**Date:** 20141031

**File:** 568-34-299
**XR:** 566-34-8920 to 8923

**Citation: 2014 PSLRB 96**

*Public Service Labour Relations Act*

Before the Chairperson

BETWEEN

**MARY TERRY PRIOR**

Applicant

and

**CANADA REVENUE AGENCY**

Respondent

Indexed as
*Prior v. Canada Revenue Agency*

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:*** David Olsen, Vice-Chairperson

***For the Applicant:*** Amarkai Laryea, Public Service Alliance of Canada

***For the Respondent:*** Joshua Alcock, counsel

Heard at Toronto, Ontario,
July 8 and 9, 2014.

## I. Application before the Vice-Chairperson

[1] On September 26, 2013, the Public Service Alliance of Canada ("PSAC" or "the union"), on behalf of Mary Terry Prior ("the applicant"), applied to the Public Service Labour Relations Board ("the Board"), requesting that the Chairperson exercise the discretion under paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") for an extension of the time set out in the collective agreement to refer two grievances to adjudication pursuant to section 209 of the *Public Service Labour Relations Act* ("the *Act*").

[2] Pursuant to section 45 of the *Act*, the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of the powers or to perform any of the functions under paragraph 61(*b*) of the *Regulations* to hear and decide any matter relating to extensions of time.

[3] Section 61 of the Board's *Regulations* authorizes the Board to extend time limits either before or after the expiry of the time if it is in the interest of fairness to do so, notwithstanding the provisions of a collective agreement.

[4] The Board has developed criteria that it considers in extending time limits. Those criteria are: clear, cogent and compelling reasons for the delay; the length of the delay; the due diligence of the grievor; balancing of the injustice to the employee against the prejudice to the employer and the chances of success of the grievance.

### A. Stipulated facts

[5] On June 10, 2010, Mrs. Prior grieved that the Canada Revenue Agency ("the employer" or "the respondent") had contravened article 19 of her collective agreement due to the fact that she had submitted a properly filled out return-to-work/accommodation plan that the employer had refused to accept. She claimed that the employer had no valid reasons for the refusal.

[6] On August 5, 2010, Mrs. Prior grieved that the employer had contravened article 54 of her collective agreement due to the fact that her request for leave with pay for other reasons had been denied.

[7] The grievances were pursued through the various steps in the grievance process and were heard at the final level.

[8] It is not disputed that on December 13, 2012, Mrs. Prior signed for and received a final-level reply denying her grievances.

[9] The final date for referral of the grievances to adjudication set out in the *Regulations* was January 22, 2013, 40 days after the receipt of the final-level reply of the employer.

[10] The grievances were not referred to adjudication until August 20, 2013, some seven months after the final date for referral.

**B. Witnesses**

[11] The union called two witnesses, Stephen Prior and Pierre Mulvihill. Mr. Prior is the husband of the applicant. Initially, he was not involved in any aspect of his wife's workplace grievances; however, as her medical condition deteriorated and her anxiety increased with respect to the issues surrounding her grievances, he became more involved, and at her request, started acting on her behalf in dealing with Mr. Mulvihill, the bargaining agent's labor relations officer.

[12] Mr. Mulvihill is currently employed in the National Capital Region as a regional representative of the PSAC. At all times material to this application, he was a labour relations officer representing employees at the final level of the grievance procedure and was assigned to a number of regions, including Northern and Eastern Ontario and including Peterborough.

[13] The employer called two witnesses, Matt Yaworski and Charlene Hall.

[14] Mr. Yaworski is currently employed as a senior labor relations advisor with the Canada Border Service Agency. At all times material to this application, he was a labor relations advisor at the Canada Revenue Agency and had carriage on behalf of the employer of Mrs. Prior's grievances at the final level of the grievance procedure.

[15] Ms. Hall, at all material times, was a unit director for collective bargaining interpretation at the resource center for the Canada Revenue Agency. She had been involved in the earlier stages of the grievance process as well as in discussions concerning the possible resolution of Mrs. Prior's grievances. Mr. Yaworski reported to her.

## II. Summary of the evidence

[16] Mr. Mulvihill became aware of Mrs. Prior's case through the president of the Peterborough local, David Quist, who had filed the original grievances. His formal involvement began after the grievances were filed. He was aware that there had been discussions concerning accommodation of the applicant in the workplace. When the grievances were transmitted to the final level of the grievance process, Mr. Mulvihill took carriage of them.

[17] Over a period of 10 months, Mr. Mulvihill attempted to reach a mutually satisfactory resolution to the grievances with Mr. Yaworski.

[18] When it became apparent that there was not going to be a settlement on the basis of the terms being sought by Mrs. Prior, Mr. Mulvihill arranged for a meeting at the final level of the grievance process to ensure that all of Mrs. Prior's arguments were part of the record. He did not expect the grievance reply to be favorable. He advised the grievor that when he received the reply to the grievances, he would refer the grievances to the PSAC for referral to adjudication.

[19] Initially he dealt with Mrs. Prior; however, with the passage of time, especially after the failure to reach a resolution of the grievances, Mrs. Prior's health deteriorated, at which time, at her request, he started dealing with the applicant's husband.

[20] Mr. Prior stated that he had numerous conversations with Mr. Mulvihill and corresponded with him by email. In addition to representing Mrs. Prior with respect to her grievances, Mr. Mulvihill was also handling access-to-information requests on her behalf. Mr. Mulvihill was the one doing the paperwork and moving it through the process. Mr. Prior advised that he had to follow up with Mr. Mulvihill on a number of occasions to determine what the next steps were in progressing the file.

[21] There was a delay in the employer sending out the replies at the final level of the grievance process from the spring of 2012 until late November 2012 because the issue was difficult and on account of the nature of the settlement discussions.

[22] Mr. Mulvihill was advised on November 21, 2012 by Mr. Yaworski that the final-level responses had been prepared and that the responses would likely be issued by the end of the month or early December 2012. Mr. Mulvihill advised the Priors by

email on November 27, 2012 that the next step would be to send the files to the PSAC for its review and for referral to the Board for adjudication.

