**Date:** 20201105

**Files:** 566-02-12391 to 12393

**Citation: 2020 FPSLREB 96**

*Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

**ARLENE EWANIUK**

Grievor

and

**TREASURY BOARD**
**(Department of Citizenship and Immigration)**

Employer

Indexed as
*Ewaniuk v. Treasury Board (Department of Citizenship and Immigration)*

In the matter of individual grievances referred to adjudication

**Before:** James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor:** Yafa Jarrar, grievance and adjudication officer

**For the Employer:** Holly Hargreaves, counsel

Decided on the basis of written submissions,
filed May 29, July 10, August 21, and October 2, 2020.

**REASONS FOR DECISION**

## I. Individual grievances referred to adjudication

[1] Arlene Ewaniuk ("the grievor"), at the time of the events giving rise to this matter, was a case processing agent classified PM-01 and employed in Edmonton, Alberta, at the Case Processing Centre of the Department of Citizenship and Immigration ("the employer").

[2] When the grievances were filed, the grievor was an elected representative of the Canada Employment and Immigration Union (CEIU). Under article 14 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services group (expiry date: June 20, 2014; "the collective agreement"), she was entitled to leave without pay to attend to union matters. Article 52 permitted the employer to grant, at its discretion, leave without pay for purposes other than those specified in the collective agreement.

[3] On several occasions before the events occurred that led to the grievances, the grievor requested (and was granted) leave for union business under article 52. On June 24, 2015, she requested one hour of leave under that article ("Leave Request #1") to attend to union business. The employer denied the request on this basis: "Leave with or without pay for alliance business is specified under Article 14. As such, Article 52 would not cover the reasons you have indicated."

[4] The grievance in file 566-02-12391 pertaining to that request was filed on July 8, 2015. When it denied the grievance, the employer stated, "Article 52 cannot be used to expand the provisions already covered in the collective agreement."

[5] Less than a month later, on July 14, 2015, the grievor again requested one hour of leave under article 52 to attend to union matters ("Leave Request #2"); this request was also denied. She then filed the same request under article 14 ("Leave Request #3"), and the employer asked what kind of "union business" the leave was required for. She replied that it was for a meeting with the national executive, as specified by clause 14.12. The employer did not feel that she had provided sufficient information to substantiate that the meeting met the criteria specified by that clause.

[6] The grievor then filed the grievance in file 566-02-12392 to reflect the denial of leave under article 52 pertaining to Leave Request #2. The grievance in file

566-02-12393 pertains to Leave Request #3, which is the same request but under clause 14.12.

[7] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board (PSLREB) and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[8] This matter had been scheduled for a hearing in Edmonton, on April 28 and 29, 2020. In late March 2020, owing to the global pandemic, the hearing was postponed indefinitely, and the parties agreed to proceed by way of written submissions. On May 29, 2020, they supplied an agreed statement of facts (ASF) and books of documents to which the ASF refers. They made written submissions on July 10, August 21, and October 2, 2020.

[9] For the following reasons, the grievances in files 566-02-12391 and 12392, pertaining to Leave Requests #1 and #2, are denied. The grievance in file 566-02-12393, pertaining to Leave Request #3, is upheld.

## II. Summary of the evidence

[10] The ASF reads as follows:

> *1.* [The grievor] *is a Case Processing Agent (PM-01) employed at the Department of Citizenship and Immigration's Case Processing Centre in Edmonton, AB.*
>
> *2. At the time the grievances were filed, the grievor was an elected representative of the Canada Employment and Immigration Union (CEIU). Her role was that of the Alternate National Vice-President for Alberta/Northwest Territories and Nunavut.*
>
> *3. The grievor requested leave for union business under Article 52 of the PA collective agreement on 6 occasions in 2011, 1 occasion in 2012, 5 occasions in 2013, 1 occasion in 2014, and 3 occasions in 2015; said leave requests were approved by the Employer.* ***[Tabs 1, 2, 3, 4, 7, 9, 11, 12, 13, 14, 15 of the Bargaining Agent Book of Documents]***

4. *On March 14, 2012, the grievor informed management that she had included an incorrect leave code on her leave form, and that she was requesting leave for union business under Article 52, not clause 14.13, of the PA collective agreement. Rather than the grievor submitting an amended leave form, management agreed to change the leave code.* ***[Tabs 10 and 11 of the Bargaining Agent Book of Documents]***

5. *On June 24, 2015,* [the grievor] *requested one hour of leave under Article 52 of the PA collective agreement to attend a regional meeting with the National Executive Vice President on June 25, 2015. [****Tab 1 of the Employer Book of Documents]***

