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File: 566-02-2175

Citation: 2009 PSLRB 94



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

WAYNE HANNA

Grievor

and

**DEPUTY HEAD
(Department of Indian Affairs and Northern Development)**

Respondent

Indexed as

Hanna v. Deputy Head (Department of Indian Affairs and Northern Development)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Deborah M. Howes, adjudicator

For the Grievor: William R. Gardner, counsel

For the Respondent: Sean F. Kelly, counsel and Caroline Proulx, student-at-law

Heard at Winnipeg, Manitoba,
March 24 and 25, 2009.

REASONS FOR DECISION

I. Nature of the preliminary objection

[1] This decision deals with the objection of the Deputy Head of the Department of Indian Affairs and Northern Development (“the employer”) to an adjudicator’s jurisdiction to hear Wayne Hanna’s grievance. Mr. Hanna (“the grievor”) grieved the employer’s denial of his claim for reimbursement of legal expenses under the Treasury Board of Canada Secretariat’s *Policy on Indemnification of Legal Assistance for Crown Servants* (“the Policy”).

[2] The sole question between the parties at this point is: Does an adjudicator have jurisdiction under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”) to hear the merits of the grievance? To answer the question, this decision focuses on two sub-questions:

1. Is the denial of legal expenses under the employer’s Policy a disciplinary action resulting in a financial penalty?
2. Did the grievor raise the allegation of disciplinary action resulting in financial penalty within the grievance process before the referral to adjudication?

[3] I find that I do not have jurisdiction under paragraph 209(1)(b) of the *Act* to hear the grievance. The answer to the two sub-questions is no. As a result, I refused to hear the merits of the grievance. My reasons follow.

II. Summary of the arguments

A. For the employer

[4] Counsel for the employer asserts paragraph 209(1)(b) of the *Act* bars this grievance from adjudication unless the grievor has alleged the grievance involves a disciplinary action resulting in a financial penalty. He asks me to decide the matter on the preliminary objection and not reserve my decision or continue to hear the merits.

[5] Counsel says the grievor cannot modify the nature of the grievance at adjudication and that he must raise the issue in the grievance or during the grievance process before adjudication so that the employer may respond. No presentation made during the grievance process by the grievor or on his behalf raised the issue of disciplinary action. As a result, the employer was not aware that the grievor was taking

this position until after the referral to adjudication. According to the case law, the grievor must raise the issue during the grievance process to enable the employer to respond.

[6] Finally, counsel argues that the employer's decision to refuse reimbursement of legal expenses was an administrative decision and not a disciplinary action. When the employer decided to deny the reimbursement of legal expenses for the grievor, no disciplinary action was contemplated or taken. The case law establishes objective tests to determine if an employer's action is disciplinary. This case does not meet those tests.

[7] The employer relies on the following 14 cases to support its arguments:

- 1) *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.)
- 2) *Schneidman v. Canada (Customs and Revenue Agency)*, 2007 FCA 192
- 3) *Marin v. Canada (Treasury Board)*, 2007 FC 1250
- 4) *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5
- 5) *Rh eaume v. Canada Revenue Agency*, 2008 PSLRB 79
- 6) *Canada (Attorney General) v. Frazee*, 2007 FC 1176
- 7) *Canada (Attorney General) v. Basra*, 2008 FC 606
- 8) *Canada (Attorney General) v. Assh*, 2005 FC 734
- 9) *Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada)*, 2006 PSLRB 16
- 10) *Bratrud v. Office of the Superintendent of Financial Institutions Canada*, 2004 PSSRB 10
- 11) *Cochrane v. Treasury Board (Health Canada)*, 2001 PSSRB 129
- 12) *Bourbonnais v. Canada (Attorney General)*, 2006 FCA 62
- 13) *Canada (Attorney General) v. Boutilier (C.A.)*, [2000] 3 F.C. 27
- 14) *Canada (Attorney General) v. Demers*, 2008 FC 873

B. For the grievor

[8] Counsel for Mr. Hanna argues the grievance falls within paragraph 209(1)(b) of the *Act*. Counsel for the grievor suggests I will need to consider all the evidence on the merits to determine if the decision to deny the legal expenses was disciplinary and I should dismiss the preliminary objection and hear the merits of the case.

