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Public Service
Labour Relations Act

Before the Chairperson

BETWEEN

GRAHAM E. HICKLING

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as

Hickling v. Canadian Food Inspection Agency

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson

For the Grievor: Nao Fernando, Professional Institute of the Public Service of
Canada

For the Employer: Patti Bordeleau, Executive Director, Labour Relations Division

Decided on the basis of written submissions
filed April 12 and 26, 2007.





REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Graham E. Hickling ("the grievor") has referred a grievance to adjudication alleging a breach of the Veterinary Medicine Group collective agreement between the Professional Institute of the Public Service of Canada (PIPSC or "the bargaining agent") and the Canadian Food Inspection Agency ("the employer") (expiry date: September 30, 2007). The employer has raised a preliminary objection to the reference to adjudication on the basis that the grievor did not comply with the grievance procedure as set out in the collective agreement. This decision relates solely to the preliminary objection.

[2] Pursuant to section 45 of the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the Chairperson authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under section 225 of the *Public Service Labour Relations Act* ("the Act") for the hearing and determination of this matter.

[3] The employer's objection was made on April 12, 2007. The bargaining agent replied to those submissions on April 26, 2007. The submissions appear below. I determined that the employer's preliminary objection would be dealt with by way of written submissions and that the employer's objection of April 12, 2007, would be considered as the employer's submission on the issue. This was communicated to the parties by a letter dated June 13, 2007. The bargaining agent, in its initial submission of April 26, 2007, had reserved the right to adduce further evidence and authorities in the event that a preliminary objection was raised. The bargaining agent was therefore invited to make further written submissions. In an email sent on July 4, 2007, the bargaining agent's representative stated that it would not be making any further submissions on the preliminary motion.

II. Background

[4] Mr. Hickling filed a grievance on October 27, 2006. His bargaining agent made representations on his behalf at the first level of the grievance process at a grievance hearing on November 10, 2006 (cited in the first level response, dated November 23, 2006). The grievance was denied at the first level. Mr. Hickling transmitted his grievance to the second level. The second level response dated January 8, 2007, summarizes the process followed at that level as follows:

...

... At the grievance consultation meeting conducted by teleconference on December 22, 2006, your PIPSC representative, Nao Fernando, indicated that the arguments presented at first level will not be repeated.

...

[5] The grievance was transmitted to the third level of the grievance process on January 12, 2007. The grievance was referred to adjudication on February 26, 2007, without a grievance hearing having taken place. The employer states in its submissions (below) that it was not informed that the grievor or his representative did not intend to consult at the final level. The bargaining agent does not contest that allegation.

III. Summary of the arguments

A. For the employer

[6] The employer made written submissions in a letter to the Public Service Labour Relations Board on April 12, 2007. Those submissions are as follows:

...

The Canadian Food Inspection Agency (CFIA) respectfully objects to the notice of reference to adjudication of the above-noted matter. The CFIA was not given any opportunity to respond at the final level of the individual grievance procedure, contrary to the provisions of the collective agreement and the CFIA's grievance procedures.

Clause D6.06 of the collective agreement between the CFIA and the Professional Institute of the Public Service of Canada provides that the grievance procedure consists of three (3) steps. These steps have been agreed upon by the CFIA and the Institute. Clause D6.06 reads as follows:

D6.06 There shall be no more than a maximum of three (3) steps in the grievance procedure. These steps shall be as follows:

- (a) Step 1 - first level of management;
- (b) Step 2 - intermediate step;
- (c) Final Step - President or his authorized representative.

Clauses D6.11 and D6.21 of the collective agreement states the following:

D6.11 The Employer shall normally reply to an employee's grievance at any step of the grievance procedure within twenty (20) calendar days after the grievance is presented.