[23] He advised Mr. Prior that he would take care of the situation and not to worry about it and that there was no need for the Priors to do anything.

[24] On November 30, 2012, Mr. Prior wrote to Mr. Mulvihill, inquiring whether he had received the replies to the grievances. As of that date, Mr. Mulvihill had not received replies to the grievances. He had communicated to Mr. Prior that he would be receiving copies of the grievance replies.

[25] Mr. Prior testified that it was his understanding that when Mr. Mulvihill received the grievance replies, he would handle the matter and move it forward with whatever action was required.

[26] Mr. Yaworski stated that on November 29, 2012, a memorandum was sent to Laura Palermo, the manager of labor relations for the Ontario region, together with the final-level grievance replies, requesting that she remit the original to the applicant. The memorandum noted that a copy of the grievance reply had also been sent to Mr. Mulvihill.

[27] Mr. Yaworski also stated that on November 29, 2012, he sent, by regular mail, a copy of the final-level grievance replies to Mr. Mulvihill, and he produced a copy of the letter.

[28] As recited *supra,* it is not disputed that Mrs. Prior signed for and received replies to the grievances at the final level on December 13, 2012. A business record from Canada Post Corporation filed in evidence confirms that Mrs. Prior signed for the item on that date. In early January 2013, Mr. and Mrs. Prior went to Cuba on holidays. Mr. Prior followed up with Mr. Mulvihill after their return on or about January 17. He acknowledged that this was the first follow-up with Mr. Mulvihill since the end of November and some 35 days after Mrs. Prior had signed for the grievance replies. Mr. Mulvihill stated that he did not recall receiving copies of the grievance replies. On January 17 or 18, 2013, Mr. Prior telephoned him to inquire about the progress of the file. During that discussion, he was advised that the Priors had received the replies of the employer to the grievances. He advised Mr. Prior to leave the matter with him. Mr. Prior sent copies of the replies attached to an email to Mr. Mulvihill on January 21.

The email from Mr. Prior stated that the document had been picked up on the 7th or 8th of December.

[29] Mr. Mulvihill telephoned the employer on or about January 17 or 18, 2013 to see why he had not received copies of the replies to the grievances. The person he spoke with had not handled the files and she took a message for Mr. Yaworski. He spoke with Mr. Yaworski the next day. He advised him that he had not received the replies and that the deadlines for referral to adjudication were past and asked what they could do to fix the situation. I should note here that Mr. Mulvihill was of the belief that the deadline had passed based on the mistaken information that the Priors had provided him regarding the date on which they had received the grievance replies. In fact the deadline would only expire in another four days.

[30] He stated that he usually receives copies of the final-level decisions with respect to grievances. He observed that no one from the Union of Taxation Employees is an addressee on the cover letter to the grievance replies from CRA dated December 5, 2012.

[31] Mr. Mulvihill stated that Mr. Yaworski said that he would look into the situation. He subsequently advised him that a copy of the replies had been sent to him. Mr. Mulvihill maintained that he had not received a copy.

[32] Mr. Mulvihill knew that Mr. Yaworski did not have the authority to extend the time limits for referral of the grievances to adjudication and that he would have to go to his superior, Ms. Hall. He believed that Mr. Yaworski would ensure that the gist of their discussion would be passed on to Ms. Hall.

[33] Mr. Yaworski confirms that Mr. Mulvihill telephoned him on January 17, 2013 and advised him that the union was beyond or close to the deadline to refer the grievances to adjudication. Mr. Yaworski told Mr. Mulvihill that he was not in a position to address the issue and would have to contact his manager, Ms. Hall.

[34] Mr. Yaworski also stated that he was concerned that Mr. Mulvihill had recently made two written requests for an extension of time to refer grievances unrelated to this case to adjudication, indicating that they were made on behalf of Edith Bramwell, which was not the normal procedure. His understanding was that requests for an

extension of time to refer a grievance to adjudication were to be sent from the representation branch of the PSAC and not from one of its components.

[35] Upon receipt of such a request, it would be given to the labor relations officer who had carriage of the matter, who would then discuss it with the manager of labor relations, Ms. Hall. He stated that the normal practice was to grant two extension requests and possibly a third for each file.

[36] Mr. Yaworski stated that it was his understanding that Ms. Hall had discussed with Mr. Mulvihill the fact that he was not using the appropriate procedure. In light of these circumstances, he thought it best to refer the matter to Ms. Hall. He stated that he was concerned that Mr. Mulvihill was trying to pull a fast one.

[37] Ms. Hall testified that she had been involved in the earlier stages of the grievance process as well as in discussions concerning the possible resolution of Mrs. Prior's grievances.

[38] She explained that in May 2012, Mr. Mulvihill had faxed a request for an extension of time for referral to adjudication of an unrelated grievance prior to the deadline, which he had signed on behalf of Edith Bramwell. Ms. Hall had a discussion with Mr. Mulvihill on May 15, 2012 in which she explained the employer's position that all future requests for an extension of time would have to be made by the PSAC. She did accept the request for an extension of time on a one-time exceptional basis. Mr. Mulvihill had, at that time, acknowledged in writing the employer's position.

[39] She stated that her involvement in the granting of extensions of time was to authorize her administrative assistant, who received requests for extensions to grant two extensions; however, on the third request, Ms. Hall was to be advised.

[40] She stated that in January 2013, she did not know whether Mr. Mulvihill had the authority to request an extension of time to refer a grievance to adjudication.

[41] On January 22, 2013, Mr. Yaworski sent an email to Ms. Hall with respect to the Prior grievances. The email states in part that Mr. Mulvihill had inquired into the final-level reply for the grievances and stated that he never received the reply. He advises that he contacted Laura Palermo to confirm when the final-level replies were mailed out and that according to the information he received from her, they were sent and delivered on December 13, 2012.

[42] He confirms his telephone discussion with Mr. Mulvihill in which Mr. Mulvihill advised him that the Priors told him that they had received the replies on December 7 or 8, 2012 but did not share a copy with him and that according to Mr. Mulvihill, it was only on January 21, 2013 that the Priors emailed him a scanned copy of the final-level reply.

