Date: 20221003

Files: 566-02-14284 and 44708 and 568-02-44709

Citation: 2022 FPSLREB 82

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

N.L.

Grievor and Applicant

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
N.L. v. Treasury Board (Department of National Defence)

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* and two individual grievances referred to adjudication

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor and Applicant: Linda Tassile, Public Service Alliance of Canada

For the Respondent: Philippe Giguère, counsel

Decided on the basis of written submissions filed May 9, 11, 17, and 27, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. The grievor's motions

[1] N.L. ("the grievor") made two preliminary motions.

[2] He was an employee of the Department of National Defence ("the department") before he was suspended without pay in 2015 and then dismissed in 2016 for disciplinary reasons. The hearing for a grievance about his termination is scheduled for February 6 to 17, 2023 (file 566-02-14284).

[3] His first motion was an application for an extension of time under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") to refer to adjudication a grievance about his suspension without pay during the administrative investigation that led to his termination (file 566-02-44708). The grievance was filed with the employer in 2016 and followed the grievance process established in the collective agreement. However, it was referred to adjudication only in May 2022, when it was discovered that due to an error by the Public Service Alliance of Canada (PSAC or "the bargaining agent"), the grievance was not referred to adjudication in 2017, when the termination grievance was referred.

[4] The grievor's second motion was a request to anonymize file 566-02-14284 and, if the first motion is granted, file 566-02-44708.

[5] The grievor pleaded guilty to a criminal offence. The guilty plea and his subsequent conviction were central to the employer's reasons for his suspension and termination. He received an absolute discharge and took steps to remove the information about his conviction from the public sphere. Therefore, the purpose of the anonymization request is to protect his privacy. He asked the Federal Public Sector Labour Relations and Employment Board ("the Board") to identify him by only his initials in its decisions and to remove from its records any information that would allow identifying him, including his last name, first name, and place of residence.

[6] The legal employer, the Treasury Board of Canada, consented to the anonymization request but opposed the application for an extension of time to refer the grievor's suspension grievance to adjudication.

[7] For the following reasons, I allow the application and grant the request.

II. The application for an extension of time

A. Summary of the facts, as described by the parties

[8] In 2013, the Canadian Forces National Investigation Service (CFNIS) began an investigation into equipment theft allegations. The investigation involved civilian employees of the department, including the grievor. In January 2015, it led to his arrest and that of other departmental employees.

[9] On May 27, 2015, the grievor was suspended without pay for the duration of an administrative investigation into the equipment theft allegations. Nearly a year later, on May 11, 2016, he filed a grievance against his suspension without pay. Among other things, he argued that the administrative investigation took an unreasonable amount of time and that the decision to suspend him was discriminatory. The grievance was numbered 8254 as part of the department's grievance process.

[10] At the first two levels of the grievance process, the Union of National Defence Employees (UNDE) local ("the local") represented the grievor. On June 7, 2016, the employer denied the grievance at the second level.

[11] On June 15, 2016, the local presented the grievance at the third level. According to the grievor, it failed to send the grievance and transmittal forms to the third level at the UNDE ("the component").

[12] The component was responsible for representing the grievor at the third level and for forwarding the grievance to the PSAC if, in its view, the grievance was to be referred to adjudication. The PSAC was responsible for referring the grievance to adjudication if it believed that a referral was appropriate.

[13] The component opened a file for grievance 8254. On July 13, 2016, it asked the local to send it the documents relevant to the grievance. A reminder was sent the following month. It appears that the component never received the grievance form.

[14] On December 22, 2016, the grievor was informed of his termination for disciplinary reasons, which was retroactive to May 27, 2015, the date on which he was suspended without pay.

[15] The grievor filed a grievance against the termination. It was numbered 8818 as part of the department's grievance process.

[16] In March 2017, the two grievances were heard together at the third level of the grievance process, which was the final level. On May 26, 2017, the employer denied them both. According to it, the grievor's grievance against his suspension without pay was moot because he had been dismissed for disciplinary reasons retroactively to his suspension date, and the decision to terminate him had the effect of replacing the suspension. Its final-level decision on his suspension grievance was not filed with the Board.

[17] In early June 2017, a labour relations officer with the component placed a note on both of the grievor's grievance files. It was intended for a clerk and indicated that both grievances had been heard together and that they should be forwarded to the PSAC together.

