Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-1068-95

OTTAWA, ONTARIO, NOVEMBER 1, 1996

PRESENT: THE HONOURABLE NOËL J.

BETWEEN:

EPHREM LECLERC,

Applicant,

and

ATTORNEY GENERAL OF CANADA,

Respondent.

ORDER

The December 16, 1994 decision of the Veterans Appeal Board is quashed and the matter is referred back to the Board so that it may dispose of it in accordance with the reasons accompanying this order.

"Marc Noël"

J.

Certified true translation

for Christiane Delon

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BETWEEN:

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Respondent.

REASONS FOR ORDER

NOËL J.:

The applicant is seeking judicial review of a decision of the Veterans Appeal Board rendered on December 16, 1994, the effect of which was to maintain the level of his pension at one fifth the amount to which he claims he is entitled.

I. THE FACTS

Between December 8, 1953 and December 7, 1956, the applicant was a member of the Royal Canadian Air Force. He was forced to leave at the end of 1956 on the ground that, because he was suffering an otitis media in the left ear, he was unable to perform his duties. Between 1970 and 1987, the applicant

attempted several times to obtain a pension under the *Pension Act*,[1] arguing that the otitis he was suffering was related to his military service. These attempts were fruitless.

However, on May 15, 1987, the Pension Review Board acknowledged for the first time that the applicant's condition might be attributable to the inclement weather to which he was exposed during his years of service. The Board decided at that time that the applicant's condition was 20 percent explicable by his military activities, and granted him a pension that was calculated accordingly:

> From all of the circumstances of this case and all the evidence presented and having drawn every reasonable inference in favour of the Appellant, this Board is of the opinion that pension entitlement on a one fifth basis for that part of the disability that arose out of or was directly connected with peace time service is indicated, and this board rules accordingly.[2]

This decision clearly assumes that the applicant was afflicted by his condition prior to his enlistment. That is the explanation for the limited amount of the pension he was granted.

On April 23, 1991 the applicant asked the Veterans Appeal Board to amend this decision, arguing that the Board had no basis for finding that his condition existed prior to his enlistment. In a decision handed down on July 11, 1991, the Board refused to allow the applicant's request. It relied, in part, on a medical report dating back to February 21, 1970, which stated that the applicant had suffered problems in the left ear since childhood, and another medical report written in April 1954, in which the examining physician stated that it was his "[TRANSLATION] impression that the disabling condition in the left ear had existed prior to enlistment in the regular forces". In conclusion, the Board commented that "[TRANSLATION] the appellant [had] already benefited from the provisions of

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[1] R.S.C. 1985, c. P-6 (hereinafter the "Act").

[2] Book of decisions, at p. 17. This decision was later amended to state that the applicant was suffering not only from an ear ache but from a left otitis media with mastoidectomy and hearing loss. (See Book of decisions, at p. 16.)

subsection 10(5) of the Act...and the generosity of the previous Board, and it [was] unnecessary to amend the decision under appeal."[3]

The applicant asked the Federal Court of Appeal to quash this decision on the ground:

> [TRANSLATION] that the Board erred in its interpretation of the evidence when it concluded that the applicant's disability existed prior to his enlistment in the military and that he had received adequate treatment during his service.[4]

In a decision rendered on June 22, 1993,[5] the Court of Appeal noted the contradictory evidence concerning the applicant's condition at the time of his enlistment but it also noted that it was common ground that the disabling condition the applicant was suffering had not been recorded during his pre-enlistment medical examination and was not diagnosed until more than three months later.

The Court, relying on the provisions of subsection 21(9) and section 108 of the Act,[6] held that the matter should be referred back to the Board. The initial judgment rendered by the Court of Appeal had been drafted as follows:

> [TRANSLATION] [T]he subject decision will be set aside and the matter returned to the Board for it to decide on the basis that the pension to which the applicant may be entitled cannot be reduced on the ground that the evidence does not show clearly enough the relationship between the applicant's disability and his military service. [emphasis added]

A few days later, on June 28, 1993, the Court of Appeal, having noted that its judgment might result in some confusion, amended the wording to read:

> [T]he subject decision will be set aside and the matter returned to the first Board for it to decide on the basis that the pension to which the applicant may be entitled cannot be reduced on the ground that the evidence does not clearly show that the cause of his disability is subsequent to his enlistment. [emphasis added]

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[3] Book of decisions, at p. 14.

[4] Originating notice of motion, filed October 21, 1991, Respondent's Record, at p. 2.

[5] Book of decisions, at p. 2.