[43] Mr. Yaworski advises Ms. Hall that:

> *The issue is that the union is beyond the 40 days or close to the deadline to refer the grievances to the PSLRB. I told him that I was not in a position to address the issue. Pierre will call you to discuss his concerns. From my point of view, something with Pierre's recollection and the information from the region does not jive (e.g.) dates. Moreover, Pierre should have also received a copy of the final level replies. I am not sure why he did not follow up with the Priors?*

[44] In his testimony, Mr. Yaworski stated that the issue of the time limits was one of the issues that concerned Mr. Mulvihill during their discussion. He would not agree that Mr. Mulvihill was asking for an extension of time and stated that if the union was beyond the 40 days for referral of a grievance to adjudication, it was not the same as asking for an extension of time.

[45] Mr. Yaworski sent an email on January 22, 2013 to Mr. Mulvihill, advising him that he had emailed Ms. Hall about the Prior issue. He also advised him that he may want to try calling her the next afternoon to make sure she had a chance to read his email.

[46] Mr. Yaworski at no time advised Mr. Mulvihill that in fact Mrs. Prior had picked up the grievance replies on December 13, 2012 and not December 7 or 8. Nevertheless, he stated that the position of the employer was that the time for referral to adjudication had expired.

[47] Mr. Mulvihill did not call Ms. Hall right away.

[48] Ms. Hall explained that when the employer's written submissions had been prepared in October 2013 in response to the union's submission regarding its application for an extension of time, the submission recited that she had no record of Mr. Mulvihill's attempt to contact her on January 22, 2013.

[49] She stated that in April 2014, while preparing for a new assignment in the Pacific region, she reviewed the Prior file, including all of the emails from Mr. Yaworski that had been placed on the file when he left the Canada Revenue Agency. In her review, she found an email that was part of a chain that included the email from Mr. Yaworski on January 22 advising her of Mr. Mulvihill's telephone discussion.

[50] The email is dated January 23rd and is addressed from Ms. Hall to Mr. Yaworski. The subject matter is "Re: Prior Reference to Adjudication Issue." The email states: "He just called indicating that he never received the replies, so I have Kendra checking to see."

[51] Ms. Hall stated that this e-mail jogged her memory and that she remembered that Mr. Mulvihill had called her and that he indicated that he had not received copies of the grievance reply. She was asked whether she discussed anything else with Mr. Mulvihill, and she replied that she did not recall. She was specifically asked if Mr. Mulvihill raised the issue about the union missing the deadline for referring the grievances to adjudication. She could not recall; nor could she recall having a discussion with Mr. Mulvihill about trying to resolve the file. She did not recall giving any direction to Mr. Yaworski with respect to extending the time limits on the Prior file.

[52] She stated that she had not calculated the deadline for referring the grievances to adjudication. Her focus was in ensuring that her administrative staff had sent a copy of the grievance replies to Mr. Mulvihill in accordance with their procedure.

[53] Based on that conversation, she contacted her administrative assistant and asked her to search the physical file as well as the electronic log to verify if she had mailed a copy of the reply to Mr. Mulvihill. She replied that both the physical file and the electronic log revealed that a copy had been mailed to Mr. Mulvihill on November 29, 2012.

[54] Ms. Hall stated that she called Mr. Mulvihill back and left him a message indicating that their research indicated that he was sent a copy of the reply.

[55] Mr. Mulvihill recalls receiving a telephone message from Ms. Hall advising that the situation was as it was and that the employer was staying the course and sticking to its position.

[56] Mr. Mulvihill, in light of the response of the employer, believed that the union had missed the deadline for referring the grievances to adjudication. He had never been in a situation where a deadline for referral to adjudication had been missed. There had been extensions of deadlines granted by the employer at the 11th hour. There was an administrative practice in place whereby a request for extension is submitted in writing, but in his view, the practice did not apply once a deadline had been missed. He testified that he could not think of a solution.

[57] He did not know that the Public Service Labour Relations Board could grant an extension of time to refer a grievance to adjudication after the time limits for referral had expired.

[58] He discussed the situation with a senior Labour Relations Officer in the Union of Taxation Employees, Mr. O'Brien, who was generally aware of Mrs. Prior's grievances and the fact that Mr. Mulvihill had been attempting to settle them. Mr. O'Brien's advice was to follow up again with the employer. Mr. Mulvihill explained that with respect to Mr. O'Brien's advice, his access to the employer on staff relations matters was no higher than Ms. Hall, and he already had her response.

[59] Mr. Prior emailed him on January 24, wanting to ensure that he had received the final-level grievance replies. Mr. Mulvihill replied to him on February 7, stating that he had received the emails. Mr. Mulvihill stated that he did not advise Mr. Prior that the deadline for referral of the grievances to adjudication had been missed.

[60] Mr. Prior confirmed that Mr. Mulvihill did not tell him anything about time limits or that the time limits had been missed. Mr. Mulvihill advised him that he had not been copied on the letter enclosing the final-level replies in the grievance process and that once he had received those replies, he would respond accordingly.

[61] Mr. Mulvihill tried to reach Mr. Yaworski in March 2013 concerning the Prior file; however, he did not believe that he connected with him. Mr. Yaworski noted in his file that Mr. Mulvihill had called him on March 6, 2013. The call was not answered, and Mr. Mulvihill did not leave a message.

[62] Mr. Yaworski had no further dealings with Mr. Mulvihill on the Prior file.

[63] During this period of time, there were a number of outstanding grievances for which Mr. Mulvihill had responsibility. Mr. Yaworski was having some difficulty

communicating with Mr. Mulvihill. Nevertheless, Mr. Mulvihill was managing some of his files during the month of May 2013.

[64] Mr. Mulvihill testified that he was on and off work between March and June 2013. He stated that he was preoccupied and depressed and that he had commenced treatments in mid-April for a number of medical conditions.

[65] In his view, during this time, the Prior file was in limbo, not closed; however, he did not know what to do with it.

[66] Mr. Prior stated that he had initiated a discussion with Mr. Mulvihill in early May 2013 and again followed up on June 14, 2013 by email with regard to updates on both files: the grievances and the access-to-information request.

