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Public Service Labour Relations Act

Before the Chairperson

BETWEEN

DENIS MARTEL AND DANIEL CARROLL

Applicants

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Martel and Carroll v. Treasury Board (Correctional Service of Canada)

In the matter of applications for an extension of time referred to in paragraph ~~61(b)~~ of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Michele A. Pineau, Vice-Chairperson

For the Applicants: Céline Lalande and Robert Deschambault, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN

For the Respondent: Mark Sullivan, Treasury Board Secretariat

Decided on the basis of written submissions filed November 20, 2006.
(P.S.L.R.B. Translation)

Applications before the Chairperson

[1] This decision deals with the power of the Chairperson of the Public Service Labour Relations Board ("the Board") to refer a grievance to an adjudicator or a board of adjudication, as the case may be, when the grievance has not been presented at the final level of the grievance process before being referred to adjudication, contrary to section 225 of the *Public Service Labour Relations Act* ("the *Act*").

Context of the applications

[2] Denis Martel and Daniel Carroll ("the applicants") are Sainte-Anne-des-Plaines correctional officers. Each presented an individual grievance on November 21, 2005 and February 27, 2006, respectively, because of second-hand tobacco smoke in their workplace. According to the applicants, the employer has not taken any steps to prevent exposure to second-hand smoke, which is still ongoing. The applicants submit that the employer's failure to take action is in violation of clause 18.1 of the collective agreement between the Union of Canadian Correctional Officers and the Correctional Service of Canada, the *Non-smokers' Health Act,* sections 7 and 15 of the *Canadian Charter of Rights and Freedoms,* and section 1 of the *Quebec Charter of Human Rights and Freedoms.*

[3] Clause 20.03 of the collective agreement provides for a three-level grievance process. The applicants' grievances were dismissed by the employer at the first and second levels because, among other reasons, the applicants had not presented their grievance within 25 days of first becoming aware of the action or circumstances giving rise to the grievance (clause 20.10). In the case of Mr. Martel, it is alleged that exposure to second-hand smoke began in 2000; for Mr. Carroll, it is alleged that exposure began in 1989.

[4] The steps taken for Mr. Martel's grievance were as follows:

- The grievance was presented at the first level on November 21, 2005.
- The employer replied at the first level on December 22, 2005.
- The grievance was presented at the second level on January 27, 2006.
- The employer replied at the second level on February 9, 2006.
- The grievance was referred to adjudication on April 13, 2006.
- The notice of reference to adjudication was received by the employer on May 3, 2006.

- The grievance was presented at the third level on May 18, 2006.
- There has been no reply from the employer at the third level.

[5] On June 1, 2006, the employer raised an objection on the jurisdiction of an adjudicator to hear this matter in light of the failure to meet the time limits of the grievance process.

[6] The steps taken for Mr. Carroll's grievance were as follows:

- The grievance was presented at the first level on February 27, 2006.
- The employer replied at the first level on March 13, 2006.
- The grievance was presented at the second and third levels on April 6, 2006.
- The employer replied at the second level on April 12, 2006.
- There has been no reply from the employer at the third level.
- The grievance was referred to adjudication on May 19, 2006.
- The notice of reference to adjudication was received by the employer on June 16, 2006.

[7] On June 27, 2006, the employer raised an objection regarding Mr. Carroll's grievance.

[8] On July 10, 2006, on behalf of the applicants, the bargaining agent responded to the employer's objections regarding a failure to meet the time limits in the two cases, alleging that the grievances were repetitive and continuous in nature and it was within the jurisdiction of an adjudicator to hear the matters.

[9] Since the grievances had not been presented at all the levels required by the grievance process, the Chairperson contacted the parties on September 6, 2006, and asked them to submit written responses to the following questions:

1. *Given subsection 209(1) and sections 225 and 241 of the* Public Service Labour Relations Act, *can the Acting Chairperson refer the grievances to an adjudicator if the grievances have not been presented at the final level of the grievance process before being referred?*

2. *If applicable, how does the presentation of grievances at the final level of the grievance process, after the grievances have been referred to adjudication, affect their reference to adjudication?*

Summary of the arguments

[10] The applicants have not submitted responses to the questions.

