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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

IAN GUILLEMETTE

Applicant

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Cited as
Guillemette v. Deputy Head (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: Charlie Arsenault-Jacques, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Respondent: Alexandre Toso, counsel

Decided on the basis of written submissions, filed November 14 and 27 and December 1, 2023.

REASONS FOR DECISION

I. Application before the Board

[1] Ian Guillemette ("the applicant") is a correctional officer with the Correctional Service of Canada ("the respondent"). He filed a grievance challenging his suspension without pay, which he referred to adjudication on January 19, 2022.

[2] The respondent objected to the referral to adjudication because it was done late. The applicant conceded that the referral was made after the deadline but requested that the Federal Public Sector Labour Relations and Employment Board ("the Board") grant him an extension of time.

[3] This decision is about only the extension request that was made after the respondent's objection. The application was made under s. 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "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.*

[4] For the reasons that follow, the application is granted.

II. Background

[5] The applicant is a correctional officer and a member of the bargaining unit represented by the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent").

[6] On October 31, 2019, after his home was searched, he was suspended first with and then without pay from November 7, 2019, pending the investigation's results. His salary was restored as of March 16, 2020.

[7] As soon as he learned that he was suspended without pay, he contacted his bargaining agent to file a grievance on his behalf challenging the suspension without pay.

[8] The grievance was filed on December 4, 2019, and was transmitted to the second level of the grievance process on December 18, 2019. On January 6, 2020, the respondent and the bargaining agent agreed to an extension of time for the second-level response, until February 21, 2020. The applicant provided arguments to the bargaining agent to support his grievance and inquired about its status.

[9] The respondent did not respond at the second level, and the grievance was transmitted to the third level on February 19, 2020.

[10] Beginning in March 2020, the COVID-19 pandemic triggered a series of emergency measures across Canada, including in workplaces. The applicant works at the La Macaza Institution in Quebec; its operations were significantly affected by the pandemic and the accompanying health measures.

[11] The bargaining agent's workforce was reduced significantly, and the pandemic heavily engaged its attention. According to the applicant, from March 2020 to April 2021, the bargaining agent and the respondent interacted about nothing other than the pandemic and the health measures. The respondent contradicted that version, which the applicant presented. The respondent argued that certain labour-management relations activities continued despite the pandemic.

[12] However, only in October 2021 were concerns raised at the local about the status of the applicant's file, which was found in November 2021. But an error in form meant that it was not referred to adjudication until January 19, 2022.

[13] The respondent never responded at the final level of the grievance process.

[14] To add context, I note that the applicant was terminated on August 5, 2021. He challenged the termination in a grievance, which the Board allowed (see *Guillemette v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 12). He was reinstated to his duties from his termination date (with a 20-day suspension).

III. Summary of the arguments

[15] To ease reading and to avoid repetition, I will summarize both parties' arguments. I will return to the relevant case law in my analysis.

A. Arguments based on the *Schenkman* criteria

[16] Both parties invoke the criteria set out in *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, which the Board generally applies when analyzing a request for an extension of time for a grievance.

1. Are there clear, cogent, and compelling reasons for the delay?

[17] The applicant argues that the delay was due to the bargaining agent's errors. A bargaining agent error is not always considered a clear, cogent, and compelling reason, but it can be, especially if the grievor's diligence is well established. It seems unfair to penalize an employee when the delay was entirely attributable to the bargaining agent.

[18] For its part, the respondent argues that for 23 months, neither the applicant nor the bargaining agent indicated that they wished to pursue the grievance, which delayed the referral to adjudication by 17 months. Errors and negligence cannot be clear, cogent, and compelling reasons for the delay.

[19] The respondent cites many Board decisions that state that the reasons for the delay must be serious and convincing. Some decisions state that bargaining agent negligence is not sufficient to account for a delay. In addition, representation activities did not stop during the pandemic.

[20] With case law in support, the respondent argues that in the absence of clear, cogent, and compelling reasons, it is not necessary to continue the analysis.

2. How long was the delay?

[21] The applicant states that the delay was 17 months; the Board granted an extension of time in *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42, despite a 20-month delay.

