Date: 20220516

File: 569-02-38858

Citation: 2022 FPSLREB 38

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

UNION OF CANADIAN CORRECTIONAL OFFICERS - SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Bargaining Agent

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)

In the matter of a policy grievance referred to adjudication

Before: Guy Grégoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Franco Fiori, counsel

For the Employer: Karl Chemsi and Andréanne Laurin, counsels

Decided on the basis of written submissions, filed April 20, 26, and 29, 2022.

REASONS FOR DECISION

I. Introduction

[1] A pre-hearing conference call ("the call") was held on April 13, 2022, to confirm and finalize the details for the hearing of this case, scheduled for May 30 and 31 and June 1, 2022. During the call, the representative for the Treasury Board ("the employer") noted that the employer had never issued a decision on the policy grievance. It requested an adjournment to allow the employer to render its decision. The parties were directed to submit written arguments in support of their respective positions.

[2] For the following reasons, the employer's objection to the Board hearing this grievance is dismissed, and its adjournment request is denied. The Federal Public Sector Labour Relations and Employment Board ("the Board") confirms that it can hear this policy grievance and orders the hearing to proceed as scheduled on May 30 and 31 and June 1, 2022.

II. Preliminary objection and response

[3] On July 11, 2018, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") filed a policy grievance with the employer and simultaneously referred it to the Board for adjudication. As of that date, the employer had not rendered a decision on the grievance. The employer claimed that it did not have a chance to render a decision before the grievance was referred to adjudication. It argued that the reference to adjudication before the Board was premature because the bargaining agent must exhaust the grievance process in its entirety before referring a grievance to adjudication. In its reply to the bargaining agent's submissions, the employer claimed that it made "… a fundamental objection to the jurisdiction of the… [Board] to hear this grievance at this stage."

[4] The bargaining agent responded that the employer's argument does not correspond to the strict and literal interpretation of the applicable legislative and regulatory provisions as well as to the clauses that deal with the grievance process in the relevant collective agreement between the employer and the bargaining agent for correctional services (CX), with an expiry date of May 31, 2018 ("the collective agreement").

III. The legislative framework

[5] Both parties relied on the following legislative framework, including these provisions of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*):

…	[…]
220 (1) *If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.*	***220 (1)*** *Si l'employeur et l'agent négociateur sont liés par une convention collective ou une décision arbitrale, l'un peut présenter à l'autre un grief de principe portant sur l'interprétation ou l'application d'une disposition de la convention ou de la décision relativement à l'un ou l'autre ou à l'unité de négociation de façon générale.*
…	[…]
221 *A party that presents a policy grievance may refer it to adjudication.*	***221*** *La partie qui présente un grief de principe peut le renvoyer à l'arbitrage.*
…	[…]
225 *No grievance may be referred to adjudication until the grievance has been presented at all required levels in accordance with the applicable grievance process.*	***225*** *Le renvoi d'un grief à l'arbitrage ne peut avoir lieu qu'après la présentation du grief à tous les paliers requis conformément à la procédure applicable.*
…	[…]

[6] Section 96 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"), as follows, was also relied on:

96 *An employer or deputy head or, in the case of a policy grievance, the party that did not refer the grievance to adjudication must, no later than 30 days after the day on which that party was provided with a copy of the notice of the reference to adjudication, file*	***96*** *L'employeur ou l'administrateur général ou, dans le cas d'un grief de principe, la partie qui n'a pas renvoyé le grief à l'arbitrage dépose auprès de la Commission, au plus tard trente jours après le jour où elle a reçu copie de l'avis de renvoi du grief*

with the Board a copy of the decision that was made in respect of the grievance at each level of the applicable grievance process.	*à l'arbitrage, une copie des décisions rendues à l'égard du grief à tous les paliers de la procédure applicable.*

[7] The employer's submissions referred to the following clauses of the collective agreement:

