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Citation: 2021 FPSLREB 93

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

CARLA BOWDEN

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Bowden v. Treasury Board (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication and
In the matter of an application for an extension of time referred to in paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Lisa Greenspoon, Public Service Alliance of Canada

For the Employer: Patrick Turcot, counsel

Decided on the basis of written submissions, filed February 22, March 1 and 24, and April 9 and 16, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Carla Bowden is employed by the Treasury Board ("the employer") and works at the Canada Border Services Agency (CBSA) as a border services officer. She was in a position as a border services instructor (BSI) until November 2017. In it, she was authorized to carry defensive equipment, including a duty firearm. After she went on leave in November 2017, her defensive equipment was removed by the employer. She was advised of the removal on March 22, 2018.

[2] Ms. Bowden filed a grievance on January 18, 2019, alleging breaches of the no-discrimination and overtime provisions in the collective agreement between the employer and her bargaining agent, the Public Service Alliance of Canada for the Border Services (FB) Group (expired June 20, 2018).

[3] Her grievance was referred to adjudication on January 12, 2021.

[4] The employer objected to the timeliness of the grievance. The bargaining agent submitted that the grievance is timely as it is a continuing grievance. In the alternative, it argued that the time limit should be extended by the Federal Public Sector Labour Relations and Employment Board ("the Board") pursuant to s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"). (Note that in this decision, "the Board" refers to the Board and any of its predecessors.)

[5] Clause 18.15 of the collective agreement specifies the time limit for filing a grievance:

> *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance.…*

[6] I determined that the Board's jurisdiction to hear this grievance could be decided through written submissions. In this decision, I have summarized the facts that are relevant to deciding the employer's objection. I have not addressed the merits of the grievance. I have summarized the allegations in it only to ascertain its true nature.

II. Context of the grievance

[7] Before going on injury-on-duty leave on November 17, 2017, the grievor was in a position that required using defensive equipment, including a duty firearm. Her injury-on-duty leave related to a claim of sexual harassment at work. The grievor filed a complaint of sexual harassment. The sexual harassment complaint and the circumstances relating to that complaint are not included in the grievance.

[8] On November 29, 2017, the employer decided to remove the grievor's defensive equipment (including her duty firearm) from her work locker. The employer stated that this removal was due to the grievor's medical condition at that time.

[9] The grievor returned to work on January 15, 2018. She was on assignment to an unarmed position. On March 22, 2018, she was informed by email of the date of the removal of her defensive equipment (November 29, 2017). On March 28, 2018, she asked the employer for information on the process for having her defensive equipment returned to her. The following day, the employer outlined the next steps for its return, which were a doctor's note stating that she was fit to return to full duties as a BSI, and signing a "Fitness to Carry Defensive Equipment Assessment" (FCDEA) consent form.

[10] The grievor provided the medical note in early May 2018 as well as signed FCDEA consent. On September 27, 2018, she requested an update on the status of the return of her defensive equipment. She was advised that the committee responsible for making that decision had met and that a decision was expected within 5 to 10 business days. On October 24, 2018, the employer told the grievor that it was still waiting for the committee's decision.

[11] On November 19, 2018, the employer told the grievor that the return of her defensive equipment had been approved, with these two conditions:

> …
>
> *- Should BSI Bowden return to her substantive position as an Instructor at the Chilliwack Campus, Campus Management shall contact our Psychological Support Professionals to determine if another FCDEA may be required; and,*
>
> *- Should BSI Bowden express her intention to deploy to another armed position within the Agency, prior to the deployment taking place, Campus Management shall contact our Psychological Support Professionals to determine if another FCDEA may be required.*

…

[12] The grievor was also advised that she would require a "Triennial Recertification" before taking any border services officer shifts at a port of entry. This recertification would require her current manager's approval, who would be responsible for any related travel costs.

