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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

BRADLEY BERNATCHEZ

Grievor

and

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

Employer

Indexed as

Bernatchez v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: François Ouellette, Union of Canadian Correctional Officers -
Syndicat des agents correctionnels du Canada - CSN

For the Employer: Daniel Trépanier and Erin Saso, Treasury Board of Canada
Secretariat

Decided on the basis of written submissions,
filed June 23 and July 7 and 26, 2022.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] At the relevant time, Bradley Bernatchez (“the grievor”) was employed by the Treasury Board (“the employer”) as a correctional officer with the Correctional Service of Canada (CSC), classified at the CX-01 group and level, and was working at Millhaven Institution in Kingston, Ontario, in the CSC’s Ontario Region.

[2] At the relevant time, the grievor’s terms and conditions of employment were governed in part by a collective agreement that was signed on January 5, 2021, and that expired on May 31, 2022, between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (“the union”) for all employees in the Correctional Services Group (“the collective agreement”).

II. Summary of the evidence

[3] On May 28, 2021, the grievor filed a grievance, which stated as follows:

...
DETAILS OF GRIEVANCE ...

Requested 8.5 lieu time and 4.25 Family Leave for duration of shift on May 24, 2021.

CORRECTIVE ACTION REQUIRED ...

Would like to use 8.5 lieu and 4.25 family leave for duration of shift.

And all other rights that I have under the Collective Agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.

...

[4] On June 3, 2021, the grievance was denied at the first level of the grievance procedure. The response denying the grievance on that day stated as follows:

This in response to your grievance submitted on 2021/05/28 in which you are grieving management’s decision to deduct lieu hours of more then 8.5 hours on or about 2021/05/24. Your requested corrective action is that the employer ceases to deduct more than 8.5 hours of lieu hours (would like to use 8.5 lieu and 4.25 family leave for duration of the shift on May 24, 2021); that

you be re-credited back the extra lieu hours (4.25 hours) deducted over 8.5 hours; any all other rights that I have under the Collective agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.

As per the current Collective agreement - Article 34: modified hours of work -

***2. Leave and lieu hours: general** - When leave or lieu hours are granted, they will be granted on an hourly basis and the hours debited for each day of leave or lieu hours shall be the same as the hours the employee would normally have been scheduled to work on that day.*

***Lieu hours in lieu of designated paid holidays:** e. On any given designated paid holiday, employees must exhaust their lieu hour credits prior to using leave with pay for family-related responsibilities or sick leave;*

As this was agreed to by the union as part of your current Collective agreement your grievance and corrective action is denied.

[Sic throughout]

[Emphasis in the original]

[5] On June 4, 2021, the grievor transmitted the grievance to the second level of the grievance procedure.

[6] On August 9, 2021, the grievor transmitted the grievance to the third level of the grievance procedure.

[7] The employer did not respond to the grievance at either the second or third level within the timelines set out in the collective agreement. On May 17, 2022, the grievor referred it to the Federal Public Sector Labour Relations and Employment Board (“the Board”) for adjudication.

[8] By email on Tuesday, May 24, 2022, at 13:18, the Board’s registry wrote to the parties, acknowledging receipt of the referral of the grievance to adjudication on May 17, 2022.

[9] On Thursday, June 23, 2022, the employer wrote to the Board, objecting to the Board’s jurisdiction to hear the grievance on the basis that its reference to adjudication was not timely. The employer’s objection is set out later in this decision in the summary of the arguments, as is the grievor’s response and the employer’s reply.

A. The collective agreement

[10] Article 20 of the collective agreement is entitled “Grievance Procedure”. The parts relevant to this objection state as follows:

