Date: 20071206

File: 166-34-33761

Citation: 2007 PSLRB 115

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

HELENE SPACEK

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Spacek 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: Paul Love, adjudicator

For the Grievor: Paul Reniers (May 9 and October 3 to 6, 2006) and Nao Fernando (March 7 and May 24, 2007), Professional Institute of the Public Service of Canada

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Vancouver, British Columbia,
May 9 and October 3 to 6, 2006, and March 7 and May 24, 2007.

I. Grievance referred to adjudication

[1] Helene Spacek ("the grievor"), an employee of what is now the Canada Revenue Agency ("the employer" or "the Agency"), filed a grievance on April 15, 2003, related to her performance assessment. The grievor is employed as a regional research and technology adviser (CO-02) in the Scientific Research and Experimental Development (SRED) Branch at the Agency's Vancouver Tax Services Office. She is a member of the Audit, Financial and Scientific Group bargaining unit bound by the collective agreement between the employer and the Professional Institute of the Public Service of Canada (PIPSC) ("the collective agreement").

[2] Her grievance states:

. . .

> *The Performance Assessment Report for the Period* [*sic*] *from January 1, 2002 to August 31, 2002, given to me on March 21st, 2003, does not accurately or completely reflect my performance, and the Performance Review process associated with this Performance Assessment Report was not conducted according to CCRA's policy, "Employee Performance Management Guidelines", or Article 40 of the PIPSC collective Agreement.*

. . .

[3] The relief sought is the following:

. . .

> *That my Performance Assessment Report be amended to my satisfaction, that I be transferred to another team so that another Team Leader can do my Performance Reviews in the future, and that I be made whole.*

. . .

[4] The February 9, 2004, final-level grievance reply from D.G.J. Tucker, Assistant Commissioner, Human Resources (HR), is as follows:

. . .

> *This is in reply to your grievance concerning your performance assessment report, in which you state that it did not accurately reflect your performance and that the employer contravened Article 40.02(b) of the PIPSC collective*

> *agreement. As corrective action, you requested that the performance assessment report be amended to your satisfaction and that you be transferred to another team.*
>
> *I have carefully reviewed your grievance as well as the submission and final level presentation made on your behalf by your Professional Institute of the Public Service of Canada representative.*
>
> *After a thorough review, I have concluded that the performance assessment is both factual and reflective of your overall performance. I have also concluded that although there were different views concerning the process, the Performance Management Guidelines were provided to you on March 26, 2002. In addition, I see no evidence of bad faith on the part of your supervisor in preparing your assessment.*
>
> *I have also noted that effective June 2, 2003, you were assigned to another team.*
>
> *In view of the foregoing, your grievance is hereby denied and the corrective action you requested will not be forthcoming.*
>
> . . .

[5] 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*").

[6] By a letter from its counsel dated May 2, 2006, the employer raised an issue concerning this grievance's adjudicability:

> . . .
>
> *The Employee presented her grievance on April 15, 2003 in which she states* [text of the grievance and desired corrective measures].
>
> *The Employer respectfully submits that the Public Service Labour Relations Board consistently held that an adjudicator appointed to hear a reference to adjudication under section 92 of the PSSRA has no jurisdiction to review performance appraisals.*

> *Accordingly, the Employer will argue at this hearing that the above-mentioned grievance is not adjudicable under section 92 of the PSSRA.*
>
> . . .

[7] This grievance was scheduled to be heard together with another of the grievor's grievances, PSSRB File No. 166-34-35739. At the end of the employer's jurisdictional argument on both grievances I split this case from the other grievance for the purposes of holding a hearing. I have written a separate decision in PSSRB File No. 166-34-35739.

[8] By the time this matter proceeded to adjudication, the grievor had been transferred to another team with her subsequent performance appraisals done by a different team leader. The requested relief remaining in her grievance is that her "Employee Performance Management Report" ("performance report") be amended to her satisfaction and that she be made whole.

[9] In this case, after the parties' representatives made oral submissions on the issue of jurisdiction, I issued an oral ruling that I had jurisdiction to determine whether the process set out in the collective agreement was followed and whether there were breaches of article 40 of the collective agreement.

[10] The grievor was represented by Paul Reniers, from the PIPSC, for the 2006 hearing dates. Mr. Reniers left the bargaining agent before closing arguments were made. This matter was scheduled for closing arguments on March 7, 2007. Mr. Fernando, the grievor's new representative, was not ready to proceed on that date, and over the employer's objection to an adjournment, the arguments were adjourned for teleconference submissions at a date to be fixed by the Public Service Labour Relations Board, but peremptory on the bargaining agent. At the time of the adjournment application both parties agreed to teleconference submissions. The parties subsequently agreed to resume the case with oral submissions, and the closing arguments were completed on May 24, 2007.

[11] The hearing took place over a number of months. At the end of the hearing day on May 6, 2006, with the consent of the parties, I made a direction that Doug Cline, Research and Technical Manager, SRED Program, not communicate with the grievor about her evidence in the grievance process pending the continuation of the hearing. I also indicated that if the bargaining agent wished to make a further application for a

broader communication ban, it should do so in accordance with the applicable rules. Since that would be an extraordinary remedy, if such an application were made, it would have to be made with authorities provided. Counsel for the employer agreed to communicate the direction to Mr. Cline. After the direction, I was not made aware of any problems between the grievor and Mr. Cline.

[12] After considering the evidence, in my view there is little reason to recite the parties' differing perceptions of the factual nuances relating to the content of the review, as nothing depends on them. I have refrained from providing detailed commentary on or repeating each party's evidence concerning the performance assessment's contents. I have summarized the evidence, rather than reciting all of the testimony, to the extent necessary to adjudicate on the "process" and the issue of the alleged breach of article 40 of the collective agreement raised in this grievance. I have issued a decision on this grievance on a jurisdictional point.

II. Summary of the evidence

[13] The grievor and Mr. Cline testified. Their evidence made it plain that a communication breakdown occurred between them, although it is difficult for me to determine exactly when it occurred. It appears to have predated the performance assessment process.

[14] Throughout the evidence, both parties made many objections as to whether certain questions were relevant to the process or whether they were simply being asked to deal with the assessment's content. Obviously, this can be a difficult line to draw, and it has to be dealt with on a question-by-question basis. I have attempted to confine my summary of the evidence to the process issues, including the issue of the breach of article 40 of the collective agreement, raised by this grievance.

