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*Public Service  
Staff Relations Act  
and Public Service  
Labour Relations Act*

Before an adjudicator  
and  
Before the Public Service  
Labour Relations Board

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BETWEEN

**MOHAMMAD ASLAM CHAUDHRY**

Grievor/Complainant

and

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

Employer/Respondent

Indexed as

*Chaudhry v. Treasury Board (Correctional Service of Canada)*

In the matter of a grievance referred to adjudication pursuant to section 92 and a complaint made under section 23 of the *Public Service Staff Relations Act*.

**REASONS FOR DECISION**

***Before:*** Ian Mackenzie, adjudicator and Vice-Chairperson

***For the Grievor/Complainant:*** Daniel Fisher, Public Service Alliance of Canada

***For the Employer/Respondent:*** Renée Roy, counsel

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Heard at Kingston, Ontario,  
June 6 to 8, 2005.

## REASONS FOR DECISION

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### Grievance referred to adjudication and complaint

[1] Mohammed Aslam Chaudhry was an Administrative Services Assistant with the Correctional Service of Canada (CSC) in the Central Registry at Millhaven Institution. He was rejected on probation on February 6, 2004, and given one-month's notice, thereby ceasing to be an employee as of March 7, 2004. He filed a grievance against his rejection on probation on February 11, 2004 (Exhibit G-3). Mr. Chaudhry and his bargaining agent, the Public Service Alliance of Canada (PSAC), also filed a complaint under section 23 of the *Public Service Staff Relations Act (PSSRA)* alleging that his supervisor, Susan Sly, had threatened the loss of his job if he proceeded to file a grievance. The complaint was filed with the Public Service Staff Relations Board (the "Board") on June 16, 2004. Mr. Chaudhry was subject to the Program and Administrative Services group collective agreement between the Treasury Board and the PSAC, with an expiry date of June 20, 2003 (Exhibit G-1).

[2] By letter dated September 3, 2004, the employer objected to the jurisdiction of an adjudicator to hear the grievance on the rejection on probation. The bargaining agent, on behalf of the grievor, argued that the rejection on probation was disguised discipline. The Board advised the parties on September 20, 2004, that the matter of jurisdiction should be raised at the commencement of the hearing. With regard to the grievance, this decision relates solely to the matter of jurisdiction.

[3] On April 1, 2005, the *Public Service Labour Relations Act (PSLRA)*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (*PSMA*), was proclaimed in force. Pursuant to section 61 of the *PSMA*, I continue to be seized with this reference to adjudication. Pursuant to section 39 of the *PSMA*, the Board continues to be seized with this complaint. The grievance must be dealt with in accordance with the provisions of the *PSSRA*, R.S.C., 1985, c. P-35 (the "former Act"). The employer made submissions on which Act should apply to the complaint and I have addressed this issue in the reasons.

### Summary of the evidence

[4] Mr. Chaudhry commenced employment in the public service on February 17, 2003, at the Bath Institution, as an Administrative Services Assistant, at the CR-03 group and level (Exhibit E-1). On June 16, 2003, he was appointed to an indeterminate position at Millhaven Institution in Central Registry. At Millhaven

Institution, he started out in the position of Transfer Clerk, and was assigned to a new position as Input and Releases Clerk in October 2003. His letter of offer for the term appointment (Exhibit E-1) noted that the probationary period for all employees appointed from outside the public service was 12 months. The letter of offer for the indeterminate position (Exhibit E-2) stated that he would be required to complete his present probationary period, as stated in the initial letter of offer. Consequently, Mr. Chaudhry's probationary period was scheduled to end on February 16, 2004.

[5] The Warden of Millhaven Institution, Jim Marshall, issued a memorandum rejecting him on probation on February 6, 2004 (Exhibit G-2). Mr. Marshall had the delegated authority to reject on probation (Exhibit E-17). The letter sets out the basis for the rejection on probation as follows:

[...]

*I have reviewed your recent performance evaluation authored by Susan Sly Acting Chief Administrative Services. This information has been shared with you previously. This documentation reflects your job performance is unacceptable. Efforts to assist you in meeting acceptable performance standards have not been successful. I note also that you have been awarded discipline within this period for unacceptable conduct while employed at Bath Institution.*

[...]

[6] Susan Sly, A/Chief of Administrative Services, was Mr. Chaudhry's supervisor at Millhaven Institution. She made the recommendation to reject Mr. Chaudhry on probation; her supervisor, the Assistant Warden, Management Services (AWMS), John Stevenson, supported this recommendation.

[7] Mr. Stevenson testified that Ms. Sly had discussed with him issues around Mr. Chaudhry's work performance on a number of occasions. He testified that she first discussed performance-related issues within two or three months of Mr. Chaudhry's arrival at Millhaven Institution. He testified that there were two interrelated categories of issues that she raised: one was in following procedures, and the other was in relationships and interactions with staff.

[8] Ms. Sly testified that her recommendation to reject on probation was made primarily because of Mr. Chaudhry's inability to perform the duties of the Input and Releases Clerk position and secondarily, because of his working relationships.

[9] The discipline referred to in the rejection on probation memorandum occurred at Bath Institution. Ms. Sly testified that although she was aware that discipline was imposed, she was not aware of the events at Bath Institution and the discipline did not form part of her recommendation to reject Mr. Chaudhry on probation.

[10] Mr. Stevenson testified that he was aware of the discipline at Bath Institution, as he had imposed the discipline after Mr. Chaudhry arrived at Millhaven Institution. The discipline was a letter of reprimand. He testified that it did not form part of his consideration in supporting the recommendation to reject on probation.

[11] The Warden, Jim Marshall, also testified that he did not consider this discipline in accepting the recommendation. He requested that Human Resources prepare the memorandum. He did not ask that the sentence referring to the discipline at Bath Institution be included in the letter, and he did not know why it was put in.

[12] Mr. Chaudhry came to Canada in 1987. He received post-secondary education in Pakistan. When he first arrived in Canada, he took computer science and business courses. He successfully applied for and was put on the Public Service Commission's inventory and was referred to a job at the CSC. He rented a room in Kingston and commuted to his home and family in Toronto on weekends.

[13] At Bath Institution, his duties included filing, giving files to people, sorting the mail, answering the telephone and computer input. He testified that no work performance deficiencies were brought to his attention while at Bath Institution.

[14] Mr. Chaudhry received training in records management in February 2003, as well as a course on the "Offender Management System" in March 2003. He received his CSC orientation training in November 2003 (Exhibit E-8).

[15] When he arrived at Millhaven Institution, Mr. Chaudhry was assigned to the Transfer Desk. His job description was a generic job description that applied to all the clerk positions in Central Registry at Millhaven Institution (Exhibit E-7). He was trained by RosaLee Mohan, an Administrative Services Clerk. Ms. Mohan prepared a desktop procedure for Mr. Chaudhry that covered the duties of the position (Exhibit E-9). Ms. Sly testified that she arranged for one week of on-the-job training for Mr. Chaudhry; most new employees received only two or three days of training. She testified that at the time, she understood that there had been difficulties at Bath

Institution and she wanted to ensure that the difficulties were not related to proper training.

