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File: 166-34-35391

Citation: 2005 PSLRB 177



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

STANLEY BAHNIUK

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Bahniuk v. Canada Revenue Agency

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Harvey Newman, counsel

Heard at Calgary, Alberta,
July 26 and 27, 2005.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Stanley Bahniuk filed a grievance alleging a breach of the performance leave provision of the collective agreement between the Canada Customs and Revenue Agency (CCRA) and the Public Service Alliance of Canada (PSAC) in respect of the Program Delivery Administrative Services group (expiry date: October 31, 2003 (Exhibit G-1)). In particular, he alleges that he was the subject of discriminatory treatment in the application of the performance leave clause in his collective agreement (clause 54.03).

[2] Mr. Bahniuk received his performance appraisal on September 10, 2002. He filed his grievance on September 20, 2002 and received a final level response on October 22, 2004. The grievance was referred to adjudication on November 26, 2004. At the request of the grievor, the grievance was held in abeyance until April 2005, when it was scheduled for a hearing.

[3] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the “former Act”). Furthermore, it should be noted that effective December 12, 2005, the CCRA’s name changed to the Canada Revenue Agency (CRA).

[4] At the beginning of the hearing, counsel for the employer made submissions on the appropriate scope of evidence for the grievance. I made a ruling on the scope of evidence after hearing the submissions of the parties. Their submissions, and my ruling, are set out below. I have first set out the collective agreement provision in question and the allegations and corrective action requested in the grievance.

[5] The collective agreement provides as follows:

...

ARTICLE 54

LEAVE WITH OR WITHOUT PAY FOR OTHER REASONS

...

**

54.03 Management Performance Leave

(a) Subject to the conditions established in the Employer's CCRA Performance Guidelines for the Management/Gestion (MG) Group, employees who perform MG duties during the annual review period, shall be eligible to receive up to ten days (10) of management performance leave for people management based on the annual performance assessment.

. . .

[6] In his performance appraisal, Mr. Bahniuk received a rating of “does not meet” for one of the assessment elements. As a result, he did not meet the qualifying criteria for receiving performance leave (“Performance Pay and Leave Guidelines”, Exhibit E/G-1).

[7] In his grievance, Mr. Bahniuk alleged as follows:

The completed Employee Management Report given to me for the period 2001-04-01 to 2002-03-31 is unsupported and does not fully represent my performance. The negative comments are based upon by [sic] Mr. Peech's continued discriminatory actions. As a result of his discrimination and incompetent actions I have not been compensated fully according to Article 54.03 of the Master Agreement.

[8] As corrective action, he requests the following:

Mr. Peech is held accountable for his actions. I request that my Employee Management Report be completed in accordance with proper consideration for CCRA Performance Guidelines. I am compensated appropriately under article 54.03 of the Master Agreement.

Submissions on scope of evidence

For the employer

[9] Mr. Newman submitted that, according to his reading of the grievance, the grievor is seeking to have an adjudicator review his performance appraisal. Mr. Newman submitted that an adjudicator does not have jurisdiction to review performance appraisals. He referred me to the discussion of this principle set out in *Bratrud v. Office of the Superintendent of Financial Institutions*, 2004 PSSRB 10. There was no allegation of disciplinary action in the grievance and to raise it at adjudication would not be appropriate (*Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109).

[10] He submitted that the basis for eligibility for performance leave is compliance with the CCRA's "Performance Pay and Leave Guidelines" (Exhibit E/G-1). If the grievor can demonstrate that he met the criteria under the Guidelines and was denied eligibility, then an adjudicator would have jurisdiction. Other than this limited scope, Mr. Newman submitted that I did not have jurisdiction. To hold otherwise would be to review the performance appraisal and to substitute my opinion for that of management.

For the grievor

[11] Ms. Seaboyer submitted that an adjudicator can examine the process used in a performance appraisal and that failure to follow the process amounts to bad faith. She submitted that the appraisal process must be transparent and follow the guidelines. She submitted that an adjudicator has jurisdiction to look at the good faith of the employer. This grievance does refer to discriminatory treatment, which is an element of bad faith.

Reply

[12] Mr. Newman submitted that the grievance does not refer to bad faith. He also submitted that technical irregularities in the conduct of the review process were of no consequence.

