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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

BENJAMIN HANNAH

Applicant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Hannah 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: Asira Shukuru, analyst

Decided on the basis of written submissions, filed December 16, 2022, and January 20, February 6, and April 18 and 26, 2023.

REASONS FOR DECISION

I. Application before the Board

[1] On June 6, 2022, Benjamin Hannah ("the applicant") filed a grievance with his employer, the Correctional Service of Canada ("the respondent"), to dispute a 30-day disciplinary suspension imposed on May 19, 2022.

[2] On November 18, 2022, the grievance was referred to adjudication before the Federal Public Sector Labour Relations and Employment Board ("the Board") by the applicant's bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent"). The bargaining agent and the Treasury Board are parties to a collective agreement (for the Correctional Services (CX) group, which expired on May 31, 2022; "the collective agreement") that covers the applicant's bargaining unit. Although the Treasury Board is the legal employer, for the purposes of this decision, the Correctional Service of Canada is deemed the employer, as well as the respondent, since the Treasury Board has delegated to it its authority over human resources.

[3] On December 16, 2022, the respondent objected to the referral, arguing that it was untimely. The bargaining agent, on the applicant's behalf, responded with an explanation and an application for an extension of time made under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[4] This decision deals only with the respondent's objection and the consequent application for an extension of time to refer the grievance to adjudication. If the application is allowed, a hearing on the merits of the grievance will be held at a future date.

II. Context

A. The grievance

[5] The applicant works as a correctional officer at the Mission Institution in British Columbia. The respondent imposed a 30-day suspension on him. There is no information on file about the alleged offence or the respondent's justification for the disciplinary measure.

[6] Pursuant to s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), grievances related to a suspension can be referred to the Board as a collective agreement matter (s. 209(1)(a)), or as a disciplinary matter such as a termination or suspension incurring a financial penalty (s. 209(1)(b)).

[7] Despite the grievance subject being apparently disciplinary, the grievance was not referred under s. 209(1)(b) but rather under s. 209(1)(a), as a grievance involving the application or interpretation of the discipline article in the collective agreement. The respondent states that it should have been referred under s. 209(1)(b); the applicant does not dispute that it concerns a disciplinary matter.

[8] The significance of referring under s. 209(1)(a) or (b) is that (a) requires the bargaining agent's support and representation, while (b) does not. I will address this issue in the analysis.

B. The respondent's objection

[9] The respondent objected to the referral because it was late. The respondent relied on s. 90 of the *Regulations*, which provides that a grievor must refer his or her grievance to adjudication no later than 40 days after receiving a decision at the final level of the grievance process or, if there is no final-level decision, no later than 40 days after the expiry of the period within which the decision was required.

[10] The grievance was transmitted to the final level on July 21, 2022. According to clause 20.14 of the collective agreement, the respondent had 30 days to reply, and therefore, a reply was due by September 2, 2022. Since there was no final-level reply, the applicant should have referred his grievance at the latest by October 12, 2022. In fact, he referred it on November 18, which was over a month late.

C. The applicant's response

[11] The bargaining agent explained that the third-level transmittal form was not received when the grievance was readied for its referral to adjudication. When it was received, the grievance was referred, which was on October 25, 2022. However, an error was made as to the subject of the grievance. On November 3, 2022, the Board emailed the bargaining agent, noting the error. On November 8, 2022, the Board asked that the form be resubmitted; it was resubmitted on November 18, 2022.

[12] The applicant recognized that the referral was late and applied for an extension of time to refer the grievance to adjudication.

III. Summary of the arguments

A. For the applicant

[13] The applicant bases his arguments mainly on *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42, which is a case involving the same bargaining agent and the same respondent and a similar fact situation. In that case, some confusion arose in referring the grievance to adjudication, and the Board took the position that Mr. Barbe should not be penalized for the bargaining agent's actions, since he could not have referred the grievance himself.

