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Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

IAN STURDY

Applicant

and

DEPUTY HEAD
(Department of National Defence)

Respondent

Indexed as
Sturdy v. Deputy Head (Department of National Defence)

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

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson

For the Applicant: Himself

For the Respondent: Simon Kamel, counsel

Decided on the basis of written submissions
filed February 15 and March 14 and 21, 2007.

I. Application before the Chairperson

[1] Ian Sturdy is an indeterminate excluded employee with the Department of National Defence (DND) at the GL-COL12D5 group and level. He referred a grievance to adjudication on May 15, 2006. The referral to adjudication alleges that the grievance relates to a disciplinary action resulting in termination, demotion, suspension or financial penalty. The grievance alleges that the DND had failed to acknowledge his right to representation at a third-level grievance hearing. That hearing occurred on October 14, 2003, and Mr. Sturdy presented his grievance on October 20, 2005. The Deputy Head of the DND ("the respondent") has objected to the reference to adjudication on the basis that the grievance was not timely and that an adjudicator is without jurisdiction to hear its merits. Mr. Sturdy has applied for an extension of time to file a grievance.

[2] Mr. Sturdy requested that the application for extension of time be dealt with by written submissions. The respondent agreed with this request, and the Chairperson ordered that the application be decided on the basis of written submissions. The parties were directed to respond to the following issues:

. . .

> 1) *Has the grievance been presented at the first level of the grievance process within the time limit set out in the* Public Service Staff Relations Board Regulations and Rules of Procedure, 1993 *(the* Regulations*)? In the affirmative, explain the reasons why.*
>
> 2) *If the grievance has not been presented within the time limit set out in the* Regulations*, for what reasons should the Chairperson grant the grievor an extension of time for presenting the grievance at the first level of the grievance process*. . . .

. . .

[3] The Chairperson requested that the parties address the criteria for determining whether or not to grant an extension of time set out in *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101. Those criteria are as follows:

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the applicant;

- balancing the injustice to the applicant against the prejudice to the respondent in granting an extension; and

- the chance of success of the grievance.

[4] I was appointed under section 45 of the *Public Service Labour Relations Act* to exercise the Chairperson's powers as specified in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") for the hearing and determination of the application for an extension of time.

II. Summary of the arguments

[5] The written submissions of the parties are set out below and have been edited for length and style. The full submissions are on file.

A. For Mr. Sturdy

[6] Mr. Sturdy filed the following written submissions on February 15, 2007:

. . .

> *Submissions on timeliness*
>
> Background Facts
>
> *My grievance ["Grievance 0099"] is the subject of this Reference to Adjudication; however, in order to fully appreciate the context in which this grievance arises, some review of the facts and circumstances pre-dating my initiation of Grievance 0099 is required. In particular, some review of an earlier grievance, to wit ("Grievance 0085"), is necessary, as Grievance 0099 relates specifically to the* [DND's] *failure to acknowledge or provide me with advice about my rights to an advisor at the third level telephone hearing of Grievance 0085, much less provide actual representation or the means to actually retain representation. The lack of an advisor or representation at this hearing, which concerned my dispute of the discipline imposed on me for alleged harassment, adversely affected my ability to grieve the discipline that resulted, among other things, in my continued suspension from my position as Business Manager and demotion to another non-supervisory position which among other things deprived me of the opportunity for acting pay. This discipline, meted out by Base Construction Engineering Officer Lt. Col. Arsenault (now retired) October 18th, 2002, was the subject of Grievance 0085.*

Grievance 0085

Grievance 0085 was initiated by me at the suggestion of Lt. Col. Paul Arsenault after I made inquiries as to what my options were with respect to challenging the administrative action taken by Lt. Col. Arsenault. At all times the [DND] *was aware of my intention to continue to challenge any findings of wrongdoing on my part and challenge my continuing suspension from my position as Business Manager. However, as I was without representation, being an excluded employee, it was a difficult process for me, and for management evidently, to readily determine what my rights were in any given situation and how those rights, if any should be properly exercised. This led to delays by management which are fully acknowledged and delays in some cases by me while I struggled to determine what my rights were as an unrepresented excluded employee.*

I was advised [by the DND] *to grieve Lt. Arsenault's decision of October 18th 2002. This was nine months later and well beyond the technical timelines of the grievance procedures but nonetheless with the blessing of a senior Human Resources Officer. Also you will note, the grievance was not heard at either first or second level but rather went directly to the third level.*

Grievance 0085 was heard by Kevin Marchand with my attending the hearing, such as it was, by telephone and a decision was rendered December 30th, 2003, stating that it was out of time and signed by Diane McCusker [Director General, Employee Relations]. *A letter was subsequently sent by management in Esquimalt stating that the grievance should be allowed on its merit as Management had held this up not the Employee. I wrote my own letter dated January 19th, 2004 to Diane McCusker with the same information.*