[67] Mr. Prior's understanding at this time was that everything was still moving through the process and that Mr. Mulvihill had everything under his care. He had not been told anything about time limits being missed. Mr. Prior himself was preoccupied at this time and not focusing on the grievance as his wife was not doing well medically and had been hospitalized.

[68] Mr. Mulvihill stated that he was on sick leave from mid-June until September 8 or 9, 2013. He may have seen the email from Mr. Prior when he returned to work but did not think so.

[69] On June 26, Mr. Prior resent the email he sent on June 14, as he had not heard anything from Mr. Mulvihill. He also tried to reach Mr. Mulvihill by phone but was unable to reach him.

[70] Mr. Yaworski testified that on July 10, 2013, he had received a request from Nicole Saint Ubain, Mr. Mulvihill's administrative assistant, requesting a copy of the final-level reply to Mrs. Prior's grievances. She had stated that their file did not have a copy of the final-level reply.

[71] Mr. Yaworski wrote to Ms. Hall by email the same date identified the subject as "Prior reference to adjudication issue" and the importance as "High". He informed her of the request and in addition stated:

> *. . . Pierre also contacted us in January 2013 claiming to have not received the final level reply. See my e-mail below. At the*

> *time there was an issue with timelines to refer the matter to adjudication. It was our position that the timelines had expired. PSAC did not seek to refer Ms. Prior's grievances to adjudication.*

[72] Mr. Yaworski stated that he was surprised that he had been contacted about the Prior file as he had assumed that the union had elected not to proceed.

[73] In late July, Mr. Prior received notification from the union that the grievance file would be closed. He stated that this caused a great deal of frustration as they had believed that Mr. Mulvihill was handling the grievances and moving them through the appropriate channels.

[74] An email from Lyson Paquette to Mrs. Prior dated July 31 refers to a telephone message left on July 30 advising the Priors of the temporary absence of Pierre Mulvihill and that the sender was reviewing the file. The letter recites the history of the grievances and asks the Priors whether they wish to close the file or if not, to provide information concerning when they received the reply at the final level of the grievance procedure. The email states that when the questions are answered, the union would take the appropriate actions.

[75] Mr. Prior replied by email the same date, stating in part:

> *I'm very concerned that Pierre dropped the ball on this and was misleading in his actions throughout 2012 on how he was handling the grievances . . . . Please advise how the Union of Taxation Employees intend [sic] to proceed and correct this condition that Pierre has let develop, if we missed the window for adjudication because of neglect on behalf of the union we will continue to follow this up through our lawyer. I know this email sounds harsh but please understand our frustration level in this situation.*

[76] Later that day, Lyson Paquette wrote to the Representation Section of the Collective Bargaining Branch of the Public Service Alliance of Canada, requesting that the PSAC refer Mrs. Prior's grievances to adjudication.

[77] Mr. Prior's understanding was that the union would now move the grievances forward and get back to him. He confirmed that neither he nor Mrs. Prior had ever indicated to Mr. Mulvihill or anyone else in the union that they wished to withdraw or not proceed with the grievances.

[78] On August 20, 2013, the grievances were referred to adjudication under section 209 of the *PSLRA* by the Public Service Alliance of Canada.

[79] On September 3, 2013, the Canada Revenue Agency advised the Board that the Agency was objecting to these matters being heard at adjudication as they were referred months after the expiry deadline prescribed in the *Regulations*.

[80] On September 26, 2013, the union provided its reply to the objection that included an application to extend the time limits.

## III. Summary of the arguments

### A. For the bargaining agent

[81] Section 61 of the *Regulations* provides the Board with authority to extend time limits in the interest of fairness. The often-cited case of *Schenkman v. Treasury Board (Public Works and Government Services Canada*, 2004 PSSRB 1) outlined five factors the Board considers in extending time limits, namely, clear, cogent and compelling reasons for the delay; the length of the delay; the due diligence of the grievor; balancing the injustice to the employee against the prejudice to the employer and the chance of success of the grievance.

[82] The decision of the Board in *IBEW Local 2228 v. Treasury Board and the Public Service Alliance of Canada*, 2013 PSLRB 144, involves a fact situation similar to those found in this case. In that case, the Board dealt with a situation involving a bargaining agent error in which the grievors in a group grievance relied upon the bargaining agent to ensure that the requirements of the grievance process would be respected. The bargaining agent had full carriage of the matter. The Board acknowledged that an employee remains accountable even when represented; however, on the facts of that case, the grievors had taken all the steps possible and had every reason to trust the bargaining agent that the group grievance would be referred to adjudication and in fact had been referred. The Board found that the grievors could not be faulted for not exercising due diligence. The delay in that case was not insignificant, a period of some 19 months; nevertheless, in the absence of evidence of actual prejudice to the employer, the Board extended the time limits.

[83] Similarly, in *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8, the Board extended time limits in circumstances where a grievance was not properly

transmitted to the second and third levels of the grievance process. The reasons for the delay could be attributed to bargaining agent oversight as a generic grievance involving over 1 000 grievances that were similar to the grievance in issue were actively pursued; however, Mr. Savard's grievance fell through the cracks. The Board found that the grievor diligently pursued his grievance by regularly requesting information and updates, and in the circumstances, the delay of approximately 5 months was not inordinate.

[84] In *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59, the applicant grieved her termination of employment; however, her bargaining agent presented her grievance at the first level of the grievance process some five months later. The evidence established that the grievor sincerely believed that her bargaining agent had presented her grievance at the first level of the grievance process within the applicable time limits. The Board, while endorsing the principle that a principal is bound by the acts of his or her agent, nevertheless concluded that there was room for the exercise of discretion if negligence on the part of the agent was present or apparent, and in conclusion, balancing the injustice to the applicant against the prejudice to the respondent in the absence of evidence, extended the time limits.

[85] What the Board should take from all of these cases is that fairness should drive an application to extend time limits.