[9] Mr. Hanna's counsel says that the decision not to reimburse Mr. Hanna's legal expenses created a significant financial burden for Mr. Hanna and that it is analogous to a financial penalty, like a fine. It amounts to a disguised disciplinary action resulting in a financial penalty. Counsel says that the employer would have known throughout the grievance process that the grievor was pointing out that the matter related to a financial penalty.

[10] Counsel also asks me to infer that the words “without prior authorization” in the employer’s reasons reveal its displeasure at how the grievor behaved when obtaining legal advice. The employer denied him reimbursement as disguised discipline for his failure to comply with the Policy. The result to the grievor was a significant financial penalty. The employer knew or should have known throughout the grievance process that the grievor was challenging the reasons for decision, thus challenging the core of the decision.

[11] In context, counsel asserts Mr. Hanna sought independent legal advice in 2000 because complaints made against him by his co-workers were very serious and could have had a significant impact on his future career. The employer did not inform Mr. Hanna of the Policy during the investigations, so he was not able to meet its technical obligations, such as obtaining his supervisor’s prior approval. This case has been ongoing for years because the process of denying Mr. Hanna his legal expenses under the Policy took a long time. At first, there was a denial with no reasons, which led to a lengthy delay and a second denial with reasons. Mr. Hanna disagrees with the reasons and the decision.

[12] The grievor relies on six authorities to support his position:

- 1) *Burchill*
- 2) *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42
- 3) *Demers v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 89
- 4) *Stevenson v. Canada Revenue Agency*, 2007 PSLRB 43
- 5) *Basra*
- 6) *Federal Courts Act*, R.S.C., 1985, c. F-7

III. Reasons for decision on jurisdiction

[13] The *Act* limits or restricts the grievances that employees can refer to adjudication. Section 209 provides in part:

209.(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee’s satisfaction if the grievance is related to

...

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

...

[14] There is no dispute that Mr. Hanna is an employee, that he filed an individual grievance and that he is not satisfied with the outcome. Mr. Hanna does not raise any allegation of termination, demotion or suspension.

[15] My examination in this jurisdictional question centers on the following phrases from subsection 209(1) “. . . has been presented up to and including the final level in the grievance process . . . if the grievance is related to a disciplinary action resulting in . . . financial penalty . . .” I identified two sub-questions:

Is the denial of legal expenses under the employer’s Policy a disciplinary action resulting in a financial penalty? I will break this question into three parts:

- a) Must the grievance include both discipline and a financial penalty to come under paragraph 209(1)(b) of the *Act* or can it include either reason?
- b) What is the grievance about?
- c) Is the denial of legal expenses a disguised disciplinary action?

Did the grievor raise the allegation of disciplinary action resulting in a financial penalty within the grievance process before the referral to adjudication?

I deal with the questions in the same order.

A. Question 1(a): Must the grievance include both discipline and a financial penalty to come under paragraph 209(1)(b) of the Act, or can it include either reason?

[16] Section 209 contains four general grievance topics that may be referred to adjudication; they are distinct. I interpret paragraph 209(1)(b) as a single phrase qualifying the different types of disciplinary action that may be referred to adjudication. I rely on *Assh* for my approach.

[17] The first words in the phrase are “disciplinary action.” These words distinguish the grievances contemplated in paragraph 209(1)(b) from those in paragraphs 209(1)(a), (c) and (d). The other subsections deal with the interpretation or application of a collective agreement or an arbitral award, actions against an employee in the core administration, and certain demotions or terminations of an employee of a designated

separate agency. Sub-paragraph 209(1)(c)(i) and paragraph 209(1)(d) specifically require grounds other than a breach of discipline or misconduct.

[18] The next words in paragraph 209(1)(b) of the Act are “resulting in.” This phrase ties directly to the disciplinary action and means that the disciplinary action must have one of the stated results which are termination, demotion, suspension or financial penalty. Those are the more serious forms of discipline within the normal range. A written warning would not be adjudicable under this paragraph.

[19] Therefore, to be adjudicable under paragraph 209(1)(b) of the Act, a financial penalty must be the result of and be directly tied to a disciplinary action. If a financial penalty is not the result of a disciplinary action, it cannot be adjudicated under paragraph 209(1)(b). A financial penalty alone is not adjudicable. The answer to question 1(a) is that both reasons, discipline and a financial penalty, are required.