[16] The Transfer Desk job involved transferring inmate files as the inmates left Millhaven Institution to go to other institutions. Each inmate generally has seven files, such as a case management file, a health care file, and an admission and departure file. Millhaven Institution is a reception area for Ontario, as well as being a maximum-security prison. Inmates come to Millhaven Institution to be assessed prior to being sent to other institutions across the country. Parole officers gather information and make an assessment of each inmate and that information goes to the Transfer Desk at Central Registry; the information is then put on the appropriate file. The assessments are often done on a tight timeframe, as inmates are often transferred the next morning.

[17] Ms. Sly testified that she realized that in the beginning the job had a steep learning curve. She expected accuracy and speed to pick up within the first three weeks. She described the job as high-pressure. The files have to be accurate and there are expensive transfer teams who need to have the documents ready so that they can transfer inmates quickly. She thought that the Transfer Desk job might have been too stressful for Mr. Chaudhry. She recognized that not everyone was suited to the high pressure of the position. She also testified that although there was a willingness on the part of his co-workers to help, they felt that he was asking the same questions too often and there was a level of frustration on their part. She also testified that Mr. Chaudhry was having trouble keeping up with the work.

[18] In cross-examination, Ms. Sly testified that she did not attribute the difficulties in the Transfer Desk position totally to Mr. Chaudhry, and that she did not automatically assume that he was to blame for his performance in that position. She therefore arranged for a rotation of assignments and advised the staff at a meeting on September 9, 2003, that job rotation was to begin on October 6, 2003 (Exhibit E-11).

[19] Mr. Chaudhry testified that Ms. Sly explained the rotation to all the staff as an opportunity for everyone to learn everyone else's job. He was not advised that the rotation was specifically intended to transfer him to another position. Ms. Sly confirmed that she did not advise Mr. Chaudhry or the other employees of the real reasons for the rotation.

[20] Mr. Chaudhry testified that the Transfer Desk position was the “most convenient” job to do and that he had plenty of time to spare to assist others in Central Registry. He stated that he had plenty of time to do more than his share of additional filing. He testified that he received adequate training and resources in that position. He also testified that there was “not one instance” when he fell behind when he was in that position. He noted that his relations with his co-workers were good and that they were all speaking to each other. In his testimony, he stated that he felt that Ms. Sly was mixing up the time before October with the period after October.

[21] Mr. Chaudhry was put into the Input and Releases Clerk position at the beginning of October 2003. The duties of the position involved the preparing of “newcomer” files. He was provided with on-the-job training by a co-worker, Karen Douglas. Ms. Sly testified that, initially, the training did not go well; Mr. Chaudhry was confrontational. She was not in the office at the time, but she testified that the confrontation was mediated by the Deputy Warden and the AWMS, John Stevenson.

[22] Ms. Sly testified that Mr. Chaudhry had not cleared all his files at the Transfer Desk prior to taking on his new position. She asked him by e-mail if he had had an opportunity to clear the files (Exhibit E-11) and he responded the next day stating that he had. He testified that he did not dispute that there were some files left to complete, but stated that he was changing jobs and there was nothing wrong with having some files left.

[23] Ms. Sly testified that in his new position, Mr. Chaudhry initially fell behind in his work in the first few weeks, which Ms. Sly stated was understandable. Mr. Chaudhry testified that he had told her that when he started in the position, the work for that desk was three weeks behind. She then noticed that Mr. Chaudhry was staying after 4:30 p.m. on numerous occasions and that caused her some concern, as in her view the job did not dictate those kinds of hours. She expressed her dismay and told him that she did not have the ability to pay him overtime. She testified that he told her he did not want to be paid for his overtime. She also testified that she initially let the overtime continue because she thought that he would get more efficient as time on the job progressed. Eventually, she forbade him to work overtime and she testified that he fell behind in his work significantly. Ms. Sly testified that falling behind in the opening of newcomer files had an impact across the Institution. Without the legal portfolio to

put the information in, documents were floating around until the file was established. She testified that she received oral complaints from other departments within the Institution but she asked them to “give him a chance”. However, sometime around December, Ms. Sly testified that a Department Head at Millhaven advised her that he no longer wanted the liability of the unopened files and wanted something done immediately.

[24] In cross-examination, Ms. Sly was asked if she ever drew Mr. Chaudhry’s attention to problems with his work in October or November of 2003. She testified that she had conversations with Mr. Chaudhry and the need to work cohesively with his co-workers.

[25] Mr. Chaudhry testified that in his position as Input and Releases Clerk, he was expected to perform duties that belonged to the Admissions Clerk position. He testified that Ms. Sly seemed incapable of telling the person in that position to do her job. Mr. Chaudhry stated that all of the duties he was expected to perform were never intended to be one job.

[26] On October 7, 2003, co-workers noticed that in Mr. Chaudhry’s shred box there were files that could be reused. When the files were removed it was discovered that there were files that should not have been in there. Mr. Chaudhry was also advised that he was to write his full name legibly on all transmittal notes. He testified that after this was raised by his co-workers, he changed his practice.

[27] On October 8, 2003, Ms. Sly advised Mr. Chaudhry that he had left his computer terminal on after leaving for the day (Exhibit E-11). She advised him that it was important to ensure that he signed off the network and turned off his computer every day. Mr. Chaudhry testified that he had left his computer on more than once and that he had tried to convince his colleagues that leaving the computer on was better for the hard drive than turning it off every evening. He testified that after his supervisor raised this issue, he started to turn his computer off at the end of the day.

[28] On October 22, 2003, Maria Stebelsky, a regional mediator with the CSC, conducted meetings with the staff at Central Registry in an attempt to resolve ongoing conflicts, including a one-on-one meeting with Mr. Chaudhry. Ms. Sly had contacted her to arrange for the meetings.

[29] Mr. Chaudhry requested assistance with his backlog. In an e-mail to two of his co-workers on October 23, 2003 (Exhibit E-11), Ms. Sly asked them if they could help him out. One of his co-workers, Anne Riggs, replied that she was too busy to help out. Mr. Chaudhry testified that it was not uncommon to be inundated with newcomer files to be opened, as some days there would be none and other days there might be over 20. He testified that on that day, there were too many files. He also testified that this was not his work but was work that belonged to the Admissions Clerk.

[30] Ms. Sly testified that clerks who were away from the office, except for the Transfer Clerk, were expected to catch up on their own work when they returned and could generally do so within two to three days. When Mr. Chaudhry went for his two weeks of orientation training in November, Ms. Douglas took over his duties because two weeks was too long for the position to be empty. When she stepped in, Mr. Chaudhry was behind in creating 28 newcomer files. Mr. Chaudhry testified that this was true and that it was expected that this desk would be four or five days behind.

[31] Ms. Douglas advised Mr. Chaudhry on October 28, 2003 by e-mail (Exhibit E-11) that he was not putting the “Warrant Expiry Dates” (WED) on the files. In her e-mail, Ms. Douglas stated:

*... In no way was I criticizing you or trying to put pressure on you, I was just trying to help/remind you of this particular step as sometimes things can get forgotten. As you are aware, I was in that position from April until you took over in October of this year, and I realize how busy it can be at times.*

[...]

[32] Mr. Chaudhry said that he was against putting these dates on the files since it was giving him extra work. He testified that these files were coming from other institutions and the WED should have been put on the files at those institutions.

