

Date: 20101101

File: 566-02-3752

Citation: 2010 PSLRB 114



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

SARAH SZMIDT

Grievor

and

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

Employer

Indexed as
Szmidt v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Michel Bouchard, Union of Canadian Correctional Officers —
Syndicat des agents correctionnels du Canada - CSN

For the Employer: Maureen Harris, Treasury Board Secretariat

Decided on the basis of written submissions
filed June 30 and October 1, 12 and 19, 2010.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Sarah Szmidt (“the grievor”), a correctional officer at Millhaven Institution in Bath, Ontario, filed a grievance on February 2, 2010 alleging that she should have received shift premiums from June 2008 to January 2010 inclusive. The Correctional Service of Canada (“the employer”) has objected to the timeliness of her grievance. The grievor’s bargaining agent (Union of Canadian Correctional Officers — Syndicat des agents correctionnels du Canada — CSN, (“the bargaining agent”)) and the employer were asked to provide written submissions on the preliminary objection.

II. Background

[2] The grievor filed her grievance on February 2, 2010. At the first and second levels of the grievance process, the employer rejected the grievance on the basis that it was not timely. The second-level decision was issued on March 10, 2010. The bargaining agent presented the grievance at the final level on March 8, 2010 and referred the grievance to adjudication on May 25, 2010. In accordance with section 96 of the *Public Service Labour Relations Board Regulations* (“the *Regulations*”), the employer was required to file copies of the decisions made in respect of the grievance at each level of the grievance process with the executive director of the Public Service Labour Relations Board (“the PSLRB”) within 30 days of receiving the acknowledgement letter sent by the PSLRB. The deadline imposed was July 2, 2010. The employer provided copies of the decisions at the first and second levels to the PSLRB on June 17, 2010.

[3] The employer issued its final-level decision on the grievance on June 18, 2010 and forwarded it to the PSLRB on June 25, 2010. The final decision also rejected the grievance on the basis of timeliness.

[4] On June 30, 2010, the employer objected to the reference to adjudication on the basis that the grievance was not filed within the prescribed time limits in the collective agreement and requested that the grievance be dismissed without a hearing.

[5] The collective agreement between the Treasury Board and the bargaining agent (expiry date: May 31, 2010) states that an employee may present a grievance at the first level of the grievance process within 25 business days of being notified of, or becoming aware of, the action or circumstances giving rise to the grievance (clause 20.10).

[6] The employer submitted that the issue being grieved was initially raised in January 2008, as it was the subject of a grievance that was referred to adjudication on May 12, 2008. As a result of that grievance, employees working within institutions at all sites were advised at the end of March 2008 that the employer had taken the position that only shift workers were entitled to receive a shift premium. The bargaining agent did not dispute this submission of the employer.

[7] The collective agreement provision governing grievance decisions of the employer is as follows:

20.13 The Employer shall normally reply to an employee's grievance at the final level of the grievance procedure within thirty (30) days after the grievance is presented at that level.

[8] The relevant provisions of the *Regulations* for the referral of a grievance and the raising of an objection to timeliness are as follows:

63. A grievance may be rejected for the reason that the time limit prescribed in this Part for the presentation of the grievance at a lower level has not been met, only if the grievance was rejected at the lower level for that reason.

...

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.

(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.

...

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.

96. An employer or deputy head or . . . shall, no later than 30 days after the day on which that party was provided with a copy of the notice of the reference to adjudication, file with the Executive Director a copy of the decision that was made in respect of the grievance at each level of the applicable grievance process.

III. Summary of the arguments

A. For the employer

[9] The employer submitted that the grievance was not timely when it was submitted at the first level of the grievance process. Timeliness was raised by the employer at all levels of the grievance process, as required by section 63 of the *Regulations*, and the grievance was denied on that basis.

[10] Although the final—level grievance response was not issued by the employer within the 30-day period referred to in clause 20.13 of the collective agreement, that fact is not relevant to the untimely nature of Ms. Szmidt's grievance. The employer respected the requirements of section 63 of the *Regulations* by raising an objection on the basis of timeliness at all levels of the grievance process.

B. For the grievor

[11] The grievor submitted that the employer did not properly raise the issue of timeliness at the final level of the grievance process. Consequently, pursuant to subsection 95(2) of the *Regulations*, the employer is prevented from raising its objection. Although the employer has submitted a document labelled as a final—level grievance response, stating that the grievance is untimely, it is clear that the response was not provided to the grievor within the time limits set out for a reply in the

collective agreement (30 days). The bargaining agent properly referred the grievance to adjudication after the time limit for the employer's decision at the final level of the grievance process. The employer did not issue a final—level response until after the acknowledgement letter sent from the PSLRB on June 1, 2010. Clearly, the grievance was not at the final level of the grievance process at that point; it had been referred to adjudication. When the employer issued its decision, it was with respect to a grievance that was no longer at the final level. Since the grievance was not properly rejected on the basis of timeliness at all subsequent levels (the final level), the employer is barred by subsection 95(2) from raising an objection to timeliness.