...	[...]
<i>20.02 In determining the time within which any action is to be taken as prescribed in this procedure, Saturdays, Sundays and designated paid holidays shall be excluded.</i>	<i>20.02 Lorsqu’il s’agit de calculer le délai au cours duquel une mesure quelconque doit être prise ainsi qu’il est stipulé dans la présente procédure, les samedis, les dimanches et les jours fériés désignés payés sont exclus.</i>
...	[...]
<i>20.05 Except as otherwise provided in this agreement, a grievance shall be processed by recourse to the following levels:</i>	<i>20.05 Sauf indication contraire dans la présente convention, un grief est traité par les paliers suivants :</i>
<i>a. level 1: first (1st) level of management;</i>	<i>a. palier 1 - premier (1er) palier de direction;</i>
<i>b. level 2: intermediate level;</i>	<i>b. palier 2 - palier intermédiaire;</i>
<i>c. final level: deputy head or deputy head’s authorized representative.</i>	<i>c. palier final - l’administratrice générale ou l’administrateur général ou, encore, sa représentante ou son représentant autorisé.</i>
...	[...]
<i>20.11 A grievance may be presented at the first (1st) level of the procedure in the manner prescribed in clause 20.07 no later than the twenty-fifth (25th) day after the date on which he or she is notified orally or in writing or on which he or she first becomes aware of the action or circumstances giving rise to the grievance.</i>	<i>20.11 Au premier (1er) palier de la procédure, un grief de la manière prescrite au paragraphe 20.07 peut être présenté, au plus tard le vingt-cinquième (25e) jour qui suit la date à laquelle il est notifié, oralement ou par écrit, ou prend connaissance, pour la première fois, de l’action ou des circonstances donnant lieu au grief.</i>
<i>20.12 The Employer shall normally reply to an individual or group grievance, at any level in the grievance procedure, except the final level, within ten (10) days after the date the grievance is presented</i>	<i>20.12 L’employeur répond normalement au grief individuel ou collectif, à tous les paliers de la procédure de règlement des griefs sauf au dernier, dans les dix (10) jours qui suivent la date de</i>

at that level. Where such decision or settlement is not satisfactory to the grievor, the grievance may be referred to the next higher level in the grievance procedure within ten (10) days after that decision or settlement has been conveyed to him or her in writing.

20.13 If the Employer does not reply within fifteen (15) days from the date that a grievance is presented at any level, except the final level, the grievor may, within the next ten (10) days, submit the grievance at the next higher level of the grievance procedure.

20.14 The Employer shall normally reply to a grievance at the final level of the grievance procedure within thirty (30) days after the grievance is presented at that level.

...

20.16 The decision given by the Employer at the final level in the grievance procedure shall be final and binding upon the grievor unless the grievance is a class of grievance that may be referred to adjudication.

20.17 The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the grievor and, where appropriate, the Union representative.

...

20.23 Where an employee has presented a grievance up to and including the final level in the grievance procedure with respect to:

a. the interpretation or application in respect of him or her of a

présentation du grief audit palier. Si la décision ou le règlement du grief ne donne pas satisfaction à l'auteur du grief, le grief peut être présenté au palier suivant de la procédure dans les dix (10) jours qui suivent la date à laquelle il reçoit la décision ou le règlement par écrit.

20.13 À défaut d'une réponse de l'employeur dans les quinze (15) jours qui suivent la date de présentation d'un grief, à tous les paliers sauf au dernier, l'auteur du grief peut, dans les dix (10) jours qui suivent, présenter un grief au palier suivant de la procédure de règlement des griefs.

20.14 L'employeur répond normalement au grief au dernier palier de la procédure de règlement des griefs dans les trente (30) jours qui suivent la date de la présentation du grief à ce palier.

[...]

20.16 La décision rendue par l'employeur au dernier palier de la procédure de règlement des griefs est définitive et exécutoire pour l'auteur du grief, à moins qu'il ne s'agisse d'un type de grief qui peut être renvoyé à l'arbitrage.

20.17 Les délais stipulés dans la présente procédure peuvent être prolongés d'un commun accord entre l'employeur et l'auteur du grief et, s'il y a lieu, le représentant du syndicat.

[...]

20.23 Lorsque l'employé-e a présenté un grief jusque et y compris le dernier palier de la procédure de règlement des griefs au sujet de :

a. l'interprétation ou de l'application, à son égard, d'une

provision of this agreement or a related arbitral award, or

disposition de la présente convention ou d'une décision arbitrale s'y rattachant, ou

b. disciplinary action resulting in suspension or a financial penalty, or

b. une mesure disciplinaire entraînant une suspension ou une sanction pécuniaire, ou

c. termination of employment or demotion pursuant to paragraph 12(1)(c), (d) or (e) of the Financial Administration Act,

c. un licenciement ou une rétrogradation aux termes des alinéas 12(1)c), d) ou e) de la Loi sur la gestion des finances publiques

and the employee's grievance has not been dealt with to his or her satisfaction, he or she may refer the grievance to adjudication in accordance with the provisions of the Federal Public Sector Labour Relations Act and Regulations.

et que son grief n'a pas été réglé à sa satisfaction, il peut le présenter à l'arbitrage selon les dispositions de la Loi sur les relations de travail dans le secteur public fédéral et de son règlement d'exécution.

