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**Date:** 20030205

**File:** 166-2-31161

**Citation:** 2003 PSSRB 9



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**BENJAMIN MBAEGBU**

Grievor

and

**TREASURY BOARD**  
**(Solicitor General Canada - Correctional Service)**

Employer

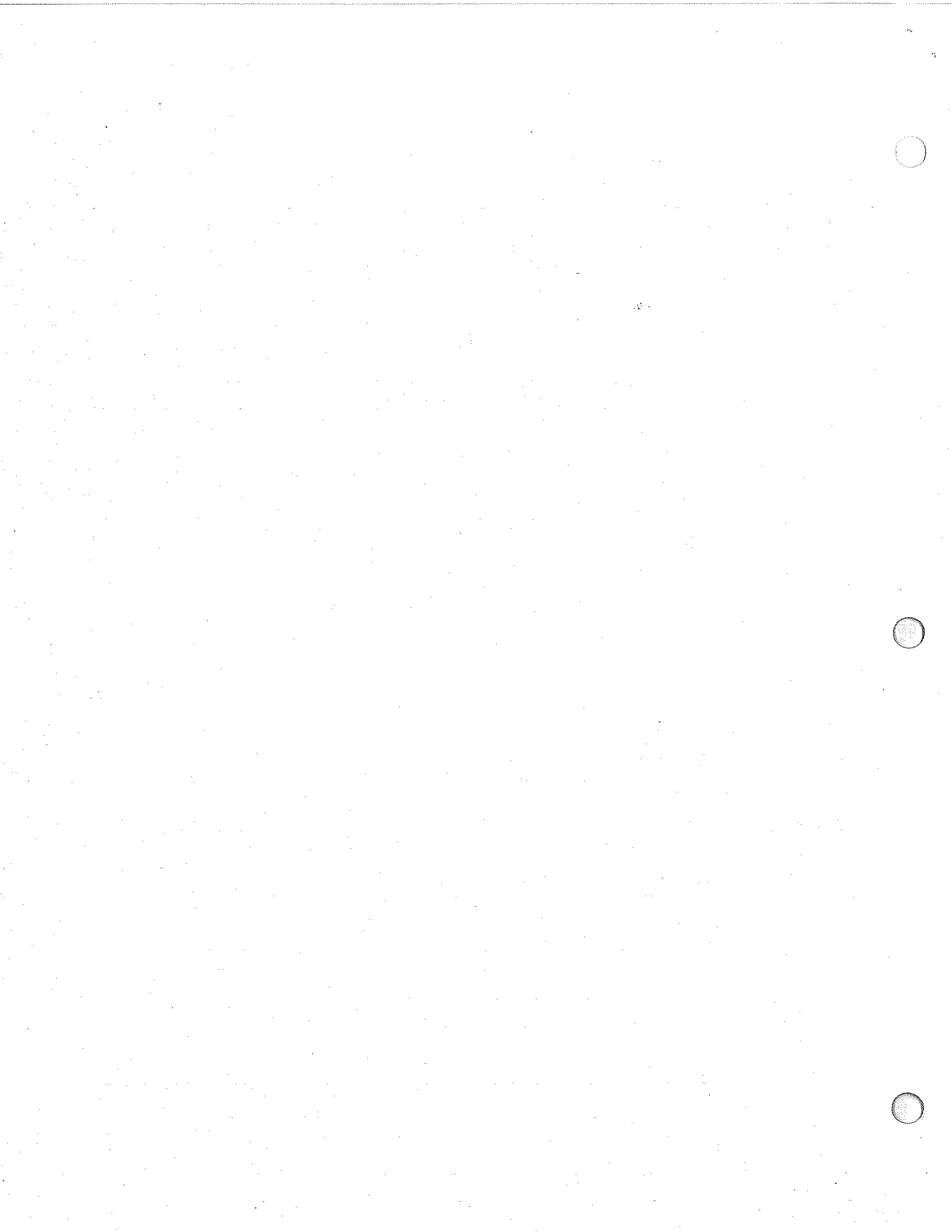
***Before:*** Joseph W. Potter, Vice-Chairperson

***For the Grievor:*** Himself

***For the Employer:*** Karl G. Chems, Counsel

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Heard at Kingston, Ontario,  
October 17 and December 9, 2002.



## DECISION

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[1] On December 7, 2000, Benjamin Mbaegbu filed a grievance with respect to his July 24, 1998 termination of employment from Kingston Penitentiary.