Ruling on scope of evidence

[13] The Board case law is clear that an adjudicator does not have jurisdiction to review a performance appraisal as such (see *Ahad v. Treasury Board (Department of National Defence)*, PSSRB File Nos. 166-2-15840, 16038 and 16233 (1986) (QL)). The case law has mostly to do with allegations of disciplinary action, which is not alleged here. Nevertheless, the principles remain the same. I conclude that I do not have jurisdiction to review the grievor's performance appraisal, except to the extent described below.

[14] Clause 54.03 establishes "eligibility" for leave based on a performance assessment. In my view, this means that the scope of evidence can include an examination of whether the "conditions established in the ... Guidelines" were met, as Mr. Newman submitted, and also whether these Guidelines were applied in good faith.

This is a very limited scope; the grievor must demonstrate, in essence, that there was no basis for the rating of “does not meet” in his performance appraisal.

[15] The grievance does not refer to “bad faith”. However, it does refer to “discriminatory actions” and “discrimination”. In my view, this is sufficient to support an allegation of bad faith.

Evidence

[16] Mr. Bahniuk is a Team Leader, Revenue Collections, at the MG-3 group and level in the Revenue Collections Division of the Calgary Tax Services Office.

[17] The conditions established by the employer for eligibility for performance leave are set out in the “Performance Pay and Leave Guidelines” (Exhibit E/G-1):

6. Eligibility for Performance Pay or Leave

...

For a manager to be eligible for performance pay or leave, the following conditions must be met.

- a) The manager must have performed the duties of an MG position in a substantive, acting, or term capacity or an equivalent PE position.*
- b) The manager must have performed the MG duties for at least six consecutive months during the performance management review period.*
- c) The manager must have received a rating of “meets” or “exceeds” in his or her core business responsibility performance assessment.*
- d) The manager must have received a rating of “meets” or “exceeds” in his or her ongoing commitment performance assessment, and*
- e) Managers in represented positions must have a performance pay or performance leave clause in their collective agreement.*

...

[18] If an employee receives an “exceeds” rating, he or she is entitled to 10 days of leave. For a rating of “meets”, the entitlement is six days of leave.

[19] Mr. Bahniuk received his performance appraisal ("Employee Performance Management Report") on September 10, 2002 (Exhibit E/G-3). His performance appraisal was prepared by his supervisor, D.R. Peech. Mr. Bahniuk met all the criteria for performance leave except for the requirement to receive a "meets" or "exceeds" rating in his ongoing performance assessment. He received a "does not meet" rating in the ongoing performance assessment ("ongoing commitment for managers") portion of his appraisal (Exhibit E/G-3). The "does not meet" rating is defined as follows:

*Failed to meet one or more of the performance expectations;
improvement is required; needs special attention.*

[20] In support of the overall assessment for ongoing commitment, Mr. Peech noted the following (Exhibit E/G-3):

...

An area of concern is Stan's communication with Senior Management and at times with his peer group. Stan should afford his supervisor the opportunity to address his concerns before elevating them. The elevation of concerns should be in an appropriate forum and manner. At times, the exchange is accusatory and lacking in professionalism, respect and sensitivity. This type of behaviour can impact morale and erode management's authority. We are committed to work with Stan on this issue.

The environment within Stan's team is one of cooperativeness, respectfulness, and professionalism. Stan treats his subordinate staff with respect, integrity and professionalism fostering cooperation. He addresses the Core Values in meetings and conversations. The Core Values are not always demonstrated in dealing with peers and Senior Management. We will continue to work with Stan to strive for congruence between individual behaviour at work and organizational values.

Stan manages conflict within his team. He listens to differing points of view, looking for the individual's needs and potential solutions. In this way he promotes interest-based negotiations. However, Stan does not follow the same format in addressing his dissatisfaction with Senior Management. While his right, Stan often takes a rights-based approach and does not seek an interest-based approach, the direction being adopted and advocated by CCRA.

...