...

[...]

****Article 34: modified hours of work**

****Article 34 : horaire de travail modifié**

Effective January 1, 2014, all references and entitlements related to designated paid holidays no longer apply to employees working shifts in accordance with clause 21.02 of this agreement.

À compter du 1er janvier 2014, toutes les références et les droits en lien avec les jours fériés désignés payés ne s'appliqueront plus aux employé-e-s qui travaillent par quarts conformément au paragraphe 21.02 de cette convention.

...

[...]

Lieu hours in lieu of designated paid holidays

Heures de congé en remplacement de jours fériés désignés payés

a. An employee is entitled to lieu hours and is not entitled to designated paid holidays. This employee shall instead earn lieu hours at the rate of eight decimal five (8.5) hours per designated paid holiday as defined in clause 26.01. An employee absent without pay on both his or her full working day immediately preceding and his or her full working day immediately following a designated holiday is not entitled to eight decimal five (8.5)

a. L'employé-e est admissible aux heures de remplacement mais n'est pas admissible aux jours fériés désignés payés. L'employé-e acquiert plutôt des heures de remplacement calculées au taux de huit virgule cinq (8,5) heures pour chaque jour férié désigné payé mentionné au paragraphe 26.01. L'employé e absent en congé non payé pour la journée entière le jour de travail qui précède ainsi que le jour de travail qui suit immédiatement le jour férié

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- lieu hours for the holiday, except in the case of an employee who is granted leave without pay under the provisions of Article 14: leave with or without pay for Union business.*
- b. On January 1 of each year an employee shall receive an advance of credits equivalent to the anticipated credits that may be earned for the calendar year in the amount of ninety-three decimal five (93.5) hours in lieu ("lieu hours") of designated paid holidays. In the event that an additional national holiday is proclaimed as per paragraph 26.01(l), this amount shall be increased by eight decimal five (8.5) hours;*
- c. An employee whose hours of work are scheduled after January 1 shall receive an advance of credits of hours in lieu ("lieu hours") of designated paid holiday credits equivalent to the remaining number of designated paid holidays that may be earned in the remainder of the calendar year multiplied by eight decimal five (8.5);*
- d. Subject to operational requirements, the Employer shall make every reasonable effort to grant lieu hours at times desired by the employee provided the employee provides forty-eight (48) hours' advance notice;*
- e. On any given designated paid holiday, employees must exhaust their lieu hour credits prior to using leave with pay for family-related responsibilities or sick leave;*
- f. An employee's remaining lieu hours on December 31 shall be paid at one decimal five (1.5) multiplied*
- désigné payé, n'a pas droit à huit virgule cinq (8,5) heures de remplacement pour le jour férié, sauf s'il bénéficie d'un congé non payé en vertu de l'article 14 : congé payé ou non payé pour les affaires du syndicat;*
- b. Le 1er janvier de chaque année, un-e employé-e a droit à des crédits de congé équivalant au nombre de crédits prévus pour l'année calendrier en cours totalisant quatre-vingt-treize virgule cinq (93,5) heures de congé en remplacement (« heures de remplacement ») de jours fériés désignés payés. Dans le cas où un congé national est proclamé selon l'alinéa 26.0l), ces crédits sont majorés de huit virgule cinq (8,5) heures;*
- c. Un employé-e dont les heures de travail sont mises à l'horaire après le 1er janvier a droit à des crédits d'heures (« heures de remplacement ») équivalant au nombre de jours fériés désignés payés restant qui peuvent être gagnés dans l'année calendrier en cours multiplié par huit virgule cinq (8,5);*
- d. Sous réserve des nécessités du service, l'employeur fait tout effort raisonnable pour accorder des heures de remplacement au moment choisi par l'employé-e si celui-ci donne un préavis d'au moins quarante-huit (48) heures;*
- e. Peu importe le jour férié désigné payé, les employé-e-s doivent épuiser leurs crédits d'heures de remplacement avant d'utiliser le congé payé pour obligations familiales ou le congé de maladie;*
- f. Au 31 décembre, le solde des heures de congé en remplacement est remboursé à l'employé-e au taux*
-

by the employee's straight-time hourly rate of pay of the substantive position on December 31;

d'un virgule cinq (1,5) multiplié par le taux de rémunération horaire à tarif normal du poste d'attache de l'employé-e en vigueur le 31 décembre;

g. Any unearned lieu hours used or paid under the provisions of this clause shall be subject to recovery.

g. Toute heure de remplacement non acquise utilisée ou payée en vertu des dispositions du présent paragraphe fera l'objet d'un recouvrement.