[2] Mr. Mbaegbu's requested corrective action reads:

*The following is a list of the corrective actions requested regarding my grievance on my wrongful dismissal on July 24, 1998.*

1. *To be compensated the amount of \$1,000,000 for the pain and suffering endured as a result of my wrongful dismissal.*
2. *To be re-instated as an employee of the Correctional Service of Canada.*
3. *To be compensated retroactive pay (including regular pay, statutory holidays pay, shift differential, and any overtime opportunity lost) from the date of wrongful dismissal to the date of re-instatement. These amounts are to reflect all increments and raises that would have been applicable had the wrongful dismissal not taken place.*
4. *To have the leave credit report adjusted to reflect the annual leave, sick leave, and family related leave that would have been earned during the period of wrongful dismissal to date of re-instatement.*
5. *To have pension adjustments made to reflect the starting date of employment with the Correctional Service of Canada to the date of re-instatement.*
6. *To be promoted and trained as a Correctional Supervisor (CX3) due to competitions missed on during the time period of wrongful dismissal.*

[3] The grievance was referred to the Public Service Staff Relations Board (the Board) on March 7, 2002. The employer wrote to the Board on April 4, 2002, and objected to the Board's jurisdiction to hear Mr. Mbaegbu's grievance on the basis that it was not filed in a timely manner. The Board sent a copy of this letter to the bargaining agent, Union of Canadian Correctional Officers (UCCO), and they replied on April 19 saying they would not be representing the grievor.

[4] On April 24, 2002, the Board directed the employer and Mr. Mbaegbu to provide written submissions with respect to the issue of timeliness. Mr. Mbaegbu submitted his on May 7, 2002, and the employer replied on May 30, 2002. Mr. Mbaegbu replied

on June 3, 2002, and included a request for an extension of time for the filing of his December 2000 grievance.

[5] The Board considered the submissions and determined that an oral hearing should be held dealing with the timeliness and extension of time issues (see letter of July 9, 2002).

[6] Accordingly, the Board wrote to both the employer and Mr. Mbaegbu on July 9, 2002, to inform them that the hearing with respect to the jurisdictional objection would be held on October 17 and 18 in Kingston, Ontario.

[7] At the hearing, Mr. Mbaegbu, representing himself, testified that he had been a correctional officer at Kingston Penitentiary from November 1992 until his termination on July 24, 1998.

[8] At about 2:00 p.m. on July 24, 1998, Mr. Mbaegbu and his union representative, Gerry Horak, met Alex Lubimiv, the Deputy Warden, and Mr. Mbaegbu was informed he was terminated. Gerry Horak suggested Mr. Mbaegbu file a grievance, so Mr. Mbaegbu picked up the necessary grievance forms and took them with him.

[9] The union representative also suggested that Mr. Mbaegbu visit the union's regional office in Kingston, which he did on July 25 and met with Union executives Bob Boucher and Linda Cross.

[10] Mr. Mbaegbu testified that during the July 25 meeting he wanted to give his then completed grievance form to Mr. Boucher to be processed. Mr. Boucher told him the grievance had to be given to his local union representative, a correctional officer by the name of Mike Donahue.

[11] Mr. Mbaegbu then went to Kingston Penitentiary on July 26, 1998, and left a sealed envelope with Mr. Donahue's name on it. As Mr. Donahue was not working that shift, Mr. Mbaegbu asked that the envelope be forwarded to Mr. Donahue. Inside the envelope, according to Mr. Mbaegbu, was a completed grievance form with respect to the termination.

[12] Not hearing anything with respect to his grievance for about two weeks, Mr. Mbaegbu made three or four calls to Kingston Penitentiary and left a message for Mr. Donahue. None of the calls were returned.

[13] Sometime later, Mr. Mbaegbu called Kingston Penitentiary and asked to speak to someone who took care of grievances. He stated he spoke to a female, and initially did not recall her name, nor did he recall when this conversation took place. He later stated in cross-examination that the female's name was Dianne Anthony. He was told by Ms. Anthony the grievance process took time.

[14] In January 1999, Mr. Mbaegbu stated he still had not heard anything and he was getting worried. He called the PSAC regional office and he spoke to Mr. Boucher again. He was told to be patient and wait.

[15] In March 1999, Mr. Mbaegbu again called the PSAC regional office and spoke to Ms. Cross. He inquired who in the PSAC headquarters handled grievances from Kingston Penitentiary and was told it was Don Reid. Mr. Mbaegbu wrote to Mr. Reid and explained his situation. Mr. Reid called Mr. Mbaegbu and said he was in the process of moving his office and to be patient.

