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File: 568-02-45388
XR: 566-02-45330 and 45331

Citation: 2024 FPSLREB 35

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

DOMINIC PELOQUIN

Applicant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Peloquin v. Treasury Board (Correctional Service of Canada)

In the matter of an application for an extension of time under s. 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: Goretti Fukamusenge, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Charlie Arsenault-Jacques, counsel

For the Respondent: Isabelle Tremblay and Marie-Claude Asselin, Treasury Board of Canada Secretariat

Decided on the basis of written submissions,
filed July 29, August 15, and November 8 and 28, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Application before the Board

[1] On July 29, 2022, Dominic Peloquin ("the grievor" or "the applicant") made an application for an extension of time to refer his grievances to adjudication, in accordance with s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"). Under that provision, the Federal Public Sector Labour Relations and Employment Board ("the Board") can, in the interest of fairness, extend a time limit provided not only in the *Regulations* but also in a grievance process set out in a collective agreement.

[2] The Correctional Service of Canada ("the employer" or "the respondent") opposed the application. In an objection that it filed after the grievances were referred to adjudication, it asserted that the Board does not have the jurisdiction to hear these grievances because, according to it, the applicant did not respect the time limits when they were presented at the first level of the grievance process, when they were transmitted to the second level, and when they were referred to adjudication. The respondent replied to the grievances only at the first level and requests that they be denied without a hearing.

[3] For the reasons explained later in this decision, the respondent's preliminary objection is dismissed, and the application for an extension of time is granted. The Board has the necessary jurisdiction to decide these grievances.

II. The issues

(1) Once a grievance has been referred to adjudication, can the respondent object that it was presented late at the different grievance-process levels if it did not deny the grievance for that reason?

(2) Do the circumstances of this case allow the Board to exercise its discretion to extend the time limits?

III. The source of the dispute

[4] The main dispute is based on a challenge to the application of a COVID-19 vaccination policy that the respondent had put in place.

[5] When the applicant filed his grievances, he held a dog-handler position classified at the CX-02 group and level at the Cowansville Institution. It was part of a

bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) ("the bargaining agent" or "the union").

[6] At all times during this dispute, the applicant's terms and conditions of employment were governed by a collective agreement between the Treasury Board, which is the legal employer, and the union for the Correctional Services group that expired on May 31, 2022 ("the collective agreement").

IV. The chronology of the grievances

[7] Given that time limits are at issue, it is appropriate to summarize the grievances' timeline, as follows:

- December 14, 2021: first-level filing;
- February 10, 2022: first-level reply issued for each grievance (the grievances are numbered 66779 and 66781);
- February 28, 2022: referral to the second level;
- no second-level reply was issued;
- March 31, 2022: referral to the final level;
- no final-level reply issued;
- July 29, 2022: referral to adjudication, and application made for an extension of time; and
- August 15, 2022: the employer raised its objection.

[8] The grievances read in part as follows at the first level:

> [The grievance numbered 66779:]
>
> [Translation]
>
> *I grieve the employer's decision to place me on indeterminate unpaid leave. The decision that Francis Anctil (the warden) made on November 15, 2021, constitutes disguised discipline and a suspension.*
>
> *In addition, during that disguised discipline, I still had custody and control of the detector dog and my work vehicle, which the Correctional Service provided to carry out my dog-handler duties at the Cowansville Institution.*
>
> …
>
> *I seek: 64 Hours, which are the hours that were deducted from my pay;*
>
> *And Compensation for any loss suffered, notably, salary, shift premium and weekend bonus, replacement hours …*
>
> *That I be made whole.*

> [The grievance numbered 66781:]
>
> [Translation]
>
> *I grieve the employer's decision to place me on unpaid leave for 8 d/64 h (21.01) and two weekend days 16H. During that leave, the employer never came to retrieve the detector dog and the service vehicle, thus leaving me entirely responsible for them and the related work.*
>
> *So, I request my eight hours at regular time and two days of overtime at the collective agreement rate.*

[9] On February 10, 2022, the respondent replied separately to the two grievances. The replies were almost identical and were the only ones issued during the grievance process. The grievance numbered 66779 was denied on its merits and for a failure to respect the time limit, while the reply to the grievance numbered 66781 was silent in that respect.