[13] On December 4, 2018, the grievor requested a clarification:

> *So to clarify:*
>
> *1. The Agency agreed with the recommendation of the Psychologist that my equipment should be returned, but if I wish to do any job that might require me to actually touch it, I might need further psychological assessment?*
>
> *2. And, in order to take overtime that every other trainer is entitled to take (without attending a triennial recertification), I have to attend a triennial? And my current manager (who was NOT the manager who decided to remove my firearm, necessitating (?) all of these extra steps) would need to pay the associated travel?*
>
> *Just checking that I have that right, I'm struggling to find the logic or reason in any of it.*
>
> *Please confirm, thank you.*

[14] The employer provided a clarification to the grievor on December 11, 2018, related to her BSI duties. It told her that although instructors were generally exempt from triennial certification, it had been determined "as per policy", that any instructors who had received this exemption would be required to attend a user-level triennial, immediately after vacating an indeterminate instructor position. She was advised that as she was in a long-term assignment in an unarmed position, an up to date certification was required to perform officer duties.

[15] On December 19, 2018, the grievor wrote to a different CBSA supervisor asking for more clarification. She stated that she was confused about "everything to do with this process":

> *…I had hoped that you would understand that what I was looking for was some explanation of WHY that was the recommendation, but since I guess that wasn't clear, I'll ask again now, and I'll clarify what information I'm looking for….*
>
> …

> *…I would like for you to clarify for me* ***the reasons for the removal****, and I'd like to know* ***who made the decision*** *to have it removed. …I believe that I have a right to know these things, and that I should have been informed much sooner about what was going on.*
>
> …
>
> *There have been so many people involved in this situation that I've lost track of who did what, and I think that it's only fair that you loop me in on some of this, since it's my own information, and the way that this was handled (and continues to be handled) has had a massive impact on me and on my entire life.*
>
> *Although I have more questions, I'd like to start with these first. Please confirm that you've received this email, and I look forward to your quick attention to this matter, as I've been kept in the dark for far too long already.*
>
> …

[16] In her email, the grievor also mentioned the status of her personal belongings at her former worksite.

[17] A CBSA manager replied on behalf of the supervisor on December 28, 2018. He explained the circumstances of the decision to remove her defensive equipment in November 2017 and the delay in communicating the decision to her. He also responded to her enquiry about her personal belongings.

III. The grievance

[18] The grievance was filed on January 18, 2019. The grievance form contains the following details:

> *I grieve that* [the employer] *…did an unnecessary non-administrative removal of my duty firearm and failed to inform me of the removal, resulting in an extremely stressful and unreasonably long process to have it returned. It's been 14 months and I am still unable to have access to it, which has resulted in missed overtime opportunities and undue stress. The lack of communication was unnecessary, and I was unable to provide any kind of input into the decision. Instead, I was contacted by my manager four months later to tell me that he supports me in taking steps to have it returned. It's now been another ten months since then and the matter is still not resolved.*
>
> *Due to the complete lack of communication from my management, I was unaware of the situation and therefor [sic] unable to respond in a timely manner.*

[19] The grievor requested the following corrective action in her grievance:

> *I request that the non-administrative removal be quashed, and that it be removed from my file entirely.*
>
> *I request that I be compensated for the lost income that resulted from me being unable to take any overtime shifts, or travel opportunities to deliver training since November 2016.*
>
> *Further, compensation for the extreme stress and the negative effect that this process (including counselling and multiple mandatory psychological assessments) has had on me and on my family, and the permanent damage that has been done to my professional reputation as a result of this decision.*
>
> *I request that I be made whole again.*

[20] The grievance was heard only at the final level and was denied by the employer on October 23, 2020, on the basis that it was untimely. The employer also addressed the merits of the grievance and denied it on the merits.

[21] The referral to adjudication by the bargaining agent alleged a breach of the overtime and no-discrimination articles of the collective agreement.

[22] The overtime article in the collective agreement is as follows:

> ***28.03 Assignment of overtime work***
>
> *a. Subject to operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.*
>
> …

[23] The no-discrimination article in the collective agreement is as follows:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

[24] The grievance does not include particulars of the discrimination alleged by the grievor. In the Notice to the Canadian Human Rights Commission (Form 24) filed with the referral to adjudication, the grievor provided the following summary of her allegations:

> *The Employer discriminated against the grievor, Carla Bowden, on the basis of her sex and disability.*
>
> *The grievor filed a sexual harassment complaint against a colleague in her workplace. The treatment she was subjected to led to her needing to take a prolonged period of sick leave from her workplace. While on sick leave, her duty firearm was removed.*
>
> *Upon her return to the workplace, she was accommodated in a position that does not require the use of her duty firearm. She request [sic] to have her duty firearm returned to her in order to be considered qualified and readily available for overtime opportunities which had always been a significant source of income for her in her substantive position.*
>
> *The Employer refused to return her duty firearm to her unless she returned to her substantive position in the same work unit where she experienced sexual harassment.*
>
> *The Employer continues to withhold her duty firearm for no good reason and the grievor believes that this act constitutes a reprisal for having filed a sexual harassment complaint.*

[25] The corrective action sought was set out in the Form 24:

> *That she be (sic) immediately have her duty firearm returned to her;*
>
> *That she be compensated for lost overtime opportunities from the period of March 2018 until such time as her duty firearm is returned;*
>
> *That she be made whole.*

IV. Is this a continuing grievance?

A. Summary of the arguments

[26] I have summarized the written submissions of the employer and the bargaining agent in this section. Both parties made submissions touching on the merits of the grievance. I have not addressed those submissions, as this decision does not address the merits.

1. For the employer

[27] Refusing to return defensive equipment to an employee who is not qualified to carry it does not make this a continuous grievance. Brown & Beatty, *Canadian Labour Arbitration*, 5th ed, at 2:3128, defines continuing violations of a collective agreement as "… repetitive breaches of the collective agreement rather than simply a single or isolated breach …". The authors state that the test to determine whether there is a

continuing violation is "… the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages." This grievance is not a claim of a recurring breach of duty but of recurring damages. The fact that defensive equipment has not been returned does not continuously breach the overtime provision in the collective agreement.

[28] Given that the grievor is still in the unarmed position, the employer's decision to proceed with the non-administrative removal of her defensive equipment had no impact on her ability to obtain overtime in her unarmed position. As for her eligibility for overtime in an armed position, she must be qualified to perform those types of duties. Until she obtains her recertification, the grievor may not carry a duty firearm; therefore, she is not qualified for overtime in an armed position. As long as she is not qualified, there is no continuous breach of the overtime provision of the collective agreement. She has not yet completed her recertification and remains unqualified to work overtime in an armed position.

2. For the bargaining agent

[29] The bargaining agent submitted that the grievance is not untimely because it is continuing. It deals with discrimination and overtime. The grievor alleged that the employer discriminated against her on the basis of disability from its continued refusal to return her defensive equipment, despite her repeated requests. This discriminatory treatment has resulted in a significant loss of overtime opportunities, in contravention of the collective agreement. For every day that the employer fails to return her defensive equipment, the grievor experiences discrimination. This is a recurring breach of duty on the part of the employer. I was referred to *Fontaine v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 39, and *Galarneau v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 1.

[30] The grievor's failure to file a grievance immediately upon discovering that her defensive equipment had been removed does not make her grievance untimely; it only limits the period for which she can claim corrective action to 25 days before the filing of her grievance (see *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL)).

3. The employer's reply

[31] The employer is not refusing to return the defensive equipment to the grievor because of her mental health; rather, it is refusing to give an unqualified employee defensive equipment. Once the grievor recertifies, the defensive equipment can be returned. This is not a discriminatory practice but rather a *bona fide* operational requirement, as well as a matter of public safety.

[32] Should the Board rule in favour of the grievor and deem this a continuing grievance, the CBSA agreed that the remedy would be limited to the 25 days before the filing of the grievance. However, the grievor was not recertified at any point in the 25 days before filing the grievance. Therefore, she was not eligible to be considered for overtime in an armed position. As a result, no remedy would be available for her.

B. Reasons - continuing grievance

[33] The employer objected to the timeliness of this grievance. The bargaining agent argued that it is a continuing grievance.

