

Date: 20231201

File: 568-02-48083

XR: 566-02-47274

Citation: 2023 FPSLREB 113

*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

JEAN-LOUIS MERCIER

Applicant

and

CORRECTIONAL SERVICE OF CANADA

Respondent

Indexed as

Mercier v. 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: Christophe Haaby, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Amélie Phaneuf, labour relations advisor

Decided on the basis of written submissions,
filed May 9, June 22, and July 13, 2023.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Application before the Board

[1] On May 1, 2023, Jean-Louis Mercier (“the applicant”) referred a grievance to adjudication before the Federal Public Sector Labour Relations and Employment Board (“the Board”). The grievance, dated June 24, 2022, is about a 10-day suspension without pay for using excessive force.

[2] On May 9, 2023, the Correctional Service of Canada (“the respondent”) opposed the referral as it contended that it was out of time. On June 22, 2023, the applicant applied for an extension of time to refer the grievance to adjudication, under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; “the *Regulations*”).

[3] This decision concerns only the application for an extension of time. If it is granted, the file will be placed on the Board’s hearing schedule.

II. Background

[4] The applicant is a correctional officer classified at the CX-02 group and level at the Port-Cartier Institution in Quebec. He is represented by his bargaining agent, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (“the bargaining agent”).

[5] The applicant was accompanied by a bargaining agent representative throughout the grievance process. Several times in the process, at the respondent’s request, it and the bargaining agent agreed to extend the time limits. The applicant transmitted his grievance to the third level on December 8, 2022. On the same day, the grievance officer responsible for his file went on leave, which was still ongoing as of the referral to adjudication.

[6] The respondent never provided a third-level response. The deadline for a response at the third and final level was January 20, 2023. Under the *Regulations*, in the absence of a response, the deadline for the referral to adjudication was March 1, 2023.

III. Summary of the arguments

A. For the applicant

[7] The bargaining agent, on the applicant's behalf, assumes full responsibility for the delay referring the grievance to adjudication. The applicant relies on the principle of fairness to ask the Board to grant the extension of time for the referral to adjudication.

[8] Generally, an application for an extension of time is analyzed according to the five criteria set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1. The fundamental principle remains fairness, as set out at s. 61(b) of the *Regulations*.

[9] The applicant reproduces the five *Schenkman* criteria in his argument as follows.

1. Clear, cogent, and compelling reasons for the delay

[10] The bargaining agent readily admits that the failure to refer the grievance on time was entirely due to an oversight on its part, which was partly caused by the local grievance officer's work stoppage. It indicates that in its jurisprudence, the Board has accepted that a bargaining agent's negligence may constitute a clear, cogent, and compelling reason.

2. The length of the delay

[11] The referral was made after a two-month delay. It was not unreasonable for the applicant to believe that the grievance was following its course. In addition, time limits exist to ensure labour relations stability; the respondent should not be surprised by a grievance that challenges an action that it thought had been resolved. In this case, the respondent was aware of the grievance and itself had extended its processing.

3. The applicant's due diligence

[12] The applicant participated in all stages of the process. He signed the third-level transmittal form. He had no reason to doubt that the bargaining agent would be responsible for referring the grievance on time. He should not be penalized for its mistakes.

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

[13] The applicant would be unduly penalized were the extension not granted, meaning that he would lose any recourse against the respondent's disciplinary decision.

[14] The two-month delay causes the respondent no prejudice.

5. The grievance's chances of success

[15] As the Board has repeatedly stated, it is not possible to assess a grievance's chances of success in the absence of the evidence to come. Rather, this criterion would be used to not grant the extension were the grievance manifestly unfounded; it is not. The applicant challenges a disciplinary measure that he considers too severe, as he is entitled to.

B. For the respondent

[16] The respondent contests that the application meets the *Schenkman* criteria.

[17] According to the respondent, the applicant did not provide clear, cogent, and compelling reasons for the delay. The grievance officer was quickly replaced, and the bargaining agent's local was active in grievances. Therefore, nothing explains why the applicant's grievance was overlooked.

