File: 166-2-28734

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JOHN S. SALLENBACK

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Todd Woytiuk, Public Service Alliance of Canada

For the Employer: Carole Bidal, Counsel

Heard at Calgary, Alberta,
September 1, 1999

Mr. John Sam Sallenback, a Correctional Officer of the Bowden Institution, Correctional Service of Canada (CSC), Bowden, Alberta, is grieving a 20-day financial penalty imposed in 1997. His grievance reads:

> *I grieve management's decision on fining myself the financial penalty equivalent to 20 days of pay. I find the penalty to be too harsh causing undue hardship and premature in penalty when the case itself has not been heard in the Court of Queen's Bench as to whether guilt has been established. Upon speaking with Regional Vice-President of our Union, I find agreement. I am within my right to present this grievance, in accordance to Collective agreement.*

Mr. Sallenback is requesting the following corrective action:

1. *fine and penalty be reduced, or quashed concerning the alleged assault.*

2. *any written documentation concerning the alleged assault be removed from my file with myself and Union Rep. present.*

3. *Representation by Union at all levels.*

Argument on Timeliness

At the outset of the hearing, counsel for the employer argued that the grievance was untimely, as announced in a letter sent to the Board on June 10, 1999 and copied to the grievor's representative on June 11, 1999. In support of her argument, counsel submitted on consent, Exhibits E-1 to E-8, with Exhibit E-1 being the relevant extract from the Master Agreement between the Treasury Board and the Public Service Alliance of Canada signed on May 17, 1989, Article M-38, Grievance Procedure. Clause M-38.10 reads:

> *M-38.10 An employee may present a grievance to the First Level of the procedure in the manner prescribed in clause M-38.05, not later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to grievance.*

Counsel argued the grievor first became aware of the 20-day financial penalty on July 12, 1997 when he received the disciplinary memorandum from Mitch Kassen, Warden, Bowden Institution (Exhibit E-2). The grievance was signed and submitted by

Mr. Sallenback on August 24, 1997 and was received by the employer on September 26, 1997 (Exhibit E-3).

Mr. Woytiuk agreed that the grievance was untimely in that it was received weeks after the date of imposition of the financial penalty. At the hearing, he requested the Board, for the first time, to extend the time limit pursuant to section 63 of the *Public Service Staff Relations Board Regulations and Rules of Procedure, 1993* to allow the grievance to be heard. Section 63 reads:

> *63. Notwithstanding anything in this Part, the times prescribed by this Part or provided for in a grievance procedure contained in a collective agreement or in an arbitral award for the doing of any act, the presentation of a grievance at any level or the providing or filing of any notice, reply or document may be extended, either before or after the expiration of those times*
>
> *(a) by agreement between the parties; or*
>
> *(b) by the Board, on the application of an employer, an employee or a bargaining agent, on such terms and conditions as the Board considers advisable.*

In support of his argument, Mr. Woytiuk called the grievor to testify.

Mr. Sallenback testified that the 20-day financial penalty arose from an incident with a fellow Correctional Officer on April 4, 1997 in Red Deer, Alberta. The incident also resulted in a charge of common assault under the *Criminal Code*. Mr. Sallenback stated the employer imposed the disciplinary action described in the memorandum he received on August 24, 1997 (Exhibit E-2), that reads:

> *<u>DISCIPLINARY INVESTIGATION</u>*
>
> *This memo is further to my letter dated June 25th in which I addressed your rebuttal to the disciplinary investigation report and advised you that the recommended disciplinary action would remain unchanged.*
>
> *In order to impress upon you the seriousness of your misconduct, and to encourage you to correct this type of unprofessional behaviour, I am imposing the following corrective action. You will serve a financial penalty equivalent to twenty eight days of pay. Twenty days has been awarded for the assault against Ms. Hardie and eight days for failing to advise your employer of your two criminal*

> *convictions. The equivalent salary amounts to $4,000.00 in total. In order that this financial penalty will not result in undue financial hardship, I am willing to allow you to have the amount owed deducted equally each pay over a period of one year.*
>
> *I am also hereby advising you that any further disciplinary action on your behalf may result in termination of your employment.*
>
> *You have the right, in accordance with your collective agreement, to present a grievance relating to this action within twenty five working days.*

The grievor said the third paragraph of Exhibit E-2 confused him, since in July 1997 he was also preparing for an upcoming court date regarding the assault charge. He testified he contacted his bargaining agent representative Nadine Kovacs for advice, but she said she could not represent him because of a conflict of interest since the other Correctional Officer involved in the April 4, 1997 incident, a Margaret Hardie, was also a member of the same Union of Solicitor General Employees – Public Service Alliance of Canada, Local 30129 (U.S.G.E.). Ms. Kovacs informed Mr. Sallenback of her refusal in a letter dated August 31, 1997 (Exhibit G-1). He admitted she had told him earlier she would not represent him. He could not remember when she told him this. The grievor then saw Bob Marks, Vice-President of U.S.G.E., Local 30129 at the time, who also would not represent him since Mr. Marks was soon moving up to a management position. Mr. Sallenback then approached a third bargaining agent's representative, Mr. J. Helm, for help.

