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File: 566-02-7361

Citation: 2016 PSLREB 21



Public Service Labour Relations Act

Before an adjudicator

BETWEEN

NATHAN PHILIP SHANDERA

Grievor

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

Indexed as

Shandera v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Michael F. McNamara, adjudicator

For the Grievor: Himself

For the Respondent: Lesa Brown, counsel

Decided on the basis of written submissions, filed August 31, September 1, 4 and 10, October 18 and November 4 and 15, 2012, and May 29 and June 16 and 25, 2014.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievor, Nathan Philip Shandera, referred five grievances to adjudication. The respondent, the Correctional Service of Canada (CSC), alleges that the Public Service Labour Relations and Employment Board (“the Board”) lacks the jurisdiction to hear the grievances because, among other reasons, they were untimely and the referral was premature.

[2] For the following reasons, I find that the referral was not premature and that in the specific circumstances of this case the respondent was not entitled to raise an objection as to the timeliness of the grievances because it did not reject them on that basis at all the lower levels of the grievance process.

II. Background

[3] The grievor is employed as a correctional manager with the CSC at the CX-4 group and level. His position is excluded, meaning that due to the nature of its duties, he is not represented by a bargaining agent.

[4] In 2012, the grievor presented the following five grievances to the respondent:

1. grievance number 1305-02-48502, dated May 8, 2012 (“grievance 1”);
2. grievance number 1305-02-48503, dated May 8, 2012 (“grievance 2”);
3. grievance number 1305-02-48504, dated May 8, 2012 (“grievance 3”);
4. grievance number 1305-02-48555, dated May 28, 2012 (“grievance 4”); and
5. grievance number 1305-02-48708, dated June 7, 2012 (“grievance 5”).

[5] On July 30, 2012, the Public Service Labour Relations Board (PSLRB) received a package of documentation from the grievor in which he advised the Board that he was referring five grievances to adjudication pursuant to paragraph 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *PSLRA*”). The respondent was notified of the referral on August 2, 2012, and on August 31, 2012, it advised the PSLRB that it would file an objection to the PSLRB’s jurisdiction to hear these grievances for a number of reasons, including that the referral was premature and that the grievances were untimely. On September 1, 2012, the grievor presented the PSLRB with his initial comments in response to the respondent’s objection.

[6] On September 4, 2012, the respondent wrote a letter to the PSLRB setting out in detail its objection to the PSLRB's jurisdiction to hear the grievances. The respondent submitted that none of the grievances concerned a disciplinary action within the meaning of paragraph 209(1)(b) of the *PSLRA* and that four of them were presented well beyond the required timelines. The respondent also argued that several of the grievances were referred to adjudication prematurely. It asked that they all be dismissed for want of jurisdiction. The grievor then filed a response.

[7] The respondent filed additional submissions on October 18, 2012, to which the grievor responded on November 4, 2012. The respondent replied to the grievor's submissions on November 15, 2012.

[8] At a pre-hearing conference held on April 22, 2014, it was decided that the question of the grievances' timeliness and their referral to the PSLRB be dealt with as a preliminary matter. Accordingly, the respondent filed updated written submissions on the issue on May 29, 2014, and the grievor responded on June 16, 2014. The respondent replied to this response on June 25, 2014.

[9] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Board to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continued under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

III. Issues and Analysis

A. Were any of the grievances referred prematurely to the Board for adjudication such that it has no jurisdiction to deal with them?

[10] As the respondent notes at the outset of its most recent submissions, the grievor occupies an excluded position and is unrepresented. Consequently, the applicable grievance process is that prescribed in the *Public Service Labour Relations Regulations*, SOR/2005-79 ("the *Regulations*").

[11] Section 72 of the *Regulations* sets out the time limits for issuing grievance replies at each level of the grievance process, as follows:

72 (1) Unless the individual grievance relates to classification, the person whose decision constitutes the appropriate level of the individual grievance process shall provide the decision to the grievor or the grievor's representative, if any, no later than 20 days after the day on which the individual grievance was received by the grievor's immediate supervisor or the grievor's local officer-in-charge identified under subsection 65(1).

(2) If the individual grievance relates to classification, the deadline is 80 days.

[12] Thus, the respondent had up to 20 days following the date it received a grievance at the final level of the grievance process to provide its decision to the grievor.

[13] Section 90 of the *Regulations* sets out the time limits for referring a grievance to the Board after the final level of the grievance process, as follows:

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.

[14] Accordingly, the grievor had up to 40 days following the day on which he received the respondent's final-level decision to refer a grievance to the PSLRB for adjudication. If a final-level decision had yet to be issued relating to any of the grievances, he could have referred that grievance to the PSLRB for adjudication up to 40 days after the expiry of the 20-day period allotted to the respondent to issue its decision.