[15] In the late summer of 1996, the grievor was hired as an outside consultant on a contract basis to review claims made by taxpayers for SRED credits. She evaluated the science aspects of the claims. She became a full-time employee on January 19, 1999. When she joined the Agency she reported to Dr. Thomas Hu, who supervised the entire science section.

[16] A SRED review has two parts. A science review is conducted by science staff such as the grievor, and a financial review is conducted by employees with financial expertise. The Agency has performance deadlines for processing applications. If the

financial side spends "too long" on the application it creates tension, stress and angst for science-side employees. At the time of the events of this grievance I am given to believe that there was considerable tension and low morale in the organization.

[17] Around March 2002, the grievor's position was reclassified to the CO-02 group and level from the PM-05 group and level.

[18] In January 2002, the section was reorganized internally and the grievor's reporting arrangements changed. Rather than having Dr. Hu as her team leader, she began reporting to Mr. Cline as of January 2, 2002, and continued to do so until June 2003. Before his appointment to his research and technical manager position, the grievor and Mr. Cline had been peers reporting to Dr. Hu. On January 28, 2002, Dr. Hu emailed everyone reporting to him, indicating that he needed to do performance appraisals for everyone up to December 31, 2001, as his official relationship terminated (Exhibit G-2).

[19] The grievor testified that she had a number of questions as a result of receiving a CO-02 job description. She emailed her new supervisor, Mr. Cline, on March 25, 2002. On March 26, 2002, Mr. Cline wrote back asking her to acknowledge receipt of the work description and referencing the "CCRA's Employment Performance Management Guidelines" ("the Guidelines"). The grievor wrote back, requesting the document's location, and Mr. Cline sent her a link to it.

[20] The Guidelines is a 32-page document that includes a forward and appendices. The guidelines in it establish who they cover. The Guidelines provide information on how to apply the "CCRA's Employee Performance Management Policy" (page 1). It sets out the review period as September 1 to August 31 of each year and requires a manager to complete a written performance report for each employee by October 31 of each year (page 3). Managers are to confer with individual employees and teams to establish goals, objectives and measurement criteria (page 4). Managers should be aware of their responsibility to involve employees in the assessment phase (page 5). The process contemplates a formal meeting to discuss performance expectations but also expresses that ongoing communication should occur throughout the review period (page 7). Managers and employees are to ensure that measurement criteria describe characteristics of performance that meet or exceed expectations in specific and verifiable terms (page 8). Managers draft a performance assessment that includes an overall rating and encourage employees to do the same. The manager meets with

the employee to discuss his or her performance in terms of expectations. The manager invites the employee's comments (page 12).

[21] The collective agreement does not expressly mention the Guidelines. The Guidelines is not a document signed by the bargaining agent or the Agency. The Guidelines purport on their face to have been developed by the Agency's Resourcing and Career Management Division, Strategy, Policy and Planning Directorate, HR Branch. There is no indication that the bargaining agent was involved in the document's preparation.

[22] The grievor testified that it was not clear to her what the performance expectations were of her from September 1, 2001, to August 31, 2002, as the targets were unclear.

[23] During the relevant time period the grievor was seeking a transfer out of Mr. Cline's team. The grievor appears to have first requested a transfer out of Mr. Cline's team by email dated August 14, 2002 (Exhibit G-11).

[24] During the summer of 2002, the employer brought in an independent workplace mediator, Michael Fogel, to mediate workplace issues. The details of that mediation and the issues addressed were not placed in evidence before me.

[25] On October 31, 2002, Mr. Cline emailed the grievor and attached a "Performance Assessment Report" for a period ending September 30, 2002, to "conform with the rest of the region" (Exhibit G-8). Mr. Cline wished to meet with her to finalize her performance assessment. Without going into its contents, the employer's form sets out performance expectations including goals, objectives, measurement criteria and required competencies. The form has four assessment categories, as follows:

> Exceeds - Exceeded the majority of performance expectations; undertook and completed additional initiatives.
>
> Meets - Met the majority of the performance expectations; may have exceeded some.
>
> Does not Meet - Failed to meet the majority of performance expectations; improvement is required; needs special attention.
>
> Unable to Assess - (for example, on extended leave).

[26] In the report, Mr. Cline assessed the grievor's performance as "meets expectations." The report was generally positive, but it reported some areas for improvement, particularly a need to improve her relationship with Mr. Cline. In cross-examination, Mr. Cline confirmed that he was late starting the review but said that sometimes other management activities take priority over a review.

[27] The grievor said that the document upset her, since it represented a "shortened" assessment period, since "it was just handed to her" and since she was expected to just sign it. She said that different targets were involved after August 31. She said that it was difficult to know what the guidelines were, what the targets were and "what else would change." The performance report was upsetting to her, and she did not think it took into account the work that she had done. She was concerned because her performance was cast in a negative light, because she was surprised by it and because she should have had a warning or had a hint or been invited to a discussion before the content made its way into her assessment. She said that from reading the Guidelines and the definition of "exceeds," which means "exceeds the majority of expectations and undertook additional initiatives," she did not understand how the content of her performance assessment was determined.

[28] Mr. Cline dropped by the grievor's cubicle on November 7, 2002, at around 09:00, to set a date for discussing the review. The grievor told him "the next week or the week after" (Exhibit G-9).

[29] The grievor testified that she was not prepared to meet with Mr. Cline when he came to her cubicle asking to set a date for the review. She said that the content of her performance report was not what she expected and that she had problems with Mr. Cline changing the end date of the review period from August 31 to September 30. She said that she wanted to understand how he came up with the content of her appraisal. She wanted to look through the statistics and find documents citing accomplishments or achievements. She said that she wanted to have a discussion with him once she had collected all of the documents.

[30] At the end of the day on November 7, 2002, the grievor emailed Salma Baloo, who was to become the new acting director, to reaffirm her request to be transferred from her current team (Exhibit G-10).

[31] The grievor emailed Mr. Cline on November 12, 2002, with a question as to whether the review period ended on August 31 or September 30 and without committing to meeting with him to discuss the performance review (Exhibit G-13). There was also some discussion between Mr. Cline and the grievor at her cubicle. The grievor made notes concerning the discussion (Exhibit G-15). One of the issues raised was the end date of the review period; another was the grievor's need for the statistical data used by Mr. Cline to support his assessment.