D6.21 Where an employee has presented a grievance up to and including the Final Level in the grievance procedure with respect to:

(a) the interpretation or application in respect of him of a provision of this Agreement or a related arbitral award,

or

(b) disciplinary action resulting in suspension or a financial penalty,

or

(c) termination of employment or demotion pursuant to paragraph 12.(2)(c) and 12.(2)(d) of the Financial Administration Act,

The grievance has never been presented at the final level. As per our usual practice, we have been waiting for the Institute to consult at the final level of the individual grievance procedure since January 2007. Attached is the individual grievance transmittal form to the final level that was signed by the grievor on January 12, 2007. We were not informed at any time that the Institute nor the grievor were ready to consult or that they decided not to consult, therefore, requesting a final level reply from the CFIA.

We respectfully request that the notice of reference to adjudication be refused by the Public Service Labour Relations Board, without a hearing, to permit the CFIA to hear or respond to the grievance at the final level of our internal grievance procedure.

B. For the bargaining agent

[7] The bargaining agent made written submissions on April 26, 2007 as follows:

The Union's position is:

- 1) The issue of jurisdiction should be a matter that should be properly raised by way of a preliminary objection, before the Adjudication Board appointed for the matter.*
- 2) Without prejudice to the Union's position in paragraph 1, the Union submits that it has complied with all the requirements of the Collective Agreement in this matter.*
- 3) The Grievance was properly transmitted up to and including Adjudication.*
- 4) There is no requirement under the terms of the Collective Agreement for the Union to request a Consultation at Step 3 of the Grievance Procedure.*
- 5) It is the Union's view that the Employer's failure to respond at Level 3 should not be a cause for any explanation from the Union.*

IV. Reasons

[8] The relevant section of the Act that sets out the jurisdiction of an adjudicator is as follows:

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.

[9] The collective agreement sets out the grievance process. As in the Act, the collective agreement refers to the right of an employee to "present" a grievance at each level. "Present" is not defined in either the Act or the collective agreement. However, the parties have made a distinction between "presenting" a grievance and "consulting" on that grievance:

D6.08 *If he so desires, an employee may be assisted and/or represented by the Institute when presenting a grievance at any step. The Institute shall have the right to consult with the Employer with respect to a grievance at each or any step of the grievance procedure.*

[10] Presenting a grievance in this context means that the grievance is transmitted and then received at the next level of the grievance process. This clause does not require that the PIPSC consult at each step of the grievance process. There is no obligation to make representations at each level. In fact, the second level response shows that the bargaining agent did not make any representations at that level. While grievance hearings at each level should certainly be encouraged, and it is a good practice for bargaining agent representatives to advise the employer if it is their intention not to make representations at any level of the grievance process, it is not my role to enforce good labour relations practices.

[11] The employer suggested in its submissions that the referral to adjudication without consultation was contrary to the usual practice of the employer. Past practice is only an aid to interpretation if the collective agreement is ambiguous, which is not the case here. The employer did not allege that the collective agreement was ambiguous, nor did it argue that the bargaining agent was estopped from referring the grievance to adjudication, and provided no information that could support such an allegation.

[12] The collective agreement also provides that the employer will "normally" reply to a grievance within 20 calendar days of receipt of the grievance (clause D6.11). The grievance was referred to adjudication 38 calendar days after it was submitted to the final level.

[13] The *Public Service Labour Relations Board Regulations* provide explicit deadlines for a referral to adjudication:

Deadline for reference to adjudication

90. (1) Subject to subsection (2), a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process.

Exception

(2) If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.

[14] This grievance falls under the exception (subsection 90(2)). In accordance with the collective agreement, the deadline for a decision at the final level was 20 days from the date of receipt of the grievance (January 12, 2007). The grievance was referred to adjudication after that 20-day period expired, but still within the prescribed 40-day period. Accordingly, it meets the technical requirements for referral to adjudication.

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

(The Order appears on the next page)

V. Order

[16] The preliminary objection is dismissed.

[17] The grievance is to be scheduled for a hearing on the merits, in due course.

August 21, 2007.

**Ian R. Mackenzie,
Vice-Chairperson**