6. *The Employer denied the leave request on the basis that,* "leave with or without pay for alliance business is specified under Article 14. As such, Article 52 would not cover the reasons you have indicated." ***[Tab 2 of the Employer Book of Documents]***

7. *On June 30, 2015, the grievor acknowledged in an email to her manager that,* "based on the information I provided, the leave I requested would not fit under Article 14. Therefore that is why Article 52 was submitted." ***[Tab 2 of the Employer Book of Documents]***

8. *On July 2, 2015, the Employer informed the grievor that,* "there is a provision in the PA collective agreement that provides for leave with or without pay for union business, therefore Article 52 does not apply to your request. The provisions of Article 14 were negotiated between the parties and these provisions stipulate the situations for which leave with or without pay for Alliance Business may/will be granted. Article 52 cannot be used to expand the provisions already covered in the collective agreement." ***[Tab 2 of the Employer Book of Documents]***

9. *On July 8, 2015, the grievor filed grievance 566-02-12391 against,* "the employer's denial of my leave requested June 25, 2015 for the period of 1 hour which contravenes Article 52 of the Collective Agreement." ***[Tab 3 of the Employer Book of Documents]***

10. *On July 14, 2015, the grievor requested one hour of leave under Article 52 of the PA collective agreement to attend a meeting with the national executive on July 21, 2015.*

11. *The Employer denied the leave request under Article 52.* ***[Tab 4 of the Employer Book of Documents]***

13. *The grievor then submitted a leave request under Article 14 of the PA collective agreement for the same matter. When asked to clarify what type of "union business" the leave was for, the grievor stated it was leave under clause 14.12 for a meeting with the national executive.* ***[Tab 5 of the Employer Book of Documents]***

14. *The Employer denied this leave request as it was not satisfied that the grievor had provided sufficient information to*

*substantiate that the meeting met the criteria of clause 14.12.* ***[Tab 6 of the Employer Book of Documents]***

15. *On July 22, 2015, the grievor filed grievances 566-02-12392 and 12393 against:*

> "the employer's denial of my leave requested July 21, 2015 for the period of 1 hour which contravenes Article 52 of the Collective Agreement" *and*
>
> "the employer's denial of my leave requested July 21, 2015 for the period of 1 hour which contravenes Article 14 of the Collective Agreement"
>
> ***[Tabs 7, 8 of the Employer Book of Documents]***

16. *On March 11, 2016, the grievances were denied at the final level of the grievance process.* ***[Tab 9 of the Employer Book of Documents]***

17. *The relevant provisions of the Program and Administrative Services Collective Agreement* [the collective agreement] *read as follows:*

> *Article 14 sets out leave with or without pay for Alliance business and directs that:*
>
> Board of Directors meetings, Executive Board meetings and conventions
>
> 14.12 Subject to operational requirements, the Employer shall grant leave without pay to a reasonable number of employees to attend meetings of the Board of Directors of the Alliance, meetings of the National Executive of the components, Executive Board meetings of the Alliance, and conventions of the Alliance, the components, the Canadian Labour Congress and the territorial and provincial Federations of Labour.
>
> Article 52 sets out leave with or without pay for other reasons and directs that:
>
> 52.01 At its discretion, the Employer may grant:
>
> a) leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty; such leave shall not be unreasonably withheld;
>
> b) leave with or without pay for purposes other than those specified in this agreement.

[Emphasis in the original]

[11] Two leave requests were submitted under clause 52.01(b). The first, dated June 25, 2015, is the subject of the grievance in file 566-02-12391 (Leave Request #1). The second, dated July 14, 2015, is the subject of the grievance in file 566-02-12392

(Leave Request #2). One leave request was submitted under clause 14.12, the denial of which is the subject of the grievance in file 566-02-12393 (Leave Request #3).

[12] The nature of the grievances submitted pursuant to the denial of Leave Requests #1 and #2 is identical. For the sake of clarity, I will treat the analysis and the arguments pertaining to those two grievances separately from those pertaining to Leave Request #3.

## III. Summary of the arguments

### A. For the grievor

#### 1. Leave Requests #1 and #2

[13] The grievor's arguments were submitted on July 10, 2020, along with books of authorities and additional documents.

[14] The grievor, who had been elected as the alternate national vice-president of the CEIU for Alberta, the Northwest Territories, and Nunavut had routinely applied for leave to attend to union matters under article 52 of the collective agreement. The employer had routinely approved those applications up to the one made on June 24, 2015.