C. Rebuttal of the employer

[12] The employer acknowledged that a final—level grievance process decision was issued after the normal period for reply set out in clause 20.13 of the collective agreement. However, that fact does not render Ms. Szmidt's grievance timely. The grievance process article of the collective agreement clearly indicates that the responsibility for initiating and advancing a grievance rests with the employee. Further, the language of clause 20.11 with respect to the employer's response to a grievance is that the employer "... shall normally reply to an employee's grievance, at any level in the grievance procedure" and that when a response is not issued within the applicable time frames, the employee is responsible for referring the grievance to the next level within the period specified. In fact, the onus on an employee to advance his or her grievance is clearly indicated as follows in clause 20.21: "An employee who fails to present a grievance to the next higher level within the prescribed time limits shall be deemed to have abandoned the grievance. . . ."

[13] The PSLRB should be guided by the determination in *Deputy Head (Public Health Agency of Canada) v. Angelis*, 2010 PSLRB 5, which concerned a request of the deputy head for an extension of time to respond to a grievance. In that decision, the Vice-Chairperson stated as follows that the employer is not prejudiced by a failure to file a reply to a grievance . . . and therefore does not require an extension to reply:

...

This is because the failure to file a reply does not result in a loss of a right under a collective agreement. The Deputy Head is not prejudiced at all by a failure to file a reply to a grievance. The Deputy Head can still issue a reply to the

grievance at any point, up to the start of the hearing of the grievance. . . .

. . .

[14] Therefore, the employer's position is that it retains the right to raise an objection on the basis of timeliness, as Ms. Szmids's grievance was untimely at the first level, she was advised of this fact and she did not request an extension of time from the Chairperson of the PSLRB. The only limitation to raising an objection on the basis of timeliness stipulated in the *Regulations* is that the grievance must have been rejected at the level at which the time limit was not met and at all subsequent levels for that reason. Ms. Szmids's grievance meets this criterion as the objection was reiterated in all the grievance responses issued under the grievance process and the employer met the requirements of section 95 of the *Regulations* by raising its objection within 30 days of the receipt of the acknowledgment letter from the PSLRB.

IV. Reasons

[15] The grievor does not dispute that her grievance was untimely. The grievor's position is that the employer waived its right to raise a timeliness objection by failing to issue its final—level decision before her grievance was referred to adjudication. The *Regulations* govern the issue of a waiver of the right to raise timeliness as an objection to the jurisdiction of an adjudicator.

[16] The collective agreement sets out a guideline for the time frame for the employer's decision or its reply to a grievance at each level. Unlike the time limit for filing a grievance, that time limit is not mandatory. The relevant clause states that the employer ". . . shall normally reply . . . at the final level . . . within . . . 30 days. . . ." It is clear that a grievor does not have to wait for the employer's decision before sending his or her grievance to the next level — in this case, referral to adjudication. However, the *Regulations* or the collective agreement do not prevent the employer from deciding a grievance after the "normal" time frame. The only restriction on the employer is that it must raise an objection to timeliness at each level of the grievance process and also within 30 days of receiving a copy of the referral to adjudication.

[17] The employer was late in issuing its final—level decision. However, it raised timeliness in that decision, which was issued after the referral to adjudication (on June 18, 2010). The employer had until July 2, 2010 to provide copies of the decisions at each level and to raise any objections to timeliness. The employer sent the decisions at

the first and second levels on June 17, 2010. It sent its final—level decision to the PSLRB on June 25, 2010. It raised its objection to timeliness on June 30, 2010. It is important to note that all this documentation was sent to the PSLRB before the 30-day time limit specified in the *Regulations* (July 2, 2010).

[18] This is not a situation in which the employer either failed to issue a decision at a level of the grievance process or failed to meet the filing requirements of the *Regulations*, as in *McWilliams et al. v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 58. Although the employer could have been more diligent in issuing its final—level decision, it did issue that decision. As a result, timeliness has been raised at each level of the grievance process.

[19] The employer has met its obligations under section 95 of the *Regulations*. The grievor has not disputed that her grievance is untimely. The grievor has not filed an application for an extension of time. Accordingly, I must dismiss the grievance on the basis that an adjudicator does not have jurisdiction pursuant to the section 225 of the *Public Service Labour Relations Act* which reads as follow:

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.

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

(The Order appears on the next page)

V. Order

[21] The employer's objection is allowed.

[22] The grievance is dismissed.

November 1, 2010.
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**Ian R. Mackenzie,  
adjudicator**