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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

MATTHEW GUENTHER

Applicant

and

**TREASURY BOARD
(Correctional Service of Canada)**

Respondent

Indexed as

Guenther v. Treasury Board (Correctional Service of Canada)

In the matter of an application for an extension of time referred to in section 61(b) of
the *Federal Public Sector Labour Relations Regulations*

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Applicant: Corinne Blanchette, Union of Canadian Correctional Officers -
Syndicat des agents correctionnels du Canada - CSN (UCCO-
SACC-CSN)

For the Respondent: Brigitte Labelle, analyst

Decided on the basis of written submissions,
filed November 30 and December 22, 2022, and February 7, 2023.

REASONS FOR DECISION

I. Application before the Board

[1] On October 26, 2022, Matthew Guenther (“the applicant”) referred a grievance to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 209(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”). Such a referral, dealing with the application or interpretation of a collective agreement, requires support from and representation by a bargaining agent. The Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (“the bargaining agent”) represents the bargaining unit to which the applicant belongs. The bargaining agent and the Treasury Board (“the respondent”) are parties to a collective agreement that expired on May 31, 2022 (“the collective agreement”).

[2] The applicant works as a correctional officer with the Correctional Service of Canada. Although the respondent is the legal employer, for the purposes of this decision, the Correctional Service of Canada is also considered employer and respondent, as the respondent has delegated its human resources management authority to it.

[3] The respondent objected to the referral to adjudication on two grounds: delay and jurisdiction.

[4] The respondent submits that the grievance should have been referred to the Board earlier. In response, the applicant seeks an extension of time to refer it under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; “the Regulations”).

[5] The respondent’s second objection is that the Board does not have jurisdiction to hear this grievance, since it does not fit under any heading of s. 209 of the *Act*. According to the respondent, the applicant grieved the denial of leave, which is granted by a policy, not by the collective agreement.

[6] The respondent requested that its objections be dealt with before a hearing is held on the merits.

[7] The Board is of the view that the application for an extension of time is properly dealt with as a preliminary decision. The respondent’s second objection deals with the

merits of the grievance, which is whether the applicant was entitled to leave with pay for a routine medical examination. If the extension of time is granted, the Board will then proceed to the merits of the grievance. This decision concerns only the application for an extension of time.

II. Context

[8] On March 17, 2022, the applicant filed a grievance that was worded as follows: “My 4 hour annual doctors appointment on 2022-03-08 was denied even though I am entitled to that leave. I had to book sick leave instead.”

[9] The grievance was denied. It was presented at the final level of the grievance process on April 25, 2022. The respondent never provided a final-level reply. As stated earlier, the grievance was referred to the Board on October 26, 2022.

III. Summary of the arguments

A. For the respondent

[10] According to the respondent, to be timely, the grievance should have been referred to the Board by July 19, 2022.

[11] Section 90 of the *Regulations* provides the deadline to refer a grievance to the Board for adjudication. If a final-level reply is received, the grievor has 40 days to refer the grievance. If no final-level reply is received, the grievance may be referred no later than 40 days after the expiry of the period within which the final decision was required.

[12] In this case, the final-level reply was required by June 7, 2022, and was not received. Consequently, the grievance had to be referred to adjudication by July 19, 2022.

[13] The respondent presented arguments to support its objection that the grievance cannot be referred to adjudication, as it is not based on the collective agreement but rather on an interpretation of a Treasury Board directive on paid leave for medical appointments. As stated, this is the essence of the grievance, and it will not be dealt with in this decision.

B. For the applicant

[14] The applicant does not deny the respondent's assertion that the referral to adjudication was late by some three months. However, the bargaining agent provides an explanation for the delay and states that the applicant should not be penalized for its oversight.

[15] The paperwork to refer the grievance to adjudication was completed by April 12, 2022. It was simply missed by the person responsible to make the referral.

[16] On August 12, 2022, a respondent representative (a grievance coordinator within its Labour Relations Operations) sent a message to the bargaining agent about two grievances, including the applicant's, inviting the bargaining agent to supply additional information or evidence before the respondent made its final decisions on the grievances.

[17] This message made the person responsible for the referral realize her oversight. According to the bargaining agent, because of this person's annual leave and shift work, the grievance could be made ready only for October 26, 2022.