[32] On November 12, 2002, Mr. Cline provided the grievor with the statistical data he had used to review her performance, information concerning the end date of the review period and a meeting request for November 21 or 22 to review her performance (Exhibit G-16). The grievor responded by email acknowledging receipt of the information but indicated that she needed a meeting to clear up questions about statistics, accomplishments and initiatives before continuing with the performance review (Exhibit G-17).

[33] By November 18, 2002, Devinder Sekhon had become Assistant Director.

[34] Mr. Cline reviewed the statistics and expectations with the grievor at a meeting on November 19, 2002. Again, the grievor made notes of her version of the meeting (Exhibit G-18). Among other topics, the statistics were discussed, and the grievor said that she would draft her own self-assessment. In the meeting the grievor alleged that Mr. Cline maliciously discriminated against her in the performance appraisal because she had asked to be removed from his team.

[35] On November 20, 2002, the grievor emailed someone in HR to determine if the Guidelines were still in effect and to determine the review period end date (Exhibit G-19). On November 20, 2002, the grievor also emailed Mr. Cline, indicating that she would prepare and provide him with a self-assessment (Exhibit G-20).

[36] By November 22, 2002, Mr. Cline confirmed that he would adjust the end of the review period from the September 30 date initially presented to August 31, 2002. This is apparent from the grievor's testimony, Mr. Cline's testimony and an examination of the grievor's notes of a discussion that took place at her cubicle on November 22, 2002 (Exhibit G-21). In cross-examination, Mr. Cline confirmed that it is a difference of more than 10% in the length of the review period and that it could affect file production statistics, but he knew that the grievor's file production was good, so it was not an

issue in her assessment. At the time that Mr. Cline prepared the initial performance review document, he believed that the Guidelines had been revised and testified that the Guidelines were formally revised a year later. He also testified that at the time that he prepared the initial review document, he believed that the review period ended on September 30 of each year.

[37] The grievor provided Mr. Cline with a self-assessment of her performance by email on November 29, 2002 (Exhibit G-22). She assessed her performance as "exceeds expectations." She emailed the following message to Mr. Cline on December 3, 2002 (Exhibit G-23):

. . .

> *Although I haven't heard back from you regarding either of my two earlier e-mails, both of which are attached below, I hope that we are making progress towards a resolution that is satisfactory to both of us regarding the content of my performance review for the period ending 31-Aug-2002, a draft version of which you e-mailed me on October 31st 2002.*
>
> *I am attempting to resolve our issues without having to exercise the formal grievance process and my understanding that the discussions and meetings we have had, and, I expect, will continue to have, on this topic, are pertinent to clause 34.01 of the PIPSC collective agreement.*
>
> *If this is OK with you, please let me know. Thanks.*

. . .

[38] The grievor's reference to clause 34.01 of the collective agreement is a reference to the employer having waived the timeliness requirements for filing a grievance.

[39] Mr. Cline provided the grievor with a revised performance review in an email attachment dated December 12, 2002 (Exhibit G-26). In cross-examination, Mr. Cline admitted that he intended to change the review period to August 31, which he did, but he said that he probably forgot to edit the supervision period to end as of August 31. He also requested that the grievor meet with him on December 16, 2002, at 13:00, and that she confirm her attendance by email. The assessment remained "meets expectations." Mr. Cline's comments on the amended assessment report included, in part, the following:

. . .

> *There are ongoing communications issues between Ms. Spacek and myself. These include both face-to-face and email instances that have generated a negative impact on our working relationship. We are actively working on this issue. Ms. Spacek has demonstrated a willingness to discuss and participate in resolving this issue.*

. . .

[40] The grievor renewed her request to be transferred from Mr. Cline's team in an email to Mr. Sekhon on December 16, 2002 (Exhibit G-27). Later that day she had a discussion with Mr. Sekhon about wanting to move, a summary of which is set out in her notes (Exhibit G-28).

[41] Mr. Cline attempted to set up a meeting with the grievor on December 16, 2002, to review and sign the performance assessment. The grievor sent Mr. Cline an email on December 16, 2002 (Exhibit G-29), declining to meet with him, indicating that she did not know the purpose of the meeting and stating that she had not had any written response to her earlier emails containing her draft self-assessment. She stated that she was taking stress leave until after the Christmas holiday. She also asked for an "interest based negotiation process" to clarify and resolve their communication issues. No meeting took place to discuss the grievor's performance report.

[42] On December 16, 2002, Mr. Cline responded as follows:

. . .

> *I believe that you received a preliminary performance review on Nov 12 2002 which we discussed on Nov 18 2002. During that meeting you indicated disagreement with some of the items and of the overall "meets" versus "exceeds" rating. You provided me with a self assessment on November 29, 2002. On December 12 2002 I sent you a revised version and a request for a meeting on Dec 16 2002 to discuss the revised performance review. You have indicated by email this morning that you are unclear on the purpose of today's meeting. The purpose of today's meeting is to finalize your performance review for this period. You have the option to sign it or not, to add your own comments or not and of course to grieve the document through the grievance process. I have reviewed your self assessment, and our conversation before writing the revised performance review. I believe it fairly and accurately represents your performance in this period. I do not feel this is an issue that*

> *needs a facilitated meeting. I would therefore request that you make a decision on the information you have at hand and decide to meet with me to finalize the review or not. You have made it clear on several occasions that you feel stressed out. I honestly feel that dealing with situations like your performance review will reduce your level of stress rather than delaying the process until after Xmas. We have agreement on your overall performance as being satisfactory and the identification of a communication issue as a problem area. You have asked for an "exceeds" overall rating which I do not believe is warranted. I am open to continuing discussions/facilitated meetings on the resolution of the communication issue but I do not feel that current or future discussions will affect the performance review period Jan 1 2002 to August 31, 2002. I would appreciate a response today.*
>
> . . .
>
> [*Sic* throughout]

[43] In his oral testimony Mr. Cline said that he was attempting to obtain closure of the outstanding performance assessment process, while leaving the door open to resolve any communication issues through mediation.

[44] On December 16, 2002, Mr. Cline, the grievor and Mr. Sekhon met, had a discussion and came to an agreement to deal with communication and performance appraisal issues in mediation. In cross-examination, Mr. Cline said that he did not feel that mediation of the performance appraisal was necessary but that mediation of the communication issues would be helpful, after which they could complete the performance assessment.

[45] Since December 16, 2002, the parties have exchanged numerous emails. At no time did the grievor agree to meet with Mr. Cline to discuss the performance review.