I then received another fresh letter from Diane McCusker dated January 22nd, 2004 that stated the grievance was denied based on its merits and not for lack of timeliness *the position taken in Ms. McCusker's original letter of December 30th, 2003.*

Prior to the grievance hearing conducted by Marchand in October 2003 another grievance was submitted by me based on the delay it took to get a 3rd level response to the original grievance. Ms. McCusker's response of June 25th, 2004, includes the following passage in which Ms. McCusker acknowledges the DND's problems in responding to my grievances in a timely fashion:

> *It has always been our focus at DGER to reply to grievances in a timely manner. I appreciate you bringing to my attention the delays in reply to your particular grievance.* As such, I have looked into your grievance specifically and with a view to addressing future grievance timeliness, developed processes that will improve response time.
>
> *[Emphasis added]*

As a direct result of this decision, and the lack of cooperation with management at Esquimalt and NDHQ legal action was filed August 2004 in the Supreme Court of British Columbia and brought forward in an attempt to prompt a resolution of the ongoing issues that were not being addressed through the existing administrative structure. Among other things I continued to be suspended from my position as Business Manager. The initiation of my legal action did not result in a settlement or resolution of the outstanding matters and when the ruling by the Supreme Court of Canada in Vaughn v. Canada *2005 SCC 11 came down it became doubtful that proceeding with my court action would lead to any more than a ruling that the PSLRB had exclusive jurisdiction. Substantial resources were devoted the legal action before the* Vaughn v. Canada *decision came down.*

I then redirected my energy to seeking a remedy within existing administrative structures as I felt that was my only possible avenue.

Grievance 0099

In October 2005 I filed grievance 0099 and a decision at first level was rendered on or about November 3rd, 2005. Lt. Moore commented as follows:

> *3. Although your grievance is untimely, I feel that it should be addressed on its merits at the appropriate level.*

The third level grievance consultation was held on February 22nd 2006 with the formal response from Ms. McCusker by way of letter dated April 10th, 2006.

Being an excluded employee, there is no help. I stumbled across the Public Service Labour Relations Board and corresponded with [PSLRB staff] *in an effort to resolve the still outstanding issues. As a direct result, my application for adjudication was filed May 10, 2006 based on the lack of advisors for excluded employees and the fact I was subjected to financial hardship over the past 6 years.*

The issues

> Issue 1: Has the grievance been presented at the first level of the grievance process within the time limit set out the in Public Service Staff Relations Board Regulations and Rules of Procedure, 1993 (the Regulations)? If in the affirmative, explain the reasons why.

The grievance was not submitted within the 35 days set out in the Regulations.

> Issue 2: If the Grievance has not been presented within the time limit set out in the Regulations, for what reasons should the Chairperson grant the grievor an extension of time for presenting the grievance at the first level of the grievance process. The parties are requested to address the criteria mentioned at 2006 PSLRB 101, paragraph 36.

My submission with respect to each of the criteria mentioned at 2006 PSLRB 101*, paragraph 36 of the decision of the PSLRB in* Rabah v. Treasury Board (Department of National Defence) *is as follows:*

Clear, cogent and compelling reasons for the delay

The delay in my filing of this grievance is the result of multiple and ultimately unsuccessful efforts to have the matter of representation for excluded employees addressed through other avenues including, the Minister of National Defence through my local MLA, the Office of the Ombudsman for National Defence and Canadian Forces (NDCF), the Civilian Forces Legal Advisor (CFLA), the Treasury Board, the Public Service Integrity Office (see heading "Due diligence" below) and as a last resort legal action I had to finance myself, which was commenced in August of 2004 (British Columbia Supreme Court Action No. 04-3552, Victoria Registry). It was not until after the Vaughn v. Canada *decision was released in 2005 that the law was clarified and it became apparent that my only recourse would be through the PSLRB under the* Public Service Staff Relations Act*. I note that the* Vaughn *case was central to the* Rabah *decision.*

I had attempted, without luck, to clarify my rights if any under the PSSRA *to adjudication as early as the Spring of 2004. In an email reply of April 19th 2004* [to PSSRB staff] *I posed the question:*

> *…according to the PSSRA definition of employee I do not fall on under this one either.* So with that thought, should a confidential exclude even present a grievance when they have a dispute with Senior Management? Or is there another mechanism in place? This is a real mess from the beginning of what is a 39 month ordeal. Don't get me wrong, I am not looking for advice. Just some answers.
>
> *[emphasis added]*

The reply [from PSSRB staff] *was in part: "I am unable to go any further and to provide you with answers to your two latest e-mails since doing so would constitute advice."*

I consistently and diligently sought direction as to my avenues of recourse and used my best judgment to pursue any and all options I thought may be available to me.

While the position of [PSSRB staff] *may have been understandable, I cannot be faulted for having attempted to raise and resolve the matter of representation for excluded employees through other avenues before the Supreme Court of Canada ruled in* Vaughn *that my only recourse was to the mechanisms of the* PSSRA.