[33] Mr. Chaudhry contacted the president of the union local, Julia Westfall, on October 27, 2003 (Exhibit G-7), complaining of “extensive pressure” from his co-workers. He testified that during that week, Ms. Sly was away and that the Admissions Clerk “unofficially” took on a more controlling role in the workplace because of her seniority and influence. Mr. Chaudhry testified that he had raised concerns about the Admissions Clerk job and the occupant of the position felt that those comments were



made against her. She made his life very difficult and showed her resentment. He testified that this difficult period only lasted a few days, however, and that things were patched up between them.

[34] On October 28, 2003, Mr. Chaudhry had a meeting with Mr. Stevenson (Exhibit E-11). Ms. Douglas was still training Mr. Chaudhry and he expressed concern that she kept telling him to do certain things a certain way. Mr. Chaudhry testified that he told Mr. Stevenson that if he did things her way and it was wrong, it would be her responsibility. He stated, as well, that Mr. Stevenson agreed to this.

[35] Ms. Sly sent an e-mail to Mr. Chaudhry on December 5, 2003 (Exhibit G-8), stating that she recognized that he was “a very conscientious worker”, as shown by his staying late in order to get caught up on his work. She also stated that she was not able to compensate him with overtime. She did allow him to leave early on that day (a Friday) to get a head start on his return to Toronto. Mr. Chaudhry testified that it was not possible to do his work in addition to the front desk duties and the Admissions Clerk duties without staying late.

[36] On December 16, 2003, Ms. Sly noted that Mr. Chaudhry was six days behind in international transfer files (Exhibit E-11). Over the Christmas holidays, one of his co-workers, Ruth Cordukes, caught up on the opening of newcomer files and made up 24 newcomer files (Exhibit E-11).

[37] Mr. Chaudhry testified that Ms. Sly led him to believe that she was going to help him with his workload concerns and with concerns about the duties of his position and she said that there would be an assessment of the workload after the Christmas break.

[38] Millhaven Institution also has a role as a regional depot for inmate files. Ms. Sly testified that the depot had an unfilled half-time position. When staff had time, they would help the individual in the depot and once every month, everyone would go over and take a box for filing. She testified that this had no impact on Mr. Chaudhry's workload because if someone was not caught up in his or her work, the person was not expected to go help out at the depot. There was also a full-time position vacant in the Administrative Services area. These duties were simply performed as time allowed, and it was not as high a priority as other filing. Again, Ms. Sly testified that this did not have an impact on Mr. Chaudhry, as employees were not expected to help if they were behind in their work.

[39] Ms. Sly testified that Mr. Chaudhry was involved with appeals and grievances early in January and was having telephone conversations at work. Mr. Chaudhry testified that he had a staffing appeal and that the Public Service Commission had called him to discuss the case at work. His co-workers expressed concerns about these “disruptive” telephone calls (Exhibit E-11). He denied that he was loud and aggressive on the telephone. He stated that Ms. Sly told him that he should take any further calls in her office and he agreed to do so.

[40] On January 8, 2004, Mr. Chaudhry contacted his union local president, Julia Westfall, for assistance in the issue related to the distribution of work (Exhibit G-9) after he realized that Ms. Sly was not going to be doing anything about the workload situation and the vacant positions. He testified that he tried to get from Human Resources and from Ms. Sly what his job title was and what duties were allocated to that title. He felt that Ms. Sly had misled him and that it was never her intention to review the workload.

[41] On January 8, 2004 (Exhibit E-11), Ms. Sly raised the subject of making manila file folders for the shelves with Mr. Chaudhry; these file folders acted as dividers between each set of inmate files. She followed up with an e-mail on January 13, 2004, asking for the status of the manila file folders. Ms. Sly testified that he could have created the folders and placed them on the shelves in about two or three hours. Mr. Chaudhry responded to her by e-mail and copied two union representatives, John Nugent and Ms. Westfall (Exhibit E-11). He explained that he was making the folders as he discovered files without a folder. He said that she could direct him to do the folders and leave everything else and he would do so. He also said, “Practically all the file movement within the Institution is my responsibility”. He also stated that he was working as Release Clerk, Computer Input Clerk, Front Desk Clerk, and Admissions Clerk.

[42] As a result of his e-mail of January 13, 2004, Ms. Sly requested that Mr. Chaudhry attend an “informal counselling session to discuss work-related issues” on January 20, 2004 (Exhibit G-10). Ms. Sly testified that she called the meeting because the e-mail was directed to union representatives and because Mr. Chaudhry appeared to want her to direct him on a minute-by-minute basis. Mr. Stevenson, Ms. Sly, Mr. Chaudhry and his union representative, John Nugent, were in attendance. Ms. Sly testified that at the meeting, Mr. Chaudhry was told that he needed to pick up

the pace and that being behind in his work was unacceptable. She testified that Mr. Chaudhry brought up the vacant positions and that if these positions were filled, there would be more help to do his job. Ms. Sly testified that she pointed out that these vacant positions had nothing to do with his position.

[43] Mr. Nugent drafted notes of the meeting within two or three weeks of the meeting (Exhibit G-6). His notes reflect that, at the meeting, Mr. Chaudhry raised concerns about his workload. Mr. Nugent testified that an incident involving a colleague of Mr. Chaudhry's, RosaLee Mohan, was raised at the end of the meeting. In his view, it was almost "an afterthought". Mr. Nugent also testified that it was not suggested at the meeting that Mr. Chaudhry's job performance was inadequate, nor was it suggested that his job was at risk. Ms. Sly testified that the meeting ended with an understanding that in future he would bring his work difficulties directly to her.

[44] Mr. Chaudhry sent an e-mail to Mr. Nugent after the meeting (Exhibit G-11) that summarized his understanding of the meeting. It was his understanding that making files for new admissions would become the responsibility of the Admissions Clerk. He testified that Mr. Stevenson was not aware that he was performing the duties of the Admissions Clerk position. Mr. Chaudhry testified that Mr. Stevenson had said that he had raised some valid points and suggested that his supervisor (Ms. Sly) would look into it.

[45] On January 15, 2004, the Chief of Sentence Management at Matsqui Institution was asking for the file of an inmate who had been released on September 29, 2003 (Exhibit E-11). Ms. Sly testified that it was basic that the file should have been sent to the new institution. On January 23, 2004, there was another request for the file of an inmate who had been transferred from Kingston Penitentiary Temporary Detention to Collins Bay Institution on January 6, 2003. Ms. Sly testified that normally these files would be forwarded within two to three days. The significance of not sending the files promptly would be that the new institution might not have critical health or psychological assessment information about the inmate. This might have ramifications for the CSC if there was a problem. Mr. Chaudhry testified that he was late in sending out the files and that there was no good reason for it. He admitted that he missed something, but stated that things like that happened.

[46] On January 23, 2004, there was confusion about missing inmate files. It appeared from the sign-out sheet for the files that there were 12 files when, in fact, there were only eight. Ms. Sly testified that the missing files necessitated a major search of the file room until Mr. Chaudhry's error was discovered. Mr. Chaudhry testified that officially it was his duty to record the number of files taken out of the file room; however, it was common for parole officers to sign the cards themselves if Mr. Chaudhry was not in the room at the time.