[15] The employer admitted to having incorrectly applied article 52 in the past, but at paragraph 39 of her written submissions, the grievor maintained the following:

> *… the Employer is within its rights to correct an erroneous past application of Article 52 to leave requests for union business. However, past and consistent practice of approving the Grievor's leave requests for union business under Article 52 cannot be ignored.*

[16] In support of her argument, the grievor submitted the case of *John Bertram & Sons Co. v. International Association of Machinists, Local 1740* (1967), 18 L.A.C. 362 ("*John Bertram*"), which articulates the conditions that should be considered with respect to the scope of "past practice" in the interpretation of the provisions of a collective agreement. It states as follows at paragraph 13:

> *13 … (1)* [there should be] *no clear preponderance in favour of one meaning, stemming from the words and structure of the* [collective] *agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one*

> *meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice.*

[17] The grievor pointed to her email exchange of March 14, 2012, with her operations manager as evidence of the employer condoning the use of article 52 for requesting and authorizing leave for union business. On that date, the grievor wrote this:

> *I just received my copy of the Leave Form I submitted to you on Friday. I have noticed that when quoting the Article number I wrote the incorrect one in. It should be Article 52 not 14.13. Would you like me to send an amended copy to you for signature? The amended copy would be coded exactly the same except in the comments Article 52 would be written.*

[18] Her operations manager replied, "I'll just change it if it's okay with you."

[19] The employer's sudden change with respect to a past practice and its denial of the grievor's leave requests for union business under article 52 led to these grievances. On July 21, 2015, after a request for leave for union business was denied under article 52 and was resubmitted under clause 14.12, the denial was not rescinded, even though the request had been properly resubmitted under the correct clause.

[20] The grievor argued that the employer's repeated past acceptance, whether or not it was erroneous, of article 52 for requesting and approving leave to attend to union business is sufficient grounds for upholding the grievances pertaining to Leave Requests #1 and #2.

**2. Leave Request #3**

[21] The grievor also argued that the denial of the leave request for union business under clause 14.12 was unreasonable, and this grievance should also be upheld.

[22] The grievor argued that clause 14.12's wording is unambiguous. It expressly includes "… meetings of the National Executive of the components …". On July 16, 2015, she submitted a "Leave Application and Absence Report". It contains nine specific types of leave, along with the applicable codes. After that, there is a space for entering an explanation of any other type of leave sought. The space is headed

with, “For all other leave types requested, give reason(s) here and/or quote article and sub-article of applicable agreement.”

[23] Under that text and in that part of the form, the grievor typed, “Article 14 - Union Business”. On her form, she hand-wrote some additional details, so that after her modifications, the text read, in full, “Article 14.12 - Union Business - Meeting with National Executive”.

[24] The grievor argued that the employer interpreted clause 14.12 overly restrictively. On her Leave Application and Absence Report, she did not reproduce verbatim the words of clause 14.12, but in response to legitimate questions, she made it clear that leave was being sought to conduct union business under that clause and that the nature of the union business was a meeting with the National Executive.

[25] Thus, the errors that were made when those leave requests were submitted under article 52 were finally rectified. The grievor submitted the request under the appropriate article, and the denial of her request was unreasonable.

[26] The grievor pointed to the considerable back-and-forth dialogue accompanying her request under clause 14.12. She was first asked to specify the precise nature of the request because the term “union business” was a little vague, and article 14 was relatively broad. At that point, she returned to her original leave request and handwrote additional details.

[27] Apparently, that was still not enough, as further information was requested. She informed the team lead that the nature of the meeting in question was a phone call with the National Executive.

[28] The Operations Manager ultimately denied Leave Request #3, stating, “You have not provided sufficient information to substantiate that your meeting fits the article. As such, I am not satisfied that it meets the criteria in article 14.12.”

[29] The grievor argues that this was an overly narrow and restrictive approach to clause 14.12, and an unreasonable exercise of managerial discretion.

[30] The clarifications that the grievor provided to the initial (reasonable) requests for further specificity brought her rationale sharply into focus and directly in line with the provisions of clause 14.12.

[31] Thus, argued the grievor, the grievance pursuant to Leave Request #3 should be upheld.

**B. For the employer**

**1. Leave Requests #1 and #2**

[32] On August 21, 2020, the employer submitted its arguments and books of authorities.

[33] The employer agreed that the language of clauses 14.12 and 52.01(b) is clear and unambiguous. The collective agreement in place when those grievances were filed has since been replaced by a new one, and although the numbering has changed slightly, the wording of those two provisions has not changed.

[34] Clause 52.01(b) is discretionary and must not be turned into one of general application. It cannot be used to expand the provisions already specifically covered elsewhere in the collective agreement. Leave Requests #1 and #2 were properly denied because they both requested leave for union business, which is covered by clause 14.12.