[15] The respondent contends that grievances 1, 2 and 3 were referred to adjudication before the expiry of its 20-day period to issue its decision on them at the final level, pursuant to subsection 72(1) of the *Regulations*. The respondent submits that therefore the referrals were premature.

[16] The respondent maintains that the deadline to issue its decision for all three grievances was July 26, 2012, and that the grievor referred the grievances to adjudication prematurely on July 19, 2012. However, the respondent's submission contains a fundamental error. The grievances were not referred to adjudication on July 19, 2012, but rather on July 30, 2012, the date when the PSLRB received the "Notice of Reference to Adjudication of an Individual Grievance" form ("the notice form") from the grievor. This point was clearly indicated to the respondent in the letter the PSLRB sent to the grievor and the respondent, dated August 2, 2012, in which the PSLRB acknowledges receiving the reference to adjudication on July 30, 2012. It is true that the notice form is dated July 19, 2012, but irrespective of what date may appear at the bottom, it was without any doubt filed with the PSLRB on July 30, 2012. The date stamps that the PSLRB's Registry Operations placed on all the documents filed with the notice form bear the July 30, 2012, date.

[17] Furthermore, even if the referral was effected on July 19, 2012, the respondent has still failed to establish that the referrals to adjudication were premature. It did not indicate in its submissions how it calculated that the deadline to issue its decision was July 26, 2012. According to the notice form, the date on which all three grievances were presented at the final level was June 18, 2012.

[18] The grievor submitted a letter sent to him by Sylvain Garceau, Supervisor, Grievance Management, CSC, dated June 18, 2012, in which Mr. Garceau confirmed receiving these grievances at the final level. The letter states that ". . . as per usual practice, the deadline for responding to the grievance(s) is extended by mutual agreement, pending your presentation." There is no indication in the material submitted by the parties that the grievor actually agreed to such an extension, and the "usual practice" is probably in relation to grievances filed by the bargaining agents that represent employees at the CSC and not by unrepresented individuals. On the contrary, in an email dated September 1, 2012, and addressed to the respondent and the PSLRB following the respondent's initial notice of objection to the timeliness of the referral, the grievor explicitly stated that he had not agreed to any extension, noting that as of that day, he had yet to receive any final-level decision from the respondent about the three grievances. In fact, the respondent issued the final-level response to these grievances only on December 31, 2012.

[19] However, even if a “hearing” was held on July 6, 2012, as far as subsection 90(1) of the *Regulations* is concerned, the key date is when the grievance was received by the respondent at the final level. Subsection 72(1) says that the respondent must respond within 20 days of the date it receives the grievance at that level, not from the date it is “presented” or heard. The evidence shows that as of June 18, 2012, the respondent acknowledged receiving grievances 1, 2 and 3. The 20-day period following this date ended on July 8, 2012. As of the following day, the grievor was entitled to refer the grievances for adjudication.

[20] In any event, as I have already explained, even if the deadline was July 26, 2012, the referral for adjudication was made after that date, on July 30, 2012. Therefore, the respondent has not established that the referral of grievances 1, 2 and 3 was premature.

B. Were any of the grievances filed late?

[21] The respondent maintains that several of the grievances were submitted beyond the prescribed period for filing a grievance and that therefore they are untimely. Section 68 of the *Regulations* sets out the applicable time limits for filing a grievance at the first and succeeding levels of the grievance process, as follows:

68 (1) A grievor may present an individual grievance at the first level of the individual grievance process no later than 35 days after the earlier of the day on which the grievor received notification and the day on which the grievor had knowledge of the alleged violation or misinterpretation or any occurrence or matter affecting the grievor’s terms and conditions of employment.

(2) A grievor may present an individual grievance at each succeeding level beyond the first level

(a) no later than 15 days after the day on which the decision of the previous level was received; or

(b) if a decision of the previous level was not received, no later than 40 days after the expiry of the period within which the decision was required.

(3) An individual grievance is deemed to have been presented within the time referred to in subsection (1) or (2) if, within that time, it is delivered or sent by courier to the grievor’s immediate supervisor or the grievor’s local officer-in-charge identified under subsection 65(1).

[22] Accordingly, the grievor was required to initially present his grievances no later than 35 days after learning of the event or matter giving rise to the grievances or after the day when he received notification of it, whichever is earlier.