[6] Since the case originated from the Veterans Appeal Board, the Court had in mind not section 108 of the Act but subsection 10(5) of the *Veterans Appeal Board Act*, which is to the same effect.

Following this decision, the Appeal Board again reviewed the matter. Notwithstanding the clear effect of the Court of Appeal decision, the Board identified the issue in dispute as follows:

> [TRANSLATION] the only issue in dispute is whether the medical evidence establishes that the disabling condition was, as the adjudicators held, prior in origin to his enlistment,[7]

and concluded that the applicant's condition existed prior to his enlistment.

The applicant then requested a further review of this decision on the ground that it failed to comply with the terms of the Court of Appeal judgment. It was pursuant to this request that the Board rendered its December 16, 1994 decision that is the subject of this application for judicial review.[8]

In the course of this decision, the Board acknowledged an error in its previous decision. In its reasons, the Board says it accepts the Court of Appeal's decision and acknowledges that it must now presume that the applicant was in good heath at the time of his enlistment. However, the Board stated that this presumption did not mean that the applicant was necessarily entitled to a full pension.

After reviewing the evidence and a medical guideline by the Canadian Pension Commission concerning hypacusis and otitis media, the Board concludes that:

> [TRANSLATION] there is no basis in the evidence to find that the applicant's military duties contributed to the aggravation of the disabling condition to a greater degree than that recognized by the present right to a one-fifth pension.[9]

More specifically, this decision upheld the previous decision and confirmed that the applicant's military service was not the cause of his disability.

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[7] Book of decisions, at p. 5.

[8] Book of decisions, at p. 8.

[9] Book of decisions, at p. 12.

II. THE ISSUES

The applicant argues that since his disability is presumed not to have existed at the time of his enlistment, the Board did not have the option of finding that it was not caused by his military service. In the alternative, he argues that in light of the evidence and the statutory presumptions in his favour, the Board could not reasonably conclude that military service was not the cause of his disability.

III. RELEVANT STATUTORY PROVISIONS

The provisions of the Act that are likely to be useful in resolving this dispute are the following:

> 21. (1) In respect of military service rendered during World War I or World War II and subject to the exception contained in subsection (2),
>
> > (a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable to or was incurred during such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I; ...
>
> (2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,
>
> > (a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I; ...
>
> (2.1) Where a pension is awarded in respect of a disability resulting from the aggravation of an injury or disease, only that fraction of the total disability, measured in fifths, that represents the extent to which the injury or disease was aggravated is pensionable.
>
> (3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of (g) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof.
>
> (9) Subject to subsection (10), where a disability or disabling condition of a member of the forces in respect of which the member has applied for an award was not obvious at the time he became a member and was not recorded on medical examination prior to enlistment, that member shall be

> presumed to have been in the medical condition found on his enlistment medical examination unless there is
>
> > (a) recorded evidence that the disability or disabling condition was diagnosed within three months after the enlistment of the member; or
> >
> > (b) medical evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to the enlistment of the member.
>
> 108. The Commission and every Entitlement Board shall, in determining the entitlement of an applicant to an award and in assessing the extent of the disability of a member of the forces,
>
> > (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or member;
> >
> > (b) accept any uncontradicted evidence presented to it by the applicant or member that it considers to be credible in the circumstances; and
> >
> > (c) resolve in favour of the applicant or member any doubt, in the weighing of evidence, as to whether the applicant or member has established a case.

Furthermore, subsection 10(5) of the *Veterans Appeal Board Act*[10] provides:

> 10. (5) In all appeals to the Board, the Board shall
>
> > (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the appellant;
> >
> > (b) accept any uncontradicted evidence presented to it by the appellant that it considers to be credible or trustworthy in the circumstances; and
> >
> > (c) resolve in favour of the appellant any doubt, in the weighing of evidence, as to whether the appellant has established a case.

IV. ANALYSIS AND DECISION

At the outset, counsel for the respondent noted, as the Board had done in its decision, that the existence of the presumption under subsection 21(9) did not necessarily lead to the conclusion that the applicant's disabling condition was the result of his military service. In this regard, he directed my attention to the distinction between the right to a pension as a result of military service in time of war and the right to a pension as a result of military service in peace time. In the first case, a pension is granted for invalidity caused by "an injury or disease or an

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[10] R.S.C. 1985, c. 20 (3rd suppl.).

aggravation thereof that was attributable to or was incurred during such military service",[11] while in the second, the cause of the invalidity must be one that "arose out of or was directly connected with such military service".[12]

