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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROBERT MCWILLIAMS, GEORGE VAUTOUR AND LISA WHITE

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
McWilliams et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievors: John Mancini, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Employer: Mark Sullivan, Treasury Board Secretariat

Decided on the basis of written submissions
filed March 30 and April 17, 2007.

I. Individual grievances referred to adjudication

[1] Robert McWilliams, George Vautour and Lisa White ("the grievors"), who are all correctional officers working at the Atlantic Institution of the Correctional Service of Canada ("CSC"), filed individual grievances on December 1, 2006. The grievances of Mr. McWilliams and Ms. White read as follows:

. . .

> *I grieve the fact that I was discriminated upon by not having been paid at the top income Level when the government stopped the wage Freeze in June of 1996. I should have been paid at the top Level when the Freeze was over.*
>
> *CORRECTIVE ACTION REQUESTED*
>
> *That I receive back time for income Level that I should have been at.*

. . .

The grievance of Mr. Vautour is identical in substance but marginally different in wording.

[2] Unsuccessful in the grievance procedure, the grievors referred the matter to adjudication under paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* ("the *Act*") on February 8, 2007, with the support of the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN ("the bargaining agent").

[3] In accordance with section 96 of the *Public Service Labour Relations Board Regulations* (SOR/2005-79) ("the *Regulations*"), the representative of the Treasury Board Secretariat ("the employer") filed copies of the CSC's response to the grievances at the first and second levels with the Public Service Labour Relations Board ("the Board"). No third or final level response was filed with the Board.

[4] I have been appointed by the Chairperson of the Board under the authority of paragraph 223(2)(*d*) of the *Act* to hear and determine this matter as an adjudicator.

II. Preliminary Objection

[5] On March 30, 2007, the employer objected to the jurisdiction of an adjudicator to consider the grievances on the grounds that the grievors submitted them in an untimely fashion, violating the applicable collective agreement.

[6] Board staff wrote to the bargaining agent on April 3, 2007, and requested that it advise the Board of its position on the employer's objection to jurisdiction.

[7] This decision is based on the written submissions of the parties.

III. Summary of the arguments

A. For the employer

[8] The employer argued in support of its objection to jurisdiction as follows:

. . .

> *This is further to your March 12 and 26, 2007 letters concerning the above-noted references to adjudication and to inform you of the employer's objection to the Public Service Labour Relations Board's (PSLRB) jurisdiction to hear these matters.*
>
> *Each grievance is dated December 1, 2006. The grievances all read as follows:*
>
> "I grieve the fact that I was discriminated upon, by not having been paid at the top income level when the government stopped the wage freeze in June of 1996. I should have been paid at the top level when the freeze was over".
>
> *The corrective action requested in each grievance is as follows:*
>
> "That I receive back-time for income level that I should have been at".
>
> *A copy of each of the grievances is attached as Annex A.*
>
> *The employer submits that these grievances are untimely and violate Article 20 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers-Syndicat des agents correctionnels du Canada-CSN (expiry date: May 31, 2010).*
>
> *Article 20.10 of this agreement provides that:* "An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 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".

> *The* Budget Implementation Act, 1994 *froze wages in the Federal public service for a period of two years. At issue in these grievances is the rate of pay that was applied to the grievors following the removal of the wage freeze in June of 1996. As noted previously, the grievances were filed on December 1, 2006, in excess of ten years after the situation that gave rise to them occurred. Therefore, it is the employer's position that the grievances are untimely and that, as a result, the PSLRB lacks jurisdiction to hear them.*
>
> *On the basis of the foregoing, the employer respectfully submits that the grievance should be dismissed without a hearing. In the absence of such a decision, the employer requests that the PSLRB deal with the preliminary issue with respect to jurisdiction prior to hearing the matters on their merits.*

. . .

B. <u>For the grievors</u>

[9] The bargaining agent replied in a letter dated April 17, 2007, the relevant text of which reads: "Mr. Mancini does not wish to do a representation re the above mentioned grievances."

IV. <u>Reasons</u>

[10] On the face of the written record before me, the employer's objection to jurisdiction has *prima facie* merit. The three grievances are dated December 1, 2006. They challenge an action of the employer that had effect beginning in June 1996, over a decade earlier.

[11] The collective agreement for the Correctional Service Group, which expires on May 31, 2010, stipulates a time limit within which grievances must be submitted:

. . .