It would seem unjust to deprive me of the opportunity to be heard by enforcing the timeliness provisions of the grievance mechanisms when I was expressing to any and all who would listen that I did not know what my rights were as [an] *excluded manager. Evidently the Supreme Court of Canada felt this issue was sufficiently unclear as to hear and decide the* Vaughn *case.*

The length of the delay

Throughout the period of January 2004 (when the third level grievance decision was handed down) and October of 2005 I diligently pursued my complaints about the lack of representation for excluded members, the particulars of which are set out below under the heading of "Due diligence."

I persistently complained that my rights generally, and specifically my rights under the PSSRA *were unclear. I sought clarification but did not receive it.*

It was not until the Vaughn *case that this area of uncertainty was given some clarity. Following the* Vaughn *case I made the difficult decision to discontinue my legal action and pursue the only remaining avenue, grievance and adjudication under the* PSSRA.

As in Rabah, *and maybe more so in this case I was "…preoccupied with seeking a remedy every step of the way…" [para 26], a fact which the Employer was at all times fully aware of. At no time did I do anything to suggest that I was dropping the matter.*

Due diligence of the applicant

What follows is a point form summary of some but not all of the due diligence efforts I made to address the matter of representation for excluded managers:

- *Reference to the Ombudsman, letter from the Ombudsman's office of June 8th, 2006, representation for excluded employees was an issue*

> *In our last letter to you dated March 18th, 2004, we explained that the mandate of this Office specifically prohibits the Ombudsman's Office from investigating any matter that falls within the jurisdiction of the Treasury Board under the* Public Service Staff Relations Act. *As your concerns relate specifically to staff relations matter, I have to reiterate that we do not have jurisdiction to intervene further in your case.*
>
> *…*
>
> *You report as well that the CFLA has stalled on a decision regarding expenses. This Office is not involved in discussions with CFLA in regard to expenses, and you are encouraged to address your concerns to that office.* With regard to the question of representation for excluded managers, we reported to you in our letter of February 2004, that we raised them with the Senior Harassment Advisor, Director General of Employee Relations. That office continues to be a point of contact regarding this issue.
>
> *[emphasis added]*

- *Legal action commenced August 2004 only a few months after the third level decision in Grievance 0105.*

- *Letter to the Minister of National Defence and reply dated May 10th, 2006, includes the following:*

> *…Departmental staff inform me that your active grievances, including the ones concerning the representation issue, continue to be addressed.*

- *Letter to Minister of National Defence from Denise Savoie dated May 25th, 2006, at the behest of myself.*

- *Letter to the Public Service Integrity Office (PSIO) and reply.*

- *Inquiries* [to PSSRB staff] *in the spring of 2004 and* [to PSLRB staff] *in the spring of 2006.*

My diligent efforts to have this matter dealt with are beyond question and satisfy the due diligence standard in Rabah.

Balancing the injustice to the applicant against the prejudice to the employer

As in Rabah, *the decision in* Vaughn, *confirms that my only recourse is a grievance under the* PSSRA. *Moreover, given the diligent but unsuccessful efforts of myself to have this matter addressed by other means, the refusal of a grant of extension of time for filing* [a] *grievance will decisively cut off my only remaining avenue of recourse based* [on] *a formality as opposed to the substance of the matter, a position Lt. Moore hearing the grievance for the first time was not comfortable with:*

> *3. Although your grievance is untimely, I feel that it should be addressed on its merits at the appropriate level.*

The Employer has repeatedly acknowledged its own lengthy delays in this matter from the beginning of the harassment process, so it would seem unfair to punish one party for failing to observe a strict timeline when the other party acknowledges its substantial delays in dealing with the "complex matter."

Chance of success of a grievance

As in Rabah, *the chance of success of a given grievance is impossible to determine with certainty on such an application, that much more difficult on written submissions alone.*

However as I set out in the body of my grievance and the Reference to Adjudication, I was given no advice as to my rights if any to representation at the hearing before

> *Marchand, neither was any representation made available to me before the hearing.*
>
> *The* [DND] *does not deny that I was not advised of any rights to representation at the third level grievance but states only that the* [DND] *had no obligation to advise me of my rights much less provide an advisor or a representative.*
>
> *Conclusion*
>
> *It must be noted for the record, during the two lengthy harassment allegation and investigation processes, several times I made direct inquiries to the Human Resources Department in Esquimalt about the issue of representation for excluded managers. In a disciplinary decision meeting Ms. Nevile stated there was a group in Ottawa and she would advise. One month passed, Ms. Nevile stated there was no representation for excluded employees. While researching this very topic, I came across the Treasury Board Web site with a policy on advisors for excluded managers. This process was implemented by Treasury Board but allowed individual Government Departments* [to decide] *whether they wanted to participate. While several departments did sign on, National Defence did not participate. Prior to my harassment ordeal, Treasury Board must have realized by the effort they demonstrated at their website, there was a serious hole in the system.*
>
> . . .
>
> [*Sic* throughout]