[35] The employer can exercise its discretion under clause 52.01(b) only if the leave is for a purpose other than those specified elsewhere in the agreement. Granting leave for union business under that clause would contradict its express language. In *Ducey v. Treasury Board (Department of National Defence)*, 2016 PSLREB 114, the PSLREB determined that past practice could not be used to contradict collective agreement language. In its analysis, it relied on the following paragraph from *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112:

…

> *[71] … I am prepared to accept as a general principle that when a contractual clause is ambiguous, or where it employs technical terminology whose meaning is not immediately clear, I may look to the practice of the parties as an aid when interpreting its true meaning. Assuming for the sake of argument that article 27 is ambiguous (and I am not satisfied that it is), it must at the very least be clear that the parties are aware of the practice in question, and that the practice has been uniformly applied. It is obviously easier to satisfy that condition where there is only one work site, a "hands-on" employer and a relatively small work force. But that is not the case here. I believe I am safe in stating that the collective agreement covers tens of thousands of employees performing a*

> *multitude of tasks across Canada in a number of different (and widely-spaced) work sites. It was the bargaining agent's burden to establish on a balance of probabilities that the practice in question was widespread and was known to the Treasury Board. The evidence it adduced did not go beyond certain employees in the Newfoundland office. The fact then that local managers in Newfoundland have adopted a particular practice with respect to article 27 in the collective agreement cannot be used as an interpretive aid, at least where, as here, there is no evidence that the practice was wide-spread or that the Treasury Board itself was aware of it prior to 2007: see, for example*, Versagold Group Limited Partnership (Valley Centre) v. Retail Wholesale Union, Local 580*, (2010) 102 C.L.A.S. 293 at para 55 to 57;* Fleming, a division of United Dominion Ltd and CAW, Local 1090 *(2000) 63 C.L.A.S. 135 at para 7 and 8.*
>
> …
>
> [*Sic* throughout]

[36] To begin with, the employer argued that clause 52.01(b) is not ambiguous. Secondly, using that clause to authorize leave for union business was not a widespread practice. The fact that one director in one office did not make the grievor resubmit her leave forms so that they read "Article 14" instead of "Article 52" cannot be said to be a widespread practice that the Treasury Board was aware of.

[37] The employer noted that the grievor acknowledged that the employer is within its rights to correct any erroneous past application of article 52.

[38] Thus, argued the employer, the grievances pertaining to Leave Requests #1 and #2 should be denied.

**2. Leave Request #3**

[39] The third leave request was made immediately after Leave Request #2 was denied. The grievor reissued the request, this time under clause 14.12, stating that it was for "Union Business" and later adding that it was for a "Meeting with the National Executive". She was asked to provide additional information to substantiate that the meeting fit within the parameters of clause 14.12.

[40] The employer has a right to exercise managerial discretion and to manage the workplace. The request for clarification and additional information to substantiate that a leave request satisfied the language of the collective agreement was consistent with this managerial prerogative.

[41] The employer argued that the grievor was inconsistent and unclear when articulating the rationale underlying the leave request. In Leave Request #2, she cited "union business" as her reason for requesting leave. After it was denied, she had an extensive conversation with her team leader, who documented it as follows:

> …
>
> [The grievor] *submitted another leave request using article 14 at approximately 3:30. I spoke with* [the grievor] *and advised her that article 14 has many choices and asked her which one she was seeking leave under and that that I could not submit just under article 14 which is why she originally submitted it under article 52.* [The grievor] *advised me she still didn't think it was covered under article 14 which is why she originally submitted it under article 52. I advised* [the grievor] *that I would need the appropriate selection as well as something more than "union business" as the reason for the request.* [The grievor] *told me she was meeting with national executive. I then advised* [the grievor] *that she could give me a copy of invitation or email to attach to the paperwork, she advised me it was a phone call and again she is meeting with national executive. The paperwork was changed to article 14.12 and she added the words "meeting with national executive"*
>
> …
>
> [*Sic* throughout]

[42] Subsequently, the Operations Manager asked the grievor for more information, to substantiate that Leave Request #3 fit within the parameters of clause 14.12. Their conversation was summarized in an email the grievor sent to her union representative, as follows:

> …
>
> *The last request for this leave was questioned by* [R], *he wanted to know who the meeting was with, what type of meeting it was and if I had a written invitation that I could supply to him. I found this type of questioning very intrusive and quite frankly did not feel I needed to answer them, in order for him to make the decision on the leave request. I offered the following information … I was meeting with National Union for a meeting concerning Regional Issues. It came back as denied.*
>
> *I truly believe that Management is in the mind set [sic] that unless it falls under Article 14 or 18 all Union Leave will be denied. Because my roles and responsibilities fall outside these specific Articles at time [sic], I will not be able to fully perform my duties.*
>
> …

[43] The grievor was offered opportunities to clarify or substantiate Leave Request #3, and therefore, argued the employer, the grievance pertaining to Leave Request #3 should be denied.