B. Question 1(b): What is the grievance about?

[20] In this part, I focus on the words “. . . if the grievance is related to a disciplinary action resulting in . . . financial penalty” I will examine the grievance to determine if its subject matter (the employer’s action) is a disciplinary action that resulted in a financial penalty.

[21] Mr. Hanna filed his grievance on December 10, 2007. The grievance reads:

1. I was accused in on or around August 14, 2000 of having harassed a fellow employee. Further, on October 24, 2000 new allegations regarding fraud were raised against me. As a result of these allegations, which were of a very serious nature, I sought independent legal advice and engaged Paul Edwards [counsel] . . . to assist me in responding to these allegations.

2. DIAND engaged KPMG to investigate the allegations and placed me on other leave for the duration of the investigation. During the course of the investigation, Mr. Edwards . . . was involved in assisting me with responding to allegations and communicating with DIAND. The investigation concluded that none of the allegations made against me were correct or fair and no disciplinary action was undertaken against me and the matter was closed as of June, 2002.

3. On November 1, 2002, I submitted an application for reimbursement of legal expenses pursuant to the Treasury Board of Canada Secretariat Policy on Indemnification of Legal Assistance for Crown Servants on the advice of legal counsel for DIAND, Tom Saunders. On November 15, 2002, Mr. Saunders advised that “[t]he Department is not

prepared to consider a claim by Mr. Hanna for reimbursement of his legal expenses at this time.”

4. I was informed that t his application was denied because I did not follow the correct procedure in submitting my application to my direct supervisor.

5. I approached my direct supervisor through counsel on June 30, 2006, January, 2007, Feburary, 2007 and March, 2007 to determine whether DIAND would pay my legal expenses pursuant to the policy.

6. Subsequently, in April, 2007, I approached Deputy Minister Michael Wernick regarding my claim. I was asked to provide further information which information was provided.

7. On December 3, 2007 my counsel received a letter from Michael Wernick advising that my claim for legal fees was denied.

8. As a consequence, I am filing a grievance in respect of the denial.

[Sic throughout]

[Emphasis added]

[22] Before continuing the determination of what the grievance is really about, I will summarize some of Mr. Hanna’s history and the process he went through to claim his legal expenses. The history gives context to his claim and helps determine the true character of his grievance.

[23] Although the grievor testified about much of the history, especially about the events from mid-2000 to the hearing date, I have not included the details because the allegations of misconduct and most of the employer’s actions during that time are not the subject of the grievance before me, and I am not dealing with the merits of the grievor’s claim. He also filed grievances in 2000 and 2001 and claimed reimbursement of legal expenses in two of those grievances, but none of them are before me. I acknowledge that Mr. Hanna has expended considerable personal time and energy, in addition to his legal fees, in these events. I conclude that he does not feel the matters were resolved satisfactorily or that anyone with the employer has ever appropriately acknowledged the impact of these events on him.

[24] Mr. Hanna began working as a federal public service employee in October 1983. A series of events occurred in the Region from August 2000 to mid-2001, which resulted in Mr. Hanna seeking reimbursement of legal expenses; some co-workers had filed three complaints against him, alleging serious misconduct. In October 2000, Mr. Hanna sought independent legal counsel for assistance in the investigations, but was unaware of the Policy at the time. Counsel represented him as the employer

investigated the complaints, and Mr. Hanna filed grievances about the employer's actions during the investigations. In 2001, Mr. Hanna received a written warning arising from one of the complaints. In 2002, the employer informed Mr. Hanna that the investigations had concluded and that it would not take any further action against him.

[25] In November 2000, Mr. Hanna began seeking other employment opportunities within the federal public service. On December 18, 2000, Mr. Hanna accepted a deployment to the employer's communications branch in Ottawa, in a unionized position with the Public Service Alliance of Canada bargaining unit. He occupies this position today. Mr. Hanna's superior has a very high opinion of him. She considers him a very sound manager. He has a very good reputation with clients. He is highly regarded for his communications skills in his work with clients.