> ***20.10*** *An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 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] The bargaining agent declined to make a submission on the issue of timeliness and jurisdiction. As a result, there is no argument before me that the normal interpretation of the plain words of clause 20.10 does not apply, or that it applies differently than as argued by the employer, or that the matter complained of is of a continuing nature. Based on the documents on file and a plain reading of clause 20.10, it is reasonable to conclude that the grievors did not comply with the requirement to file their grievances at the first level of the grievance procedure ". . . not later than the twenty-fifth (25th) day after the date on which [they were] notified orally or in writing or on which [they] first [became] aware of the action or circumstances giving rise to the grievance[s]".

[13] I also note that neither the grievors nor their bargaining agent made an application to the Board to relieve the grievors of their obligation to file grievances within the time limit stipulated in clause 20.10.

[14] Were I to conclude the analysis here, I would find that the grievances, non-compliant with clause 20.10, do not satisfy section 225 of the *Act*, that states:

> ***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.*

[15] Am I entitled to rule on my jurisdiction to hear the grievances on this basis alone? I believe not, for the following reason. Section 95 of the *Regulations* establishes procedural requirements where a party seeks to raise the issue of timeliness in relation to a grievance:

> ***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.*
>
> *(3) If the party raises an objection referred to in subsection (1), it shall provide a statement in writing giving details regarding its objection to the Executive Director.*

[16] In my view, an adjudicator may rule on a jurisdictional objection related to timeliness only if the objecting party has met the requirements of section 95 of the *Regulations*. Although neither party has raised the application of section 95 in the circumstances of these three references to adjudication, I believe that I am under a positive obligation to do so *proprio motu*. Not to inquire into compliance with section 95 of the *Regulations* would be to fail to give an important element of the legal framework for considering grievances its appropriate application and weight. Key requirements stated in section 95 are mandatory, not discretionary. Therefore, I turn here to consider the employer's compliance with section 95 on the face of the record before me.

[17] Board staff sent a copy of the three references to adjudication to the employer on March 12, 2007. The employer notified Board staff of its timeliness objection to jurisdiction on March 30, 2007. I find that the employer did, accordingly, file its objection within 30 days of receiving notice of the references to adjudication from the Board, as required by subsection 95(1) of the *Regulations*.

[18] In its objection, the employer argued that the grievors failed to respect the collective agreement time limit at the first level of the grievance procedure for the submission of their grievances. This argument locates the employer's objection under paragraph 95(1)(*a*) of the *Regulations*.

[19] In order for the objection to be properly before me, the employer must show that it has complied with the requirement outlined in subsection 95(2); that is to say, that the ". . . grievance[s] w[ere] rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason."

[20] Mike MacAulay, Acting Unit Manager, issued the first level response to each of the three grievors on December 6, 2006. The response read, "I cannot render a decision at this level because it is beyond my authority." In respect of the requirement expressed in subsection 95(2) of the *Regulations*, I find that this response did not

reject the grievances as untimely ". . . at the level at which the time limit was not met. . . ." The first level responder had the opportunity to reject the grievances at that initial level based on their untimely filing. He did not do so. His assertion that he was unable to render a decision at this level is entirely unexplained and, in my view, without foundation regarding the issue of timeliness.

[21] I have considered whether there might be a basis for arguing that Mr. MacAulay's response did not qualify as an authoritative first level reply given his statement that he allegedly lacked authority to decide, and that I should, instead, look to the second level response for the employer's first substantive pronouncement on the issue. I note that the employer did raise the issue of timeliness at the second level of the grievance procedure. Simon Coakeley, Regional Deputy Commissioner, wrote on December 27, 2006, in part, as follows:

. . .

> *First, your grievance is untimely because Section 20.10 of the CX Collective Agreement reads as follows: "An employee may present a grievance to the First (1st) Level of the procedure in the manner prescribed in clause 20.05 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." The action in question in your grievance was in 1996 and you were informed at that time that this action was going to be taken.*

. . .