Mr. Sallenback agreed he had signed his grievance (Exhibit E-3) on August 24, 1997, but did not realize he had signed it late since he had a lot going on in his life at the time. He was especially worried about his upcoming court case for the assault charge.

The grievor said he had never read Article M-38.10 of his collective agreement.

During cross-examination, Mr. Sallenback testified he was represented by his bargaining agent during his disciplinary hearing on July 12, 1997, when he received Exhibit E-2. He read Exhibit E-2 and showed it to his bargaining agent's representative on July 12 asking for clarification. He also said that he wrote a rebuttal to the

investigation report of the April 4, 1997 incident before he was given the 20-day financial penalty.

The grievor added that on August 24, 1997 when he signed his grievance (Exhibit E-3), he did not give it to his immediate supervisor but to a bargaining agent's representative.

During re-examination with reference to Exhibit E-5, dated December 30, 1997, the level-three response to his grievance, Mr. Sallenback said that he grieved only one of the allegations regarding the financial penalty.

Mr. Woytiuk concluded by admitting that the time lines for the grievance were poor and that this was the bargaining agent's fault. He argued the situation at the time was confusing for the grievor and for U.S.G.E., Local 30129, and asked me to extend the time limit to submit the grievance.

Counsel for the employer argued that the grievance was untimely in 1997 since clause M-38.10 is clear and was understood by all concerned at the time. She reminded me that responses at all steps of the grievance process (Exhibit E-4, E-5 and E-6) referred to the untimeliness factor but the bargaining agent never requested an extension of time. She added that the bargaining agent did not even respond to the employer's letter of June 10, 1999 (Exhibit E-7) to the Board indicating the employer's objection to the Board's jurisdiction to hear the reference. Ms. Bidal referred me to Board decisions *Sittig* (166-2-24117), *Ouellette* (166-2-21255) and *Lusted* (166-2-21370) regarding timeliness.

Counsel concluded the bargaining agent should have made application to extend the time limit much earlier than before me. She could also not accept the grievor's explanation that he was confused in July and August 1997 since he had had bargaining-agent representation all along: from the investigation, at the time of imposition of discipline, and throughout the grievance process. She noted that even Ms. Kovacs' letter (Exhibit G-1) withdrawing her support to Mr. Sallenback was dated after the 25-working-day limit, and that the bargaining agent is to blame for the tardiness in this matter. She concluded there is no valid reason before me for the lateness of the grievance.

Mr. Woytiuk advised me that the need to deal with a situation regarding the extension of time was beyond the training of bargaining agents' representatives at the local union level. He also did not respond to the employer's letter of June 10, 1999 (Exhibit E-7) because he wanted Mr. Sallenback to testify personally before the Board.

Decision on Timeliness

I conclude that the employer's objection to the timeliness of Mr. Sallenback's grievance is founded.

As early as July 12, 1997, the day the grievor became aware of the 20-day financial penalty when he received Exhibit E-2 in the presence of a bargaining agent's representative, Mr. Sallenback and his bargaining agent knew that they had 25 working days according to the Master Agreement, clause M-38.10 to file a grievance. This deadline was clearly indicated in the disciplinary memorandum. The grievance was received by the employer on September 26, 1997, weeks beyond the allowable time limit.

Whether the delay was one week, one month or one year, the reasons given to me for the delay are simply not sufficient to warrant an extension of time.

Mr. Sallenback testified that he was confused as to the meaning and potential impact of the third paragraph of Exhibit E-2 because of his pending court appearance to answer charges of common assault. This paragraph reads:

> *I am also hereby advising you that any further disciplinary action on your behalf may result in termination of your employment.*

His bargaining agent or his lawyer should have explained that what was before him were two separate and distinct jurisdictions, one a criminal matter not to be confused with his rights and responsibilities under the Master Agreement and the Public Service Staff Relations Act.

Even if one assumes that the grievor was unaware that his grievance was untimely, as in *Lusted* (supra), the employer raised the question of timeliness at all steps of the grievance process (Exhibit E-4, E-5 and E-6) as well as in its letter to the Board dated June 10, 1999 (Exhibit E-8). The bargaining agent chose not to respond

until the process reached adjudication so that Mr. Sallenback could personally tell his side of the story. With all due respect, this is not the wisest use of the grievance process. The bargaining agent simply did not seek to rectify the situation within a reasonable period of time after it became aware of it. This conclusion was pointed out in *Lusted* (supra) in 1991, and reinforced by adjudicator Tarte in *Sittig* (supra) in 1996.

Since I have determined Mr. Sallenback's grievance is out of time and have been persuaded an extension of the time limits is not justified in the circumstances, I conclude that I lack jurisdiction to hear this grievance.

J. Barry Turner,
Board Member.

OTTAWA, September 15, 1999.