[16] Ms. Cross was called as a witness by Mr. Mbaegbu and she stated she was a regional union representative for the Public Service Alliance of Canada (PSAC), and has served in that capacity since January 1998. In 1998, the PSAC was the bargaining agent for correctional officers.

[17] Mr. Mbaegbu asked Ms. Cross if she recalled meeting him in 1998 to talk about his termination. Ms. Cross stated she did not recall very much about his case because she was not heavily involved in it, nor was she involved at the outset. She did recall meeting Mr. Mbaegbu late in 2000 or early in 2001 and then writing to the new bargaining agent for correctional officers, UCCO, about the matter.

[18] In cross-examination, Ms. Cross testified she would have first met Mr. Mbaegbu prior to 2000, because 2000 was the year the correctional officers left PSAC to join UCCO. She testified she had no direct knowledge of a grievance being filed by Mr. Mbaegbu.

[19] Ms. Cross testified she recalled a conversation she had with Mr. Reid about Mr. Mbaegbu's case where Mr. Reid told her that Mr. Mbaegbu's case was the subject of a human rights inquiry and there was no record of any grievance.

[20] According to Mr. Mbaegbu's evidence, he received a call in January 2000 from Mr. Reid informing him the grievance was nowhere to be found and Mr. Mbaegbu

should go to the regional PSAC office in Kingston to see what could be done. He did. Mr. Mbaegbu was told the PSAC office would do a thorough search to see what became of the grievance.

[21] Not hearing anything up to June 2000, Mr. Mbaegbu went again to the PSAC office and met Ms. Cross. At that meeting, Ms. Cross sent a letter to Mr. Reid, according to the evidence of Mr. Mbaegbu, inquiring about the grievance.

[22] Mr. Mbaegbu said he was told to put in another grievance in July 2000 by Ms. Cross.

[23] Since he had moved to Toronto by that time, he was told to go to the PSAC office in Toronto to file his grievance there. He did. He heard nothing further until October 2000, at which time his grievance forms were returned to him and he was told they had to be signed by a union representative from Kingston Penitentiary.

[24] Mr. Mbaegbu completed a new form in November 2000 and had it signed by a union official from Kingston Penitentiary, then sent it to Mr. Reid. It was received by the employer in December 2000.

[25] During the first day of what was scheduled to be a two-day hearing, Mr. Mbaegbu requested that the hearing be adjourned so he could have sufficient time to gather further evidence.

[26] The employer's counsel objected to this request, stating that Mr. Mbaegbu had ample notice of the hearing and should have had his witnesses and any necessary documentation ready at that time.

[27] I considered the request for adjournment and then granted it.

[28] Mr. Mbaegbu also requested that the employer search its records to obtain the name of the officer who was working at the "North Gate" of Kingston Penitentiary on July 26, 1998. This was the person with whom Mr. Mbaegbu would have left his initial grievance. I ordered the employer to conduct the necessary search of its records to see if this information was obtainable and to provide Mr. Mbaegbu with the requested information.

[29] The necessary search was done and on November 14, 2000, the employer's counsel sent Mr. Mbaegbu the information he requested. There were two correctional officers working the North Gate on July 26, 1998. Those two were Mary Dagenais and Chris Munroe.

[30] When the hearing resumed on December 9, 2002, Mr. Mbaegbu stated he sent three subpoenas out on December 5 but none of the individuals were there to testify. He stated he had subpoenaed Correctional Officers Dagenais, Munroe and Horak by sending the subpoenas by courier to the attention of the Warden at Kingston Penitentiary.

[31] The employer's counsel requested a short recess to investigate the matter and reported back that Mr. Mbaegbu had been told before sending out the subpoenas that Mr. Munroe was no longer at Kingston Penitentiary and Ms. Dagenais was on extended sick leave. It was unlikely that either ever received the subpoena, stated the employer's counsel.

[32] I instructed the parties to proceed with the hearing and we would deal with the issue of the three absent witnesses at the conclusion of Mr. Mbaegbu's evidence.

[33] In cross-examination, Mr. Mbaegbu said he did not keep a copy of his 1998 grievance and when he did not receive a reply to it after two months had elapsed, he called the Deputy Warden to inquire about its status. He was told to be patient. In August 1999, after still not receiving a reply to his termination grievance, he contacted Mr. Don Reid, the PSAC representative in Ottawa.

[34] Mr. Mbaegbu conceded it would be fair to say that by August 1999 he was not sure the employer had ever received his grievance.

[35] Pedro Sousa-Dias was a former correctional officer at Kingston Penitentiary and assisted Mr. Mbaegbu throughout the oral hearing. Mr. Sousa-Dias testified that in his experience, grievance replies take an exceptionally long time to be issued at Kingston Penitentiary, so the fact that Mr. Mbaegbu did not pursue the matter immediately should not be held against him.