[22] The information available to me does not establish why it might be legally sound to discount Mr. MacAulay's first level response and rely, instead, on the employer's second level reply in determining compliance with subsection 95(2) of the *Regulations.* I can neither accept on its face Mr. MacAulay's statement that he had no authority to render a decision, nor draw an inference that his "non reply" was not a *bona fide* reply within the meaning of clause 20.10 of the collective agreement. I note, on this point, that the Federal Court inferred in *Persons wishing to use Pseudonyms of Employee No. 1, Employee No. 2 et al. v. Her Majesty the Queen*, 2004 FC 1221, at para. 17, that the failure of a decision-maker in the grievance procedure to reply must be construed as a decision rejecting the grievance. The Federal Court of Appeal left this aspect of the lower court's decision intact in *Her Majesty the Queen v. Persons wishing to adopt the Pseudonyms of Employee No. 1, Employee No. 2 et al.*, 2005

FCA 228. Subsequently, the Federal Court of Appeal in *Her Majesty the Queen v. Persons wishing to adopt the Pseudonyms of Employee No. 1, Employee No. 2 et al.*, 2007 FCA 152, at para. 8, endorsed the view that failure to respond at a grievance procedure level represented a rejection of the grievance.

[23] Given my finding that the employer's first level response did not reject the grievances as untimely ". . . at the level at which the time limit was not met . . . .", I must rule that the employer has not met the threshold condition expressed in subsection 95(2) for my considering its jurisdictional objection.

[24] If I am in error on this point, I rely, in the alternative, on the fact that the employer did not file with the Board a third (i.e., final) level response to the grievances. (The record indicates that the grievors referred their grievances to the third level on January 12, 2007, after the second level response referenced in paragraph 21 above.) I must either conclude that there was no such response or that the employer breached its full filing requirements under section 96 of the *Regulations*. In either case, the employer in its submission has not met its obligation under subsection 95(2) of the *Regulations* to establish that it continued to reject the grievances because of their untimely submission ". . . at all subsequent levels of the grievance process. . . ." This failure constitutes alternate grounds for ruling that the employer has not met the threshold condition expressed in subsection 95(2) for my considering its jurisdictional objection.

[25] Consequently, I accept jurisdiction to consider the grievances but I do so under the condition discussed below.

[26] The bargaining agent's reply that "Mr. Mancini does not wish to do a representation re the above mentioned grievances" itself raises a significant procedural issue. The reply does not say that the bargaining agent's representative declines to submit arguments on the jurisdictional objection raised by the employer. Its plain wording states, instead, that the bargaining agent's representative does not wish to make a representation regarding ". . . the above mentioned grievances."

[27] I find this reply difficult to interpret and understand. The grievances at issue involve the application or interpretation of the collective agreement to which the bargaining agent is a party. As such, subsection 209(2) of the *Act* requires that the grievors ". . . obtain the approval of [their] bargaining agent to represent [them] in the

adjudication proceedings." The record shows that the bargaining agent's representative, Mr. Mancini, signed the notices referring the grievances to adjudication. The fact that he now, as stated on April 17, 2007, ". . . does not wish to do a representation re the above mentioned grievances" might well be taken to infer either that he, on behalf of the bargaining agent, is no longer willing to represent the grievors or that he is withdrawing or abandoning the grievances.

[28] It is essential to a well-functioning grievance adjudication procedure under the *Act* that every party be as precise, clear and responsive as possible when replying to a request from the Board. In this instance, I judge the submission on behalf of the bargaining agent's representative to be, at the very least, unclear. I, therefore, require, as a condition of my accepting jurisdiction to proceed with this matter, that the bargaining agent's representative indicate clearly and in writing that the bargaining agent continues to approve the three references to adjudication and intends to represent the three grievors at a hearing on the merits of the grievances. Should the bargaining agent's representative not do so, I will be compelled to conclude that the grievors do not now satisfy the requirement stated in subsection 209(2) of the *Act*, and that I consequently lack the jurisdiction to hear and determine their references to adjudication.

[29] For the above reason, I make the following order:

(The Order appears on the next page)

V. Order

[30] I direct the representative of the bargaining agent to confirm in writing, within 14 calendar days of the date of this decision, that the bargaining agent continues to approve the three references to adjudication and intends to represent the three grievors at a hearing on the merits of the grievances.

[31] On condition that the representative of the bargaining agent satisfies the condition expressed above, I direct the Board's Registry Operations and Policy Directorate to schedule a hearing for the grievances.

[32] In the event that the bargaining agent does not satisfy the condition expressed above, the grievances are dismissed.

May 31, 2007.

Dan Butler,
adjudicator