[34] In *Galarneau*, the Vice-chair referred to Blouin and Morin, *Droit de l'arbitrage de grief*, 5th edition, at page 311, for this definition of a continuing grievance:

> …
>
> *[Translation]*
>
> V.55 - In certain cases, a limitation period may only be for the past, not for the future. This is the case in a continuing grievance. It is also the case when benefits under a collective agreement are claimed in a context where the services rendered that form the basis of the claim are performed successively and where the violation of the collective agreement is recurring or repetitive (III.50). In other words, the event that gives rise to the grievance is repeated episodically. When the grievance is filed, the event is not a past fact but rather a current practice of the employer. Thus, the complainant may not be criticized in the future for failing to make a claim in the past: in such a situation, the limitation period operates only on a day-to-day or periodic basis ….
>
> …

[35] The arbitrator in *British Columbia v. B.C.N.U.* (1982), 5 L.A.C. (3d) 404, relied on the definition of a continuing grievance in Professor Gorsky's *Evidence and Procedure in Canadian Labour Arbitration*, at page 35, as follows:

> *… The recurrence of damage will not make a grievance a continuing grievance. It is necessary that the party in breach violate a recurring duty. When a duty arises at intervals and is breached each time, a "continuing" violation occurs, and the agreement's limitation period does not run until the final breach. When no regular duty exists and the harm merely continues or increases without any further breach, the grievance is isolated, and the period runs from the breach, irrespective of damage.*

[36] In *Ontario Public Service Employees Union v. Ontario (Ministry of the Attorney General)*, 2003 CanLII 52888 (ON GSB), the arbitrator posed the question to be answered as follows: "Does it [the grievance] involve a continuing course of conduct rather than one action which happens to have continuing consequences?"

[37] The grievance in this case has elements of both a single event or transaction and a continuing course of conduct. The full grievance is set out at paragraphs 18 and 19 of this decision. Grievances are rarely well-crafted legal documents, and it is necessary to look at them in the context of the facts, as well as their wording. To determine the nature of a grievance, it is also necessary to look at both the details section as well as the requested corrective action. In addition, there is a discrimination allegation in the grievance which also requires an examination of the details provided to the Canadian Human Rights Commission. I will address the allegation of discrimination separately, after the review of the other grievance allegations.

[38] In the details section of the grievance, the grievor alleged the following:

- "an unnecessary non-administrative removal" of her duty firearm;
- a failure by the employer to inform her of its removal;
- "… an extremely stressful and unreasonably long process to have it returned";
- an unnecessary lack of communication; and
- her inability to provide any kind of input into the removal decision.

[39] All these allegations relate to events that happened in the past (and outside the 25-day time limit for filing a grievance). These allegations relate to the removal of the grievor's duty firearm and her efforts to communicate about the removal on her return to work. The removal of the defensive equipment occurred in November 2017. The grievor was advised of the removal in March 2018. The grievor was informed of the process for the return of her defensive equipment in March 2018. The conditions of the return of her defensive equipment were communicated to the grievor on November 19, 2018. The grievor received clarification from CBSA on the reasons for the recertification requirement on December 11, 2018. This email did not contain any new

decision. The correspondence from the CBSA manager of December 28, 2018, was in response to the grievor's request for clarity on the reasons for the removal and also did not communicate any new decision.

[40] There is one allegation in her details section that refers to a potential ongoing breach of the collective agreement: the inability to have access to her duty firearm "has resulted in missed overtime opportunities".

[41] In the requested corrective action in her grievance, the grievor sets out the following requests that relate to the employer's action of removing the duty firearm and the process for its return that she had gone through:

- the quashing of the removal of the duty firearm;
- the removal from her file of the notice of removal;
- compensation for the "extreme stress and the negative effect" of the process; and
- the "permanent damage" to her reputation that resulted from the employer's decision to remove the duty firearm.

[42] All these corrective measures relate to the employer's decision to remove her firearm and the process the employer imposed for assessing whether and under what conditions to return it. In other words, none of this requested corrective action relates to a continuing grievance.

[43] The grievor provided no particulars in her grievance related to the no-discrimination article of her collective agreement, however, the Form 24 Notice provided some details on the alleged discrimination. She is alleging discrimination on the basis of sex and disability.

[44] The grievor does not provide particulars on the allegation of discrimination on the basis of disability. The grievor's defensive equipment was removed on the basis of the employer's concerns about her medical condition at that time (November 29, 2017). The employer also told the grievor on March 29, 2018 that in order to have her defensive equipment returned, she would be required to provide a doctor's note stating that she was fit to return to her full duties as a BSI. The grievor was advised on November 19, 2018 that a condition of the return of her defensive equipment should she move to an armed position could require another FCDEA (in other words, proof of fitness to have defensive equipment). All of these events are arguably related to disability or perceived disability.