...

[...]

[Emphasis in the original]

[11] Clause 21.02 is a portion of the collective agreement that addresses shift work.

III. Summary of the arguments

A. For the employer

[12] The employer submits that the Board is without jurisdiction to hear the matter as the grievance was referred to it for adjudication outside the time limits prescribed by clause 20.14 of the collective agreement and s. 90(2) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[13] The grievor filed his grievance on May 28, 2021, and it was presented at the final level of the grievance procedure on August 9, 2021. The employer had until September 22, 2021, to issue a final-level response.

[14] Section 90(2) of the *Regulations* states as follows:

(2) If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.

(2) Si la personne dont la décision constitue le dernier palier de la procédure applicable au grief n'a pas remis de décision à l'expiration du délai dans lequel elle était tenue de le faire selon la présente partie ou, le cas échéant, selon la convention collective, le renvoi du grief à l'arbitrage peut se faire au plus tard quarante jours après l'expiration de ce délai.

[15] Since no response was issued at the final level, the grievor and the union had until November 1, 2021, to refer the grievance to adjudication. The grievance was referred to adjudication on May 17, 2022, over six months late.

[16] The employer submits that the grievance is untimely.

B. For the grievor

[17] The grievor submits that the employer did not raise its timeliness objection within the established timelines. This question has already been the subject of the Board's jurisprudence, particularly as set out in *Lafrance v. Treasury Board (Statistics Canada)*, 2006 PSLRB 56, *Sidhu v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 76, *McWilliams v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 58, and *Pannu v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLRB 4. The grievor submits that the referenced decisions are all unanimous and that they state that the employer may raise an objection with respect to timeliness only if the grievance was rejected for this reason at the first possible and all subsequent stages of the grievance procedure.

[18] The grievor also submits that under s. 95 of the *Regulations*, the employer is required to raise its timeliness objection within 30 days of its receipt of the reference to adjudication. The grievance was referred to adjudication on May 17, 2022, and the employer did not raise its objection within the time frames set out in s. 95.

[19] The grievor submits that the Board can exercise its discretion under s. 61 of the *Regulations* and extend the time for referring the grievance to the Board for adjudication. In this respect, the grievor refers me to *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1.

[20] The grievor submits that the union advisor responsible for referring grievances to the Board for adjudication stopped working and was off work due to mental health issues and personal problems effective March 18, 2022. The grievor further submits that the advisor's health and personal issues had existed for several months before his absence from work in March of 2022.

[21] The grievor states that the situation involving the union advisor regrettably resulted in certain files not being processed within the time limits and was out of the union's control, and as such, he should not lose his right to recourse.

[22] The grievor submits that if the Board does not reject the employer's objection, the Board take it under reserve and deal with it at the same time as it addresses the grievance on its merits, to allow him and the union to provide more exhaustive evidence on the issue.

C. The employer's reply

[23] In response to the union's submission that the employer did not raise its timeliness objection within the established timelines, the employer submits that it was within the timelines set out in s. 95(1) of the *Regulations*, which state that a party has 30 days to raise an objection based on timeliness after being provided a copy of the notice of the reference to adjudication. The employer received notice from the Board of the referral to adjudication on May 24, 2022, and provided its objection on June 23, 2022, the 30th day, which was within the allowable timeline.

[24] With respect to the union's submission on the extension of time, the employer submits that *Schenkman* provides the basic criteria for determining whether discretion should be exercised and an extension of time granted. The criteria are 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.

[25] The union submits that the untimely referral of the grievance was due to circumstances beyond its control, namely, the mental health and personal issues of a union advisor who was responsible for the file. It states that the advisor had had these issues for several months before March 18, 2022.

[26] The employer cannot confirm or dispute the claim with respect to the union advisor's personal circumstances; however, it submits that the advisor in question had referred other files to adjudication before and during the time frame in question. The employer then sets out six specific board file numbers and states that the grievances relating to them were referred to the Board for adjudication by the advisor in question in September and December of 2021 as well as in March of 2022.