Stan, you are a very experienced team leader and possess a wealth of technical expertise. You handle the tasks within your team very well. You fall short in demonstrating model behaviour in your dealings with Senior Management, for your employees to emulate. The Calgary TSO endeavours to manage following the Agency's Core Values, the Standards of Ethics and Conduct, and the Manager's Charter. We are committed to work with you demonstrating our integrity and professionalism with the aim of assisting you to build respect and cooperation with management of the TSO.

[21] All team leaders in the division received a draft of a proposed performance agreement outlining performance expectations, on October 15, 2001 by e-mail from Mr. Peech (Exhibit G-2). In his e-mail message, Mr. Peech stated that each team leader would be asked to sign an agreement and requested that the team leaders review the document. At a team leader meeting on October 23, 2001, Mr. Peech said that he would be meeting with each team leader to discuss their individual learning plans and performance agreement (Exhibit G-3). Mr. Bahniuk testified that Mr. Peech never contacted him to discuss his learning plan or performance agreements. Mr. Peech testified that all the other team leaders approached him to discuss their performance agreements. Mr. Bahniuk testified that the draft performance agreement was a generic document.

[22] On December 20, 2001, Mr. Peech met with Mr. Bahniuk after two incidents involving a colleague of Mr. Bahniuk's, Launa McCann. On the previous day, Mr. Bahniuk had had a conversation with Ms. McCann about a file that had been taken from his team without the matter first being discussed with him. On the following day (December 20), he discussed with her the assignment of new employees. At the end of the conversation she was crying. Mr. Bahniuk testified that she was crying because she was pregnant and "hormonal". Mr. Bahniuk went immediately to Mr. Peech's office; when he arrived, Mr. Peech was on the telephone with Ms. McCann. Mr. Peech testified that he spoke to Mr. Bahniuk after he had finished his telephone call. He suggested that Mr. Bahniuk come back later to discuss the matter after he had calmed down. However, Mr. Bahniuk wanted to discuss a number of issues. Mr. Bahniuk asked why he was not considered for acting assignments when Mr. Peech was absent. He also asked that he receive Mr. Peech's comments in writing.

[23] When Mr. Bahniuk did not receive Mr. Peech's comments in writing, he submitted a grievance dated January 14, 2002 (Exhibit E-G-4) alleging that:

No performance expectations, learning plan or feedback have been provided to me since Don Peech has become my manager. He has not allowed me to act in any capacity for him. When I confronted him about this on December 20, 2001 he said, "You will never act for me". At that time, I asked him to put it in writing. To date I have not received anything. Don has purposely discriminated against me.

[24] As corrective action he requested:

I request that I be given opportunity, equal to other team leaders to act, contribute and perform my duties. I am also requesting proper timely direction. In addition I am requesting disciplinary measures against Don Peech that should involve a suspension without pay.

[25] Mr. Peech wrote a memorandum to Mr. Bahniuk on January 18, 2002, in response to the December 20, 2001 meeting (Exhibit G-4) indicating as follows:

... The conversation on December 20 was in relation to issues surrounding the lack of professionalism as well as teamwork and co-operation. There have been outbursts denouncing management rather than providing a constructive criticism. This was as recent as the last Divisional Meeting on September 27, 2001. This provides for a negative atmosphere and can have far reaching impact on morale and how positively employees perceive management.

It has been indicated by some of your peers that they are reluctant to work with you on projects. Feedback from other Managers is that at times you have been counter productive in that it appears that you are not looking at the common goal in committee meetings, i.e. Training Committee. Most recently, your conduct in confronting a colleague Team Leader was accusatory and certainly not professional nor sensitive to that individual.

CCRA Code of Ethics and Conduct is quite specific. It states that "conduct also involves thinking through the possible impact of your actions and decisions on all interested parties in terms of what is right or wrong or fair." Teamwork and cooperation relates to the ability to develop positive relationships and to work co-operatively in a partnership with team members, team leaders and management. It includes working together as a team, as opposed to working competitively or on a separate agenda. These items were covered in the draft expectations provided and forwarded to you on October 15, 2001, to which you did not respond.

Some improvement in these areas has been observed, however it is necessary that further and significant improvement be demonstrated and at that point in time, I will consider you for acting assignments. I am committed to work with you Stan and assist you in improving your skills. It is important to note that a continuation of this negative attitude and accusatory unprofessional outbursts may result in disciplinary action being taken.

