

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

BIBIANNE BOULAY

Applicant

and

**TREASURY BOARD
(Correctional Services of Canada)**

Employer

RE: Application for Extension of Time for Filing of Grievance and Referral of
Grievance to Adjudication

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Applicant: François Leduc, Counsel

For the Employer: Hélène Laurendeau, Counsel

Heard at Quebec City,
October 8-9, 1996.

DECISION

This decision concerns an application for an extension for the filing of a grievance with the employer and, according to counsel for the applicant, its referral to adjudication, if the grievance is determined to have been duly filed.

Below are the main facts of the case.

In August 1989, Bibianne Boulay, Head of Medical Services (NU-HOS-05) at the Donnacona penitentiary, submitted her resignation following the announcement of the elimination of her position.

Six years later, in August 1995, within a few days' time she received and lost a job offer (as Health Care Supervisor at Donnacona) from the Marie-Andrée Laforce employment agency, which provides employees for the Donnacona penitentiary. Subsequent to a conversation with Marie-Andrée Laforce, Bibianne Boulay came to the conclusion that the penitentiary's acting assistant warden, Michel Bélisle, did not wish to avail himself of her services.

Bibianne Boulay applied under the terms of the *Privacy Act* for access to personal information, and on January 6, 1996 discovered three documents which led her to believe that the elimination of her position in 1989 had in reality been a disguised disciplinary discharge. Two days later, she consulted a lawyer and had the latter inform Marie-Andrée Laforce that Bibianne Boulay was demanding \$115,400 for breach of employment contract. Her counsel subsequently ceased practising law. On March 7, 1996, Bibianne Boulay consulted another lawyer, Mr. François Leduc, through whom on March 8, 1996 she asked her bargaining agent, the Professional Institute of the Public Service of Canada, as well as the assistant warden at the Donnacona penitentiary, to refer her discharge grievance to adjudication. Neither agreed to do so, giving their reasons on March 22 and 27, 1996.

On April 12, 1996, Bibianne Boulay's counsel submitted an application to the Public Service Commission for an extension of time in which to refer the discharge grievance to adjudication. On May 9, 1996 the Commission informed her that she should contact the Public Service Staff Relations Board instead. On May 29, 1996 Bibianne Boulay filed an application for adjudication and extension of time before the Public Service Staff Relations Board. Finally, on May 31, 1996, she sent the Board a

document entitled "Grievance" in which she set forth the circumstances of her claim and demanded that she be reinstated.

Two questions must be answered here. Should the 25-day time limit provided for in the collective agreement (clause 35.09, Exhibit E-1) be extended to allow Bibianne Boulay the time to file a grievance with her employer? Or rather, should we consider that such a grievance has been filed, and consequently extend the 25-day deadline to allow her to refer the grievance to adjudication?

In both cases, Bibianne Boulay is asking the Board to exercise the power of extension conferred by section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure*, 1993, SOR/93-348:

63. Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times

- a) by agreement between the parties; or*
- b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.*

This decision bears solely on the application for extension of time. This application is based on the facts that occurred in 1995 and 1996, and it is on these facts that our decision must be grounded. However, in order to provide for a better understanding of the case, certain events that took place in 1989 prior to Bibianne Boulay's resignation should be recorded.

Events Prior to 1995

On December 5, 1984, Bibianne Boulay began work as a nurse at the Dorchester penitentiary in New Brunswick.

On June 2, 1986, following a competition, she became Head of Medical Services at the Donnacona penitentiary, where she supervised the work of another nurse, Suzanne Pelletier (NU-HOS-03) and six or seven nurses whose services were provided

as part of a privatization pilot project by the Sécamed and Médicis agencies. Her performance was deemed satisfactory (Exhibit E-2) by an appraisal covering the period from February 9, 1987 to July 4, 1988, although a few problems were noted in the area of interpersonal relations.

In February 1988 Bibianne Boulay was absent from work for three weeks because of illness. Upon her return in March 1988, she noticed that her office had been moved. She was informed that she would henceforth be working on the administration floor, and she was denied access to the Health Centre except to take inventory or respond to complaints from the inmates. In 1989 she was seconded for three months to the Port-Cartier penitentiary (Exhibit A-2). At the end of March 1989, she returned to Donnacona. In response to a request for explanations (Exhibit A-5), the penitentiary's assistant warden, Robert Chaput, replied (Exhibit A-6) that she had been removed from the Health Centre because of an administrative decision and that the conditions for her secondment to Port-Cartier had been respected, as she was reinstated to her position of Head of Medical Services upon her return on March 28, 1989.