[10] The reply to the grievance numbered 66779 read in part as follows:

> [Translation]
>
> …
>
> *… You indicated that your two grievances were similar; however, grievance 66781 referred more to your obligations to the detector dog while you were without pay. This grievance referred more to the vaccination policy's application. You did not raise any prohibited discrimination grounds at the hearing of your grievance.*
>
> *I note that your grievance was filed beyond the time limits set out in clause 20.11 of your collective agreement. In effect, this section provides that a grievor may file a grievance at the first level of the process no later than the twenty-fifth day after the day on which they are informed of or become aware of the action or circumstances giving rise to the grievance. However, you became aware or were informed of the action or circumstances that gave rise to your grievance more than twenty-five days ago, on November 2, 2021, by the institution's warden. All the same, I will decide the merits of your grievance.*
>
> …
>
> *… On November 2, 2021, the warden informed you that unless you complied with the policy, you would be placed on unpaid administrative leave as of November 15, 2021. Thus, in accordance with the policy and your refusal to become vaccinated, you were on unpaid administrative leave from November 15, 2021, to November 24, 2021 …*

…

> *As your grievance was filed after the time limits set out in your collective agreement, it is denied on that basis and on the merits for the reasons set out above. Thus, no corrective measure is granted to you.*

[11] Note that the grievance numbered 66779 (Board file no. 566-02-45330) was referred to adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), while the grievance numbered 66781 (Board file no. 566-02-45331) was referred to adjudication under s. 209(1)(a). In the application for an extension of time, the bargaining agent indicated, "[translation] The suspension-without-pay grievance also includes a disciplinary component."

V. Summary of the arguments

[12] Both parties cited the criteria established in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, to analyze the application for an extension of time. Those criteria read as follows:

…

> *[75] …*
>
> - *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.*

…

A. For the applicant

[13] On the applicant's behalf, the union acknowledges that the grievances were referred late to adjudication. It explains that for over three months, from April to July 2022, the applicant had the impression that his grievances were following their course and that they had been referred to the Board. It explains that they were in a union representative's personal email account and that that person did not send them for a referral to adjudication.

[14] The union argues that the applicant was diligent by following up once he learned that his grievances had not been referred to adjudication. It emphasizes that although it is regrettable, the delay of just over a month is not outrageous and is not attributable to the applicant.

[15] It maintains that there are clear, cogent, and compelling reasons for the delay. It argues that the applicant's grievances involve the application or interpretation of the collective agreement, and so, he could not have referred them to adjudication without the bargaining agent's support. Thus, the union's negligence to provide such support constitutes a clear, cogent, and compelling reason for the delay. To support that argument, it refers to *Grekou v. Treasury Board (Department of National Defence)*, 2020 FPSLREB 94.

[16] The union also asserts that the applicant would suffer significantly greater harm than would the respondent if the extension-of-time application is dismissed. It explains that the grievance is the only procedure available to the applicant to assert his rights and that refusing to extend the time limit would end that recourse. It adds that many similar grievances have been filed about the vaccination policy and that the employer has always been aware of the existence and nature of the dispute.

[17] The union also claims that the Board cannot determine the grievances' chances of success, as a comprehensive review of the merits is not possible at this stage of the process.

[18] It adds that the 40-day deadline set out in the *Regulations* for a referral to adjudication if the employer does not reply to a grievance exists to protect grievors' rights. To that effect, it refers to *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42.

[19] The union also cites other Board decisions, including *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144; *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79; and *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33.

B. For the respondent

[20] The respondent cites the collective agreement and the *Regulations* to support its objection to the extension-of-time application. It asserts that the applicant did not

respect the time limits set out in the collective agreement, whether when filing the grievances at the first level or transmitting them to the second level. It notes that the first-level reply was issued on February 10, 2022, and that the applicant transmitted the grievance to the second level only on February 28, 2022; this was four days late.

[21] The respondent also suggests that the lack of a second-level reply constituted a denial decision that did not provide reasons. As no other reply was issued at that level, it could not object to the grievance being transmitted to the final level.

[22] It adds that in the absence of a final-level reply, the applicant did not comply with the 40-day time limit set out in the *Regulations*. He referred the grievance to adjudication over 30 days late.

[23] And in its additional arguments submitted to support its objection, the respondent also reiterates the *Schenkman* criteria.

[24] It maintains that several people with the bargaining agent lacked diligence. The respondent explains that although the bargaining agent was responsible for referring the grievances to adjudication, the applicant cannot be absolved of his responsibility to have followed up with the bargaining agent, to ensure that the time limits set out in the *Regulations* were respected. He did not follow up until he was informed that the grievances had not been referred to adjudication.