[47] Ms. Sly testified that the Supervisor of Visits and Correspondence, Mike Mitchell, contacted her a number of times to ask about the status of newcomer files. In January, he sent her an e-mail. She got a list from Mr. Mitchell and asked Mr. Chaudhry about the files for inmates who had arrived on January 14 and 19, 2004 (Exhibit E-11). Mr. Chaudhry responded to her e-mail and recognized that he was behind in his files. He stated that the work should be with the Admissions Clerk. Ms. Sly testified that the job of admissions was with the Input and Releases Clerk and not with the person labelled as Admissions Clerk. She also testified that this had been explained to Mr. Chaudhry.

[48] In cross-examination, Mr. Chaudhry was asked if Ms. Sly consistently represented to him that she felt that the newcomer files were part of his job. He replied that, "in a way she did". The Desk Manual for the Input and Releases Clerk (Exhibit E-10) states that the position has responsibilities for new admissions.

[49] On January 26, 2004, Ms. Sly sent an e-mail to Mr. Chaudhry seeking information on the status of files. He responded to Ms. Sly and copied Mr. Stevenson and his union representatives. Ms. Sly approached Mr. Stevenson seeking his guidance, as she felt that she had no more resources to offer to assist Mr. Chaudhry. Mr. Stevenson suggested that a mid-term "Performance Evaluation Report" (PER) be prepared outlining the problems with Mr. Chaudhry's performance that he felt had already been raised with Mr. Chaudhry. Mr. Stevenson testified that "it became clear that we had a duty to now make it crystal clear" that all efforts to help Mr. Chaudhry were not having the desired effect. He said that the purpose of the PER was to do a performance synopsis "to paint as clear a picture of unresolved problems" as possible. At that point, he and Ms. Sly were under the mistaken impression that Mr. Chaudhry's probationary period was for a full year from the date that he started at Millhaven Institution (i.e., June 16, 2004) and not from the commencement of his term

employment with the CSC. As a result, both of them were under the mistaken impression that they had until June 16, 2004, to address his performance issues. Mr. Stevenson testified that they both felt that it was premature to reject Mr. Chaudhry on probation before giving him the full period of time to prove himself. Once they learned that they had less time, they decided to go ahead and reject Mr. Chaudhry on probation.

[50] With the assistance of his union representative, Julia Westfall, Mr. Chaudhry prepared a draft grievance dated January 29, 2004 (Exhibit G-14):

*DETAILS OF GRIEVANCE*

*I grieve that I am required to work at 2 full time jobs and sometimes required to do 3 jobs, while a coworker is only required to work at 1 full time job. I grieve that this practice is discriminatory because I am a newer employee and I also grieve that this will impact on my health and safety if I am required to continue to do more than one full time job,*

*CORRECTIVE ACTION REQUESTED*

*I request that I be required to only do one full time job and the Institution hire the necessary staff in order to fill the vacant positions that I am now required to fill.*

[51] Mr. Chaudhry testified that he printed out the draft grievance and it was left on the printer for a short while. It was his sense that Ms. Sly had been informed of the grievance. Ms. Sly, however, denied that she was aware that he was intending to file a grievance.

[52] Ms. Sly met with Mr. Chaudhry during the afternoon of January 29, 2004. She testified that she asked him to think, over the weekend, what else she could do to assist him in his performance. She testified that Mr. Chaudhry told her that his workload was “incredible”. Ms. Sly testified that she thought she had provided him with a graph that compared workloads over a few years (Exhibit E-14) and showed that there was virtually the same number of files as in the previous year. She also showed him the Administrative Services Assistant performance objectives (Exhibit E-13) and told him that the duties of that position had not changed. Mr. Chaudhry testified that he did not recall seeing this document. In an e-mail to his union representative, Ms. Westfall, that he sent the following day, he summarized the meeting as follows (Exhibit G-13):

[...]

*I was called upon by my Supervisor on 29<sup>th</sup> Jan 04 at around 3:30 PM. I went to see the supervisor at about 3:40 PM. The supervisor wanted to discuss about my e-Mail that I had sent to her (Mon 2004-01-26 3:23 PM). She had made it very clear to me that, "Aslam, I hope, you know that you are still under probation. I have to write your evaluation report. I shall have to see that you are able to perform the job assigned to you on a timely manner." Your evaluation Report is very important for you as this is going to HAUNT you, later on.*

*"You have to finish all the jobs assigned to your Desk". All these jobs that you are mentioning are the jobs which people before you have performed when they were on this desk.*

*We had discussed much more about the importance of the Evaluation of Performance report. I was told repeatedly, that I must do all these jobs as these are the jobs for this DESK. I did try to see difference between DESK and ONE PERSON'S job. I did not succeed to get a clear answer for that.*

*I was scared so I postponed hearing in the Grievance to the management. I want to know from you, what consequences may result and what are only empty threats. The threats seemed to be logically true. I am scared and still determined to do some thing about it. This is very stressfull [sic] situation.*

[...]

[53] At this meeting, Mr. Chaudhry testified that Ms. Sly did not use the word "grievance", as alleged in his complaint. She said, "I know what you are going to do and who is misleading you". She said that if he pursued the workload issue, she would have to write a PER and that it would "haunt him". He testified that she did refer to a "grievance" on February 4, 2004. At the February 4, 2004 meeting, Mr. Chaudhry testified that Ms. Sly told him that if he did not agree to do his job, she would have to write a PER. He told her that he agreed that all the duties were his. She then asked him if he was going to file the grievance and he replied that he would hold on to it and pursue it after he completed his probationary period. Ms. Sly denied that she in any way discouraged him from filing a grievance.

[54] Mr. Chaudhry then testified that Ms. Sly sent a notice of an acting assignment to him after he told her that he had not applied for it. Mr. Chaudhry testified that "God wanted him to stay" and that it would be "immoral to leave a place where things are

wrong". He testified that he would not let the person who came after him suffer as he did.

[55] Ms. Sly testified that she directed Ms. Mohan to help Mr. Chaudhry get caught up in his files. On January 30, 2004, Ms. Mohan e-mailed Ms. Sly to tell her that Mr. Chaudhry had not prepared enough labels for her to open the files. In a memorandum Ms. Mohan prepared on February 2, 2004 (Exhibit E-11), she indicated that she had completed 84 files in addition to her regular duties.

[56] Ms. Sly prepared a PER and forwarded it to Mr. Marshall on February 6, 2004 (Exhibit E-16). In the cover memorandum to Mr. Marshall (Exhibit E-15), she stated: "Every effort has been made in order to facilitate successful integration into our records area and Millhaven as a whole". She then recommended that, based on "the failed performance of duties", Mr. Chaudhry be rejected on probation on or before February 16, 2004. On the same day, Mr. Marshall accepted the recommendation and asked that a letter be prepared.