[14] The applicant then applies the *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, criteria to the situation to conclude that the extension should be granted. I will return to the *Schenkman* criteria in more detail during the analysis.

[15] The applicant cites recent Board jurisprudence to support granting the extension of time, for fairness reasons (see *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).

[16] The applicant also submits two additional cases to support his argument: *Slusarchuk v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 22; and *Lewis v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 27. The relevant cases will be addressed in the analysis.

B. For the respondent

[17] The respondent maintains its objection to timeliness. According to it, the criteria in *Schenkman* have not been met, although it does not detail how, except to state that the applicant has not demonstrated clear, cogent, and compelling reasons for the delay.

[18] The respondent also provides a copy of an email showing that the third-level transmittal was sent to both a bargaining agent representative and the applicant on July 27, 2022, at 10:03 a.m.

[19] Consequently, according to the respondent, "… it should not have taken the bargaining agent two months to track down a copy in order to send to the regional office. If the bargaining agent was unable to obtain a copy either through her electronic records or a hardcopy, then they could have approached the grievor as well who was also copied on that email."

[20] The respondent cites *Parker v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 57, in support of its arguments. I will return to that decision in the analysis.

IV. Analysis

[21] As stated earlier, the grievance was referred under s. 209(1)(a) of the *Act*. Pursuant to s. 209(2), such a referral requires the bargaining agent's support. The respondent stated that the grievance should properly have been referred under s. 209(1)(b), which concerns disciplinary matters. This implies that the applicant could have acted on his own to refer the grievance without the bargaining agent's support.

[22] However, as the applicant stated, this is not the bargaining agent's practice. It refers all bargaining unit grievances to the Board. Therefore, the applicant's reliance on the bargaining agent to follow through on the grievance process was not misplaced.

[23] Section 61 of the *Regulations* 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,*	***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.*

[24] The starting point for the Board to decide whether to grant an extension of time is whether doing so is in the interest of fairness.

[25] The Board has consistently applied the *Schenkman* criteria to assess the merits of applications for an extension of time. I will reprise them and apply them to the present circumstances.

A. Clear, cogent, and compelling reasons

[26] The respondent submits that there is no clear, cogent, and compelling reason for the delay, as the third-level transmittal form was sent to the applicant and his representative on July 27, 2022. There were no further explanations on this topic, but I find the accompanying email somewhat bewildering. It is addressed to the applicant and reads as follows:

> *Hello Benjamin,*
>
> *Please be advised that we have received a copy of the attached 3rd Level Transmittal for Grievance Number 67768, and it has been transmitted to the 3rd Level. As per your request, this grievance remains in abeyance at the 2nd Level.*
>
> …

[27] The email was not sent to the person who took care of referrals to adjudication. Once she obtained a copy, she proceeded to refer the grievance on October 25, 2022. Unfortunately, some errors were made, so after a few corrections, the correct version was finally sent on November 18, 2022.

[28] There is a line of jurisprudence at the Board that a grievor should not be penalized for the errors of the bargaining agent representing him or her (see, for example, *D'Alessandro*). 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 length of the delay

[29] According to the respondent, the referral should have been sent by October 12, 2022. Taking October 25, 2022, as the first date on which the bargaining agent attempted to refer the grievance, the delay is not very significant. Of course, the proper referral was made only on November 18, 2022, but even so, given the fact that there was never a final reply, the delay does not seem considerable.

C. The due diligence of the applicant

[30] The applicant filed his grievance on time and followed the steps under the bargaining agent's direction. His diligence is not at issue. Rather, the issue is the impact of the bargaining agent's administrative errors.

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

[31] This criterion clearly favours the applicant. He grieved a heavy financial penalty and has no other recourse to claim redress. The respondent has not stated how granting the extension would cause it prejudice. It has already turned its mind to the grievance, and the nature of the proceedings was not altered by a month's delay making the referral.