[11] The employer submits that Mr. Martel's grievance was referred to adjudication on April 13, 2006 but was not presented at the third and final level of the grievance process until May 18, 2006. Therefore, the grievance could not validly be referred to an adjudicator.

[12] However, in Mr. Carroll's case, the employer points out an irregularity, in that the transmittal of the grievance to the second and third levels occurred on the same day, April 6, but the reply at the second level was sent on April 12, 2006. Nevertheless, since the reference to adjudication on May 19, 2006, took place after the presentation of the grievance at the final level, the employer does not object to the grievance being referred to an adjudicator.

[13] After receiving the employer's submissions, the Chairperson again sought the position of the applicants; however, no response has been received.

[14] Under section 45 of the *Act*, the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions in hearing this matter on the basis of written submissions under section 225 of the *Act*.

Reasons

[15] Paragraph 223(2)*(d)* of the *Act* sets out the authority of the Chairperson of the Board, or, in this case, the undersigned Vice-Chairperson, to refer a grievance to an adjudicator:

> *223. (2) On receipt of the notice by the Board, the Chairperson must*
>
> . . .
>
> *(d) . . . refer the matter to an adjudicator designated by the Chairperson from amongst the members of the Board.*

However, this authority is subject to section 225 of the *Act*, which states the following:

> *225. No grievance may be referred to adjudication, and no adjudicator may hear or render a decision on a grievance, until*

> *the grievance has been presented at all required levels in accordance with the applicable grievance process.*
>
> [Emphasis added]

Therefore, section 225 of the *Act* limits the authority of the Chairperson to refer a grievance to an adjudicator, if the grievance in question has not been validly presented at each level of the grievance process.

[16] Moreover, under section 95 of the *Public Service Labour Relations Board Regulations* ("the *Regulations*"), the employer may raise an objection based on the failure to meet a time limit prescribed in a grievance process after the grievance has been referred to adjudication. Section 95 of the *Regulations* reads as follows:

> *95. (1) A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication,*
>
> *(a) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the presentation of a grievance at a level of the grievance process has not been met; or*
>
> *(b) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.*
>
> *(2) The objection referred to in paragraph (1)(a) may be raised only if the grievance was rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason.*
>
> . . .

[17] Since the employer, in its reply to the two grievances in question at the first and second levels of the grievance process, raised an objection on the grounds that the initial time limit for the presentation of a grievance had not been met, the employer may raise this objection again with respect to the reference to adjudication. The employer raised an objection within 30 days of receiving the notices of reference to adjudication. At first glance this objection, raised within the prescribed time limit, appears to constitute grounds for barring the reference of the grievances to an adjudicator.

[18] After review of the grievances in question, including the employer's replies at the first and second levels, I am of the opinion that, based on the files before me, there

is an arguable case that the grievances were presented within the applicable time limits. Therefore, aside from the following analysis on the effect of section 225, the employer's objection on the failure to meet the time limit for presenting the two grievances at the first level of the grievance process is a matter that must be decided by an adjudicator, if required. Therefore, the two grievances may be referred to an adjudicator.

[19] What remains is to determine whether or not the reference to adjudication of each of the two grievances is in accordance with section 225 of the *Act.*

[20] First, let us consider the case of Mr. Carroll. The employer raised an objection on June 27, 2006, on the grounds that a technical irregularity occurred when the grievance was presented simultaneously at the second and third levels of the grievance process. Note that the employer did not raise this irregularity in its reply at the second level, nor at the third level, since there was no reply. Since the employer concedes, in its written submissions of November 17, 2006, that the reference to adjudication on May 19, 2006, took place after the presentation of the grievance at the final level, I am of the opinion that this technical irregularity does not invalidate the reference to adjudication process under section 241 and, therefore, that Mr. Carroll's grievance can validly be referred to adjudication.

