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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

BRENDA VAN DE VEN

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Van de Ven v. Treasury Board (Canada Border Services Agency)

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

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Marie-Pier Dupont, counsel

For the Employer: Adam C. Feldman, counsel

Heard via videoconference,
April 24, 2023.

REASONS FOR DECISION

I. Introduction

[1] Brenda Van de Ven ("the grievor") was an employee of the Canada Border Services Agency (CBSA or "the employer"). She filed two grievances in January 2015. After she referred them to adjudication, the employer objected to the jurisdiction of the Board to hear them, stating that they were transmitted late to the final level of the grievance process in the relevant collective agreement.

[2] The grievor denied that the grievances were transmitted to the final level late; in the alternative, she argued that an extension of the timelines should be granted as allowed for under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79, "the *Regulations*").

[3] The grievor was at all material times a trade officer for the CBSA working in Vancouver, British Columbia, and classified FB-04 in the Border Services (FB) bargaining unit represented by the Public Service Alliance of Canada (PSAC or "the union"). The grievances relate to the interpretation of the collective agreement between the parties with the expiry date of June 20, 2014 ("the collective agreement"). The grievor was represented in the internal grievance process by a component of the PSAC, the Customs and Immigration Union (CIU or also "the union").

[4] For the reasons that follow, I grant the applications for an extension of the time limit for the transmission of the grievances to the final level of the grievance process. I order that the case be scheduled to be heard on its merits.

[5] In this decision, "the Board" will refer to both the Federal Public Sector Labour Relations and Employment Board and its predecessors.

II. Summary of the facts

[6] This summary of facts is drawn from the materials on file, the joint book of documents provided by the parties, and testimony from witnesses.

[7] The grievor's witnesses included the following:

- herself; and
- Carla Busnardo, at the material time a CBSA trade officer and a CIU union steward, now retired from both roles.

[8] The employer's witnesses included the following:

- Jonathan Evans, a manager in the trade division that the grievor worked in; and
- Anita Andersson, at the material time the director of trade operations in the CBSA's Pacific Division.

[9] As noted, this matter concerns two grievances. Grievance 1 (bearing the internal number 117265, now Board file no. 566-02-14002) alleged a failure on the part of the employer to accommodate the grievor after it denied a request for a flexible work arrangement on January 15 and 16, 2015. Grievance 2 (bearing the internal number 117266, now Board file no. 566-02-14003) was similar except that it concerned the denial of a request for accommodation on January 19, 2015, and the denial of an alternative request to take a single day of leave without pay.

[10] The flexible work arrangement that was requested for the days in question was telework. The grievor testified that her requests for accommodation were based on family status. She has a son with special needs. In 2015, his needs meant that frequent visits to specialists were required. She had previously been allowed to work from home from time to time, which facilitated getting her son from school to specialists and back. On the dates in question, management had denied her requests.

[11] Ms. Busnardo was in attendance at the office when the grievor was informed that her requests for a flexible work arrangement on the dates in question were denied. Both she and the grievor testified that they believed that the employer's denial was wrong. As a steward, Ms. Busnardo assisted the grievor in preparing her grievances using the CBSA's forms.

[12] Because the grievor's telework requests were denied, she used leave without pay for the care of family to take time off work. As corrective action, she sought to be compensated for lost wages and benefits for the periods of leave without pay she took; she also reserved the right to claim financial compensation for the employer's alleged violation of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "*CHRA*").

[13] Both grievances were presented to management on January 29, 2015. The first level of the grievance process was bypassed. At the second level of the grievance process, the grievances were denied by Ms. Andersson, on April 1, 2015. The grievor transmitted the grievances to the third level of the grievance process that same day. She and Ms. Busnardo signed the forms transmitting the grievances to the third level.

The receipt of the transmittals was signed by Sandy Dahka, the grievor's acting manager, the same day.

[14] The third level of the grievance process applicable to the CBSA and its workplace is the regional director general (RDG).

[15] No timeliness objection was made with respect to the initial filing of the grievances or their transmittal to the third level. For reasons that will be discussed later, it is important to note that no decision was rendered at the third level of the grievance process.

[16] The timeliness objection concerns the grievor's transmittal of grievances to the **final** level of the grievance process. At issue are the transmittal forms used to move the grievances to the final level ("the transmittal forms").

[17] The transmittal form for grievance 1 bears the signatures of the grievor and Ms. Busnardo with a date of April 17, 2015. The transmittal form for grievance 2 bears their signatures with a date of April 16, 2015.

[18] In the section of the transmittal forms where the receipt of the transmittal is to be confirmed by management, Ms. Dahka's name is typed in, along with the dates of April 17 and April 16, 2015, respectively, for grievances 1 and 2.