[45] The allegations relating to discrimination on the basis of sex are set out in the Form 24 Notice. The grievor has alleged that the employer refused to return her defensive equipment unless she returned to her BSI position, where she experienced sexual harassment. She also alleges that the withholding of her defensive equipment by the employer is an act of reprisal for having filed a sexual harassment complaint.

[46] These allegations of discrimination on the basis of disability and sex flow from the employer's decision to remove the duty firearm and the imposition of conditions on its return. This does not meet the criteria for a continuing grievance. In my view, this is not the same as the situation in *Galarneau*.

[47] In *Galarneau*, the issue was exposure to second-hand smoke, and the grievances related to the occupational health and safety article in the relevant collective agreement. The adjudicator found that the health-and-safety obligation set out in the collective agreement was continuing and that it repeated each time the employees were called on to render services. She found that if the article conferred a substantive right to reasonable measures by the employer for the grievors' occupational safety and health, then that right existed at all times, and therefore, its violation might occur each time the employer failed to take reasonable measures to protect it.

[48] In this grievance, the action that is alleged to be discriminatory was the removal of the duty firearm and the application of conditions on its return. Both actions of the employer happened outside of the 25-day time limit for filing a grievance. The grievor's allegation is that these actions have had an ongoing discriminatory effect. The grievor has not pointed to any further alleged discriminatory action by the employer after November 19, 2017. In other words, the allegation is that the discrimination has continued without any further alleged breach. This grievance is similar to the one in *Fontaine*, in which the alleged harassment was found not to constitute a continuing grievance.

[49] The grievor refers to the continued refusal of the employer to return her defensive equipment, including a reference to her repeated requests for the return. Whether or not the grievor made repeated requests, a continuing refusal of an employer to do something when it has already clearly communicated its position on the request does not necessarily result in a continuing grievance. The only way that a repeated request can reset the time limit is if that request is based on changed

circumstances or if the employer considers additional information when arriving at its decision. In this case, the circumstances of the matter have not changed, nor has the employer considered additional information relating to the return of her defensive equipment since November 19, 2018.

[50] The only requested corrective action that relates to an alleged ongoing breach of the collective agreement is the grievor's request that she be compensated for the lost income that she alleged is the result of her being unable to take any overtime shifts since November 2016.

[51] The collective agreement provision relating to overtime opportunities is a recurring right to the equitable distribution of overtime. It is a recurring right because overtime is allocated by the employer on an ongoing and regular basis. Under this article, the employer is (subject to operational requirements) required to "make every reasonable effort" to offer work on an equitable basis among "readily available qualified employees." This is a continuing obligation of the employer in that it applies every time the employer offers overtime opportunities.

[52] The employer argued that if this is a continuing grievance, the grievor would not be entitled to any damages since she remains unqualified for overtime. This is an argument on the merits of the grievance, and it can be raised at the hearing on the merits.

[53] Accordingly, I find that the part of the grievance relating to overtime opportunities comprises a continuing grievance and is therefore timely. The remainder of the grievance is untimely. I will now address whether an extension of time for the untimely aspects of the grievance is justified.

V. Extension of time

A. Summary of the arguments

1. The bargaining agent's submissions

[54] The facts of this case justify extending the timeline in accordance with s. 61 of the *Regulations*. The criteria for the Board's assessment are summarized in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1 at para. 75, as follows:

…

- 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 in granting an extension; and

- the chance of success of the grievance.

[55] These criteria are not fixed, and the overriding goal is to determine what is fair based on the facts of each case (see *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144 ("*IBEW*") at para. 62). The criteria are also not necessarily of the equal weight and importance; see *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81 at para. 51.

[56] In this case, the grievor's due diligence in pursuing the matter with management, as well as the injustice to the employee as balanced against the prejudice to the employer in granting the extension, are the two factors that ought to be given the most weight.

[57] The grievor believed that management supported her in her quest to have her duty firearm returned to her, and through correspondence with management over the course of 10 months, it is clear that she was led to believe that the duty firearm was in the process of being returned to her. She never thought that management would refuse to allow her to attend the Triennial Recertification, and as late as December 28, 2018, she was told that attempts were being made to reach her current manager to inquire of her plans with respect to continuing the grievor's assignment in her unarmed position.