On March 30, 1989, Bibianne Boulay was put in charge (Exhibit A-3) of coordinating courses offered by the Department on the new mission statement for the Correctional Service of Canada.

On April 4, 1989 she received a letter dated March 31, 1989 informing her that her position would be eliminated as of October 3, 1989 (Exhibit A-4) and that she had become surplus as of April 3, 1989.

From the time she learned she had been declared surplus (i.e., April 4, 1989), she carried out the duties of coordinator assigned on March 30, 1989 (Exhibit A-3).

Between April 1989 and June 1989, her employer offered her three positions: one in Dorchester, New Brunswick, one in Kingston, Ontario, and one in Drummond, Quebec. She declined all three offers. She was told that, since she had turned down all three, she might not be given another.

Finally, she accepted a position (NU-HOS-03) in Ste-Anne-de-Bellevue, Quebec, where she continued to be paid as an NU-HOS-05. She worked at Ste-Anne-de-Bellevue

for two weeks, and then decided to leave the position in order to join her husband in Quebec City.

On August 11, 1989 Bibianne Boulay asked her employer to extend the period of her surplus status (Exhibit E-6). Her employer agreed to extend the period until March 1, 1990 (Exhibit E-8). However, she submitted her resignation (Exhibit E-6) on August 19, 1989, and this was accepted by her employer (Exhibit E-8). Bibianne Boulay was given six months' salary (Exhibit E-9) in lieu of the unexpired portion of her surplus period.

A year after leaving her job—i.e., August 4, 1990—Bibianne Boulay was diagnosed as having “mild” multiple sclerosis. According to medical opinion, she had the physical abilities required to perform the duties of head nurse and instructor.

Events in 1995 and 1996

As I stated at the outset, according to her own testimony, within a few days' time Bibianne Boulay received and lost an offer from the Marie-Andrée Laforce agency to go back to work at the Donnacona penitentiary, six years after resigning. An interview with Marie-Andrée Laforce toward the end of August 1995 convinced her that the penitentiary's assistant warden was opposed to hiring her as health care supervisor (Marie-Andrée Laforce did not testify).

Suspecting something was amiss, Bibianne Boulay attempted to obtain more information, and on November 23, 1995 filed an application under the *Privacy Act* (Exhibit E-9).

While skimming through information received on January 6, 1996, she came upon three documents that convinced her that the elimination of her position was in fact a disguised disciplinary measure.

First, in a memo (Exhibit A-10-3) dated March 31, 1989, Louise Guertin, a personnel division regional administrator, sent the Regional Planning and Human Resources Director the letter making Bibianne Boulay surplus. Ms. Guertin ended the memo as follows (translation): “*You understand that, in a case as complex as this, we feel it is desirable to proceed step by step.*” (Louise Guertin did not testify.)

A second document (Exhibit A-10-5) dated May 1990 and signed by Robert Chaput, assistant warden of the Donnacona penitentiary, is a reply to a request for a reference from the Hôtel-Dieu du Sacré-Coeur de Jésus hospital in Quebec City, where Bibianne Boulay had applied to work. Mr. Chaput wrote (translation): *“We feel she is very competent as a nurse. Her problem lies in the area of interpersonal relations.”* (Robert Chaput did not testify.)

Lastly, a third document (Exhibits A-10-9, A-10-10, A-10-11) entitled “Daily Report,” listed Bibianne Boulay’s duties at the Heath Centre and contained remarks on the various tasks she had performed in June, July and August 1988. Bibianne Boulay noted that, unbeknownst to her, her work had been under scrutiny in 1988. She believed that one Suzie Marcotte, employed successively by the Sécamed, Médicis and Upjohn agencies, which at one time or another provided employees for the Health Centre, was the author of the “Daily Report” (Exhibits A-10-9, A-10-10, A-10-11) and the individual observing her actions during the period in question. (Suzie Marcotte did not testify.)