[18] The applicant also responds to the jurisdictional objection and states that the grievance is indeed covered by the collective agreement. Again, this will not be dealt with in this decision.

[19] Given the lateness of the referral, the applicant applied for an extension of time for the referral.

[20] The applicant's main argument is that he should not be penalized for the bargaining agent's lack of diligence. He cites *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLRB 42, in which the Board granted an extension of time in similar circumstances: the error was due to the bargaining agent, the delay was not excessive, the grievance had been filed on time, and the grievance needed the bargaining agent's support, so the applicants in that case could not have referred it themselves.

[21] The applicant submits that in the interest of fairness, he should also be granted an extension of time.

[22] The respondent did not reply to the applicant's arguments in support of an extension of time. It simply stated that it maintained its jurisdictional objections.

IV. Analysis

[23] The usual analysis to determine whether an extension of time should be granted in the grievance process is to apply the criteria found in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which should guide the Board in its decision. I shall consider each of these in turn.

A. Clear, cogent, and compelling reasons

[24] The bargaining agent did not deal with the grievance due to an oversight. The applicant would not have been able to act on his own, as the grievance was referred as a collective agreement interpretation matter. As stated in *Barbe*, sometimes, the bargaining agent's inaction is a sufficient explanation for a delay (although not desirable). The delay between when the person responsible for the referral realized the oversight and when it was actually referred to the Board is less compelling. However, the circumstances of each case must be considered in determining what is in the interest of fairness and the reason for the delay must also be weighed against the other *Schenkman* criteria.

B. The applicant's due diligence

[25] The applicant acted quickly to challenge the denial of the claimed leave. He had no reason to doubt that the grievance had been referred.

C. The length of the delay

[26] The delay is not significant, especially since it was at the referral stage. In other words, there is no surprise for the respondent, which is already aware of the grievance.

D. Balancing the injustice to the applicant against the prejudice to the respondent

[27] As in *Barbe*, this criterion is favourable to the applicant. He will not have the opportunity to challenge the denial of the leave otherwise. The respondent has already turned its mind to the grievance; it has not presented any argument to show that the three-month delay for its referral would cause it any prejudice.

E. The chance of success of the grievance

[28] I am not aware of any jurisprudence on granting leave for routine medical checkups. It is impossible to assess the chance of success without further arguments from the parties. This is not a case in which the frivolous character of a grievance would weigh against granting an extension.

[29] As stated in *Barbe*, the starting point is s. 61 of the *Regulations* that allows the Board to grant an extension, which reads as follows:

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,*

(a) *by agreement between the parties; or*

(b) *in the interest of fairness, on the application of a party, by the Board or an adjudicator, as the case may be.*

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) *soit par une entente entre les parties;*

b) *soit par la Commission ou l'arbitre de grief, selon le cas, à la demande d'une partie, par souci d'équité.*

[Emphasis added]

[30] The guiding principle must be fairness.

[31] As in *Barbe*, I do not think that it is fair to deprive the applicant of his opportunity to challenge the respondent's decision because of an error committed by the bargaining agent. As stated in *Barbe*, at para. 50: "If a grievor is not at fault, and if he or she diligently informed the union and helped file the grievance, I do not see how, in all fairness, he or she should then suffer the consequences of the bargaining agent's errors."

[32] The delay in this case is much shorter than it was in *Barbe*, 3 months, as compared to 20 months. As in *Barbe*, the requested extension is for the referral and

not the filing of the grievance (and therefore, the respondent is informed), and the applicant had to rely on the bargaining agent to refer the grievance.

[33] In the end, I believe that the reasoning in *Barbe* applies to this case too. Fairness dictates that the applicant have his grievance heard.

[34] Before I conclude, I must say that I am a little puzzled by the respondent raising the timeliness objection in light of its behaviour. The final-level reply was due June 7, 2022, according to the respondent's calculations. Yet, on August 12, 2022, it invited the bargaining agent to provide additional submissions on the grievance before it was to provide its final decision, which it never did. Although not considered as part of the *Schenkman* analysis in this case, the respondent's behaviour cannot go unnoticed by the Board.

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

(The Order appears on the next page)

V. Order

[36] The extension of time to refer the grievance in Board file no. 566-02-45952 to adjudication is granted.

[37] The grievance will be set on the Board's hearing schedule in due course.

September 19, 2023.

**Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board**