[26] I summarize the history of Mr. Hanna's claims for the reimbursement of legal expenses as follows:

- On November 1, 2002, Mr. Hanna claimed reimbursement under the Policy after learning about the Policy from the employer's legal counsel.
- Based on what Mr. Hanna interpreted as the encouragement of counsel, Mr. Hanna expected a favourable response, which he did not receive. Instead, on November 15, 2002, the same legal counsel wrote that the claim was denied "at this time." Mr. Hanna interpreted the words "at this time" as being time sensitive when coupled with the absence of any reasons for the denial. He continued to hope that another application would receive a different response. As he worked to repay his legal bills, I conclude Mr. Hanna could not abandon the hope which led him to reapply in 2005.
- In February 2005, Mr. Hanna began again to seek reimbursement. He met with the Director General of Human Resources for INAC, gave her a package of documents and waited for a response. Mr. Hanna followed up in October 2005. Then in November 2005, Tony Keeshig, Manager of Staff Relations and Compensation Division at INAC, became involved and asked Mr. Hanna to apply through his supervisor.
- On June 30, 2006, Mr. Hanna's counsel wrote to Mr. Hanna's supervisor formally applying for reimbursement of his legal fees dating back to 2000. Mr. Hanna had heard that his November 2002 application failed because he did not follow the Policy when submitting his application, particularly in applying through his supervisor first. Therefore, this was a way to restart the application process, using the required steps in the Policy.

- The supervisor did not respond to Mr. Hanna's application. On January 30, 2007, Mr. Hanna's legal counsel wrote again. Then, Mr. Hanna's counsel wrote to the Director General on February 2, 2007, seeking a response to Mr. Hanna's claim for "legal fees reimbursement." On April 11, 2007, Mr. Hanna's counsel next wrote to the Department Head, seeking a response to the claim for reimbursement of legal expenses even enclosing a draft grievance. The grievor's counsel and the department then exchanged correspondence over the months to try to provide additional information to assist the department in its decision.
- On December 3, 2007, the Department Head wrote to Mr. Hanna denying his request for reimbursement of legal expenses under the Policy. The reason given for the denial was that Mr. Hanna's claim did not fit within the Policy; the Policy was not intended to provide assistance in internal administrative investigations, from which Mr. Hanna's claim arose. The December 3, 2007 letter prompted Mr. Hanna's grievance on December 10, 2007.

[27] The chronology and all the related evidence I heard lead me to conclude that Mr. Hanna's grievance is about the denial of reimbursement of legal expenses, which caused him significant financial hardship. Mr. Hanna is challenging the employer's decision under the Policy. The grievance is not about a disciplinary action involving a financial penalty.

[28] Mr. Hanna's grievance clearly relates, on its face, to the Policy and to legal expenses. The same is true for each of the letters presented during the grievance process by Mr. Hanna's counsel. Mr. Hanna disagrees with the employer's decision and its reason for denying him reimbursement. Mr. Hanna's own evidence in cross-examination repeatedly confirmed that his grievance was about the denial of legal expenses under the Policy and not about any disciplinary action taken against him. The grievor continued his quest for the reimbursement of legal fees in part because of his interpretation of the words in the letter of November 15, 2002 that stated not "at this time." The employer was not trying to change Mr. Hanna's behavior for a different result. Mr. Hanna was trying to change the employer's behavior for a different result.

C. Question 1(c): Is the denial of legal expenses a disguised disciplinary action?

[29] The *Frazer* case (applied in *Basra*) summarizes the principles for determining whether an employer's conduct constitutes discipline. As an adjudicator, I must

consider the purpose and effect of the employer's action. An essential characteristic of disciplinary action is the desire to correct an employee's bad or culpable behavior. A primary factor to consider is the employer's intention. Another factor is the impact on the employee in the employment context. This case reminds us that not every action that adversely affects an employee amounts to discipline; nor do the employee's feelings of being unfairly treated convert an administrative decision into a disciplinary decision.

[30] I heard and received considerable evidence from the grievor about the events in 2000 and 2001. I agree that the allegations were serious, but the evidence shows that the employer's decisions about the allegations and whether to discipline Mr. Hanna as a result concluded months before he first applied for reimbursement of his legal fees under the Policy. His first request was made in November 2002. Nothing else happened after the employer denied his request several weeks later. The employer did not follow up.