[46] On January 13, 2003, the grievor asked Mr. Cline for a signed copy of the performance review (Exhibit G-32). They had further discussions concerning workplace mediation. A mediation scheduled for January 27 to 29, 2003, was postponed by the mediator, Scott Prior, on January 24, 2003. The mediator's reasons for not proceeding with the mediation are set out in an email to the grievor and Mr. Cline (Exhibit G-39). The mediator referred to issues regarding the agreement to mediate and regarding support during the pre-mediation and mediation process. He also indicated that he believed that neither party was ready to proceed at that point. Mr. Cline said that the

mediation did not take place because there appeared to have been no agreement on who could attend the mediation and on the issues to be discussed, and there were problems with the timely availability of a mediator.

[47] It is clear that by at least January 30, 2003 (Exhibit G-39), Mr. Cline wished to keep the communication issues separate from the performance assessment issues and that he was not prepared to mediate his assessment of the grievor's performance. In cross-examination, Mr. Cline said that he felt that mediation of a performance assessment was over-complicating a straightforward process and that there were ample avenues within the Guidelines to address the performance appraisal concerns.

[48] After more emails were exchanged, Mr. Cline provided a performance review that he signed and for which the grievor provided comments. A face-to-face meeting between Mr. Cline and the grievor did not take place. Mr. Cline wanted a face-to-face meeting to discuss with the grievor the appraisal, the independent learning plan and the next cycle's performance expectations. Mr. Cline said that he consulted with Sheila Penny, an HR consultant, on March 14, 2003, and after that proposed a meeting on March 20, 2003, at 15:00, to complete the performance review. Mr. Cline did not hear back from the grievor by email, so he approached her at her cubicle on March 20, 2003, at around 15:00. The grievor had apparently declined the meeting at 10:30 on that day. The grievor made notes of the conversation at her cubicle (Exhibit G-43).

[49] On March 20, 2003, at 17:18 (Exhibit G-44), the grievor demanded a signed copy of the performance appraisal and indicated that she would review it, add her comments and sign it. She indicated that she was not prepared to meet one-on-one with Mr. Cline without a representative present. She said in her email, in part:

. . .

> *Due to the effects of stress which I continue to experience regarding our relationship, and the prospect that I will feel intimidated (as I did at our meeting this afternoon at 3 pm), and that my comments may be subject to misrepresentation, I conclude that a one-on-one meeting would not be in anyone's best interests. If you insist on a meeting, then I insist that a representative of my choice be present.*

. . .

[50] Mr. Cline provided the grievor with a signed copy of her performance review on March 21, 2003. After sending Mr. Cline emails on March 27 (Exhibit G-48) and March 28, 2003 (Exhibit G-49), the grievor signed the performance review and gave it to him, along with her own self-assessment, on April 1, 2003.

[51] Mr. Cline said that the Guidelines is one of the tools given to managers and employees to set expectations as to how the performance management process operates. The performance management process is tied to a position's job description and its competencies and to the individual learning plan. Mr. Cline said that the measurable criteria for assessing performance include the processing guidelines, the guide to ethics and conduct and the job description. Mr. Cline said that even though continuous feedback is given throughout the year, it is important to formally assess performance once per year.

[52] One of the grievor's basic complaints is that the difference between the "meets" and "exceeds" ratings was not clearly expressed to her and that this is only explained at the review. She felt that she deserved an "exceeds" rating because she conducted 12 technical reviews and 13 pre-claim project reviews, added eight new executive accounts, had the most executive accounts, had 216 instances of client service, exceeded the timeliness targets, and conducted six additional initiatives not within her job description. The grievor said that she found it stressful dealing with Mr. Cline on a day-to-day basis. The grievor said that she found the performance assessment process threatening, but she admitted that Mr. Cline did not threaten her during the process.

[53] In cross-examination, the grievor admitted that it was up to the manager to assess employees' performance. She agreed that it was possible that sometimes an employee would disagree with a manager's assessment. In those cases, an employee has different recourses, such as filing a grievance or a having a discussion or meeting with the manager. She admitted that Mr. Cline had received her self-assessment and that he had incorporated some, but not all, of her comments. She had a chance to submit comments. She also admitted that she has never received an "exceeds expectations" assessment in all of her years with the Agency.

[54] In her direct examination, the grievor said that she did not understand the difference between "meets" and "exceeds," but in cross-examination she said that she did not talk to Mr. Cline to get clarification about the performance ratings. She was asked why she did not consult Mr. Cline if she was confused about the ratings, and she

said that she did not recall. In cross-examination she admitted that Mr. Cline modified his final assessment after receiving her self-assessment. The modifications, however, did not meet her expectations.

[55] Mr. Cline testified that in 2001 the Agency moved to a competency-based skills assessment. Mr. Cline said that none of the employees received an "exceeds" assessment in the review period. Almost all of the employees fit into the "meets" category. Mr. Cline testified that there is a review committee that reviews assessments at the request of an employee. Mr. Cline testified that it usually took two months to complete an assessment process. This was the first assessment cycle that he had conducted as a manager, although he had participated in numerous assessments as an employee. He testified that the performance review process is not usually a "mediated" process but that a manager may use interest-based negotiation techniques to resolve disagreements about the contents of the report. This is consistent with the Guidelines (page 17).

[56] Mr. Cline testified that he and the grievor had some communication issues, separate and apart from the performance assessment process. He was prepared to mediate those problems but not the performance assessment.

[57] Mr. Cline admitted that the draft performance appraisal he sent to the grievor on October 31, 2002, was for the period ending September 30, 2002. He confirmed that the grievor told him that it should have been to the end of August. He sought clarification from other managers and by November 2002, he revised the performance review period to end in August. Mr. Cline said that when he received the grievor's self-assessment on or about November 29, its content surprised him, and he disagreed with her assessment that she had exceeded expectations. After receiving her self-assessment he modified the content of his assessment but not his finding that she met expectations.

[58] Mr. Cline said that towards the end of the process the grievor did not wish to meet with him without a representative present. He said that there was a lack of trust between them that prevented them from conversing. He said that he performed most of the performance assessments as a "conversation" in a person-to-person meeting where issues were discussed. He said that the grievor had access to his schedule and that she successfully avoided a face-to-face meeting with him about her performance. In the end he just gave her a signed document, which she returned. Despite his efforts

to do so, he did not have a meeting with the grievor or a conversation with her about her performance. He said that he had attempted to meet with the grievor 10 or 12 times. Mr. Cline said that "it would be very abnormal" to have a formal mediation process to complete a performance assessment. Mr. Cline believed that the grievor came close to being insubordinate in her refusal to meet with him.