[22] Furthermore, this is not a new grievance, as it is at the referral-to-adjudication stage. In other words, despite the delay, the respondent was not taken by surprise.

[23] The respondent argues that a 17-month delay is very significant. In the past, the Board has characterized lesser delays (6 months, 10 months, and 13 months) as significant, which militates against granting the extension.

3. Did the applicant demonstrate due diligence?

[24] The applicant acknowledges that it is true that an employee may file a disciplinary grievance alone and refer it to adjudication, without bargaining agent support. However, the bargaining agent in question does not follow that practice; it accompanies all its members in every grievance. So, its members rely on the bargaining agent to transmit grievances on time.

[25] The applicant acted diligently. He requested filing a grievance as soon as possible, signed the required forms, and contacted the bargaining agent several times, to substantiate his case by offering arguments and providing evidence. As in *Barbe* and *D'Alessandro v. Treasury Board (Department of Justice)*, 2019 FPSLREB 79 ("*D'Alessandro 2019*"), the applicant should not be punished for the bargaining agent's negligence, given that he has exercised due diligence.

[26] The respondent submits that there is no indication of due diligence by the applicant or the bargaining agent to advance the grievance between the third-level transmittal and the referral to adjudication. According to the respondent, there is no evidence that the applicant inquired into his grievance's status between the third-level transmittal and the referral to adjudication, which was a period of 23 months.

4. Who would suffer the most prejudice? The respondent if the application is granted, or the applicant if it is dismissed?

[27] The applicant submits that clearly, he would suffer more prejudice, since without the grievance, he will be deprived of all remedies.

[28] The applicant also submits that as in *Zeleke v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 76, the respondent has yet to render a decision at the final level of the grievance process. In other words, the delay depends at least in part on the respondent. If it renders a final-level decision, the applicant would have the next 40 days in which to refer the grievance to adjudication.

[29] According to the applicant, he could apply to the Board for an order under s. 12 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2), which would require the respondent to render a final-level decision, after which the grievance could be referred to adjudication.

[30] The respondent's opinion is that in the circumstances, it would suffer the most prejudice, since it has long believed that the applicant has abandoned his grievance.

[31] In addition, granting an extension after such a considerable delay would seriously undermine confidence with respect to the time limits being respected. Extensions should be exceptions, not the rule, to make the time limits meaningful.

5. What are the chances of success of the grievance?

[32] The applicant states that the issue is whether the extension would be unnecessary because the grievance has no chance of success. However, at this stage, the Board cannot decide the grievance's merits because it has not received any evidence. It is not frivolous for a public servant to challenge an action that has deprived him or her of salary for an extended period.

[33] The respondent objects by pointing out that certain facts are already known, due to the hearing on the termination. For example, during that period, the applicant was investigated after a harassment complaint was made and was suspended after his home was searched, where prohibited weapons and devices were seized. The respondent's legitimate concerns at that time justified the suspension. Therefore, this criterion is not favourable to the applicant.

B. Other arguments based on the facts and case law

[34] The applicant submits that the respondent wrongly relies on s. 90(2) of the *Regulations* to oppose the referral to adjudication. Section 90 provides that the reference to adjudication must be made within 40 days of receiving the decision at the final level of the grievance process (s. 90(1)). Section 90(2) states that if no final-level

response is received, a grievor may refer the grievance to adjudication within 40 days after the date on which the response should have been provided.

[35] This provision is intended to protect a grievor who does not receive a response, to prevent an employer from profiting from its inaction. Otherwise, the employer could delay the process indefinitely. The applicant argues that the respondent is attempting to take advantage of its failure to respond. It has waited to respond and has blamed him for the delay referring the grievance to adjudication.

[36] According to the applicant, although s. 90(2) of the *Regulations* provides an opportunity for him to refer his grievance in the absence of a response, he is entitled to await the final-level response, which the respondent has still not provided.

[37] The applicant argues that this situation is very similar to that in *Barbe* in that the facts occurred in the same office and with the same actors. In that case, the Board found that it would be unfair to penalize grievors who were not in any way responsible for delays. The applicant also relies on a recent decision, *Mercier v. Correctional Service of Canada*, 2023 FPSLREB 113, in which the Board also granted an extension to the time limit for a referral to adjudication, in the interest of fairness.