[31] By the time Mr. Hanna reapplied for the reimbursement of his legal fees in 2006, the denial of which is the subject of this grievance, he was in a new position represented by a bargaining agent and was well respected by his superiors. There is no evidence from which I can conclude or reasonably infer that the employer ever intended or sought to discipline Mr. Hanna by denying his claim for legal fees in 2006 or 2007. All the events that could have led to discipline occurred between 2000 and 2002. Nothing new occurred in 2006 or 2007.

[32] I find the Deputy Head was applying the Policy, as recommended to him, and he intended to finalize Mr. Hanna's four-year inquiry about legal expenses, not punish him. There is no indication that Mr. Hanna was engaging in any conduct, which required corrective action or that the employer viewed him as engaging in any culpable conduct. There is no evidence to suggest disguised discipline.

[33] I turn now to examining the briefing note provided to the Deputy Head before he responded to Mr. Hanna's claim on December 3, 2007. The briefing note summarizes the events that led to Mr. Hanna's claim and includes a recommendation to deny the claim. The summary closely resembles Mr. Hanna's description of events since 2000, except it notes that Mr. Hanna received a written warning as a result of one of the investigations in 2001. There is no mention of disciplinary action contemplated or taken against Mr. Hanna in 2006 or 2007.

[34] Mr. Hanna's counsel focuses on a phrase within the briefing note that outlines the view of the Office of the Public Service of Values and Ethics that the grievor's claim is unfounded "... [s]ince only harassment complaints that proceeded before a tribunal or court might qualify, and that he obtained legal advice without prior authorization. [Emphasis added]" Counsel for the grievor asks me to infer that the words "without prior authorization" reveal the employer's displeasure at how the grievor behaved when obtaining legal advice and that it denied him reimbursement as disguised discipline, resulting in a financial penalty to him. The evidence does not support such an inference, and I do not draw that inference.

[35] I see no suggestion in the briefing note or in the evidence of Tony Keeshig, who prepared it, that the employer saw Mr. Hanna's conduct in claiming legal expenses in 2007 for events in 2000 as improper or worthy of discipline. Prior authorization may be a required step to obtain benefits under the Policy, but grounds for disciplinary measures would not be created if an employee does not follow the steps. The Policy does not require employees to adhere to a standard of conduct. Breaching the Policy does not prompt discipline; but it means that the applicant will not qualify for the entitlements under the Policy. The evidence does not show or even suggest that the employer was attempting to readjust (in a disciplinary sense) Mr. Hanna's conduct in the future if he were to apply for legal expenses. On the contrary, the evidence shows the employer was applying the Policy literally and it was considering how it had been applied in previous cases. The stated reason for denial does not meet the objective tests for discipline.

[36] Finally, I distinguish Mr. Hanna's case from *Demers v. Deputy Head (Correctional Service of Canada)*, where the adjudicator found she had the authority to deal with a grievance about a fine. Mr. Hanna's grievance is not about a fine, and no attempt was made by the employer to characterize its denial of legal expenses as a fine. In *Demers*, the employer was attempting to alter Mr. Demers' behavior; there is no evidence of similar intent in this case. Mr. Hanna cannot convert the financial obligation to pay his own legal fees into a fine just because the employer will not reimburse his expenses.

[37] In conclusion, I find:

- the grievance must relate to both aspects: disciplinary action and a resultant financial penalty;

- Mr. Hanna's grievance is about the denial of reimbursement of legal fees under the Policy; and
- Mr. Hanna's grievance (the employer's denial) is not about an actual or disguised disciplinary action resulting in a financial penalty.

On those grounds alone, the preliminary objection succeeds.

D. Question 2: Did the grievor raise the allegation of disciplinary action resulting in a financial penalty within the grievance process before the referral to adjudication?

[38] The next question to examine in this jurisdictional challenge arises from the following words in subsection 209(1) “. . . has been presented up to and including the final level in the grievance process [Emphasis added]” Counsel for the employer states that Mr. Hanna did not raise the matters of discipline or disciplinary action leading to a financial penalty at any time during the grievance process. Mr. Hanna's counsel says the employer would have known that the refusal to reimburse the grievor resulted in a financial penalty to Mr. Hanna. Counsel for the grievor also states that, by challenging the failure to follow the steps in the Policy, Mr. Hanna raised the disciplinary issue in the grievance meetings. Alternatively, counsel argues that by challenging the decision to deny the reimbursement, the grievor questions the very nature of the decision, not just an interpretation of it.