Thus a war pensioner is entitled to a pension for any invalidity incurred during military service, irrespective of its origin, while a peace-time pensioner must establish a causal relationship between his invalidity and the military service. In this regard, the presumption enjoyed by the applicant establishes that his condition did not exist prior to his military service. The evidence discloses, moreover, that this condition existed when he left the military service. It must thereby be concluded that his condition was incurred during his military service. But the presumption is silent concerning the cause of his condition, which leaves the onus on the applicant to establish a direct relationship between the cause of his condition and his military service. This is what the Appeal Board attempted to explain in the course of its decision, when it stated:

> [TRANSLATION] To be eligible for a pension under subsection 21(2) of the *Pension Act*, the applicant must establish that his work in the military service or his military duties contributed in some way to the appearance or aggravation of his disabling condition. In no circumstances does the presumption concerning medical condition in subsection 21(9) entitle one to what is called the "insurance principle" provided for veterans in peace time under subsection 21(1) of the *Pension Act*.[13]

This is also what the Court of Appeal obviously decided to clarify when it amended the initial order it rendered in this case. As we could see, its initial decision could have been interpreted as giving some effect to the presumption concerning the cause of the disability, while the amended version eliminates any ambiguity about the fact that the presumption has a strictly temporal effect, as subsection 21(9) contemplates.

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[11] S. 21(1)(a) of the Act.

[12] S. 21(2)(a) of the Act.

[13] Book of decisions, at p. 11.

Over and above the fact that the Board was required to presume that the applicant's condition was incurred during his military service, he still had to demonstrate the cause of that condition. More specifically, he had to show that his condition, or its aggravation, "arose out of" or "was directly connected with" his military service. The Board found that the applicant's condition was not the result of his military service but that the military service had contributed by 20 percent to its aggravation, thus confirming the previous decision.

In light of this short discussion, it is clear that from a statutory standpoint, the Board was entitled to find that military service was not the cause of the applicant's disability, notwithstanding the presumption of good health in his favour. It is equally clear that this conclusion did not prevent the Board from also finding that the applicant's condition had been aggravated by his military service and that, in the circumstances, subsection 21(2.1) was applicable.

The only remaining question is therefore whether the Board could, reasonably and without acting in a perverse manner, conclude as it did based on the evidence that was before it, when this evidence is considered in light of the statutory presumptions in the applicant's favour.

There are three such presumptions. The first is the one we have already discussed, which provides that the applicant was deemed to be in good health at the time he enlisted.[14] The second is the one in subsection 21(3) of the Act which, for the purpose of determining whether a disability or aggravation thereof is directly connected with or arose out of military service, presumes this to be the case if the individual, in the course of his duties, was exposed to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof. The third is the one in section 108 of the Act and subsection 10(5) of the

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[14] S. 21(9) of the Act.

Veterans Appeal Board Act, which provide that in matters involving the awarding of a military pension:

1. every reasonable inference in favour of the applicant shall be drawn;

2. any uncontradicted evidence presented by the applicant shall be accepted, provided that it is credible; and

3. any doubt as to whether the applicant has established a case shall be resolved in favour of the applicant.

Concerning the evidence as such, the Board had before it the opinion of Dr. Langis, issued October 28, 1986, which is the basis of the partial award of pension that was granted by the Board of Review on May 15, 1987. It states:

> [TRANSLATION] Having reviewed your military medical file, there is no doubt in my mind that all the difficulties in your left ear began in the R.C.A.F. in the course of your training, in inclement climatic conditions.[15]

The Board also had before it a medical guideline of the Canadian Pension Commission concerning conductive hearing loss and otitis media. The following extracts were noted by the Board in the course of its decision:

> Conductive Hearing Loss
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> Blast injury and barotrauma have already been mentioned as possible causes of conductive hearing loss. Among the more common causes are otitis externa, otitis media, and otosclerosis.
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> Otitis externa is an inflammation of the skin of the external ear canal. Swelling, or collection of discharge in the canal, or both may cause a conductive hearing loss. It is temporary — with one exception. A form of malignant otitis externa occurs in elderly diabetics. It is resistant to treatment, and could cause a permanent conductive hearing loss.
>
> Otitis media is inflammation of the middle ear caused by infection, and may be acute or chronic.
>
> In acute otitis media, the main complaint is pain. Pus accumulates in the middle ear (hence the name acute suppurative otitis media) and bulges the eardrum. The eardrum may rupture, pus will be discharged, and the pain will stop at once. A conductive hearing loss is present from the onset. With proper treatment the infection clears, the perforated eardrum usually heals leaving a small scar, and the hearing returns completely to normal.
>
> With or without treatment, the perforation may persist. The hearing may or may not be normal, depending on the size and situation of the perforation. The ear is prone to recurrent infections and purulent discharge. The otitis media has become chronic. This type of chronic otitis media is seldom, if ever, a threat to life, and can often be treated successfully by surgery (tympanoplasty).
>
> A more dangerous type is chronic otitis media with cholesteatoma. This does not begin with acute otitis media, but is chronic from the start. (Some authorities believe it may occur as a result of repeated attacks of acute otitis media in childhood which were unrecognized, untreated, or inadequately treated. Some have even postulated attacks of acute otitis media in utero.)