[38] The respondent notes that the delay in *Mercier* was much shorter, 2 months versus the 17 months in this case. In addition, the applicant in *Mercier* had been actively involved at all stages of the internal proceedings, unlike in this case, in which no written arguments were made or hearings held in the grievance process before the respondent.

IV. Analysis

A. The *Schenkman* criteria

[39] According to the respondent, in the absence of clear, cogent, and compelling reasons, it is not necessary to continue the analysis, as was concluded in *Bertrand v. Treasury Board*, 2011 PSLRB 92. In that case, the request for an extension was for filing a grievance, which was six months after the events that gave rise to it.

[40] In other decisions that the respondent cited, bargaining agent negligence was at issue and was found insufficient as a clear, cogent, and compelling reason (see, for example, *Callegaro v. Treasury Board (Correctional Service Canada)*, 2012 PSLRB 110).

[41] However, some jurisprudence suggests that a bargaining agent's error may in fact be a clear, cogent, and compelling reason (see *D'Alessandro 2019*, and *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144); it depends on the facts and the circumstances.

[42] The bargaining agent's admitted negligence is not a very satisfactory explanation; general inaction due to the pandemic, without more details, is not entirely convincing. The pandemic forced a surge in electronic rather than face-to-face communications, but it did not prevent cases and litigation from proceeding.

[43] Were this a bargaining agent grievance rather than an individual grievance, the absence of a satisfactory explanation would be fatal. However, on further analysis, some factors remain that lean in the applicant's favour.

[44] The delay is considerable, but given the case law, it is not insurmountable.

[45] There is no doubt that the grievance was filed as early as possible and that it was first pursued diligently. Given the respondent's delay responding, it is understandable that the applicant waited first. Given also that the bargaining agent handles grievances, the applicant could have expected the grievance to follow the necessary steps. If the bargaining agent's diligence is somewhat questionable, the applicant's is not.

[46] There is no doubt that denying the extension would cause greater prejudice to the applicant, since he would be deprived of recourse. Although the reference was late, the respondent was not taken by surprise. Apparently, it is still thinking about the final-level response.

[47] The respondent argues that the applicant can always have recourse against the bargaining agent. However, this remedy would not be consistent with the substance of the grievance, namely, a suspension without pay. The respondent gives the example of *D'Alessandro v. Public Service Alliance of Canada*, 2018 FPSLREB 90, in which the complainant made a complaint against his bargaining agent for not filing grievances. The complaint resulted in the bargaining agent filing grievances — with objections to the delay — and a Board decision (see *D'Alessandro 2019*, mentioned earlier) that granted the extension, as the complainant was not responsible for the delay. In that

case, the Board did not want to penalize the complainant for his bargaining agent's omission.

[48] Finally, the final criterion remains, which involves the merits of the grievance. I agree with the applicant that in the absence of the complete evidence, the Board cannot rule on this criterion. The grievance would have to absolutely not be an arguable case, which is not so.

[49] The respondent presented arguments to set out the grievance's weakness, but those arguments should be made when the grievance is heard on the merits.

B. Other criteria from the case law

[50] The sole issue in this case is the bargaining agent's inaction. In the same way as in *Barbe*, *Mercier*, and *D'Alessandro 2019*, I am strongly reluctant to deny the applicant his recourse, since he acted diligently to have the grievance filed and to provide his evidence and arguments. In my opinion, the concern for fairness must also prevail in this case.

[51] The respondent appears to criticize the applicant for his inaction, comparing his situation to that of *Mercier* and pointing out that there was no hearing in the grievance process before it. It seems to me that the inaction in this case is also the respondent's fault. Not holding a hearing and not responding to the grievance are two actions that it failed to take.

[52] I agree that the failure to make a reference to adjudication after the 40-day regulatory period passed was the bargaining agent's fault. However, it seems unfair to penalize the applicant for the general inaction with respect to his grievance.

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

(The Order appears on the next page)

V. Order

[54] The request for an extension of time is granted. The grievance in Board file no. 566-02-44041 will be placed on the Board's hearing schedule.

March 19, 2024.

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