[57] Mr. Chaudhry was provided with the PER at the same time that he received the rejection on probation memorandum at a meeting with Ms. Sly and Mr. Stevenson on February 6, 2004. The summary section of the PER ("Plan of Action") (Exhibit E-16) reads as follows:

*Mr. Chaudhry has been provided with counseling sessions which have individually involved the A/CAS and the AWMS and also joint counseling among those parties. Mr. Chaudhry has also been provided access, and on several occasions that I am aware of has utilized, the assistance of Union representation in order to provide him with a clear understanding of his role as a public servant. Further working in a team environment Mr. Chaudhry was provided access to peers in central registry that have in excess of 20 years knowledge working specifically in this area. There was an understanding from the onset of his tenure that any records related query was appropriate to ask and an answer would be provided. Further Mr. Chaudhry was provided one on one discussion with our Regional Mediator Ms. Maria Stebelsky. Despite this significant intervention as noted above Mr. Chaudhry continues to have difficulties completing his work in a timely fashion in meeting deadlines and determining priorities. His work continues to be significantly behind and intervention must be provided by other staff members in order to ensure that we meet accepted standards and regulations. He clearly can not differentiate between*

*significant and insignificant aspects of the work assigned. Further his interactions with staff in Central Registry continue to be of a confrontational approach which does not promote a spirit of teamwork.*

[58] Mr. Chaudhry told Mr. Stevenson that he would not sign the PER until he had an opportunity to prepare a statement of reasons for disagreement. Mr. Chaudhry prepared his reasons for disagreement and provided his statement on February 14, 2004 (Exhibit G-15). Mr. Chaudhry's reasons for disagreement contained statements that he largely testified to in this hearing. He also made the following comments:

[...]

*I have never been told that my performance is less than my supervisor's expectations or official requirements. The meetings, which are now labeled as "COUNSELLING SESSIONS", were nothing but appreciations for my good work or some times a routine update about the status of a particular file, transfer, or release.*

*At least 10 + times verbally and 1 time through an e-mail I was praised and appreciated for my hard work, dedication and desire to help others.*

*According to my understanding of the situation, prior to the 20<sup>th</sup> of January my supervisor never had a reason to ask me for improvement in my performance and she never did. There were few occasions when my supervisors asked me about a particular work situation. She was always satisfied after I had explained that situation to her. There were only 3 or 4 of these situations in the last 7 months. Considering, that I was doing jobs for 4 positions, this was appreciable conduct and my supervisor did appreciate it many times.*

*My Supervisor could never see me lacking in efficiency because I was already working more than twice the normal workload for one person. I believe, the idea of rejection on probation was not all based on my performance or any of my abilities. Ms. Sly repeatedly praised my abilities in private as well as in the presence of others.*

[...]



*What could be the reason, which led my supervisor to fabricate this performance evaluation report? To the best of my knowledge: My Supervisor was convinced that I shall file a grievance with the management in very near future. She had tried to talk me out of it but when I told her that this is my religious obligation to try to stop this evil practice so that the person who comes to this desk after me shall not have to go through this much troubles and torture. I had also reminded her that whatever benefit you may have by running this office with 2 staff less than approved is not worth the hardships that you are causing to your staff on this desk.*

[...]

[59] Ms. Sly testified that she harboured no ill feelings towards Mr. Chaudhry, although as a supervisor, she became frustrated in dealing with his performance issues. She believed that he was working to the best of his abilities and gave the job his best effort, but that this was not sufficient to do the job.

[60] Mr. Chaudhry testified that Ms. Sly never indicated to him that he was getting behind in his files and never indicated to him that he was not competent.

### Summary of the arguments

#### For the employer/respondent

[61] Counsel for the employer/respondent submitted that I do not have jurisdiction to hear this matter. The evidence clearly demonstrates that this was a rejection on probation pursuant to section 28 of the *Public Service Employment Act (PSEA)*. There was a well-defined employment-related reason for the rejection on probation. The grievor has failed to show that the rejection was a sham, camouflage or made in bad faith. Rejection on probation is removed from jurisdiction by subsection 92(3) of the *PSSRA*.

[62] The onus for a rejection on probation is well established. Counsel referred me to *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429, and the test set out in *Jacmain v. Attorney General (Canada) et al.*, [1978] 2 S.C.R. 15. Counsel also referred me to *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529.

[63] In the case here, the employer has shown that it had employment-related reasons for the rejection on probation. Mr. Chaudhry was unable to keep up with the workload and efforts to assist him were fruitless. It is true that Mr. Chaudhry may well

have believed that these were not his duties and he may not have believed that he was falling behind in an unacceptable fashion. However, counsel submitted that he did not see the reality of the situation.

[64] The onus shifts to the grievor once the employer has established employment-related reasons for a rejection on probation. Counsel referred me to *Canada (Treasury Board) v. Rinaldi* (1977), 127 F.T.R. 60 and the Board's decisions in *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39, and *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33. The grievor has a very high threshold to meet. She noted that in *Owens (supra)*, the employer had already started down the path of discipline, yet the grievance was denied. The grievor has not shown that there was bad faith, a sham or camouflage. Ms. Sly was palpably credible; should she be faulted for initially giving him the benefit of the doubt? Her e-mails in November (especially the one dated November 17, 2003, Exhibit E-11) indicated her frustration and the need for Mr. Chaudhry to improve. Yes, matters did come to a head in January because Ms. Sly had come to realize that he was simply not able to perform his duties. This is not an indication of bad faith. Both Ms. Sly and Mr. Stevenson would have preferred to give him a "loud and clear" message. Failing the time to do so, they realized that he would not be able to perform satisfactorily. There was no ill will; every possible effort was made to help him succeed. Ms. Sly tried a rotation of positions, as well as asking and then demanding that others help him catch up with his work; she even offered to help him herself. Counsel said she did not think that many supervisors would have made such an offer. Mr. Chaudhry claims that the kindness Ms. Sly showed him was an indication that he was performing well. However, she was merely trying to give him positive reinforcement.

[65] Ms. Roy submitted that if Ms. Sly tried to tell him that these were his duties, one can only assume that in good faith she was setting out her expectations of him. Mr. Chaudhry chose to believe a number of things. He may wish to believe that he was rejected on probation because Ms. Sly somehow changed her mind about him. He resisted aspects of his training and felt that he was right and that his co-workers were not. He believed that tensions developed not because he was a burden to others, but because of Ms. Watt; he even implied that Ms. Sly was afraid of Ms. Watt. He also believed that he was the best employee and the most efficient. However, Mr. Chaudhry is mistaken in most, if not all, of these elements.

[66] Ms. Roy submitted that with regard to the section 23 complaint, the transitional provisions provide, by default, that the complaint should be considered pursuant to the *PSLRA*. The prohibition appears in subsection 186(2) and the complaint provision is section 190. In respect of the complaint, under either the old *Act* or the new one, she submitted that Ms. Sly's testimony is to be preferred to that of Mr. Chaudhry. Ms. Sly clearly testified that she never would have tried to discourage him from filing a grievance; she never said that anything would "haunt him". Her comments in the PER are not indicative of a contravention of the *PSSRA* or of the *PSLRA*.

[67] In terms of credibility, counsel for the employer referred me to *Faryna v. Chorny*, [1952] 2 D.L.R. 354. While Mr. Chaudhry holds his beliefs firmly, his testimony is not in harmony with the preponderance of probabilities.

[68] Under section 23 of the *PSSRA*, Mr. Chaudhry has to demonstrate that Ms. Sly sought to prevent the filing of a grievance. This is a serious allegation and not to be taken lightly (counsel referred me to *Dalphy v. Farber*, PSSRB File No. 161-2-690 (1993) (QL)). With regard to the complaint, Ms. Sly's testimony is far more credible. Ms. Roy submitted that the complaint should be dismissed.