[23] The respondent alleges that grievances 2, 3, 4 and 5 were filed after this period had expired, as follows:

- a) Grievance 2: the grievance presentation form is dated May 8, 2012. The grievor complains that the Assistant Warden of Operations (AWO) sent a letter about the grievor to the Workers' Compensation Board (WCB) on October 14, 2011, in which he disclosed information about the grievor's personal life. The grievor asks that the matter be investigated. The grievance did not specify when he gained knowledge or was notified of this letter. However, a "Local Fact Finding Investigation" report prepared by the CSC about this alleged breach, which the grievor says he received in May 2012, notes that the grievor submitted allegations about the breach to the investigator on March 19, 2012. Therefore, he must have been aware of the letter on that date, if not earlier.
- b) Grievance 3: the grievance presentation form is dated May 8, 2012 and signed as received by the employer dated May 9, 2012. The grievor states that he filed harassment claims with the respondent in relation to five incidents that occurred between April 2010 and August 2011. He claims that the respondent did not investigate or mediate the allegations and that he became a target of continued harassment while on workers' compensation leave.
- c) Grievance 4: the grievance presentation form is dated May 28, 2012 and signed as received by the employer dated May 30, 2012. The grievance relates to a letter dated January 16, 2012, which the Assistant Warden sent to the grievor's physician. The grievor alleges that the letter constitutes harassment and is discriminatory.
- d) Grievance 5: the grievance presentation form is dated June 7, 2012 and signed as received by the employer dated June 12, 2012. The grievance contains two allegations. In the first, the grievor states that during a meeting at which senior management informed him that he was being suspended

without pay, held on October 8, 2011, he was not provided with any representation, even though he requested it. In the second part of the grievance, the grievor states that information about his complaint to the Canadian Human Rights Commission was given to the AWO. He notes that the fact that the AWO was aware of the complaint was noted in a WCB investigation report about him, dated January 26, 2012, which gives an account of an interview with the AWO. The grievor does not indicate when he received a copy of the WCB investigation report.

[24] These grievances all appear to have been presented late. Grievance 2 clearly relates to a letter dated October 14, 2011, and as indicated in the description of the grievance, the grievor must have been aware of the letter from March 19, 2012, if not earlier. In grievance 3, the harassment to which he refers predates the filing of the grievance by at least eight months. The letter at issue in grievance 4 was sent four months before the grievance was filed. Finally, the denial of representation that the grievor alleges in the first part of grievance 5 occurred in October 2011, seven months before the grievance was filed. The disclosure with respect to his human rights complaint that is also mentioned in the grievance was referred to in a report dated January 26, 2012. Although the grievance does not state when the grievor learned of the report's content, he did not present any information with his submissions to suggest that he learned of the disclosure within the 35 days before he filed the grievance.

[25] The grievor argued in his submissions that he filed grievances 2, 3 and 4 within days after he received a copy of an investigation report that the respondent had commissioned, which had determined that most of his allegations were unfounded. He did not attach a copy of the report with his submissions, but it seems to have been included with the documents relating to grievance 1 in the referral to adjudication. The report appears to deal with the privacy issues raised in grievance 2, but it is not evident if it dealt with the matters raised in the other grievances.

[26] Irrespective of whether this report had any impact on when the grievor could file his grievances, and assuming that these grievances were all presented late, is the respondent entitled to object as to their timeliness nonetheless? According to section 63 of the *Regulations*, a grievance may be rejected on the basis that it was presented late only if it was rejected at a lower level for the same reason. This point is

reiterated at subsection 95(2), which provides that an objection as to the timeliness of a grievance's presentation 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. Did the respondent reject the grievances on this ground at all the levels preceding their referral to adjudication?

[27] The respondent states in its submissions that the parties waived the first level of the grievance process, but it did not provide any document or other evidence to support this assertion nor did it give any details as to how this consent was obtained. In his September 1, 2012, initial response to the respondent's objection, the grievor denied having agreed to bypass the first level of the grievance process and claimed that it was the respondent's unilateral decision. It should be reiterated that the grievor is not represented by a bargaining agent and that any practice with respect to the first level of the grievance process that might have been in place between the respondent and the bargaining agents with which it deals did not apply to the grievor.

[28] Therefore, the respondent first addressed grievances 2, 3 and 5 at the second level. In all three instances, it stated in its grievance replies that they were "deemed untimely." It mistakenly said that the grievor had to file his grievances within 25 days after the date on which he was notified or became aware of the event giving rise to them. This appears to be the period contemplated in the collective agreement for CX Group employees, but as mentioned earlier, it does not apply to the grievor. In fact, he had up to 35 days to file the grievances. However, irrespective of the period mentioned, the respondent stated clearly at the second level that in its view, the grievances were untimely.

[29] The respondent did not issue the final-level responses to grievances 2, 3 and 5 before the expiry of the 20-day period following the day on which the grievances were received at that level from the grievor. That period ended on July 8, 2012, at the latest, with respect to grievances 2 and 3 (as mentioned earlier in this decision), and on July 25, 2012, at the latest, with respect to grievance 5, which the respondent declared to have received at final level on July 5, 2012.