[27] In addition, the employer submits that the advisor's administrative support also completed referrals to the Board for adjudication on their behalf and set out two

specific board file numbers stating that the grievances relating to those matters were referred to the Board for adjudication by the advisor's administrative assistant in January of 2022.

[28] For these reasons, the employer submits that the union's explanation does not establish a clear, cogent, and compelling reason for the delay. There is clear evidence that the union advisor in question was able to perform the same task on other occasions during the relevant period.

[29] Given that the union advisor in question as well as the administrative assistant successfully referred other grievances to adjudication during the relevant time, the employer concludes that the reason for the delay was administrative oversight. In this respect, the employer refers me to paragraph 27 of *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, which states as follows:

27 The applicant did not convince me that she had a clear, cogent and compelling reason to explain the 80-day delay referring her grievance to adjudication. In fact, the delay is entirely attributable to an administrative error of the union. Neither the applicant nor her union were [sic] prevented from referring the grievances to adjudication. They simply did not do it within the legal timeframe.

[30] In terms of balancing the injustice to the employee against the prejudice to the employer in granting an extension, the onus to establish the injustice, if any, is the grievor's to bear. The dispute in question is related to the administration of leave and is limited to a minute 4.25-hour period. While the grievor and union may dispute the significance of the matter, the employer submits that were the matter of utmost importance to the grievor, a more diligent effort to ensure a timely referral, such as an inquiry as to the grievance's status, would have been made.

[31] As for the grievance's chance of success at adjudication, the employer submits that the grievance has little chance of success, given its subject matter. It states that the subject matter of the grievance is that the grievor disputes its decision to deduct 12.25 hours of lieu time for his shift on Victoria Day as opposed to 8.5 hours of lieu time and 4.25 hours of family responsibility leave. The collective agreement clearly and unequivocally states, "On any given designated paid holiday, employees must exhaust

their lieu hour credits prior to using leave with pay for family-related responsibilities or sick leave ...”.

[32] The employer reiterates its request that the grievance be dismissed as it is untimely and further submits that the application for an extension of time be dismissed.

IV. Reasons

A. The timeliness of the reference of the grievance to adjudication

[33] The grievance procedure in the federal public service is governed by the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), the *Regulations*, and any group-specific collective agreement that may be entered into between an authorized bargaining agent and the employer with respect to employees in a particular bargaining unit.

[34] The parties agreed at article 20 of the collective agreement to certain terms and conditions governing the grievance procedure. As set out in that agreement, there are three levels in the procedure. If a grievor is unsatisfied with the employer’s response at the final level, he or she may refer the grievance to adjudication (if it is a grievance that the Board would otherwise have jurisdiction over).

[35] Once a grievance has been filed at the first level, the employer must reply to it within 10 days, the calculating of which does not include Saturdays, Sundays, or holidays (clause 20.16 of the collective agreement). If the employer has not replied to the grievance at any particular level, except the final level, within 15 days of the date on which the grievance was received at that level, the grievor may transmit it to the next level within 10 days of that date. Clause 20.17 provides that by agreement, the parties may extend the time frames for taking the steps in article 20.

[36] Section 63 of the *Regulations* is found under the heading “Grievances”, the subheading “General Provisions”, and the marginal note “Rejection for failure to meet a deadline” and states as follows:

Grievances

Griefs

General Provisions

Dispositions générales

...

[...]

Rejection for failure to meet a deadline**Rejet pour non-respect d'un délai**

63 A grievance may be rejected for the reason that the time limit prescribed in this Part for the presentation of the grievance at a lower level has not been met, only if the grievance was rejected at the lower level for that reason.

63 Le grief ne peut être rejeté pour non-respect du délai de présentation à un palier inférieur que s'il a été rejeté au palier inférieur pour cette raison.

...

[...]

[Emphasis in the original]

[37] Section 90 of the *Regulations* sets out the procedure for referring a grievance to the Board for adjudication and states as follows:

Deadline for reference to adjudication**Délai pour le renvoi d'un grief à l'arbitrage**

90 (1) Subject to subsection (2), a grievance may be referred to adjudication no later than 40 days after the day on which the person who presented the grievance received a decision at the final level of the applicable grievance process.

