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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

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BETWEEN

**MICHAEL ZELEKE**

Grievor and Applicant

and

**DEPUTY HEAD  
(Correctional Service of Canada)**

Respondent

Indexed as

*Zelege v. Deputy Head (Correctional Service of Canada)*

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

**Before:** Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor and Applicant:** Fathiya Wais, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

**For the Respondent:** Sarah Thuswaldner, Correctional Service of Canada

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Decided on the basis of written submissions,  
filed April 11 and 26 and May 12, 2023.

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## REASONS FOR DECISION

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### I. Overview

[1] This decision is about two related preliminary matters in this grievance. First, the respondent objects to the grievance on the basis that it was referred to adjudication after the time limit had expired. Second, the grievor applies for an extension of time to refer the grievance to adjudication.

[2] The grievor does not dispute that the grievance was referred to adjudication late. The real issue is whether the Federal Public Sector Labour Relations and Employment Board (“the Board”) should grant the grievor an extension of time to refer the grievance to adjudication.

[3] The respondent has not issued its decision at the final level of the grievance process despite the grievor giving it an extension of time to do so. The interests of fairness favour granting the requested extension of time in light of the respondent’s failure to comply with its own deadlines in this case. Additionally, the respondent has not demonstrated that it will suffer any prejudice if I grant this extension of time. Even if it were to suffer prejudice, that prejudice lies under its control as it depends upon whether or when it issues a final level grievance decision.

[4] Therefore, I grant the grievor an extension of time to refer this grievance to adjudication.

### II. Chronology of the grievance and why it was referred to adjudication late

[5] The grievance is against a disciplinary suspension without pay. The grievor filed the grievance on September 27, 2022, and transmitted it to the final level of the grievance process on October 27, 2022. The respondent requested an extension of time to decide the grievance until January 13, 2023. The grievor agreed to that extension. Despite that extension of time, the respondent never made a final-level grievance decision.

[6] The grievor referred the grievance to adjudication on March 23, 2023. The grievor’s bargaining agent representative explained that someone with the bargaining agent (the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN) miscalculated the 40-day period to refer the grievance to adjudication by treating that period as beginning to run 30 days after the January

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*Federal Public Sector Labour Relations and Employment Board Act and  
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13, 2023 agreed-upon deadline for a final-level decision instead of running from that deadline.

[7] There is no dispute that the reference to adjudication was due on February 22, 2023. To explain, the 40-day period to refer the grievance to adjudication begins to run as of the date of the final-level decision or, in the absence of one, as of the date a final-level decision was due under one of three sources: (1) a collective agreement, (2) the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; “the *Regulations*”), or (3) a date agreed to by the parties. As the parties agreed to a deadline of January 13, 2023 for the respondent to decide the grievance at the final level, the 40-day period to refer this grievance to adjudication began to run as of that date. Therefore, the deadline to refer the grievance to adjudication expired on February 22, 2023. The reference to adjudication was filed late.

[8] The remainder of these reasons will focus on the grievor’s application for an extension of time.

### **III. Reasons for granting the extension of time**

#### **A. The five usual factors when assessing an application for an extension of time**

[9] The Board has the power to extend any period of time set out in a collective agreement or the *Regulations* “in the interests of fairness” (s. 61(b) of the *Regulations*). Both parties oriented their submissions around the so-called *Schenkman* factors (from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1) commonly applied by the Board in assessing whether to grant an extension of time, which are:

- whether there are 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 respondent in granting an extension; and
- the chance of success of the grievance (often expressed as whether there is an arguable case in favour of the grievance).

[10] These criteria are not all weighted equally, nor are they each important in every case. As the Board stated in *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLRB 93 at para. 55, “These criteria are not fixed, and the overriding

goal is to determine what is fair based on the facts of each case ... The criteria are also not necessarily of the [sic] equal weight and importance ....”

**B. The reason for the delay is not critical in this case**

[11] The respondent applied the principle that not all factors have equal weight by submitting that the first factor (a clear, cogent, and compelling reason for the delay) is key. The respondent then argued that a bargaining agent’s error is not a sufficient explanation for the delay. The respondent relied upon *Martin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 62, *Edwards v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 126, *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, and *Parker v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 57 in support of that proposition.

[12] The grievor, by contrast, submitted that a representative’s error does justify an extension of time. The grievor relied upon the following cases in support of that proposition along with general propositions about extensions of time: *Grekou v. Treasury Board (Department of National Defence)*, 2020 FPSLREB 94, *Riche v. Treasury Board*, 2009 PSLRB 157, *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42, *Slusarchuk v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 22, *Lewis v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 27, *Gee v. Deputy Head (Department of Public Safety and Emergency Preparedness)*, 2022 FPSLREB 58, *D’Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79, and *Lessard-Gauvin v. Treasury Board (Canada School of Public Service)*, 2022 FPSLREB 40.