[59] Mr. Cline testified that in a "normal" assessment cycle with most of the team members he would draft performance assessments, email them to the employees, arrange to have a discussion with them, at the discussion talk with them about their individual learning plans and their upcoming performance expectations, and sign off on the performance reports. He said that there is an opportunity for dialogue and to argue about and possibly revise the performance report at a face-to-face meeting. Mr. Cline said that normally employees who receive a "does not meet" assessment are aware of this before the performance review, as there is continuous feedback throughout the year. Mr. Cline testified that an ordinary performance assessment process takes two months. In the grievor's case he sent the performance assessment report to her on October 31, 2002, and she signed the performance assessment document on April 1, 2003. That process did not include a face-to-face meeting where the individual learning plan, upcoming performance expectations and performance assessment reports were signed off.

[60] Mr. Cline said that employees who exceed expectations are flagged at management meetings as a result of the continuous feedback process. Mr. Cline said that he understood the "exceeds category" as exceptional performance, substantially better than "meets." He says rarely does the category have a pay impact unless the person is below expectations and is up for an increment. Mr. Cline said that "exceeds expectations" is for a very select category of people who are "on the move" and "go the extra mile." Mr. Cline said that the performance expectations set out in the performance report are generic, apply to all research technical advisors and are negotiated between the research technical advisors and managers, working together. Performance expectations are captured in a document signed off at the beginning of the performance cycle, usually at the assessment meeting for the previous cycle.

[61] Although he believes that he put a full effort into the process, Mr. Cline said that he feels that he failed in the grievor's performance appraisal process because they were unable to have a one-on-one conversation. Mr. Cline felt that she was unwilling to

have a conversation with him. When there was a need for verbal communication, she wished to have a witness present. She also insisted on communicating via email rather than in person. He said that he managed to have a discussion with all of his other team members. In the end, as a result of advice received from HR and Mr. Sekhon, he completed the paper process to comply with the collective agreement, but to him it was unsatisfactory.

[62] Mr. Cline said that an employee who is dissatisfied with an assessment can file a grievance within 14 days, seek feedback from the manager or ask for a review committee.

III. Summary of the arguments

A. For the grievor

[63] In his opening statement at the hearing, Mr. Reniers said that this was a case where the performance review process came to be "a battleground between the two parties and one of the ongoing battles during this time period." He characterized it as a battle between Mr. Cline's determination to assert his authority and the grievor's desire for fairness and consideration. The result was a drawn out and at times tumultuous performance assessment process that became intertwined with deep workplace tensions. Mr. Reniers said that he intended to demonstrate that events in the process were highly influenced by other problems in the workplace.

[64] I note that the grievor's opening statement alleges that the time taken to complete the assessment was a "process issue."

[65] The grievor argued that the grievance's adjudicability issues are intertwined with its merits and that they "meld into each other." The grievor said that the Guidelines were incorporated into the collective agreement and that the Agency has breached article 40 of the collective agreement. The collective agreement does not merely envisage a form being completed and handed over to an employee. If that is the case, then the word "shall" in clause 40.02 of the collective agreement implies that the employer's obligation is imperative, that it is not subjective and that it is subject to review. The grievor's pivotal concern is that the assessment criteria are intended to be used in a neutral and independent manner in the employer's assessment of her work.

[66] The grievor said that the Guidelines were breached because the employer never informed her of the goals, objectives and measurement criteria. The grievor did not know how her work performance was to be assessed. She said that the employer breached the collective agreement because there was no evidence that the employer conferred with employees and teams to establish goals. On page 8 of the Guidelines the criteria describe a performance that meets or exceeds expectations. The grievor was unable to ascertain for herself whether the employer was accurately applying the Guidelines and the definitions for meets or exceeds expectations in assessing her performance. As the grievor was not aware of the goals, she asks that I find that the Guidelines and the collective agreement were breached and that the performance appraisal is "null and void." As the grievor's representative said, "No good fruit can come from a poisoned tree." The whole tree was poisoned when the employer breached the Guidelines and the grievor says that "whatever it fathered was illegitimate."

[67] The grievor relied on *Johnson v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-02-17560 and 17561 (19880901), for the proposition that an employer is bound to follow guidelines it publishes if they are reasonable. The grievor said that the collective agreement gives the employer free rein to establish the performance assessment criteria and that once criteria are established, they have the force and effect of a collective agreement. An employer's obligation to provide criteria is not met by simply publishing them. The employer should use them when assessing performance; otherwise the right described in clause 40.02(b) of the collective agreement is meaningless: *Purolator Courier Ltd. v. Teamsters Local Union 91*, [2004] C.L.A.D. No. 65 (QL). If the obligation in clause 40.02(b) is only to give criteria to the grievor and not to use them when her performance is assessed, then the right in the collective agreement would yield an absurd result. An adjudicator should interpret the agreement to avoid such an absurd result: *Billet v. Treasury Board (Department of Veterans Affairs)*, 2006 PSLRB 28. If the obligation is merely to hand over the Guidelines, then the employer could meet its obligation by handing over a book about basket weaving. A collective agreement should be interpreted in light of the context and intent of the parties: *Dominion Colour Corp. v. Teamsters Chemical, Energy & Allied Workers, Local 1880* (1998), 75 L.A.C. (4th) 364. Approaching this from a "prism of intent and purpose," the context in this case is that a performance appraisal would be prepared

and the employee ought to know the standard by which performance is judged to give the collective agreement force and authority.

[68] Every clause in a collective agreement has to have an intent and purpose: *Rusk v. Treasury Board (Indian & Northern Affairs Canada)*, PSSRB File No. 166-02-16586 (19881114), and *Buchmann v. Treasury Board (Canada Customs and Revenue Agency)*, 2002 PSSRB 14. The purpose of clause 40.02(b) of the collective agreement is not simply that a document be handed to an employee but that the employee be permitted to understand the process to ensure that it is fair and objective. While the grievor's performance assessment characterized her as "meeting expectations", portions of the assessment indicated that she "exceeded expectations." She was pursuing excellence in her job, and she had the right to find out what was required for her to achieve it. She was stymied in her attempt, since the employer breached the Guidelines.