#### For the grievor/complainant

[69] The grievor's representative submitted that the grievor has met the burden of proof in showing that his rejection on probation is related to discipline. The employer's conduct was in bad faith and arbitrary. Mr. Chaudhry was not put on notice that his livelihood was in jeopardy. He was only provided with this warning after the decision to reject him on probation had been made. It is Mr. Fisher's submission that due process had not been followed.

[70] Mr. Fisher submitted that there was no dispute over the test set out in the jurisprudence. He referred me to *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, which refers to the necessity of following the "building blocks" in coming to a decision to reject on probation. Mr. Chaudhry was given a false sense of security and was misled as to his performance. From June to October 2003, there were no references to his performance and no e-mails. During this long period of time, no concerns were expressed about his performance.

[71] Mr. Fisher referred me to *Dhaliwal (supra)*, which sets out the duty to act in good faith. Specifically, it sets out an obligation to advise of consequences. When did the employer tell Mr. Chaudhry what the consequences would be? The employer admitted that it was under the gun and as a result, it rushed to reject the grievor while on probation. Mr. Chaudhry was not provided with an opportunity to make adjustments because the opportunity came too late.

[72] Mr. Fisher also referred me to the conclusion in *Dhaliwal (supra)*, that there was “a lack of diligence by the employer that would have given the grievor an opportunity to discuss, defend or make the necessary adjustments to meet the requirements of his position”. Mr. Fisher stated that he took the same position in this case. He also referred me to the definition of good faith and fair dealing contained in that decision and the reference to being “misleading”. The January 20, 2004 meeting was misleading because there was nothing Mr. Chaudhry could have done to correct matters.

[73] Mr. Fisher noted that in an e-mail from Ms. Sly (Exhibit G-8) dated December 5, 2003, she refers to Mr. Chaudhry as a ‘very conscientious worker”. This looks like a compliment, praising his work. This e-mail is misleading. This goes to Ms. Sly’s credibility, as she sent this some eight weeks prior to the end of his status. In the October 8, 2003 e-mail (Exhibit E-11) she refers to “your friends in Records”. This was also misleading, given her testimony about the relationships in the office. In her e-mail of October 24, 2003 (Exhibit E-11), she refers to the fact that he was “inundated” with files. This confirms his testimony that he had been inundated and this could be regarded by him as a “thumbs-up”. The e-mail of October 28, 2003, from Ms. Douglas (Exhibit E-11) confirms that he maintained a harmonious relationship and raises issues about Ms. Sly’s testimony on this point. The testimony of Mr. Chaudhry was clear that any shortcomings were really just natural, understandable workplace performance issues that should not form the basis of a rejection on probation.

[74] Mr. Fisher suggested that the fact that it took half an hour for Ms. Sly and Mr. Stevenson to discuss the rejection shows that the employer had some hesitation in coming to this decision. Mr. Fisher submitted that there were credibility issues regarding who made the decision; each seemed to suggest that the other made it. Ms. Sly’s credibility was in question because she could not remember the date on which she made the decision to recommend the rejection on probation.

[75] Mr. Fisher submitted that Mr. Chaudhry should not have to pay the consequences of the fact that his supervisor was late in bringing matters to the attention of her supervisor, Mr. Stevenson. Why was this not done earlier? Mr. Chaudhry is paying the price because Ms. Sly did not know that the end date of the probationary period was sooner than she expected. The decision of January 29, 2004, to reject him on probation rendered moot the concerns and conclusions raised in the January 20, 2004 meeting.

[76] Mr. Fisher referred me to the following quotation from *Dhaliwal (supra)*:

[...]

*To determine whether the employer's actions were made in good faith, I must examine the meaning of good faith. In the Treasury Board's "Guidelines for Non-Disciplinary Demotions or Termination of Employment for Cause", good faith is defined as: "Means a manner of conduct based upon honesty of intentions and fairness of treatment." The test or procedure/principles adopted by the Treasury Board with respect to the principles of fairness are:*

- *the duty to act in good faith;*
- *the duty to fully inform the employee of what is required from him or her;*
- *the duty to inform the employee that he or she is not meeting the requirements of the position, and to inform him or her of the nature of the deficiency and what the consequences will be if he or she continues to fail to meet the requirements of the position;*
- *the duty to provide the employee with the opportunity to make the necessary adjustments to meet requirements;*
- *the duty to assist the employee in making these adjustments; and*
- *the duty to explore reasonable alternative solutions before demoting the employee or terminating his or her employment.*

[...]

[77] Mr. Fisher submitted that the steps in the Treasury Board policy do not say fire him and then meet the obligation. The employer undertook an effort to self-servingly fill in the gaps and absolutely violated the Treasury Board policy.

[78] Mr. Fisher noted that the rejection on probation memorandum refers to discipline as a fundamental consideration. The responses of the employer's witnesses were unsatisfactory. The Warden's testimony indicates that he just rubber-stamped the decision. What valid consideration was taken by the Warden, and did he satisfy himself that rejection was justified? He did not know who wrote the letter. None of the witnesses could testify as to why the reference to discipline was included. This is simply not good enough.

[79] Mr. Fisher referred me to *Re City of Toronto and Canadian Union of Public Employees, Local 79* (2002), 113 L.A.C. (4<sup>th</sup>) 151. Mr. Chaudhry was entitled to a fair assessment, but the assessment came too late (January 29, 2004). Mr. Fisher also referred me to *Re Pacific Western Airlines Ltd. and Canadian Airline Flight Attendants Association* (1981), 30 L.A.C. (2d) 68. Mr. Chaudhry was not given a fair opportunity. The fact that his shortcomings were brought to his attention too late was evidence of arbitrary treatment. I was also referred to *Canada (Attorney General) v. Matthews* (1997), 139 F.T.R. 287, and to *Re Abex Industries Ltd. and United Food & Commercial Workers' Union, Local 173W* (1995), 48 L.A.C. (4<sup>th</sup>) 353. Mr. Fisher stated that if the employer does not properly advise of deficiencies, this renders the decision arbitrary. He also referred me to *Re Goodale v. Treasury Board (Post Office Department)*, PSSRB File No. 166-2-3050 (1978) (QL).

[80] In conclusion, Mr. Fisher asked that in weighing the evidence, I allow the grievance and that consideration be given to the complaint.

### Reply

[81] Ms. Roy argued that the grievor's representative makes much of the fact that the Treasury Board policy on non-disciplinary termination was not followed. However, the test for a rejection on probation rests in jurisprudence and not in the Treasury Board policy. The policy clearly states that it applies to paragraph 11(2)(g) of the *Financial Administration Act (FAA)* and it is made clear in note 3 of the policy that rejection on probation is not governed by the policy. She referred me to *Owens (supra)*, where this argument was raised and the implication of the decision is that it was not relevant. She submitted that the policy was either not clearly brought to the attention of the adjudicator in *Dhaliwal (supra)* or that he was mistaken.

[82] Ms. Roy noted that in *Dhaliwal (supra)*, the employer was not aware of the true facts; Mr. Dhaliwal's mother had died and there were other extenuating circumstances. In this case, Ms. Sly evaluated Mr. Chaudhry's performance over an extended period of time and trained and assisted him.