Should you wish to dialogue or seek further clarification, I am prepared to meet with you.

[26] Mr. Peech testified that he had not brought his concerns about the September 17, 2001 meeting to Mr. Bahniuk's attention at the time, because he did not consider that matter particular important.

[27] Under cross-examination, Mr. Peech was also shown a note to file that he had prepared on November 21, 2001, with regard to a complaint made to him by a team leader about a comment Mr. Bahniuk had made to a training facilitator that training was better 15 years ago (Exhibit G-9). He had not brought this point to Mr. Bahniuk's attention.

[28] Mr. Bahniuk filed a grievance against Mr. Peech's memorandum on January 21, 2002 (Exhibit E/G-5), as follows:

The memorandum of January 18, 2002 is accusatory but does not provide concrete examples. Some of the references are dated; no feedback was given at the time, and is biased. In none of these examples has Don come to me for my side and objectively assessed the situation.

[29] As corrective action, Mr. Bahniuk requested that the memorandum be removed from his file and that his request for disciplinary action against Mr. Peech "is fulfilled". He also stated that the memorandum was evidence that Mr. Peech discriminates against him.

[30] In response to the grievance filed by Mr. Bahniuk against the failure of Mr. Peech to put his comments in writing, Reid Corrigan, Director, Calgary Tax Services Office, wrote as follows on February 11, 2002 (Exhibit E/G-4):

...

CONCLUSION

I will direct management in Revenue Collections to ensure that performance expectations be communicated to you on a more timely basis in the future. I will ask Mr. Peech to meet with you by month end to finalize your performance expectations. However, I would ask that where you have concerns about the content of such expectations, that your concerns be communicated to your manager on a timely basis. This is consistent with the principle that the performance management process is a shared responsibility.

...

[31] On February 20, 2002, Mr. Corrigan responded to the grievance against Mr. Peech's January 20, 2002 memorandum (Exhibit E/G-5). He stated:

...

With regards to the second issue, I am concerned with the relationship difficulties between yourself and Mr. Peech.

Further to previous conversations you and I have had, I wish to confirm my offer of support to both you and your manager in establishing a more effective working relationship. Prior to our next meeting, I encourage you to consider an offer of mediation where both parties will be assisted in communicating concerns and the communication process will be managed to ensure it is respectful and professional. I will also ask Mr. Peech to provide regular performance feedback so that concerns can be addressed as they arise. Feedback will be offered during regularly scheduled meetings with your manager and confirmed to you in writing. I will ask Mr. McCutchan to monitor the situation and keep me apprised of progress.

[32] Mr. Peech was on extended leave from the middle of February until April 1, 2002 and, as a result, he had no further discussions with Mr. Bahniuk about his performance.

[33] Mr. Bahniuk testified that during the performance appraisal period (2001 to 2002) he had disagreed with management's interpretation of a Court of Appeal case relating to bankruptcy and income tax debts owing (the decision in *Markovitz*). Mr. Peech testified that the approach to certifying debt was a direction from headquarters. In an e-mail message to a colleague (Exhibit G-14), Mr. Bahniuk disagreed with the approach and stated: "Do you not believe this is breaking the law

and are you proposing that we break the law.” Mr. Bahniuk felt that his position on the Markovitz decision was being used against him in his performance appraisal.

[34] Mr. Bahniuk testified that Mr. Peech never observed his work performance, and that he did not know how he came to any of the conclusions (positive or negative) in the performance appraisal.

[35] In the final level response to this grievance, the Assistant Commissioner, D.G.J. Tucker, acknowledged that the performance expectations and subsequent performance appraisal were not provided within the timeline specified in the Guidelines. He stated that this fact was regrettable, but that the issue to be addressed was whether the appraisal accurately reflected Mr. Bahniuk’s performance during the period in question.

Summary of the arguments

For the grievor

[36] Ms. Seaboyer submitted that the issue before me is whether the employer acted in an arbitrary or discriminatory manner or in bad faith, specifically with regard to the grievor’s performance appraisal, thereby denying him performance leave under clause 54.03 of the collective agreement. She argued that the performance appraisal provided to the grievor for the 2001-02 fiscal year was arbitrary, discriminatory and in bad faith. The performance expectations were delivered only in October 2001, six months into the appraisal period. These performance expectations were generic and not specific to the grievor, and were in draft form.