B. <u>For the employer</u>

[69] The Agency argued that the grievance has two parts; first, that the performance assessment does not accurately reflect the grievor's performance and second, that the performance review process was not conducted according to the Guidelines, which are incorporated by reference into the collective agreement. The relief sought includes a claim that she be transferred to another unit and that the performance assessment be amended to her satisfaction.

[70] An adjudicator has no power or jurisdiction to amend the content of a performance review under paragraph 91(1)(*a*) of the former *Act*: *Ahad et al. v. Treasury Board* (*Department of National Defence*), PSSRB File Nos. 166-02-15840, 16038 and 16233 (19870126). An adjudicator may only take jurisdiction if there is a finding of disguised discipline or bad faith, and an adjudicator cannot ordinarily take the place of an employer to determine an employee's performance: *Veilleux v. Treasury Board (Public Service Commission)*, PSSRB File No. 166-02-11370 (19820729). The Agency submitted that the grievor has not alleged any disguised discipline, so I have no jurisdiction to consider her claim.

[71] An employee's claim that a performance appraisal's contents do not reflect his or her actual performance is not grievable at adjudication unless there is specific language giving the employee that right in the collective agreement: *Largess*

v. Treasury Board (Transport Canada), PSSRB File Nos. 166-02-17666 and 17667 (19881207).

[72] Article 40 of the collective agreement does not give an individual right to an employee to refer a grievance to adjudication and to have an adjudicator review the content of a performance appraisal unless there is bad faith: *Bahniuk v. Canada Revenue Agency*, 2005 PSLRB 177, and *Ball v. Canada Revenue Agency*, 2007 PSLRB 12.

[73] If the adjudicator finds that he has jurisdiction to review the grievor's performance assessment, then she has the burden to establish that article 40 of the collective agreement was breached. Looking at each clause of article 40, it is clear that there is no evidence to support any breach of the collective agreement. Clause 40.01(a) provides that the assessment be done within a certain period of time. Clause 40.01(b) provides that the assessment must take place on the form prescribed by the employer and that the employer record the assessment on the appropriate form (Exhibit E-3). The grievor was given the evaluation form as prescribed by clause 40.01(b). There is no evidence of a breach of clause 40.02, since Mr. Cline provided the grievor with a web link to the performance review guidelines. Exhibit E-3 indicates that there was no breach of clause 40.03. The grievor was given the form and an opportunity to sign it. The appraisal was done by a supervisor who had supervised her for more than half the evaluation period.

[74] Clauses 40.02(a) and (b) of the collective agreement are a simple obligation for the employer to ensure that the person conducting the review provides to the employee the form and any instructions to fill it out to ensure that there are no surprises for the employee. Clause 40.02 does not require the employer to follow or comply with the Guidelines; the employer should do its best, but that is not grievable to adjudication.

[75] While the grievor suggested that the Guidelines are incorporated by reference into the collective agreement that is not the case. They are simple guidelines provided to managers and employees to help them understand the process. It is a document that the employer unilaterally prepared without consulting the bargaining agent.

[76] The case law clearly establishes that these documents, promulgated by the employer on a unilateral basis and without consultation with the bargaining agent, are

not incorporated by reference into the collective agreement. As stated in Brown and Beatty, *Canadian Labour Arbitration,* 3rd Edition, 2006, at para 4:1230:

> *For an ancillary document to be part of the collective agreement, it must be intended by the parties to be part of the collective agreement and either meet formal requirements of a collective agreement, or be incorporated by reference into it.*
>
> *Although there may be circumstances where such documents do not form part of the collective agreement because of their failure to comply with the necessary formalities, more commonly whether a document is incorporated as part of the agreement will turn on the parties' intention. In approaching this question, arbitrators have suggested that ancillary documents should only be incorporated by reference where that intention is clearly expressed.*
>
> [Footnotes omitted]

[77] The employer argued that the collective agreement does not clearly refer to the Guidelines, and that the Guidelines do not refer to an agreement to incorporate it into the terms of the collective agreement. One cannot assume that any written document, later created, is automatically incorporated into the collective agreement. It has to be specifically signed and referred to either in the collective agreement or in the document itself; otherwise it would create labour relations chaos and uncertainty as to the contents of the agreement between the employer and the bargaining agent.

[78] Labour relations chaos would be created if all of the documents that the employer unilaterally created became part of the collective agreement without the parties' mutual intent, indicated by way of a signed document or an incorporation-by-reference statement in a signed document.

[79] The employer relied on *Corning Glassworks of Canada Ltd. v. American Flint Glass Workers Union* (1981), 29 L.A.C. (2d) 195. There must be intent to incorporate a document into the terms of the collective agreement. Such intent can be found in a written document that is signed by both parties. As the arbitrator said at pages 199-200:

. . .

> *Counsel for the Union argued that Professor Christie was wrong in saying that both parties must sign a supplementary document before it can be considered to be part of the*

> *collective agreement. His argument was to the effect that it is only "the" collective agreement that must be signed since the supplementary agreement is only part of the collective agreement and therefore signature by both parties is not required. I do not agree with this argument and would hold that the signature of both parties is required, as much for a "part" of the collective agreement as for the main agreement itself. There is sound sense in this, as there would be endless argument as to what documents were intended to be a part of the collective agreement and which were not. A signature by both parties is usually a clear indication of an intention to be bound. Absent such signatures, it is extremely difficult to sort out among the many documents that pass in the course of negotiations, and even after negotiations have been concluded, as to what was intended to be binding and what was not.*
>
> . . .

[80] While a collective agreement can consist of one or more documents, the parties must manifest an intent to include a document within a collective agreement. In *United Grain Growers Ltd. v. Grain Workers' Union*, Local 333 (1986), 24 L.A.C. (3d) 226, the arbitrator said:

> . . .
>
> *The presence or absence of signatures may well be a factor in determining whether a document created in mid-term is to be regarded as an integral part of the collective bargaining relationship. However, in the final analysis, it all comes down to the true intent of the parties as disclosed by the evidence.*
>
> . . .

[81] It is important to have a written document indicating mutual agreement and sufficient evidence in writing concerning the precise terms of the agreement: *Dawson Creek & District Hospital v. HEU* (1995), 49 L.A.C. (4th) 104. It is an easy matter for the parties to refer to documents and incorporate them into a collective agreement: *Toronto District School Board v. Ontario Secondary School Teachers' Federation* (2004), 126 L.A.C. (4th) 406. An example of such incorporation is in *Kenora Police Services Board v. Kenora Police Assn.* (2001), 102 L.A.C. (4th) 439.