B. For the respondent

[7] On March 14, 2007, the respondent filed the written submissions that follow:

> . . .
>
> *1. It is clear from the evidence and Mr. Sturdy's submissions that his grievance was not presented within the time limit set out in the* Public Service Staff Relations Board Regulations and Rules of Procedure, 1993*. The question then becomes whether the grievor should be granted an extension of time for presenting the grievance at the first level of the grievance process. In order to respond to this question, we will address the criteria set out in* Rabah v. Treasury Board (DND)*, 2006 PSLRB 101, at paragraph 36. Of critical importance in this matter is the fact that Mr. Sturdy's grievance is clearly not adjudicable to begin with. We will address this issue further, below.*

. . .

Background Information

3. Mr. Sturdy is an indeterminate employee at DND. He is at the GL-COI-12-D5 group and level and his position is excluded from collective bargaining. He has been employed with DND for 27 years.

4. On July 22, 2003, Mr. Sturdy filed a grievance stating:

> *I grieve management's letter of discipline Ref. 6007-1 (BCEO) 18 Oct. 2002 par. 6C in regards to Lt. Col. Arsenault's interpretation of touching an employee on the shoulder to gain his attention as harassment and using the application of Treasury Board Policy in the wrong context. By applying the rules under Treasury Board Policy I am considered at the same parallel of justices as the person with a much greater founded allegation of harassment. This grievance should be heard at 3rd level as the 1st and 2nd level agreed to the application of the Policy".*

The corrective measure sought by Mr. Sturdy reads as follows:

> *Remove the found allegation of harassment. Review the Policy at the Treasury Board level. Provide letter of apology for process.*

5. The letter of "discipline" to which Mr. Sturdy refers to is in fact a written reprimand that was issued on October 18, 2002. His July 22, 2003 grievance (thereafter the "original grievance") was therefore filed some 9 months after the issuance of the written reprimand.

6. This original grievance has been the subject of a third level grievance consultation on October 14, 2003, between Mr. Sturdy and Kevin Marchand, then Employee Relations Operations Officer with DND. Diane McCusker, Director General Employee Relations, issued her response at the third level on December 30, 2003, which was superceded by another letter from Mrs. McCusker on January 22, 2004.

7. On October 20, 2005, Mr. Sturdy filed the instant grievance. In the grievance, Mr. Sturdy states that the Department failed to acknowledge his rights to an advisor at a third level consultation, which was conducted by phone.

8. The October 20, 2005 grievance (thereafter the "present grievance") was denied at the first level of the grievance procedure on November 3, 2005 as it was found untimely. However, the 1st level Grievance Officer agreed to transmit the grievance to the third and final level.

9. Diane McCusker, Director General, Labour Relations and Compensation, denied the present grievance at the final level on April 10, 2006 as it was found to be untimely and as Mr. Sturdy's rights as an excluded employee were not found to have been breached during the third level grievance consultation.

The* Rabah *criteria

10. The facts in the Rabah *case can easily be distinguished from the present grievance. In* Rabah, *Adjudicator Mackenzie stressed the fact that the grievor was preoccupied with serious criminal charges against him and that it was a compelling reason for the delay in filing a grievance. In addition, Mr. Rabah's Union failed to approach him and advise him of his rights under the collective agreement. Obviously, the present grievance does not deal with criminal charges, nor does it deal with a unionized employee. We will explain below how Mr. Sturdy's reasons for the 2-year delay in filing his grievance are far from compelling.*

<u>Clear, cogent and compelling reasons for the delay</u>

11. The delay in filing the grievance is solely based on Mr. Sturdy's actions or inaction. The final level letter to the original grievance expressly stated that there was a 25-day time limit. It states in the second paragraph:

> *An employee may present a grievance not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.*

12. Mr. Sturdy knew, at least from December 2003, that he only had 25 days to file a grievance. Yet Mr. Sturdy made a conscious decision to wait 2 years before filing his grievance, to wit in October 2005. This is clear from his submissions when he states on page 4, paragraph 5, that:

> *As a direct result of this decision, and the lack of cooperation with management at Esquimalt and NDHQ legal action was filed August 2004 in the Supreme Court of British Columbia and brought forward in an attempt to prompt a resolution of the ongoing issues that were not*

> *being addressed through the existing administrative structure.*

13. Mr. Sturdy favored the court process rather than exhausting the internal process. His decision was made knowing full well that an internal process existed and that it was subject to timelines; he chose a completely different avenue. As stated by Justice Binnie in the Supreme Court of Canada decision Vaughan v. Canada*:*

> *The appellant ought to have proceeded with the remedies granted by Parliament under the PSSRA. It was not open to him to ignore the PSSRA scheme and litigate his claim to ERI benefits in the courts by dressing it up as a "negligence" action.*