[25] To rebut the bargaining agent's argument that refusing to grant an extension of time would prejudice the applicant, the respondent cites *Martin v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 62, specifically paragraph 37, which read as follows:

> *[37] Section 61 of the* Regulations *is not intended to absolve bargaining agents of this obligation to their members when they fail to meet it. The applicant is not left without recourse if she is denied an extension of time to refer her grievance to adjudication. She may proceed against the bargaining agent under section 190 of the* Act *for its failure to represent her effectively.*

[26] In particular, the respondent argues that there are no clear, cogent, and compelling reasons. So, it suggests that the other factors to consider when deciding to grant an extension of time are irrelevant. To support this argument, it refers to *St-Laurent v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 4; *Sonmor v.*

Treasury Board (Correctional Service of Canada), 2013 PSLRB 20; and *Callegaro v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 110.

[27] With respect to the length of the delay, the respondent simply cites the comments at paragraph 46 of *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92. It indicates that it does not wish to make additional comments given, according to it, "[translation] … the relatively significant weight of the other factors involved in this application."

[28] Paragraph 46 of *Grouchy* read as follows:

> *[46] Before applying those criteria to the facts of this case, I wish to make the following general comments. In principle, time limits set by the* Act *and the* Regulations *are mandatory and should be respected by all parties. Having relatively short time limits is consistent with the principles that labour relations disputes should be resolved in a timely manner and that parties should be entitled to expect that an issue has come to an end when a prescribed time limit has elapsed. Time limits are not elastic, and extending them should remain the exception and should occur only after the decision maker has made a cautious and rigorous assessment of the circumstances.*

[29] Finally, the respondent relies on *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144 at para. 63, and asserts that the criterion of the chances of success of the grievances should be evaluated, as it raises a clear issue of jurisdiction in its arguments.

VI. Analysis

[30] I will begin by examining whether the respondent's objection has merit before considering whether granting an extension is justified.

A. Once the grievances were referred to adjudication, the respondent could not object that they were presented late at the different grievance-process levels if it did not deny them for the same reason

[31] Although s. 95(1)(a) of the *Regulations* states that a party may raise an objection on the grounds that a time limit set out in a collective agreement was not met, s. 95(2) states that such an objection may be raised only if the grievance was rejected at the level at which the time limit was not met and at all subsequent levels of the grievance process for that reason of not respecting it.

[32] But in this case, the respondent replied only at the first level of the grievance process. Consequently, at the other levels, it did not reject the grievances for not respecting the time limits, as it did not reply then, which violated the provisions set out at s. 72(1) of the *Regulations*.

[33] Section 72(1) reads as follows:

Deadline for decision	***Délai pour remettre une décision***
72 (1) *Unless the individual grievance relates to classification, the person whose decision constitutes the appropriate level of the individual grievance process* ***must provide*** *the decision to the grievor or the grievor's representative, if any, no later than 20 days after the day on which the individual grievance was received by the grievor's immediate supervisor or the grievor's local officer-in-charge identified under subsection 65(1).*	***72 (1)*** *Sauf dans le cas du grief individuel ayant trait à la classification, la personne dont la décision en matière de griefs individuels constitue le palier approprié de la procédure* ***remet*** *sa décision au fonctionnaire s'estimant lésé ou, le cas échéant, à son représentant au plus tard vingt jours après la réception du grief par le supérieur hiérarchique immédiat ou le chef de service local visé au paragraphe 65(1).*

[Emphasis added]

[34] The respondent explains that the lack of a second-level reply constituted a decision to reject that did not provide reasons. It suggests that it could not have objected to the grievance being transmitted to the final level because no reply was issued at that level.

[35] I do not agree with that argument. The lack of a reply does not constitute a response to reject that does not provide reasons. The respondent had a duty to reply but chose not to. Section 72(1) of the *Regulations* does not give it discretionary power over whether to reply. The provision is mandatory. Indeed, the use of the present tense *remet* (in the French version) in s. 72(1) is a way to express a requirement. The provision imposed a duty on the respondent to render a decision no later than 20 days after receiving the grievance. That duty is also clear in the English version, with the use of the term "must provide".

[36] Given that, the respondent also asserts that the applicant did not respect the time limits set out in the collective agreement. Its applicable provisions are set out in

clauses 20.12 and 20.14. In addition, under s. 237(2) of the *Act*, a collective agreement's provisions take precedence over regulations that are inconsistent with them. This raises a related question of whether clauses 20.12 and 20.14 are inconsistent with what s. 72(1) of the *Regulations* sets out.