### C. The grievor's rebuttal

[44] On October 2, 2020, the grievor filed a rebuttal, which largely restated her earlier arguments.

## IV. Decisions and reasons

[45] The parties independently agreed to the framework for analyzing the general principles applicable to collective agreement interpretation. I agree with them. Words must be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the agreement, its object, and the parties' intention. A fundamental presumption is that the parties are assumed to have intended the words expressed within a collective agreement provision. The words in a provision must be construed in their ordinary and plain meanings, unless such an interpretation is likely to result in absurdity or would be inconsistent with the entire collective agreement. Cases supporting these principles include *Communication, Energy and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery* (2004), 130 LAC (4th) 239 at paragraph 40, and *Communications, Energy and Paperworkers Union of Canada v. Irving Pulp & Paper Ltd.*, 2002 NBCA 30.

[46] Academics, as well as the courts, have considered the adjudicator's role in interpreting collective agreements. *Brown and Beatty*, in *Canadian Labour Arbitration*, 5th ed., state the following at paragraph 4:2100 (entitled, "The Object of Construction: Intention of the Parties"):

> *… when faced with a choice between two linguistically permissible interpretations, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies.*

### A. Leave Requests #1 and #2 (files 566-02-12391 and 12392)

[47] Like the parties, I do not find any ambiguity in the wording of either clause 14.12 or article 52. The grievor's earlier leave applications under article 52, and the employer's repeated approval of them, did not validate that article as the appropriate vehicle for her applications. On this point, I find that I must disagree with the grievor.

When an error is discovered, it is always a good idea to correct it rather than to perpetuate it.

[48] The employer was correct when it (finally) applied and enforced the correct interpretation of article 52.

[49] The grievor correctly cited the case of *John Bertram* for the conditions that should be considered with respect to the scope of past practice in the interpretation of a collective agreement. The fourth condition in paragraph 13, which she cited in argument, is important and bears repeating: "…evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice."

[50] No evidence was submitted that anyone other than certain team leaders or operations managers in one particular office ever acquiesced in the practice of erroneously approving leave for union business under article 52. There is no evidence that those individuals, to use the language of *John Bertram*, "… have some real responsibility for the meaning of the agreement …". In short, I find that the Treasury Board was never aware of that particular practice.

[51] The employer cannot be faulted for finally deciding to correctly apply clause 52.01(b) to the grievor's leave requests. On that basis, the grievances pertaining to Leave Requests #1 and #2 are denied.

**B. Leave Request #3 (file 566-02-12393)**

[52] I agree with the grievor. The employer's need for additional information about the nature of the leave being sought was an unreasonable exercise of managerial discretion. She was challenged on the rationale underlying her leave request, at which time she went back to handwrite certain clarifications on her Leave Application and Absence Report dated July 15, 2015. The reason she sought an hour's leave was not for vacation, sick leave, family related leave, or any other type of leave specified in the nine boxes. Rather, she wrote the reason and quoted the applicable article, as required by the form. She wrote, "Article 14.12 - Union Business - Meeting with National Executive".

[53] I find that it is of no consequence that she did not reproduce, word for word, the text of clause 14.12. The only time the phrase "National Executive" appears

in that clause is in the context of "… meetings of the National Executive of the components …". No other interpretation of what the grievor wrote is reasonable or even possible. She even added, when questioned, that the meeting was to take place by way of a phone call. She made things about as clear as one could have hoped for under the circumstances.

[54] I do not find the grievor to have been either inconsistent or unclear, as the employer has suggested. It does not matter that she admitted to harbouring doubts as to whether article 14 was the correct way to characterize her leave request. Given the long history of the grievor's and the employer's incorrect application of article 52 to these kinds of leave requests, her doubts were understandable.

[55] The employer's denial of Leave Request #3 was unreasonable and was a clear violation of clause 14.12 of the collective agreement. Therefore, the related grievance is upheld.

[56] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

## V. Order

[57] The grievances in files 566-02-12391 and 12392 are denied.

[58] The grievance in file 566-02-12393 is allowed. I order the relief sought by the grievor, namely, a declaration that the employer violated the collective agreement in disallowing her leave request under clause 14.12. This decision serves as that declaration.

November 5, 2020.

**James R. Knopp,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**