14. The [DND] *cannot be faulted for Mr. Sturdy's own actions or inactions. This is even more apparent when looking at the efforts made by the* [DND] *to ensure that Mr. Sturdy could consult individuals as to his rights, given his excluded status. For instance, the* [DND] *put Mr. Sturdy in contact with a local union representative in order to seek the information he required. This was initiated as early as November 2002. As indicated in the e-mail to Mr. Sturdy dated Tuesday, November 12, 2002 at 3:21pm:*

> *I (Ms. Neville, Human Resources Manager) did recruit Mr. Fletcher, but as a result of your request for a representative (other than or as well as Capt. Sand), I asked Mr. Fletcher whether he would assist you. My request was to facilitate the process and perhaps enable you not to go to the expense of hiring a lawyer, as you felt you had to. I thought Mr. Fletcher was a good representative, because he was from the local area, not part of CFB Esquimalt (Base), did not know any details of the situation, so he had no pre-conceived opinions, and he is well respected by his peers and Management.*

15. Mr. Sturdy decided to "terminate" the assistance he was receiving from Mr. Fletcher because he felt that he was acting on behalf of the [DND].

16. The [DND's] *letter dated October 18, 2002 indicates that Mr. Fletcher was not Mr. Sturdy's only representative during that period of time. Not only did a DND Officer aid him, but he also retained the services of an attorney. . . .*

17. Mr. Sturdy had several resources available to him to make choices and decisions. Help was made available to him and by having retained the services of an attorney, Mr. Sturdy had the necessary tools to protect his alleged rights by filing a timely grievance. There was only so much effort the [DND] *could deploy to assist Mr. Sturdy; he had to take charge of his own matter. Mr. Sturdy seems to be almost implying in his submissions that the* [DND] *should have taken carriage of his affairs on his behalf.*

18. Former Chairperson Tarte indicated in Jamieson v. Treasury Board (National Defence) *[2002] C.P.S.S.R.B. No. 79 that an employee sometimes holds the key to the successful resolution of his own matters. He stated:*

> *As the old saying goes, you can bring a horse to water but you can't make him drink. The employer made every reasonable effort to help Mr. Jamieson obtain the necessary certificate to continue working at CFB Kingston. For whatever reason, the grievor was not prepared to accept the employer's offers of help and training. Mr. Jamieson could easily have asked for and received additional exposure to steamfitting work. Rather than cooperate with the employer, the grievor resisted any attempt to move him along, putting up obstacles at every opportunity.*

19. Mr. Sturdy did not make reasonable efforts, personally or through his representatives, to submit his grievance within the prescribed time limits.

20. The fact that he chose other avenues to try and resolve the present grievance does not change the fact that he should have proceeded with a grievance at the earliest opportunity in order to protect his alleged rights. We will expand on this issue under the due diligence *heading.*

21. It is interesting to note that Mr. Sturdy's claim with the Supreme Court of British Columbia does not relate to the subject matter of the present grievance. In addition, this claim was filed with the Supreme Court of British Columbia on August 18, 2004, some ten months after the grievance consultation that gave rise to the present grievance.

22. In his submissions, Mr. Sturdy gives an example of how he tried to "clarify" his rights through contacting the PSSRB. He waited until Spring 2004 to do so, and this shows, again, that he did not act expeditiously.

23. In fact, what the above clearly demonstrates is that Mr. Sturdy consciously chose not to file a grievance before 2005. We submit that Mr. Sturdy has simply not provided clear, cogent and compelling reasons for a two-year delay in filing his grievance.

The length of the delay

24. It is important to note that in several Board decisions, the time elapsed in filing a grievance was a very serious consideration. Mr. Sturdy waited 24 months before filing a grievance, as opposed to 14 months in the Rabah *decision. These Board decisions namely include* Anthony and Treasury Board (Fisheries and Oceans Canada) *PSSRB No. 149-2-167*, Wyborn v. Parks Canada Agency, *PSSRB No. 149-33-226 & 166-33-3026 and* Enns v. Treasury Board (Correctional Services Canada), *PSSRB No. 166-2-32552 & 166-2-32554.*

. . .

27. The underlying principle for time limits is stability of labour relations, which would certainly not be achieved if we were to grant Mr. Sturdy with a two-year extension.