[37] The provisions set out in clauses 20.12 and 20.14 read as follows:

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 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.*	***20.12*** *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 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 *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.*	***20.13*** *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 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.*	***20.14 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.*

[Emphasis added]

[38] Certainly, the wording of s. 72(1) of the *Regulations* differs from that of clauses 20.12 and 20.14 of the collective agreement in that clause 20.14 adds the word "normally". However, I believe that these provisions are not inconsistent; their purposes are not mutually exclusive or contradictory. In my opinion, they even have a common feature, which is the use of the present tense to set out the employer's duty:

"must provide the decision" (the *Regulations*) or "shall normally reply" (the collective agreement). The use of the present tense in those provisions indicates that the person with a duty to reply to or render a decision on a grievance enjoys no discretion.

[39] Although the addition of the word "normally" to clauses 20.12 and 20.14 of the collection agreement seems to suggest that this provision offers some flexibility, in my opinion, the flexibility is with the time limit and not the act of replying. The consequence of not complying with the duty to reply within the time limit set out in clause 20.12 results in a new time limit in clause 20.13 to present the grievance at the next level. As for the *Regulations*, the provisions in s. 72(1) impose a requirement but are silent about the consequences of not complying. Therefore, in my opinion, the consequence of not complying must be determined based on the circumstances of each case.

[40] If the parties stipulated that the employer shall "normally" reply to grievances, it is because they expected a reply to be issued within the time limit required under the collective agreement or within a time limit that they agreed to. Consequently, when the employer chooses simply not to reply, it violates the collective agreement and the *Regulations*. Thus, it cannot claim that failing to reply or its silence constitutes a reply to reject grievances, to avoid the application of s. 95(2) of the *Regulations*.

[41] In both cases, if the legislator's intent, on one hand, and the intent of the parties to the collective agreement, on the other hand, had been for the person making the decision to have the discretionary power not to render a decision on individual grievances, as described in s. 72(1) of the *Regulations* and clauses 20.12 and 20.14 of the parties' collective agreement, they would have used terms that do not bind, such as "may" ("may provide a decision" or "may normally" reply).

[42] Indeed, s. 11 of the *Interpretation Act* (R.S.C., 1985, c. I-21) seems to confirm that explanation, and it reads as follows:

11 *The expression "shall" is to be construed as imperative and the expression "may" as permissive.*	***11*** *L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le*

> *verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.*

[43] By not issuing a decision, the respondent also failed to raise an objection about the time limits. However, under s. 95(2) of the *Regulations*, it may raise the time-limit issue only if it denied the grievances at the first level and every subsequent level of the applicable grievance process on the grounds of that lack of respect. Similar issues have been addressed in several Board decisions, and the Board has reiterated that to raise an objection about a time limit for adjudicating grievances, the employer must have denied the grievances at all levels of the grievance process based on the time limit not having been respected (see, for example, *LeFebvre v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLREB 87 at para. 41). The lack of such an objection at any level constitutes a waiver of making one at the adjudication stage (see *Amato v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 50 at para. 18).

[44] Certainly, in Board file no. 566-02-45330, the employer denied the grievance numbered 66779 at the first level for not respecting the time limit. However, as it did not reply at the second or final level of the grievance process, it did not comply with s. 95(2) of the *Regulations*. With respect to the grievance numbered 66781 (Board file no. 566-02-45331), the sole reply, only at the first level, made no mention of the time limit not being respected.

[45] Therefore, the employer's objection to this point is dismissed.

[46] The respondent also argues that the applicant did not meet the 40-day time limit set out in s. 90(2) of the *Regulations*. It notes that the grievance was transmitted to the final level of the grievance process on March 31, 2022, and that according to clause 20.14 of the collective agreement, the respondent had 30 business days to reply at the final level. The 30-day time limit expired on May 16, 2022. Under s. 90(2) of the *Regulations*, because the respondent did not reply at the final level, the grievance could have been referred to adjudication only at the latest 40 days after May 16, 2022. The 40-day time limit expired on June 25, 2022. The bargaining agent referred the applicant's grievances to adjudication on July 29, 2022.

[47] The bargaining agent does not dispute it and acknowledges that the grievances were referred to adjudication outside the time limits. It explains that the delay is

attributable to it and not to the applicant and, citing *Barbe*, it maintains that the applicant should not suffer the consequences of its errors. It referred the grievances to adjudication along with an extension-of-time application under s. 61(b) of the *Regulations*. That application leads to the following question.