[37] Ms. Seaboyer noted that the “Employee Performance Management Guidelines” (Exhibit E/G-2) set out the process for ongoing feedback and dialogue. The onus rests on the supervisor to initiate that dialogue. Mr. Peech did not go out of his way to meet and discuss matters with the grievor. At a meeting on October 23, 2001, Mr. Peech made a commitment to meeting with the team leaders, but he did not meet that commitment.

[38] Mr. Seaboyer argued that documentation that the grievor was never made aware of was used to support his performance appraisal. An employee has the right to know about the information used, and an opportunity to respond must be provided. There is an obligation to have a transparent process that does not set up an employee for

failure. There was no ongoing dialogue and, as a result, Mr. Peech set the grievor up for failure. These are not the actions of someone acting in good faith. The reliance of Mr. Peech on the grievor's response to the *Markovitz* decision was not supported by any discussion with the grievor or any document.

[39] Ms. Seaboyer submitted that Mr. Peech was not comfortable with confrontation and found it easier to avoid anyone who challenged his authority. The bargaining agent did not dispute that the grievor challenged authority in a determined, dogmatic manner. However, he was the only employee with whom Mr. Peech did not meet to discuss expectations, and the grievor was the only employee to challenge Mr. Peech's authority aggressively. It was clear from the responses to other grievances (Exhibits E/G-4 and E/G-5) that management recognized that there was a difficult relationship; it was not happy with how the relationship was playing out, and believed more dialogue was necessary.

[40] Ms. Seaboyer submitted that some delay in providing expectations was accepted, but that the expectations should have been provided earlier. Missing a timeline does not in itself constitute bad faith, but in conjunction with everything else it shows a pattern.

[41] Ms. Seaboyer noted that the grievor was treated differently than Ms. McCann on December 20, 2001. The grievor was treated differently from other team leaders. He was not asked for his opinion and accounts were taken away from him without discussion. These are all examples of differential treatment and signs of bad faith and arbitrariness. Mr. Seaboyer also submitted that Mr. Peech drew a negative reference because of the grievor's filing of grievances. However, the filing of grievances does not result in the grievor not meeting the expectations for this "ongoing commitment assessment". Ms. Seaboyer submitted that the grievor received a "does not meet" rating because he was difficult to supervise and because Mr. Peech does not deal well with those who challenge his authority. The grievor is not afraid to speak up. He challenged the integrity of his manager and did not back down. The grievor felt that with regard to the decision in *Markovitz* the employer was asking him to do something illegal. He asked the same questions that were being asked by others. He continually challenged management and did not take management's views at face value. Management would prefer that the grievor "just go away" but he is not that kind of employee.

[42] The incident with Ms. McCann was unfortunate, Ms. Seaboyer submitted. All concerned could have handled it better. However, Mr. Peech has an obligation as a manager and should have handled the situation more openly. He listened to Ms. McCann but did not extend the same courtesy to the grievor. A manager who knows how to manage would have given the grievor time to calm down.

[43] Ms. Seaboyer submitted that there was no evidence that Mr. Peech discussed performance issues with the grievor. The January 18, 2002 letter (Exhibit E/G-4) was specifically requested by the grievor. The allegation in the letter that the other team leaders did not want to work with him is not supported by any documentation. The grievor testified that he had good working relationships with the other team leaders and he did acknowledge the incident with Ms. McCann. The failure to consult in a timely manner on performance issues constitutes bad faith, Ms. Seaboyer submitted. In addition, the failure to discuss performance issues is in bad faith and discriminatory.

[44] Ms. Seaboyer submitted that the criteria for performance leave impose an extremely high and very subjective test based on getting along with peers and supervisors. Meeting that test is difficult because the grievor challenges authority. Mr. Peech had an obligation to deal with the grievor in a transparent, unbiased and fair manner. She submitted that the evidence supports the grievor's claim that he was not treated in good faith.