[86] Mr. Prior showed due diligence in pursuing the grievances on behalf of his spouse throughout the entire period. Mr. Mulvihill had advised him that he should not worry about progressing the grievances because the union had carriage of the matter. He followed up with Mr. Mulvihill on a regular basis and had no reason to believe the grievances had not been referred to adjudication until the summer of 2013, when he received notification from the union that the grievance file would be closed. It is clear that the Priors had no intention of abandoning the grievances.

[87] It was the confusion surrounding the date that Mrs. Prior received the grievance replies that led Mr. Mulvihill to miss the time limits.

[88] Based on the information received from Mr. Prior that the grievance replies had been picked up on December 7 or 8, Mr. Mulvihill believed that the union was out of time to refer the grievances to adjudication. Based on the reply of the employer that nothing could be done to resolve the situation, he did not know what to do, as his

previous experience in securing extensions of time were limited to situations where the time limits had not as yet expired. He was unaware that the PSLRB could grant extensions of time to refer grievances to adjudication. He approached his superior for assistance in trying to figure out what the appropriate course of action might be. He was stuck, as he had not encountered this situation before. He had not abandoned, withdrawn or closed the grievance files. His health during the entire period may have had an impact on his work. He was on medical leave from June to September 2013 and was struggling with his own workplace issues.

[89] Mr. Yaworski understood that Mr. Mulvihill's concern in their discussion of January 17, 2013 was with respect to the timeliness of the referral to adjudication due to the fact he had not received a copy of the final-level responses. Mr. Mulvihill was looking for some kind of resolution, although he did not officially request an extension. Mr. Mulvihill believed that the time limits for referral to adjudication had expired based on the information he received from the Priors that the final-level reply was picked up on December 7 or 8, 2012.

[90] It is also clear that Mr. Yaworski understood that an extension request was in play; however, he was not in a position to address it. When one looks at the timelines, the time for referral to adjudication of the grievances may not have expired when Mr. Mulvihill first raised the issue with Mr. Yaworski. Mr. Yaworski confirmed with the region that in fact the replies were picked up by Mrs. Prior on December 13, 2012. Mr. Yaworski and Ms. Hall both confirmed that there is a practice at the Canada Revenue Agency to grant two or even three extensions of time in which to refer a grievance to adjudication when a request for extension prior to the expiration of time limits is made. Mr. Yaworski did not advise Mr. Mulvihill that the grievance replies were picked up by Mrs. Prior on December 13 as opposed to December 7 or 8. Mr. Yaworski confirmed in his e-mail of July 10, 2013 to Ms. Hall that it was the employer's position that the timelines had expired when Mr. Mulvihill had raised the issue in January 2013. Mr. Mulvihill, although he could not remember the exact wording of the telephone message from Ms. Hall in January, stated it was to the effect that nothing could be done to resolve the situation. It is clear that when Ms. Hall left her voicemail on January 22, the time limits for referral to adjudication had expired. Thus, extenuating circumstances surround the case.

[91] There is no evidence of prejudice to the employer. What the Board heard is that there is a general practice of granting two extensions and in some circumstances, three. This would only have been the first extension. There is no evidence to suggest that the grievance is frivolous or vexatious.

**B. <u>For the employer</u>**

[92] The grievance was not referred to adjudication in a timely fashion. The applicant signed for the final-level reply on December 13, 2012. The deadline for referral to adjudication expired on January 23, 2013. The applicant advised the union that she had received the final-level reply by way of a telephone call on January 17, 2013. The employer does not dispute that the applicant informed the union that she had received the reply on December 7 or 8, 2012. She provided the union with a copy of the final-level reply on January 21, 2013. The employer accepts that the union, in the person of Mr. Mulvihill, maintain the consistent position that he did not receive a final-level reply from the employer during this time.

[93] However, it is clear from the *Regulations* that the calculation of the time limits for referring a grievance to adjudication begins on the date the grievance reply is received by the grievor. The employer does not understand the union's argument that the non-receipt of the grievance reply by Mr. Mulvihill has any significance, except that it led to confusion. It is not in dispute that the reference to adjudication did not occur until August 20, 2013, seven months after the expiration of the time limit.

[94] It has been repeatedly held by the Board that the extension of time limits should be the exception and not the rule. See *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92. The leading case of *Schenkman* is a consolidation of the factors to be considered by the Board in extending time limits. The criteria are not necessarily of equal importance. Weighting is situational, depending on the facts in the case at hand.

[95] That is not to say that the jurisprudence does not reflect a preponderance of weighting. There must be clear and compelling reasons for the delay and due diligence. The two factors are intertwined. If there are no compelling reasons for the delay, then the other factors will not matter much in most cases. See *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102, at paragraph 26; *Copp v. Treasury Board (Department of Foreign Affairs and International*

*Trade)*, 2013 PSLRB 33, at paragraph 22; *St-Laurent et al. v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 4, at paragraph 19; and *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110, at paragraph 20.

[96] In dealing with delays, the Federal Court of Appeal, in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 (F.C.A.), developed an appropriate test for extending time limits. That test is: 1. There is a continuing intention to pursue his or her application. 2. The application has some merit. 3. There would be no prejudice arising from the delay on the non-moving party. 4. There exists a reasonable explanation for the delay. The justification for extension of time turns on the facts of each particular case.

[97] In *Canada v. Tran,* 2008 FC 297, the Federal Court, in applying the *Hennelly* decision, determined that the test for extension of time had not been satisfied as there had not been a reasonable explanation for the delay, even though the other criteria had been satisfied. In that case, counsel, having realized that no timely application had been filed, waited over a month to file the application for the extension of time. The Court found the delay unreasonable. In *Doray v. Canada*, 2014 FCA 87, involving a motion for an order extending the time limit to appeal the judgment of the Tax Court, the Federal Court of Appeal ruled that the applicant must demonstrate a continuing intention to appeal, an arguable case for appeal and a reasonable explanation for the whole period of delay. Also relevant is whether the respondent was prejudiced by the delay.