[18] The two-month delay is not in itself an obstacle, but because it resulted from an unexplained omission, this factor is not favourable to the application for an extension.

[19] The applicant did not demonstrate due diligence when he referred the matter to adjudication. He could have asked the bargaining agent about the status of his grievance; he did not.

[20] The respondent's opinion is that the prejudice that it would be caused by an extension of time is more serious than the harm that the applicant would suffer were it not granted. He would still have the opportunity to make a complaint against his bargaining agent. However, the respondent will have to commit resources if the case is referred to adjudication despite the delay.

[21] Finally, according to the respondent, the grievance has no chance of success. The misconduct was serious, and it could have imposed a harsher penalty. It argues that the current state of the law is in its favour.

IV. Reasons

[22] As the parties pointed out, generally, the analysis of a request for an extension of time accounts for the factors listed in the *Schenkman* decision. It should be noted that any decision on an extension, including the *Schenkman* decision, is based on s. 61(b) of the *Regulations*, which provides as follows that the Board may grant the extension in the interest of fairness:

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,

...

(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 :

[...]

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

[23] Thus, in my opinion, fairness must take precedence.

[24] I agree with the respondent that the delay was not explained in great detail, except as an oversight by the bargaining agent.

[25] As the Board has concluded in some decisions, a grievor should not be penalized for a bargaining agent's error (see *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79, and *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42), especially if there is no indication that the grievor was not diligent.

[26] In this case, the applicant participated in all the steps of the grievance process. He could have inquired about the status of his grievance, but he did not. In contrast, the respondent requested several extensions and ultimately never responded at the final level. Since extensions had already been added to the grievance process, it was reasonable for the applicant to believe that the grievance was still following its course.

[27] The length of the delay is two months, which in itself is not very significant, again, in light of the rather slow processing of the grievance. I do not see how proceeding would prejudice the respondent; it was already seized of the grievance, and the elapsed time does not change that.

[28] Finally, in the absence of any evidence, it is impossible for the Board to determine the grievance's chances of success. On the other hand, challenging a disciplinary measure that imposed a 10-day suspension is not frivolous.

[29] There are two lines of thought in the Board's jurisprudence, identified in *Barbe*, as to whether a bargaining agent's error can constitute a clear, cogent, and compelling reason for a delay in the grievance process or in a referral to adjudication.

[30] One view is that an employee can be held to account for their bargaining agent's errors (see *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33), and the other view is that an employee should not be held to account, as they would be adversely affected by the actions of not only their employer but also their bargaining agent (*D'Alessandro*).

[31] I note that in *Zelege v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLRB 76, the application was granted because the employer did not respect the deadline to respond at the final level of the grievance process.

[32] For my part, I believe that in the interests of fairness, this application for an extension of time should be allowed. The applicant did not fail in his diligence; he participated actively in all the grievance process steps. He loses his only recourse if the application is not allowed (recourse against the bargaining agent is not recourse against the respondent), and as several decisions have pointed out, the respondent did not meet its deadlines for issuing a final-level decision.

[33] In the *Zelege* decision, the Board clearly stated that the employer's mere delay responding to the grievance did not justify the grievor's delay referring a grievance to Federal Public Sector Labour Relations and Employment Board Act and Federal Public Sector Labour Relations Act

adjudication, since the *Regulations* provide for that possibility. That said, in this case, I continue to be surprised by the respondent's allegation of a delay referring a grievance, given that it did not respond at the final level of the grievance process. It is not a determinative factor, but it comes into play when all the criteria are considered from a fairness perspective.

[34] As in *Barbe*, this factor seems paramount to me. In this case, the applicant is not at fault. However, he would be deprived of his recourse because of an administrative omission. Between the two case-law streams, I prefer to favour the one that allows an applicant their recourse, in the absence of any indication that they have been negligent.

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

(The Order appears on the next page)

V. Order

[36] The respondent's objection is dismissed.

[37] The request is allowed for an extension of time to refer the grievance in Board file no. 566-02-47274 to adjudication.

[38] The grievance will be placed on the Board's hearing schedule.

December 1, 2023.

FPSLREB Translation

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