90 (1) Sous réserve du paragraphe (2), le renvoi d'un grief à l'arbitrage peut se faire au plus tard quarante jours après le jour où la personne qui a présenté le grief a reçu la décision rendue au dernier palier de la procédure applicable au grief.

Exception**Exception**

(2) If no decision at the final level of the applicable grievance process was received, a grievance may be referred to adjudication no later than 40 days after the expiry of the period within which the decision was required under this Part or, if there is another period set out in a collective agreement, under the collective agreement.

(2) Si la personne dont la décision constitue le dernier palier de la procédure applicable au grief n'a pas remis de décision à l'expiration du délai dans lequel elle était tenue de le faire selon la présente partie ou, le cas échéant, selon la convention collective, le renvoi du grief à l'arbitrage peut se faire au plus tard quarante jours après l'expiration de ce délai.

[Emphasis in the original]

[38] Section 10 of the *Regulations* states that if a time limit under the *Regulations* for filing a document expires on a Saturday or holiday, it may be filed on the day next following that is not a Saturday or a holiday.

[39] “Holiday” is not defined in the *Regulations* or the *Act*. It is defined in s. 35 of the *Interpretation Act* (R.S.C., 1985, c. I-21) and includes Sunday.

[40] There is no suggestion from the employer that the original grievance was filed out of time or that the grievor did not transmit the grievance to the levels of the grievance procedure in a timely manner. The employer’s objection lies solely with the grievor’s failure to refer the grievance to adjudication within the timeline set out in the *Regulations*.

[41] The grievor transmitted the grievance to the final level in the grievance procedure on August 9, 2021. Based on the time limits set out in clause 20.14 of the collective agreement, the employer had 30 days to reply, not counting Saturdays, Sundays, and holidays (as provided for by clause 20.02). Therefore, the final day for the employer to reply would have been Tuesday, September 21, 2021.

[42] The collective agreement is silent on the time frame within which a grievance may be referred to adjudication when no response is delivered by the employer. However, clause 20.23 of the collective agreement states that where an employee has presented a grievance up to and including the final level in the grievance procedure and the employee’s grievance has not been dealt with to his or her satisfaction, he or she may refer the grievance to adjudication in accordance with the provisions of the *Act* and *Regulations*. By default, under s. 90(2) of the *Regulations*, the grievor had 40 days after the date on which the employer was required to deliver its response. Forty days from September 21, 2021, would have been October 31, 2021. As October 31, 2021, was a Sunday, the time extends to the first day after that that is not a holiday; in this case, it is Monday, November 1, 2021, based on s. 10 of the *Regulations*, that provides that a time limit under the *Regulations* is calculated by taking into account all calendar days, as there is no equivalent to clause 20.02 of the collective agreement that excludes Saturdays, Sundays and holidays.

[43] The grievor transmitted his grievance to the Board on May 17, 2022. This was more than 6 months past the deadline. Therefore, it is untimely. However, it is untimely only if the employer objects to the timeliness of the reference to adjudication

within 30 days of the date it received notice of the reference to adjudication. This is set out in s. 95(1)(b) of the *Regulations*, which states as follows:

<p>95 (1) A party may, no later than 30 days after being provided with a copy of the notice of the reference to adjudication,</p> <p style="text-align: center;">...</p> <p>(b) raise an objection on the grounds that the time limit prescribed in this Part or provided for in a collective agreement for the reference to adjudication has not been met.</p>	<p>95 (1) Toute partie peut, au plus tard trente jours après avoir reçu copie de l'avis de renvoi du grief à l'arbitrage :</p> <p style="text-align: center;">[...]</p> <p>b) soulever une objection au motif que le délai prévu par la présente partie ou par une convention collective pour le renvoi du grief à l'arbitrage n'a pas été respecté.</p>
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[44] The employer received an email from the Board's registry on May 24, 2022, advising it of the reference to adjudication of the grievance. Therefore, the employer had to raise its objection within 30 days of that day. It delivered its objection to the Board by email on June 23, 2022, which was the 30th day after May 24, 2022, and therefore the last day on which it could have raised its objection under s. 95(1)(b) of the *Regulations*.

[45] As only the grievor's referral to adjudication was not timely, the only possible timeliness objection that the employer could have raised was about the referral, and as such, the employer did so and is not in breach of the *Regulations*. Therefore, I find that the grievance is untimely.