[36] Mr. Sousa-Dias also stated that in his opinion the attitude of the local union representative, Mr. Donahue, was such that he would avoid proper representation of people in minority groups, such as Mr. Mbaegbu.

[37] The issue of the absent subpoenaed witnesses now had to be dealt with, as none had appeared.

[38] I inquired from Mr. Mbaegbu what these three individuals were likely to testify to had they appeared. Mr. Mbaegbu conceded he had not spoken to them about their evidence, but stated Mr. Horak would confirm he was with Mr. Mbaegbu at the time of the termination hearing.

[39] It was hoped that Ms. Dagenais and Mr. Munroe would recall a visit Mr. Mbaegbu made on July 26, 1998, at the North Gate of Kingston Penitentiary where Mr. Mbaegbu left a sealed envelope addressed to Mr. Donahue.

[40] I indicated at the oral hearing that I would take this under advisement.

#### Argument of the Grievor

[41] Mr. Mbaegbu argued that he has proven he intended to file a grievance in 1998 when initially discharged.

[42] The proper forms were picked up and completed at the time of termination. Mr. Mbaegbu dropped them off at the North Gate of Kingston Penitentiary and made numerous telephone calls to follow up on the grievance submission.

[43] The union has an obligation to make sure that the grievance is processed. They did not do that.

[44] Insofar as the number of delays is concerned, Mr. Mbaegbu stated he was working with officials of the PSAC initially. Then the correctional officers were taken over by UCCO, and more delays ensued. None were his fault, he claimed, but rather were the fault of his union representative, Mr. Mike Donahue.

#### Argument for the Employer

[45] There are two issues in this case. Firstly, there is the timeliness issue. Did Mr. Mbaegbu file his grievance within the 25-day time limit as specified in clause 20.10 of the applicable collective agreement? If not, the second issue is, did the grievor act with due diligence in seeking an extension of time?



[46] Mr. Mbaegbu blames the union for not having dealt with his grievance; however, union approval is not necessary for a termination grievance.

[47] Even if it is believed that a grievance was completed in 1998, Mr. Mbaegbu admits it was not delivered to his supervisor or local officer-in-charge, as is required by virtue of clause 20.05 of his collective agreement.

[48] The union had no record of any grievance being filed. Ms. Cross testified she had no record of any termination grievance. She said there was evidence of a human rights complaint, but no grievance.

[49] Mr. Mbaegbu had an obligation to follow up on the alleged filing of a grievance but he never did so.

[50] When the second grievance was filed in December 2000, there was no reference to this alleged first grievance. In fact, the first time this claim was made was when Mr. Mbaegbu wrote to the Board and stated so, in May 2002.

[51] There is no evidence to show Mr. Mbaegbu filed a grievance within 25 days, as prescribed by his collective agreement, so there is no jurisdiction to hear this matter.

[52] Section 63 of the *P.S.S.R.B. Regulations and Rules of Procedure* allows for an extension of time in the filing of a grievance, but this is not a case to exercise this discretion.

[53] In May 2002, some 17 months after the December grievance, Mr. Mbaegbu wrote the Board trying to justify himself. It was only at that time that he mentioned he had filed a grievance in 1998, but he did not ask for an extension of time. There is no clear, compelling and cogent reason for allowing this extension.

[54] The evidence of Mr. Mbaegbu indicates he did not commence calling the local PSAC office until some six months had elapsed, following his claim of filing the 1998 grievance. He said he was not informed about time limits. Either the union failed to advise Mr. Mbaegbu properly, or else Mr. Mbaegbu's testimony lacks credibility.

[55] There is no evidence to indicate Mr. Mbaegbu was diligent in handling his case and it should be dismissed.

[56] The following cases were submitted:

*Achtemichuk* (Board files 166-2-19683 to 19694); *Rouleau* 2002 PSSRB 51; *Rattew* (Board file 149-2-107); *Guaiani* (Board files 166-2-21358, 149-2-109 and 149-2-110); *Wyborn v. Parks Canada Agency*, 2001 PSSRB 113; *Boulay* (Board file 149-2-160.)