[98] In this case, the application took seven months after the time limit for the referral to adjudication had expired. The fact that Mr. Mulvihill, on January 17, 2013, received late notice that the reply of the employer had been delivered to Mrs. Prior, and that his efforts to communicate with the employer in many respects was not effective or fruitful, are the reasons why the timelines were missed. That confusion lasted until at the latest January 23 or 24, when it became clear that the timelines were missed. All of the facts were before the union in late January to make a reference to adjudication, yet it took until August 20. There is no single compelling or cogent reason for that delay, other than excuses that lack substance. All Mr. Mulvihill had to do was to attend at the offices of the representation group of the PSAC in the same building and ask for an extension request to be filed.

[99] Workload is not an excuse for extending time limits. See *Chin v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1033 (T.D.)(QL), in which the Court refused to reconsider an order dismissing an application for extension of time within which to file an application for leave to appeal an immigration decision. The ground for the delay was the solicitor's schedule. Mr. Mulvihill stated that his health was not good. There were no specifics and no medical reports filed in evidence. In *Brassard v. Treasury Board (Department of Public Works and Government Services),* 2013 PSLRB 102, the Board acknowledged that a health condition may be a clear, cogent and compelling reason justifying an extension of time but that will depend on the specifics of the condition, which were not met in that case. In sum, there are no clear and compelling reasons that justify the delay.

[100] It is fair to say that the union is not a distinct and separate entity apart from the applicant. It is not a true third party. Grievances are union-controlled. The applicant is bound by the act of its agent.

[101] What did the applicant do? She did not testify. She was not subject to examination or cross-examination. The Board should draw an adverse inference and conclude that she was fully aware of the time limits for referring her grievance to adjudication.

[102] Mrs. Prior picked up the grievance reply on December 13, 2012. Neither Mr. nor Mrs. Prior took any action until January 17, 2013, when Mr. Prior contacted Mr. Mulvihill, a period of 33 days — almost the entire limitation period. Despite Mr. Mulvihill saying he didn't have a copy of the grievance reply, they didn't forward the grievance reply until 38 days after its receipt, within 2 days of the expiration of the time limit. Their explanation was that it was Christmas and they were on vacation, and Mrs. Prior felt anxiety about discussing the grievance. They were on vacation for only 7 days, leaving 3.5 weeks. As Mrs. Prior did not testify, we do not have any evidence about her anxiety. There is no medical evidence to establish that she was suffering from anxiety.

[103] Mr. Prior was not suffering from stress. He stated that he did not want to deal with this over the holidays as he did not want to upset his wife. He threw away 38 days of the 40-day time period. They also contributed to the confusion experienced by Mr. Mulvihill as they did not inform him of the correct date the final-level grievance replies were picked up.

[104] Mr. Mulvihill's conduct gave the Priors lots of reasons to be concerned. Mr. Mulvihill didn't call; he did not respond to emails. The Priors have to take responsibility for the exercise of insufficient due diligence.

[105] The employer has suffered prejudice as it is entitled to know that a matter has been put to bed. Section 90 of the *Regulations* has been put in place for a reason, namely, the stability of the labor relations regime. In any event, if there are no clear and compelling reasons to explain the delay, there is no need to look at actual prejudice.

**C. Reply argument**

[106] There is no reason to draw an adverse inference on account of Mrs. Prior not testifying. The facts are clear that Mrs. Prior was not in a position to take the lead on the file since 2010, when her husband became the contact person.

[107] While union agent error may not be a compelling an explanation for the delay, it is clear that the applicant has satisfied the due diligence factor. Mr. Mulvihill advised the Priors on or about November 30, 2012 that he would be receiving the replies at the final level of the grievance process, that he would handle the situation and that there was no need for them to do anything. There was no need for the Priors to follow up; nevertheless, the Priors consistently did, following their vacation in January and thereafter.

[108] There is no actual evidence of prejudice to the employer if the extension of time were to be granted.

**IV. Reasons**

[109] It is not disputed that the grievances were referred to adjudication some seven months after the expiration of the time limits. The time limit for referring a grievance to adjudication is prescribed in section 90 of the *Regulations* of the Board, which is no later than 40 days after the date on which the person who presented the grievance received a decision at the final level of the grievance process.

[110] Time limits under the *Act* are prescriptive, and as submitted by the respondent, should be extended only by exception.

[111] Under paragraph 61(*b*) of the *Regulations,* the Chairperson or a delegate may extend time limits either before or after the expiry of the time, if it is in the interests of fairness to do so. The Board has developed criteria that it considers in extending time limits as outlined in *Schenkman, supra,* at paragraph 75, namely, clear, cogent and compelling reasons for the delay; the length of the delay; the due diligence of the grievor; balancing of the injustice to the employee against the prejudice to the employer and the chances of success of the grievance. The criteria are not necessarily of equal importance, and weighting is situational, depending on the facts in the case at hand.

[112] The employer forcefully argues that the jurisprudence reflects a preponderance of weighting on one factor, clear, cogent and compelling reasons for delay. There must be clear and compelling reasons for the delay and due diligence of the applicant. These two factors are intertwined, and if there are no compelling reasons for the delay, then the other factors will not matter much in most cases. The employer relies upon a number of decisions of the Board as well as a number of decisions of the Federal Court, as recited in the argument.

[113] Turning to the facts of the case, the employer argues that there are no clear and compelling reasons that justify the delay, given that all of the facts were before the union in late January 2013 to make a reference to adjudication, yet it took until August 20 to do so. There is no single compelling or cogent reason for the delay other than broad excuses that lack substance. The union is not a distinct and separate entity apart from the applicant. It is not a true third party. The grievances are union-controlled. The applicant is bound by the act of its agent. In any event, the Priors did not exercise due diligence in pursuing the grievances.

[114] In *Thompson*, Chairperson Bloom had to deal with a request for an extension of time involving facts not dissimilar to those presented in this case, as well as a number of the same legal issues. As noted *supra*, the applicant had grieved the termination of her employment. The bargaining agent presented her grievance at the first level of the grievance process some five months later. The evidence established that the applicant believed that her bargaining agent had presented her grievance within the applicable time limit. She had relied on the ability of the bargaining agent representative to serve her needs, and she had placed her full confidence in him. The Board gave little credence to the testimony of the bargaining agent representative, who claimed that the

grievance had in fact been presented at the first level of the grievance process in a timely fashion and that the respondent had refused or failed to deal with it. The Chairperson found his evidence implausible.