Policy Grievances	***Griefs de principe***
20.29 *Subject to and as provided in section 220 of the* Federal Public Sector Labour Relations Act *and the relevant sections of this article, the Employer and the Union may present a grievance to the Union or the Employer, as the case may be, authorized to deal with the grievance. The party who receives the grievance shall provide the other party with a receipt stating the date on which the grievance was received by him.*	***20.29*** *Sous réserve de l'article 220 de la* Loi sur les relations de travail dans le secteur public fédéral *et conformément aux dispositions du dit article, l'employeur ou le syndicat peut, selon le cas, présenter un grief au syndicat ou à l'employeur autorisé à traiter le grief. La partie qui reçoit le grief remet à l'autre partie un récépissé indiquant la date à laquelle le grief lui est parvenu.*
20.30 *There shall be no more than one (1) level in the grievance procedure.*	***20.30*** *La procédure de règlement des griefs compte un seul (1) palier.*
…	[…]
20.32 *The Employer and the Union may present a grievance in the manner prescribed in clause 20.29, no later than the twenty-fifth (25th) day after the earlier of the day on which it received notification and the day on which it had knowledge of any act, omission or other matter giving rise to the policy grievance.*	***20.32*** *L'employeur et le syndicat peuvent présenter un grief de la manière prescrite au paragraphe 20.29, au plus tard le premier en date du vingt-cinquième (25e) jour qui suit la date à laquelle l'employeur ou le syndicat, selon le cas, est notifié et du jour où il ou elle a pris connaissance du geste, de l'omission ou de toute autre question donnant lieu au grief de principe.*
20.33 *The Employer and the Union shall normally reply to the grievance within thirty (30) days when the grievance is presented.*	***20.33*** *L'employeur et le syndicat répondent normalement au grief dans les trente (30) jours suivant sa présentation.*
…	[…]

20.35 Reference to adjudication	***20.35 Renvoi à l'arbitrage***
A party that presents a policy grievance may refer it to adjudication, in accordance with sections 221 and 222 of the Federal Public Sector Labour Relations Act*.*	*La partie qui présente un grief de principe peut le renvoyer à l'arbitrage, conformément aux articles 221 et 222 de la* Loi sur les relations de travail dans le secteur public fédéral*.*
…	[…]

IV. Reasons

[8] The employer argues that the bargaining agent referred the policy grievance to the Board for adjudication prematurely. By doing so, the employer did not have a chance to render a decision on the grievance. The employer points to the requirement in s. 225 of the FPSLRA that before any grievance can be referred to adjudication it must have been presented at all required levels in accordance with the applicable grievance process.

[9] In the employer's view, this requires more than a mere notification of a grievance to the other party. The employer points to the provision in s. 96 of the *Regulations* that states that the other party must file with the Board a copy of its decision within 30 days of the grievance's referral to adjudication. This requirement implies that before referring a grievance to adjudication, the grievance process must have run its course, which includes giving the other party the opportunity to reply to the grievance prior to its referral to adjudication. Until such time, the Board cannot be "validly seized."

[10] I disagree. As the bargaining agent correctly points out, according to the applicable legislative and collective agreement provisions, it could refer the grievance for adjudication at the same time as it was filed with the employer. Section 221 of the *FPSLRA* states that a party that presents a policy grievance may refer it to the Board for adjudication and s. 225 provides that no grievance may be referred to adjudication until it has been presented at all required levels in accordance with the applicable grievance process. While individual grievances ordinarily are required to be presented at up to three levels (clause 20.05 of the collective agreement), clause 20.29 of the collective agreement states that in the case of policy grievances, there shall be no more than one level in the grievance procedure.

[11] I find that since the bargaining agent presented the policy grievance at the one required level, it could immediately refer it to the Board for adjudication, in accordance with ss. 221 and 225. To "present" a grievance, in the context of *FPSLRA* and the collective agreement, means quite simply to file or submit the grievance with the other party, the employer. In this case, having submitted the grievance to the employer at the only applicable level on July 11, 2018, the bargaining agent had satisfied the requirements of s. 225 and could immediately refer it to the Board for adjudication as well.

[12] The employer argued that the grievance process is the foundation of its labour relations with the bargaining agent and that the process provided the parties with the opportunity to discuss the matter, review it, and attempt to resolve it at the lowest possible level. It claimed that grievances can often be resolved during the process. If a bargaining agent is allowed to bypass the grievance process, it would constitute an affront to the foundation of labour relations. The Board cannot be validly seized of a grievance when the grievance process has not been exhausted.