[83] She also referred me to *Spurrell v. Office of the Superintendent of Financial Institutions*, 2003 PSSRB 15, where the grievance was denied even though there was not an adequate process. As well, she referred to *Boyce (supra)*, where the adjudicator held that it was not his role to determine the adequacy of procedures.

[84] Ms. Roy submitted that with regard to credibility and the date on which the decision was made, Mr. Fisher never challenged Ms. Sly in cross-examination that the January 29 notes were fabricated and never asked her if the mid-term evaluation was appropriate.

[85] Ms. Roy noted that Mr. Fisher also contradicted himself when he argued that Ms. Sly and Mr. Stevenson took half an hour to discuss the rejection on probation, thereby showing some hesitation on the part of the employer, and then argued that the decision was pre-planned.

[86] Ms. Roy argued that with regard to the relationships in the workplace, Ms. Sly was trying to integrate Mr. Chaudhry. In any event, the difficulties with colleagues were secondary; the primary reason for the rejection was work performance. The October 28, 2003 e-mail was not necessarily indicative of a good relationship, as it came on the heels of a meeting with Mr. Stevenson.

[87] Ms. Roy stated that there were a number of postulations about the reasons for rejection put forward by Mr. Chaudhry. But in the end, they are just that. These postulations are made against a supervisor who did everything in her power to help this employee.

[88] Ms. Roy noted that it is very common that Human Resources draft letters of rejection on probation.

[89] She argued that the fact that Ms. Sly sometimes highlighted positive things about Mr. Chaudhry's performance does not mean that there were no problems. Mr. Chaudhry glossed over some of those problems in his testimony.

[90] Ms. Roy submitted that all of the employer's witnesses were clear that the discipline did not form the basis, even in part, for the rejection. She also referred me to *Penner (supra)*, which held that the employer had two choices: either to proceed by way of discipline or rejection on probation.

[91] Ms. Roy submitted that I cannot slip into a review of the merits of the rejection on probation. The issue is not whether Mr. Chaudhry performed well, but rather whether it was disguised discipline.

### Reasons

[92] Mr. Chaudhry has filed a complaint, as well as referring a grievance to adjudication against his rejection on probation. The evidence for both the complaint and the grievance overlaps. I will first address the complaint before turning to the grievance.

- Section 23 Complaint

[93] Mr. Chaudhry and his representative allege that Ms. Sly's actions were in direct contravention of subsection 8(1) and paragraphs 8(2)(a) and (c) of the *PSSRA*. This subsection and paragraphs read as follows:

*8.(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*

*(2) Subject to subsection (3), no person shall*

*(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*

[...]

*(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*



*(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or*

*(ii) to refrain from exercising any other right under this Act.*

[94] Counsel for the employer argued that her reading of the transitional provisions for the *PSLRA* led to the conclusion that the new provisions in the *PSLRA* would apply to this complaint. Mr. Chaudhry's representative made no submissions on this point. The new provisions in the *PSLRA* are substantially the same in terms of the grounds for a complaint. The significant difference in the two regimes, in the context of this complaint, is the reverse onus of proof placed on the respondent:

*191(3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[95] The transitional provision in the *Public Service Modernization Act* states:

*39.(1) Subject to this Division, any proceeding that the former Board was seized of immediately before the day on which section 12 of the new Act comes into force is transferred to the new Board to be disposed of in accordance with the new Act.*

[96] The treatment of grievances filed prior to the coming into force of the *PSLRA* is specifically set out in the transitional provisions: a grievance is to be dealt with "in accordance with the provisions of the former Act, as they read immediately before that day" (*PSMA*, subsection 61(1)). It can then be argued, in the absence of a similarly specific provision for complaints, that complaints will be dealt with in accordance with the new provisions contained in the *PSLRA*. However, there are rights that vested when the complaint was filed: in particular, the absence of a reverse onus on the respondent. There is a presumption in the interpretation of statutes that vested rights should not be interfered with unless there is a clear indication from Parliament of its intention to do so: *Interpretation Act* (s. 63) and Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4<sup>th</sup> Edition, at page 568. In this case, there is no express provision that removes the vested right of the onus of proof. Accordingly, I

have determined that the complaint is to be decided by the Public Service Labour Relations Board in accordance with the legislative scheme of the *PSSRA*. This means that the onus of proof rests on the complainant.

[97] I note that Mr. Chaudhry's representative made no specific submissions on this complaint. I agree with counsel for the employer that a complaint of a breach of section 8 of the *PSSRA* is a serious matter. While I am not prepared to go as far as the Board in *Dalphy (supra)* and call it quasi-criminal, there certainly must be strong evidence to support such a claim.

[98] The complainant alleges that the inclusion of a reference to his use of union representation in his PER (Exhibit E-15) was inappropriate. Ms. Sly's comments in the PER were that union representation was used to give him a "clear understanding of his role as a public servant". I agree that the reference was unusual; however, it does not constitute an interference with his rights under the *PSSRA*. There was no evidence that the fact that he consulted union representatives was taken into account in the decision to reject him on probation.

[99] The complainant also questions the "relevancy" of the reference to previous discipline in the memorandum of rejection on probation (Exhibit G-2). It is not clear to me how this relates to a complaint of an unfair labour practice. The relevance of the statement in the memorandum is best left to the grievance.

[100] The complainant alleges that the threat to Mr. Chaudhry's continued employment, should he decide to pursue his grievance, was clear and that threat was ultimately carried out in the guise of a rejection on probation. Mr. Chaudhry testified that the draft grievance prepared by his representative (Exhibit G-14) was left on the printer for a short time and he hypothesizes that Ms. Sly must have learned about the grievance as a result. Ms. Sly denies that she knew about the grievance. During his testimony, Mr. Chaudhry admitted that Ms. Sly did not use the word "grievance" when warning him of the consequences of continuing to pursue the issue of his duties and responsibilities. Mr. Chaudhry alleges that Ms. Sly stated that if he should continue to complain about his workload, his PER could contain negative comments that would "haunt him" in the future. He then alleges in his complaint that she asked him to reconsider submitting his grievance and that he provided her with a response the following day. When he got back to her, he stated that he would not be proceeding

with the grievance at that time but would wait until the expiry of his probationary period before pursuing the workload or work-duties issue. Ms. Sly denies that she asked him to reconsider filing a grievance or that she discouraged him in any way from filing a grievance.

[101] In their testimony, Ms. Sly and Mr. Chaudhry are in direct contradiction. I must determine whose version of the events is the most credible.

[102] In *Faryna v. Chorny (supra)*, the criteria for determining credibility are set out as follows:

[...]

*...In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances...*

[...]

[103] I find it likely that Ms. Sly warned him of the consequences of continuing to dispute the duties of his position, those consequences leading to a possible rejection on probation. However, that warning related to the performance of his duties and not to the filing of a grievance. There was not sufficient evidence to show that she was even aware that he intended to file a grievance. Mr. Chaudhry had no evidence to show that she saw the grievance on the printer or was advised of its existence by someone who saw it. I therefore find that Ms. Sly's testimony is to be preferred, as it is in harmony with the "preponderance of probabilities".

[104] Accordingly, the complaint is dismissed. Should I be wrong on the effect of the transitional provisions and the provisions of the *PSLRA* do apply, I find that the respondent would have met its reverse onus in this case.