The due diligence of the applicant

28. The fact that Mr. Sturdy chose other avenues to try and resolve his matter does not change the fact that he should have proceeded with a grievance at the earliest opportunity. This was made abundantly clear by the Board in Pomerleau v. Treasury Board (CIDA), *PSSRB 166-2-34819. Adjudicator Matteau explained how an employee can certainly explore other means to resolve a dispute, but not to the detriment of the grievance process. She states:*

> *28. Where a right to a formal process exists and is subject to prescriptive extinction, the wiser course will always be to take the informal route only after having secured that formal right. These two approaches coexist quite comfortably as long as one is not employed to the detriment of the other. The informal systems put in place under the Public Service Modernization Act and the systems that were already in place specifically recognize this procedural aspect and the importance of protecting the parties' rights. Provision is made for suspending the formal process. A party cannot be criticized for resorting to the formal process to protect its rights.*

29. He could simply have protected his alleged rights by submitting a grievance and subsequently pursued the avenues he mentions in his submissions. But as Mr. Sturdy explained it in his submissions, he preferred to follow the court process rather than the internal grievance procedures. The [DND] *cannot be faulted for the personal choices made by Mr. Sturdy, especially when he had access to several individuals for guidance, namely his own attorney.*

30. Also, it's important to note that most of Mr. Sturdy's efforts to deal with his matter were done after the filing of the grievance. For instance in his submissions, he mentions a reference to the Ombudsman, a letter to the DND Minister and another letter to the Minister; these actions were all taken in 2006, well after the present grievance. We submit that these actions are simply not relevant to the determination of the due diligence aspect of this case.

Balancing the injustice to the employee against the prejudice to the [respondent] *in granting the extension*

31. In the present grievance, there was no disciplinary action or financial penalty taken against Mr. Sturdy. He did not lose his employment, nor was he demoted. This is quite a different situation than in the Rabah *case, where he had been rejected on probation and was also facing serious criminal charges. Given our comments on the chances of success of the present grievance, we submit that the injustice towards Mr. Sturdy is non-existent. On the other hand, the* [respondent] *would be forced to deploy considerable resources to argue a grievance that was filed some 2 years later. The finality of disputes envisaged in* Wyborn *and* Anthony, *with a time limit of 25 days, would certainly not be respected by proceeding with this case. Also, the stability of labour relations would certainly not be achieved by allowing a 2-year extension to Mr. Sturdy's grievance.*

32. It is clear from Mr. Sturdy's submissions that had the Vaughan *decision been decided differently, he would not have filed a grievance . . . . Therefore, had* Vaughan *not existed, the grievor simply would not have filed a grievance to begin with. As explained in the* Enns *decision, if an employee had no intention to file a grievance then there seems to be no reason to extend the time limits.*

. . .

34. Equally in the present grievance, it would constitute a greater prejudice to the [respondent] *than the employee. The question then becomes whether the Board should even weight the prejudices that might result from a refusal to grant an extension of time. Based on the* Wyborn *case, it*

would seem that in circumstances, such as the present grievance, there is no need to proceed with such an analysis:

> *As Ms. Khanna submitted, the Federal Court of Appeal found that the Board is not required to weight the prejudices that might follow upon the granting or refusal of an extension of time limits when it has found that the grievor had not formed the intention to grieve until after the time to do so had expired. However, if there were such a requirement in the instant case, concerning the prejudice to Mr. Wyborn I would find that the greatest prejudice would be to the employer. Time limits contribute to the stability in labour relations and should not be set aside lightly.*

35. Mr. Sturdy had no intention of filing a grievance and this fact should have considerable weight when analyzing the present criteria.

The chance of success of the grievance

36. The chance of success of his grievance is remote at best. Unlike the Rabah *case, this is not a situation where bad faith could even influence the outcome of the matter. In fact, the present grievance is very academic in nature.*

37. Mr. Sturdy's grievance pertains to the Department's alleged failure to advise him of his right to have an advisor present at his third level grievance consultation held in October 2003. The hearing was held to discuss a grievance on a letter of reprimand issued following a harassment investigation. Mr. Sturdy's position is excluded from collective bargaining; he is therefore not represented by a union.

38. The wording of section 209 of the PSLRA does not support the reference to adjudication of the present grievance. The present grievance does not relate to the interpretation or application of a provision of a collective agreement or an arbitral award or a disciplinary action resulting in a suspension or a financial penalty, or termination of employment or demotion pursuant to the Financial Administration Act.

*39. His original grievance was also academic, since letters of reprimand are not adjudicable and the Board would be without jurisdiction in any event (*Lamarre and Treasury Board (Fisheries and Oceans), *PSSRB File No. 166-2-26902).*

. . .

[*Sic* throughout]

C. Mr. Sturdy's rebuttal

[8] Mr. Sturdy responded to the respondent's submissions on March 21, 2007. His rebuttal submissions are as follows:

. . .