E. The chances of success of the grievance

[32] As the Board has often stated, this last criterion would serve to support denying an extension were the grievance devoid of any merit. This is not so in this case. There is no information on the facts underlying the disciplinary sanction, and thus, the merits are unknown, but it is not frivolous for a grievor to challenge a heavy financial penalty.

[33] The case law I consider relevant to this case involves only applications for an extension of time under s. 61(b) of the *Regulations*.

[34] In *Parker*, the applicant argued that the two-month delay referring the grievance to adjudication was attributable to the work reality during the COVID-19 pandemic, when all office work was done remotely. The respondent pointed out that the communications at issue would have been electronic in any event, even absent the pandemic, as the persons involved were in different geographic locations. Therefore, the pandemic was not a proper explanation.

[35] In its analysis, the Board emphasized the importance of respecting time limits. It also stressed the fact that the analysis must start with cogent reasons to explain the delay. According to the Board, the applicant in *Parker* failed to provide clear, cogent, and compelling reasons for the delay. The applicant alleged a "difficulty of communication", but the information necessary for the referral was readily available, and communication was necessarily by email, as the applicant and his representative were respectively in Saskatoon, Saskatchewan, and Edmonton, Alberta. In the end, the Board allowed the objection on the grounds of timeliness and dismissed the application for an extension of time.

[36] In *Slusarchuk*, the transmittal to the final level of the grievance process had been untimely. The deadline had been missed by six working days. The bargaining agent stated that it was entirely responsible for the delay because its representative had been overwhelmed and mostly absent from work. The Board found the reason rather weak, as the bargaining agent should have safeguards in place for those types of situations. Nevertheless, it granted the extension of time because the other four *Schenkman* criteria made the case compelling. The delay was brief, the applicant had been diligent, and he would have been far more prejudiced by having his right to recourse denied than the respondent for having to deal with a known grievance that had already been decided on the merits at the second level of the grievance process. Finally, the grievance raised a valid issue to be resolved at adjudication. It could not have been said to be frivolous.

[37] The decision in *Slusarchuk* is interesting in that it gives weight to the other *Schenkman* criteria despite finding the reasons for the delay on the light side. In other words, the whole of the situation must be considered.

[38] In *Barbe*, the emphasis was placed on fairness as the guiding principle of applying s. 61(b) of the *Regulations*, as its wording suggests. In short, in that case, the Board considered that it would be unfair to deprive the applicants of their recourse because of the bargaining agent's administrative error. In that case, the delay was much more considerable, some 20 months.

[39] The respondent cited *Parker* for the proposition that absent a clearly articulated reason for the delay, the Board will not be inclined to grant an extension.

[40] In *Parker*, no real explanation was provided beyond the pandemic and remote work, which in fact did not explain anything, since all communication was by necessity electronic.

[41] In the present case, the delay was explained. I find that as in *Slusarchuk*, the whole of the *Schenkman* factors favour the applicant, and I will grant the extension of time. It is not that as in *Parker*, the inaction remains unexplained. Documents were missed, and errors were made. As in *Barbe*, the applicant should not be penalized for errors not of his making.

[42] I must note that a bargaining agent's administrative errors will not always be met with indulgence. The applicant's submissions stressed that the bargaining agent takes charge of grievances, whether they are filed under the collective agreement or are of a disciplinary nature. If so, the bargaining agent must ensure that deadlines are monitored and respected.

[43] Yet, the respondent bears some responsibility too. It sent an ambiguous message to the applicant (confirming in the third-level transmittal email that the grievance was held in abeyance at the second level), and after missing the negotiated deadline for a final reply, it decided to lay in wait for the applicant to in turn miss his referral deadline. As stated in *Barbe*, it is somewhat troubling to apply against an applicant a provision meant to protect his or her interests (the referral possibility in the absence of a final reply), and in the present case, even more so when the delay is not considerable.

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

(The Order appears on the next page)

V. Order

[45] The application for an extension of time to refer the grievance with Board file no. 566-02-46121 to adjudication is granted.

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

September 21, 2023.

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