On January 6, 1996, Bibianne Boulay read the above-mentioned documents. However, she did not file an “application for adjudication and extension of time” (Exhibit A-17) with the Board until May 29, 1996. According to her testimony, she became persuaded on January 6, 1996 that the elimination of her position in 1989 was a disguised discharge.

Following are the events that took place between January 6 and May 29, 1996.

On January 8, 1996, after consulting lawyer Serge Lessard, Bibianne Boulay notified (Exhibit A-11) the Marie-Andrée Laforce employment agency that she wanted \$115,400 for breach of contract.

In the weeks that followed, she learned that Mr. Lessard had stopped practising law, and that her file had been turned over to another firm. She was finally successful in recovering her file on March 6, 1996.

On March 7, 1996, she consulted François Leduc.

On March 8, 1996, Mr. Leduc wrote (Exhibit A-13) to the Professional Institute of the Public Service of Canada (“the Professional Institute”) and the assistant warden

of the Donnacona penitentiary, informing them that he had been given a mandate to file a discharge grievance and asking them to refer that grievance to adjudication.

On March 20 or 21, 1996, Bibianne Boulay met with counsel from the Professional Institute and discussed the matter.

On March 22, 1996, Robert Chaput (Exhibit A-14) replied to François Leduc, saying that Bibianne Boulay had not been discharged, but that her position had been eliminated in 1989, that she had received a lump-sum payment, and that she could not file a grievance or refer a grievance to adjudication.

On March 27, 1996 the lawyer from the Professional Institute wrote (Exhibit A-12) to Bibianne Boulay stating that, in her opinion, it would be difficult if not impossible to convince an adjudicator that the elimination of her position constituted disguised discharge, and that, as a result, the Professional Institute would not represent her.

On April 12, 1996, Mr. François Leduc (Exhibit A-15) asked the Public Service Commission to allow an application for extension of time in order that Bibianne Boulay's discharge grievance might be referred to adjudication.

On May 9, 1996, the Public Service Commission replied (Exhibit A-16) to Mr. Leduc that several attempts had been made to contact him (April 25, May 2 and 8, 1996) but that he had not returned the calls, and that applications for adjudication were to be filed with the Public Service Staff Relations Board.

Finally, on May 29, 1996, this Board received an "application for adjudication and extension" (Exhibit A-17). On May 31, 1996, we received a document entitled "Grievance" (Exhibit A-18).

The employer produced Serge Doyon, a staff relations adviser for the Correctional Service's regional administration, as a witness. Mr. Doyon submitted a directive from the Commissioner (Exhibit E-11) concerning delegation of authority in matters of labour relations. This directive enumerates the positions that constitute levels of the grievance procedure. According to the witness, Robert Chaput, the assistant warden at Donnacona, did not constitute such a level, and consequently was not in a position to reply to a grievance. Serge Doyon testified that, despite the fact

that “assistant warden” is mentioned in paragraph 4, page 3 of the directive, in actual fact, although assistant wardens have authority in disciplinary matters, they do not constitute levels in a grievance procedure.

Arguments

Following is a summary of Bibianne Boulay’s claims.

According to her counsel, we must decide whether there are grounds to allow the application for an extension of time in which to file the grievance or, if it is determined that the grievance has been duly filed, to refer it to adjudication.

The facts of 1989 were such that Bibianne Boulay may have believed that her position had been eliminated. However, when in August 1995 she lost an opportunity offered by the Laforce agency to go back to work at Donnacona, she was naturally surprised to learn from Marie-Andrée Laforce that the assistant warden was opposed to her return. This revelation, in addition to her discovery in early January 1996 of the three documents in question (Exhibits A-10-3, A-10-5, A-10-9, A-10-10, A-10-11), cast another light on the events of 1989 and gave rise to doubts.

The earliest date that can be used for calculating the deadline is January 8, 1996, as prior to that time Bibianne Boulay was attempting to determine the facts. This being said, on January 8, 1996 she did not receive suitable professional advice, and her first counsel then ceased practising. It must be concluded that, as a result, it was impossible for her to act.

Furthermore, she made several attempts between January 8 and March 7, 1996, at which time she consulted a second lawyer. The period between these two dates should not be counted; the law society should have gotten involved.