[30] Subsection 90(2) of the *Regulations* provides that if the respondent does not issue a final-level decision within the response period, the grievance may be referred to adjudication. Accordingly, the grievor referred all three grievances to the PSLRB on July 30, 2012. The respondent ultimately issued a single final-level response for

grievances 2 and 3 on December 31, 2012, and for grievance 5, on January 15, 2013. In both final-level responses, it denied the grievances, stating that they had not been filed within the applicable timelines set out in the *Regulations* and that therefore it deemed them untimely.

[31] As for grievance 4, the respondent proceeded to deal with the matter at the final level. The grievor acknowledged in his September 1, 2012, reply to the respondent's objection that he agreed to the second level being bypassed because the person who would have responded to the grievance at the second level was implicated in the grievance. However, the grievor denies having consented to the first level being bypassed. In a letter sent to the grievor by Mr. Garceau, dated June 5, 2012, the respondent acknowledged having received the "final level grievance." Thus, the 20-day period to issue its response to grievance 4 following this date ended on June 25, 2012, at the latest. The respondent issued its final-level response on July 26, 2012, and while it stated that it considered the grievance untimely, the response was issued after the deadline for response had elapsed.

[32] I find that with respect to grievances 2, 3, 4 and 5, the respondent did not demonstrate that it rejected them as untimely at all levels preceding their referral to adjudication. It did not provide any responses at the first level for grievances 2, 3 and 5, and I am not persuaded that the grievor waived his right to any response at that level. I note again that all of the grievances concern an unrepresented grievor who is not bound by any collective agreement. In these specific circumstances, the respondent should have sought the grievor's explicit consent to waive the first grievance level.

[33] Under subsection 72(1) of the *Regulations*, the grievor should have received a first-level response within 20 days after the respondent received these grievances. The respondent did not respond at all at the first level. A failure by a decision maker in the grievance procedure to reply is construed as a decision rejecting the grievance (see *McWilliams v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 58. at para 22 and 23). This "non-reply" rejection, as described in *McWilliams*, means that the respondent's first response did not reject the grievances as untimely.

[34] Besides, even if it had been established that the grievor consented to waiving a first-level response, the fact that the respondent did not file a final-level response within the 20-day period following the transmittal and its reception of the four grievances (2, 3, 4 and 5) also constitutes a "non-reply" rejection of the grievances,

which again means that they were not rejected as untimely. It does not matter if the final-level responses, which were issued weeks and months later, asserted that the grievances were filed late. Subsection 95(2) of the *Regulations* is clear. The respondent's responses at every level must have rejected the grievances for the reason of timeliness for it to raise the issue as an objection. Having failed to, it was barred from raising the objection (see *McWilliams* at para 24).

[35] I recognize that this question about whether a timeliness objection can validly be raised when the final level response is issued late was addressed somewhat differently in *Szmidt v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 114. Neither party referred to this decision in their submissions but I find anyway that it can be distinguished from the present case. In *Szmidt*, there was no dispute that the grievance was untimely. The employer invoked the untimeliness of the grievance in its final level response, but it was issued after the grievor had referred the grievance for adjudication. The adjudicator held that despite being late in issuing the final level response, the employer had met its obligations under section 95 of the *Regulations*, holding that although the employer could have been more diligent in issuing its final level response, "it did issue the decision."

[36] While I am not necessarily bound by this finding, in my view, there is an important distinction to be drawn between the two cases. In *Szmidt*, the employer issued its final level response only seven days after the grievance was referred to adjudication, and more importantly, five days before it sent its timeliness objection to the PSLRB.

[37] In the present case, the respondent issued its final level responses to grievances 2, 3 and 5, between five and six months after the response periods had expired and the grievances had been referred to adjudication, and at least four months after the respondent had sent its timeliness objection to the PSLRB. The final level response to grievance 4 was issued over one month after its due date.

[38] This distinction from *Szmidt* is very important, especially with respect to grievances 2, 3 and 5. The employer should simply not be allowed to correct its omission so many months after the referral to adjudication and, more importantly, after the respondent had already presented to the PSLRB its objection to the grievances' timeliness, an objection that would otherwise have had to be dismissed because the grievances had not been rejected for timeliness in a final level response.

To enable the respondent to rectify this omission unilaterally several months after making its objection to the PSLRB would be highly prejudicial and unfair to the grievor.

[39] I therefore maintain that the respondent failed to reject grievances 2, 3, 4 and 5, on the grounds of timeliness at every level and it is therefore barred from raising the objection.

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

(The Order appears on the next page)

IV. Order

[41] I deny the respondent's objection.

[42] I find that the referral of the grievances to adjudication was not premature and that the respondent was not entitled to raise an objection as to the timeliness of that referral because it did not reject the grievances on that basis at all the lower levels of the grievance process.

March 17, 2016.

**Michael F. McNamara,
adjudicator**