications as Air Traffic Controllers 6.

Subsequently, the Canadian Air Traffic Control Association became bargaining agents for employees in the bargaining unit which includes the grievors, and on August 30, 1968, a collective agreement

was signed between the Association and the employer, providing, inter alia, for certain salary increases retroactive to July 1, 1967. Throughout this period the grievors remained classified as Air Traffic Controllers 6, subject to the qualifications implicit in their "present incumbent only" status. There is nothing in the collective agreement which would vary this status or affect the grievors' positions in this regard. The work they performed continued to be that of an Air Traffic Controller 5.

For some time the Bureau of Classification Revision had been considering classifications throughout the public service, and the collective agreement before me was, like others, negotiated on the basis of revised position descriptions.

On October 11, 1968, memoranda were addressed to the grievors from the Regional Personnel Administrator advising them of the new classification to which their positions had been converted. The text of the memorandum was as follows, in each case:

> 1. As you are probably aware, the Bureau of Classification Revision conversion of positions takes place shortly after the ratification of the first Collective Agreements. Your position has been assigned to the A.T.C. Group of the Technical Category, and has been classified as AI5.
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> 2. In most cases the classification of the incumbent and the individual will coincide. However, for a number of reasons there may be cases where employees will not be classified the same as their positions; for instance if the employee is not performing the full duties of the position, or if the employee lacks the full qualifications required for certification at the same level of the position. If the incumbent lacks the full qualifications for the position, the Collective Agreement provides a provision for some extra monetary compensation.

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3. If the classification of the incumbent and the position do not coincide, the incumbent will be informed in the near future of reasons for the differences.

4. Conversion to the new classifications and levels will be effective July 1, 1967. A new classification challenge procedure has recently been established which is available to all employees who feel that their position has been improperly classified. Details of this procedure may be obtained from your Unit Chief.

The conversion, it will be noted, was effective July 1, 1967. As of that date, then, the grievors were considered as having worked in the position now classified as AI5, rather than that formerly known as Air Traffic Controller 5. In the cases of the grievors the conversion was a change of job title only, and there was no change in their duties and responsibilities. There is no complaint with respect to this memorandum or with respect to the conversion of the grievors positions. The grievors would not appear to be adversely affected by the conversion, for the positions remained at the grade 5 level. It is essential to note that nothing in this memorandum indicated that the grievors' personal classifications - or at least the levels of these classifications - were in any way in jeopardy. The memorandum, in paragraph 2, contemplates cases in which an employee's personal classification is not the same as his position. This, of course, was the grievors' situation.

Shortly after this, the grievors were sent copies of Classification Revision Forms, which indicated that their classification as Air Traffic Controller 6 had been revised to the new group and level of AI6. This would appear quite properly to confirm the grievors in

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their personal classifications, incorporating the appropriate revision in the title of the classification. The result of it all would be that the grievors continued to work in the classification AI5, although personally classified and paid as AI6, on a present incumbent only basis.

When the grievors were sent copies of the Classification Revision Forms, however, these were attached to a memorandum from the Regional Personnel Administrator, which reads as follows:

> 1. Attached is a photo copy of the classification revision form which was used to convert positions, and also to certify incumbents in positions. In your particular case the position classification portion of the form is incorrect, and the position is actually only an A.I. 5. The mistake occurred because at one time it was anticipated that the co-ordinator positions in the Area Control Centres might be classified at the A.I. 6 level. However, it has been resolved that these positions will only be classified at the A.I. 5 level.
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> 2. The position which you are occupying is one which is assigned for a co-ordinator position, but does not reflect that these are your duties.

From that time on, the grievors have been paid at the rate appropriate to the classification of AI5. Their retroactive salary increases were not those appropriate to an AI6 (although they had been classified at the 6 level throughout the relevant period), but rather those of an AI5. The grievances allege that this classification and payment constitutes a violation of the collective agreement.