[82] The employer argued that the publication of the Guidelines does not create an estoppel. The employer made no promise or assurance that the Guidelines would benefit the grievor or impact on her performance review. There is no indication that

the grievor relied on the documents, that she sustained any prejudice or that her assessment would have been any different had the Guidelines been followed. The employer relies on Brown and Beatty, at para 2:2211.

C. Grievor's reply

[83] The grievor reiterated that she is not arguing about the performance appraisal itself but the process and clause 40.02(b) of the collective agreement specifically. The grievor said that the parties contemplated including the Guidelines into the collective agreement and having it form part of the collective agreement. The Guidelines is a written document that forms part of the collective agreement. The grievor did not agree that labour relations chaos would be created by including documents by reference into a collective agreement that are not specifically incorporated into it. Certainty and objective standards are required in performance assessment.

IV. Reasons

[84] After reflecting on the evidence in this case, it is my view that in pith and substance this grievance is about the content of the assessment and is dressed or characterized as a dispute about the process. In my view, Mr. Reniers' characterization of the dispute as one of the battlegrounds chosen by the parties as an expression of deep conflict between the Agency and its employees is apt. I must decide this dispute, however, in accordance with applicable law. Adjudication is often not the most satisfactory method of resolving conflict in the workplace, and the adjudicator's jurisdiction is proscribed by the grievance filed and by sections 91 and 92 of the former *Act*.

[85] The grievor has referred her grievance to adjudication under paragraph 92(1)(*a*) of the former *Act*. The relevant section reads as follows:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> > *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> . . .

> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*
>
> [Emphasis added]

[86] It is well-settled law that an adjudicator lacks jurisdiction under subsection 92(1) of the former *Act* to revise a performance assessment where an employee does not agree with it. In considering a grievance and language similar to clause 40(1)(a) of the collective agreement, the adjudicator in *Ahad* said, at pages 22-23:

. . .

> *In the entire text of article 20, there is nothing on which an employee who was dissatisfied with the assessment rating given by the employer, an employee who was dissatisfied with a decision rendered by a merit review board, or an employee who was dissatisfied with the contents of a performance evaluation report could base a reference under the provisions of paragraph 91(1)a) of the* Public Service Staff Relations Act*, thereby obliging an adjudicator to hear and decide the merits of his grievance and hence the merits of the assessments.*

. . .

[87] Generally, an adjudicator considering a performance assessment grievance has very limited jurisdiction to review the process to determine whether there was bad faith or disguised discipline: *Largess*, *Bahniuk* and *Ball*. In *Bahniuk,* the adjudicator said:

. . .

> *[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.*

. . .

[88] In *Veilleux*, the adjudicator said, at page 14:

. . .

> *In this matter, the employer rated the grievor "entirely satisfactory" when it evaluated his performance. It is hard to conceive of this as a punitive measure, and hence disguised disciplinary action.*
>
> *Section 7 of the Act contains the following provisions:*
>
> > *7. Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*
>
> *This section indicates that, unless the adjudicator is satisfied that the matter involves disguised disciplinary action, he cannot take the place of the employer in matters respecting the organization of work, the assignment of duties to positions or the classification of positions. Furthermore, he cannot take it upon himself to decide in the employer's stead on a performance rating for an employee, since this is the right of the employer under section 7 of the Financial Administration Act.*

. . .

[89] It is trite, however, that jurisdiction must be considered in light of the grievance's wording. The grievor has not raised issues of bad faith or disguised discipline in her grievance. Those issues are therefore not before me.

[90] Given the limits on jurisdiction, I can only determine the substance of the grievor's grievance if the collective agreement has been violated or if the employer's process breached it. The grievor points to what she claims are breaches of the Guidelines, which she claims are incorporated by reference into the collective agreement. As this is her grievance, she bears the burden of proof of establishing the terms of the collective agreement. Ordinarily, this is a relatively simple matter of tendering a signed copy of the collective agreement into evidence, and I do have a copy of it before me, filed as Exhibit G-1.

[91] Given that the grievor has not alleged bad faith or disguised discipline, which are the usual cases in which an adjudicator may have some jurisdiction over a performance assessment matter, in my view, there is only jurisdiction for me to

proceed with an analysis of the grievor's grievance if I find that this is a matter that concerns a breach of the collective agreement. If the Guidelines form part of the collective agreement, I can consider whether or not the Agency has breached the collective agreement by violating the Guidelines.

[92] The collective agreement's wording concerning performance appraisals is clear and unambiguous:

. . .

> *40.01 For the purpose of this Article,*
>
> *(a) a formal assessment and/or appraisal of an employee's performance means any written assessment and/or appraisal by any supervisor of how well the employee has performed the employee's assigned tasks during a specified period in the past;*
>
> *(b) formal assessment and/or appraisals of employee performance shall be recorded on a form prescribed by the Employer for this purpose.*
>
> *40.02 Prior to an employee performance review the employee shall be given:*
>
> *(a) the evaluation form that will be used for the review;*
>
> *(b) any written document that provides instructions to the person conducting the review;*
>
> . . .
>
> *40.03*
>
> *(a) When a formal assessment of an employee's performance is made, the employee concerned must be given an opportunity to sign the assessment form in question upon its completion to indicate that its contents have been read. An employee's signature on the assessment form shall be considered to be an indication only that its contents have been read and shall not indicate the employee's concurrence with the statements contained on the form.*
>
> *The employee shall be provided with a copy of the assessment at the time that the assessment is signed by the employee.*

> *(b) The Employer's representative(s) who assess an employee's performance must have observed or been aware of the employee's performance for at least one-half (1/2) of the period for which the employee's performance is evaluated.*
>
> *(c) An employee has the right to make written comments to be attached to the performance review form.*
>
> *40.04 Upon written request of an employee, the personnel file of that employee shall be made available once per year for the employee's examination in the presence of an authorized representative of the Employer.*
>
> *40.05 When a report pertaining to an employee's performance or conduct is placed on that employee's personnel file, the employee concerned shall be given an opportunity to:*
>
> *(a) sign the report in question to indicate that its contents have been read,*
>
> *and*
>
> *(b) submit such written representation as the employee may deem appropriate concerning the report and to have such written representations attached to the report.*
>
> *40.06 In the absence of a Management initiated annual performance appraisal, one shall be provided at the employee's request.*
>
> . . .