[19] However, on the final version of both transmittal forms, Ms. Dahka's name and those dates are crossed out. Handwritten in their place is Ms. Andersson's name and the date of June 5, 2015.

[20] The final-level reply to the grievances was issued by the CBSA's vice-president for Human Resources on March 22, 2017. The final-level reply denied the grievances as untimely because they were transmitted to the final level more than 15 days after they had been transmitted to the third level. The grievances were also denied on their merits.

[21] The grievances were referred to adjudication on April 20, 2017. On May 24, 2017, the employer objected to the referral due to its timeliness objection with respect to their transmittal to the final level. The PSAC provided its position on June 6, 2017, claiming that the employer was estopped from making the objection due to the past practice in the management of grievance timelines between the CBSA and CIU.

Alternatively, it requested that the Board exercise its powers to extend the timelines. The employer provided its reply on June 27, 2017.

[22] Following that exchange, the Board opened the corresponding applications for an extension of time (file numbers 568-02-00384 and 00385).

[23] As additional background, it is important to note that on April 15, 2015, the grievor submitted her resignation from the CBSA, and management accepted it. Her last day of work at the CBSA was April 17, 2015.

III. The timeliness objection

A. The parties' preliminary positions on the timeliness of the grievances

[24] I will start with the positions of the parties in the exchange that took place after the referral to adjudication. This exchange provides important information that forms the backdrop to my consideration of the evidence and arguments presented at the hearing.

[25] As noted, the employer's timeliness objection (of May 24, 2017) was that the grievances were not transmitted to the final level within the time limits prescribed in the FB collective agreement. Clauses 18.16 and 18.17 of it read as follows:

18.16 *A grievor may present a grievance at each succeeding level in the grievance procedure beyond the first level either:*	***18.16*** *Un employé-e s'estimant lésé peut présenter un grief à chacun des paliers de la procédure de règlement des griefs qui suit le premier:*
a. where the decision or settlement is not satisfactory to the grievor, within ten (10) days after that decision or settlement has been conveyed in writing to the grievor by the Employer,	*a. lorsque la décision ou la solution ne lui donne pas satisfaction, dans les dix (10) jours qui suivent la date à laquelle la décision ou la solution lui a été communiquée par écrit par l'Employeur,*
or	*ou*
b. where the Employer has not conveyed a decision to the grievor within the time prescribed in clause 18.17, within fifteen (15) days after presentation by the grievor of the grievance at the previous level.	*b. lorsque l'Employeur ne lui a pas communiqué de décision au cours du délai prescrit dans la clause 18.17, dans les quinze (15) jours qui suivent la présentation de son grief au palier précédent.*

18.17 *The Employer shall normally reply to a grievance at any level of the grievance procedure, except the final level, within ten (10) days after the grievance is presented, and within twenty (20) days where the grievance is presented at the final level except in the case of a policy grievance, to which the Employer shall normally respond within thirty (30) days. The Alliance shall normally reply to a policy grievance presented by the Employer within thirty (30) days.*	***18.17*** *À tous les paliers de la procédure de règlement des griefs sauf le dernier, l'Employeur répond normalement à un grief dans les dix (10) jours qui suivent la date de présentation du grief, et dans les vingt (20) jours si le grief est présenté au dernier palier, sauf s'il s'agit d'un grief de principe, auquel l'Employeur répond normalement dans les trente (30) jours. L'Alliance répond normalement à un grief de principe présenté par l'Employeur dans les trente (30) jours.*

[26] In its letter of objection, the employer noted that the grievances had been transmitted to the third level on April 1, 2015. Given that a decision had not been issued at the third level, the referral to the final level should have happened within the 15 days provided for in clause 18.16(b), the employer said. It said that the grievances were transmitted on June 5, 2015, well beyond the 15-day period in the collective agreement. For that reason, the employer rejected the grievances as untimely in its final-level reply. Accordingly, it objected to the Board's jurisdiction to hear the grievances, in accordance with s. 95 of the *Regulations*.

[27] In its letter, the employer pointed out that there had been "two administrative errors" in its final-level reply. That reply had stated that the grievances were transmitted to the third level on March 1, 2015, and to the final level on April 17, 2015. The employer explained that the final-level reply should have said: "Your grievances were transmitted to the third level on **April** 1, 2015 and then to the fourth level on **June 5**, 2015 (absent a third level reply), which is beyond the fifteen (15) day time limit" [emphasis in the original].