Therefore, the deadline must be recalculated as from the day that Bibianne Boulay met with her second lawyer—March 7, 1996. The letter of March 8, 1996 (Exhibit A-13) addressed to the Professional Institute and the assistant warden of the penitentiary acts in lieu of a grievance. Under the terms of section 72(1) of the Regulations, the assistant warden should have referred that letter to the final level of the grievance procedure. He did not do so. Rather, he himself answered the letter on March 22, 1996. The deadline by which the employer should have replied to the final

level was April 1, 1996. Bibianne Boulay had 25 days from March 22, 1996 or from April 1, 1996 in which to refer her grievance to adjudication. At the latest, therefore, she would have had to act by either May 3, 1996 or May 13, 1996. Although the referral was made on May 29, 1996, the fact that Bibianne Boulay's lawyer mistakenly contacted the Public Service Commission on April 12, 1996 instead of the Public Service Staff Relations Board must also be taken into account.

The arguments of counsel for the employer may be summarized as follows.

There was no grievance, and as a result, Bibianne Boulay's application can only be an application to file a grievance, and not one to refer a grievance to adjudication. Although the grievance form is not cast in stone, the elements listed in section 70 of the *Regulations* must be present. The letter of March 8, 1996 (Exhibit A-13) contains neither these facts nor the remedy sought. The items contained in the document (Exhibit A-18) filed with the Board should have been contained in the letter of March 8, 1996 (Exhibit A-13). In short, the letter of March 8, 1996 to the assistant warden is merely a letter of intent, in which future recourse was mentioned.

In 1989, Bibianne Boulay learned from her performance appraisal (Exhibit E-2) that her employer felt that certain aspects of her performance (interpersonal relations) required improvement. Consequently, she should have asked to consult her file in 1989. Allowing her access to the grievance procedure six years after she resigned would create instability. The documents discovered in 1996 and the loss of the job offer from the Laforce agency should not be accepted as grounds for a claim.

Furthermore, even if it is determined that these two factors do constitute new information allowing her to file a grievance, it must be noted that on January 6, 1996, Bibianne Boulay was aware of these facts and that she should have acted on that date. However, instead of filing a grievance at that time, she decided to take action against the Laforce agency. In so doing, she made her choice as to priorities, and this choice should not be allowed to burden the employer. She did not demonstrate diligence on January 8, 1996 or on March 8, 1996 (Exhibit A-13) when, through her second lawyer, she contacted the Public Service Commission instead of the Public Service Staff Relations Board. One might even contend she should have taken action in September 1995.

Jurisprudence cited: *Odette Béliveau and Treasury Board* (Board file 166-2-11937); *Walter Stubbe and Treasury Board* (Board file 149-2-114) (Federal Court of Appeal file A-130, 93); *Keith Rattew and Treasury Board* (Board file 149-2-107); *Yvon Labelle and Treasury Board* (Board files 149-2-119 and 166-2-21900); *Wayne Miller and Treasury Board* (Board file 166-2-27258); *Leo E. O'Neill and Treasury Board* (Board file 166-2-3109).

Reasons for Decision

The application is dismissed for the following reasons.

Bibianne Boulay resigned on August 19, 1989 (Exhibit E-6). Seven years later, she began to suspect she had been discharged. According to her testimony, these suspicions were based on the perusal of three documents (Exhibit A-10) received in January 1996 which, as she interpreted them, may have indicated a discharge.

Bibianne Boulay began to believe that the elimination of the position (Exhibit A-4) she had occupied in April 1989, followed by the layoff in October 1989, could have in fact been a disguised discharge.

I had difficulty following this logic, as after the announcement of the elimination of the position, Bibianne Boulay received four offers of employment from her employer. She accepted the fourth offer and went to work in Ste-Anne-de-Bellevue. It was her own decision to leave this last position and submit her resignation (Exhibit E-6).

It seems to me that the offers of employment from her employer, together with her acceptance of the position in Ste-Anne-de-Bellevue and eventual resignation, are, at least *a priori*, incompatible with the intent and actual fact of a discharge, and that furthermore, her own bargaining agent's legal counsel advised her accordingly (Exhibit A-12).

Regardless, and without prejudice to the merits of this aspect of the case, Bibianne Boulay wishes to file a grievance with the Board seven years later.