[93] The grievor focuses on the words in clause 40.02(b) of the collective agreement and argues that an alleged failure by the employer to follow "any written document that provides instructions to the person conducting the review" is a breach of the collective agreement. The first question in this case is whether she has proven that the Guidelines are incorporated by reference into the collective agreement. If they are not part of the collective agreement, it is not necessary for me to determine whether they were breached.

[94] The legal test for determining whether a document is part of a collective agreement, as set out in the case law, is whether or not the document is intended by the parties to be part of the collective agreement. As Arbitrator Munroe said in *United Grain Growers Ltd.*:

. . .

> *The presence or absence of signatures may well be a factor in determining whether a document created in mid-term is to be regarded as an integral part of the collective bargaining relationship. However, in the final analysis, it all comes down to the true intent of the parties as disclosed by the evidence.*

. . .

[95] To meet the test for contract formation there has to be a manifest intention of the parties to be bound by a term and sufficient certainty about the terms of the contract, as well as consideration. An article contained in a signed collective agreement is a term that both parties have agreed to be bound by. It is trite law that a collective agreement may consist of one or more written documents. In considering whether a document is part of the collective agreement, it is the "mutual intent of the parties" and not the "unilateral intention of a party" that matters.

[96] The test for incorporation of a document by reference into a collective agreement is set out in the case law: *Corning Glassworks of Canada Ltd., United Grain Growers Ltd., Dawson Creek* and *Kenora Police Services Board*.

[97] The burden is on the party asserting the existence of a collective agreement or a term included in an agreement to prove, on a balance of probabilities, a manifest intention to be bound and sufficient certainty about the terms.

[98] The Guidelines are not specifically referred to in clause 40.02(b) of the collective agreement. Clause 40.02(b) simply refers to "any written document that provides instructions." The Guidelines do not refer to the collective agreement and make no reference to being incorporated into it. The Guidelines are published on a management website but have not been signed by either party. No evidence was adduced as to the document's creation by either party. On its face it appears to be a document created by the Agency, with no reference to bargaining agent involvement. The negotiating history surrounding the collective agreement was not adduced into evidence by either party in reference to what the parties mutually intended to be caught by the words "any written document that provides instructions" or in reference to whether the parties mutually intended that clause to mean something different than providing the documents on which the assessment criteria were based.

[99] Applying the applicable law, I find that the grievor has not proven that the Guidelines are incorporated by reference into or are part of the collective agreement. If the parties intended the Guidelines to be part of the collective agreement, a simple matter of drafting could have made that explicit. A breach, if any, of the Guidelines is not a breach of the collective agreement, and therefore the argument based on a breach of the Guidelines fails.

[100] Given that I have found that the Guidelines are not incorporated into the collective agreement, I am without jurisdiction to find any breach of the collective agreement based on the Guidelines.

[101] In interpreting clause 40.02(b) of the collective agreement, it is my view that the employee must be given the documents on which the reviewer relies to assess performance. The issue of assessment conducted in bad faith based on standards not provided to the employee is not before me in this grievance.

[102] After hearing four days of evidence, and considering the arguments, it is my view that this case is primarily about the substance of the grievor's performance. She claims that she should have been rated as "exceeds expectations" instead of "meets expectations." She challenges the rating and the method used by the employer to rate her performance.

[103] I am somewhat at a loss as to what the "process issue" is that the grievor complains of under the collective agreement. The grievor's performance was assessed by a manager familiar with her work for at least half of the performance review period. Generally the process for performance appraisal is that the employer prepares a draft. It is usually provided to the employee. The manager uses the employer's form and refers the employee to the assessment criteria. The parties then meet and discuss it. The manager signs the appraisal. The employee adds comments and signs the appraisal. Career and learning plan objectives are discussed. The matter is one that should be relatively simple to resolve for two persons without significant communication or personality conflicts.

[104] Mr. Cline provided the written assessment, and the grievor was given an opportunity to make comments. He appears to have considered but not accepted all of her comments. I find that the employer has complied with the process set out in the collective agreement and that therefore the process used in the assessment did not

breach any of the terms of the collective agreement. I also find, on a balance of probabilities, that the grievor refused to meet with Mr. Cline, so the amount of time taken to assess her performance or the lack of an in-person meeting is not in breach of the collective agreement.

[105] Why the performance assessment process took more than seven months to bring this issue to closure is beyond me. The parties worked in cubicles on the same floor near each other. While there are obvious issues between the grievor and Mr. Cline, they are not within my purview as an adjudicator hearing this grievance.

[106] This grievance does not allege bad faith or disguised discipline. Ordinarily, an adjudicator has no jurisdiction to review a performance appraisal in the absence of bad faith or disguised discipline: *Veilleux.* In my view, I am without jurisdiction to consider the substance of this grievance.

[107] However, even if I found that there was jurisdiction and that there was a breach of the collective agreement, I have no jurisdiction to order that the employer substitute a rating of "exceeds" for "meets" or substitute "an assessment satisfactory to the grievor." The exclusive right to organize the public service rests with the employer, and that is not generally something that is reviewable under paragraph 91(1)(*a*) of the former *Act* except in extremely limited circumstances, none of which are present. Generally, an adjudicator is ill-placed to assess an employee's performance, and performance assessment is entirely a management prerogative or a management right, with certain limited exceptions. In an appropriate case, where there is jurisdiction and the adjudicator finds a breach of a right, the adjudicator may possibly order a new assessment.

[108] In summary, the grievor alleges that there is a breach of the collective agreement in that the Guidelines were incorporated by reference into the collective agreement. For this grievance to make any sense, and for the grievance to succeed, the Guidelines must have been incorporated into the collective agreement.

[109] The Guidelines contain an approach by management to performance appraisals. The document is not referred to in the collective agreement. It is a document that was created unilaterally by the employer; there is no evidence before me that the bargaining agent had any role to play in its creation. It is not signed by either party or by both parties. The Guidelines are not incorporated by reference into the collective

agreement. The grievor was provided the documents required by clause 40.2(b) of the collective agreement.

[110] In my view, it is fair to say that neither the grievor nor Mr. Cline was satisfied with the process; however, the grievor did have her performance assessed. She may not like the result, but I have no jurisdiction to amend the result to her liking.

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

(The Order appears on the next page)

V. Order

[112] The grievance is dismissed.

December 6, 2007.

Paul Love,
adjudicator