[58] The length of the delay filing the grievance from the point at which the grievor was first informed of the removal of her duty firearm is nearly 10 months. This factor, taken in isolation, likely favours the employer. However, as the Board noted in *Rinke v. Canadian Food Inspection Agency*, 2005 PSSRB 23 at para. 16, "There is no magic threshold where one can say that anything that is transmitted before the threshold is reasonable, but that something that is transmitted after is not." Many times, the Board has forgiven lengthy delays on the basis of the weight attributed to other factors in *Schenkman*; see *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79; *IBEW*; *Richard v. Canada Revenue Agency*, 2005 PSLRB 180; and *Rabah v. Treasury Board (Department of National Defence)*, 2006 PSLRB 101.

[59] The Board ought to attribute significant weight to the due diligence of the grievor. The evidence demonstrates her diligence in trying to have her duty firearm returned to her. She continually followed up with management, underwent two psychological assessments as soon as she was able to, and telephoned and emailed her managers frequently to receive updates on the process of having her duty firearm returned. She was reassured over the course of many months that management was supportive of returning her firearm to her. As soon as it was made clear to her that her duty firearm would not be returned, she filed her grievance. The Board has recognized that the due diligence of the grievor can be enough to grant an extension of the timelines. In *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8 at para. 66, the Board stated that the grievor in that case had a "… clear and sustained intention to address this dispute."

[60] The employer asserted that if overtime opportunities had truly been significant to the grievor, she would have proceeded with her recertification, and the fact that she did not is evidence of her lack of diligence. The employer cannot on the one hand deny her attendance at the Triennial Recertification, unless she is to move back into an armed position, and then on the other hand, claim that her failure to proceed with recertification is evidence of her lack of diligence. The grievor has been ready and willing to attend the Triennial Recertification since she was first made aware of her requirement to attend to have her duty firearm returned to her.

[61] The grievor is a single parent who relied on overtime opportunities as a significant part of her income for her entire career as an armed officer with the CBSA. The only reason that her duty firearm was removed from her was that she suffered an injury on duty from a toxic work environment. But for the employer's lack of action in addressing this situation, she would have retained her duty firearm and would have been eligible to continue accepting overtime opportunities. Denying this extension would hinder her ability to fully challenge the employer's actions in refusing to return her duty firearm, despite her willingness to attend the Triennial Recertification, and would prevent her from seeking any potential remedy for the losses she has suffered as a result of the employer's discriminatory behaviour.

[62] This is not a moot but a live labour relations issue. The grievor is still not in possession of her duty firearm. She is currently losing opportunities to work overtime. She could request to have her duty firearm returned to her tomorrow, and the

employer could deny it. She could then file a grievance based on that refusal. The employer must either confront this issue now or several months from now. Either way, the issue will not simply resolve itself. It is difficult to see what prejudice the employer will suffer if an extension of the timelines is granted given that if not, the parties will be required to restart the grievance process only to end up exactly where they are now, before the Board. As noted in *Riche v. Deputy Head (Department of National Defence)*, 2010 PSLRB 107 at para. 15, an employer cannot claim prejudice if it will have to address a similar grievance.

[63] The chance of success of the grievance should be considered only "… if the grievance is frivolous or vexatious or if the issue of true jurisdiction is exceedingly clear" (see *IBEW*, at para. 63). This grievance does not fall into these categories. It is a very arguable case that does not concern jurisdiction and cannot be described as frivolous or vexatious.

2. The employer's submissions

[64] Time limits are meant to be respected and should be extended only in exceptional circumstances that depend on the facts of each case. The facts of this case do not justify extending the time limit.

[65] The employer also relied on the *Schenkman* criteria. The factors are not necessarily of equal importance, and the weight attributed to each one must be viewed contextually. That said, the Board has consistently held that absent "… clear, cogent and compelling reasons, the other factors are of little relevance"; see *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110 at para. 20; *Bertrand v. Treasury Board*, 2011 PSLRB 92 at para. 42; *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68 at para. 47; *Fontaine*, at paras. 34 to 40; and *Brassard v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 102 at para. 26.