[28] In its (June 6, 2017) reply to the timeliness objection, the PSAC stated as follows:

…

> *The Employer has argued that the grievance is untimely as it was not transmitted to the Fourth level within the prescribed timelines. The bargaining agent respectfully submits that the Employer is estopped from raising such objection on timeliness as its current practices and actions throughout the grievance procedure in general indicate that it has always accepted -and continues to*

> *accept- that the time limits are considered "suspended" as long as the parties [sic] third level meeting also known as the "consultation meeting" hasn't taken place.*
>
> *At an adjudication hearing, the bargaining agent would be more than willing to provide ample evidence of past and current numerous examples of the parties' mutual understanding on the third level consultation meeting process described above and how it applied over the years. Accordingly, and with respect, the bargaining agent submits that it is disingenuous to suddenly raise a timeliness objection and to claim that management had an impression these two joined grievances were abandoned.*
>
> …
>
> *… the employer through its conduct over the years, has always assured the union Locals that the time limits are deemed suspended as long as the consultation meeting at the third level of the grievance process didn't materialize. As a result of this practice and such assurances, the union Locals have consistently agreed not to escalate to the final level without having had an opportunity to talk and exchange views at this Consultation meeting first. It is regrettable to see the employer 'go back on its word' and act as if the mutual understanding about the third level "consultation meeting" was not made. The Employer is therefore estopped from arguing that the grievance was abandoned.*
>
> …

[29] In its (June 27, 2017) response, the employer stated this:

> …
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> *… The regional practice is that the Canada Border Services Agency (CBSA) historically does not meet the time limits as described in Article 18.17, at the third level, because it is difficult to "…normally reply to a grievance…within ten days after the grievance is presented…"… Further, both the Employer and the PSAC work to "triage" grievances when they come in; certain grievances may take precedence for scheduling over other grievances because of* [their] *nature … As this is an "informal", mutually agreed upon process between two parties, this understanding/process has never been formalized in writing but is indeed a practice.*
>
> …

[30] The employer then went on to say this:

> …
>
> *… The employer disagrees with PSAC's argument that this agreement of "suspending" time limits extents to transmitting grievances from one level to the next, as per Article 18.16(b).*

> *Typically, once a grievance is pending at the third level, it remains at third level until it has been replied too… deciding to skip level 3, such as in this case, after it had been transmitted to this level and without rationale or consultation does not normally occur… As mentioned by the PSAC, "*as a result of this practice and such assurances, the union locals have consistently agreed not to escalate to the final level without having had an opportunity to talk and exchange views at this Consultation meeting first.*" This is however what the Union did in this case, i.e. escalate the file to the final level, without a consultation or without informing the employer of its wish to skip level 3. Contrary to PSAC's argument, the employer did not "*go back on its word*".*
>
> *… Although there is a general understanding that time limits may be suspended as long as the consultation meeting at third level has not occurred, the employer submits there certainly was no formal agreement to do so for these files, nor is there any evidence that the CIU attempted to schedule these grievances at third, prior to deciding to transmit.*
>
> …
>
> [*Sic* throughout]

B. Evidence with respect to the timeliness objection

[31] The testimonies of the witnesses at the hearing and the joint book of documents shed little light on the parties' general practices with respect to the management of timelines at the third and fourth levels of the grievance process, focusing instead on the facts of these grievances.

[32] The grievor testified that she recalled signing the transmittal forms on April 17, 2015, her last day of work at the CBSA. She testified that Ms. Busnardo asked her to sign the transmittal forms. She recalled Ms. Busnardo getting up afterwards and stated that she believed that the transmittal forms were put in a tray on Ms. Dahka's desk. However, she did not witness this as her desk was on the other side of the room from Ms. Dahka's.

[33] Ms. Busnardo testified that in her career as a union steward, she represented on approximately 100 grievances. When completing a transmittal, she would often prepare the transmittal forms in advance. She said that she should have left these transmittal forms with the manager (Ms. Dahka) the same day they were signed. However, she could not specifically recall doing so. She testified that she could not recall, given the passage of time, exactly what happened to the transmittal forms

between April 17 and June 5, 2015. She could have given them to someone else to submit.

[34] The unsigned transmittal forms came to Ms. Busnardo's attention on June 5, 2015. She could not recall exactly how that happened. Entered into evidence was an email from Ms. Andersson to Ms. Busnardo dated June 5, 2015, at 3:12 p.m., with the subject line, "Level 4 Grievance Transmittal Forms - VanDeVen [*sic*]". However, there was no content to the email and no indication of an attachment. Ms. Busnardo forwarded that email at 3:16 pm to David Knoblauch, the CIU local branch president, stating that the transmittal forms were signed by the grievor in April but that they reached her only the day before, "… so [she] changed the date for Anita to sign them off". In the email, she said that there was a new manager on the team and that Ms. Andersson "… wanted to be sure it was okay to accept them at this late date."