[115] With respect to the criteria developed by the Board for the exercise of the authority to extend time limits, Chairman Bloom stated:

> *[7] It is self-evident that the particular set of circumstances defining each case must dictate the weight to be given to any one of the above criteria relative to the others. It would be patently unfair to attribute the same weight to each of these criteria irrespective of the factual context. Consequently, it behooves the Chairperson seized of an application for an extension of time to apply or at least attempt to apply each of the criteria to the facts of the particular case at hand. Once this exercise is completed, the Chairperson should then attribute the appropriate weight to each of the criteria based on the specific factual circumstances that may, in some instances, justify attributing all or most of the weight to only one or two of the criteria.*

[116] The employer, in *Thompson*, argued that there were no clear, compelling and cogent reasons for the delay and that the time limits were not unreasonable and that they contributed to stability in labor relations. The Chairperson agreed with the principle; however, he stated that as the Board has discretion to grant extensions, it is in the exercise of that discretion that the Chairperson's role and judgment are paramount.

[117] The respondent, in *Thompson*, also argued that the employer should not be prejudiced by the union's negligence and that the applicant had the obligation to follow up, despite the union officer's inaction. Chairperson Bloom stated:

> *[13] While I fully endorse the principle whereby a principal is bound by acts of his or her agent acting within the mandate's legitimate and valid limits, nevertheless, there is room for the exercise of discretion if negligence on the part of the agent is present or apparent. . . .*

[118] Chairperson Bloom then turned to address the standard of balancing the injustice to the applicant against the prejudice to the respondent. The employer did not invoke any particular hardship that the respondent would suffer resulting from the delay in presenting the grievance.

[119] He found that the applicant's diligence could not be doubted and that she had no reason to pursue the matter personally since the union's officer not only had the matter in hand but also had given her every reason to believe that he was following up diligently.

[120] He concluded that in applying the five criteria set by the jurisprudence to the facts of the case, only one had a predominant impact on his decision. Fairness dictated that the applicant not be penalized by the action or inaction of the officer of the union in whom she had placed her full confidence. He stated: "Moreover, she had every reason to rely on his ability to serve her needs because that is the statutory relationship between the bargaining agent and its representatives on the one hand and the employees in the bargaining unit on the other."

[121] In *Copp,* the Vice-Chairperson disagreed with the decision in *Thompson* in two significant respects. The case involved a termination grievance. There was a delay of 80 days in transmitting the grievance to adjudication. Throughout the process, the applicant diligently ensured that the union had all of the information it needed to process her grievances. The reason for the delay was the union's negligence. She believed that she should not be penalized for administrative error on the part of the union and that the granting of an extension of time would not prejudice the respondent.

[122] Having reviewed the criteria outlined in *Schenkman*, *supra*, the Vice-Chairperson stated at paragraph 22:

> *Those criteria are not necessarily equally important. If there are no clear, cogent and compelling reasons for the delay, in most cases, it would not matter that much whether the delay was 40 days or 80 days or whether the applicant was diligent or that refusing to extend the time would create an injustice to the applicant greater than the prejudice to the respondent by allowing the extension. . . .*

He concluded that administrative errors by a union representing an employee do not constitute a clear, cogent and compelling reason to explain the delay, even though an applicant may exercise due diligence in pursuing her grievance.

[123] The Vice-Chairperson also stated at paragraph 29:

> *I disagree with the decision in* Thompson. *That decision was written more than five years ago in a jurisprudential context that might not have been as clear as it is now. Since then, it has been decided often that a union's omissions, negligence or mistakes are not cogent and compelling reasons for extending time. In my opinion, as I stated in* Callegaro, *"… the applicant and her union cannot be considered as two separate entities…" In that context, the errors of the union are the errors of the applicant.*

[124] In *International Brotherhood of Electrical Workers local 2228 v. Treasury Board,* at paragraph 62, it was observed that it is important to emphasize that the *Schenkman* criteria merely serve to assist the decision maker in coming to a determination as to whether an extension of time is to be granted:

> *. . . With the greatest respect, these criteria bear no fixed presumptive calculations that prevent a decision maker from considering whether, in the interests of fairness, an extension of time ought to be granted. The factors that steer such an inquiry are fact driven and based on the underlying principle of what is fair in the circumstances. . . .*

[125] The proposition that an applicant and the union cannot be considered as two separate entities and that as a consequence, an applicant who has exercised due diligence in pursuing his or her grievance in circumstances where the union has been negligent cannot therefore satisfy the threshold criterion of a clear cogent and compelling reason for a delay in seeking an extension, in my view, is not in accord with the generally accepted principles of labour law.

[126] The Supreme Court of Canada has determined that a union has a duty of fair representation to the individual employees that it represents, arising out of the exclusive power given to the union to act as a spokesperson for the employees in the bargaining unit. See *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509.

[127] Most jurisdictions in Canada, including this jurisdiction, have expressly codified the duty in their collective bargaining statutes. The scope of the duty of fair representation has been found to include a duty of trade unions to avoid serious negligence in representing employees in the grievance procedure. Where complaints concerning the failure of the union to pursue a grievance to arbitration have been

found to contravene the duty, labor boards have ordered trade unions to take the grievance to arbitration and ordered the employer to waive preliminary objections to arbitration, such as a failure to comply with the time limits. See G.W. Adams, *Canadian Labour Law* (second edition), chapter 13.36.2.

[128] Labor relations legislation in Ontario, New Brunswick, British Columbia, Manitoba, Saskatchewan and the federal private sector under the *Canada Labour Code*, as well as the *PSLRA*, provide grievance arbitrators/adjudicators with the authority to relieve against breaches of time limits in connection with processing a grievance to arbitration/adjudication.

[129] Usually, the statutory authority to extend a time period is expressed in terms of there being in existence circumstances where there are reasonable grounds for the extension, and no substantial prejudice would result from granting the relief. See Brown and Beatty, *Canadian Labour Arbitration*, para 2:3142.