[45] Ms. Seaboyer referred me to *Dhaliwal v. Treasury Board (Solicitor General Canada: Correctional Service)*, 2004 PSSRB 109. That decision dealt with a rejection on probation but the principles of good faith discussed in the decision are applicable here, she stated. She submitted that Mr. Peech showed a lack of diligence and also failed to assist the grievor in the performance of his duties. She also submitted that, as in *Dhaliwal (supra)*, the employer has violated its own policy and that this violation constitutes bad faith.

[46] Ms. Seaboyer requested as corrective action a declaration that the performance appraisal was done in bad faith. Given the passage of time and the difficulties involved in appraising the grievor's performance during the period in question, Ms. Seaboyer also requested an order giving a rating of "meets" in the performance appraisal and that the grievor be awarded the appropriate leave. She submitted that this corrective action was necessary so that the employer did not benefit from its own

wrongdoing and because a real remedy must be provided. She also requested that I remain seized of this matter.

For the employer

[47] Mr. Newman submitted that it was the employer's position that the grievor had been appropriately compensated pursuant to clause 54.03 of the collective agreement. This clause states that the conditions for receiving performance leave are set out in the Guidelines. He noted that the grievor did not meet one of the conditions, specifically the requirement to receive a "meets" or "exceeds" rating in the "ongoing commitments" portion to the performance appraisal.

[48] Mr. Newman submitted that the grievor was experienced and understood what was expected of him. The performance appraisal indicates that there was interaction with Mr. Peech. (The appraisal states that the grievor kept his manager informed.) The performance appraisal also indicates that the grievor appreciates the value of communicating with his own staff but fails to apply this value in communicating with his peers and managers.

[49] Mr. Newman argued that the evidence amply supports the concerns of management identified in the performance appraisal. When his own interests were involved, the grievor was difficult to deal with and was unwilling to have discussions with his manager and peers in a professional manner. The incident with Ms. McCann was a very disturbing matter. The grievor admitted that the discussion was heated. He caused her to cry but dismissed it as her own fault because she was pregnant and "hormonal". This demonstrates insensitivity on the grievor's part and thus was appropriately considered by management with respect to his communication. At the December 20, 2001 meeting, the grievor did not want to discuss the impact on Ms. McCann but was interested only in his concerns, such as acting opportunities. He never made any attempt to reconcile with Ms. McCann or apologize. This demonstrates his self-righteous attitude in dealing with events and with people.

[50] Mr. Newman submitted that no one was criticizing the grievor for filing grievances; that is his right. However, one would think that there were other ways to raise issues in the workplace prior to filing grievances.

[51] Mr. Newman submitted that there was evidence of the grievor's "accusatory" manner. There was ample evidence for Mr. Peech to come to this conclusion. The comments in the performance appraisal were not made in bad faith or in an arbitrary or capricious manner. There was no ulterior motive other than to make the grievor a better manager. There was no bad blood between Mr. Peech and the grievor.

[52] Mr. Newman referred me to the CCRA's "Code of Ethics" (Exhibit E-1) and submitted that the grievor had fallen short in the leadership role of managers.

[53] Mr. Newman submitted that the failure of Mr. Peech to raise his concerns about the September 27, 2001 meeting until December 2001 did not constitute bad faith. Managers are not obliged to collar employees for every inappropriate action, nor should that kind of action by managers be encouraged in the public service.

[54] Mr. Newman also submitted that the January 18, 2002 letter was sent well before the performance appraisal and sets out a number of performance-related matters. There was an honest attempt by Mr. Peech to deal with the issues. We are not here to judge Mr. Peech's supervisory skills; our test is only to see if he was dealing with the grievor in bad faith. Being oblivious to the reality of the situation or making things up would constitute bad faith, Mr. Newman submitted. This is not the case here.

[55] Mr. Newman submitted that Mr. Peech initiated dialogue, but it was the grievor who refused to discuss matters with him. The fact that the grievor was inflexible, self-righteous and accusatory does set up barriers. There was a reasonable amount of feedback and the opportunity for even more.

[56] Mr. Newman argued that the core appraisal shows that Mr. Peech's respect for the grievor's technical expertise and skills as a manager. Mr. Peech was not trying to set up the grievor for failure but was trying to help him improve and advance his career within the CCRA.