[13] I acknowledge that there are many cases when the explanation for the delay is the predominant or even dispositive factor when deciding an application for an extension of time, as in *Parker*, at para. 41, and *Martin*, at para. 33. If I were to follow that approach in this case, I would conduct a tedious review of the case law listed above on whether a bargaining agent’s or other representative’s failure should be visited upon the grievor. I would carefully consider cases in which such negligence was treated as a compelling reason for the delay (as in *Gee*, *D’Alessandro*, *Barbe*, *Lewis*, and *Slusarchuk*) and other cases in which it was not (as in *Copp*, *Edwards*, and *Grekou*). As the Board put it succinctly in *Barbe*, at para. 48:

*[48] Clearly, the Board has two schools of thought — grievors can be held accountable for their bargaining agents' errors, or grievors must not be held accountable when they are adversely affected not only by their employers' actions but also by their bargaining agents' actions....*

[14] I have decided not to weigh in on which of those two schools of thought should be followed, and I have decided this application on a simpler basis.

**C. The respondent's failure to provide a final-level decision is the critical factor**

[15] The respondent's ongoing failure to provide a final-level decision is the key fact in this case, for two reasons.

**1. The respondent's own delay means an extension of time is fair**

[16] First, the respondent complains about the grievor's delay despite its own delay. The respondent was supposed to render a final-level decision by December 9, 2022. It asked for an extension of time to render its decision to January 13, 2023, which the grievor agreed to. The respondent then missed the very deadline it asked for. By the time the grievor referred this grievance to adjudication, the respondent's final-level decision was well overdue. The Board has not been informed that the respondent has rendered a final-level decision on the grievance since. The respondent has not explained its delay in rendering the decision at the final level.

[17] The respondent also did not help its case by being late in responding to this application for an extension of time. The respondent was two days late responding to this application, and explained its delay by stating that it lost the Board's email setting the deadline to respond. The respondent does not explain how its own request that the Board accept late submissions despite its mistake is consistent with its position that a mistake by a grievor's representative cannot justify an extension of time.

[18] The *Regulations* require me to assess whether "the interest of fairness" justifies an extension of time. It would be unfair to deny the grievor an extension of time, given the respondent's cavalier treatment of its own deadlines in this case.

**2. The respondent will suffer no prejudice if the extension is granted**

[19] Second, the respondent has not demonstrated that it will suffer prejudice if I grant this application.

[20] I have carefully read the respondent's submissions about prejudice and have decided to reproduce them here in their entirety:

...

*Equal weight should be given to the injustice to the employee as to the prejudice caused to the Employer, should the Board grant the extension. The Employer argues that it will inevitably be prejudiced by the subsequent late Reference to Adjudication that has been filed for a grievance regarding the investigation into the grievor. While the grievances are separate and should remain so, the lenience given to a delay on one will inevitably influence the other.*

...

[Sic throughout]

[21] The respondent's submissions do not identify any actual prejudice flowing from the 29-day delay in referring the grievance to adjudication: for example, no documents have been lost, no witnesses have forgotten the events leading to the suspension, and the respondent has incurred no cost in its reliance on the grievor not referring the grievance to adjudication.

[22] I am also concerned about the respondent's failure to provide a decision at the final level. If I refuse this application for an extension of time, the respondent could issue a final level decision. If the respondent denies the grievance, this restarts the 40-day period for the grievor to refer the grievance to adjudication in accordance with s. 90(1) of the *Regulations*. The respondent states that its prejudice is "inevitable"; in fact, the existence of any prejudice depends upon whether or when the respondent issues its final level decision. The respondent cannot claim "inevitable" prejudice from circumstances under its own control. I will also not reward it for failing to provide a final level grievance decision.

#### **D. A respondent's delay does not automatically justify an extension of time**

[23] To be clear, my decision is based upon the particular facts of this case. I also gave some weight to the relatively short time by which the deadline was missed (29 days) and the lack of any indication that the grievor failed to act with due diligence. This decision is not a licence for grievors to miss deadlines whenever the employer has also missed a deadline. Extensions of time are never automatic, and I want to emphasize that an employer's delay will not automatically justify granting an extension of time. However, in this case, the respondent's delay and the resulting

absence of prejudice was the predominant factor justifying granting the extension of time.

[24] In light of my decision granting the grievor an extension of time, the objection to the timeliness of this reference to adjudication has become moot and I dismiss it solely for that reason.

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

*(The Order appears on the next page)*

**IV. Order**

[26] The application for an extension of time is granted.

[27] The objection to the timeliness of the reference to adjudication is dismissed.

[28] The grievance will be returned to the Board's Registry for scheduling in the normal course.

August 1, 2023.

**Christopher Rootham,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**