[21] The case of Mr. Martel is somewhat different. Mr. Martel advanced his grievance to adjudication before presenting it at the final level of the grievance process. However, section 225 is clear: No grievance may be referred to adjudication under subsection 209(1) until the grievance has been presented at all the required levels in accordance with the applicable grievance process. Mr. Martel has given no reason to justify his failure to comply with section 225.

[22] Moreover, section 241 states that a defect in form or technical irregularity cannot be used to invalidate proceedings under the *Act:*

> ***241.*** *(1) No proceeding under this Act is invalid by reason only of a defect in form or a technical irregularity.*
>
> *(2) The failure to present a grievance at all required levels in accordance with the applicable grievance process is not a defect in form or a technical irregularity for the purposes of subsection (1).*

[23] That exception is new law. Before applying it, it should be pointed out that the English and French versions of subsection 241(1) are not identical and that the difference is worth explaining. The French version refers to proceedings "prévues par la présente partie . . . ," "présente partie" being Part 4 of the *Act*. The English version refers instead to proceedings "under this Act . . . ," an application that is significantly broader than the French version.

[24] The meaning of this provision must be found in its context, in order to determine the version that seems to be more consistent with the purposes of the *Act*. The French version of section 241 applies only to Part 4 of the *Act*, which includes only general provisions that do not involve any proceedings. Therefore, it would be meaningless to apply the exception in section 241 only to Part 4. One of the principles of the interpretation of statutes is that Parliament does not speak needlessly.

[25] The preamble of the *Act* states that one of the goals sought by Parliament is the fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment. In this regard, Parliament has decided that a proceeding should not be invalidated by a simple technical irregularity if the proceeding is otherwise valid. How can one then justify limiting section 241 to Part 4, as is done in the French version? A contextual interpretation of the *Act* leads us to favour the English version of this section; that is, that the exception for a defect in form or technical irregularity applies to all proceedings under the *Act*. In my view, the English version of section 241 conveys the true intention of Parliament, rather than the more restrictive wording of the French version, which goes against the purpose of the exception set out in section 241.

[26] Given this clarification, subsection 241(2) of the *Act* clearly states that the failure to present a grievance at all levels of the grievance process is not a technical irregularity that would make it possible to circumvent the requirements of section 225. The wording of section 241 does not give the Chairperson authority to refer a grievance to an adjudicator if the grievance has not been presented at all required levels. Therefore, the fact that Mr. Martel advanced his grievance to adjudication before he had completed the grievance process invalidates the reference to adjudication of his grievance.

[27] For all of the above reasons, I make the order in paragraphs [30] and [31].

Observations

[28] Mr. Martel's grievance presents a special situation. This grievance is one of 50 grievances dismissed by the employer at the first and second levels of the grievance process on the grounds that they did not meet the time limits of the grievance process set out in the collective agreement. However, the employer failed to decide on these grievances at the third level within the time allowed, which suggests that it is not distinguishing between these grievances.

[29] Given that Mr. Martel's grievance is identical (except for the alleged date of exposure to second-hand smoke), and that the workplace of the applicants in question is the same, it appears to me that there would be no prejudice to the employer if the same approach were used for Mr. Martel's grievance as will be used for the other grievances, even though, for the purposes of this decision, Mr. Martel does not have access to the adjudication process provided for by the *Act*.

Order

[30] I declare that Mr. Carroll validly advanced his grievance to adjudication, and I refer his grievance to an adjudicator.

[31] I declare that Mr. Martel did not validly advance his grievance to adjudication, and I order that Board file 566-02-276 be closed.

April 5, 2007.
P.S.L.R.B. Translation

Michele A. Pineau,
Vice-Chairperson