B. Request for an extension of time

[46] The grievor submitted that the Board can exercise its discretion under s. 61 of the *Regulations* and extend the time for referring the grievance to the Board for adjudication. In this respect, he referred me to *Schenkman*. The test for extending time under s. 61 of the *Regulations* has been well established by the criteria in *Schenkman*, which are 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.

[47] The grievor submitted that the reason for the delay was that the union advisor responsible for referring grievances to the Board for adjudication in Ontario stopped working and was off work due to mental health issues and personal problems as of March 18, 2022. He further submitted that the advisor's health and personal issues had existed for several months before his departure from work in March of 2022. The grievor also stated that the situation involving the union advisor resulted in certain files not being processed within the time limits and that this was out of the union's control.

[48] In its reply, the employer submitted that in fact, the union referred several files to the Board for adjudication both before and after this grievance should have been referred to adjudication and during the months preceding the departure of the union advisor in question. I have had the opportunity to review those Board files and to verify that indeed, they were referred to adjudication either by the union advisor in question or by the Ontario office that he was responsible for.

[49] The reason for the delay is not clear, cogent, or compelling. Even accepting that the union advisor responsible for referring the grievance to adjudication was suffering from some ill health and personal issues at some point in time before the actual referral to adjudication, this is still very limited and lacks sufficient detail to satisfy the test of clear, cogent, and compelling.

[50] The grievor stated that the union advisor left on sick leave on March 18, 2022, and that he had been ill or having personal issues for some months before leaving. However, the time frame to refer the grievance to the Board, which was between September 22 and November 1, 2021, was four to six months before the advisor departed his position. Was the union advisor unfit to carry out the functions of his position in September and October of 2021? It also does not explain why during this same time frame, other grievances were referred to the Board, and the grievor's was not. Finally, again accepting that the union advisor left on March 18, 2022, it was another two full months before the grievance, already out of time to be referred to the Board, was finally referred, on May 17, 2022; for this, there was no explanation.

[51] The delay is not insignificant. It is not a day, a few days, a week, or a few weeks. It is over six months.

[52] There is nothing to suggest that the grievor acted with any due diligence.

[53] The last two of the *Schenkman* criteria are balancing the injustice to the grievor against the prejudice to the employer and the chance of success of the grievance. These two go somewhat hand in hand. It is difficult to assess the injustice to the grievor as the issue is whether the employer could deny him the use of the 4.25 hours of paid family responsibility leave with in-lieu hours, and there is a specific clause in the collective agreement that states that this is in fact what the union and employer agreed to.

[54] The facts of this case appear to be exactly what is contemplated in clause 34(e) of the collective agreement. The grievance states that the grievor wanted to use 8.5 hours of lieu time and 4.25 hours of family responsibility leave to cover his shift on May 24, 2021. Article 34 deals with the use of lieu hours in lieu of designated paid holidays. It sets out that the employees governed by the collective agreement receive credit for all paid holidays at the start of the fiscal year in the sum of 93.5 hours for the year and that those lieu hours are to be used on the designated paid holiday. Clause 34(e) specifically states that on any given designated paid holiday, employees must exhaust their lieu-hour credits before using leave with pay for family related responsibilities or sick leave.

[55] The test in the *Schenkman* criteria does not require the Board to make a finding on the merits of the grievance; it is sufficient for the Board to assess on the information available, if it is available, the likelihood of success. At this point, based on the information provided, the grievance appears to have little chance of success, given that the allegations appear to be specifically contemplated in the collective agreement and that the employer appears to have followed the collective agreement.

[56] In addition, it is difficult to assess the injustice to the grievor being greater than the prejudice to the employer when at issue is such a nominal amount of leave time; both types of leave are paid leave, and the grievor received paid leave for the entire time requested.

[57] Finally, in his submission, the grievor suggested that if the Board does not reject the employer's objection, the Board take it under reserve and deal with it at the same time as it addresses the grievance on its merits, to allow the grievor and union to provide more exhaustive evidence.

[58] Both the union and employer are seasoned parties in terms of appearing before the Board. It is incumbent on them, when either one raises an objection to jurisdiction, to put their best foot forward and advance all the arguments they have based on all the facts that are known to them. The Board is not required to put off to a hearing an issue that should have been dealt with by a party in submissions.

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

(The Order appears on the next page)

V. Order

[60] The objection is allowed.

[61] The application for an extension of time is dismissed.

[62] The grievance in Board file no. 566-02-44758 is denied.

November 10, 2023.

**John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board**