> *1. With respect, the* [respondent's] *submission lacks substance and reflects a fundamental lack of knowledge of the issues. The* [DND] *on its part failed timeliness on a number of issues directly related to this complaint and admitted as much as indicated in my initial submission At one time twenty-six grievances were in the possession of senior management and despite repeated inquires the employer failed to communicate the status of the grievances or establish times for hearing the grievances. This complaint is a continuation of an unfinished process that has gone six years unresolved. At no time did I ever communicate to the* [DND] *anything less than my unwavering resolve to be heard. It is also clear that Treasury Board had identified problems a number of years ago with respect to the lack of representation for excluded employees, but did not force all the government departments to participate but rather made participation in the program voluntary. It is also well established senior management knew of the program and hence the real problem that confronted me throughout this matter as an excluded employee.*
>
> *2.* [The respondent's] *counsel states that I requested my grievance to be heard at 3rd level.* [The respondent's] *counsel failed to communicate that my suggestion was agreed to by the then Base Construction Engineering Officer (Lt. Col. P. Arsenault) and by the Ombudsman investigator as an unbiased method to resolve. It is clear that senior management was embarrassed by the flaws in the whole process and determined to find something that would satisfy the union and complainants. The Ombudsman report and draft copy demonstrated behaviour between management and the union during these investigations that was corrupt and failed the test of transparency.*
>
> *3. In rebuttal* [to] *the* [respondent's] *suggestion that the grievance was not filed until nine months after the issuance of the written reprimand, this grievance arose during the Ombudsman's Investigation of the process, and the investigators involvement to resolve issues through a process called Best alternative to Negotiated Agreement, (BATNA), whereby this grievance was negotiated in an effort to drop the 26 grievances that were still outstanding. This fact was clearly demonstrated in my initial submission.*

4. I strongly disagree [with the respondent's submission] *that the grievor's "…preoccupation with serious criminal charges…" in* Rabah *distinguishes that case from mine, in that my grievance arose in context of serious allegations of harassment against me by co-workers, which allegations ultimately caused the loss of my position to which I will never be permitted to return. The gravity of my circumstances is not comparable to the* Rabah *case. As for my not being a unionized employee, I consider myself to have been somewhere in between management and union given that I was excluded from the Union but still bound by the collective agreement.*

5. It is clear from my initial submissions that my choice to commence legal action was done as a last resort, based on my experience with the internal process and my conclusion that I had, for all practical purposes, exhausted my remedies internally, or at least had done my best to exhaust them, and my only remaining avenue was the Courts.

6. . . . It is apparent that, with respect, the [DND] *does not fully comprehend the issues concerning excluded employees. The excluded group does not have representation nor is the union interested in advising or representing as demonstrated by email. There is no definitive direction and that was a concern of the Ombudsman's office taken up with senior staff at National Defence Headquarters. Staffing officers represent management, even though they fall under the same situation. They would be in a conflict in helping another excluded employee. Even the military have assisting officers assigned to them. It is not fair or accurate to say that I "ignored the PSSRA" system and tried to circumnavigate it through the Courts.*

7. . . . Mr. Fletcher was recruited by Ms. Nevile to help work through the process and 26 grievances that were outstanding. After many inquiries to Mr. Fletcher his answers were, he would have to consult Ms. Nevile. His reply to me was, "he would not have been interested representing me, but was only doing this to help out Ms. Nevile". . . .

8. . . . the statements [in the respondent's submissions] *about representation are out of context. If Mr. Fletcher or Capt Sand were to represent me as an advisor, they were not trained as per Treasury Board directive on advisors for excluded employees. They did not possess the knowledge to provide this service and Capt Sand was in a conflict of interest by falling directly under the command of the Lt. Colonel and certainly not accountable to me. My lawyer was present but at my expense.*

9. . . . The only resources available were the ones I paid for in an administrative process. While I did have the benefit of legal counsel from time to time, at my expense, representation was periodic not continuous. As [an] *excluded, you are on your own. Although management offered a military member to help, he had no experience in civilian processes, especially harassment. The* [respondent's] *counsel, with respect, appears to have little or no understanding or appreciation of the two flawed investigations, the cancellation of a management review and the issues raised by the Ombudsman's Office. It appears others have avenues of recourse but not excluded managers.*

10. . . . Senior management failed to address 26 grievances when presented to them, [and] *they put me through 2 flawed investigations that clearly were tampered with by both the union and management. On top of all of this, the second investigator made comments about me that were untrue and certainly well beyond his mandate.*

11. . . . the [respondent] *fails to acknowledge the time and disparity of the whole process in which the grievance arises.*

12. . . . if you have no representation and no avenues of redress, then as a citizen of Canada under the freedoms and rights I should be accorded every opportunity to address my concerns to the highest officials to demonstrate problems with the system. I have suffered over the past six years by being removed from my position as Mechanical Systems Business Manager. I have lost income from acting pay in high positions and overtime. I have suffered mental stress and anxiety and was acknowledged by the Ombudsman investigator and the Base Construction Engineering Officer with a recommendation that I should receive some compensation for my misfortune.