[66] The bargaining agent did not present clear, cogent, and compelling reasons to justify the untimely filing of the grievance. Ongoing discussions between a bargaining agent and the employer do not suspend the time limit, unless the parties expressly agree. Ongoing discussions to resolve a labour relations issue are not a clear, cogent, and compelling reason for a delay; see *Tuplin v. Canada Revenue Agency*, 2021 FPSLREB 29 at para. 56.

[67] The delay filing the grievance was lengthy. The grievor was notified by email on March 22, 2018, of the removal of her defence equipment. The grievance was filed on January 18, 2019, 300 days after she was notified of the decision.

[68] The grievor was not diligent in her actions. She is a long-standing CBSA employee, and it is highly unlikely that she would not have known that she was a member of the bargaining unit and that bargaining agent representatives were available to discuss any issues or concerns she might have had. Her rights were easily verifiable, and this grievance should have been filed within the 25-day period provided for in her collective agreement.

[69] The grievor submitted that overtime shifts were a significant source of income for her. However, she was not without income. Had this truly been significant to her, she would have proceeded with her recertification to be eligible for the overtime opportunities in an armed position. As of February 24, 2021, she had not yet been recertified to carry her duty firearm. A diligent grievor, at the very least, would have requested to proceed with the recertification and would have filed her grievance within the stipulated time frame.

[70] While overtime might have been an additional source of income for the grievor, allowing this grievance would not mean she would be eligible to claim for overtime. To be eligible for overtime, the grievor has to be qualified. Since she has yet to complete the recertification, she was not, and is still not, qualified to carry a duty firearm. Therefore, she would not have been eligible for any armed-position overtime opportunities within the 25 days of filing her grievance. There is no injustice to the employee as she was not, and still is not, eligible for overtime opportunities for an armed position. On the other hand, the prejudice to the employer would be returning a duty firearm to an employee who is not qualified to carry it. That would risk the health and safety of the grievor, her colleagues, and the public.

[71] As for any injustice with respect to the allegation that the employer's refusal to return the grievor her duty firearm was discriminatory on the basis of disability, there is none. The employer's decision was based on a *bona fide* operational requirement. Until the grievor completes her recertification, her duty firearm cannot be returned to her.

[72] As for the grievance's chances of success, the Board has previously held that without a clear, cogent, and compelling reason that justifies the delay, the other factors for deciding applications for extensions of time are not relevant, and an extension should not be granted, despite the grievance potentially having some merit. Typically, this criteria of the *Schenkman* test carries little weight in contrast to the others as it is difficult to assess the merits of the case without a hearing. However, based on the uncontested facts of this case, this grievance is unlikely to succeed. The facts are that the grievor has not been recertified since her return in January 2018; therefore, she is not qualified to carry a duty firearm. Even if the Board rules in her favour, the employer cannot give a firearm to someone who is not qualified to carry one; it is a matter of public safety.

B. Reasons

[73] The application for an extension of time is for the parts of the grievance other than the alleged breach of the overtime provision of the collective agreement. Those alleged breaches are as follows:

- the removal of her firearm;
- the failure of the employer to inform her of its removal;
- the process to have it returned;
- the lack of communication from the employer;
- her inability to provide any input into the removal decision; and
- the alleged discrimination in removing her defensive equipment.

[74] For the reasons that follow, I find that it is not appropriate to grant an extension of time for the remaining allegations in the grievance.

[75] Section 61 of the *Regulations* provides for the extension of time limits in grievance procedures by agreement between the parties or in the interest of fairness, on the application of a party.

[76] The *Schenkman* criteria, which were reiterated in *Vidlak v. Treasury Board (Canadian International Development Agency)* 2006 PSLRB 96, provide the following useful framework for analyzing an extension-of-time request:

- Are there clear, cogent, and compelling reasons for the delay?
- What is the length of the delay?
- Did the grievor exercise due diligence?
- Balancing the injustice to the employee against the prejudice to the employer.
- What is the chance of success of the grievance?

[77] Time limits in collective agreements are meant to be respected by the parties and should be extended only in exceptional circumstances. Those circumstances always depend on the facts of each case; see *Salain v. Canada Revenue Agency*, 2010 PSLRB 117. I agree that the criteria are not fixed and are not of equal weight and importance (see *IBEW* and *Gill*). However, I cannot agree with the bargaining agent in this case that the first criteria can be ignored completely. There must be a clear, cogent, and compelling reason for the delay filing a grievance. The grievance system is designed to be an effective and efficient way of dealing with disputes in the workplace. Time limits should be generally respected and should be extended only when there are compelling reasons.