[39] To decide this question, I examined the correspondence and notes related to the grievance process and considered the evidence of Mr. Hanna and the other witnesses involved in the grievance process. I also relied on *Burchill*, *Schneidman*, *Garcia Marin*, *Lee* and *Rhéaume* for the following principles, that

1. the grievor must raise the allegation of discipline or disguised discipline in the initial grievance or during the grievance process and,
2. at adjudication, the grievor cannot refer or argue a new or different grievance than the grievance argued during the grievance process.

[40] The evidence shows conclusively that in both the grievance and in the grievance process, neither Mr. Hanna nor his counsel stated that the denial of legal fees

reimbursement was or could have been construed as a disciplinary action. I summarize my findings and the relevant evidence as follows:

- The first level of the grievance process included the written grievance, filed December 10, 2007, a grievance hearing on February 5, 2008 and the employer's written response of February 22, 2008. The grievance does not refer to disciplinary action; neither does the response. Both documents reference only the claim for reimbursement of legal fees arising out of allegations resulting in investigations.
- The second level included the letter advancing the grievance to Step 2, which contains the argument about why the Policy applies and alleges a failure of the employer to inform Mr. Hanna about the Policy. The letter contains no reference to actual or alleged disciplinary action or the grievor's view that the denial constituted a disciplinary action. Maryse Pesant's evidence and her notes from the second-level conference call with Mr. Hanna's counsel confirm no mention of any allegation of or discussion about disciplinary action being included in this grievance.
- The third level included typed notes of the third-level grievance meeting, written comments on those notes made by Mr. Hanna's counsel and the employer's written response to the grievance. All the documents focus on the Policy and on the reasons for applying or not applying the Policy. None of the documents includes any reference to disciplinary action or disciplinary action resulting in a financial penalty. Maryse Pesant's testimony confirmed the evidence in the documents. No discussion took place about disciplinary action or financial penalty at the third level.
- The final step in the grievance process was the reference to adjudication filed July 3, 2008, which included the original request for legal fees reimbursement (June 14, 2007), the grievance (December 10, 2007) and Form 21. The letter specifically states: "Please note that the grievance relates to indemnification for legal fees which arose out of an investigation against Mr. Hanna which began in or about August 2000."
- On Form 21, counsel for Mr. Hanna marked paragraph 12 to indicate paragraph 209(1)(b) of the *Act* covering disciplinary action resulting in termination, demotion, suspension or financial penalty, as the provision of the *Act* under which the grievance is referred to adjudication.
- Form 21 was the first notice to the department about an alleged disciplinary action resulting in financial penalty.

IV. Reasons

[41] I conclude neither Mr. Hanna nor his counsel expressly raised the concept of disciplinary action during the grievance process before Form 21 was completed. I also conclude that the employer could not reasonably have been aware that Mr. Hanna was raising disciplinary action when he challenged the employer's conclusion that he had not followed the Policy by not seeking prior permission to retain outside legal assistance. Counsel for Mr. Hanna spent considerable time in cross-examination of the employer's witnesses to attempt to have them concede that the employer would have or should have connected the dots from challenging the reasons to alleging disciplinary action, but he was not successful.

[42] Grievance processes are part of good labour relations practices, and those practices encourage employees, bargaining agents and employers to identify concerns and arguments so that they can be addressed early on and not fester. A claim going to the core of the grievance or an argument in support of a grievance should not be so obscure that the parties do not have a chance to reasonably discuss and resolve the matter. The case law requires the grievor to give the employer notice of the specific nature of the complaints in the grievance. Because of the grievor's failure to raise the concept of disciplinary action, the employer did not have a chance to respond to the allegation before it arose at adjudication. This ground is also fatal to my jurisdiction.

[43] In summary, Mr. Hanna's grievance does not meet the statutory requirements in paragraph 209(1)(b) of the *Act* for referral to adjudication. On that basis, I uphold the employer's objection to my jurisdiction.

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

(The Order appears on the next page)

Order

[45] The grievance is dismissed.

July 31, 2009.

**Deborah M. Howes,
adjudicator**