Her position gets complicated, as the deadline for filing a grievance with her former employer and referring the grievance to adjudication, once the various steps of

the grievance procedure have been taken, has expired. Bibianne Boulay would therefore like the Board to grant her an extension of time, either to file a grievance with the employer or refer it to adjudication, if the Board concludes that it has already been duly filed.

I am of the opinion that no grievance was duly filed with the employer and that the letter (Exhibit A-13) of March 8, 1996 cannot act in lieu of a grievance. This letter was sent to two parties: the employer and the union. This very fact makes it ambiguous. Next, it requests that Bibianne Boulay's grievance "be referred to adjudication," when at this stage neither the union nor the employer is responsible for doing so, as the grievance must first be filed with the employer. Lastly, the letter (Exhibit A-13) does not contain any of the elements (in particular, the details of the situation in question and the remedy sought) that would make it possible to consider it a grievance. As a result, I conclude: (1) that no grievance was duly filed with the employer; (2) that the present application is an application to file a grievance with the employer; and (3) that the referral to the Board on May 29, 1996 was premature, as no grievance had been duly filed with the employer.

This being said, should we allow an extension of time in which to file a grievance with the employer?

Let us assume that the starting point for calculating the deadline by which Bibianne Boulay should have filed a grievance with her former employer was January 6, 1996, as according to her testimony this was the day she learned of the "facts" that led her to conclude that the elimination of her position was in fact a disguised discharge, these "facts" being the remarks in the documents obtained under the terms of the *Privacy Act*.

What did Bibianne Boulay do after January 6, 1996? She successively hired two lawyers: the first notified (Exhibit A-11) the Laforce employment agency that she was seeking damages for breach of contract; the second limited himself to asking (Exhibit A-13) the union and the employer to refer a discharge grievance to adjudication.

In the first case, the notice (Exhibit A-11) has been deferred. In the second, both the employer and the union declined (Exhibits A-12 and A-14) the request.

It was only on April 26, 1996 that the second lawyer drew up a grievance (Exhibit A-18) containing a summary of the facts and the remedy sought.

Unfortunately, instead of being filed with the employer, the grievance (Exhibit A-18) was referred to two agencies, the first of which suggested recourse to the second. Finally, on May 29, 1996 (Exhibit A-17), an application was made to that second body, the Public Service Staff Relations Board, to extend the deadline in order to refer the grievance to adjudication.

To summarize, Bibianne Boulay put her affairs into the hands of two lawyers as of January 6, 1996. We do not know what was discussed at their meetings, the instructions she gave, or the advice she received. However, it is clear that, as from January 6, 1996, the deadline for filing a grievance was not respected. At the same time, it was on this date at the latest, when Bibianne Boulay learned of the three documents in question (Exhibits A-10-3, A-10-5, A-10-9, 10, 11) that, according to her testimony, she became convinced she had been the subject of a disguised discharge seven years earlier. She should therefore have acted no later than 25 days after this date. This she did not do. The failure to act within established time limits seems mainly due to the disappearance of her first lawyer, although, in the absence of more complete evidence, it is difficult for me to come to a definite conclusion in this regard.

The second lawyer attempted to rectify the situation on March 8, 1996 (Exhibit A-13), but for reasons that remain obscure, did not draw up a grievance until April 26, 1996. What is more, the grievance was not filed with the employer, as it should have been, but referred to a commission that does not have jurisdiction in this type of dispute.

There is no evidence that the omissions and actions of the lawyers were committed in bad faith. However, I do not believe these omissions and actions, which, according to the evidence, seem to be at the source of the delay, can by themselves constitute reasons for extending the deadline in which to file a grievance with the employer. It seems to me that errors committed by lawyers and other employee representatives cannot be the sole ground for extending time limits without running the risk of opening the door to a series of applications citing a variety of oversights as justification for seeking the extension of time limits. In conclusion I feel that in the

present case, the facts as a whole, as submitted, cannot support the conclusion that there are sufficient reasons for extending the deadline in which to file a grievance, and , consequently, the application is dismissed.

Marguerite-Marie Galipeau
Deputy Chairperson

OTTAWA, November 25, 1996

Certified true translation

Serge Lareau