[130] For example, subsection 60(1.1) of the *Canada Labour Code* empowers an arbitrator to extend time limits in the grievance process or arbitration procedure if there are reasonable grounds for the extension, and the other party would not be unduly prejudiced by the extension.

[131] The statutory language of the *Code* does not require the party seeking an extension to provide a reasonable explanation or reasonable excuse for the delay. The question for the arbitrator is whether overall there are reasonable grounds to grant the extension, coupled with the question of whether an extension would prejudice the opposite party. For example, in *Canadian National Railway v. Teamsters Canada Rail Conference*, (June 20, 2011) (Can R.O.A.), arbitrator Michel Picher found there were reasonable grounds to grant an extension of time limits in which to file a grievance in circumstances where the employee had been terminated, the union's local chairman negligently failed to process the grievance, there was a pending duty of fair representation complaint outstanding before the Canada Industrial Relations Board and the issue of prejudice to the employer could be mitigated.

[132] I find Chairman Bloom's rationale in *Thompson* compelling where he stated that as the Board has discretion to grant extensions, it is in the exercise of that discretion that the Chairperson's role and judgment are paramount. He determined in that case

that there is room for the exercise of discretion if negligence on the part of the union is present or apparent.

[133] The respondent referred to a number of decisions of the Federal Court of Canada in support of the proposition that a justification for an extension of time requires that there exist a reasonable explanation for the delay and in some cases for the whole period of the delay.

[134] I have carefully reviewed these decisions. In *Hennelly*, the application for the extension of time was brought under present rule 8(1) of the *Federal Court Rules*. The rule provides: "On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order."

[135] As noted in their text, *Federal Court Practice 2012*, Saunders, Rennie and Garton state at page 351, "Rule eight does not stipulate the factors on which the discretion to extend or abridge time should be exercised. However, the courts have established factors which should be addressed by a party seeking the variation of the time periods set by the *Rules*."

[136] In *Tran*, the legislative provision in issue that authorized the Court to extend time limits was subsection 225.2(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended. The section contained a limitation period for reviewing court orders authorizing the Minister of National Revenue to take collection action under the *Income Tax Act*. The section provided in part:

> *225.2(9) . . . an application under subsection 225.2(8) shall be made*
>
> > *(*a*) within 30 days from the day on which the authorization was served on the taxpayer in accordance with this section; or*
> >
> > *(*b*) within such further time as a judge may allow, on being satisfied that the application was made as soon as practicable.*
>
> [Emphasis added]

[137] The Court in that case determined that the application was not brought as soon as practicable as required by the *Act*. The Court then considered whether it could use

its inherent discretion to extend the 30-day limitation based on the tests as developed by the Court in *Canada (Attorney General) v. Hennelly* and concluded it could not.

[138] In *Doray*, a decision of the Federal Court of Appeal, the applicant moved for an order extending the time to appeal the judgment of the Tax Court. Paragraph 27(2)(*b*) of the *Federal Courts Act* provides that an appeal from the Tax Court of Canada shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal.

. . .

> (b) *in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.*

. . .

In that case, based on factors decided in the case law, the Court decided not to grant the extension sought.

[139] It is apparent that the *Federal Courts Rules* do not stipulate the factors on which the Courts' discretion to extend time limits is to be based, and the Courts therefore have developed and established factors in the case law to be applied. The provision in the *Income Tax Act* expressly requires that a judge be satisfied that the application was made as soon as practicable. These cases, in my view, are very different from this case, where the *Regulations*, as subordinate legislation, mandate that extensions of time be granted if it is in the interests of fairness to do so.

[140] I therefore adopt Chairperson Bloom's rationale in *Thompson*, to grant an extension in a situation where negligence of representatives of the union is present or apparent and the grievor has exercised due diligence in pursuing their grievance and there is no compelling evidence of prejudice to the employer. I agree that fairness should drive an application to extend time limits.

[141] On the facts of this case, the union's negligence was responsible for the late referral to adjudication. As in *Thompson*, in my view, the applicant, Mrs. Prior, and her husband have satisfied me that they exercised due diligence in pursuing her grievances. I am not prepared to draw an adverse inference on account of the fact that Mrs. Prior did not testify. At all times material to facts surrounding this extension of

time, Mr. Prior was acting as her agent. The Priors relied completely on Mr. Mulvihill to progress the grievances. He advised them on November 30, 2012 that he would be receiving replies at the final level of the grievance process, that he would handle the situation and that there was no need for them to do anything. The Priors could only assume that Mr. Mulvihill would have received the replies at the final level of the grievance process at the same time as they did and would take the necessary action to refer the grievances to adjudication. They nonetheless followed up with Mr. Mulvihill after their return from vacation in January. Mr. and Mrs. Prior were never advised that the time limits for referral to adjudication may have been missed.

[142] They followed up with Mr. Mulvihill on a regular basis during the winter/spring of 2013. They had no reason to believe the grievances had not been referred to adjudication until the summer of 2013, when they received notification from the union that the grievance file would be closed. They replied the same date, expressing concern that if the ball had been dropped, they had been misled, and that if the window for adjudication had been missed because of the neglect of the union, they would follow up through their counsel. On these facts, I conclude that the Priors had no intention of abandoning the grievances and had exercised due diligence.

[143] The employer did not produce any evidence of actual prejudice or particular hardship that it would suffer if the time limits for referral to adjudication were extended. On the other hand, the applicant is out of the workforce, and this is her only recourse for redress. In my view, the injustice to the applicant of refusing access to adjudication clearly outweighs any prejudice the respondent might suffer incidentally from allowing this matter to be heard on the merits.

[144] As in *Thompson*, *supra*, in my view, fairness dictates that the applicant not be penalized by the action or inaction of Mr. Mulvihill. She also had placed her full confidence in him and relied on his ability to serve her needs. As Chairperson Bloom stated, ". . . because that is the statutory relationship between the bargaining agent and its representatives on the one hand and the employees in the bargaining unit on the other."

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

*(The Order appears on the next page)*

**V. Order**

[146] The application for the extension of time is granted.

October 31, 2014.

**David Olsen,**
**Vice-Chairperson**