[35] The email chain resurfaced in an exchange between Ms. Busnardo and Laurel Randle, a national labour relations officer for the CIU, dated March 31, 2017. From the sequence of events, I conclude that this email exchange took place shortly after the employer had issued its final-level reply denying the grievances on the basis of timeliness (on March 22, 2017). In the email, Ms. Busnardo explained to Ms. Randle that Mr. Knoblauch had no recollection of the grievances, that the transmittal to the third level had been timely, that no hearing had taken place at the third level, that "[u]nfortunately, we do not get a lot of level 3 representation done in a timely manner", and that the third-level hearing "… did not happen in a timely manner so we gave up and asked to have it moved to 4 …". She added that the regional director general "… did not meet to discuss the grievance (as is the norm out here) so how can it be untimely? We give her a lot of leeway and when we given up because the hearing never comes, there is no time frame to go by."

[36] Asked if she had any evidence that the union had sought a consultation meeting at level 3 of the grievance process, Ms. Busnardo testified that she has not seen any documentation of that. However, she said that that had been the intent of the union.

[37] Ms. Busnardo also testified that the CIU did not meet with the level 3 decision maker very often. She said that it was rare to have a strict deadline at that level, given that the regional director general is a very busy person. Timelines were managed in a fluid way, she said.

[38] Mr. Evans testified that he did not recall a general agreement to suspend timelines after a transmittal form was received. He said that at the time in question, he received about four transmittals per year. He said that the management team would respond within an hour to acknowledge the transmittal and then submit it to Human Resources. In cross-examination, he confirmed that his experience was limited to the transmittal of grievances at levels 1 and 2 and that he was not aware of how long it typically took for a response to be issued at level 3.

[39] Mr. Evans testified that he had worked with Ms. Busnardo in her role as a union steward and that she was approachable and willing to resolve issues through collaborative discussions but that she was not a stickler for details.

[40] Mr. Evans was not directly involved in the grievor's grievances, but he was the manager in place when she submitted her letter of resignation. He said that he was taken aback by the letter and that he met with her because he wanted to make sure that she was not jumping into resigning and that she was making an informed decision. He testified that she appeared very positive, that she was looking forward to the change, and that she appeared to have fully thought it through. He then proceeded to prepare a letter of acceptance, dated April 15, 2015, accepting the resignation effective April 17, 2015.

[41] Ms. Andersson testified that she signed the transmittal forms on June 5, 2015, and that her signature did not mean that she accepted the grievances as timely, only that they were received on that day. She testified that it was Ms. Busnardo who crossed out the name of Ms. Dahka and replaced it with hers and changed the date. She could not recall why the union wanted to skip level 3 and go right to the final level. After signing the transmittal, she forwarded the transmittal forms to Human Resources. She also wrote as follows:

> *… Please note that the griever missed the deadline for filing at Level 3 and even though were advised that they could still transmit after the fact, have indicated that they do not want it heard at Level 3 and wish to go directly to Level 4. In this case the level 4 has not been filed in a timely fashion.*
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> …
>
> [*Sic* throughout]

[42] In cross-examination, Ms. Andersson could not provide clarification as to whether the transmittal to level 3 was late or whether her email contained a typo. She did not believe that the transmittal forms had been sitting in Ms. Dahka's inbox; she recalls meeting with Ms. Busnardo on June 5, 2015, and getting the transmittal forms from her.

[43] She testified that there was no general agreement to extend timelines for transmittals at the third level. She testified that she could not recall how long it would normally take to receive a grievance reply at the third level and that grievances at that level were handled by the regional director general, which was one level above hers.

C. Arguments with respect to the timeliness objection

[44] The grievor argued that the transmittal to the final level was not untimely. The grievances had been transmitted to the third level on April 1, 2015. No answer was received at that level. The wording of the collective agreement is that the transmittal to the next level must happen within 15 days, but the wording of the collective agreement indicates that Saturdays and Sundays are excluded from that calculation. The transmittal forms were signed on April 17, 2015, which was within the timelines provided for in the collective agreement.

[45] The fact that management did not sign the transmittal forms until June 5, 2015, is an error not attributable to the grievor or the union. The testimony of the grievor and Ms. Busnardo was that the transmittal forms were signed on April 17, 2015, and that they should have been handed to management that day.

[46] The grievor also argued that Ms. Busnardo had testified that consultation meetings at the third level were often very difficult to schedule, often taking 6 months or more. The union was at the whim of management and demonstrated a fluid approach in allowing extensions for the reply at that level. If the transmittal took place only on June 5, it was only about 30 business days late, which should not give rise to a timeliness objection by the employer given the parties' practices with respect to the scheduling of consultation meetings at the third level.