[18] According to the grievor, the component's clerk did not find the suspension grievance form (grievance 8254) in the file and on June 6, 2017, sent only the termination grievance to the PSAC (grievance 8818). The existence of a grievance against the grievor's suspension without pay was not mentioned when the termination grievance was forwarded. Therefore, the PSAC had no information that would have led it to believe that a second grievance should have been sent to it for referral to adjudication.

[19] On June 27, 2017, the PSAC referred the grievor's termination grievance to adjudication. The Board numbered the file 566-02-14284.

[20] A few weeks later, the department's labour relations team leader emailed the department's director general of civilian human resources management operations and stated that both of the grievor's grievances (grievances 8818 and 8254) were referred to adjudication on June 27, 2017.

[21] In 2021, file 566-02-14284 was placed on the schedule for Board hearings. The hearing was scheduled for January 4 to 7, 2022, but was postponed several times.

[22] On April 28, 2022, and a few weeks before the first scheduled hearing date, one of the department's labour relations advisors contacted the Board's registry to inquire about file 566-02-14284, specifically whether both of the grievor's grievances were included in it. She said that she had information indicating that the grievor would have referred two grievances to adjudication.

[23] Only when it became aware of that information request did the bargaining agent learn that a second grievance should have been referred to adjudication in 2017.

[24] The bargaining agent immediately searched its database and found no record of the grievor's grievance against his suspension without pay. The component also carried out research, and on May 4, 2022, it confirmed that two grievances should have been referred to adjudication but that only one grievance was referred to the PSAC. That same day, the bargaining agent informed the Board that a second grievance should have been referred to adjudication and requested that the situation be discussed at a case management conference to be held two days later.

[25] At the case management conference, the bargaining agent informed the Board and the employer of its intention to request an extension of time to refer to adjudication the grievor's grievance against his suspension without pay, to which the employer raised an objection.

B. Analysis

[26] This application was made under s. 61(b) of the *Regulations*, which, among other things, provides that in the interests of fairness and on the application of a party, the Board may grant an extension of time to refer a grievance to adjudication.

[27] To determine whether an extension should be granted, the Board uses the five criteria established in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which are clear, cogent, and compelling reasons for the delay; the length of the delay; the applicant's due diligence; balancing the injustice to the applicant against the prejudice to the employer in granting an extension; and the grievance's chances of success.

[28] The circumstances of each case affect the importance and weight given to each criterion. Each criterion established in *Schenkman* must be considered in light of the factual context. I applied those criteria to the circumstances of this case, and my observations follow.

[29] The delay referring the grievance to adjudication was due solely to the bargaining agent's error.

[30] Recently, in *Lessard-Gauvin v. Treasury Board (Canada School of Public Service)*, 2022 FPSLREB 40, the Board reviewed a good number of decisions dealing with an application for an extension of time in circumstances in which bargaining agent negligence or error was at issue. From that overview, the Board and its predecessors have sometimes granted an extension of time for a delay caused by a bargaining agent's error or negligence, but such extensions have also sometimes been denied. A bargaining agent's administrative errors do not necessarily constitute clear, cogent, and compelling reasons (see *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33; and *Edwards v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 126 at para. 24). The factual context plays a key role.

[31] I find that the circumstances of this case differ from the circumstances described in the case law that the parties cited and that was discussed in *Lessard-Gauvin*. Many of the decisions rendered by the Board and its predecessors dealt with situations in which a bargaining agent was aware of the need to make a referral to adjudication and was negligent by delaying or failing to make the referral. For the same reason, *Trenholm v. Staff of the Non-Public Funds, Canadian Forces*, 2005 PSLRB 65, *Copp*, and *Edwards*, which the parties cited, are of limited use.

[32] In this case, the bargaining agent's failure to refer the grievance to adjudication within the prescribed time occurred because it was unaware of the very existence of a second grievance that had to be referred to adjudication because the component did not communicate that information to it. The situation occurred because of the failure of the component's clerk.

[33] There is no doubt in my mind that the grievor and the component intended to refer both grievances to adjudication. The component's labour relations officer had placed a note on both grievance files indicating that the grievances had to be forwarded together to the PSAC. Had it not been for the clerk's error, I believe that the grievor's suspension grievance would have been referred to adjudication in 2017.

[34] The reason for the delay, in this case the component's error, is only one factor that I must consider when deciding whether to grant an extension. Nevertheless, I find that ignoring the very existence of a grievance that must be referred to adjudication is a clear, cogent, and compelling reason for the delay.