- Rejection on probation grievance

[105] The jurisdiction of an adjudicator over rejection on probation cases in the core public service is tightly circumscribed by both legislation and jurisprudence.

[106] The *PSSRA*, in subsection 92(3), states that nothing in subsection 92(1) "shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the *Public Service Employment Act*". Rejection on probation is governed by section 28 of the *PSEA*. There is no dispute that Mr. Chaudhry was on probation and that the rejection on probation memorandum was received during his probationary period.

[107] The Federal Court in *Leonarduzzi (supra)* has determined that the employer is not required to establish just cause but is only required to establish, through some evidence, that the rejection was related to employment and "not for any other purpose". In *Penner (supra)*, the Federal Court of Appeal adopted the test articulated by this Board in *Smith v. Treasury Board (Post Office Department)*, PSSRB File No. 166-2-3017 (1977) (QL):

[...]

*In effect, once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt....*

[...]

[108] Once the employer has discharged its burden of demonstrating that the rejection was for an employment-related reason, the burden of proof then shifts to the grievor to demonstrate that the employer's actions are, in fact, "a sham or a camouflage" or in bad faith and therefore not in accordance with subsection 28(2) of the *PSEA*: *Leonarduzzi (supra)* and *Penner (supra)*.

#### Was there an employment-related reason?

[109] Ms. Sly testified that she did not fault Mr. Chaudhry for his performance on the Transfer Desk, recognizing that the job was not suitable for everyone. However, at the hearing, the employer raised a number of concerns about Mr. Chaudhry's performance before his rotation to the new position of Input and Releases Clerk. I have not considered this evidence in my determination of whether there was an employment-related reason because Ms. Sly did not rely on these incidents in coming to her decision to reject the grievor on probation.

[110] The rejection on probation memorandum (Exhibit G-2) referred to a written reprimand. I am satisfied from the evidence of Ms. Sly and Messrs. Stevenson and Marshall that this discipline did not form part of the decision to reject Mr. Chaudhry on probation. It is unfortunate that this was not set out in the final level response to the grievance (Exhibit G-4). It is also unfortunate that neither a revised memorandum nor a formal retraction of that portion of the memorandum referring to discipline was issued. However, the failure to do so has no impact on my decision.

[111] The evidence on Mr. Chaudhry's performance after his rotation to the Input and Releases Desk shows that there were a number of employment-related reasons for his rejection on probation. Ms. Sly testified as to a number of concerns about delays in his work, as well as personal conflicts and mistakes that were made in the performance of his duties.

[112] I conclude, therefore, that the employer had an employment-related reason for the rejection on probation.

Was the rejection a "sham" or in bad faith?

[113] The burden now shifts to the grievor to demonstrate that the rejection on probation is a "sham" or in bad faith. The grievor's representative relied on *Dhaliwal* (*supra*) to argue bad faith on the part of the employer. In my view, *Dhaliwal* falls squarely within the analysis in *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-2-23967 (1993) (QL). In *McMorrow*, the adjudicator noted that, in his view:

*...if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity...*

*It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith, ... keeping in mind of course that good faith should always be presumed.*

[114] It is important to note that the burden rests on the grievor to show bad faith; there is no requirement that the employer prove that it acted in good faith. The onus is still on the grievor to show that the employer acted in bad faith or, as articulated in *Dhaliwal*, (*supra*), to show that the employer did not act in good faith.

[115] *Dhaliwal (supra)* refers to the Treasury Board policy on non-disciplinary termination as an example of the building blocks necessary to support a rejection on probation. I think that this policy was used as an illustration of some of the principles of good faith only and was not viewed by the adjudicator as binding on the employer in a case of rejection on probation. As counsel for the employer noted, the Treasury Board policy does not apply to employees on probation.

[116] In *McMorrow (supra)*, the adjudicator found that the supervisor had reached a firm conclusion to reject the grievor on probation prior to the end of the investigation and without the benefit of any input from the grievor. Similarly, in *Dhaliwal (supra)*, the employer's concerns about the grievor's use of leave were not brought to his attention and he was not given an opportunity to explain his reasons for the leave requests. There was also an element of condonation by the employer, given that his supervisor approved the leave requests without questioning them. In Mr. Chaudhry's case, he was aware that his supervisor had concerns about his performance. She sent him a number of e-mails and discussed issues with him. He had numerous opportunities to discuss his performance with her and did do so on a number of occasions.

[117] Mr. Fisher focused on the fact that Mr. Chaudhry was not warned in a timely manner of the consequences of his performance failings. The first mention of the possibility of a rejection on probation happened a very short time before his rejection on probation. Mr. Fisher referred to *Dhaliwal (supra)*, where it quotes the definition of good faith in the Treasury Board policy as including warning the employee of "what the consequences will be if he or she continues to fail to meet the requirements of the position". It is important to note that this principle was developed for employees who are no longer on probationary status. Arbitrators and adjudicators have long recognized that there is an underlying purpose to a probationary period. It requires that probationary employees be treated differently from those who have completed their probationary period:

[...]

*...one must also recognize the legitimate interests of the employer in attempting to secure the most competent, compatible and suitable workforce it can acquire. One cannot reasonably expect an employer to be able to assess the full capabilities and potentiality of a job applicant from a*

*brief interview, an application form, references and the like. Rather he must be entitled to an opportunity to view the new hire in the particular context of his own work environment. That is the sole purpose of the probationary period. It is, as we have said, a legitimate purpose.*

[...]

*(Re Porcupine Area Ambulance Service and Canadian Union of Public Employees, Local 1484 (1974), 7 L.A.C. (2d) 182 (Beatty), at p. 185.)*

[118] The fact that an employee is advised that he is on probationary status at the commencement of his employment is sufficient warning that performance-related concerns can result in a rejection on probation. This is congruent with the underlying purpose of probationary status, which is to assess the suitability of an employee for continued employment. Different considerations apply to those employees who have completed their probationary period, where a warning of consequences of the failure to meet performance objectives is appropriate.

[119] In this case, performance-related concerns were brought to Mr. Chaudhry's attention on a number of occasions. Assistance in meeting his performance objectives was provided in the form of on-the-job training, a desktop manual and periodic assistance so he could get caught up with his workload. The fact that Mr. Chaudhry disputed some of the duties assigned to him, or that he felt that his workload was too heavy as a result, is not relevant for a determination of good faith. There was no evidence that the duties assigned to Mr. Chaudhry were any different from those normally assigned to employees in the Input and Releases Clerk position. In any event, to consider the duties of the position or the workload would result in an assessment of the merits of the decision to reject Mr. Chaudhry on probation and I do not have jurisdiction to do so. Since I do not have the jurisdiction to examine the merits of the decision to reject him on probation or the adequacy of the assessment of his performance, I make no conclusions on the matters.

[120] In conclusion, I find that Mr. Chaudhry has not met his burden of proof; the evidence has not demonstrated that the rejection on probation was a sham, a camouflage or in bad faith. Accordingly, I am without jurisdiction.

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

*(The Order appears on the next page.)*



Order

[122] The complaint under section 23 of the *PSSRA* is dismissed.

[123] The grievance against the rejection on probation is dismissed for lack of jurisdiction.

July 13, 2005.

**Ian Mackenzie,  
adjudicator and Vice-Chairperson**