[47] The employer argued that after the grievor made the referral to the third level, there was no evidence that the union made efforts to schedule a consultation meeting. In the union's submissions of June 6, 2017, it took the position that the parties agreed

to suspend the timelines as long as the consultation meeting was not held. However, the evidence before the Board is that the grievor decided to skip right to the final level. If that is what the grievor wanted to do, she and her union were responsible for transmitting the grievances on time.

[48] The employer argued that there is no credibility to the grievor's argument that the grievances were transmitted on April 17, 2015, and perhaps were lost or misplaced or that they simply sat in a manager's inbox. Mr. Evans and Ms. Andersson testified that the management team took grievance transmittals seriously and always acted on them quickly. The grievor and her representative did not act diligently to ensure that the timelines were met. The evidence before the Board is that the transmittal forms did not come to Ms. Andersson until June 5, 2015, which is the date on which she signed them. This was seven weeks outside the time limits provided for in the collective agreement, and the grievances should be found to be untimely.

D. Analysis and reasons

[49] Given the evidence before me, I find it very difficult to assess whether the transmittal of the grievances to the final level was made in a timely fashion. The hearing took place almost eight years to the week after the events in question, making it very difficult for witnesses to remember exactly what took place.

[50] However, my consideration of this evidence does lead directly to my conclusion that if the transmittal was untimely, it would be in the interest of fairness to extend the timelines in this case.

[51] On the evidence before me, and on a balance of probabilities, I conclude that the grievor and Ms. Busnardo signed the transmittal forms on April 17, 2015. Despite the passage of time, the grievor and Ms. Busnardo had clear recollections that the transmittal forms were signed on the grievor's last day of work. The letter accepting her resignation confirms that the date was April 17, 2015.

[52] What happened after that is much less clear. The grievor testified that she believed that Ms. Busnardo transmitted the transmittal forms that day, and Ms. Busnardo testified that she should have delivered them that day, but she could not recall doing so. Considering the testimonies of Ms. Busnardo and Ms. Andersson, the content of the transmittal forms themselves, and the emails entered into evidence, I

have to conclude that the transmittal forms were not delivered to management until they came into Ms. Andersson's possession on June 5, 2015. What happened between April 17 and June 5 is unclear.

[53] The provisions of the collective agreement are clear. Clause 18.17 states that the employer shall "normally" respond to a grievance within 10 days of receiving it at that level, except that at the final level, it shall normally respond within 20 days. Clause 18.16(b) states that if there is no reply to the grievance within the time frame set out at clause 18.17, at a certain level of the grievance process, the deadline for transmitting the grievance to the next level is 15 business days. If the grievances were transmitted on April 17, 2015, their transmittal would have been timely. Their transmittal on June 5, 2015, was outside the time limits set out in the collective agreement.

[54] However, I do not think that the story ends there. The timeliness of the transmittal must also be considered in relation to the parties' general practices with respect to the management of grievance process timelines. To summarize the parties' submissions that took place following the referral of the grievances to adjudication, I conclude the following:

- despite the provision at clause 18.17 that states that the employer will normally respond to grievances at the third level with 10 days, this is not the case, given the volume and other resource pressures;
- the parties do not have a case-by-case system for the requesting and granting of extensions for management reply;
- instead, the parties have in practice agreed that grievances transmitted to the third level are placed in abeyance pending the scheduling of a "consultation" meeting;
- once a reply is issued at the third level, a grievance can be referred to the final level; and
- this is an unwritten, informal practice.

[55] I heard very little evidence at the hearing to shed additional light on these practices. Ms. Busnardo testified that it could take six months or more to hold a consultation meeting with the regional director general at the third level. She confirmed there was a general agreement to hold grievances in abeyance until they could be answered at that level. Mr. Evans and Ms. Andersson testified that they had

no knowledge of a general policy to extend timelines at the third level but also that their experience was restricted to the management of grievances at the first and second levels. They could not testify how long it normally took for a reply to be issued at the third level.

[56] I heard testimony from Mr. Evans that Ms. Busnardo did not demonstrate attention to detail when it came to the management of grievances. At the same time, I also found two clear incidents of errors on the part of management: Ms. Andersson's email to Labour Relations on June 5, 2015, stating that the transmittal of the grievances to the **third** level had been late (which was incorrect), and the employer's final-level reply, which stated that the transmittal to the third level had been done on March 1, 2015, and the transmittal to the final level on April 17, 2015 (both incorrect).

[57] Assessing the evidence and submissions as a whole, I conclude that what was truly wrong with the grievor's transmittal to the final level was not that it was too **late** but that it was too **early**. Had the grievor simply waited for a reply from the regional director general at the third level and **then** transmitted the grievances to the final level within 10 days of that reply, it appears that there would have been no basis for the employer to make a timeliness objection.