### Decision

[57] Clauses 20.05 and 20.10 of the collective agreement applicable to the grievor read:

*20.05 An employee who wishes to present a grievance at a prescribed level in the grievance procedure shall transmit this grievance to his or her immediate supervisor or local officer-in-charge who shall forthwith:*

(a) *forward the grievance to the representative of the Employer authorized to deal with grievances at the appropriate level,*

*and*

(b) *provide the employee with a receipt stating the date on which the grievance was received by him or her.*

*20.10 An employee may present a grievance to the First (1<sup>st</sup>) Level of the procedure in the manner prescribed in clause 20.05 not later than the twenty-fifth (25<sup>th</sup>) 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 the grievance.*

[58] Mr. Mbaegbu was discharged by way of a letter dated July 24, 1998. The grievance filed by Mr. Mbaegbu is dated December 15, 2000. There is no question this grievance is well beyond the time lines specified in clause 20.10 of the collective agreement. Is this a case where an extension to these time limits should be allowed?

[59] Section 63 of the *P.S.S.R.B. Regulations and Rules of Procedures* states:

*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.*

[60] See for example *Rattew* (supra), the last paragraph on page 14 and ending on page 15, wherein it states:

*... In general, the purpose and intent of section 83 (as it then was) and similar provisions is not to render nugatory the time-limits provided by the parties in a collective agreement or in the Regulations. Rather, it is to allow the exercise of a redress provided in legislation or in a collective agreement, notwithstanding the expiry of time-limits where to do otherwise would cause an injustice. In making that determination, the extent of the delay and the reasons for it must weigh heavily in the balance, as well as the relative prejudice to the parties. In this respect, the Board would note the recent arbitral award, Re Corporation of City of Thunder Bay and Canadian Union of Public Employees, Local 87 (1992), 20 L.A.C. (4th) 361 (Charney). In this award the arbitration board was asked to exercise its discretion under the Ontario Labour Relations Act to relieve the bargaining agent from the effects of failing to meet the time limits provided in the relevant collective agreement for filing a grievance. In this case, the grievor was seeking to be reinstated in his employment on the grounds that he had been discriminated against because of his physical disabilities. Although the arbitration board found that the company's ability to defend its actions had not been prejudiced, nevertheless the board refused to exercise its discretion because of the length of the delay, approximately eleven months. It should be noted that the arbitration board came to this conclusion notwithstanding that the excessive delay was largely the responsibility of the union which represented the grievor.*

...

[61] Mr. Mbaegbu's first witness was Ms. Linda Cross, a PSAC representative. Ms. Cross testified her research did not reveal that Mr. Mbaegbu had filed a grievance in 1998. The union was aware of a human rights complaint he had filed but not aware of any grievance on his termination.

[62] This is consistent with the employer's position, namely that they too have no record of any grievance being filed within the 25-day time period.

[63] Mr. Mbaegbu said he did file a grievance in 1998, and did so by leaving it at the North Gate of Kingston Penitentiary. The collective agreement, at clause 20.05, states that the grievance shall be transmitted to the grievor's supervisor or local officer-in-charge. In my view, Mr. Mbaegbu failed to do this by simply leaving it at the North Gate addressed to his union representative.

[64] Even if I accept his statement that he left a grievance for his union representative at the North Gate in 1998 (which may or may not have been substantiated by the testimony of either Ms. Dagenais or Mr. Munroe), for some reason this grievance did not get transmitted to management.

[65] In this case, I am of the view that Mr. Mbaegbu was not prejudiced by having his subpoenaed witnesses fail to appear. Mr. Horak would simply have confirmed he attended the termination hearing, a fact not in dispute.

[66] Given this, I am of the view that no grievance was filed with the employer in 1998. The next question to answer is should an extension of time be allowed in which to file a grievance?

[67] Mr. Mbaegbu testified, in cross-examination, he felt it was fair to say that by August 1999 he was not sure the employer had received his grievance. He waited until December 15, 2000, to file a second grievance, and until May 2002 before signing an affidavit stating he had indeed filed a grievance in 1998.

[68] As I stated at paragraph 38, in *Rouleau* (supra) "the employer is entitled to have some closure on its business operation within a reasonable period of time following its action. What that reasonable period of time is, will depend on the circumstances of each individual case."

[69] The employer stated that Mr. Mbaegbu was not diligent in handling his case, and, given the facts as presented to me, I would have to agree. In this instance, I have not been persuaded that Mr. Mbaegbu acted with due diligence once he realized that the employer had not replied to his 1998 grievance.

[70] The time limits contained in the collective agreement are specific and, in my view, should not be lightly set aside. After thoroughly reviewing all of the evidence, including written submissions by the parties, I am of the view that an extension of time is not warranted in this case.

[71] In light of the above, I must dismiss this grievance for want of jurisdiction.

**Joseph W. Potter,  
Vice-Chairperson.**

OTTAWA, February 5, 2003.