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15 Record at p. 51, Appendix C.

> Cholesteatoma is an ingrowth of squamous epithelium (skin) which expands like a tumor. If untreated, it may invade the mastoid bone, causing chronic mastoiditis; the facial canal, causing facial paralysis; and the labyrinth (inner ear) causing labyrinthitis, with vertigo and sensorineural hearing loss. These can lead to meningitis or brain abscess, and possibly death. This is the type of chronic otitis media that was at one time treated by radical mastoidectomy. The usual treatment now is a form of tympanoplasty. ...
>
> A non-suppurative form of otitis media has been called catarrhal otitis media, serous otitis media, otitis media with effusion, and other names. In this variety, the midddle ear contains serous or mucoid fluid, and there is a conductive hearing loss that can be reversed by treatment. If untreated, the condition may progress to chronic adhesive otitis media — in effect, scarring of the middle ear — with a permanent conductive hearing loss.
>
> A history of earache prior to enlistment or even a history of previous discharge from the ear is not evidence of previous otitis media. There are many causes of both symptoms. An earache may even be caused by a condition unconnected with the ear — referred pain from a tooth, for example. Real evidence of a pre-enlistment otitis media would be such facts as: a documented history; a conductive hearing loss detected at enlistment by the methods of testing then in use (conversation or whispered voice tests, audiometry); a scarred, fixed, or perforated eardrum (proof of previous middle ear disease); and the scar of a previous mastoidectomy.
>
> Otitis media can be related to Regular Force service in only one uncommon circumstance: rupture of the eardrum from blast or injury, with subsequent infection of the middle ear....[16]

Relying primarily on the final paragraph of this guideline, and pointing out that Dr. Langis had not explained how a bacterial infection of the middle ear might have been caused by bad weather, the Board concluded that:

> [TRANSLATION] From the medical standpoint, there is no ground for saying that a bacterial infection of the ear might have resulted from exposure to bad weather.[17]

With those words the Appeal Board disposed of Dr. Langis's opinion.

Given the presumption of good health, the Board should have assumed that the applicant's eardrum was intact at the time of his enlistment, which rules out the possibility that it was scarred, fixed or perforated or that the applicant was suffering from some middle ear ailment at the time of his enlistment.

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[16] Book of decisions, at pp. 10 and 11.

[17] Book of decisions, at p. 12.

Furthermore, the Board, while assigning little significance to it, accepted the fact that the applicant had been exposed to inclement weather or, as they put it, "bad weather", during his training period. Through the initial presumption under subsection 21(3), the Appeal Board should therefore have presumed the existence of a causal relationship between the applicant's ailment or its aggravation and the climatic conditions to which he was exposed.

The evidence as accepted by the Appeal Board discloses that the initial indications of the ailment were manifested on March 22, 1954, almost four months after the commencement of military service. The applicant was then complaining of hearing loss. Since the disabling condition did not appear to dissipate he was hospitalized in April 1954. A development culture of the pus that was accumulating in his left ear confirmed the presence of staphylococci. The Board unequivocally recognized that the applicant was then suffering from an otitis media in the left ear.

As for the remainder of the evidence, I am unable to overlook the fact that the Board could not refrain from drawing attention to some factors which would suggest that the applicant's condition existed at the time of enlistment. I have in mind in particular the extract from the examination of October 9, 1974, which the Board chose to cite, as well as the statements by the physicians who examined the applicant in 1956 and who spoke, as the Board notes, of a "[TRANSLATION] former" otitis.[18] Needless to say, the Board had to disregard its apparent convictions concerning the applicant's medical condition and accept, for the purposes of its decision, that the applicant's condition had developed following his enlistment and not before.

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[18] Book of decisions, at pages 9 and 12.

Thus, upon his arrival in the Armed Forces, the applicant is presumed to have been in good heath, which means he was not suffering any illness. A few months later, he was suffering from an otitis media in the left ear. The cause of this illness or condition, in temporal terms, should therefore be situated between the time of his enlistment in December 1953 and the time his condition was first manifested, in March 1954.