[58] It is a matter of some speculation as to how much longer the grievor would have had to wait for a reply at that level. By June 5, 2015, she had already waited 2 months, which was well more than the "normal" period of 10 working days set out in the collective agreement. The only testimony I heard on the subject was that of Ms. Busnardo, who said that it normally took 6 or more months to receive a third-level reply.

[59] There is not enough evidence before me to conclude why the grievor did not wait for the reply at the third level — as outlined earlier in this decision, she had believed that the transmittal to the final level happened on April 17, 2015. On balance, it appears that the grievor and her union did not want to wait for a reply and that they asked to have the grievances addressed instead at the final level.

[60] What is clear is that having made the transmission to the final level on June 5, 2015, the grievor had to wait until March 22, 2017, for the employer to issue its final-level reply. This was a period of **more than 20 months** and well in excess of the

"normal" 20 days for a response at this level as set out in the collective agreement at clause 18.17.

[61] Presumably, if the grievor had lost patience waiting for the final-level reply and attempted to refer the grievances to adjudication, the employer would have made the same timeliness objection there. This is not what the grievor did, however. She waited 20 months for the final-level reply and only then referred her grievances to adjudication.

[62] With its timeliness objection, the employer is seemingly demanding that the grievor adhere strictly to the timelines that apply to her within the collective agreement, while at the same time benefitting from indefinite extensions to the time provisions that apply to it.

[63] I have no doubt that the practices of the parties to place grievances in abeyance at the third and final levels of the grievance process, pending a triaging for consultation, makes for more efficient labour relations than having to negotiate extensions to timelines for each and every grievance on an individual basis, as provided for in clause 18.22. However, given the practices of the parties and the wording of the collective agreement, the grievor was effectively left with the choice of deciding within 15 days to advance her grievances to the next level without a reply, as per clause 18.16(b), or waiting for an unspecified amount of time for the employer to issue a decision so that she could make a transmittal to the next level within 10 days, as per clause 18.16(a).

[64] In this informal arrangement, there is an obvious lacuna facing those who initially opt to have their grievances heard at the third level but later decide that they wish to move directly to the final level, to avoid unspecified further delays. The parties would obviously benefit from something other than an informal unwritten practice, one that might address what happens in a situation like this, when an employee and their union wish to advance a grievance to the next level in a situation in which the employer's delay answering becomes unreasonable.

[65] I am hesitant to simply declare that the transmittal of these grievances to the final level was timely, lest it be seen as a green light for other grievors and the union to opt out of the triage process that the parties claim to have in place. At the same time, while the timeliness objection may be in accordance with the strict provisions of the

collective agreement, it hardly seems fair. This conclusion informs my consideration of the grievor's requests for an extension of time.

IV. The requests for an extension of time

[66] Applications requesting an extension of time for the filing or transmittal of a grievance are made under s. 61 of the *Regulations*, which reads as follows:

Extension of time	***Prorogation de délai***
61 *Despite anything in this Part, the time prescribed by this Part or provided for in a grievance procedure contained in a collective agreement for the doing of any act, the presentation of a grievance at any level of the grievance process, the referral of a grievance to adjudication or the providing or filing of any notice, reply or document may be extended, either before or after the expiry of that time,*	***61*** *Malgré les autres dispositions de la présente partie, tout délai, prévu par celle-ci ou par une procédure de grief énoncée dans une convention collective, pour l'accomplissement d'un acte, la présentation d'un grief à un palier de la procédure applicable aux griefs, le renvoi d'un grief à l'arbitrage ou la remise ou le dépôt d'un avis, d'une réponse ou d'un document peut être prorogé avant ou après son expiration :*
(a) *by agreement between the parties; or*	***a)*** *soit par une entente entre les parties;*
(b) *in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.*	***b)*** *soit par la Commission ou l'arbitre de grief, selon le cas, à la demande d'une partie, par souci d'équité.*

[67] The parties agreed that to assess an application for an extension of time under s. 61 of the *Regulations*, the Board should apply the criteria established in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, as set out at paragraph 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.*
>
> …

[68] The grievor argued that all the *Schenkman* criteria are met in this case, except that criterion number 5 is a factor that cannot be assessed in advance of hearing the case and should be reserved only to deny extension requests in those situations in which the grievance, on its face, is completely devoid of merits.

[69] The grievor also argued that the Board is not bound to a strict application of the *Schenkman* criteria and that it should keep in mind that the overriding consideration is to grant applications in the interest of fairness; see *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144 ("*IBEW*") at paras. 44 and 62.

[70] The grievor also argued that the majority of the Board's decisions on requests for an extension of time relate to requests to extend the time to file a grievance or to refer it to adjudication. Few cases address a request to extend a transmittal timeline within the grievance process, which is the issue in this case.