[35] The grievance was referred to adjudication almost five years late, which is a considerable delay. As explained earlier in this decision, the delay was long because the PSAC was unaware of the grievance until April 2022, when an employer representative referred to the existence of a second grievance in a communication to the Board's registry.

[36] The third criterion established in *Schenkman* is that of the grievor's due diligence. He believed that his two grievances had been referred to adjudication. The component reportedly informed him that both grievances had been referred to adjudication and that it could take a very long time for the Board to hear them. That explains why he made no effort to ask the bargaining agent about the status of his suspension-without-pay grievance. He had no reason to doubt that that grievance had been referred.

[37] The grievance was referred to adjudication as soon as the PSAC became aware of it and as soon as the grievor learned that his suspension grievance had not been referred to adjudication in 2017, as he was made to understand. I believe that he exercised due diligence.

[38] What about the fourth criterion established in *Schenkman*, which is balancing the injustice to the grievor against the prejudice to the employer in granting an extension?

[39] The employer argued that the grievor's suspension grievance would be moot because his termination was retroactive to the date of his suspension without pay. In its view, its termination decision replaced the suspension.

[40] A grievance against a suspension without pay during an investigation may, in certain circumstances, be moot when a grievance against a subsequent termination is denied (see *Canada (Attorney General) v. Bétournay*, 2018 FCA 230). However, it is not a given that the grievor's grievance against his termination will be denied. At this stage, the Board has not heard any evidence.

[41] In addition, the grievor's suspension grievance did not challenge his suspension without further clarification. He claimed that the decision to suspend him without pay was discriminatory in that a similar decision was not applied fairly to other employees in a similar situation; that is, to other employees who faced the same allegations. The

grievor argued that he would suffer an injustice if his application for an extension of time were dismissed. He would be deprived of the opportunity to make his case fully on this matter. Although it would have been helpful had the grievor developed his argument on this matter more, I still believe that dismissing the application for an extension of time could deprive him of such an opportunity.

[42] While an injustice may be done to the grievor if the extension is denied, the employer did not demonstrate how it could be prejudiced if it were granted.

[43] Unlike in *Edwards*, this is not a situation in which the employer will be prejudiced in preparing its case or in presenting its evidence were the extension granted. It believes that, as did the grievor, his suspension-without-pay grievance was referred to adjudication. It likely believed that the Board's hearing would include both grievances, which arose from the same factual situation. They are closely related and rely heavily on the same evidence.

[44] A review of balancing the injustice to the grievor against the prejudice to the employer in granting an extension led me to find that an injustice may be caused to the grievor if the application for an extension of time for the referral to adjudication were dismissed. The employer failed to demonstrate that it would suffer prejudice.

[45] The last *Schenkman* criterion requires analyzing the grievance's chances of success. The criterion's purpose is to enable the Board to deny an extension for a grievance with no chance of success. Although it is impossible for me to predict the grievance's outcome, since I have not heard any evidence, at first glance, it is an arguable case. The grievance is not frivolous or vexatious.

[46] In conclusion, the length of the delay for the referral to adjudication was considerable, and there are few circumstances under which an extension of time should be granted for such a large delay. However, in this case, the delay was considerable because the PSAC was unaware of the grievance's existence. There is a clear, cogent, and compelling reason for the delay, the grievor exercised due diligence, and he may be caused an injustice if the application for an extension of time is dismissed.

[47] *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144 at para. 62, stated that the Board's review must be based on facts and

on the principle of what is fair in the circumstances. The circumstances of this case are unique, and I believe that in the interests of fairness, the extension of time to refer the grievance to adjudication should be granted.

[48] The application for an extension of time should be allowed.

III. The anonymization request

[49] On May 9, 2022, the grievor made a request to anonymize file 566-02-14284. The request's scope was then expanded to include file 566-02-44708 if the extension of time for the referral to adjudication were granted. It was also further clarified to include documents under the control of the Board's registry that would not have been included in files 566-02-14284, 566-02-44708, or 568-02-44709.

[50] It appears that the grievor's request indicated that he asked the Board to anonymize all records that contain information or documents that could identify him. For the order he sought to have the desired effect, I believe that his request should be deemed to apply also to file 568-02-44709, which is the Board's file that corresponds to the application for an extension of time and to this decision.