It is to be observed that the most recent official document setting out the grievors' classifications is the Classification Revision Form, which certifies their new classifications as AI6. The grievors, of course, had been classified at the grade 6 level since 1962, and there is no proper authorization in any of the

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material before me which would justify their transfer to a lower level. It would appear that the grievors have had their classifications altered merely on the assertion by the Regional Personnel Administrator that their classification was "incorrect". The Regional Personnel Administrator's memorandum states that the "position classification" is incorrect, and that the "position" is only an AI5. While it is of course true that the grievors' positions - that is, the actual jobs they perform - are at the AI5 level, the Classification Revision Form does not appear to deal with positions in this sense, but rather with the personal classifications of the individuals concerned. As I have indicated, the grievors do not deny that their positions, in the sense of actual jobs, are classified as AI5. If this were all there were to it, there would be no complaint. It is the de facto alteration of the grievors' personal classifications which is complained of, and it is this alteration which, on the evidence, has plainly been made without cause or authority. If, by his memorandum of November 1, 1968, the Regional Personnel Administrator meant to point out that the work the grievors were doing was actually classified as AI5, then there was no justification for effecting any change in their personal status at the grade 6 level on a present incumbent only basis. If, on the other hand, he was asserting that the grievors' personal classifications had been "converted" to that of AI5, then he was patently mistaken, and has failed to draw the distinction, referred to in his own memorandum of October 11, between cases where "the classification of the incumbent and the position do not coincide". The grievors' is just such a case. The conversion of classifications affects both their position classification and their personal classification, but there is nothing to

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suggest that it "converted" the one to the other, although this is precisely the effect of the employer's action.

On the evidence, the true situation is simply this: the grievors have been performing the work of Air Traffic Controllers 5 since 1964. Throughout that period they have been personally classified as Air Traffic Controllers 6 on a present incumbent only basis. The coming into force of a collective agreement has not in itself altered this situation. The conversion of classifications, however, means that the grievors, since June 1, 1967, are considered as having been working in the classification AI5 and as having been personally classified as AI6. There is no evidence of any properly authorized document or of any occurrence which would justify any change in that state of affairs. Accordingly the grievors were entitled to be paid at the rate appropriate to the classification AI6, and to receive retroactive payment according to that grade.

Article 14.02 of the collective agreement is as follows:

> 14.02 An employee is entitled to be paid for services rendered at:
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> (a) the pay specified in Appendix "A" for the classification of the position to which he is appointed, if the classification coincides with that prescribed in his certificate of appointment, or
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> (b) the pay specified in Appendix "A" for the classification prescribed in his certificate of appointment, if that classification and the classification of the position to which he is appointed do not coincide.

I am unable to accept the contention of counsel for the employer that this provision has no application in the instant case.

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Indeed, it is apparent that this is a case to which the provisions of article 14.02 (b) apply precisely. The classification prescribed in the grievors' certificates of appointment, and the classification of the positions to which they are appointed, do not coincide. Accordingly, by article 14.02 (b) they are entitled to the pay specified for the classification prescribed in the certificates of appointment. They have not received such payments, and are claiming them in these proceedings. They are grieving with respect to the application with respect to them of a provision in the collective agreement. Under article 5.15(a) of the collective agreement this course is open to them, and upon the facts in this case they are clearly entitled to succeed, and to obtain the relief asked.

It would appear that the document above described as a Classification Revision Form may also be referred to as a "certificate of appointment": it is a form numbered CSC 254, and it is so described in the Regional Personnel Administrator's memorandum. This form, which in the case of Mr. Addaway at least appears to have been issued on November 14, 1967, states that his group and level is AI6. The only other such document relating to Mr. Addaway is the notice of promotion to Air Traffic Controller 6, which became effective on July 1, 1962. It is beyond doubt, in any event, that the "classification prescribed in his certificate of appointment" is, in the case

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of each of the grievors, that of AI6. The classification of the position to which each is appointed is AI5. Therefcre, by reason of article 14.02 (b) of the collective agreement, each of the grievors is entitled to the pay specified in Appendix "A" of the collective agreement for the classification AI6, and I so award.

DATED AT TORONTO, THIS 12th DAY OF JUNE, 1969.

"J.F.W. Weatherill"
Adjudicator