[71] In addition to *Schenkman* and *IBEW*, the grievor relied on *Lessard-Gauvin v. Treasury Board (Canada School of Public Service)*, 2022 FPSLREB 40 at paras. 36 to 44; *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42 at paras. 25 and 50; *Gee v. Deputy Head (Department of Public Safety and Emergency Preparedness)*, 2022 FPSLREB 58; and *Slusarchuk v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 22.

[72] The employer argued that the criteria in *Schenkman* are not met. It argued that if the grievor wanted to move directly to the final level, she and her union were responsible for adhering to the timelines in the collective agreement. It argued that she has not provided a clear and cogent reason for not meeting those timelines and that she cannot rely on a mistake made by her union; see *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33; *Martin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 62; *N.L. v. Treasury Board (Department of National Defence)*, 2022 FPSLREB 82; and *Barbe*.

[73] I find that there are two tendencies in the case law, well described in *Barbe* at paragraph 48. On the one hand, some of the Board's case law suggests that the first *Schenkman* criterion, a clear and cogent reason for the delay, takes precedence over the other criteria and that bargaining agent errors are not cogent and compelling

reasons for a delay (see *Martin* and *Copp*). On the other hand, the more recent case law suggests a more balanced approach to the use of the *Schenkman* criteria and a more flexible approach to whether a grievor is to be held accountable for errors on the part of their union; see *Lessard-Gauvin*, at para. 32; *Barbe*; and *Slusarchuk*.

[74] I agree with the Board's decision in *IBEW* that keeping in mind the wording of s. 61, the overall consideration is one of fairness. I also agree with the Board in *N.L.* at paragraph 28, which states, "The circumstances of each case affect the importance and weight given to each criterion." I also agree with the union's argument that the fifth criterion in *Schenkman* ("the chance of success of the grievance") is difficult to assess at this stage. It is more appropriate to apply that criterion as a means of not allowing an application to extend timelines when a grievor fails to make out an arguable case of a violation or if the Board finds a grievance frivolous or vexatious; see *N.L.*, at para. 45; *Barbe*, at para. 38; and *Lessard-Gauvin*, at para. 50.

[75] Given those considerations, I would slightly reformulate the *Schenkman* criteria, and borrowing from the Board's decision in *Bastien v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 34 at para. 10, would restate them as questions, as follows:

> In assessing whether it is in the interest of fairness to grant an application for the extension of a timeline in the grievance process, the Board will consider the following questions:
>
> 1) Are there clear, cogent, and compelling reasons for the delay?
> 2) How long was the delay, and at what stage of the grievance process did it occur?
> 3) Did the grievor exercise due diligence?
> 4) Who would suffer the worst prejudice, the employer if the extension were granted, or the employee if it were not granted?
> 5) Would the extension serve no useful purpose because the grievance has no chance of success or is frivolous or vexatious?

[76] I will now apply these criteria to the grievor's applications for an extension of time.

A. Are there clear, cogent, and compelling reasons for the delay?

[77] In this case, the passage of time makes it difficult to determine the reasons for the delay. As discussed earlier, I find that the grievor and her union representative signed the transmittal forms on the grievor's last day of work at the CBSA, which was April 17, 2015. This was within the timelines provided for under the collective agreement. The grievor believed that the transmittal forms were provided to her manager by Ms. Busnardo. However, the transmittal forms were not signed by a manager until June 5, 2015. It is not clear whether this was an error on the part of the grievor's union or whether there was an error by management during a time of transition. Overall, it appears that the grievor and her union made a decision to advance her grievances to the final level in the context in which the employer does not normally reply to grievances at the third level within the timelines under the collective agreement, but that transmittal was not confirmed until June 5, 2015.

[78] The employer argued that the reasons for the delay in transmission lie with the grievor's union and that "[a] bargaining agent's administrative errors do not necessarily constitute clear, cogent and compelling reasons …" for a delay; see *N.L.*, at para. 30. However, I am not convinced that there was an administrative error on the part of the grievor's union. I have also concluded that the transmission of the grievances fell outside the practices of the CBSA and CIU not because they were late but because they were early.

[79] The reasons that management did not sign the transmittal forms until June 5, 2015, may not be clear, but I find them cogent to the extent that the delay was quite contained in time. I also find the reasons that the grievor wished to transmit to the final level compelling, given that she otherwise might have waited several months for an answer to the grievances at the third level.

B. How long was the delay, and at what stage of the grievance process did it occur?

[80] Unlike many of the applications before the Board made under s. 61 of the *Regulations*, the delay in this case was not in the initial filing of the grievances or in their referral to adjudication but in their transmittal from the third level to the final level in a context in which the employer had not yet provided its reply. This is arguably a less-prejudicial stage for seeking an extension, given that the employer's

consideration of the issues raised in the grievances had already begun and was not yet completed.