Moreover, the evidence discloses that during this time the applicant underwent his training and was exposed to the elements. I note that this was the wintertime. The Appeal Board therefore had to presume a causal relationship between the bad weather to which the applicant was exposed during his training and the otitis media, the first indications of which were manifested during this period, insofar as the bad weather might reasonably be the cause of this condition. In this regard Dr. Langis, an ear, nose and throat specialist, had stated that he entertained "[TRANSLATION] no doubt" about the existence of such a relationship.

Despite this, the Board persisted in seeing no relationship between the cause of the applicant's condition and his training period. Relying strictly on the medical guideline, which states that otitis media is related to military activities only if there is a "rupture of the eardrum from blast", and on the fact that the applicant had not been exposed to blasts, it concluded that the cause could not be related to his training period.

However, since the existence of the applicant's ailment as of April or March 1954 is established, and since according to the presumption of good health the causal factor must be located between that time and the time of his enlistment, what else could explain the occurrence of his condition other than the bad weather to which he was exposed during his training? I note in this regard that according

to the evidence the applicant was not exposed to any other possible cause.[19] This evidence concerning the existence of a single identifiable cause is both uncontradicted and credible. It follows that under the presumption in subsection 10(5) of the *Veterans Appeal Board Act*, the Board was bound to take this as proved. The evidence before the Board indicated only one cause, therefore, for the applicant's condition: the inclement winter weather to which the applicant had been exposed during his training.

Bearing in mind that the Board was further bound to draw from the evidence every reasonable inference in favour of the applicant and to resolve any doubt in his favour, the Board could not reasonably reach the conclusion it did. In my view, the decision it reached can only be explained on the basis of an unacknowledged refusal by the Board to agree to act on the presumption that the applicant was in good health at the time of his enlistment.

The medical guideline on which the Board relied sets out some rules of general application that cannot be applied blindly and irrespective of the evidence. Clearly, the author of the guideline did not have in mind a situation in which any cause of otitis is excluded other than that related to the environment and bad weather during the winter. Dr. Langis, on the other hand, had that precise situation in mind and it is in that context that he concluded "that there is no doubt... that all the difficulties in your left ear began in the R.C.A.F. in the course of your training, in inclement climatic conditions."[20] In its decision the Board criticizes Dr. Langis for not explaining how a bacterial infection of the ear might have been caused by bad weather. The criticism is superfluous since, according to the

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[19] Apart from the machine gun firing exercises during his training.

[20] Record, Appendix C, p. 51.

hypothesis Dr. Langis was working on for the purposes of his opinion, the applicant's condition could not be explained otherwise.[21]

I conclude, therefore, that the Appeal Board could not reasonably find that the cause of the applicant's otitis media, as opposed to its aggravation, did not arise out of or was not directly connected with his military service. The matter is therefore referred back to the Board for a decision on the pension to which the applicant is entitled, on the assumption that this causal relationship has been established.

The applicant's counsel asked that the respondent be ordered to pay his costs on the ground that the Board intentionally breached his client's rights and, in particular, thwarted the Court of Appeal decision. I must note that the Board conducted itself in a stubborn fashion and was incapable of disregarding its convictions concerning the origin of the applicant's condition. But I am nevertheless not prepared to attribute bad faith to it. I therefore refuse to award costs in the circumstances.

However, I note that in the normal course of things the applicant would be entitled to his full pension only three years after the date on which his entitlement is confirmed. The Board may, however, if it is of the opinion that a pension should be granted effective some previous date, grant additional compensation. In the circumstances of this case, and in particular having regard for the decision of December 10, 1993 which clearly unnecessarily delayed the applicant's right to his full pension, I venture to hope (while recognizing that the decision is the

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[21] The hypothesis in question is that the applicant was in good health at the time of his enlistment and was exposed to poor winter weather conditions during his training. Dr. Langis had expressly set out this hypothesis as a condition underlying the opinion he expressed. Record, Appendix C, p. 52.

Board's to make) that the Board will elect to exercise its discretion in favour of the applicant and grant him some additional compensation.

"Marc Noël"

J.

November 1, 1996
Ottawa, Ontario

Certified true translation

Christiane Delon

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO.:	T-1068-95
STYLE:	Ephrem Leclerc v. Attorney General of Canada
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	October 16, 1996

REASONS FOR JUDGMENT OF NOËL J.

DATED: November 1, 1996

APPEARANCES:

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Michael Donovan	for the respondent

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