[57] Mr. Newman submitted that the decision in *Dhaliwal (supra)* was a specific decision based on a specific set of facts. He noted that in this case there were no guidelines similar to those referred to in *Dhaliwal*. In this case, the failure to meet all the requirements in the employer's Guidelines on appraisals (Exhibit E/G-2) had no bearing on the ultimate appraisal. In any event, there was substantial compliance with

the Guidelines. He also noted that the Treasury Board guidelines referred to in *Dhaliwal* were not applicable to the CCRA as a separate employer.

[58] Mr. Newman noted that according to *McMorrow v. Treasury Board (Veterans Affairs Canada)*, PSSRB File 166-2-23967 (1993) (QL) (cited in *Dhaliwal (supra)*), there is a presumption of good faith. He also referred me to the definition of bad faith from *Black's Law Dictionary* contained in *Dhaliwal*: "dishonesty of belief or purpose". Mr. Newman submitted that an ulterior motive and setting the grievor up for failure would constitute bad faith. Such is not the case here. Mr. Newman also noted that in *Dhaliwal*, there was no evidence that concerns were brought to the grievor's attention. In this case, the grievor knew what was expected of him and Mr. Peech tried to bring concerns to his attention at the December 20, 2001 meeting and in the January 18, 2002 memorandum (Exhibit G-4).

[59] Mr. Newman submitted that Mr. Peech had enough relevant facts to arrive at the conclusion that he did. The Guidelines set a very high standard of eligibility for performance leave and the grievor did not meet that high standard. Mr. Peech's conclusion in the performance appraisal was supportable on the evidence and Mr. Newman requested that I dismiss the grievance.

[60] In the alternative, if I should find that there was bad faith on the part of the employer, Mr. Newman submitted that the only appropriate remedy would be a declaration. He submitted that it was impossible to know what the rating would have been.

Reply

[61] Ms. Seaboyer submitted that, contrary to Mr. Newman's assertions, the grievor was disputing the entire basis for the performance appraisal and not just the negative parts. The grievor testified that he did not know how Mr. Peech came up with even the positive aspects of his appraisal.

[62] Ms. Seaboyer submitted that the grievor filed grievances only when he was not getting responses from his employer. His grievance in response to the January 18, 2002 letter was justified because that letter threatened disciplinary action. She submitted that the criticism of the grievor in the performance appraisal for

defending his rights amounted to punishing him for exercising his rights under the collective agreement and the legislation.

Reasons

[63] As noted above, I ruled at the hearing that the scope of my jurisdiction was a narrow one. My jurisdiction is limited to the collective agreement and does not extend to evaluating the performance appraisal itself. In my view, my jurisdiction is limited to determining if the employer acted in bad faith in denying Mr. Bahniuk performance management leave. Bad faith, in this context, would mean that the employer had no basis for its assessment of Mr. Bahniuk's performance. Whether Mr. Bahniuk deserved the rating he received is not a matter within my jurisdiction. The role of an adjudicator in cases such as these will always be an extremely limited one.

[64] Ms. Seaboyer suggested that the criticism of the grievor for filing grievances amounts to punishing him for exercising his rights, under both the collective agreement and the former *Act*. This line of argument takes us far from the original grievance. The proper avenue for raising such allegations would have been a complaint against the employer pursuant to section 23 of the former *Act*.

[65] In the context of a rejection on probation, the adjudicator in *McMorrow (supra)* defined bad faith as a decision that was "capricious and arbitrary, without regard to the facts". In order to find bad faith in the withholding of an entitlement in the collective agreement, Mr. Bahniuk therefore needs to show that there was no basis for the rating of "does not meet" in his performance appraisal. The evidence shows that there was a basis for this rating. His manager demonstrated concerns about his performance. The evidence showed that there were events and behaviour that caused those concerns. It is not my role to determine whether I agree with the rating given. In my view, the performance rating was based on legitimate observations by management and therefore "with regard to the facts". There was no evidence to support that the decision was capricious or arbitrary. I therefore conclude that the appraisal was made in good faith.

[66] As noted in the final level grievance response, the fact that the timeline of the appraisal process was missed was regrettable. However, in these circumstances, the failure to meet procedural requirements does not constitute bad faith.

[67] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[68] The grievance is dismissed.

December 20, 2005.

**Ian R. Mackenzie,
adjudicator**