[81] Furthermore, the delay was relatively short. According to the collective agreement, with the transmittal to the third level having taken place on April 1, 2015, the transmittal to the final level should have been made with 15 days, excluding Saturdays, Sundays, and designated paid holidays. Instead, it was confirmed as transmitted on June 5, 2015. In other words, it was transmitted late by about 6 weeks, or approximately 30 days.

[82] This delay must be considered in a context in which the employer regularly takes a long time to provide its reply at the third level of the grievance process, as confirmed by both the employer's submissions and the undisputed testimony of Ms. Busnardo that the employer regularly takes six months or more to respond at that level.

[83] Arguably, the transmission of the grievances to the final level saved the employer the time of preparing a response to the grievances at the third level. Furthermore, a delay in transmittal of 30 days is a small delay, compared to the 20 months it took for the employer to issue its final-level reply.

C. Did the grievor exercise due diligence?

[84] The grievor signed the transmittal forms on April 17, 2015, her last day of work, and believed that they were provided to management that day. Shortly after that, she began new employment outside the federal government. As the grievor's representative, Ms. Busnardo did make sure that Ms. Andersson signed the transmittal forms on June 5, 2015, and immediately reported this to the local branch president, Mr. Knoblauch.

[85] The employer argued that the grievor did not demonstrate due diligence because she and her union did not seek a consultation session at the third level. After the grievor testified that she had been busy with her new job after leaving the CBSA, it argued that this showed that she was not available for such a consultation. I am not at all convinced of this. The position of the parties was that they engage in a "triage" process to determine the schedule for consultation, which suggests an equal responsibility rather than one resting solely with the grievor and her union.

Furthermore, I was presented with no evidence that the employer directly sought to engage the grievor before issuing its final-level reply.

[86] In fact, there is no indication that the employer raised a timeliness objection until March 22, 2017, when it issued its final-level reply to the grievances. Once that happened, the grievor and her union acted diligently in referring the grievances to adjudication. There was no reason for the grievor to do anything between June 2015 and March 2017 other than wait for a reply. Other than the unexplained gap in transmission between April 17 and June 5, 2015, I find that the grievor acted with due diligence to advance her grievances.

[87] After the grievor testified that her union asked her a few times whether she wished to proceed with her grievances to adjudication, the employer argued that this demonstrated a lack of due diligence on the part of the union. It argued that this was tantamount to the union wanting to abandon the grievances, which is not in standing with good labour relations practices.

[88] I disagree. After the passage of many years, it was entirely appropriate for the grievor's union to ask her if she wished to proceed to a hearing. This helps ensure that the parties are dedicating time to grievances that matter to the grievor involved. In this case, the grievor said that she wished to proceed, and her union provided her with counsel as a representative. She and her union have acted diligently.

D. Who would suffer the worst prejudice, the employer if the extension were granted, or the employee if it were not granted?

[89] The employer argued that it is prejudiced by having to present a case this far out from the events in question. It said that at some point, it should have the comfort of knowing whether the grievances have been abandoned, and that it is hard to call witnesses this far out. It specifically mentioned that Ms. Dahka, the grievor's direct supervisor, is now retired and not available.

[90] I agree that it is difficult for the employer, and in fact for the grievor, for this matter to proceed to a hearing more than 8 years after the events in question. However, the extension requested in this application is only for the approximately 30 days to transmit the grievances to the final level. This is an extremely short extension compared to the subsequent delays affecting this matter: a period of 20 months for

the employer to issue its final-level reply, and a period of 6 years before the hearing into this matter was scheduled.

[91] I do not accept that an extension of 30 days is prejudicial to the employer, which, as a result of the transmittal directly to the final level, no longer had to undertake the work of responding at the third level.

E. Would the extension serve no useful purpose because the grievance has no chance of success or is frivolous or vexatious?

[92] I was presented with no arguments that the grievances have no chance of success or are frivolous or vexatious.

V. Conclusion

[93] Having slightly restated the *Schenkman* criteria and considered each of them, I conclude that it is in the interest of fairness to grant the grievor an extension until June 5, 2015, to transmit her grievances to the final level of the grievance process. The most critical criteria that I have relied on is the fact the requested extension is only about 30 days for the transmission of the grievances to the final level, in a context in which the employer's anticipated time of response to the grievances at that level was far longer.

[94] The grievances are to be heard on their merits during the next available block of hearing dates.

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

(The Order appears on the next page)

VI. Order

[96] The extension-of-time applications (in file numbers 568-02-384 and 385) are allowed.

[97] The grievances (in file numbers 566-02-14002 and 14003) are to be placed on the Board's hearing schedule during the next available block of dates.

June 9, 2023.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board