B. Do the circumstances of this case allow the Board to exercise its discretionary power to extend time limits?

[48] The application for an extension of time to refer the grievances to adjudication is based on s. 61(b) of the *Regulations*, 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,***	***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.***

[Emphasis added]

[49] To determine whether it may extend a time limit within the meaning of s. 61(b) of the *Regulations*, the Board consistently uses the *Schenkman* criteria cited earlier.

[50] The Board has rendered several decisions dealing with the *Schenkman* criteria, including recent ones involving the same employer and the bargaining agent, such as *Barbe*; *Lewis v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 27; and *Hannah v. Treasury Board (Correctional Service of Canada)*, 2023 FPSLREB 87.

[51] It is also clear that the parties cite similar arguments and the same decisions as those cited in *Barbe*. In *Barbe*, the Board conducted a detailed comparative analysis of

several decisions dealing with the *Schenkman* criteria. Although the circumstances of each case must be examined individually, there is no need to re-examine those precedents in this case, which has the same parties. In the future, I encourage the parties to consider that analysis and those in other decisions to avoid repeating procedures, which is contrary to the principles of judicial economy and finality.

[52] The *Regulations* enable the Board to extend any time limit in a grievance process set out in a collective agreement, in the interests of fairness. The *Regulations* do not define the concept of fairness; the scope and application of that concept depend on the specific circumstances of each case. Therefore, I believe that the concept involves ensuring that all persons have equal access to paths to recourse and that it includes the principles of natural justice, including the right to be heard, considering the needs and rights of all parties involved. The application of this concept in the context of this case through the *Schenkman* criteria is summarized in the following paragraphs.

1. The length of the delay

[53] I agree with the argument that time limits set out in a regulation, a collective agreement, or an Act are mandatory and that all parties must respect them. I also recognize that recourse should not be summarily closed due to a delay that is neither abusive nor excessive. However, while not excusing the failure to meet the time limits in this case, I find that the delay was not excessive in the specific circumstances of this case.

[54] With respect to the presentation of the grievance that was filed on December 14, 2020, the delay was about 10 days. As for its referral to the second level, the respondent noted a delay of 4 days and a delay of less than 40 days referring it to adjudication. The respondent did not indicate that those delays prejudiced it in any way.

[55] The respondent referred to certain Board decisions, including *Martin* and *Edwards v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 126. However, the delay in this case is not comparable to the ones examined in those decisions, which were of several years. In *Martin*, at para. 32, the Board concluded that nothing explained "… the complete failure to pursue the grievance from the summer of 2014 to the point in the summer of 2020 when it was finally referred to adjudication." *Martin* involved a delay of six years. In *Edwards*, at para. 26, comparing

the situation to that of *Schenkman*, the Board noted that the length of the delay was also many years and that it was "… an excessively long delay and far out of the ordinary …".

2. The applicant's due diligence

[56] The bargaining agent explains that the applicant demonstrated due diligence. It states that he followed up with his union representative on July 8, 2022, as soon as he was informed that his grievances had not been referred to adjudication. For its part, the respondent maintains that the applicant and the bargaining agent's representatives were negligent and that there was a lack of diligence on their part.

[57] The grievances were transmitted to the final level on March 31, 2022. It is unclear whether the bargaining agent or the applicant checked up on their advancing status between March 31 and July 8, 2022. Although the applicant followed up on July 8, 2022, he had gone three months without checking anything. It would have been diligent to inquire earlier about the grievances' status.

3. Balancing the injustice to the employee against the prejudice to the respondent by granting the extension

[58] The decision as to whether to extend the time limits is extremely important because, if I decide to dismiss the extension-of-time application, the case will be summarily closed. The issue becomes to determine, in the interest of fairness, the prejudice that the respondent would suffer if the application is granted. With respect to prejudice, the employer simply cited paragraph 37 of *Martin*, which states that the applicant would have recourse against the bargaining agent if the application is dismissed. It did not suggest that it would suffer any prejudice if the time-limit extension is granted. I find that the applicant would suffer significant prejudice if his grievances could not be heard on the merits. The respondent indicated that he could still exercise recourse against the bargaining agent. I do not find that such recourse would serve the objectives of the grievances currently before the Board.

4. Clear, cogent, and compelling reasons

[59] The bargaining agent explains that the grievor's grievances are about the application or interpretation of the collective agreement. Citing the provisions of s. 89(3) of the *Regulations*, it argues that referring such grievances to adjudication requires its support. Thus, it concludes that its negligence constitutes a clear, cogent,

and compelling reason to justify the delay because the applicant could not have referred the grievances to adjudication on his own.