[51] The grievor's request was specific. He asked the Board to identify him by only his initials in its decisions and in the hearing schedule and to delete from its files and registry any information that could identify him, including his last name, first name, and place of residence. In my view, his email address and telephone number are implicitly covered by this request because that information could easily allow identifying him.

[52] As the union representative confirmed at a case management conference, the anonymization request did not seek to hide information such as the grievor's workplace and the names of witnesses or persons who might have been involved in, or participated in, criminal or administrative investigations.

[53] The employer consented to the anonymization request. That consent is important but does not determine the request's outcome. Given the importance of the open court principle, the Board must nevertheless decide whether the circumstances of this case and the issues involved justify restricting access to the information that the grievor would like to keep out of the public eye.

[54] The open court principle is well recognized in the jurisprudence (see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; and recently, *Sherman Estate v. Donovan*, 2021 SCC 25). The principle also applies to the Board (see *Canada (Attorney General) v. Philps*, 2019 FCA 240), which recognizes the principle in its *Policy on Openness and Privacy*.

[55] The case law recognizes that in certain circumstances, it may be appropriate for a court, or a quasi-judicial tribunal such as the Board, to issue an order restricting court openness to balance the right to freedom of expression with an important public interest. It is a discretionary authority that must be exercised with restraint and in a way that ensures that the open court principle is maintained (see *Sierra Club of Canada*, at paras. 48 and 53; and *Philps*, at paras. 23 to 25).

[56] As the Supreme Court of Canada recently reiterated in *Sherman Estate*, at para. 38, any person asking the Board to exercise its discretion in a way that limits court openness must establish the following:

> …
>
> *1) court openness poses a serious risk to an important public interest;*
>
> *2) the order sought is necessary to prevent this risk to the identified interest because reasonably alternative measures will not prevent the risk; and*
>
> *3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> …

[57] The grievor's request is not unprecedented. The Board has made such orders in some cases and has dismissed others (see, among others, *Grievor X v. Canada Revenue Agency*, 2020 FPSLREB 74; *Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 89; *Olynik v. Canada Revenue Agency*, 2020 FPSLREB 80; and *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53). Each case is individual and must be considered in light of its particular facts and the interest that the applicant seeks to protect.

[58] The following context, which the grievor stated and the employer did not dispute, is relevant to this request.

[59] In 2015, the grievor was arrested after a criminal investigation into allegations of workplace equipment theft. He pleaded guilty to a charge of possession of property obtained by crime under $5000.

[60] The trial judge accepted a joint sentencing proposal and granted the grievor an absolute discharge.

[61] According to the grievor, an absolute discharge removes all public record of a conviction after one year. In his view, this description is consistent with the wording of s. 6.1(1)(a) of the *Criminal Records Act* (R.S.C., 1985, c. C-47; *CRA*), which states the following:

6.1 (1) *No record of a discharge under section 730 of the* Criminal Code *that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if*	***6.1(1)*** *Nul ne peut communiquer tout dossier ou relevé attestant d'une absolution que garde le commissaire ou un ministère ou organisme fédéral, en révéler l'existence ou révéler le fait de l'absolution sans l'autorisation préalable du ministre, suivant l'écoulement de la période suivante :*
(a) *more than one year has elapsed since the offender was discharged absolutely; or*	***a)*** *un an suivant la date de l'ordonnance inconditionnelle;*
…	[…]

[62] One year after receiving an absolute discharge, the grievor submitted an "Application for no-disclosure of information contained in computerized records in criminal matters", to make all references to the charges against him, his conviction, and his absolute discharge in the court records and files inaccessible to the public.

[63] The grievor's entanglements with the law overlapped in time with his workplace troubles.

[64] Shortly after the grievor's arrest, the employer initiated an investigation into alleged misconduct about the equipment theft allegations. It decided to suspend him during the investigation and then terminated his employment for disciplinary reasons.

[65] The grievor stated that he intended to provide substantial evidence from the criminal investigation and on the contextual factors that contributed to his absolute discharge. He intended to use this evidence to support his claims that a termination did not constitute a reasonable disciplinary measure in the circumstances and that he was treated differently from other employees who faced similar allegations.

[66] The employer stated that it was highly likely that it would seek to introduce the grievor's conviction into evidence at the hearing because it was closely related to the employer's decision to terminate his employment.