[13] The employer pointed to clause 20.33 of the collective agreement, which states that the employer and the bargaining agent shall normally reply to the grievance within 30 days of when it is presented. It argued that this means that the bargaining agent must wait for this "deadline" to expire before referring it to adjudication. However, by its plain reading, this is not a deadline. It is merely a statement of when a party is "normally" expected to respond to the other party's policy grievance, likely for the purpose of engaging in the discussions to which the employer alluded in its arguments. But there is no indication that the expiry of this period is a prerequisite to referring a policy grievance to adjudication.

[14] I would agree that ideally parties should take every opportunity to discuss with each other and resolve their disputes amicably before resorting to adjudication. However, the fact of the matter is that the applicable legislative and collective agreement provisions do not prevent a party from referring a policy grievance right after it has been presented to the other party.

[15] The notion of the term "present" was addressed in *Association of Justice Counsel v. Treasury Board*, 2016 PSLREB 48, where the Board considered the plain and ordinary

meaning of the term and concluded that it means to file or submit something. The Board stated as follows:

> …
>
> *[111] Further, the use of the word "present" in the collective agreement as a whole, and in the context of all the clauses dealing with policy grievances, including clause 24.05 dealing with the presentation of policy grievances by mail, is consistent with the interpretation that the word "present" means "file" or "submit" and is inconsistent with the interpretation that it means "present" in the sense of "presenting a case to a decision maker."*

[16] Similarly, in this instance, there is no express or implied indication that to present a policy grievance means to present a case to a decision-maker. In fact, at this point, I note an important distinction between the provisions of the *FPSLRA* relating to the referral of individual grievances and policy grievances. Section 209(1) provides that an employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and **that has not been dealt with to the employee's satisfaction**. Although it is not a question on which I am ruling in this case, it could arguably be submitted that this highlighted provision implies that the employer is expected to have the opportunity to give a decision with which the employee is not satisfied before the individual grievance can be referred. Clause 20.14 of the collective agreement says the employer shall normally reply to an individual grievance at the final level within 30 days of the grievance's presentation.

[17] In contrast, there is no similar provision in s. 221 of the *FPSLRA*. Its language could not be any simpler. A party that presents a policy grievance may refer it to adjudication. There is no pre-condition that the party be dissatisfied with how the other party has "dealt with" the grievance.

[18] Given these findings, which are based on the applicable legislative and collective agreement provisions, I need not deal in detail with some of the other arguments raised by the bargaining agent in response to the employer's objection.

[19] These arguments included the fact that four years have passed since the grievance was filed, which gave the employer all the time it needed to formulate a response, to enter into a discussion with the bargaining agent and resolve the issue at the lowest possible level, or even to object to the grievance's referral to the Board. It defies common sense that four years on, the employer can suspend the grievance

adjudication process by arguing that it was denied the opportunity to respond to the policy grievance. By not taking any action, the employer became the architect of its misfortune, so to speak. Even as of this date, it is still open to the employer to address the grievance and to provide its response. The bargaining agent stated that throughout this process, the parties met regularly, almost every six weeks, and that this issue could have been brought up at any time. But it was not.

[20] I cannot help but also note that this grievance was filed along with a second grievance (569-02-38857), which was also simultaneously filed with the employer and referred to adjudication. Both grievances were scheduled to proceed together before the Board. After the parties had discussions, a settlement was apparently reached, and the second grievance was withdrawn. This shows that the mere fact that the grievances were simultaneously filed with the employer and referred to adjudication did not prevent the employer from discussing and resolving issues with the bargaining agent.

[21] As a final observation, I note that during the pre-hearing conference call, both parties confirmed that they were ready to proceed on the specified hearing dates.

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

(The Order appears on the next page)

V. Order

[23] The objection is dismissed.

[24] The adjournment request is denied.

[25] The hearing will proceed as scheduled on May 30 and 31 and June 1, 2022.

May 16, 2022.

Guy Grégoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board