[78] The grievor was advised of the removal of her duty firearm on March 22, 2018. Therefore, the alleged breaches relating to the removal of her duty firearm, her inability to provide input on the removal, and the employer's failure to inform her of the removal came to her attention on that date. She did not file the grievance relating to these events until January 18, 2019.

[79] The grievor was advised of the process for the return of her defensive equipment on March 29, 2018. On November 19, 2018, she was advised by the employer of the conditions relating to the return of the defensive equipment. Although further clarification relating to her status as a BSI was provided on December 11 and again on December 28, 2018, I find that the requirement for recertification was clearly communicated to the grievor on November 19, 2018.

[80] The grievor provided no clear, cogent, or compelling reasons for the delay in filing the grievance in her submissions. It is suggested in the submissions that she was waiting for the employer to act. In my view, this is not a compelling reason, given that the employer was clear as to its intentions. As indicated in *Salain* at para 45, "…[d]iscussions to resolve issues do not justify the untimely filing of grievances. Once filed, a grievance can always be held in abeyance pending the outcome of discussions between the parties."

[81] The Board and its predecessors have been consistent in the approach to assessing the other criteria for an extension of time when they have found no cogent or compelling reason for a delay filing a grievance. In *Bertrand*, I found that in the absence of a cogent and compelling reason for a delay filing a grievance, there is no

need to assess the other factors. In *Brassard*, the Vice-chair summarized the case law before the Board until that point (2013) as follows (at paragraph 26):

> *… If there are no clear, cogent and compelling reasons for the delay, then the length of the delay, the diligence of the applicant, the balancing of the injustice to the applicant against the prejudice to the respondent and the chances of success of the grievance would not matter that much in most cases. A solid reason is needed for the delay. The Board has consistently taken that approach in the past two years (see, for example,* Lagacé *or* Callegaro v. Treasury Board (Correctional Service of Canada), *2012 PSLRB 110). Furthermore, as I wrote in* Copp v. Treasury Board (Department of Foreign Affairs and International Trade), *2013 PSLRB 33, in the past, the Board rarely agreed to grant extensions of time without clear, cogent and compelling reasons justifying the delay.*

[82] I agree that in most cases, the remaining criteria do not matter much when assessing an extension-of-time application. However, I will briefly consider those other criteria.

[83] The length of the delay is significant in this case for the foundation of the grievance — the removal of the duty firearm. For that allegation, the delay is almost 10 months. The delay from the date of being advised of the process for the return of the duty firearm is approximately two months. This delay is not significant.

[84] The grievor did not show due diligence in pursuing her grievance. Her submissions focus on her following up with management on the process for the return of her duty firearm. However, the conditions of that return were made clear to her by November 19, 2018, and she did not file her grievance until January 2019. This does not show diligence on her part. In other words, there was not a "… clear and sustained intention to address the dispute" (see *Savard*).

[85] The bargaining agent's argument that there is no prejudice to the employer because the grievor could just file a grievance again relating to lost overtime opportunities is not relevant, as I have already determined that the alleged loss of overtime opportunities is a continuing grievance. There is some prejudice to the employer in allowing the grievance to proceed as it relates to events that happened 10 months before it was filed. However, I agree that the prejudice is not significant.

[86] I agree that the chance of success of the grievance should be given no weight in this case. The grievance is not frivolous and there is an arguable case.

[87] In balancing the criteria for granting an extension, I find that it is not appropriate to grant one. The lack of a clear, cogent, and compelling reason for the delay is a significant barrier to granting one. In this case, the grievor's lack of due diligence pursuing the grievance is an additional factor that leads to my conclusion that it is not appropriate to grant an extension of time to those parts of the grievance that are not continuing.

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

(The Order appears on the next page)

VI. Order

[89] The employer's objection on timeliness is allowed in part, as follows:

> 1) The part of the grievance relating to an alleged breach of the overtime article of the collective agreement is a continuing grievance and therefore timely; and
> 2) The remainder of the grievance is untimely.

[90] The grievor's request for an extension of time is denied.

August 12, 2021.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board