[60] For its part, citing *Edwards*, the respondent maintains that a bargaining agent's errors or omissions do not constitute clear, cogent, and compelling reasons to explain the delay. It notes that the bargaining agent was not prevented from referring the grievance to adjudication; it simply did not do it within the time limits set out in the *Regulations*.

[61] I am unable to conclude that the bargaining agent's negligence necessarily constitutes a clear, cogent, and compelling reason. Certainly, ss. 89(3) of the *Regulations* and 209(2) of the *Act* state that an employee may not refer an individual grievance related to the interpretation or application of a collective agreement provision unless the bargaining agent agrees to represent the employee in the adjudication process. A similar provision is also set out at clause 20.24 of the collective agreement, as follows:

20.24 *Where a grievance that may be presented by an employee to adjudication is a grievance relating to the interpretation or application in respect of him or her of a provision of this agreement or an arbitral award, the employee is not entitled to refer the grievance to adjudication unless the Union signifies in the prescribed manner:*	***20.24*** *Lorsque le grief que l'employé-e peut soumettre à l'arbitrage porte sur l'interprétation ou l'application, à son égard, d'une disposition de la présente convention ou d'une décision arbitrale, l'employé-e n'a le droit de présenter ce grief à l'arbitrage que si le syndicat signifie de la façon prescrite :*
a. its approval of the reference of the grievance to adjudication,	*a. son approbation du renvoi du grief à l'arbitrage,*
and	*et*
b. its willingness to represent the employee in the adjudication proceedings.	*b. son accord de représenter l'employé-e dans la procédure d'arbitrage*

[62] However, I do not believe that the requirement for bargaining agent support to refer such grievances to adjudication automatically exempts the applicant from meeting the time limits set out in the *Regulations*. Although I agree with the argument that the applicant should not be a victim of his union representative's errors, the fact remains that he must set out a clear, cogent, and compelling reason to justify the

delay. In my opinion, exactly at the moment when the grievor's recourse is dependent on bargaining agent support, it should be doubly vigilant and diligent, not to jeopardize the grievor's rights. The clarity and logic of a reason that justifies the delay depends on the circumstances of each case. Essentially, it is not enough for the bargaining agent to submit that it is responsible for the delay; it must also explain why (see *Cherid v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 8 at para. 23).

[63] In this case, the bargaining agent explained that for over three months, from April to July 2022, the grievances remained at a standstill in a union representative's personal email account. Only on July 8, 2022, did the union local realize that documents were missing. According to the bargaining agent, the situation was cleared up when the union representative returned from vacation and everything was forwarded to the Board, on July 29, 2022. That explanation on its own is not a cogent and compelling reason and does not excuse the delay.

5. The grievances' chances of success

[64] This decision is about only the arguments for the extension-of-time application and the employer's objection. It is not appropriate to speculate on the chances of success, as I have not examined the issues on their merits. It is impossible to assess the chances of success without further arguments from the parties and without evidence, but at first glance, these grievances do not seem frivolous or absurd.

VII. Conclusion

[65] Before concluding, independently of the outcome on the merits, it is entirely normal, in any case, for a person involved in a decision-making process not to reach the desired conclusion. However, one of the most important interests for any person involved in a decision-making process is how that outcome is reached. Despite the losing party's disappointment with the outcome of a matter, the predominant need is that the result was, and appeared to be, achieved in a fair manner as part of a fair process.

[66] Having examined the five *Schenkman* criteria, I find that it would not be fair to deprive the applicant of the right to have his grievances heard at adjudication, in the circumstances of this case. The concern for fairness, guided by the combination of the following factors, leads me to grant the application for an extension of time:

- I find that the length of the delay is not excessive;
- the applicant could not advance his grievances without the bargaining agent's support;
- the respondent undermined the grievance process by failing to reply to the grievances, which contravened the requirements set out in the *Regulations*; and
- the respondent would not suffer any prejudice if an extension of time is granted.

[67] In conclusion, in the interest of fairness, I grant the applicant's application for an extension of time to refer the grievances to adjudication.

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

(The Order appears on the next page)

VIII. Order

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

[70] The grievances will be placed on the hearing roll at a later date.

March 18, 2024.

FPSLREB Translation

Goretti Fukamusenge,
a panel of the Federal Public Sector Labour Relations and Employment Board