[67] It is difficult for the Board to hold a hearing on the grievor's grievances without receiving evidence revealing the charges against him, his conviction, and his absolute discharge. It is even more difficult for the Board to consider rendering a decision that would ignore the facts central to this case.

[68] As noted earlier in this decision, the case law provides that each case is individual and that it must be considered in the light of its particular facts and the interest that the applicant seeks to protect.

[69] I draw no conclusions as to whether the Board or the Administrative Tribunals Support Service of Canada (ATSSC), which provides support services to the Board, including the services provided by the registry, are subject to the *CRA*. However, I must acknowledge that Parliament chose to provide a measure of protection for the privacy of convicted persons who have been granted an absolute discharge. That protection is reflected in the *CRA*, which is designed to minimize the consequences of a criminal record when a person convicted of an offence under federal law has been granted an absolute discharge or a record suspension.

[70] One of the purposes of that Act is to support certain convicted persons in their rehabilitation as law-abiding members of society (see s. 4.1(2) of the *CRA*). The *CRA* operates to remove from view records in a federal agency's custody that may reveal the fact of a conviction. That Act also prohibits the federal agency from communicating or revealing the existence of the conviction without the prior authorization of the

Minister of Public Safety and Emergency Preparedness. In my view, this is a recognition that that aspect of the privacy of persons granted an absolute discharge deserves protection in the open-court context and has a clear public interest aspect (see *Sherman Estate*, at para. 32).

[71] To disclose the grievor's identity with respect to his conviction and the charges that led to it, or to make that information publicly available, would be contrary to the important interests that that Act seeks to protect. In addition, as noted earlier in this decision, it is difficult for the Board to consider rendering a decision about grievances that would ignore the facts central to this case.

[72] When all those factors are considered, the benefits of anonymizing the grievor's name outweigh the detrimental effects on the rights and interests of the parties and the public. This is an exceptional case in which departing from the open court principle is justified.

[73] I believe that anonymizing the grievor's identity while allowing the publication of the decision and public access to the Board's records respects the open court principle. In addition to certain information that may identify him, information about the Board's records, arguments, and decisions will be available to the public. Anonymizing the grievor's identity is the least invasive way to avoid a serious risk to an important public interest.

[74] Bearing in mind the *CRA* and the respondent's consent, it is appropriate to anonymize files 566-02-14284, 566-02-44708, and 568-02-44709 and to allow the grievor to be identified by his initials for the purposes of this decision, the decision that will be rendered on the merits of the grievances, and any subsequent decisions that may be rendered between now and when a decision is rendered on the merits of the case. The necessary steps should also be taken to ensure that the grievor's initials are used to identify this file on the Board's hearing schedule.

[75] The anonymization request should be granted.

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

(The Order appears on the next page)

IV. Order

[77] The application for an extension of time to refer the grievance to adjudication is allowed.

[78] File 566-02-44708 will be placed on the Board's hearing schedule so that files 566-02-44708 and 566-02-14284 are heard together.

[79] The request to anonymize files 566-02-14284 and 566-02-44708 is granted. Anonymizing file 568-02-44709 is also ordered.

[80] The ATSSC is ordered to implement anonymization measures with respect to the Board's hearing schedule; Board files 566-02-14284, 566-02-44708, and 568-02-44709; and previous and future decisions and orders in files 566-02-14284, 566-02-44708, and 568-02-44709, as applicable, as follows:

a) the grievor's first and last name will be replaced with "N.L."; and
b) the grievor's place of residence, telephone number, and email address will be redacted.

[81] All documents filed with the Board and all exhibits adduced in evidence that contain the grievor's name, place of residence, telephone number, or email address shall remain anonymous in the manner just described.

[82] The ATSSC is ordered to provide to the parties copies of files 566-02-14284, 566-02-44708, and 568-02-44709, except for documents protected by attorney-client privilege. The grievor's representative will be required to prepare an anonymized copy of the files provided by the ATSSC, obtain agreement from the employer's representative with respect to the anonymization, and file anonymized copies of the files with the Board.

[83] Files 566-02-14284, 566-02-44708, and 568-02-44709 will be sealed temporarily until the grievor's representative has filed anonymized copies of them.

[84] Once the anonymized documents have been filed, the ATSSC is ordered to replace the original documents in files 566-02-14284, 566-02-44708, and 568-02-44709 with the documents that the grievor's representative will have anonymized.

October 3, 2022.

FPSLREB Translation

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board