13. . . . if the chances of success of my grievance are so dim I fail to see why "considerable resources" would have been deployed by the [respondent] *to defend it.*

14. . . . I deny [the respondent's suggestion] *that I did not have the intention to grieve this matter before the* Vaughn *decision. As I stated, I had, I felt, exhausted the internal process and only after the* Vaughn *decision came down was it clear that I had no other recourse but the internal process.*

15. . . . I had filed numerous grievances, before the Vaughn *decision, but without satisfactory result so turned to the Courts only to be turned back when the Supreme Court of Canada rendered its opinion on the option of employees in my circumstances.*

> *16. . . . the nature of . . . the grievance in question is much broader then a mere "…letter of reprimand…". [I have addressed in my initial submissions].*
>
> *17.* [In] *conclusion, the past six years have been most difficult for me personally and financially. Senior management in Esquimalt admitted to flaws in the process highlighted by the Ombudsman's Report. Excluded employees have been left without any advisors in times of misfortune as I have experienced. Even during my interview with Kevin Marchand, he admitted that excluded employees have no where to go. Union members have representation all the way to Ottawa. Military Members have assisting officers and AJAGs office. But the fundamental principles for excluded employees have been forgotten, although Treasury Board attempted to resolve but failed to enforce. The time frame for this particular grievance is one of a kind. Senior management has put me in a position where I have a choice to bury my head or fight the system . . . . The issues are far greater than timeliness of the grievance it is the moral opportunity to correct a wrong and establish once and for all the rights of excluded employees.*
>
> . . .
>
> [*Sic* throughout]

III. Reasons

[9] There is no dispute that Mr. Sturdy filed his grievance after the applicable time limit. In fact, Mr. Sturdy filed his grievance more than two years after the event that he is grieving. I must determine if the circumstances warrant a granting of an extension of time to file his grievance. After reviewing the submissions of Mr. Sturdy and the respondent, I find that an extension of time is not warranted for the reasons set out below.

A. Clear, cogent and compelling reasons for the delay

[10] Mr. Sturdy has not demonstrated a clear, cogent or compelling reason for his delay in filing his grievance. It is clear, however, that he knew about his right to grieve, since the grievance he eventually presented related to a grievance hearing. By his own admission, he had also filed numerous other grievances. Although he may have been uncertain as to his right to representation at a grievance hearing (i.e., the substantial issue of his grievance), he knew about the grievance process and his right to access that process. He also should have been aware of the time limits for filing grievances, as

his earlier grievance was initially rejected by the DND on the basis of timeliness in December 2003. Although the DND later rescinded its rejection of that earlier grievance on the basis of timeliness (in January 2004), Mr. Sturdy was on notice that a grievance could be denied on that basis. Mr. Sturdy has not established why he could not have presented his grievance within the applicable time limit.

[11] Mr. Sturdy relies in part on his court action to justify his failure to file the grievance in a timely manner. Given that he knew of his right to file a grievance, the fact of his having been involved with another legal process is not a cogent or compelling reason for his delay.

B. Length of the delay

[12] The grievance was presented more than two years after the third-level grievance hearing that Mr. Sturdy alleged constituted a breach of his rights. Two years is a significant delay.

C. Due diligence of Mr. Sturdy

[13] Mr. Sturdy knew of his right to grieve, since he had already filed (by his count) numerous grievances. Furthermore, the other actions on which he has relied to demonstrate due diligence in the pursuit of his grievance were all commenced significantly after the event that he is now grieving. He did not demonstrate due diligence in the pursuit of his grievance in the period immediately following the incident that he is now grieving.

D. Balancing the injustice to Mr. Sturdy against the prejudice to the respondent in granting an extension

[14] I agree that I do not need to proceed with a balancing of the injustice to Mr. Sturdy against prejudice to the respondent, in the absence of a clear, cogent and compelling reason for the delay. However, there is a strong presumption in favour of a prejudice to the respondent when the delay is of the length in this case.

E. Chance of success of the grievance

[15] I agree that it is not always easy to predict the chance of success of a grievance at adjudication. However, that is mainly the case where the grievance is in fact adjudicable. Although Mr. Sturdy alleges that his grievance does relate to disciplinary

action, it is worth reviewing the details of his grievance and the corrective action requested:

. . .

> *I grieve the Department failed to acknowledge my rights to an advisor at a third level grievance. The grievance was conducted by phone. I was not advised to my rights. The rights of a union member are different than excluded managers. As an excluded employee it was necessary to provide my own advisor at a significant personal expense.*
>
> ***Corrective Action Requested***
>
> 1. *Dismiss administrative action grieved at third level.*
> 2. *Provide advisors as per TB and directive of Non-represented employees advisor program to all excluded managers.*
> 3. *Provide compensation for expenses occurred during harassment situation.*

. . .

[16] Mr. Sturdy grieves the failure of the DND to acknowledge his right to representation at a grievance hearing. He is also grieving the failure of the DND to provide him with a representative. On its face, Mr. Sturdy's grievance is not likely adjudicable on the ground of disciplinary action resulting in termination, demotion, suspension or financial penalty. It therefore has an extremely low chance of success at adjudication. This factor weighs significantly against the granting of an extension of time.

[17] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[18] The application for an extension of time to present the grievance is denied.

[19] I order the applicant's grievance file (PSLRB File No. 566-02-367) closed.

May 9, 2007.

Ian R. Mackenzie,
Vice-Chairperson